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CLIENT ALERT

ITC Finds Post-Lashify that Sales and Marketing Investments Would Further Satisfy the Domestic Industry Requirement

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In the first Commission Opinion on domestic industry issued by the U.S. International Trade Commission since the Federal Circuit's opinion in *Lashify, Inc. v. ITC*, 130 F. 4th 948 (Fed. Cir. 2025), which expanded the cognizable investments under the economic prong, the ITC found in no uncertain terms that the complainant's "sales and marketing expenses . . . would only further support the Commission's determination that there is a domestic industry." *See Certain Dermatological Treatment Devices and Components Thereof*, Inv. No. 337-TA-1356, Comm'n Op. at 18 (June 18, 2025).

In the underlying investigation, the complainant relied upon a host of domestic activity in support of the economic prong, including activities directed to sales and marketing. Post-*Lashify*, the complainant petitioned the ITC to consider those sales and marketing expenses in view of the Federal Circuit's decision that such investments are now cognizable under Section 337. *See* our recent post on *Lashify* here. The Commission did not analyze the sales and marketing activities individually because it ultimately found that the complainant satisfied the economic prong even without their consideration. But the ITC's statement that such activities "would only further support" the finding of a domestic industry cements the Commission's position that, post-*Lashify*, investments in sales and marketing are fair game.

Notably, Commissioner Kearns added that "*Lashify* appears to require crediting ***all*** [of complainant's] activities," even though only "***some*** of them go beyond the sorts of activities that would be conducted by a mere importer." *Id*. at 17 n. 10 (emphasis added). Commissioner Kearns' view appears to indicate that activities of a "mere importer," such as those incurring only distribution and marketing-type expenses, are indeed appropriate under Section 337.

The Commission's opinion in *Dermatological Treatment Devices*, and Commissioner Kearns' views on activities of mere importers, stand in stark contrast to the Commission's virtually simultaneous petition for rehearing en banc in *Lashify*, arguing that "sales, marketing, warehousing of finished goods, and distribution . . . should ***not*** be included" under the economic prong. *See* Case No. 23-1245, Doc No. 117, p. 15 (May 21, 2025) (emphasis added). If and until the Federal Circuit redecides *Lashify*, however, the Commission has made clear that sales and marketing expenses will be considered, for now.

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