Nguyen, RN, as some of the contractor nurses).). Mr. Park explained that Ms. Oh, the head trainer, coordinated Benev's training for its customers and worked directly with the CEO, MABs/KOLs, and Dr. Na to develop training protocols for the Sylfirm X. (Tr. (Park) at 462:18-463:14.). Mr. Park also testified that Benev is "[redacted] in training and educating the customers to use [Benev's] products efficiently and safely" and that Benev [redacted] for these Sylfirm X trainings, which is reflected in the training documents and invoices upon which Serendia relied. (*Id.* at 460:22-24, 465:12-17; CPX-0107C (training); CPX-0112C (Benev expenses); CX-0611C - CX-0636C, CX-0638C - CX-0642C, CX-0644C - CX-0647C, CX-0649C, CX-0650C, RX-1225C, RX-1234C, and RX-2346C (training invoices); RX-0157C (training); CX-1018C and CX-1019C (Thomas Schedules).).

d) Development of Patient Care Protocols

Mr. Park testified that Dr. Na, Mr. Min, and Benev's MABs/KOLs all have contributed to the development and refinement of Sylfirm X patient care protocols. (Tr. (Park) at 465:23-469:6; RX-2544C (Park Dep. Tr.) at 183:6-186:14; CX-2901C, CX-2902C, and CX-0667C (patient care protocols); CX-0664C (Benev Na Agmt.).). These individuals have observed how the DI Product is used and the resulting effects, and then conferred with ViOL [redacted]. (Tr. (Park) at 465:23-466:4, 469:2-6 (testifying that [redacted].). As Mr. Park indicated, the [redacted]. (Tr. (Park) at 467:1-469:8.). Dr. Na specifically testified that [redacted]. (Tr. (Na) at 97:16-22.).

e) Warranty/Repair Services

Mr. Park explained that Benev has engaged in Sylfirm X warranty and repair services through its engineering contractor, Mr. McDaniel of West Coast Laser Services, and Benev's personnel who troubleshoot, coordinate repairs, and arrange for the devices to be returned to Benev for repair and then shipped back to customers once repaired. (Tr. (Park) at 469:8-472:13.). According to Mr. Park, Mr. McDaniel received special training to repair the Sylfirm X and performs repairs at Benev's facility, in its warehouse. (*Id.* at 469:17-21; RX-2544C (Park Dep. Tr.) at 51:4-21; CPX-0015C (West Coast Laser).). Mr. Park also testified that Benev stored replacement parts at its facility so repairs can be quickly completed. (Tr. (Park) at 472:8-13; RX-2544C (Park Dep. Tr.) at 158:16-159:12.). He clarified that to support these repairs, Benev's CEO and CFO set up the warranty and repair program for the U.S. (Tr. (Park) at 471:21-472:7.). Additionally, Mr. Park explained that Benev's customer service team have provided technical support by troubleshooting problems with customers and assists with warranty and repair claims that require escalation. Benev's ISRs communicate with customers about needed repairs, and Benev's delivery service (Trump Card) picks up devices to be repaired and deliveres loaner devices. (Tr. (Park) at 470:14-471:20; 475:6-14; CPX-0105C, CPX-0106C, CX-0609C, and CX-0591C (Trump Card).).

f) Installation and Delivery

Mr. Park testified that Benev provides white glove delivery service of the Sylfirm X product through its contractor, Trump Card. (Tr. (Park) at 475:14-477:15; CX-0609C, CPX-0105C, and CPX-0106C (Trump Card); CX-1016C (Thomas Schedule).). Trump Card "specializes in delivery, transportation, setting up, [and the] installation of medical devices, including Sylfirm X." RX-2544C (Park Dep. Tr.) at 16:10-13.). As described above, Trump

Card also provides pick-up and delivery services for devices that require repair, and then provides loaner devices. (Tr. (Park) at 476:16-20.) [redacted]. (*Id.* at 476:21-477:5.).

g) Respondents' Expert's Acknowledgement of Benev's Domestic Industry Activities

Respondents' economic expert, Dr. Vander Veen, acknowledged that the activities Serendia included in its domestic industry analysis are appropriate. For every one of Benev's activities that Mr. Thomas included in his domestic industry analysis, Dr. Vander Veen confirmed that the activity: (i) could be a qualifying domestic industry activity, (ii) has previously been credited by the Commission as a qualifying domestic industry activity, (iii) was credited by Dr. Vander Veen in this Investigation as a qualifying domestic industry activity, or (iv) all the above. Dr. Vander Veen's testimony is quoted below.

> Q. Dr. Vander Veen, I'm asking: You previously have included customer service investments in your domestic industry analyses, right?
>
> A. In certain context, yes.
>
> * * *
>
> Q. . . . You have previously opined that product quality improvement or utilization are qualifying domestic industry activities, right?
>
> A. Yes.
>
> * * *
>
> Q. And you agree that activities in relation to developing patient care protocols may be a cognizable domestic industry activity, right?
>
> A. Yes, I think it could be.

* * *

Q. Okay. Now you agree that if MABs or KOLs, that's key opinion leaders, are monitoring for product improvements, that could qualify as a domestic industry activity, right?

A. That's correct.

* * *

Q. And you recognize that clinical research and trial expenses could be qualifying DI expenses?

A. Could be, yes.

Q. In fact, here in your analysis you actually credit some of Benev's clinical trial investments in your adjusted calculations, right?

A. Yes, as for the reasons discussed yesterday.

* * *

Q. Okay. And you agree that warranty and repair work is a category of investment that the Commission has previously credited towards the domestic industry analysis, right?

A. That's correct.

Q. And, in fact, in your analysis before Judge McNamara you credited Benev's service warranty and repair expenses, right?

A. Yes, I included an amount.

Q. You actually credited the same amount as Mr. Thomas.

There's no dispute with warranty and repair expenses between you and Mr. Thomas, right?

A. Not for this. Not for this number. There were other disputes, some of those investments Mr. Thomas isn't asserting.

Q. I'm talking about warranty and repair expenses, Dr. Vander Veen.

You credit to your analysis the same amount for warranty and repair that Mr. Thomas credits for his analysis; is that fair?

A. Yes, under this prong B calculation. I said there were other investments that he

is no longer asserting that we had disputes about.

* * *

Q. Let's talk about the next category, FDA regulatory consultants.

Now you agree that FDA regulatory expenses, like the other categories, have previously been credited by the Commission in a domestic industry analysis, right?

A. That's correct.

Q. And in your analysis before Judge McNamara you actually credit some of Benev's FDA regulatory expenses as qualifying DI expenses, right?

A. Yes.

* * *

Q. All right. Then let's move on to the next category, delivery and installation.

You agree that delivery and installation could be a qualifying domestic industry activity?

A. In certain contexts.

Q. Is that yes?

A. I said yes, in certain contexts.

* * *

Q. All right. Let's move on to the last category, then, of DI investments, post-sale customer training and education.

Now you agree that the Commission has in the past credited some investments in post-sale customer training and education towards the DI analysis?

A. Yes, in certain contexts.

Q. And, in fact, you actually credit in your analysis for Judge McNamara some of Benev's investments in post-sale customer training and education, right?

A. That's correct.

Q. But you limit those credited investments to those you found in just one document. It's Bates number Benev 977, which is now RX 1226C, right?

A. I believe that's correct. I didn't memorize the exhibit numbers, but yes.

Q. Okay. Now that's because, according to you, Mr. Park testified at deposition that that document, which is now RX 1226C, provided an accurate representation for Benev's training expenses, right?

A. Yes, for the time period of that document.

Q. All right. But Mr. Park did not testify at his deposition that that document, RX 1226C, was a complete accounting of Benev's cost for post-sale customer training and education, right?

A. No. Again, as I said, it's for the time period that he was discussing.

Q. So you agree that Mr. Park didn't testify that that document was a complete accounting of Benev's costs for post-sale customer training and education, right?

A. Yes.

Q. Okay. In fact, he testified at his deposition that , right?

A. I believe that's correct, yes.

Q. But still the only post-sale training and education expenses you credit are just from that one document, right?

A. I, again, I was relying on the -- on expenses I could see in the documents, and so that's what I relied upon.

Q. And so I'm right, the only expenses you credited are from that one document?

A. Yes. Again, my exercise was to determine expenses that I could identify in the documents, and that's what I relied upon.

Q. And because the only expenses you credited are from that one document, you don't include in your analysis any Benev post-sale training and education expenses that aren't included in just that one document, right?

A. That's correct.

(Tr. (Vander Veen) at 1401:2-5 (customer service), 1403:9-13 (product quality improvement/ utilization), 1405:25-1406:3 (developing patient care protocols), 1406:7-16 (customer training and education), 1406:17-21 (monitoring for product improvements), 1407:24-1408:5 (FDA clinical research and trials), 1411:6-1412:4 (service, warranty, and repair), 1412:5-14 (FDA regulatory consulting); 1412:15-21 (delivery and installation), 1415:9-1417:9 (post-sale customer training and education).).

h) Conclusion

As Serendia pointed out, the described activities in which Serendia, through Benev, and others engage, demonstrate, and the evidence confirms, that Benev is more than a "mere importer." (CBr. at 101.). That Benev's U.S. competitors, including those that are no longer a party to this Investigation, ***largely forego*** these activities also confirms that Benev is more than a "mere importer." (CX-1048C (Jonathan Banks Dep. Tr.)[87] at 85:14-88:16; CX-1042C (Andrew Storrs Dep. Tr.)[88] at 27:5-16, 31:11-19, 37:6-20, 217:10-16; CX-1054C (Mark Rohrer Dep. Tr.)[89] at 163:6-9; CX-1044C (Bradley Renton Dep. Tr.)[90] at 37:10-38:18, 57, 146:1-24, 225:17-21, 229:1-234:25; CX-1052C (Kibbey Dep. Tr.) at 45:9-12, 65:1-20, 97:2-98:20, 101:4-11; CX-1056C (Witman Dep. Tr.) at 57:11-19; CX-1055C (Aviram Dep. Tr.) at 73:6-74:4, 150:11-151:1; CX-1049C (James Bartholomeusz Dep. Tr.)[91] at 17:20-22.). Accordingly, in view of the realities of the marketplace when compared to Respondents' activities, Benev is more than a "mere importer." *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm'n Op., 39 (Aug. 1, 2007) (domestic industry evaluated in view of "the facts in each investigation, the article of commerce, and the realities of the marketplace").

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[87] When he was deposed on June 28, 2023, Mr. Jonathan Banks was the Chief Financial Officer of Cartessa. (CX-1048C (Banks Dep. Tr.) at 18:17-20.).

[88] When he was deposed on June 29, 2023, Mr. Andrew Storms was the Chief Operating Officer of Cartessa. CX-1042C (Storrs Dep. Tr.) at 21:22-22:4.).

[89] When he was deposed on June 27, 2023, Mr. Mark Rohrer was the founder of Rohrer Aesthetics, LLC. (CX-1054C (Rohrer Dep. Tr.) at 12:11-12.).

[90] When he was deposed on July 7, 2023, Dr. Bradley Renton was an employee of Cutera. (CX-1044C (Renton Dep. Tr.) at 19:4-20:20.).

[91] When he was deposed on July 26, 2023, Mr. James Bartholomeusz was the Chief Technology Officer of Lutronic. (CX-1049C (Bartholomeusz Dep. Tr) at 11:2-3, 7-8.).

C. Benev's Significant Investment in Labor and Capital

1. Mr. Thomas' Allocations Are Reasonable

As Benev's CFO, Mr. Park, explained, Benev [redacted]. (Tr. (Park) at 452:5-18.). Rather, to isolate Benev's investments that are both cognizable and specific to the Sylfirm X, Serendia's expert, Mr. Vincent Thomas,[92] performed two (2) types of calculations.

First, for Benev's employees (CEO, CFO, and two customer service employees), MABs and KOLs, and ISRs, Mr. Thomas performed a time-based allocation to exclude time that those employees *did not spend* on qualifying activities with respect to the Sylfirm X, such as to exclude time spent on "sales and marketing." (Tr. (Thomas) at 689:6-15; CDX-0003C.0010 (identifying the time-based allocations and supporting documentation).). Mr. Park provided the specific time-based allocations. (Tr. (Park) at 478:23-479:8 [redacted], 479:9-23 [redacted], 479:24-480:13 [redacted], 480:14-481:2 [redacted], 481:3-12 [redacted].).

The evidence demonstrates that Mr. Park's time estimates are reliable and sufficient under Commission precedent. Mr. Park provided his time estimates based on his personal knowledge, experience, and observations from his day-to-day job responsibilities, and in view of instructions from Mr. Thomas to only include time spent on qualifying activities (i.e., the

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[92] When he testified during the Hearing on November 6, 2023, Mr. Vincent Thomas was a Senior Managing Director of FTI Consulting. (CPSt. at Ex. 5.). Serendia identified Mr. Thomas as an expert to "testify regarding matters relating to the economic prong of the domestic industry; importation issues; secondary indicia of non-obviousness; the remedy and bond sought by Serendia in the Investigation; and/or other economic issues within the scope of his expert report or deposition." (CPSt. at 7.).

activities discussed above in Section XI.B.3) and exclude time spent on non-Sylfirm X products or non-qualifying activities such as sales and marketing. (Tr. (Park) at 477:25-478:17 (describing instructions from Mr. Thomas regarding providing approximate time estimates and to be "very conservative in terms of my estimation"), 481:19-482:20 (describing the bases and accuracy of his time estimates), 485:13-19 (testifying that it took a [redacted] to come up with his time estimates).).

As Staff noted, Mr. Park's time estimates, and Mr. Thomas' allocations based thereon, are reasonable in view of the available evidence and circumstances of the alleged domestic industry. *See, e.g.*, *Certain Solid State Storage Drives*, Inv. No. 337-TA-1097, Comm'n Op. at 17-21, 32 (June 29, 2018) (relying on the DI licensee's president's "general recollection" to make a "reasonable, good faith estimate" for allocations of square footage and employee time and rejecting contention that the time estimates were unreliable due to a lack of documentary corroboration).[93]

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[93] Respondents filed a notice of supplemental authority ("NSA") with respect to the Federal Circuit's opinion in *Zircon Corp. v. Int'l Trade Comm'n*, 2024 WL 2037162, Case No. 2022-1649 (Fed. Cir. May 8, 2024). (Doc. ID No. 821353 (May 13, 2024).). In the NSA, Respondents argued that the Federal Circuit affirmed in *Zircon* "a finding that testimony attributing a portion of overall research and development investments to the domestic industry product was unreliable because it lacked documentary support and an explanation for how the corporate witness arrived at the recited portion," and that this ruling is relevant to arguments in this Investigation regarding the economic prong." (NSA at 1 (citing *Zircon*, 2024 WL 2037162, at *8-9).

Serendia and Staff each filed a response to Respondents' NSA. (Doc. ID No. 821664 (Serendia Resp.) (May 16, 2024); Doc. ID No. 821689 (Staff Resp.) (May 16, 2024).). Both Serendia and Staff argued that Respondents are mistaken. (Serendia Resp. at 1; Staff Resp. at 1.). For the following reasons, it is a finding of this ID that *Zircon* is not applicable here. If anything, *Zircon* reaffirms the principles that support finding a domestic industry in this Investigation.

Zircon does not support Respondents' arguments concerning: (1) Mr. Park's (Benev's CFO) detailed and credible testimony concerning how much time certain Benev employees (including himself) and domestic contractors, including Benev's MABs and KOLs, devote to qualifying, non-sales and marketing activities for the Sylfirm X; and (2) the documentary support for certain of the alleged domestic industry activities.

Mr. Thomas also performed a revenue-based allocation. He took Benev's sales of the DI Products and "divided that into the total sales for Benev, which included, not only the sale of the Sylfirm X, but all the products that Benev sells," to "isolat[e] the impact of Sylfirm X and remov[e] the effect of other products." (Tr. (Thomas) at 687:24-689:5; CDX-0003C.0010

As Staff noted, the portions of *Zircon* to which Respondents cited did not change the law, but in fact, credited the Commission's decisions (including the precedent discussed in Staff's briefs) on the issue of sworn witness testimony directed to the domestic industry requirement. *See Zircon*, 2024 WL 2037162, at *9 (discussing *Certain Solid State Storage Drives, Stacked Elecs. Components, and Prods. Containing Same* ("*Solid State Storage Drives*"), Inv. No. 337-TA-1097, Comm'n Op., 2018 WL 4300500, at *13 (June 29, 2018); *Certain LED Lighting Devices, LED Power Supplies, & Components Thereof* ("*LED Lighting Devices*"), Inv. No. 337-TA-1081, ID, 2018 WL 7350925, at *91, 93 (Dec. 19, 2018)). Thus, Respondents' cited portion of *Zircon* does not alter the basic principle that "there is no Commission requirement that sworn witness testimony directed to the domestic industry requirement cannot be credited without further corroboration by underlying documentation. Instead, all that is required is the use of reasonable allocations for the purposes of establishing the economic prong of the domestic industry requirement." *Solid State Storage Drives*, Inv. No. 337-TA-1097, Comm'n Op. at 21-22 (internal citations omitted); *see also Certain Raised Garden Beds*, Inv. No. 337-TA-1334, Comm'n Op. at 44-45 (Apr. 1, 2024) (quoting *Solid State Storage Drives* in (1) crediting a corporate officer's "estimates of employee time" attributable to cognizable activities, and (2) dismissing Respondents' argument that the estimates were "'self-serving' and 'not supported by any record or evidence.'").

Moreover, the relevant facts in *Zircon* are distinguishable from the evidence/facts here. The Federal Circuit noted that, unlike in *LED Lighting Devices* where "the witness in question ***explained*** how he derived his estimate," the *Zircon* witness "provided ***no explanation*** of how he reached the particular figure in his witness statement," and thus the Federal Circuit declined to "override" "[t]he ALJ's credibility determinations and weighing of the evidence [which] are entitled to great weight[.]" *Id.* (emphases added). Here, as in *LED Lighting Devices*, Mr. Park ***credibly explained*** the bases for each of his time estimates. (*See* Tr. (Park) at 477:18-482:20; *see also* SBr. at 156-58.).

To the extent that Respondents cite *Zircon* for their argument that certain of the labor investments lack corroborating documentary support and should therefore be disregarded or reduced, Respondents' reliance is misplaced. First, *Zircon* does not support Respondents' argument. The cited portion of *Zircon* concerned a witness' conclusory, "unelaborated" estimate of the amount of "[R&D] funds that were devoted to developing the chip," and not whether or how much documentary evidence is required to corroborate that labor activities were performed. *Zircon*, 2024 WL 2037162, at *8-9. Second, there is no "absence of documentary evidence that these activities are occurring at all." (RRBr. at 82.). As discussed above, there is documentary and credible testimonial evidence demonstrating that each category of labor activity was undertaken. (*See* Section XI.B.; *see also* SBr. at 138-58; SRBr. at 27-28.).

In sum, *Zircon* does not support Respondents' domestic industry arguments. The relevant law cited in the Staff's and Serendia's briefs was credited by the Federal Circuit, and unlike in *Zircon*, the testimony at issue in this Investigation is credible and supported by detailed explanations. Here, there is documentary and testimonial evidence supporting each category of cognizable labor activities.

(identifying the revenue-based allocation percentages and supporting documentation). The sales-based allocation resulted in a ***further*** reduction to Benev's claimed DI investments for the Benev personal, medical professionals, and post-sale customer support, labor categories. (*See* Tr. (Thomas) at 696:8-19; CDX-0003.0019 (Benev personnel), 0027 (medical professionals), 0042 (post-sale customer support).). For example, Mr. Thomas' two-part allocation resulted in crediting only [redacted] of Benev's total payments to ISRs. (*See* Tr. (Thomas) at 709:19-710:14.).

Thus, Mr. Thomas' revenue-based allocation is reasonable in view of the available evidence and circumstances of the alleged domestic industry. *See, e.g.*, *Certain High-Density Fiber Optic Equipment and Components Thereof*, Inv. No. 337-TA-1194, Comm'n Op. at 64 (Aug. 3, 2021) (agreeing that a "sales-based allocation method" was reasonable because it "eliminate[d] non-DI related investments"); *Certain Collapsible Sockets for Mobile Elec. Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm'n Op. (July 9, 2018) (finding a sales-based allocation appropriate).

Respondents contended that the time allocations are "unreliable" and "not credible" because "Benev cannot actually track the time or effort any employee spends on the Sylfirm X." (RPBr. at 154, 166.). Respondents effectively seek to impose a requirement that any company alleging a domestic industry must track its expenditures on a product-by-product basis, and its employee's time on a product- and category-specific basis. However, the Commission has repeatedly made clear that "a precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation." *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 26 (May 16, 2008); *see also Certain Movable Barrier Operator Sys. and Components Thereof*, Inv. No. 337-TA-1118, Comm'n Op. at 28 (Jan. 21, 2021) ("[C]omplainants do not need to provide a 'precise

accounting' of their expenditures[.]"). That labor hours are not tracked for a particular product or activity in the ordinary course of business is not at all unusual, nor does it preclude a knowledgeable employee from making reasonable estimates as to how much time employees spend performing certain types of activities (as opposed to time spent on other, non-qualifying activities, or non-DI products). "All that is required it the use of reasonable allocations for the purposes of establishing the economic prong of the domestic industry requirement." *Certain Solid State Storage Drives, Stacked Elec. Components, and Prods. Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 21-22 (June 20, 2018). It is a finding that Mr. Thomas' allocations are reasonable.

In sum, the evidence demonstrates that Mr. Thomas' allocation methodologies are reasonable and reliable. They sufficiently identify the specific, cognizable investments in the DI Products.

2. Benev's Investments in Labor and Capital Are Quantitatively and Qualitatively Significant

The evidence demonstrates that Benev's cognizable, allocated labor and capital expenditures are quantitatively and qualitatively significant because they are necessary to support ongoing innovation and product development for the Sylfirm X. Moreover, Benev's investment of [redacted] is significant in the context of Benev's business and ViOL's total manufacturing costs for the Sylfirm X.

Mr. Thomas presented two (2) alternative contextual analyses: (1) comparing Benev's qualifying labor and capital investments to Benev's total operating expenses from its financial statements (i.e., not just limited to Benev's total labor and capital expenses); and (2) comparing Benev's qualifying labor and capital investments to ViOL's manufacturing costs for the Sylfirm

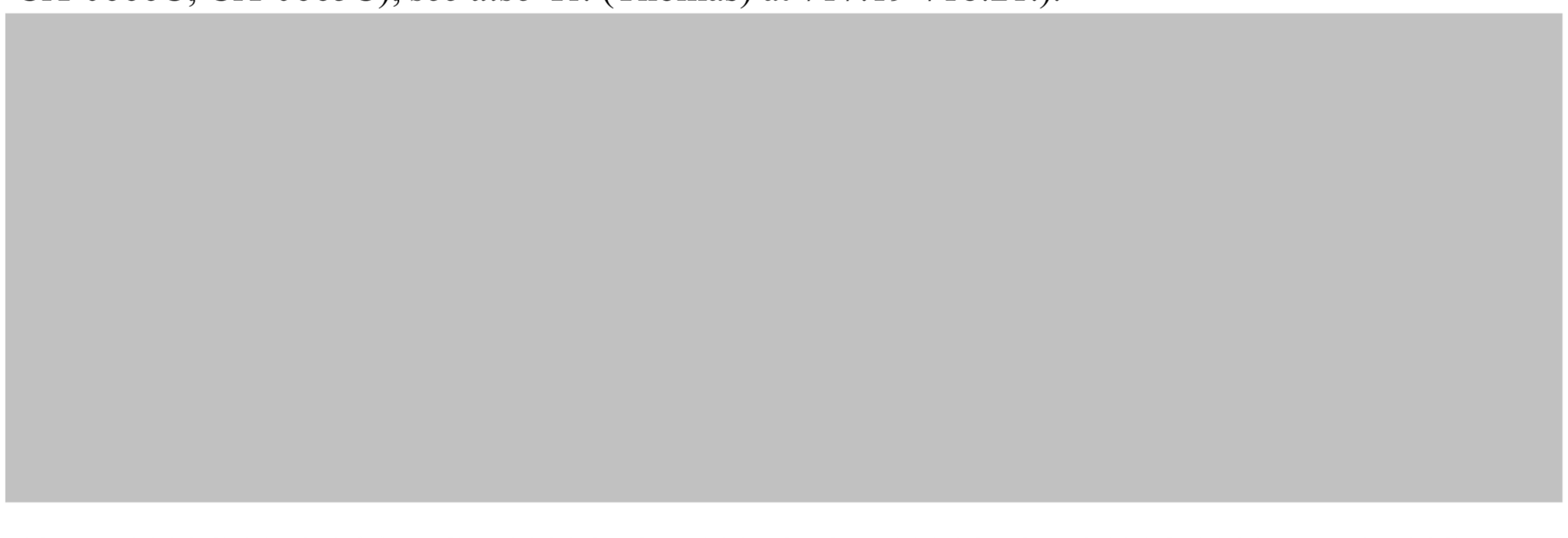
X products in Korea converted to U.S. dollars.[94] (Tr. (Thomas) at 717:19-720:16.).

As demonstrated below in Mr. Thomas' demonstratives, the evidence establishes that Benev's domestic industry investments are ***quantitatively*** significant under either contextual metric, with which Staff agreed. (SBr. at 159.).

Figure 41: Thomas Demonstratives Illustrating Quantitative Significance of Labor and Capital



(CDX-0003C.0058 (citing CX-0999C; CX-1001C; CX-1004C; CX-3401C.0002; CX-0359C; CX-0666C; CX-0665C); *see also* Tr. (Thomas) at 717:19-718:21.).



(CDX-0003C.0059 (citing CX-0999C; CX-1001C; CX-1004C; CX-3401C.0002; RX-2566C; CPX-0156C; CX-3382C); *see also* Tr. (Thomas) at 718:22-720:16.).

Respondents contended that using ViOL's manufacturing data as a comparator is "improper" because ViOL did not produce "any underlying business records to support" its

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[94] Respondents' economic expert, Dr. Vander Veen, did not offer rebuttal to Mr. Thomas' quantitative significance analysis. (Tr. (Vander Veen) at 1347:23-1367:21.). Thus, Mr. Thomas' opinion that the domestic industry investments are ***quantitatively*** significant is ***unrebutted***. (Tr. (Thomas) at 717:19-720:13; CDX-0003C.0058-59.).

manufacturing costs. (RPBr. at 163; *see also* RRBr. at 82 (quoting Vander Veen's testimony, Respondents asserted that "there is a 'striking' absence of documentary evidence that these activities are occurring at all").). However, the evidence indicates that ViOL's summary document was created for this Investigation from data kept in the ordinary course of business, and that ViOL's CEO, Mr. Lee, was deposed by Respondents' counsel about the document. (*See* RX-2566C (Lee Dep. Tr.) at 118:18-119:18 (testifying that [redacted]). The document itself contains a [redacted]. (CPX-0156C (tab 2); *see also* Tr. (Thomas) at 745:9:17 (describing the [redacted].). Accordingly, Respondents' criticism is without merit. *See Certain Wet Dry Surface Cleaning Devices* ("*Wet Dry Surface Cleaning Devices*"), Inv. No. 337-TA-1304, ID at 233-34 (Mar. 24, 2023) (rejecting contention that a summary domestic industry document created for the investigation was unreliable); *Elec. Digital Media*, Inv. No. 337-TA-796, ID at 451 (Oct. 24, 2012) ("I find no basis to dispute the authenticity or accuracy of the data in Exhibit CX-19C. Samsung's expert ***Dr. Vander Veen insinuates the data was created for litigation purposes and is unreliable. I find his assertion to be unfounded speculation that is not supported by the record evidence.***") (emphasis added). That is the finding here, also.

The respondents in *Wet Dry Surface Cleaning Devices* made a similar argument as Respondents did here, specifically that a spreadsheet that was prepared for the investigation and was the primary piece of evidence for the alleged labor expenses was unsupported by corroborating evidence. The Commission found that the respondents "overstated their case when

they argued that there is no evidence to support" the quantification of the identified labor expenses because multiple witnesses, including the complainants' economic expert, and its corporate witness (Vice President for Financial Planning) "testified about the document, how it was created, and why it is accurate, reliable, and credible." *Wet Dry Surface Cleaning Devices*, Inv. No. 337-TA-1304, Comm'n Op. at 83 (Dec. 18, 2023); *see also id.* at 83 n.24 (noting that "[a]lthough Respondents do not have the burden of proof on this issue, Respondents provided no contrary evidence, beyond opinion and conjecture that [the data used to calculate the asserted domestic industry investments] is inaccurate or unreliable"). Here, too, Respondents have "overstated their case."

In this Investigation, there is ample documentary and testimonial evidence for the identified labor and capital investments, including testimony from Serendia's economic expert (Mr. Thomas), Benev's CFO (Mr. Park), and ViOL's CEO (Mr. Lee).

The weight of the evidence also demonstrates and supports a finding that the Benev's allocated domestic labor and capital investments are ***qualitatively*** significant. Staff agrees. (SBr. at 160.). Specifically, Benev's investments in labor and capital are qualitatively significant because: (i) the DI Products are important to Benev and add value to Serendia/Benev DI Products; (ii) Benev's qualifying activities rise above those of a "mere importer;" and (iii) the DI Products are important to Benev's customers and patients. (Tr. (Thomas) at 715:11-717:18; CDX-0003C.0054-57; CX-0918, CX-0896, CX-0887, and CX-0912 (customer/patient praise).).[95] The investments are important to Benev because the

[95] Respondents' economic expert, Dr. Vander Veen, did not offer a rebuttal to Mr. Thomas' qualitative significance analysis. (Tr. (Vander Veen) at 1347:23-1367:21.). Thus, Mr. Thomas' opinion that the domestic industry investments are qualitatively significant is unrebutted. (Tr. (Thomas) at 715:11-717:18; CDX-0003C.0054-57.).

[redacted] (Tr. (Park) at 450:9-16.). The [redacted]. (*Id.*; Tr. (Thomas) at 715:11-16; CDX-0003C.0054; RX-2544C (Park Dep. Tr.) at 85:2-17; CX-1021C (Thomas Schedule).).

Additionally, Benev's domestic activities and investments in labor and capital add value to the DI Products because they relate directly to the FDA development and clearance process, clinical research and trials, quality assurance and product safety tracking, technical customer support, warranty returns and repairs, post-sale training and education, product improvements, development of patient care protocols, and professional installation. (Tr. (Thomas), at715:17-716:15; CDX-0003C.0055; RX-2544C (Park Dep. Tr.) at 73:8-79:24, 85:2-17, 92:15-93:22, 95:18- 99:18, 101:11-103:24, 108:8-22, 126:6-128:25, 158:2-159:12, 183:2-184:6, 220:3-221:3; RX-2551C (July 26, 2023 Na Dep. Tr.) at 367:7-371:8, 379:2-380:22, 389:5-15; RX-2549C (Aug. 9, 2023 Na Dep. Tr.) 76:12-79:16; RX-2566C (Lee Dep. Tr.) at 88:7-89:19, 97:3-98:21, 150:1-6, 183:6-184:1; CPX-0109C; CX-2901C; CX-2902C; CX-1099C; CX-1100C; CX-1101C; CX-2539C; CX-2545C; CX-2552C; CX-0360C; CX-0652C; CX-0504C; CX-0503C; CX-0667C; CX-0459C; CX-0037C; CX-0103C; CX-0068C; CX-0085C; CX-0918; CX-0896; CX-0887; CX-0912; CX-0915; CX-0916; CX-0917; CX-0900; CX-0901; CX-0902; CX-0914; CPX-0117C; CX-0895; CX-0877; CX-0670C.).

Respondents argued that, with respect to significance, Mr. Thomas, "fails to account for Benev's activities that do not relate to the Asserted DI Products - i.e., cosmeceutical products and the 'compounding' or 'cooking,' labeling, and packaging of its products." (RPBr. at 163-64.). However, Benev has not relied upon the so-called cosmeceutical products for purposes of the domestic industry requirement, and thus Benev's activities with respect to non-DI Products

does not negate the significance of its investments with respect to the Sylfirm X. *See Certain Fitness Devices, Streaming Components Thereof, and Sys. Containing Same*, Inv. No. 337-TA-1265, ID at 253 (Sept. 9, 2022) ("[T]he total size of a company relative to its investments in the articles protected by the patent does not negate the possibility that those investments are still 'significant' and 'substantial.'") (citing and quoting *Certain Carburetors and Prods. Containing Such Carburetors*, Comm'n Op. at 28 (Oct. 28, 2019) ("Significance is based on the marketplace conditions regarding the articles protected by the Asserted Patents. The fact that a complainant may have substantial sales of other products is not pertinent to this analysis.")) (unreviewed).

In any event, as explained above, Mr. Thomas did compare Benev's qualifying labor and capital investments with respect to the Sylfirm X to Benev's total operating expenses, i.e., Benev's operating expenses pertaining to all its products. (Tr. (Thomas) at 717:19-718:12 ("[T]he comparative that I'm using is total operating expenses. It [redacted]. So I'm being, I think, very conservative in that regard. As you can see, over this period, the expenditures that I've identified amounted to [redacted] of the total operating expenses, which, again, is very conservative, in light of the fact that the denominator or total operating expenses [redacted]); *id.* at 746:23-747:17 (discussing comparative analysis).).

For the foregoing reasons, the weight of the evidence adduced demonstrates and supports findings that Benev's qualifying investments are both quantitively and qualitatively significant.

XII. RECOMMENDATION ON REMEDY AND BOND

A. Legal Standard

1. A Limited Exclusion Order Is Standard

Pursuant to Commission Rule 210.42, an administrative law judge ("ALJ') must issue a

recommended determination on: (i) an appropriate remedy if the Commission finds a violation of Section 337, and (ii) an amount, if any, of the bond to be posted. 19 C.F.R. § 210.42(a)(1)(ii). When a Section 337 violation has been found, as here, "the Commission has the authority to enter an exclusion order, a cease and desist order, or both." *Certain Flash Memory Circuits and Prods. Containing the Same*, Inv. No. 337-TA-382, Comm'n Opinion on the Issues Under Review and on Remedy, the Public Interest and Bonding, at 26 (June 9, 1997).

Additionally, upon a finding of infringement, 19 U.S.C. § 1337(d) provides for a Limited Exclusion Order ("LEO"), directed to the products of named respondents, excluding any articles that infringe one or more claims of the asserted patents. 19 U.S.C. § 1337(d). A Cease and Desist Order ("CDO") is also appropriate where the evidence demonstrates the presence of commercially significant inventory in the United States. 19 U.S.C. § 1337(f); *see also Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, Comm'n Opinion, USITC Pub. No. 2391, 1991 WL 790061 at *30-32 (June 1991). Infringing articles may enter upon the payment of a bond during the sixty-day Presidential Review Period. 19 U.S.C. § 1337(j)(3). The bond is to be set at a level sufficient to "offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefiting from the importation." *Certain Dynamic Random Access Memories, Components Thereof and Prods. Containing Same*, Inv. No. 337- TA-242, Comm'n Opinion, 1987 WL 450856 at 37 (Sept. 21, 1987).

2. Exceptions for Warranty Repairs Are Often Considered to be in The Public Interest When There is Evidence to Support the Same

If the Commission determines there has been a violation, it "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States unless, after considering the effect of such exclusion upon the public

health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry." 19 U.S.C. § 1337(d)(1). The Commission has determined previously that the public interest weighs in favor of exempting service, repair, and replacement parts from the scope of an LEO for devices sold before issuance of the LEO. *Certain Mobile Devices* at 22; *Certain Liquid Crystal Display Devices* at 27. In addition, the Commission has determined that, to mitigate harm to U.S. consumers, any repair and service exemption may extend until the expiration of the Presidential review period. *Certain Fitness Devices* at 3.

B. A Limited Exclusion Order with a Standard Certification Provision Is Warranted

If there is a finding of violation of Section 337, Serendia has requested that the Commission issue a Limited Exclusion Order ("LEO") "directed to named Respondents and their agents, subsidiaries, affiliates, importers of record, and suppliers excluding from entry into the U.S. products manufactured by or on behalf of named Respondents that infringe any claim of the Asserted Patents." (CBr. at 118.).

Respondents agreed that, if a violation of Section 337 is found, then a LEO is the appropriate form of relief. (RBr. at 104.). However, Respondents have argued that a LEO should include "a certification provision permitting importers to certify that their products do not contain the accused functionality and are thus not subject to exclusion." (*Id.* (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. (June 14, 2007)).).

1. Service, Repair, and Replacement

Respondents have argued that a LEO should "include an exception to allow for continued service, repair, or replacement of any products sold by Respondents before the expiration of the Presidential review period." (RBr. at 104 (citing *Certain Fitness Devices, Streaming Components Thereof, and Systems Containing Same*, Inv. No. 337-TA-1265, Reconsideration Notice (May 5, 2023) ("*Certain Fitness Devices*")).). Respondents argued that the LEO exception for service, repair, or replacement should "include replacement parts, such as disposable cartridge tips, so that the utility of the products is not impaired and any warranties can be honored." (RBr. at 104 (citing *Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-631, Comm'n Op. at 27 (July 14, 2009) ("*Certain Liquid Crystal Display Devices*"); *Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. No. 337-TA-744, Comm'n Op., 2012 WL 3715788, at *14 (June 5, 2012) ("*Certain Mobile Devices*").). Here, the service, repair and replacement provision would include exemptions for "replacement parts, such as disposable cartridge tips, so that the utility of products is not impaired and any warranties can be honored." (RBr. at 104.).

Serendia argued that it would not have opposed Respondents' request for an exception for service, warranty, and repair if Respondents had provided evidence that Respondents have existing warranty obligations and that the service, warranty, and repair exemption were limited to articles purchased by U.S. consumers prior to issuance of remedial orders. (CBr. at 118 (citing *Certain Movable Barrier Operators*, Inv. No. 337-TA-1209, LEO, ¶ 1 (Feb. 9, 2022)).). Respondents did not provide evidence during the Hearing to justify the remedial orders that Respondents have requested, even if such an exception is often granted and may be in the public interest here.

Staff's view is that Respondents' requested service, warranty, and repair exception is a public interest issue that falls outside the scope of this proceeding, (SBr. at 168.). To the extent such an exception is recommended, then Staff argued that it should cover infringing products sold through the end of the Presidential Review period. (*Id.* at n.67).

Because neither Jeisys/Cynosure nor EndyMed provided evidence to support their request for a LEO with an exception for importation of parts for service, repair, and replacement, it is not recommended that the Commission adopt Respondents' proposal. A record should be developed that would support Respondents' proposal.

2. No Exemption for Products Capable of Being Operated in a Non-Infringing Manner

Respondents argued that a LEO should not prohibit importation of Accused Products or components thereof that are "not found to infringe or are beyond the scope of this Investigation." (RBr. at 105.).

According to Jeisys/Cynosure, its Accused Potenza System "can be operated in monopolar mode, can be operated using a handpiece and tips that include only a single microneedle, and can be operated using a handpiece and tips that do not include microneedles." (*Id.*). According to Dr. van der Weide's testimony, these three (3) modes of operation are not infringing. (Tr. (van der Weide) at 331:22-332:5 ("the monopolar modality or single or noninvasive tips are not within the asserted claims" of the '836 patent.")). Moreover, Respondents argued that a LEO should not prohibit importation of the Jeisys/Cynosure Accused Potenza System for use in a non-infringing manner. (RBr. at 105-106.).

With respect to Respondent EndyMed, Serendia has not accused EndyMed's PRO and PURE consoles of infringement on their own or when used with handpieces other than the

accused Intensif handpiece. (RBr. at 106.). Dr. Goldberg testified that his infringement opinion was limited to the EndyMed consoles with the Intensif handpiece. (Tr. (Goldberg) at 214:1-3.). Dr. van der Weide also testified that he did not provide an opinion that the EndyMed PRO or PURE consoles infringe on their own or with any handpiece other than the accused Intensif handpiece. (Tr. (van der Weide) at 390:6-13.). Therefore, Respondents argued that a LEO should "exclude EndyMed's PRO and PURE consoles." (RBr. at 106.).

Serendia argued that Respondents' requested carveouts for both would "eviscerate any remedial relief for their violation of Section 337." (CBr. at 119.). Serendia cited Commission precedent which states that the scope of a remedial order generally is not limited to the products that were adjudicated to infringe. (*Id.* (citing *Certain Audio Players and Controllers, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-1191, Comm'n Op. at 24 (Feb. 1, 2022) ("*Certain Audio Players*"); *Certain Human Milk Oligosaccharides & Methods of Producing Same*, Inv. No. 337-TA-1120, Comm'n Op. at 19-20 (June 20, 2020) ("*Certain Human Milk Oligosaccharides*").).

Staff's view is that it is "black letter Commission law that exclusion orders are not limited to products that were actually adjudicated to infringe the Asserted Patents." (SBr. at 166 (citing *Certain Audio Players* at 24; *Certain Human Milk Oligosaccharides* at 19-20).). According to Staff, the type of carveout that Respondents have requested, i.e., a carveout for importation of products capable of being used in a non-infringing manner, "is only appropriate if a specific product has been adjudicated and explicitly found not to infringe." (SBr. at 167.). Therefore, Staff has recommended that the scope of products subject to any remedial order "are those products specified in the Notice of Institution of Investigation, *i.e.*, "RF microneedling dermatologic treatment devices and components thereof." (SBr. at 166.).

Serendia and Staff both correctly rely on the Commission's decisions in *Certain Audio Players* and *Certain Human Milk Oligosaccharides*. Both of those decisions stand for the proposition that the scope of a remedial order is not limited by the products adjudicated as infringing in this Investigation. Respondents did not identify contrary authority. Therefore, it is not recommended that the Commission include the exemption or carveouts for infringing Accused Products that also have non-infringing uses as Respondents have requested.

3. No Delay for Respondents to Develop Alternative, Non-Infringing Products

Respondents argued that a remedy should be delayed to permit Respondents "an opportunity to develop alternative, non-infringing products in order to mitigate the significant unwarranted impact on consumers, the Respondents, and the economy." (RBr. at 107.).

Respondents asserted that "an economically reasonable adjustment period is 12-24 months, given the technical nature of the products and potentially required FDA review." (*Id.* (citing *Certain LTE- and 3G-Compliant Cellular Communications Devices*, Inv. No. 337-TA-1138, RD at 3, 31-33 (Apr. 3, 2020) ("*Cellular Communications Devices*"); *Certain UMTS and LTE Cellular Communication Modules and Products Containing the Same*, Inv. No. 337-TA-1240, RD (Apr. 15, 2022) ("*Cellular Communication Modules*"); *Certain Chemical Mechanical Planarization Slurries and Components Thereof*, Inv. No. 337-TA-1204, Comm'n Op. at 42-43 (Jan. 6, 2022)).).

Serendia argued that Respondents failed to elicit evidence during the Hearing about the development process for their proposed, alternative, non-infringing products, or how the 12-24 month figure for the delay of remedial orders was calculated. (CBr. at 119.). According to Serendia, Respondents have "wholly failed to justify why such continuing infringement should

be authorized." (*Id.*).

Staff's view is that Respondents' requested delayed implementation is based on public interest grounds. (SBr. at 168.). Since public interest was not delegated to the ALJ, Staff considers Respondents' requested delayed implementation to be beyond the scope of the present proceeding. (*Id.*).

There have been instances in which implementation of a remedy has been justified by public-interest related evidence. For example, in *Cellular Communications Devices*, the respondents argued that entry of the LEO should be delayed 12-24 months "to provide sufficient time for Respondents to implement a potential design-around or negotiate a FRAND royalty with INVT, given that INVT claims its patents are SEPs." *Cellular Communications Devices* at 31-32. However, there was evidence to support that recommendation. (*Id.* at 32-33.).

In *Cellular Communications Modules*, the ALJ found that certification of a new non-infringing communication module could take "up to 19 months, and re-design and re-certification of a downstream device to transition for a new module from a different supplier can take 8 to 24 months. The evidence shows that a delay of less than 12 months [for entry of the exclusion order] would be insufficient, and would further exacerbate the worldwide semiconductor shortage already affecting Philips, respondents, and respondents' downstream customers." *Cellular Communications Modules* at 32. Therefore, the ALJ found that "a delay of 12 months in entry of any exclusion order will be required to mitigate the effects on third parties." *Id.* at 32-33.

However, neither *Cellular Communications Devices* nor *Cellular Communications Modules* applies here. There is no evidence to support delay consistent with the four (4) public interest factors. 19 U.S.C. § 1337(d)(1). Indeed, public interest fact-finding was not delegated;

and thus there is no evidence of the same in the record. Moreover, Respondents did not offer an evidence -based justification why such a delay is warranted. The Accused Products are largely used for cosmetic or "aesthetic" purposes even though the devices themselves may require medical clearance by the FDA. (*See infra*.). Indeed, the Accused Products, like the DI Products, concern devices that are largely used for elective treatment. Therefore, it is the recommendation here that the Commission not delay implementation of remedial orders. Currently, there is no evidentiary basis for making such a recommendation.

C. A Cease and Desist Order Is Warranted

In the event of a finding of violation of Section 337, Serendia has also requested that the Commission issue a permanent cease and desist order ("CDO") that would prohibit Respondents from, *inter alia*, importing, selling for importation, marketing, advertising, offering for sale, offering for lease, selling, leasing, distributing, licensing, using, or otherwise transferring the infringing products within the United States. (CBr. at 120.).

The Commission has held that a CDO should issue when "with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order." *Certain Air Mattress Systems, Components Thereof, and Methods of Using the Same*, Inv. No. 337-TA-971, Comm'n Op. at 49 (June 20, 2017).

Serendia argued that a CDO should issue because Respondents have "stipulated to the amount of inventory held in the U.S., and that they either '(i) keep, store, hold, warehouse, maintain, or control a ***commercially significant inventory***,' or (ii) ***would not contest the commercial significance*** of their inventory." (CBr. at 120 (citing JX-0017C (EndyMed Importation and Inventory Stipulation ("EndyMed Stipulation")); JX-0020C (Jeisys and

Cynosure Importation and Inventory Stipulation ("Potenza Respondents Stipulation")) (emphasis in original).). According to the [redacted]. (JX-0017C.0002, ¶ 6.).

According to the [redacted]. (JX-0020C.0002-0003, ¶ 6.). According to [redacted] (JX-0017C.0002, ¶ 6; JX-0020C.0002-0003, ¶ 6.).

With respect to Respondent Jeisys, Serendia argued that a CDO should issue because [redacted] (CBr. at 121 (citing CX-1047C (Kang Deposition Transcript)[96] at 127:16-129:14) (emphasis in original).).

Respondents argued that "Serendia has not shown that any Respondent currently maintains a commercially significant inventory of infringing products. In addition, Serendia has not compared importation or inventory information to any reliable metric and therefore fails to show commercial significance." (RBr. at 107 (citing *Certain Wireless Consumer Electronics Devices and Components Thereof*, Inv. No. 337-TA-853, 2013 WL 5821012, at *208 (Sep. 6, 2013)) ("*Wireless Consumer Electronics Devices*".).

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[96] Mr. Don Hwan Kang is Jeisys's CEO and corporate designee.

Respondents are correct that the Commission has traditionally issued a CDO if there is evidence of either a commercially significant inventory in the United States or significant domestic operations[97] "that would undercut the remedy provided by an exclusion order." *See, e.g., Certain Automated Put Walls and Automated Storage and Retrieval Systems, Associated Vehicles, Associated Control Software, and Component Parts Thereof*, Inv. No. 337-TA-1293, Comm'n Op. at 33-34 (August 17, 2023). However, Section 337(f)(1) does not list any requirements for issuance of a CDO, except that a CDO should not issue if the four public interest factors weigh against it. 19 U.S.C. § 1337(f)(1); *see also Certain Tobacco Heating Articles and Components Thereof*, Inv. No. 337-TA-1199 ("*Tobacco Heating*"), Comm'n Op. at 49-54 (Oct. 19, 2021) (Commissioner Schmidtlein expressing her view that neither the inventory nor domestic operations need to be "commercially significant" for a CDO to issue, rather the presence of some infringing domestic inventory or domestic operations, regardless of commercial significance, provides the basis to issue a CDO).

Staff's view is that Respondents failed to identify in their Pre-Hearing Brief which of the named Respondents do not have commercially significant inventory of infringing product, in violation of Ground Rule 7.2, and so Respondents' contention may be deemed waived, abandoned, or withdrawn. (SBr. at 163.). Therefore, Staff recommends that the Commission issue a CDO directed to each of the named Respondents, except Jeisys. (*Id.* at 164.).

With respect to Jeisys, Staff's view is that, because the Potenza Respondents Stipulation says Cynosure controls a commercially significant inventory and contains inventory data only for Cynosure, not Jeisys, Serendia "has not provided evidence that Jeisys maintains any domestic

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[97] None of the Parties have argued that any of the Respondents have "significant domestic operations."

inventory, or has significant domestic operations." (*Id.*). Staff argued that a CDO against Jeisys would not address Serendia's concern that Jeisys would circumvent the LEO by finding another (non-Respondent) U.S. distributor, because "CDO's do not prohibit a foreign entity from conducting activities ***outside*** of the United States." (SBr. at 165 (emphasis in original).).

Staff also argued that Respondents acknowledged that a LEO would prevent it from making sales for importations of infringing products. (SBr. at 165.). Therefore, because there is no evidence that Jeisys maintains inventory of the Accused Products or has significant domestic operations, and because a LEO would prohibit Jeisys from selling infringing products for importation to any new, non-Respondent distributor, Staff would not recommend a CDO issue against Jeisys.

The recommendation here is that a CDO should not issue against Jeisys. However, a CDO should issue against Cynosure and EndyMed. With respect to Jeisys, it seems clear that Jeisys itself does not maintain inventory of the Accused Products in the United States, let alone that it has operations in the United States. Serendia relied on the Respondents' Stipulations to support its contention that Respondents have a commercially significant inventory of the Accused Products.[98] With respect to Serendia's concern that Jeisys may attempt to circumvent the LEO by finding a new U.S. distributor, a LEO would address that concern because Jeisys would be prohibited from selling for importation to the new U.S. distributor any infringing product. For the foregoing reasons, a CDO is recommended against Respondents Cynosure and EndyMed.

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[98] In the *Wireless Consumer Electronics Devices* decision cited by Respondents, the stipulations at issue were not sufficient evidence because they did not represent that inventory in the U.S. was commercially significant. *Wireless Consumer Electronics Devices* at *208. That is not the situation here with respect to EndyMed or Cynosure.

D. Bond During the Presidential Review Period Is Warranted

Upon issuance of a LEO or CDO, articles excluded from entry by the LEO or subject to the CDO are entitled to entry during the Presidential Review Period ("PRP") under bond in an amount the Commission determines to be sufficient to protect the complainant from injury. 19 U.S.C. § 1337(j)(3).

The Commission frequently sets the bond based on the difference in sales prices between the patented domestic product and the infringing product. *See, e.g., Certain Microsphere Adhesives, Process for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 3949, Comm'n Opinion at 24 (Jan. 1996). In other instances where a direct comparison between a patentee's product and the accused product is not possible, the Commission has set the bond at a reasonable royalty rate. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm. Opinion at 41-43 (Aug. 3, 1993). Commission precedent allows for a 100 percent bond when it is not practical or possible to set the bond based on price differential. *Certain Voltage Regulators, Components Thereof and Prods. Containing Same*, Inv. No. 337-TA-564, Comm'n Opinion at 79 (Public Version Oct. 19, 2007). The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

Complainants bear the burden of establishing the need for a bond, including the amount of bond. *See, e.g.*, *Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, USITC Pub. No. 3975, Inv. No. 337-TA-533, Comm'n Opinion at 40 (April 2008); *Certain Coenzyme Q10 Products and Methods of Making Same*, Inv. No. 337-TA-790, Initial and Recommended Determination (Sept. 27, 2012) (recommending Commission not impose a

bond because complainant failed in its burden to demonstrate the appropriate bond amount); *Certain Mobile Telephones and Wireless Communication Devices Featuring Digital Cameras, and Components Thereof*, Inv. No. 337-TA-703, Recommended Determination (Jan. 24, 2011) (recommending no bond because complainant did not meet its burden in providing evidence on the necessity of a bond); *Certain Liquid Crystal Display Devices and Prods. Containing the Same*, Inv. No. 337-TA-631, Comm'n Opinion at 27-28 (July 14, 2009) (setting zero bond because complainant "simply claimed that it was impossible to conduct a price differential analysis" and "should not benefit from a lack of any effort to identify" relevant pricing information, particularly that which is in its possession).

1. EndyMed Pure and EndyMed Pro

Serendia claimed that there is no dispute that it would be injured if sales of infringing articles were continued during the PRP, and so there is no dispute that a bond is warranted. (CBr. at 122.). According to Serendia, the only dispute is over how to calculate the amount of the bond. (*Id.*). Serendia requested the following bond amounts for the indicated Accused Products: [redacted]. (*Id.*). Serendia's support for the proposed bond amounts consists of the analysis and opinions of its expert, Mr. Vincent Thomas, who calculated a price differential between Serendia's Sylfirm X DI Product and each of the EndyMed Pure product and the EndyMed Pro product. (*Id.*).

Mr. Thomas testified that [redacted]. (Tr. (Thomas) at 722:1-723:5; CX-1023C [redacted]; CX-0608C [redacted]; CX-0062C (EndyMed's

interrogatory responses including its July 25, 2023 Second Supplemental Response to Interrogatory No. 4, which provides pricing information for EndyMed Pure and EndyMed Pro).).

According to Mr. Thomas's testimony, based on his comparison analysis between Serendia's Slyfirm X DI Products and the EndyMed products,

Serendia contended that Respondents' expert, Dr. Vander Veen, did not offer a contrary analysis or opinion. (Tr. (Vander Veen) at 1420:21-1421:1, 1421:25-1422:3.).

Respondents argued that Mr. Thomas's price comparison is unhelpful because it fails to account for "any differences in features or complementary services that may account for price differences." (RBr. at 108-109.).

Staff's view is that the price differentials that Mr. Thomas calculated are appropriate bond amounts for the EndyMed Pro and EndyMed Pure products. (SBr. at 169.).

Respondents' argument that special features or complimentary services may explain the price differential between Sylfirm X and the EndyMed products is unsupported attorney argument. Neither Respondents nor Dr. Vander Veen identified special features of, or services for, the EndyMed products that would support the price differential between Sylfirm X and EndyMed Pure or EndyMed Pro so as to disregard let alone undermine the product comparison and bond analysis that Mr. Thomas conducted. Therefore, it is recommended that the Commission enter a bond .

2. Accused Potenza Product

Serendia conceded that the [redacted]. Therefore, Serendia also conceded that calculating the bond amount based on a price differential analysis would not be appropriate. (CBr. at 122-123.). Accordingly, Serendia argued that the amount of the bond for the Potenza Product should [redacted] based on a reasonable royalty rate analysis. (*Id.* (citing *Certain Integrated Circuit Telecommunication Chips*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995)).).

The source of Serendia's proposed [redacted] bond on the Jeisys/Cynosure accused product is a patent licensing agreement between [redacted] that was executed in February 2022, (CX-0765C, "Patent License Agreement") in which [redacted]. (CX-0765C; Tr. (Thomas) at 723:6-724:5.). The [redacted] royalty rate [redacted] (CX-0765C.0005, § 3.1 ("Royalties").). Respondents' expert Dr. Vander Veen acknowledged that, because Serendia had to bring this lawsuit against Respondents, the royalty rate discount based on [redacted] would not apply to Respondents. (Tr. (Vander Veen) at 1422:25-1423:10.). Dr. Vander Veen also acknowledged that several other entities have been licensed to the Asserted Patents, and so [redacted] (*Id.* at 1423:11-1425:2.).

Respondents agreed in principle that a bond should be based on a reasonable royalty rate. (RBr. at 109; RRBr. at 90.). However, according to Respondents, the appropriate bond rate is no more than [redacted] because the patent licensing agreement with Benev "did not result from an arm's-length transaction, suggesting that the license agreement was unnecessary and

litigation-driven." (RBr. at 109; *see also* Tr. (Vander Veen) at 1366:15-1367:30.).

Specifically, relying on Dr. Vander Veen's testimony, Respondents argued that, at the time that Serendia and Benev executed their patent licensing agreement for the Serendia Sylfirm X DI Product, Benev already had an implied license to the Asserted Patents arising out of its distribution agreement with the prior owner of the Asserted Patents. (Tr. (Vander Veen) at 1367:4-8 [redacted] CX-0763C [redacted].).

Respondents also argued that Serendia "has made it impossible for Respondents to determine the arms-length royalty rate paid by competitors to license the Asserted Patents by moving to shield agreements made with Respondents in this Investigation from discovery or examination. Having made that choice, Serendia should not be allowed to rely on less reliable evidence to advance its bond arguments." (RBr. at 109.).

It is true that other respondents have been terminated from this Investigation pursuant to settlement agreements. *See, e.g.,* Order Nos. 51, 53. However, Respondents did not cite to evidence that Serendia attempted to shield those settlement agreements from Respondents for the purpose of obfuscating a bond analysis. Similarly, Respondents did not provide legal authority that a complainant's failure to present its prior settlement agreements with terminated respondents means the Commission should reject that complainant's bond arguments. Respondents' argument is not supported legally.

Serendia responded that Respondents' argument about the terminated Respondents' licenses should be disregarded because "[a]ll Respondents consented to limited service of those licenses, and none of them objected to limited service on the grounds that those licenses could be relevant to bond." (CBr. at 123 n.56 (citing Tr. (Vander Veen) at 1425:24-1426:17).). Serendia has a point that Respondents did not, before their Post-Hearing Brief, raise the issue of the relevance of the terminated respondents' settlement agreements to bond.

Staff's view is that the royalty rate in the Patent License Agreement is not useful for setting a bond rate because "Benev is selling the DI Product—not a competing product." (SBr. at 170.). Since Respondents Jeisys, Cynosure, and EndyMed conceded that a [redacted] bond is "economically reasonable," Staff suggests that a [redacted] bond is warranted for the Potenza products. (*Id.* (citing RPrHB at 173, Tr. (Vander Veen) at 1366:18-20, 1531:11-17).).

Staff's argument that the [redacted] royalty rate from the Patent License Agreement is not applicable because it is for the Sylfirm X DI Product, not a competing product, is not fully supported either. The Sylfirm X DI Product and the Accused Potenza Product both practice the Asserted Patents. They are presumably comparable absent evidence to the contrary. There is no evidence, and Respondents presented none, that the Jeysis/Cynosure Accused Potenza Product is different from the Sylfirm X DI Product such that it would result in the Accused Potenza Product being subject to a lower reasonable royalty rate than the Sylfirm X DI Product.

Respondents' argument that the [redacted] royalty rate from the Patent License Agreement is not applicable because it did not result from an arm's-length transaction is also unpersuasive. Benev's distribution agreement with VIOL Co., Ltd. ("VIOL"), executed in September 2020, (CX-0763C, "Distribution Agreement") with the prior owners of the Asserted Patents, out of which Benev's implied license arises, [redacted]

[redacted]. (CX-0763C.0003, § 6.1, CX-0763C.0008.). Moreover, the [redacted] (CX-0763C.0003, § 6.4.). In other words, in February 2022 when the Patent License Agreement was executed, Benev was free to either [redacted]. Instead, Serendia chose to [redacted]. (CX-0765C.0003, § 1.5.). In return, Benev chose to pay a [redacted] royalty. (*Id.*, § 3.1.). The negotiations between Benev and ViOL were negotiated with each obtaining certain commercial rights. The negotiations appear to be arms-length. Even if arguably not so, there is no other license agreement against which to compare a reasonable royalty rate.

With respect to Respondents' argument that Serendia cannot rely on the Patent License Agreement with Benev, that is not so. The 2020 Distribution Agreement, (CX-0763C), and the 2022 patent licensing agreement, (CX-0765C), are both in evidence and have been considered. In the absence of other evidence of a reasonable royalty rate, the [redacted] royalty rate set in the 2022 patent licensing agreement is relevant and reasonable. Therefore, it is recommended that the Commission enter a bond of [redacted] for the Accused Potenza Products. Alternatively, if the Commission finds that the [redacted] royalty rate in the Patent License Agreement is inapplicable to the Accused Potenza Products, then it is recommended that a [redacted] bond rate be entered on value because Respondents conceded that a [redacted] bond is "economically reasonable." (RBr. at 109.).