UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN ARTIFICIAL EYELASH EXTENSION SYSTEMS, PRODUCTS, AND COMPONENTS THEREOF**	**Investigation No. 337-TA-1226**

NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART A FINAL INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337; SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON ISSUES UNDER REVIEW AND ON REMEDY, PUBLIC INTEREST, AND BONDING; EXTENSION OF TARGET DATE

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has determined to review in part a final initial determination ("FID") of the presiding chief administrative law judge ("ALJ") finding no violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. The Commission requests briefing from the parties on certain issues under review, as indicated in this notice. The Commission also requests briefing from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding. The Commission has also determined to extend the target date in the above-captioned investigation to April 27, 2022.

FOR FURTHER INFORMATION CONTACT: Lynde Herzbach, Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 205-3228. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at *https://www.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: On October 28, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337"), based on a complaint filed by Lashify, Inc. of Glendale, California ("Lashify"). *See* 85 FR 68366-67. The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, sale for importation, or sale after importation into the United States of certain artificial eyelash extension systems, products, and components

thereof by reason of infringement of certain claims of U.S. Patent Nos. 10,660,388 ("the '388 patent") and 10,721,984 ("the '984 patent"), and the sole claim of U.S. Design Patent Nos. D877,416 ("the D'416 patent") and D867,664 ("the D'664 patent"), respectively (collectively, the "Asserted Patents"). The complaint also alleges the existence of a domestic industry. The notice of investigation ("NOI") names nine respondents, including: KISS Nail Products, Inc. of Port Washington, New York ("KISS"); Ulta Beauty, Inc. of Bolingbrook, Illinois ("Ulta"); CVS Health Corporation of Woonsocket, Rhode Island ("CVS"); Walmart, Inc. of Bentonville, Arkansas ("Walmart"); Qingdao Hollyren Cosmetics Co., Ltd. d/b/a Hollyren of Shandong Province, China; Qingdao Xizi International Trading Co., Ltd. d/b/a Xizi Lashes of Shandong Province, China; Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty of Qingdao, China; Alicia Zeng d/b/a Lilac St. and Artemis Family Beginnings, Inc. of San Francisco, California; and Rachael Gleason d/b/a Avant Garde Beauty Co. of Dallas, Texas. *Id*. The Office of Unfair Import Investigations is also a party to the investigation. *Id*.

The Commission later amended the complaint and NOI to substitute CVS Pharmacy, Inc. of Woonsocket, Rhode Island in place of named respondent CVS Health Corporation and Ulta Salon, Cosmetics & Fragrance, Inc. of Bolingbrook, Illinois in place of named respondent Ulta Beauty, Inc. *See* Order No. 10, *unreviewed by* Comm'n Notice (Feb. 10, 2021); *see also* 86 FR 9535 (Feb. 16, 2021).

The Commission previously terminated the investigation as to claims 2-4 and 7 of the '388 patent and claims 6-8, 12, 18-19, 25-26, and 29 of the '984 patent based on Complainant's partial withdrawal of the complaint. *See* Order No. 24 (Apr. 23, 2021), *unreviewed by* Comm'n Notice (May 11, 2021). The Commission also previously terminated claims 2-5, 10-11, 14, 17, 21-22, and 24 of the '984 patent from the investigation. *See* Order No. 38 (June 22, 2021), *unreviewed by* Comm'n Notice (July 6, 2021).

The Commission previously terminated Rachael Gleason d/b/a Avant Garde Beauty Company from the investigation based on a Consent Order. *See* Order No. 28, *unreviewed by* Comm'n Notice (May 20, 2021).

The Commission previously determined that Lashify failed to satisfy the technical prong of the domestic industry requirement for the '388 patent, thus terminating that patent from the investigation. *See* Order No. 35, *unreviewed by* Comm'n Notice (July 9, 2021).

On October 28, 2021, the presiding ALJ issued the FID, finding that no violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain artificial eyelash extension systems, products, and components thereof. FID at 141-142. The FID finds that two accused products infringe the '984 patent, the'984 patent is not invalid, and Lashify has failed to satisfy the technical prong of the domestic industry requirement with respect to the '984 patent. The FID further finds that the D'416 patent and D'664 patent are infringed and not invalid, and Lashify satisfied the technical prong with respect to both design patents. The FID further finds that Lashify has failed to satisfy the economic prong of the domestic industry requirement with

respect to all of the Asserted Patents remaining in the investigation. The FID also includes the ALJ's recommended determination on remedy and bonding should the Commission find a violation of section 337. Specifically, the ALJ recommended a limited exclusion order directed to certain artificial eyelash extension systems, products, and components thereof, and cease and desist orders directed to KISS, Ulta, CVS, and Walmart.

On November 9, 2021, Lashify filed a petition for review of the FID's findings of non-infringement, that Lashify has failed to satisfy the technical prong of the domestic industry requirement with respect to the '984 patent, and that Lashify has not satisfied the economic prong of the domestic industry requirement with respect to any of the patents-in-suit. That same day, Respondents filed a contingent petition seeking review of alleged additional, independent grounds of non-infringement and invalidity to support the FID's finding of no violation.

On November 17, 2021, Lashify, Respondents, and OUII filed their respective responses to the petitions for review.

On November 29, 2021, respondents KISS, Ulta, Walmart, and CVS filed a joint submission on the public interest pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50 (a)(4)). Lashify and OUII did not file a statement on the public interest. No submissions were received in response to the Commission notice seeking public interest submissions. 86 FR 62844-45 (Nov. 12, 2021).

Having examined the record of the investigation, including the FID, the petitions for review, and the responses thereto, the Commission has determined to review the FID in part. In particular, as to the '984 patent, the Commission has determined to review: 1) the FID's findings regarding the technical prong of the domestic industry requirement; and 2) the FID's findings that the asserted claims of the '984 patent are not invalid as obvious. The Commission has further determined to review the FID's findings regarding the economic prong of the domestic industry requirement. The Commission has determined not to review the remainder of the FID.

The Commission has also determined to extend the target date for completing this investigation until April 27, 2022.

In connection with its review, the Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

(1) Please discuss whether Complainant should be considered a mere importer when its domestic activities and investments are evaluated as a whole with respect to the asserted patents, rather than when its domestic activities and investments are evaluated in a "line-by-line" approach, with citation to the record evidence.

(2) To the extent Complainant is not a mere importer and certain domestic activities and investments with respect to the asserted patents excluded by the FID (*see e.g.*,

certain warehousing/distribution, quality control, and/or sales and marketing expenditures) should be credited as cognizable domestic industry investments, please discuss whether Complainant's cognizable domestic industry investments are significant or substantial within the meaning of section 337(a)(3)(A)-(C), with citation to record evidence. Please be sure to provide your explanation and data separately for each asserted patent.

The parties are invited to brief only the discrete issues requested above. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia,* (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (Dec. 1994). In particular, the written submissions should address any request for a cease and desist order in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainant seeks a cease and desist order, the written submissions should respond to the following requests:

(1) Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainant also relies on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.

(2) In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. In addition, the parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainant is also requested to identify the remedy sought and Complainant and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the dates that the Asserted Patents remaining in the investigation expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on **February 3, 2022**. Reply submissions must be filed no later than the close of business on **February 10, 2022**. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1226) in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf*). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure

set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on January 20, 2022.

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

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: January 20, 2022