

In the Matter of

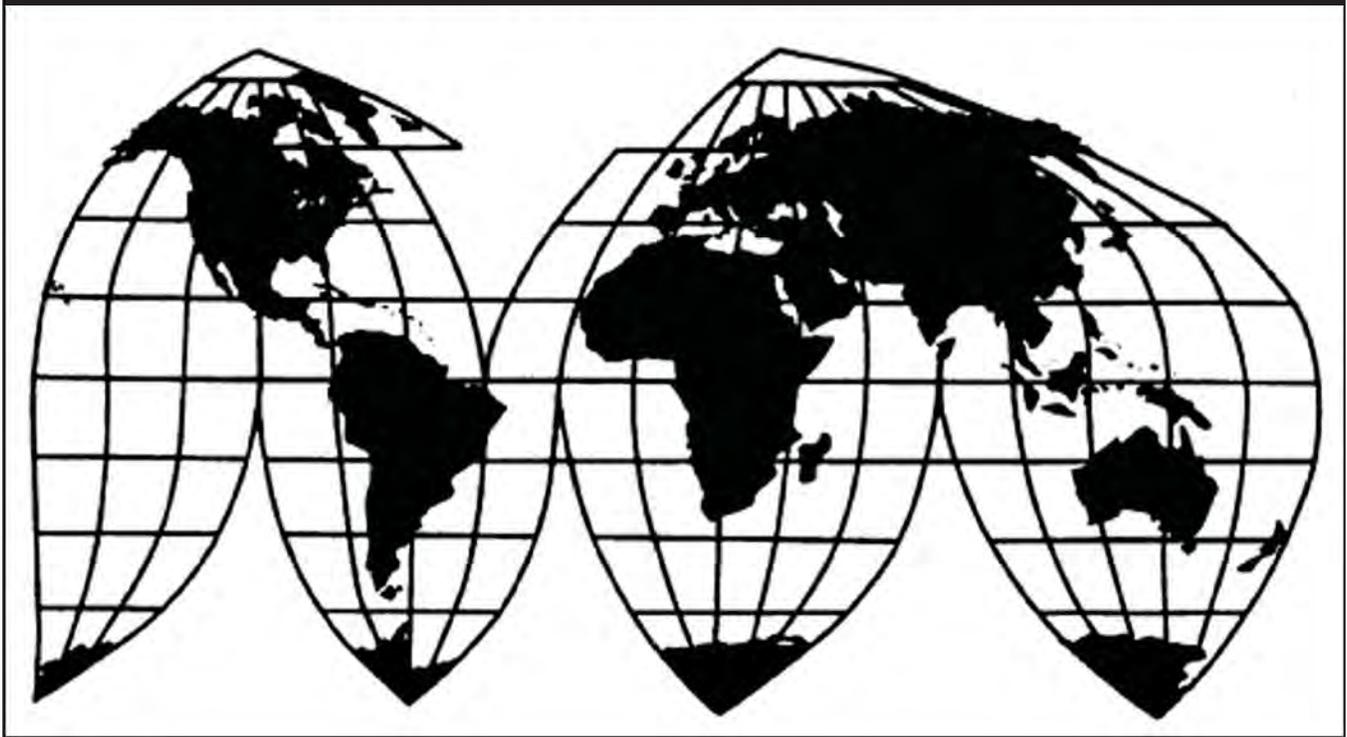
**CERTAIN PRODUCTS HAVING LAMINATED
PACKAGING, LAMINATED PACKAGING,
AND COMPONENTS THEREOF**

337-TA-874

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U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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U.S. International Trade Commission

Washington, DC 20436
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In the Matter of

CERTAIN PRODUCTS HAVING LAMINATED PACKAGING, LAMINATED PACKAGING, AND COMPONENTS THEREOF

337-TA-874



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN PRODUCTS HAVING LAMINATED
PACKAGING, LAMINATED PACKAGING, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-874

**NOTICE OF COMMISSION DECISION TO REVIEW
AN INITIAL DETERMINATION; TERMINATION OF THE INVESTIGATION
WITH A FINDING OF NO VIOLATION OF SECTION 337**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 15), which, *inter alia*, found that the complainant did not satisfy the economic prong of the domestic industry requirement. On review, the Commission has determined to reverse the ALJ's findings regarding the Commission's authority to direct the issuance of an early ID. The Commission has also determined that the complainant has not satisfied the economic prong of the domestic industry requirement. Accordingly, the investigation is terminated with a finding of no violation of section 337.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. 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, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://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 March 28, 2013, based on a complaint and amended complaint filed by Lamina Packaging Innovations, Inc. of Longview, Texas ("Lamina") alleging a violation of section 337 by virtue of the infringement of certain claims of nine patents. 78 *Fed. Reg.* 19,007. The subject products are certain laminated packaging materials, products packaged with such materials, and components thereof, and are alleged to infringe certain claims of U.S. Patent Nos. 6,207,242 ("the

'242 patent") and 7,348,067 ("the '067 patent"). The notice of investigation named fifteen respondents: Remy Cointreau USA, Inc. of New York, New York; Pernod Ricard USA LLC of Purchase, New York; Moet Hennessy USA of New York, New York; Champagne Louis Roederer of Reims, France; Maisons Marques & Domaines USA Inc. of Oakland, California; Freixenet USA of Sonoma, California; L'Oreal USA, Inc. of New York, New York ("L'Oreal"); Hasbro, Inc. of Pawtucket, Rhode Island; Cognac Ferrand USA, Inc. of New York, New York, WJ Deutsch & Son of White Plains, New York; Diageo North America, Inc. of Norwalk, Connecticut; Sidney Frank Importing Co., Inc. of New Rochelle, New York ("Sidney Frank"); Beats Electronics LLC of Santa Monica, California; and Camus Wine & Spirits Group of Cognac, France ("Camus"). Camus, Sidney Frank, and L'Oreal have since been terminated from this investigation on the basis of settlement agreements with Lamina. Notice at 2 (May 30, 2013) (terminating Camus and Sidney Frank); Notice at 2 (July 2, 2013) (terminating L'Oreal).

The Commission's notice of institution directed the presiding Administrative Law Judge ("ALJ") to conduct an early hearing and to issue an early decision on whether Lamina "has satisfied the economic prong of the domestic industry requirement." 78 *Fed. Reg.* at 19,008.

The ALJ conducted a hearing on the domestic-industry issue on May 16-17, 2013. On July 5, 2013, the ALJ issued an initial determination, which found that Lamina had not demonstrated the existence of a domestic industry as required by 19 U.S.C. § 1337(a)(2), (a)(3). Order No. 15 ("the ID").

On July 12, 2013, the parties filed petitions for review. On July 17, 2013, the parties filed replies to the others' petitions.

The Commission has determined to review the ID. On review, the Commission has determined to reverse the ALJ's findings regarding the Commission's authority to direct the issuance of an early ID. The Commission has also determined that the complainant has not satisfied the economic prong of the domestic industry requirement. Accordingly, the investigation is terminated with a finding of no violation of section 337. The Commission's reasoning in support of its determinations will be set forth more fully in a forthcoming opinion.

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 sections 210.42-.210.45 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-210.45).

By order of the Commission.



Lisa R. Barton
Acting Secretary to the Commission

Issued: August 6, 2013

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION NOTICE** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq. and the following parties as indicated on **August 7, 2013**.



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**CERTAIN PRODUCTS HAVING LAMINATED
PACKAGING AND COMPONENTS THEREOF**

Inv. No. 337-TA-874

Certificate of Service – Page 2

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PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN PRODUCTS HAVING LAMINATED
PACKAGING, LAMINATED PACKAGING, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-874

COMMISSION OPINION

I. INTRODUCTION

The Commission instituted this investigation on March 28, 2013, based on an amended complaint filed by Lamina Packaging Innovations, Inc. of Longview, Texas (“Lamina”) alleging a violation of section 337 by virtue of the infringement of certain claims of two patents. *78 Fed. Reg.* 19,007. The subject products are certain laminated packaging materials, products having laminated packaging, and components thereof, and are alleged to infringe certain claims of U.S. Patent Nos. 6,207,242 (“the ’242 patent”) and 7,348,067 (“the ’067 patent”). The notice of investigation named fifteen respondents: Remy Cointreau USA, Inc. of New York, New York; Pernod Ricard USA LLC of Purchase, New York; Moet Hennessy USA of New York, New York; Champagne Louis Roederer of Reims, France; Maisons Marques & Domaines USA Inc. of Oakland, California; Freixenet USA of Sonoma, California; L’Oreal USA, Inc. of New York, New York (“L’Oreal”); Hasbro, Inc. of Pawtucket, Rhode Island; Cognac Ferrand USA, Inc. of New York, New York, WJ Deutsch & Son of White Plains, New York; Diageo North America, Inc. of Norwalk, Connecticut; Sidney Frank Importing Co., Inc. of New Rochelle, New York (“Sidney Frank”); Beats Electronics LLC of Santa

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Monica, California; and Camus Wine & Spirits Group of Cognac, France (“Camus”). Camus, Sidney Frank, and L’Oreal have since been terminated from this investigation on the basis of settlement agreements with Lamina. Notice at 2 (May 30, 2013) (terminating Camus and Sidney Frank); Notice at 2 (July 2, 2013) (terminating L’Oreal).

As recited in a sworn declaration submitted by Lamina’s president, which accompanied Lamina’s first-filed complaint, Lamina “is an American company formed in 2011 to acquire, license, enforce, and partner on the manufacture of patented technology in the laminated paper products industry.” Compl. Ex. 42, Confidential Decl. of Michael Connelly ¶ 3 (Feb. 15, 2013).

Lamina’s amended complaint alleged the existence of a domestic industry under 19 U.S.C. § 1337(a)(3) based in part on three licensees’ “investment in plant and equipment, labor and capital, and marketing, research and development in the United States related to products that incorporate the technology claimed in the” asserted patents. Am. Compl. ¶ 9.3 (Mar. 11, 2013). In addition, Lamina alleged that it itself “has made, and continues to make, substantial investments in the United States exploiting the Asserted Patents through its licensing activities.” *Id.* ¶ 9.18. Lamina alleged that the grand total of these investments was “at least \$10000.00 USD” in the United States. *Id.* ¶ 9.22. Lamina also alleged that its “predecessors in interest have made substantial investments in the United States in the exploitation of the inventions claimed in the Asserted Patents with respect to plant and equipment, employment of labor or capital, manufacturing, engineering, research, development, testing and marketing of laminated paper products.” *Id.* ¶ 9.18. These predecessors were not successful in commercializing practice of the patents. *Id.* Lamina also alleged in the

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alternative that a domestic industry is in the process of being established, relating to articles covered by the asserted patents, apparently through Lamina's ongoing licensing activities. *Id.*

The Commission notice of institution directed the presiding Administrative Law Judge ("ALJ") to conduct an early hearing and to issue an early decision on whether Lamina "has satisfied the economic prong of the domestic industry requirement." 78 *Fed. Reg.* at 19,008. In more detail, the notice stated:

Notwithstanding any Commission Rules that would otherwise apply, the presiding Administrative Law Judge shall hold an early evidentiary hearing, find facts, and issue an early decision, as to whether the complainant has satisfied the economic prong of the domestic industry requirement. Any such decision shall be in the form of an initial determination (ID). Petitions for review of such an ID shall be due five calendar days after service of the ID; any replies shall be due three business days after service of a petition. The ID will become the Commission's final determination 30 days after the date of service of the ID unless the Commission determines to review the ID. Any such review will be conducted in accordance with Commission Rules 210.43, 210.44, and 210.45, 19 CFR 210.43, 210.44, and 210.45. The Commission expects the issuance of an early ID relating to the economic prong of the domestic industry requirement within 100 days of institution, except that the presiding ALJ may grant a limited extension of the ID for good cause shown. The issuance of an early ID finding that the economic prong of the domestic industry requirement is not satisfied shall stay the investigation unless the Commission orders otherwise; any other decision shall not stay the investigation or delay the issuance of a final ID covering the other issues of the investigation.

Id.

On March 28, 2013, the presiding ALJ issued an order requiring the parties to meet and confer toward establishment of a procedural schedule. Order No. 3. The order contained a footnote in which the ALJ stated that the Commission's request for an early

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decision on domestic industry was, in his view, “of questionable legality.” *Id.* at 1 n.1. The ALJ conducted a hearing on the domestic-industry issue on May 16-17, 2013. On July 5, 2013, the ALJ issued an initial determination, which found that Lamina had not demonstrated the economic prong of the domestic industry as required by 19 U.S.C. § 1337. Order No. 15 (“the ID”). In addition, the ALJ purported to sit in review of the Commission’s decision to direct the ALJ to make an early determination of the domestic industry issue.

On July 12, 2013, the parties filed petitions for review. Lamina’s petition principally urges reversal of the ALJ’s finding of no domestic industry. The respondents and the Commission investigative attorney (“IA”) filed petitions in support of the Commission’s authority to direct the ALJ to conduct appropriate proceedings and thereupon to issue the 100-day ID. The respondents’ petition is styled as a contingent petition. On July 17, 2013, the parties filed replies to the others’ petitions.

II. STANDARD OF REVIEW AND LEGAL STANDARDS

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) & (d)(2). 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

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the Commission, unless the Commission chooses to review the issue on its own initiative. *See* 19 C.F.R. § 210.43(b)(2).

The ALJ found that Lamina had not demonstrated the existence of a domestic industry, as required by section 337. In patent-based proceedings under section 337, a complainant must establish that an industry “relating to the articles protected by the patent . . . exists or is in the process of being established” in the United States. 19 U.S.C. § 1337(a)(2). 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. ITC*, 342 F.3d 1361, 1375 (Fed. Cir. 2003).

The “economic prong” of the domestic industry requirement is satisfied when it is determined that the economic activities and investments set forth in subsections (A), (B), and/or (C) of subsection 337(a)(3) have taken place or are taking place. *Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm’n Op. at 21 (Nov. 1996). With respect to the “economic prong,” 19 U.S.C. § 1337(a)(2) and (3) provide, in full:

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

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

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

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

Given that these criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the domestic industry requirement. *Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, Comm'n Op. at 15.

The technical prong of the domestic industry requirement, *see generally Alloc*, 342 F.3d at 1375, is not presently at issue in this investigation; the Commission's charge in the notice of institution was for the ALJ first to resolve the issue of the economic prong.

III. ANALYSIS

Two principal issues are presented on Commission review: first, the Commission's authority for directing the ALJ to conduct appropriate proceedings and to issue the 100-day ID; and second whether the ALJ correctly found that Lamina had not demonstrated that it satisfies the economic prong of the domestic industry requirement.

A. The Commission's Authority to Order the 100-Day ID

The ID's discussion of the lawfulness of the 100-day process refers variously to the Constitution, the Administrative Procedure Act ("APA"), and Commission rules. With respect to the constitutional arguments, the Commission finds the ID's analysis to lack support in the text of the Constitution or in governing precedent. None of the ID's citations stand for the proposition that the Constitution requires more process than was provided here. Indeed, the proceedings conducted by the ALJ pursuant to Commission direction specifically permitted party and third-party discovery, extensive briefing, and a hearing with respect to a dispositive issue concerning a required element of a Section

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337 violation. The ID provides no authority to support its conclusion that a complainant in a Section 337 investigation has a constitutionally-protected interest in obtaining a hearing to address all the issues presented in an investigation instead of a proceeding that prioritizes one issue that portends to be dispositive, with the remaining issues deferred depending on the resolution of the potentially dispositive issue. Thus, we find no cognizable constitutional infirmity here.

We turn next to the ID's discussion of the APA. The ID's analysis, which goes beyond the arguments provided by the parties, is based on a misapprehension that any deviation from a procedural rule is jurisdictional, and therefore within the purview of an ALJ. ID at 23. This jurisdictional analysis would turn administrative law on its head, leaving few, if any, issues, nonjurisdictional. Indeed, the law is the opposite: "Because the question – whether framed as an incorrect application of agency authority or an assertion of authority not conferred – is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as 'jurisdictional.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013).

Moreover, a Commission ALJ lacks the authority to conduct such an inquiry so as to repudiate or nullify the Commission's own application of its procedural rules. The ID's analysis appears to be based upon the ALJ's determination that the Commission acted to modify its procedural rules and that doing so was arbitrary and capricious. ID at 3-4, 21-24. That is a test from section 10(e) of the APA, codified at 5 U.S.C. § 706, and is directed to "the reviewing court" and not an ALJ. Accordingly, the ID's analysis is devoid of any legal effect.

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Further, the ID misstates administrative law. The ID asserts that the Commission was obligated to go through notice-and-comment rulemaking pursuant to section 4 of the APA, codified at 5 U.S.C. § 553, before it could implement the 100-day procedure. ID at 8-10. Procedural rules, however, have always been exempt from the APA requirement of informal rulemaking. 5 U.S.C. § 553(a)(3)(A); *see also, e.g.*, Attorney General's Manual on the Administrative Procedure Act 30 (1947) ("Section 4(a) and 4(b) [of the APA, codified as 5 U.S.C. § 553(a), (b)] applicable only to substantive rules."); 32 Charles Alan Wright & Charles H. Koch, Jr., *Federal Practice & Procedure* § 8156, at 160 (2006) ("It is clear that the drafters of the APA intended to except procedural rules from the notice and comment requirement.").¹ The ID alleged that the requirement in this investigation for an early hearing on domestic industry "go[es] beyond mere procedure." ID at 10; *see also id.* at 13. The ID offered no support for this proposition that conducting an early hearing on one likely dispositive issue – which the ALJ actually found to be dispositive – is substantive in nature.² To the contrary, the requirement for an early disposition here is "merely the manner and means by which a right to recover . . . is enforced," a definition of "procedural" provided by the Supreme Court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945); *see* 32 Charles Alan

¹ *See also, e.g.*, Rules of Adjudication and Enforcement, 78 *Fed. Reg.* 29618, 29618 (May 21, 2013) ("Although the Commission considered the proposed rules to be procedural rules which are excepted from notice-and-comment under 5 U.S.C. 553(b), the Commission invited the public to comment on all of the proposed rules."); Rules of General Application and Enforcement, 73 *Fed. Reg.* 38316, 38316 (July 7, 2008) (same).

² While statutes of limitation, which have the effect of extinguishing rights of parties to obtain relief, straddle the line between substantive and procedural, *see Sun Oil Co. v. Wortman*, 486 U.S. 717, 725-26 (1988), there is no plausible argument of cognizable substantive effect here.

It is for this reason that the ID's cited cases, ID at 24, are inapposite. *Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986) involved the rescission of licenses and not a mere procedural determination. *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008) involved "a strict deadline for filings." *Id.* at 127. Both cases are about the extinguishment of substantive rights. In addition, the decision in *Reuters* was based on the fact that "the express terms of the Communications Act" set forth certain deadlines, *id.* at 951-52, a limitation on agency authority not at issue here.

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Wright & Charles H. Koch, Jr., *Federal Practice & Procedure* § 8156, at 162 (2006) (“the thinking about that distinction” between procedural and substantive “in the *Erie* context may be useful in developing a working method for distinguishing procedural rules from substantive rules”). It is not a close question. *See, e.g., JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326-28 (D.C. Cir. 1994) (holding FCC’s “hard look” scrutiny of license applications to be procedural).

Accordingly, the Commission had the authority to direct the ALJ to conduct an expedited proceeding to resolve a dispositive issue as to one statutory element of a section 337 violation without engaging in informal (*i.e.*, notice and comment) rulemaking. Nonetheless, the ID contends that doing so here was contrary to law because it is inconsistent with preexisting Commission rules. We see no conflict. The Commission’s decision to supplement the procedures, in the interest of orderly administration of this investigation, is no different from each ALJ’s institution of “ground rules” supplemental to Commission rules at the outset of each investigation. *See, e.g.,* Order No. 2 (Mar. 28, 2013) (Notice of Ground Rules). Indeed, the Commission’s notice of institution in each investigation, including this one, is published in the *Federal Register* at the outset of the investigation before any proceedings have begun. Merely alleging, as the ID does, that absent the early treatment of the domestic industry requirement here, that domestic industry issues would have (likely) been decided on a slower track, does not create conflict.³

³ We read the ID to be suggesting that the Commission’s determination to order this 100-day procedure may interfere with an ALJ’s decisional independence, ID at 19-21, *i.e.*, that the authority to establish certain procedures rests with the ALJ, without Commission intrusion. This is not the decisional independence that the APA protects. *See generally, e.g.,* 5 U.S.C. § 554(d). The Commission plainly has the authority to impose procedural rules. 19 U.S.C. § 1335 (“The Commission is authorized to adopt such reasonable procedures and rules and regulations as it deems

(Footnote continued on the next page)

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Even if, *arguendo*, there was conflict, the Commission's own rules provide for its ability to alter or waive procedural rules. 19 C.F.R. § 201.4(b). The ID alleges that the Commission cannot waive its procedural rules because the Commission failed here to explain why this investigation was subject to special treatment. But the rule includes no such requirement. Moreover, there can be no genuine confusion about the basis for the Commission's action in this investigation, as the face of Lamina's complaint raised obvious questions as to the sufficiency of Lamina's claims to a domestic industry.⁴

Even if the Commission, for the sake of argument, lacked the express regulatory authority to waive its rules, and even if the 100-day requirement here were considered to be in conflict with extant rules (as opposed to a consonant supplement), the Commission action here was still lawful absent a showing of substantial prejudice to Lamina. In the proceeding below, respondents and the investigative attorney briefed pertinent case law on this point. The ID offered no reasonable distinction from *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970). That case involved the Interstate Commerce Commission ("ICC"), which had statutory authority to grant requests for authorization for motor carriers to operate "without hearings or other proceedings" when the need for such carriers was "immediate and urgent." *American Farm Lines*, 397 U.S. at 533 (quoting 49 U.S.C. § 310a). *American Farm Lines* was a carrier that sought

necessary to carry out its functions and duties."). The ID merely criticizes the manner in which the procedure here was imposed.

⁴ In particular, Lamina is an entity formed in 2010 for the purpose of asserting certain patents. Amended Compl. ¶ 2.4. Lamina alleged that it had "invested at least \$10000.00 USD" in "the research and evaluation of the" patent portfolio that includes the patents asserted here. *Id.* ¶ 9.22. Lamina pleaded the existence of three licenses. *Id.* ¶¶ 9.3-9.17. Each license was the result of a settlement of a federal district court action. *Id.* ¶¶ 10.1-10.2, 10.4. The amount of consideration that flowed from the licensees to Lamina was trivial, Amended Compl. Exs. 108-110 (the three licenses), particularly in the context of litigation settlements. There had been a fourth district court action, but Lamina had moved to withdraw its case there with prejudice prior to filing its complaint with the Commission that led to the institution of this investigation. *See generally Lamina Packaging Innovations, LLC v. Monsieur Touton Selection, Ltd.*, No. 12 Civ. 5039(CM), 2013 WL 1421781 (S.D.N.Y. Apr. 4, 2013).

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urgent authority to operate. Its application fell short in certain ways, but its operating request was granted, and American Farm's competitors took an appeal.

The Supreme Court affirmed the ICC's procedures, holding that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it," and that such a decision "is not reviewable except upon a showing of substantial prejudice to the complaining party." *Id.* at 1293 (quotation and modification omitted). The ID's principal distinction from *American Farm Lines* is that the "rules the Commission seeks to waive are not rules adopted for the orderly transaction of business, but rules that provide for the substantive rights of the parties." ID at 13. As we have discussed above, the ID misapprehends the distinction between procedural and substantive rules, treating virtually everything as substantive.

The test, then, from *American Farm Lines*, is whether a party has been substantially prejudiced.⁵ The facts here present a much weaker case to challenge administrative action than *American Farm Lines* itself. The ICC process at issue in *American Farm Lines* dealt with an administrative decision without any process whatsoever. Second, the issue there was not a procedural requirement in and of itself, but the fact that whether the procedural requirement was followed was dispositive as to the ICC's grant of operating authority to American Farm. There is no such analogous relationship between the timing of a determination of domestic industry in this investigation, and whether a violation of section 337 is found.

⁵ Under a separate line of cases that reach the same result, an appellant from a final action of an administrative agency bears the burden of demonstrating to the reviewing court prejudicial error. *Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-05 (2009). See generally Resp'ts' Pet. 13-17.

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The ID also relied on *PAM, S.p.A. v. United States*, 463 U.S. 1345 (Fed. Cir. 2006), which extensively discussed *American Farm Lines*. In that case, foreign pasta manufacturer PAM objected to the Department of Commerce's determination of dumping by PAM, because PAM alleged that the domestic pasta manufacturers had not properly served PAM with process early in proceedings, in violation of a certain Commerce regulation. *Id.* at 1346. The court found that PAM, who knew about, and participated in, the Commerce proceedings, did not show substantial prejudice, and therefore excused noncompliance with the rule. *Id.* at 1348.

Such cases make clear that to the extent that procedural determinations can be challenged, those challenges are only cognizable when there has been substantial prejudice shown. Contrary to Lamina's protest, there has been no such showing of prejudice here. Lamina argues that substantial prejudice arose in this investigation by reason of the expedited procedures because summary determination procedures would have shifted the burden of demonstrating the absence of a domestic industry to respondents; the expedited hearing introduced inefficiencies, redundancies, and costs; it had five days to petition for review of the ID rather than twelve days; third party discovery on the domestic industry issue had to be conducted within a four week period forcing Lamina to make discovery choices; and Lamina was confused by the notice of institution and thus did not understand that the disposition of the economic prong issue would encompass its allegation that a domestic industry was in the process of being established. Lamina Pet. 13-14. None of these arguments, however, demonstrate substantial prejudice to Lamina's right to demonstrate the economic prong element of a section 337 violation.

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Lamina had ample opportunity to develop evidence of a domestic industry in advance of filing its complaint, including obtaining information from its licensees regarding their activities and investments with respect to the licensed patents at issue here. After institution, Lamina had four weeks to take substantial third-party discovery of its own licensees in the expedited proceeding to support its domestic industry claims premised on its licensees' activities, Lamina Reply Pet. 29-31, and had the opportunity to move to extend proceedings for good cause. As far as the development of evidence to support Lamina's allegations that its own economic activities and investments were sufficient to support its claim of an industry in the process of being established, Lamina needed no discovery to support this claim. The only concrete argument Lamina makes in support of its claim that it suffered substantial prejudice is that the expedited proceeding deprived it of the opportunity to present evidence of its settlement with Sidney Frank (a respondent liquor company here) as evidence of its domestic industry. Sidney Frank paid ██████ for a paid-up license to settle from this investigation.⁶ See Order No. 11. Given that the existence of a domestic industry is ordinarily to be shown at the time of the complaint, *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm'n Op. 4-6 (Jan. 20, 2012), *aff'd sub nom. Motiva, LLC v. ITC*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013), this post-complaint settlement is irrelevant.

This is not to say that Lamina was without any recourse. Commission rules provide procedures for petitions for reconsideration of a Commission determination. 19 C.F.R. § 210.47. Moreover, the notice of institution in this investigation permitted the

⁶ Lamina does not seek to rely on its settlement with Camus Wine and Spirits Group given the consideration there. See Order No. 10; Mutual Release Agreement [between Lamina and Camus] § 3.2 (Apr. 15, 2013) [EDIS Doc. No. 839078-507654].

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ALJ to extend the deadline for the ID “for good cause shown.” 78 *Fed. Reg.* at 19,008. As set forth in detail on pages 2-7 of the respondents’ contingent petition for review, Lamina did not promptly object to the 100-day procedure here or attempt to show good cause. Rather, Lamina belatedly raised the issue shortly before the hearing, and were there any prejudice, it is attributable solely to Lamina’s delay.

B. Whether Lamina Demonstrated the Existence of a Domestic Industry

Lamina has alleged that a domestic industry exists under each of the three subparagraphs of section 337(a)(3). 19 U.S.C. § 1337(a)(3)(A)-(C) (“significant investment in plant and equipment”; “significant employment of labor or capital”; or “significant investment in” the asserted patents’ “exploitation, including,” *inter alia*, “licensing”). Lamina has also alleged that such licensing-based industry is in the process of being established.

1. Section 337(a)(3)(A) and (B): “Plant and Equipment” and “Labor or Capital”

Subparagraphs (A) and (B) of section 337(a)(3) require that the “significant investment in plant and equipment” or the “significant employment of labor or capital” exists “with respect to the articles protected by the patent.” The ALJ determined that the domestic-industry articles are packaging materials, and not the products (candles, lip gloss, etc.) contained within those packages. ID at 29-35. We reject Lamina’s complaint that the ALJ’s analysis suffered from conflating the technical prong with the economic prong. Lamina Pet. 19-22. All of the claims of the ’242 patent are directed to a “carton” and a “method for producing a laminated package.” All of the claims of the ’067 patent are directed to a “composite sheet” and a method for making a composite sheet. The ALJ recognized this in support of his conclusion that Lamina did not satisfy

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the economic prong of the domestic industry requirement. ID at 31-32. We affirm the ALJ's analysis.

Lamina argues on petition that notwithstanding that the domestic industry articles are packages – and not the contents – it nonetheless satisfies subparagraph (A) and (B). Lamina does not contend that it has undertaken any investments toward the production of articles: it produces none. Rather, Lamina relies upon the investment and employment undertaken by its three licensees. The respondents argue that these licenses were a sham, meant to confer authority upon the Commission to hear Lamina's section 337 complaint. Resp'ts' Reply Pet. 17-20; *see also, e.g.*, Tr. 136-137; RX-288C. The respondents would appear to discredit reliance by a complainant-licensor on a licensee's expenditures where there is no significant demonstration of financial or other consideration afforded in exchange for the licensees' right to practice the asserted patents, and where the licensing appears to be motivated in part to provide a predicate for relief at the Commission.⁷ The Commission need not reach this issue and takes no position on it. The Commission agrees with the ALJ that even under the Commission's traditional analysis – in which a licensor may rely upon a licensee's domestic activities and investments – Lamina's showing here was inadequate.

Lamina's arguments to the ALJ were based predominantly on Lamina's mistaken premise that it ought to be able to capture its licensees' expenditures related to products, such as candles or lip gloss, placed in laminated packages rather than the expenditures related only to the laminated packages themselves. Lamina Post-Hearing Br. 16-32

⁷ The respondents' argument applies only to Lamina's reliance on its licensees' expenditures under section 337(a)(3)(A) and (B), and not to Lamina's own licensing-related expenses under subparagraph (C).

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(May 24, 2013). The Commission affirms the ALJ's findings with regard to subparagraphs (A) and (B).

On petition for review, Lamina attempts to recast the evidence of record to segregate box-related expenses. Insofar as these arguments were not presented to the ALJ in Lamina's post-hearing brief, they have been waived. *See* Order No. 2, Ground Rule 11.1 ("All other issues" not included in the opening post-hearing brief "shall be deemed waived."). With respect to subparagraph (A) ("plant and equipment"), Lamina offered no analysis for the packaging-related expenditures of its so-called "Licensee No. 3." Lamina Post-Hearing Br. 19-22. The same is true for Lamina's arguments regarding its licensee Lafco. *Id.* at 22-24. Lamina did state in its post hearing brief that its licensee Sara Happ paid another company between [REDACTED] and [REDACTED] "in packaging for the [REDACTED] product," which is packaged in a laminated box. *Id.* at 24 (citing CX-0095C; CX-0121C; CX0185C; and CX-0186C). As will be discussed, *infra*, it has not been demonstrated that these expenditures are toward a domestic industry in the United States in view of the uncertainty where the packages are manufactured. Happ's own expenditures in connection with the packaging of its [REDACTED] product were negligible. JX-6 at 38. We affirm the ALJ's rejection of these showings for the reasons set forth on pages 35-37 of the ID.

For subparagraph (B) ("labor or capital"), Lamina's showing is similarly insufficient. It argued that each licensee spent a certain amount per year on packaging and employed workers in connection with packaging. In particular, Lamina argued that Licensee No. 3 spends a certain amount per year on packaging for the product at issue, and employs an artist on staff for packaging. Lamina Post-Hearing Br. at 27-28.

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Lamina further argued that because the packaging comprises █ of Licensee No. 3's costs for the product at issue, that █ of that licensee's labor and capital expenditures should be apportioned to the packaging. *Id.* at 28. Lamina made similar arguments for its licensees Lafco and Sara Happ. *Id.* at 28-32. We affirm the ALJ's rejection of these showings for all the reasons set forth on pages 37-40 of the ID, including the ALJ's determination that Lamina failed to explain how the claimed expenditures are significant as required by the statute.⁸

These were not the only shortcomings identified by the ALJ. None of the three licensees manufacture boxes in the United States, and we affirm the ALJ's determination that Lamina did not show that the licensees' vendors manufacture the laminated packages in the United States. ID at 39-40. Thus, we agree with the ALJ that the cost of procuring the boxes cannot count toward the existence of a domestic industry. ID at 39. Without such a showing, Lamina did not establish significant investment or employment in the United States by Lamina's licensees.⁹ *See Resp'ts' Reply Pet.* 25-26.

2. Section 337(a)(3)(C): "Substantial Investment in" the "Exploitation" of the Patents

Lamina also argued that a domestic industry exists by virtue of its licensing expenses under section 337(a)(3)(C). The Commission has explained:

⁸ Accordingly, we reject Lamina's attempt in its petition to recharacterize the evidence of record to respond to the ID, *see, e.g.*, Lamina Pet. 42-43 (licensees' post-license expenditures), in a manner inconsistent with Lamina's arguments and presentation of evidence to the ALJ, *see, e.g.*, Lamina Post-Hearing Br. 29. In any event, Lamina fails to explain how the expenditures by its licensees between the 2012 dates of the licenses and its filing of its complaint here are significant.

⁹ The ALJ also found that Lamina's licensees' expenses toward printing on the laminated boxes cannot be attributed toward the existence of a domestic industry. ID at 40 n.4. We review and take no position on this question because regardless of whether design and printing costs by Lamina's licensees may be applied toward a domestic industry, there was no showing that such costs are significant here. *See Lamina Pet.* 38, 41-42. Thus, the inclusion of such expenses is immaterial to the outcome here.

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Complainants who seek to satisfy the domestic industry requirement by their investments in patent licensing must establish that their asserted investment activities satisfy three requirements of section 337(a)(3)(C). First, the statute requires that the investment in licensing relate to “its exploitation,” meaning an investment in the exploitation of the patent. 19 U.S.C. § 1337(a)(3)(C) Second, the statute requires that the investment relate to “licensing.” [*Id.*] . . . Third, any alleged investment must be domestic, *i.e.*, it must occur in the United States. [19 U.S.C. § 1337(a)(2).]

Certain Multimedia Display and Navigation Devices and Systems, Components Thereof and Products Containing Same, Inv. No. 337-TA-694, Comm’n Op. 7-8 (August 8, 2011) (Corrected Public Version). After determining the extent to which the complainant’s investments fall within these statutory parameters, the Commission evaluates whether the complainant’s qualifying investments are “substantial” as required by the statute. *Id.* at 8. The ALJ found that Lamina satisfied the first and third requirements, *Id.* at 42, and we affirm those findings.

The ALJ found, however, that Lamina did not show that its expenditures were connected to licensing, as opposed to the antecedent litigation that led to the licenses, *i.e.*, settlement agreements. Under established Commission precedent, “to permit litigation costs not shown to be licensing-related to satisfy the domestic industry requirement would effectively render the domestic industry requirement a nullity for patentees who choose to enforce their patent rights in the district courts.” *John Mezzalingua Assocs. v. ITC*, 660 F.3d 1322, 1325-26 (Fed. Cir. 2011) (affirming the Commission’s interpretation). We affirm the ALJ’s determination that Lamina’s

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showing was insufficient to demonstrate that its expenses were properly attributable to licensing.¹⁰

We also affirm the ALJ's conclusion that Lamina failed to show that its expenses were substantial. Substantiality is judged in the context of the industry in question. *Navigation Devices*, Comm'n Op. at 14. For purposes of its argument under section 337(a)(3)(C), Lamina admits that the "relevant 'industry' is Lamina's licensing industry for laminated packaging." Lamina Pet. 63. Given this admission, we affirm the ALJ's conclusion that Lamina did not show that its "investments are substantial relative to the industry." ID at 44. In its petition for review, Lamina explains that the "problem is that Lamina is unaware of any other entities involved in this licensing packaging industry." Lamina Pet. 63. Even if true, however, Lamina failed to provide *any* context or benchmark (*i.e.*, beyond laminated packaging licensing) for assessing whether Lamina's expenses were substantial, and instead argued the substantiality of its investments in a vacuum. Such a showing is insufficient.

The two Lamina principals (Messrs. Cunningham and Connelly) are alleged to have spent hundreds of hours trying to enforce the asserted patents. Lamina Post-Hearing Br. 35-41; Lamina Pet. 57-64. But they did not keep records. While the Commission does not require precision in documenting sweat equity, some evidence sufficient to verify this investment is needed to support such a claim.¹¹ The importance of this type of support is particularly indispensable here because Messrs. Cunningham

¹⁰ We find that Lamina cannot rely upon its patent maintenance fees. *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op., 2011 LEXIS 2821 at *71 (Apr. 14, 2010) ("Congress clearly stated that it did not intend mere patent ownership to constitute a domestic industry.").

¹¹ See *Certain Stringed Instruments* at 26 ("While we do not discount the concept of sweat equity, documentation thereof in this case lacked sufficient detail. A precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation.").

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and Connolly owned, and divided their time among, more than twenty other companies. See CX-124C at QQ, 46-49; CX-123C at Q. 85; Tr. 159-61, 200-201, 209-210, 216.

They failed to explain their apportionment of time, see ID at 43 n.5, and even Lamina's expert did not rely on that time in determining licensing expenditures. Tr. 520-522; see also, e.g., CX-185C. We find Lamina, through its expert, has waived reliance upon that time, and that it is, in any event, sufficiently unreliable to be credited toward a showing of domestic industry.

Lamina's petition for review relies extensively upon *InterDigital Communications, LLC v. ITC*, 707 F.3d 1295 (Fed. Cir. 2013). Lamina Pet. 49-64. But the nature of InterDigital's business is far different from Lamina's. The Federal Circuit noted the ALJ's findings that InterDigital has a large and successful technology development and licensing business with numerous licensees to InterDigital's patents and substantial investment directed toward that licensing. *Id.* at 1298-99 ("Between 1993 and 2006, the evidence showed, InterDigital invested a total of approximately \$7.6 million in salaries and benefits for employees engaged in its licensing activities, and it received . . . about \$400 million attributable to licenses to its 3G technology [at issue in this case].").

The facts here are similar to *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op., 2008 WL 2139143 (May 16, 2008). In addition to discrediting the independent inventor's investments as being too modest, the Commission observed: "While a consummated license achieved prior to filing a complaint is not a prerequisite for us to give weight to pre-complaint efforts to license a patent, the absence of any actual licenses prior to a complaint is a factor we

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consider.” *Id.* at *15. The respondents argue that Lamina’s licenses, which were granted for virtually no financial or other consideration, are close, if not tantamount, to no licenses at all. Resp’ts Pet. Reply 16-19. However, we need not reach this issue because, as with *Stringed Musical Instruments*, the more appropriate analysis here – where the expenditures are small and the licenses few – is whether an industry is “in the process of being established.” 19 U.S.C. § 1337(a)(2). In *Stringed Musical Instruments*, that theory had been waived. 2008 WL 2139143 at *16. In the present investigation, at the hearing, Lamina argued that the 100-day proceedings were limited to the existence of an actual industry and not one in the process of being established. The ALJ properly recognized that the Commission’s notice of institution provided fair and adequate notice that the expedited proceeding was directed to resolving all issues involving whether Lamina’s economic activities could satisfy the domestic industry requirement, regardless of whether the allegations concerned domestic industry in existence or in the process of being established. *Id.* at 45-46.

The ALJ did not reach the issue whether Lamina was in the process of establishing a domestic industry because he found that Lamina had waived the argument. *Id.* at 46. While we agree that Lamina waived this issue based on its failure to present supporting arguments to the ALJ, the Commission will address the merits for the sake of completeness. As stated in *Stringed Instruments*:

An industry is “in the process of being established” if the patent owner “can demonstrate that he is taking the necessary tangible steps to establish such an industry in the United States,” S. Rep. 100-71 at 130, and there is a “significant likelihood that the industry requirement will be satisfied in the future.” H. Rep. 100-40 at 157.

2008 WL 2139143 at *16.

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Lamina argues in its petition for review that the evidence of record supports a finding of a domestic industry in the process of being established. Lamina Pet. 64-66. We agree with the IA that this investigation is similar to *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743. In that investigation, the ALJ rejected the complainant Motiva's arguments in support of a domestic industry in the process of being established:

Motiva could not demonstrate that there was any significant interest in its technology prior to the Wii's existence, and I find that there is no reason to believe that manufacturers of fitness and rehabilitation equipment will suddenly become interested in the technology because Nintendo has been excluded from the market.

Final ID at 173 (Nov. 2, 2011) (unreviewed in relevant part). On judicial review, the Federal Circuit affirmed that determination. *Motiva, LLC v. ITC*, 716 F.3d 596, 601 (Fed. Cir. 2013). The lack of interest by district court defendants and Commission respondents to settle with Lamina for any significant value likewise indicates the absence of interest in Lamina's technology. Although Lamina now relies in part on allegedly-manufacturing-oriented discussions with a company called [REDACTED], Lamina Pet. 65, the IA correctly observes that these discussions are vague and do not "indicate a significant likelihood that a contract will be signed, or that products practicing the patents-in-suit will be manufactured under" that speculative contract, IA Pet. Reply at 31. Lamina has not demonstrated a domestic industry in the process of being established.

IV. CONCLUSION

For the foregoing reasons, Lamina has not demonstrated that a domestic industry exists in the United States under section 337(a)(2) & (a)(3) or that such an industry is in

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the process of being established. The investigation is terminated with a finding of no violation of section 337.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Acting Secretary to the Commission

Issued: September 3, 2013

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq. and the following parties as indicated on **September 3, 2013**



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**CERTAIN PRODUCTS HAVING LAMINATED
PACKAGING AND COMPONENTS THEREOF**

Inv. No. 337-TA-874

Certificate of Service – Page 2

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN PRODUCTS HAVING
LAMINATED PACKAGING,
LAMINATED PACKAGING, AND
COMPONENTS THEREOF**

Inv. No. 337-TA-874

**ORDER NO. 15: INITIAL DETERMINATION ON THE ECONOMIC PRONG OF
THE DOMESTIC INDUSTRY REQUIREMENT**

(July 5, 2013)

On March 28, 2013, the Commission instituted this investigation pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

[W]hether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products having laminated packaging, laminated packaging, and components thereof that infringe one or more of claims 1, 17 and 25 of the '242 patent and claims 1 and 19 of the '067 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

78 Fed. Reg. 19007-8 (March 28, 2013). The complainant is Lamina Packaging Innovations, Inc. ("Lamina") of Longview, Texas. The respondents are Remy Cointreau USA, Inc. of New York, New York; Pernod Ricard USA LLC of New York, New York; John Jameson Import Company of Purchase, New York; Moet Hennessey USA of New York, New York; Champagne Luis Roedere of Reims, France; Maisons Marques & Domaines USA Inc. of Oakland, California; Freixnet USA of Sonoma, California; L'Oreal USA Inc. of New York, New York; Hasbro, Inc. of Pawtucket, Rhode Island; Cognac Ferrand USA, Inc. of New York, New York;

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and WJ Deutsch & Son of White Plains, New York; and Diageo North America, Inc. of Norwalk, Connecticut; Sidney Frank Importing Co., Inc. of New Rochelle, New York; Beats Electronics LLC of Santa Monica, California; and Camus Wines and Spirits Group of Cognac, France (collectively “Respondents”). The Office of Unfair Import Investigations (“Staff”) is also a party to the investigation (*Id.*) The Notice of Investigation also ordered the ALJ to “hold an early evidentiary hearing, find facts, and issue an early decision, as to whether the complainant has satisfied the economic prong of the domestic industry requirement” and issue the ID on that issue “within 100 days of institution.” (*Id.*) Pursuant to the Commission’s order, this is the initial determination as to whether complainant has satisfied the domestic industry requirement.

I. PROCEDURAL BACKGROUND

The investigation was instituted on March 28, 2013. 78 Fed. Reg. 19007-8 (March 28, 2013).

On May 7, 2013, the ALJ issued orders terminating respondents Camus Wines and Spirits Group and Sidney Frank Importing Co., Inc. on the basis of a mutual release agreement and settlement agreement, respectively. (Order Nos. 10 and 11.) On May 30, 2013, the Commission determined not to review the orders. (Notice of Commission Decision Not to Review Two Initial Determinations Terminating the Investigation as to Two Respondents on the Basis of Settlement Agreements.)

On May 16-17, 2013, the ALJ held an evidentiary hearing on the economic prong of the domestic industry requirement. Complainant Lamina Packaging Innovations, Inc. and respondents Remy Cointreau; Freixenet USA, Inc.; Beats Electronics; Champagne Louis Roederer; Maisons Marques & Domaines USA; Cognac Ferrand USA Inc.; WJ Deutsch & Sons Ltd; Diageo North America Inc.; Pernod Ricard USA LLC; John Jameson Import Company;

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Hasbro, Inc.; and Moët Hennessy USA attended the hearing. (Tr. at 1-7.) The Commission Investigative Staff also attended the hearing. (*Id.*)

On June 1, 2013, the ALJ issued an order terminating respondent L’Oreal USA Inc. from the investigation on the basis of settlement agreement. (Order No. 14.) On July 2, 2013, the Commission determined not to review that order. ((Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation as to One Respondent on the Basis of a Settlement Agreement.)

On June 17, 2013, Respondents filed a motion for leave to file a corrected post-hearing brief on the economic prong of the domestic industry requirement in order to correct certain typographical errors. (Motion No. 874-019.) Motion No. 874-019 is hereby GRANTED.

II. COMPLAINANT’S OBJECTION

On May 16, 2013, Lamina filed an objection to the Commission’s order requiring (1) the ALJ to hold an early evidentiary hearing, find facts and issue an early decision as to whether Lamina has satisfied the economic prong of the domestic industry requirement; (2) the ALJ to issue an early ID relating to the economic prong within 100 days of institution; (3) petitions for review to be filed five calendar days after service of the ID; (4) that the ID will become the Commission’s final determination 30 days after service of the ID unless the Commission determines to review the ID; (5) that any such review will be conducted in accordance with Commission Rule 210.43, 210.44, and 210.45; and (6) that a finding that the economic prong has not been satisfied shall stay the investigation unless the Commission orders otherwise. (Lamina’s Renewed Objections to the Expedited Proceedings Concerning Economic Prong at 1-2.) Lamina argues that the Commission’s order is “arbitrary and capricious” and not in

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accordance with the law. (*Id.* at 2.) The Commission has departed from its own rules without any explanation and that has prejudiced Lamina. (*Id.* at 2-3.) Lamina argues that it has been prejudiced because (1) the expedited hearing has created inefficiencies, redundancies and costs; (2) the expedited hearing did not permit adequate discovery and violated Lamina's rights under the Administrative Procedures Act ("APA")¹ and 19 C.F.R. §210.36(d); and (3) the boundaries for the hearing are unclear as the economic prong issue is "inextricably intertwined" with other issues such as technical prong, infringement, invalidity and claim construction. (*Id.* at 4-6.) Thus, Lamina requested that the hearing be postponed and rescheduled to take place later in the investigation and in accordance with normal ITC practice. (*Id.*)

At the hearing, the ALJ overruled the objection and ordered the hearing to proceed. The ALJ also sought written responses from Staff and Respondents. (Tr. at 396:3-20.)

On May 24, 2013, Respondents and Staff each filed a response to the objection. Respondents argue that the Commission acted within its authority in ordering the ALJ to issue an early ID on the economic prong. (Resp. at 1.) Respondents argue that the Commission has the authority to order expedited proceedings to consider case-determinative issues as it falls within the discretion accorded administrative agencies in managing its administrative proceedings and, further, that the Commission has done so in the past. (*Id.* at 2-4.) Respondents further assert that the expedited proceeding has been conducted in accordance with the APA since the Notice of Investigation provided sufficient notice and Lamina never requested an extension or modification to the procedural schedule. (*Id.* at 4-5.) Respondents further argue that the legal propriety of the expedited proceeding ordered by the Commission is not properly before the ALJ and that such authority only lies with the Commission. (*Id.* at 5-6.) In response to Lamina's

¹ According to Lamina, the specific right violated is the "right to adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential for a fair hearing." (*Id.* at 5-6.)

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specific objections set forth in its filing, Respondents argue that they are without merit. (*Id.* at 7-9.)

Staff argues that the Commission has previously issued notices that contemplate early IDs on specific issues in a proceeding. (Staff Resp. at 1-2.) Staff further notes that summary determination motions finding that the economic prong has been met are routinely granted. (*Id.* at 2.) As for the Commission's authority to modify or suspend its own rules, Staff argues that the U.S. Supreme Court has recognized such a right. (*Id.* at 2-3.) Staff further notes that Lamina never sought any additional non-party discovery despite its objection that the expedited proceeding precluded it from seeking additional non-party discovery. (*Id.* at 3.) Staff asserts that Lamina's other arguments also fail because the economic prong analysis includes a determination as to whether a domestic industry is in the process of being established and claim construction is not required in this phase of the investigation. (*Id.* at 4-6.)

On June 19, 2013, Lamina filed a motion for leave to file a reply and reply to Respondents and Staff's responses. (Motion Docket No. 874-018.) Motion No. 874-018 is hereby DENIED. On June 20, 2013, Respondents and Staff each filed unopposed motions for leave to file sur-replies and sur-replies. (Motion Docket Nos. 874-020 and 874-021, respectively.) In light of the ALJ's ruling on Motion No. 874-018, the motions for leave to file sur-replies are MOOT.

As noted above, the ALJ overruled Lamina's objection at the beginning of the hearing. Upon further review of the additional filings by the parties, the ALJ finds that he must change his ruling on the objection for the reasons set forth below.

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A. Administrative Procedure Act Analysis

The Commission's Notice of Institution of Investigation contained extraordinary instructions to the ALJ, instructions that are not within the Commission's written rules:

(2) Notwithstanding any Commission Rules that would otherwise apply, the presiding Administrative Law Judge shall hold an early evidentiary hearing, find facts, and issue an early decision, as to whether the complainant has satisfied the economic prong of the domestic industry requirement. Any such decision shall be in the form of an initial determination (ID). Petitions for review of such an ID shall be due five calendar days after service of the ID; any replies shall be due three business days after service of a petition. The ID will become the Commission's final determination 30 days after the date of service of the ID unless the Commission determines to review the ID. Any such review will be conducted in accordance with Commission Rules 210.43, 210.44, and 210.45, 19 C.F.R. §§ 210.43, 210.44, and 210.45. The Commission expects the issuance of an early ID relating to the economic prong of the domestic industry requirement within 100 days of institution, except that the presiding ALJ may grant a limited extension of the ID for good cause shown. The issuance of an early ID finding that the economic prong of the domestic industry requirement is not satisfied shall stay the investigation unless the Commission orders otherwise; any other decision shall not stay the investigation or delay the issuance of a final ID covering the other issues of the investigation.

The complaint by Lamina was filed on February 20, 2013, and the Notice provided above was issued March 22, 2013. The Notice did not provide grounds for this change of rules. No subsequent written material made available to the public, or written material given to the named parties who would have an interest gave the grounds for the change, or the criteria used in making the selection of this case for special treatment. No explanation or rules were published through the Federal Register, and no ITC publication has the grounds for this change in the ITC's normal rules. The Commission to date has not provided the criteria for selection of the parties to participate in this type of proceeding or offered any explanation as to how the Commission determined the relevant components of the order, such as the timing of the events.

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1. Analysis

Investigations by the ITC under 19 USC §1337 are governed by, and must be conducted consistent with the provisions of the Administrative Procedure Act (APA), 5 USC Subchapter II. The need to comply with the APA is recognized in 19 CFR 210.36, and by the statute itself and case law. 5 USC § 551 defines agency under the APA:

(1)“agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include...

The ITC comes within this definition, and the exceptions noted following 5 USC § 551(1) are not applicable to the ITC. This section also covers the meaning of rulemaking and adjudication:

(5) “rule making” means agency process for formulating, amending, or repealing a rule;

(6) “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing;

(7) “adjudication” means agency process for the formulation of an order;

5 USC §552 PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a)Each agency shall make available to the public information as follows:

(1)Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A)descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B)statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C)rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

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(D)substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E)each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register

These rules were not lightly considered and arrived at, but were implemented to ensure that provisions enshrined in the US Constitution were enforced in dealings with the government. In both the 5th and 14th amendments to the Constitution, the taking of “life, liberty or property without due process of law” is prohibited.

The Commission has long established Rules regarding adjudication of cases brought under 19 USC §1337. These rules were promulgated in accordance with 5 USC §553:

5 USC §553 - RULE MAKING

(a)This section applies, according to the provisions thereof, except to the extent that there is involved—

(1)a military or foreign affairs function of the United States; or

(2)a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b)General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1)a statement of the time, place, and nature of public rule making proceedings;

(2)reference to the legal authority under which the rule is proposed; and

(3)either the terms or substance of the proposed rule or a description of the subjects and issues involved.

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Except when notice or hearing is required by statute, this subsection does not apply—

(A)to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B)when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c)After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d)The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1)a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2)interpretative rules and statements of policy; or

(3)as otherwise provided by the agency for good cause found and published with the rule.

The rules that the Commission imposed in this case, as provided for in the Notice of Institution of Investigation were not published in the Federal Register in advance of their imposition, nor did the Commission follow any of the provisions required by 5 USC 553(b)(1), (2) or (3). In the Notice, the agency did not state its reasoning or find any of the exceptions listed in the statute applied to this case. The Commission has yet to publish a set of rules that would give notice of the criteria used for selection of complainant for this unique treatment of their complaint, nor explained in any published form how the alternative rules that were dictated for this particular case were arrived at. The new rules, implemented (so far) solely for this case and announced after the filing of the complaint, implemented a number of substantive changes in how cases have been conducted under 19 USC §1337 at the Commission, among them:

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- The Notice required the judge to conduct a specific early hearing on one aspect of the case. Under 19 CFR § 210 and the judge's ground rules, the scheduling, target dates and hearing were all left to the discretion of the ALJ, with input from the parties. Under the new rule, neither the ALJ nor parties were given input into the schedule.
- The Notice changed the timing and scope of early discovery.
- The Notice changed the timing of petitions for review of the initial determination from the ALJ, and the timing for replies to the petitions for review.
- The Notice also modifies the procedures of both the Commission Rules and the Judge's ground rules regarding discovery and settlement conferences, recommendations for mediation and other rules. It has changed at least the provisions for motions practice, discovery, filing of submissions and the scheduling of the hearing(s) required to resolve the case.

The changes, in their scope and timing, go beyond mere procedure, striking at the process that has been used at the Commission for more than 20 years. While it may be proper for the Commission to make such a change in its rules by following the rule making procedures long provided for in the APA and by the Commission, the issue raised in this matter is: Can the Commission do so without going through the rule making procedure that is required by the APA?

In its brief on the Commission's authority the Office of Unfair Import Investigations (OUII) takes the position that the Commission was within its authority to do so. They cite several cases where the Commission invited the ALJ's attention to an issue that may be decided early and be case dispositive. *Certain Drill Bits and Products Containing the Same*, Inv. 337-TA-844, 77 FR 32997-01; *Certain Incremental Dental Positioning Adjustment Appliances and Methods of Producing Same*, Inv. 337-TA-562, 77 FR 2547-01 (May 1, 2012). The staff also noted that ALJs in the past had granted motions for summary judgment on the issue of Domestic Industry. *Certain Reduced Ignition Proclivity Cigarette Paper Wrappers and Products Containing Same*, Inv. 337-TA-756 Order No. 24 Initial Determination (Oct 24, 2011); *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated*

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Software, Inv. 337-TA-724, Order 29 Initial Determination (March 11, 2011). These cases, however, are not on point in this matter. While the Commission may advise the ALJ to look at aspects of a particular case, the management of the case by the ALJ using the Commission rules and ground rules is within the written procedures that have long been published by the Commission, in conformance with the requirements of the APA. The ALJ has had discretion to manage a case under 19 CFR 210.2 and the Commission suggesting that the judge look at a particular aspect of a case is consistent with both the rules and the goals of the Commission. However, the fact that a particular result can be obtained within the rules does not mean that the rules may be ignored by an agency if the result anticipated is similar. Under the Commission Rules as published, the judge may focus on only one aspect of a case if it is dispositive, and may enter summary judgment when appropriate. This does not mean that the agency may wave the rules whenever those results are expected or desired.

OUII has also cited *American Farm Lines v. Black Ball Freight Service, et al.*, 397 U.S. 532, 539 (1970) for the proposition that "[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." While those words are indeed in the case, a fair reading of the entire case does not support the position that an agency can change its rules for adjudication, without an explanation of the standards of the new rules, and do so with retroactive application. In *American Farm Lines*, the Court noted that the ICC had the authority to grant temporary operating authority to a company without a hearing or other proceedings under certain conditions. That was in the ICC rules :

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The Interstate Commerce Commission has statutory power to grant motor carriers temporary operating authority 'without hearings or other proceedings' when the authority relates to a 'service for which there is an immediate and urgent need' and where there is 'no carrier service capable of meeting such need.' Interstate Commerce Act 210a, 52 Stat. 1238, as amended, 49 U.S.C. 310a. The ICC processes applications for such authority under rules promulgated in 1965. 49 CFR pt. 1131.2 Among other things, those require that an applicant accompany his application with supporting statements of shippers that contain information 'designed to establish an immediate and urgent need for service which cannot be met by existing carriers.' *Id.*, 1131.2(c). Each such supporting statement 'must contain at least' 11 items of information

The Commission is entitled to a measure of discretion in administering its own procedural rules in such a manner as it deems necessary to resolve quickly and correctly urgent transportation problems. It is argued that the rules were adopted to confer important procedural benefits upon individuals; in opposition it is said the rules were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications for temporary authority.

We agree with the Commission that the rules were promulgated for the purpose of providing the 'necessary information' for the Commission 'to reach an informed and equitable decision' on temporary authority applications. ICC Policy Release of January 23, 1968. The Commission stated that requests for temporary authority would be turned down 'if the applications do not adequately comply with (the) ... rules.' *Ibid.* (Emphasis added.). The rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion[397 U.S. 532 , 539] as in *Vitarelli v. Seaton*, 359 U.S. 535; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260; *Yellin v. United States*, U.S. 109. Thus there is no reason to exempt this case from the general principle that '(i)t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.' *NLRB v. Monsanto Chemical Co.*, 8 Cir., 205 F.2d 763, 764. And see *NLRB v. Grace Co.*, 8 Cir., 184 F.2d 126, 129; *Sun Oil Co. v. FPC*, 5 Cir. 256 F.2d 233; *McKenna v. Seaton*, 104 U.S.App.D.C. 50, 259 F.2d 780.

In *American Farm Lines*, the agency's rules allowed some flexibility in the information required in applications made under the emergency provisions by stating 'if the applications do not adequately comply with (the) ... rules,' the request could be turned down. The rules in place allowed for what the agency had done regarding the application, there was no issue of waiver,

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but rather a question of interpretation of a rule that existed. The agency in *American Farm Lines* did not engage in rule making, nor attempt to apply rules that had not been published. There is also a distinction to be drawn between “procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it” and what we have before us in this case. The rules that the Commission seeks to waive are not rules adopted for the orderly transaction of business, but rules that provide for the substantive rights of the parties. They define the process that is due in adjudication. Finally, in this case the Commission has not provided any explanation that could demonstrate that the ends of justice required the waiver of the ordinary rules of the Commission.

Pam, S.P.A. v. United States, 463 F.3d 1345 (Fed. Cir. 2006) fails to support the proposition for which it is cited, that “Objections to such modifications must provide a showing of substantial prejudice.” In *Pam*, the company had been an ongoing part of the proceedings before the Commerce Department:

On July 1, 2002, Commerce published in the Federal Register notice of an opportunity to request another (apparently the sixth) administrative review of certain pasta imported into the United States for possible changes in dumping margins and hence antidumping duties. On July 31, 2002, certain members of the domestic pasta industry, specifically A. Zerega's & Sons, Dakota Growers Pasta Co., New World Pasta Co., and American Italian Pasta Co. (collectively, "Zerega"), submitted a request for further administrative review of eight companies, including PAM, that were under dumping duty orders. Zerega served its request for review on some of the companies, but not on PAM. On August 27, 2002, Commerce published in the Federal Register notice of its initiation of this review, as required by statute. This notice did list PAM. On August 28, 2002, (*i.e.*, the next day), counsel for PAM entered an appearance in Commerce's administrative review. On August 29, 2002, Commerce sent questionnaires to the foreign companies, including PAM.

Not only did Pam know of the proceedings and appear before the agency, but the company asked for numerous delays which were granted to it.

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On September 3, 2002, PAM notified Commerce that it had not been properly served by Zerega and requested a 29-day extension of time to file its response in order to "mitigate to some extent the harm to PAM." PAM did not request rescission in this September 3 letter to Commerce. On September 27, 2002, Commerce granted PAM a two-week extension. On October 8, 2002, PAM requested another extension of three weeks, but again did not request rescission. On October 18, 2002, Commerce gave PAM a 15-day extension, in effect granting the 29-day extension PAM had initially requested. Commerce later granted PAM at least six additional extensions of time.

In concluding that PAM had not demonstrated that it was substantially prejudiced, we noted that "the *total* amount of additional time Commerce granted to PAM . . . far *exceeded* the 17 days PAM lost due to the lack of service" by the domestic producer. *Id.* at 1349. We further observed that "PAM neither claim[ed] or attempt[ed] to show that [the domestic company's] failure to serve it impeded its ability to respond to and defend its interests in the administrative review." *Id.*

Where the potential harm, that of not having proper notification, was cured by actual notice, an appearance by an attorney and delays that more than made up for any potential lost time, the court found PAM would have to show actual substantial damage. Note also that PAM never requested recession and service. In this case the change in rules was not agreed to at any time by the Complainant and they did not get an opportunity to correct any problem that might have been created by the failure to abide by the published rules of the Commission. As the cases cited by staff are not applicable to the case before the Commission, they cannot support OUII's contention that Lamina had a duty to show substantial prejudice before its due process rights are triggered.

I would also note that OUII mentioned in footnote 4 in its brief that 19 CFR §201.4(b) permits the Commission to alter the rules under some circumstances:

(b) Alteration or waiver of rules. Rules in this chapter may be amended, waived, suspended, or revoked by the Commission only. A rule may be waived or suspended only when in the judgment of the Commission there is good and sufficient reason therefor, provided the rule is not a matter of procedure required by law.

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This is not helpful for two important reasons. The Commission has made no statement that there was a good or sufficient reason to waive the rules in this case. The Commission has been adjudicating under 19 USC 1337 with little change since 1974. We have had jurisdiction due to licensing activity since the 1988 Omnibus Trade and Competiveness Act added licensing to 19 USC 1337(a)(3)(C). The Commission has not published any reason as to why the rule should be waived in this case. Even had they made such a publication, 19 CFR 201.4(b) does not permit such a waiver where the proposed waiver affects a matter of procedure required by law. The waiver proposed by the Commission in this matter does touch procedural matters required by law, both under its own regulations and the APA.

While an agency may deviate from a strict interpretation of its rules, if such flexibility is built into them, there is no support for the proposition that an agency may make rules, and apply them retroactively to a party that has a right pending before the agency. In this case, Lamina filed the complaint, had it accepted for adjudication by the ITC, and only then did it learn that it would be subject to a new, and different set of rules for adjudication. This is not permitted under the APA, as rule making is prospective only, never retroactive: 5 USC § 553(c).

The arguments of respondents are not persuasive. They begin by noting the Commission has in the past invited the judge's attention to some aspect of a case, which is permitted under the current written rules. None of the cases cited are similar to this case with the Commission ordering an expedited hearing on one issue, dictating the schedule, changing the dates for service on the parties and so on. While the Commission could engage in rule making consistent with the APA, and possibly could within its procedural rules allow for the process ordered in this case, it did not. If the Commission chooses to use its authority to set such rules, it must follow statutory

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law. It cannot waive the requirements of the APA, or its own rules that recognize it operates subject to the APA. 19 CFR §210.36 (d)

The respondents also cite *Southwire Co. v. ITC*, 629 F.2d 1332 (CCPA 1980) for the proposition that “waiver of a time requirement “is a matter committed to ITC discretion.” Again, the matter before the court then varied greatly from the questions raised in this case. In *Southwire*, the issue was the characterization of a motion filed by Bell, motion 52-250. If the motion were properly characterized as a motion for summary determination, it was not filed in a timely manner under Rule 210.50.

It was untimely because it was not filed 30 days prior to hearing as required by that rule. The ITC found sufficient reasons to waive the 30 day requirement of Rule 210.50. When the ITC waived the rules, it provided specific reasons as to why it did so, as was permitted under rule 201.4(b)

Bell designated both of its motions as Rule 210.51 motions to "terminate" based on license. Bell could not have known that the ITC would interpret them as motions for summary determination under Rule 210.50 until the ITC order of March 29, 1979 wherein motion 52-41 was so treated. That order was rendered one day after the commencement of the evidentiary hearing. Bell was thus totally unaware of the need to file motion 52-250 as a motion for summary determination under Rule 210.50 until the time for filing such a motion had expired. Moreover, motion 52-250 was based primarily on the March 29th finding on the '994, '430, and '423 patents. It was thus reasonable for Bell to wait for that determination before filing motion 52-250, a virtually identical motion respecting the '170 patent.

Waiver of the time requirement imposed by Rule 210.50 is a matter committed to ITC discretion. See *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539, 90 S.Ct. 1288, 1292, 25 L.Ed.2d 547 (1970). The ITC's exercise of that discretion in the present case was justified and it resulted in no prejudice to *Southwire*. *Southwire* provided extensive argument in its opposition to Bell's

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motion, the motion having presented issues that were nearly identical to issues Southwire had addressed in opposing motion 52-41.

Southwire argues that the ITC failed to abide by Rule 201.1 saying that Rule 210.50, a rule of special application, is inconsistent with and should prevail over Rule 201.4(b), a rule of general application.

That argument is unavailing. There is no inconsistency between a rule imposing a time requirement, e. g., Rule 210.50, and a rule giving the ITC authority to waive such requirement for good cause, e. g., Rule 201.4(b).

In the current case, the Commission did not provide any reason as to why it was waiving the rules, or attempt to make a showing of good cause to do so. In addition, the rules that the Commission purported to waive in this case go well beyond 201.4, and rule 210.50 examined in *Southwire*. The court also noted that the Commission had the authority written into 210.50 to set a different timeline for good cause. Finally, looking at *NLRB v. Monsanto Chem.*, 205 F.2d 763 (8th Cir. 1953), the respondents cite the case as permitting the waiver here, because “when in a given case the ends of justice require it” the Commission or ALJ has the authority to modify proceedings. Without examining *NLRB* here, the argument can be dismissed, because neither the Notice from the Commission, nor the arguments in the briefs present any evidence at all that the modification of the rules were done because “the ends of justice require it”. The Commission was silent as to its reasoning in the Notice, and the respondents have not provided any evidence that the ends of justice required this unique manner of adjudication. There is no evidence on the record that would suggest the ends of justice would not have been served by proceeding in the same manner that the Commission used in all of its other cases. That the Commission may do something when there are extraordinary circumstances, requiring the action, does not mean the Commission, or any agency may waive the rules without reason. Without some articulate reason requiring that the normal rules not be applied, they must be. The other cases cited by the respondents to demonstrate that the ITC has used a flexible approach within its rules to

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adjudicate 337 cases have no applicability here. The authority of the ALJs to bifurcate cases, reach summary judgment, issue an ID on a single issue is inherent in the authority of the ALJ. It is also inherent in the authority of the Commission to make suggestions to the judge in a particular case. That this is true does not mean the APA rules have no authority, and the Commission can achieve the same results without following the APA and its own rules, or that the Commission can set its rules aside without explanation.

The final argument made by the respondents is that the legal propriety of the Expedited Domestic Industry Proceeding is not before the ALJ. The gist of this argument is that only the Commission has the authority to interpret the Commission's rules and the laws applying to the Commission, citing 19 CFR §201.4(c) and § 210.10(b)&(c) [Respondents brief p. 5 6.]

19 CFR §201.4(c):

(c) Authority to make decisions. Authority to interpret the Commission's rules and the laws applying to the Commission, and to make findings, determinations, or other decisions not relating to matters of internal management, is retained in the Commission itself and is not delegated.

This language does not apply to adjudications that are performed under 19 USC 1337, as they are governed not just by Commission rules, but Federal statutory law, including the APA. That the ALJ must conduct the hearing according to the APA is established in 19 CFR § 210.36(a) which states the hearing must be conducted according to the APA:

(a) Purpose of hearings. (1) An opportunity for a hearing shall be provided in each investigation under this part, in accordance with the Administrative Procedure Act. At the hearing, the presiding administrative law judge will take evidence and hear argument for the purpose of determining whether there is a violation of section 337 of the Tariff Act of 1930, and for the purpose of making findings and recommendations, as described in 210.42(a)(1)(ii), concerning the appropriate remedy and the amount of the bond to be posted by respondents during

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Presidential review of the Commission's action, under section 337(j) of the Tariff Act.

The Commission has no authority to conduct or order a hearing that does not meet the requirements of the APA. If the Commission should make such an order, its action, and any action taken by the ALJ is ultra vires and the results null. The respondents argued as well that 19 CFR §210.36(d) contains all the rights that the parties have under the APA and therefore Lamina has been granted a hearing that met the requirements of the APA. The list of rights in the CFR is however not inclusive of all rights provided under the APA; it is only a partial list of rights under the statute.

(d) Rights of the parties. Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act (i.e., 5 U.S.C. §554 through 556). Hence, every party shall have the right of adequate notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

It follows from the rights of the parties that the ALJ must have the authority to determine if those rights are being honored in the process, for example, the right to cross-examine witnesses means little if the party is denied adequate time for preparation, discovery and so on. For each of the rights listed above, the ALJ must have authority to safe-guard said rights, and to determine, where rule making processes were not used, if the methods meet the requirements of due process of law. The ALJ presides over the hearing under the provisions of 5 USC § 556:

5 USC§ 556 - HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD AS BASIS OF DECISION

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

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- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

- (1) administer oaths and affirmations;
- (2) issue subpoenas authorized by law;
- (3) rule on offers of proof and receive relevant evidence;
- (4) take depositions or have depositions taken when the ends of justice would be served;
- (5) regulate the course of the hearing;
- (6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

The agency has appointed an ALJ under 5 USC §556(a)(3) to preside, and under 5 USC §556(b)(5) the ALJ is granted the powers to regulate the course of the hearing. If the hearing were being conducted outside the scope of the APA, the authority here in 5 USC §556 should be enough to allow the ALJ to make that determination.

The APA further provides guidance to an ALJ presiding over a hearing conducted in accordance with the APA. 5 USC §557(c)(3)(A)&(B)

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(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

As the Complainant in this case has raised the issue of jurisdiction, and the issue of whether this hearing was conducted according to the APA, the issue is properly before the ALJ, and should be addressed. The respondents' argument that if the Commission has not raised the issue of jurisdiction in its notice the ALJ may not consider it, and in case there is no jurisdiction must proceed without authority is without merit.

5 USC §706 also supports the ALJ's position that the authority to consider the issue of jurisdiction and whether the hearing is in compliance with the APA is within the scope of his responsibilities. It states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

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(2)hold unlawful and set aside agency action, findings, and conclusions found to be—

(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D)without observance of procedure required by law;

(E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error

In order for the Court of Appeals for the Federal Circuit to determine if the Commission has acted in a manner that violates (2)(A)(B) (C) or (D), there must be a record that reflects the Commission's actions. The Commission cannot, by not taking the issue of jurisdiction on appeal, insulate its decision from review by CAFC. The ITC has had experience in arguing that if there is a finding of no jurisdiction, then the court has no authority to review the decision.

Amgen, Inc., V. United States International Trade Commission, 902 F.2d 1532 (Fed. Cir. 1990):

This court's authority to review a decision of the Commission is limited by section 1337(c), which states in part:

Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) of [section 1337] may appeal such determination ... to the United States Court of Appeals for the Federal Circuit....

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This language has been interpreted as requiring a "final determination decision on the merits, excluding or refusing to exclude articles from 'entry' " under section 1337(d), (e), (f) or (g). *Block v. U.S. Int'l Trade Comm'n*, 777 F.2d 1568, 1571, 228 USPQ 37, 38 (Fed.Cir.1985) (emphasis in original). Thus, both the Commission and Chugai have filed motions to dismiss on the ground that this court is without jurisdiction to review the Commission's April 10, 1989 Order, since that Order constituted a dismissal for lack of subject matter jurisdiction and not a final determination on the merits.

In response, Amgen contends that the Commission's April 10 Order is intrinsically a final determination not to exclude articles from entry, and thus is appealable under section 1337(c). We agree.

The fact that the Commission termed its dismissal as one for lack of subject matter jurisdiction rather than as one on the merits is not dispositive. If this fact were dispositive, then the Commission could effectively shield all negative determinations from judicial review simply by labelling the determination as a dismissal for lack of jurisdiction. Such a result would be clearly contrary to the statutory scheme, which provides for judicial review of both positive and negative determinations. Instead, this court has recognized that when a decision is intrinsically a final determination, i.e., a determination on the merits, then that decision is appealable under section 1337(c). *Block; Import Motors Ltd. v. U.S. Int'l Trade Comm'n*, 530 F.2d 940, 944, 188 USPQ 491, 494 (CCPA 1976).

The reasoning of the CAFC in *Amgen* is compelling in determining whether the Commission, by providing a notice that only allowed the ALJ to examine specific aspects of a case, such as Domestic Industry, can thereby shield itself from review by not allowing the ALJ to take evidence or review the issue of jurisdiction. If the CAFC is to have meaningful review of the record to determine if the Commission proceedings were conducted according to law, the ALJ must have the ability to review that issue as well.

It appears from the briefs of OUII and the respondents that the state of the law they urge the ALJ and Commission to adopt is this: An agency is free to ignore its own rules, and act in any manner it wishes with regard to adjudication, unless a party affected by the agency action can prove it was substantially prejudiced by the actions. This would make a nullity of the APA, and if this were the law, agencies would be free to act in any manner they chose, so long as the

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impact on the parties could not be proven. This would eviscerate the APA, and is not the state of the law.

As was noted in Order 3 there is case law that states an agency is bound to follow its own rules and regulations:

As we stated at the outset, it is elementary that an agency must adhere to its own rules and regulations. Ad hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986); *see also NetworkIP, LLC v. FCC*, 548 F.3d 116,127 (D.C. Cir. 2008). In *Reuters* the FCC sought to deviate from its rules, because the Commissioners believed some ambiguity in the rules led to an unjust result. The court refused to allow the deviation to achieve a desired result.

In the case before the ITC, the Commission has sought to deviate from its rules to achieve a desired result; however the Commission has not articulated what the desired result is. This deviation is without a justification that the cause of justice requires it, nor is any other explanation offered as to why the Commission has abandoned its rules. Without such an explanation, and adherence to the APA, the deviation is fatal to the cause. Absent the instructions contained in the Notice in this matter, the judge would find the proceedings as conducted to be in violation of law and would proceed to hearing consistent with the rules of the ITC and APA. If the Commission should disagree with this ruling, in the alternative, the ALJ finds no domestic industry as set forth below.

III. ANALYSIS

A. Applicable Law

As stated in the notice of investigation, a determination must be made as to whether an industry in the United States exists as required by subsection (a)(2) of section 337. Section 337 declares unlawful the importation, the sale for importation or the sale in the United States after importation of articles that infringe a valid and enforceable U.S. patent only if an industry in the United States, relating to articles protected by the patent . . . concerned, exists or is in the process of being established. There is no requirement that the domestic industry be based on the same claim or claims alleged to be infringed. 19 U.S.C. § 1337(a)(2).

The domestic industry requirement consists of both an economic prong and a technical prong. *See Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm'n Op. at 55, USITC Pub. 3668 (January 2004). The complainant bears the burden of proving the existence of a domestic industry. *Certain Methods of Making Carbonated Candy Products*, Inv. No. 337-TA-292, Comm'n Op. at 34-35, USITC Pub. 2390 (June 1991).

However, in this phase of investigation Lamina is required to show that it satisfies only the economic prong of the domestic industry requirement with respect to the '242 and '062 Patents. The technical prong of the domestic industry requirement is not at issue in this phase of the investigation. (*See* 78 Fed. Reg. 19007-8 (Notice of Investigation).)

In patent based proceedings under section 337, a complainant must establish that an industry "relating to the articles protected by the patent . . . exists or is in the process of being established" in the United States. 19 U.S.C. § 1337(a)(2). Under Commission precedent, the domestic industry requirement of Section 337 consists of a "technical prong" and an "economic prong." The "technical prong" of the domestic industry requirement is satisfied when the

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complainant's activities relate to an article "protected by the patent." The "economic prong" of the domestic industry requirement is satisfied when the economic activities set forth in subsections (A), (B), and/or (C) of subsection 337(a)(3) have taken place or are taking place with respect to the protected articles. *Certain Data Storage Systems and Components Thereof*, Inv. No. 337-TA-471, Initial Determination Granting EMC's Motion No. 471-8 Relating to the Domestic Industry Requirement's Economic Prong (unreviewed) at 3 (Public Version, October 25, 2002); *see also Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Commission Op. at 25 (February 17, 2011) ("*Printing and Imaging Devices*"). Summary determination may be granted with respect to the economic prong while reserving for trial proof of the technical prong. *See Certain Microcomputer Controllers, Components Thereof, and Products Containing Same*, Inv. 337-TA-331, Initial Determination Granting Summary Determination on Economic Prong (January 8, 1992).

With respect to the "economic prong," 19 U.S.C. § 1337(a)(2) and (3) provide, in full:

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

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

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

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

Id. Given that these criteria are in the disjunctive, satisfaction of any one of them will be sufficient to meet the domestic industry requirement. *Certain Integrated Circuit Chipsets and*

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Products Containing Same, Inv. No. 337-TA-428, Order No 10 at 3, Initial Determination (Unreviewed) (May 4, 2000), citing *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Commission Op. at 15, USITC Pub. 3003 (Nov. 1996). The Commission has embraced a flexible, market-oriented approach to domestic industry, favoring case-by-case determination “in light of the realities of the marketplace” that encompass “not only the manufacturing operations” but may also include “distribution, research and development and sales.” *Certain Dynamic Random Access Memories*, Inv. No. 337-TA-242, USITC Pub. 2034, Commission Op. at 62 (Nov. 1987) (“*DRAMs*”).

Congress enacted 19 U.S.C. § 1337(a)(3) in 1988 as part of the Omnibus Trade and Competitiveness Act. See *Certain Plastic Encapsulated Integrated Circuits*, Inv. No. 337-TA-315, USITC Pub. No. 2574 (Nov. 1992), Initial Determination at 89 (October 16, 1991) (unreviewed in relevant part). The first two sub-paragraphs codified existing Commission practice. See *id.* at 89; see also *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Commission Op. at 39 (June 29, 2007). Under Commission precedent, these requirements could be met by manufacturing the articles in the United States, see, e.g., *DRAMs*, Commission Op. at 61, or other related activities, see *Schaper Mfg. Co. v. U.S. Int’l Trade Comm’n*, 717 F.2d 1368, 1373 (Fed. Cir. 1983) (“[I]n proper cases, ‘industry’ may encompass more than the manufacturing of the patented item. . . .”).

In addition to subsections (A) and (B), there is also subsection (C). “In amending section 337 in 1988 to include subsection (C), Congress intended to liberalize the domestic industry requirement so that it could be satisfied by all ‘holders of U.S. intellectual property rights who are engaged in activities genuinely designed to exploit their intellectual property’ in the United States.” *Certain Multimedia Display and Navigation Devices and Systems and Components*

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Thereof, and Products Containing Same, Inv. No. 337-TA-694, Commission Op. at 7 (August 8, 2011) (quoting *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-559, Final Initial Determination at 93 (unreviewed in relevant part) (May 11, 2007)). Thus, “[u]nlike sub-parts (A) and (B), sub-part (C) of section 337(a)(3) ‘does not require actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States.’” *Certain Personal Data and Mobile Communications Devices and Related Softwares*, No. 337-TA-710, Order 102: ID on Economic Prong at 4 (April 6, 2011) (unreviewed in relevant part) (“*Personal Data and Mobile Communications Devices*”) (quoting H.R. Rep. No. 100-40, pt. 1, at 157 (1987)); see also *Interdigital Communications v. Int’l Trade Comm’n*, 707 F.3d 1295, 1303-1304 (holding that it is not necessary that a party manufacture a product or that any other domestic entity manufacture a product).

In *Printing and Imaging Devices*, the Commission held that “under the statute, whether the complainant’s investment and/or employment activities are ‘significant’ is not measured in the abstract or absolute sense, but rather is assessed with respect to the nature of the activities and how they are ‘significant’ to the articles protected by the intellectual property right.” *Printing and Imaging Devices*, Commission Op. at 26. The Commission further stated that:

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 whether an investment is ‘substantial’ or ‘significant’ is context dependent.

(*Id.* at 31.) Indeed, the Commission has emphasized that “there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the ‘substantial investment’ requirement” of section 337(a)(3)(C). *Certain Stringed Musical*

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Instruments and Components Thereof, Inv. No. 337-TA-586, Commission Op. at 25 (May 16, 2008). Moreover, the Commission has stated that a complainant need not “define or quantify the industry itself in absolute mathematical terms.” *Id.* at 26.

The Commission has long held “that the domestic industry inquiry under Section 337 is not limited to the activities of the patent owner, but also involved the activities of any licensees.” *Wind Turbines*, Inv. No. 337-TA-376, REMAND, Commission Op. at 20, USITC Pub. 3072 (Nov. 1997) (internal citations omitted); *see also Certain Static Random Access Memories*, Inv. No. 337-TA-341, Order No. 5.; *Certain Dynamic Random Access Memories, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-242 at 62 (Sept. 1987); and *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same*, Inv. No. 337-TA-366 (Sept. 1995). “Indeed, it has been the long-standing Commission practice to examine the activities of licensees in making domestic industry determinations.” *Id.* at 20, n.14. The Commission has relied solely on the activities of the licensees in establishing the economic prong of the domestic industry requirement. *Id.* (citing *Certain Diltiazem Hydrochloride and Diltiazem Preparations*, Inv. No. 337-TA-349, Initial Determination (unreviewed portion) at 133-141)).

Here, Lamina argues that it meets the economic prong of the domestic industry requirement under subsections (A) and (B) based on its licensees’ activities and also meets subsection (C) based on its own investments and those of its licensees. (CIB at 1-2.)

B. Analysis

1. Domestic Industry Product

Lamina argues that the “assembled product”, which includes the packaging and content within the packaging (*i.e.*, wine, lip scrub, candle), should be the “article protected by the

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patent.” (CIB at 10.) Lamina sets forth several reasons for this: (1) Lamina’s licensees expend significant investment in plant and equipment and significant employment of labor and capital in the assembled product, not just the packaging; (2) the packaging drives the sales of the licensees’ products as evidenced by the substantial portion of cost allocated to the packaging; (3) the licensees and participants and customers in the respective industry recognize the importance of packaging as a driver of sales; and (4) the claim language encompasses the fully integrated products. (CIB at 10-15.)

Respondents argue that the “article protected by the patents” should include the packaging but not the products contained within the packaging. (RRB at 11.) Respondents note that the claims of the Asserted Patents are directed to laminated paperboard sheets and cartons made from laminated paperboard sheets. (RRB at 11-12.) Respondents further argue that the packaging is not integral to the licensees’ products, despite Lamina’s assertions to the contrary, because they have “wholly separable functions, values, markets, etc.”. (RRB at 12.) Respondents argue that the packaging is its own article of commerce, that the packaging industry is a separate industry, and that the domestic activities of the licensees are tangential to the claimed technology. (RRB at 13-14.)

Staff argues that the “article protected by the patent” is limited to the packaging of the licensees’ products alone. (SIB at 24.) Staff argues that the evidence fails to show that the packaging is essential or integral to the complete products sold by the licensees and that the packaging is not needed for the underlying products to function. (SIB at 26.) Staff further notes that the packaging for the products are sold as separate articles of commerce and that Lamina’s competitors are other packaging companies. (SIB at 27.)

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The ALJ finds that the domestic industry product is limited to the packaging only and does not include the products contained within those packages. First, the ALJ disagrees with Lamina's assertion that he should "assume that the 'articles' that Lamina alleges are 'protected by' the Asserted Patents is correct" and that it would be necessary to wade into the technical prong in order to make a determination. The ALJ finds that determining whether domestic industry products includes the products contained within the packaging or are limited to the packaging alone does not require any "claim construction" or trigger any other exercise necessary for determining technical prong. Rather, a simple review of the Asserted Patents and the asserted claims, without any need to resort to the construction of any claim language, clearly shows that they are directed to the packaging alone. The "assumption" that the ALJ must make at this point in the investigation is that the packaging used in the domestic industry products does meet the technical prong, but that assumption does not extend to expanding the claims of the asserted patents beyond their scope. Indeed, as Respondents correctly note, even the "technical" analysis submitted by Lamina's expert is limited to an analysis of the packaging – he does not discuss or evaluate whether the products contained within the packages meet any of the asserted claims. (*See generally* CX-0122C, CDX-075C-080C.)² Thus, the ALJ's determination that the

² The ALJ finds Lamina's assertion that the use of the word "comprising" in the claim means that the claim language includes the underlying product to be unpersuasive. Even if the use of the word "comprising" were to be as broad as Lamina asserts, there is nothing in the claim language or specification that would support Lamina's reading. Without having to delve into claim construction, a simple review of the Asserted Patents show that there is nothing in those patents to support a finding that a candle, wine bottles, or lip gloss (or lip scrub) were disclosed or even suggested by the disclosure of the Asserted Patents. *See Genentech, Inc. v. Chiron Corp.*, 112 F.3d 495, 501 (Fed. Cir. 1997), ("Comprising" is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct *within the scope of the claim.*") (citing *In re Baxter*, 656 F.2d 679, 686 (C.C.P.A. 1981).) (emphasis added); *Spectrum Int'l v. Sterilite Corp.*, 164 F.3d 1372, 1379-1380 (Fed. Cir. 1998) ("To be sure, *Moleculon* acknowledges that "a transitional term such as 'comprising' . . . does not exclude additional unrecited elements, or steps (in the case of a method claim)," but in the very same sentence the court limited this broad view of "comprising" to avoid *altering the scope* of the particular claim step at issue. Neither may the term "comprising" alter the scope of the merger element in the claim at issue here. "Comprising" is not a weasel word with which to abrogate claim limitations.") (internal citations omitted) (emphasis added).

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domestic industry products are limited to the packaging only does not constitute a technical prong analysis.

The critical question before the ALJ is whether the laminated packaging used by Lamina's licensees is "integral" to the products such that the entire "assembled package," *i.e.*, the product and the packaging, should be considered as a whole and all expenses related thereto considered for the economic prong analysis. The ALJ finds that they are not. While the packaging certainly makes the product "stand out" and is an important marketing tool, that does not rise to the level of rendering the packaging an integral or essential part of the product. Indeed, the candle would still be a candle, regardless of whether it was in the laminated packaging. Similarly, the lip gloss (or lip scrub) and the wine would still retain their product integrity regardless of the type of packaging. In fact, the [REDACTED] wine cans are also sold in single cans without the laminated packaging. (JX-8C at 18:11-15.) Lamina points to no evidence that shows that the laminated packaging is so essential or integral to the licensees' final products that it should be considered part of the final product. Rather, Lamina cites to *Certain Set-Top Boxes, and Hardware and Software Components Thereof*, Inv. No. 337-TA-761, to support its argument noting that the ALJ in that investigation held that "investments related to the product as a whole or investments related to particular aspects of the product not covered by the asserted patents" can be considered in the domestic industry analysis. However, the facts in that investigation are distinct from those in this investigation – namely, that investigation dealt with the design and development of certain software and the timing of the development of certain functionality in that software. The ALJ's conclusion in that investigation naturally held

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that investments relating to the entire product or certain uncovered aspects of the product could be considered given the integral and indistinguishable nature of the product and its development. Here, Lamina has failed to present evidence of such a level of integration with the laminated boxes or containers with their underlying product. As such, the ALJ finds that case to be inapposite.

Even assuming that the laminated packaging was somehow an essential component to the products, *e.g.* as a semiconductor chip is to a computer, Lamina has failed to allocate the amount of money spent on said component as required by Commission precedent. Rather, Lamina approaches the economic prong backwards. It argues that “Lamina’s licensees expend significant investment in plant and equipment and significant employment of labor and capital in the *assembled product*, not the packaging by itself.” (CIB at 10) (emphasis original). As such, the ALJ should consider the entire assembled product as the “article protected by the patent.” (*Id.*)

Whether the complainant has satisfied the economic prong is determined by its ability to show that it has satisfied one of the three prongs set forth in the statute – it is not dictated by how a complainant or its licensees maintain its business records. Indeed, it can certainly be argued that the manner in which the economic prong of the domestic industry requirement must be satisfied under Commission precedent is unnatural in a business sense, *i.e.*, business records are not maintained in the ordinary course of business in such a manner.³ Nevertheless, despite this fact, complainants in previous investigations have been able to analyze its business records and allocate expenses in order to meet the Commission’s standards, regardless of the fact that that is

³ For example, while most businesses do not keep track of the amount of revenue generated by a component part of a specific product from a product line, complainants have used sound methods to determine the percentage of revenue that should be allocated to that component part from financial records kept in the ordinary course of business.

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not how business records are normally kept or how business is normally conducted. Here, Lamina has failed to do so instead arguing that the ALJ and the Commission should accept a new means of determining the economic prong of the domestic industry requirement by basing it on how Lamina's licensees maintain their business records. The ALJ declines to take such an approach – as with other complainants in other Section 337 investigations, it was Lamina's burden to analyze its licensee's business records, create a sound methodology for said analysis, and present evidence that would support a finding that it had satisfied the economic prong under Commission precedent.

Lamina also makes much of the fact that the laminated packaging drives sales for its licensees' products and that its licensees have spent a substantial portion of their product costs on this packaging. (CIB at 12-13.) The ALJ finds this argument unpersuasive for showing that the domestic industry product should be the entire assembled product and not the packaging alone. The fact that Lamina's licensees spent a significant amount of production costs on packaging does not make said packaging integral to the underlying product such that the entire assembled product should be considered the article protected. Similarly, the fact that the packaging boosts sales also does not make the packaging integral or essential to the underlying product such that the entire assembled package should be considered the domestic industry product. Indeed, there are many other means that the licensees could have used to boost sales that would not have included using laminated packaging, *e.g.*, promotional offers, additional advertising, etc., but that would not have made these things integral or essential to the product. Similarly, the fact that the laminated packaging may boost sales does not make it integral to the underlying product. At best, these arguments merely show why Lamina's licensees chose to use laminated packaging – it does not provide a sound reason for including the underlying product as part of the domestic

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industry product. Furthermore, Lamina has presented no evidence to show that the reason that consumers purchased the products was because of the laminated packaging and that without said laminated packaging, the consumer would have declined to purchase it. While reasons for consumer purchase alone are not dispositive, given the circumstances in this investigation and Lamina's assertions, such evidence would have been helpful in proving Lamina's assertion that the laminated packaging was integral to the product.

Thus, for the foregoing reasons, the ALJ finds that the domestic industry product is limited to the packaging only. It does not include the product, *e.g.*, wine, candle or lip scrub, contained within that package.

2. Lamina's Licensees' Activities

Lamina argues that its licensees' activities satisfy the economic prong of the domestic industry requirement under sections (A) through (C).

a. Significant Investments in Plant and Equipment (§1337(a)(3)(A))

Lamina argues that its licensees have made significant investments in plant and equipment. Specifically, Lamina argues that [REDACTED] made significant investments to design, develop and bring its [REDACTED] product to the marketplace. (CIB at 19-22.) Lamina describes the amount of money invested by [REDACTED] in the entire [REDACTED] product, including revenue generated by the entire product and expenses relating to leasing facilities used by the [REDACTED] for the entire product. (*Id.*) Indeed, Lamina notes that the expenses set forth in its brief are related to "[REDACTED] wine product as a whole." (*Id.* at 21.)

Respondents argue that [REDACTED] only entered into the license agreement in order avoid litigation and not to exploit any claimed technology as evidenced by its decision

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not to change any aspect of their box design. (RIB at 32.) Respondents further note that Lamina failed to allocate sales and expenses associated with only the laminated packaging from the entire packaged product. (RIB at 32-33.) Lamina has presented no evidence that the laminated boxes are manufactured in the United States, whether any plant and equipment related to those boxes were incurred in the United States, or whether any labor or capital related to those boxes were incurred in the United States. (RIB at 33.) Respondents further argue that a significant amount of the expenses that Lamina relies upon were incurred were between 2002 and 2006, which was well before the date of the 2012 license agreement. (RIB at 33.) Respondents also note that Lamina improperly relies on sales and marketing expenses and Lamina also failed to allocate warehouse expenses to the laminated packaging alone instead of the entire [REDACTED] product. (RIB at 33-34.)

Staff argues that [REDACTED] expenses in purchasing the products should not be part of the domestic industry analysis because there is no evidence that those packages were made in the United States and, further, the evidence fails to provide any quantifiable estimate for [REDACTED] investment in that activity or show its significant in the context of the marketplace or industry. (SIB at 34.) Staff further argues that while sales and marketing data do not typically establish a domestic industry, the evidence presented by Lamina is directed toward the entire assembled product and not limited to the laminated packaging alone. (SIB at 34.) Staff further argues that the costs relating to storage, handling and shipping are also insufficient in establishing a domestic industry as they are no different from the activities of an importer and, further, there was no proper allocation of the costs to the packaging alone, even if the evidence were to be considered. (SIB at 34-35.)

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As the ALJ noted *supra* in Section III.B.1, the domestic industry product is limited to the laminated packaging only and does not include the entire product. Consequently, expenses related to the entire product will not be considered for the economic prong analysis. Lamina has only set forth evidence related to its licensee's expenses for the entire assembled product and has failed to set forth any evidence that delineates the expenses to the amount spent on the laminated packaging alone. As such, the ALJ finds that Lamina has failed to show that [REDACTED] [REDACTED] made significant investments in plant and equipment related to the domestic industry product.

Similarly, Lamina sets forth expenses by its other licensees, Lafco Enterprises, Inc. and Sara Happ, Inc., relating to the entire assembled product, namely candles and lip scrub, respectively. (CIB at 22-27.) Lamina fails to allocate the expenses to the amount spent on the laminated packaging alone. The ALJ finds that Lamina has failed to show that Lafco Enterprises, Inc. and Sara Happ, Inc. made significant investments in plant and equipment related to the domestic industry product.

b. Significant Investments in Labor or Capital ((§1337(a)(3)(B))

Lamina argues that its licensees have also made significant investments in the United States in employment of labor or capital. (CIB at 27-32.) Lamina details the investments made by each of the licensees in (1) the design of and printing of the packaging; (2) costs related to the box; (3) employees responsible for packaging and distribution; (4) marketing and sales activity; and (5) the percentage of packaging to the total cost of the product. (*Id.*) Lamina also sets forth the cost of the packaging for each of its licensees, which are [REDACTED] per unit for [REDACTED] [REDACTED], [REDACTED] per unit for Lafco and [REDACTED] per unit and [REDACTED] per unit for Sara Happ. (*Id.* at 28, 30, and 31.)

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The ALJ finds that Lamina has failed to show that its licensees have made significant investments in labor and capital in the United States related to the domestic industry product, *i.e.*, packaging alone. First, as with Lamina's evidence relating to its licensees' investments in plant and equipment, some of the expenses include those spent for the entire product and not on the packaging alone, *i.e.*, employees in charge of packaging and distribution, product development expenses, and marketing and sales. As such, those expenses cannot be used in the economic prong analysis absent an allocation of the amount that is related to the domestic industry product, *i.e.*, laminated packaging, alone.

As for those expenses that Lamina asserts are directly related to packaging, the ALJ also finds Lamina's evidence fails to support a finding of a domestic industry. Lamina fails to provide sufficient detail of the expenses that shows how much Lamina's licensees spent on the laminated packaging alone after the license agreement. Rather, Lamina simply averages the expenses together. (CIB at 27-28, 29, and 31). Furthermore, even assuming that such expenses could be considered because they are ongoing, Lamina failed to allocate the expenses to the amount directly related to the laminated packaging. (*See Certain Devices for Improving Uniformity Used in a Backlight Module and Components Thereof and Products Containing Same*, Inv. No. 337-TA-805, Initial Determination at 58 (limiting the economic prong analysis to activities of the licensee that occurred after execution of the license agreement) (affirmed by the Commission).) Similarly, even assuming that Lamina's estimates on the percentage of packaging to the total cost of the assemble products are correct, the ALJ finds that Lamina still fails to set forth the quantitative amount of recent sales by its licensees such that a calculation could be made – rather, Lamina provides figures of revenue generated over the “life of the product” or from over 6 years prior to the filing of the Complaint in this investigation. (*See CIB*

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at 27, 29.) These estimates are too temporally remote from when the license agreements were executed.

Even with Lamina's breakdown of the cost per package to each of its licensees, there is no means of determining the total amount of expenditures since Lamina failed to provide any information on the volume of sales that used the laminated packages.

Furthermore, even if the evidence were provided that would allow the calculation to be made, there is still no evidence that such an amount would be "significant." As noted above, in determining whether the complainant's investment and/or employment activities are "significant," the Commission does not make such an assessment in the abstract or absolute sense, but rather examines the nature of the activities, including taking into account the "nature of the investment and/or employment activities, 'the industry in question, and the complainant's relative size.'" *Printing and Imaging Devices*, Comm'n Op. at 26-27. Lamina has presented no evidence on the relative industry in question, the context of the licensee's operations, or the marketplace. *Id.* at 30. Rather, the ALJ is left with considering the magnitude of Lamina's licensee's expenses in only the "absolute sense," which he cannot do under Commission precedent. *Id.*

In addition, as Staff and Respondents have noted, even if the ALJ were to accept that Lamina's licensees made certain expenditures in the purchase of the laminated packaging, there is no evidence that those laminated packages were made here in the United States. *Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823, Comm'n Op. at 26-27 (finding that a complainant's investments in U.S. subcontracted components and services can be relied upon to establish the economic prong of the domestic industry requirement since such investments promote manufacturing in the United States by the subcontractor). Absent evidence

that the laminated packages purchased by Lamina's licensees were made here in the United States, any such expenses cannot be considered in the economic prong analysis.⁴

Thus, for the foregoing reasons, the ALJ finds that Lamina has failed to show that its licensees have made significant investments in labor and capital in the United States.

**c. Substantial Investments in the Exploitation of the Patents
((§1337(a)(3)(C))**

Lamina asserts that its licensees have made substantial investments in the exploitation of the Asserted Patents. (CIB at 32-34.) In support of its arguments, Lamina relies on the same investments it relied upon for meeting subsections (A) and (B). (*Id.*) For the same reasons set forth above, the ALJ finds that Lamina has failed to show that its licensees have made a substantial investment in the exploitation of the patents.

3. Lamina's Licensing Activities

Lamina argues that its own licensing activities satisfy the economic prong of the domestic industry requirement under subsection (C). (CIB at 35-49.) Lamina asserts that its investments relate to the exploitation of the Asserted Patents and that a strong nexus exists as evidenced by (1) Lamina's offer of a license to the Respondents of the Asserted Patents; (2) the Asserted Patents were discussed during license negotiations and have been litigated resulting in licenses; (3) the Asserted Patents comprise one third of the patent portfolio, are a valuable component of the portfolio, and are key patents in Lamina's licensing portfolio; and (4) the Asserted Patents are part of a portfolio of patents that "fit together congruently to cover the

⁴ The ALJ also finds that Lamina's assertion that the laminated packages were designed and printed by its licensees in the United States does not support a finding of the economic prong of domestic industry. These additional expenses, while affecting the laminated packaging, play no role in the manufacture or creation of the laminated packaging. In essence, these additional features are, for the purposes of economic prong analysis, no different than the underlying product – they are part of the "entire assemble package" and have no effect or bearing on the laminated packaging on to which the design is printed.

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process and structure of the new generation of laminated products.” (CIB at 42-43.) Lamina further argues that its investments relate to licensing activities, including extensive discussions with [REDACTED] about entering a license and partnership, its already existing license agreements with its licensees, and its continued efforts to license the Asserted Patents to Respondents. (CIB at 44.) Lamina further argues that all of its licensing activities have been based in the United States – all licensing discussions with its licensees occurred in the United States and Lamina has offices located in Chevy Chase, MD and Longview, TX. (CIB at 44-45.)

Lamina further argues that its licensing investments are substantial. Specifically, Lamina relies on the expenses incurred on the activities set forth above and argues that given the size of Lamina, its expenditures are substantial. (CIB at 47.) Lamina further argues that the appropriate “industry” that is at issue is not a “manufacturing” industry, but the licensing industry for laminated packaging, which includes licensing packaging manufacturers and companies using laminated packaging in their products. (*Id.* at 48.) Lamina further notes that it has already eliminated “pure litigation” expenses. (*Id.* at 48-49.)

Respondents argue that Lamina has failed to meet the economic prong of the domestic industry requirement based on its own activities because (1) Lamina’s investments and activities are litigation driven; (2) Lamina’s purported expenditures are small in magnitude; (3) Lamina identified expenses that were not quantified and were unsubstantiated; (4) Lamina’s activities and investments are not substantial nor is there any comparative analysis; and (5) Lamina’s activities and investments are not directed to the practical application of the invention or bringing the patented technology to market and are entitled to little or no weight. (RIB at 12-22.)

Staff argues that that Lamina has sufficiently shown that the enumerated expenses set forth by Lamina have a sufficient nexus to the Asserted Patents, but that the mere time spent by

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principals of Lamina do not have a significant nexus. (SIB at 12-13.) Staff further argues that the evidence fails to show that Lamina's investments are related to licensing, but instead are focused on litigation activities. (SIB at 14-15.) Staff further argues that the evidence fails to show that Lamina's investments are substantial. (SIB at 18-22.)

The ALJ finds that Lamina has established a sufficient nexus between its licensing activities and the Asserted Patents and a nexus to the United States. The evidence shows that:

- The asserted patents were discussed during license negotiations, and were the subject of the lawsuits that led to licenses, and were licensed in the United States, (CX-0042C; CX-0142C-144C; 5/16/13 Connelly Tr. 125:4-14, 108:4-109:1; CX-0082C, CX-0082C, CX-0142, CX-0143C, CX-0144C; CX-0121C e.g. Q&A 85-88, 132, 198, 201, 239, 241-242, 287, 289; CX-0124C e.g. Q&A 108-110; CX-0122C at Q&A 73-78, 82-88; 5/16/13 Perkowski Tr. at 368:19-371:3, 372:9-375:1, 375:18-380:12; CDX-0075C-0080C; CDX-0326-0327; CDX-0330);
- Lamina owns a small number of patents (six), and the asserted patents comprise one third of the portfolio, (CX-0121C at Q&A 78, 81, 82, 101-106; CX-0083C; CX-0084C; CX-0042C at LAMINA0001633 § 1 & 1636 § 6.1.1; CX-0143C at Lamina-ITC-CBI-000069 § 1; see also 5/17/13 Mulhern Tr. at 557:7-19);

Thus, Lamina has shown a sufficient nexus between the Asserted Patents and its activities and a nexus to the United States.

However, the ALJ finds that Lamina has failed to establish a sufficient nexus to licensing. As an initial note, the ALJ does not find the nexus to licensing as weak as Respondents and Staff assert. Respondents and Staff make much of the fact that Lamina's licenses with its licensees resulted from litigation. However, the Commission has explicitly stated that such activities can constitute licensing activities. *See Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op. at 50 (March 31, 2010) ("A complainant must also show that licensing activities pertain to the particular patent(s) at issue. Depending on the circumstances, such activities may include, among other things, drafting and sending cease and desist letters, *filing and conducting a patent infringement litigation*,

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conducting settlement negotiations, and negotiating, drafting and executing a license.”) (emphasis added); *see also Motiva , LLC v. Int’l Trade Comm’n*, No. 2012-1252, Slip. Op. at 9 (Fed. Cir. May 13, 2013) (“Motiva’s investment in the litigation against Nintendo could indeed satisfy the economic prong of the domestic industry requirement if it was substantial and directed toward a licensing program that would encourage adoption and development of articles that incorporated Motiva’s patented technology.”) The evidence is clear that Lamina has filed and conducted patent infringement litigation, conducted settlement negotiations, and negotiated, drafted and executed a license agreement.⁵ As such, those activities, while not necessarily focused on “putting the patent to productive use,” are the type of “licensing activities that ‘take advantage of’ the patent, *i.e.*, solely derive revenue. *Coaxial Cables* at 49.

The Commission further noted, however, that “[t]he mere fact [] that a license is executed does not mean that a complainant can necessarily capture all prior expenditures to establish a substantial investment in the exploitation of the patent.” *Id.* at 50-51; *see also Motiva*, Slip. Op. at 10 (“Motiva’s litigation against Nintendo was not an investment in commercializing Motiva’s patented technology that would develop a licensing program to encourage adoption and development of articles that incorporated Motiva’s patented technology.”) It appears that this is exactly what Lamina has sought to do, *i.e.*, capture “all prior expenditures” to establish a domestic industry. Lamina did so without “clearly link[ing] each activity to licensing efforts” and instead made general assertions that its activities related to licensing (CIB at 44). *Coaxial Cables* at 51; CIB at 44. Thus, there is insufficient evidence before the ALJ clearly showing that

⁵ The ALJ notes that Lamina’s attempts at entering into a license agreement with [REDACTED] undoubtedly support Lamina’s assertions. However, given that all of the efforts detailed by Lamina relating to the endeavor do not have any quantifiable amount tied to them, they can be given little to no weight in this analysis.

all of the investments made by Lamina were costs that were clearly linked to licensing efforts and the ALJ cannot make a finding that Lamina's investments have a nexus to licensing.

Even assuming that Lamina had established a nexus to licensing, the ALJ further finds that Lamina has failed to show that its own investments in exploiting the Asserted Patents are substantial. Specifically, while Lamina has shown that, as a small company, it has made substantial monetary investments relating to the Asserted Patents, it is not clear whether such investments are substantial relative to the industry. Indeed, even assuming that the "industry" is not "manufacturing" laminated packages but is the licensing industry for laminated packaging, Lamina has set forth no evidence as to the type of efforts taken in that industry. *See Multimedia Display and Navigation Devices*, Inv. No. 337-TA-694, Comm'n Op. at 15 ("The Commission has indicated that whether an investment is substantial may depend on the industry size and the size of the complainant. The type of efforts that are considered a 'substantial investment' under section 337(a)(3)(C) will vary depending on the nature of the industry and the resources of the complainant.") (internal citations omitted). Here, there is no evidence on the licensing industry for laminated packaging, but only evidence of Lamina's own expenditures. Consequently, the ALJ cannot make a determination as to whether Lamina's investments are substantial.

4. Domestic Industry "in the process of being established"

Lamina argues that the issue of whether a domestic industry is "in the process of being established" is outside the scope of this particular phase of the investigation because the issue of whether complainant "has satisfied" the economic prong based on an existing domestic industry is a separate issue from whether a domestic industry is in the process of being established. (CIB at 49-50.) Lamina argues that it will set forth the necessary evidence to prove that it is in the process of establishing a domestic industry at the appropriate time. (CIB at 49-50.)

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Respondents and Staff argue that this phase of the investigation is the appropriate time to determine whether a domestic industry is “in the process of being established” as it is naturally a part of the inquiry into whether Lamina has satisfied the economic prong of the domestic industry requirement. (RRB at 24-25; SRB at 17-18.)

The ALJ agrees with Respondents and Staff – whether Lamina has proven that a domestic industry is in the process of being established is properly within the scope of this phase of the investigation. While the Notice of Investigation orders the ALJ to “hold an early evidentiary hearing, find facts, and issue an early decision, as to whether the complainant has satisfied the economic prong of the domestic industry requirement,” the ALJ declines to read the specific use of “has satisfied” as a limitation on the scope of this phase of the investigation. The intent of the Commission’s order in the NOI is clear: the ALJ was required to hold an early evidentiary hearing, find facts, and issue an early ID as to whether the economic prong of the domestic industry requirement has been satisfied. Given that the scope of the investigation clearly includes a determination as to “whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337,” such a determination would include not only whether an industry exists but also whether an industry is in the process of being established. 78 Fed. Reg. 19008. The issue in this phase of the investigation is whether Lamina satisfies the economic prong of the domestic industry requirement under any and all of the bases that they set forth in their complaint. Indeed, it would make little sense to require the parties and the Commission to bifurcate the question as to whether the economic prong of the domestic industry had been satisfied depending on the approach taken, *i.e.*, establishing an existing domestic industry or one “in the process” of being established. Rather, it is clear that the Commission determined that the issue as to whether the

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economic prong of the domestic industry requirement has been satisfied was to be definitively answered within 100 days of institution.

Consequently, the ALJ finds that whether Lamina is in the process of establishing a domestic industry is properly within this phase of the investigation. However, given Lamina's position that it is not properly within this phase of the investigation, it has failed to present any evidence in support of its assertion. Absent any evidence relating to those arguments, the ALJ finds that Lamina has failed to show that a domestic industry is in the process of being established. 78 Fed. Reg. 19008.

C. Conclusion

For the reasons set forth above, the ALJ finds that Lamina has failed to satisfy the economic prong of the domestic industry requirement. The ALJ also attaches (as Attachment A) the final exhibit lists submitted with this phase of the investigation.

Pursuant to the Notice of Investigation, this initial determination shall become the determination of the Commission "30 days after the date of service of the ID" unless the Commission determines to review the ID. 78 Fed. Reg. 19008.

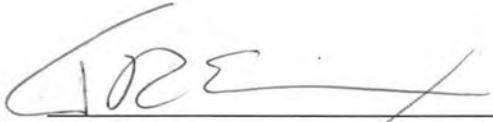
Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. Any party seeking to have any portion of this document deleted from the public version thereof shall also submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business

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information. The parties' submissions may be made by facsimile and/or hard copy by the
aforementioned date. The parties' submissions concerning the public version of this document

need not be filed with the Commission Secretary.

SO ORDERED.



Theodore R. Essex
Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 15: INITIAL DETERMINATION ON THE ECONOMIC PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT** has been served by hand upon the Commission Investigative Attorney, Monica Bhattacharyya, Esq. and the following parties as indicated on **July 12, 2013**.



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**CERTAIN PRODUCTS HAVING LAMINATED
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Inv. No. 337-TA-874

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