

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 THE COMMISSION'S FINAL DETERMINATION FINDING NO
VIOLATION OF SECTION 337; TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission ("Commission") has found no violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. The investigation is terminated.

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 (Oct. 28, 2020). 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 claims 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; CVS Health Corporation of Woonsocket, Rhode Island; Walmart, Inc. of Bentonville, Arkansas ("Walmart"); Qingdao Hollyren Cosmetics Co., Ltd. d/b/a Hollyren of Shandong Province, China ("Hollyren"); Qingdao Xizi International Trading Co., Ltd. d/b/a Xizi Lashes of

Shandong Province, China (“Xizi Lashes”); Qingdao LashBeauty Cosmetic Co., Ltd. d/b/a Worldbeauty of Qingdao, China (“Worldbeauty”); Alicia Zeng d/b/a Lilac St. and Artemis Family Beginnings, Inc. of San Francisco, California (collectively, “Lilac”); and Rachael Gleason d/b/a Avant Garde Beauty Co. of Dallas, Texas. *Id.* The Office of Unfair Import Investigations (“OUII”) 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 (“CVS”) in place of named respondent CVS Health Corporation and Ulta Salon, Cosmetics & Fragrance, Inc. of Bolingbrook, Illinois (“Ulta”) 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 Lashify’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).

Prior to the issuance of the final initial determination, the remaining respondents included: KISS, Ulta, CVS, Walmart, Hollyren, Xizi Lashes, Worldbeauty, and Lilac (collectively, “Respondents”).

On October 28, 2021, the presiding administrative law judge issued a final initial determination (“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 and the ’984 patent is not invalid, but also finds that 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 that 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.

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).

On January 20, 2022, the Commission determined to review the FID in part. 87 FR 4044-46 (Jan. 26, 2022). Specifically for the '984 patent, the Commission reviewed the FID's findings regarding the technical prong of the domestic industry requirement and the FID's findings that the asserted claims of the '984 patent are not invalid as obvious. *Id.* at 4045. The Commission also reviewed the FID's findings regarding the economic prong of the domestic industry requirement. *Id.* The Commission asked the parties to address two questions related to the issues under review with respect to the economic prong of the domestic industry requirement. *Id.*

On February 3, 2022, Lashify, Respondents, and OUII each filed an initial written response to the Commission's request for briefing. On February 10, 2022, Lashify, Respondents, and OUII each filed a reply submission.

Having reviewed the record of the investigation, including the FID and the parties' submissions, the Commission has determined to find no violation of section 337 as to any Asserted Patent. Specifically, with respect to the '984 patent, the Commission has determined to: (1) affirm, with supplemental analysis, the FID's finding that Lashify has failed to satisfy the technical prong of the domestic industry requirement; and (2) take no position regarding whether claims 1, 9, 23, and 27 of the '984 patent are invalid for obviousness under 35 U.S.C. 103. The Commission has further determined to affirm, with supplemental reasoning, the FID's finding that Lashify failed to satisfy the economic prong of the domestic industry requirement for any of the Asserted Patents. Commissioners Karpel and Schmidlein concur in the determination of no violation as to the '984 patent. However, they find a violation of section 337 as to the D'416 and D'664 patents. Specifically, they find that Lashify has satisfied the economic prong of the domestic industry requirement under subsection 337(a)(3)(B), but not under subsection 337(a)(3)(A), with respect to the D'416 and D'664 patents. They take no position on subsection 337(a)(3)(C) with respect to the D'416 and D'664 patents, or on whether Lashify satisfies the economic prong for the '984 patent.

The investigation is terminated with a finding of no violation of section 337. The Commission's reasoning in support of its determinations is set forth more fully in its opinion. The reasoning in support of the separate views of Commissioners Karpel and Schmidlein is set forth in the Separate Views of Commissioners Karpel and Schmidlein in Dissent on the Economic Prong of the Domestic Industry Requirement as to U.S. Design Patent Nos. D877,416 and D867,664, issued concurrently therewith.

The Commission vote for this determination took place on October 6, 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.

A handwritten signature in black ink, appearing to read "Katherine M. Hiner". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Katherine M. Hiner
Acting Secretary to the Commission

Issued: October 6, 2022