

In the Matter of

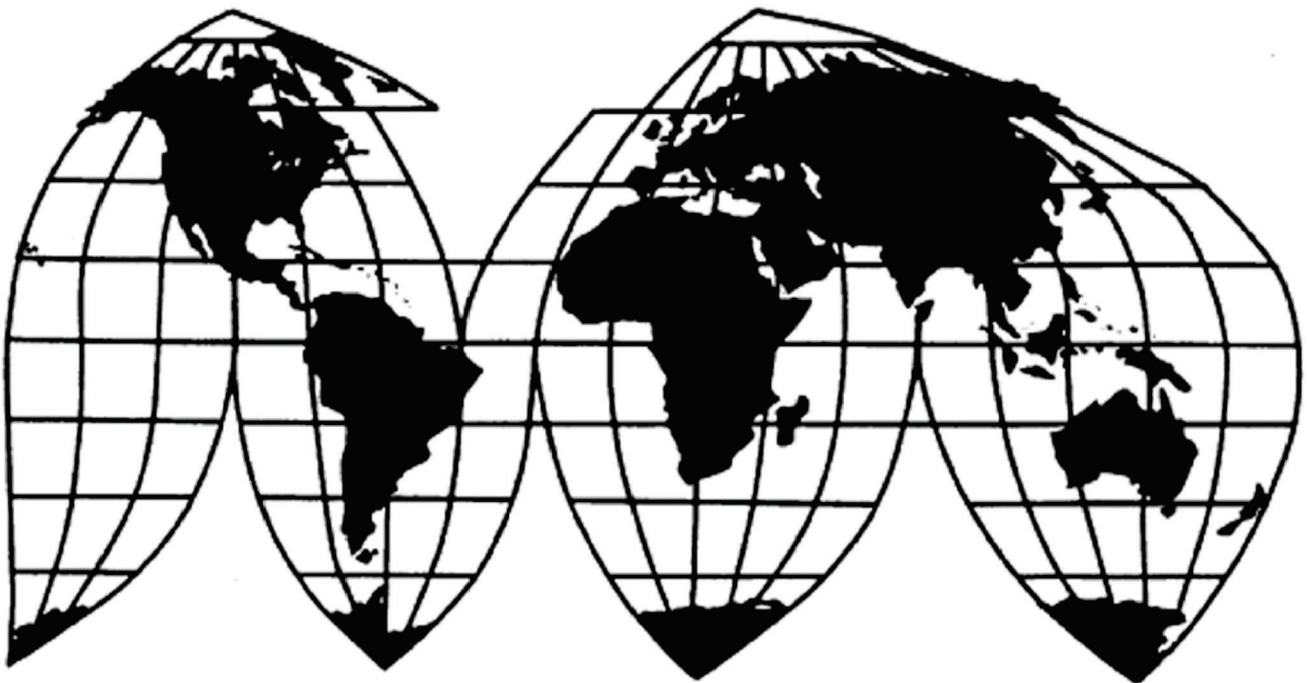
**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL SYSTEMS,
CONTROLLERS, VISUALIZATION HARDWARE, MOTION AND
MOTOR CONTROL SYSTEMS, NETWORKING EQUIPMENT,
SAFETY DEVICES, AND POWER SUPPLIES**

Investigation No. 337-TA-1074

Publication 4982

September 2019

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

David Johanson, Chairman
Irving Williamson, Commissioner
Meredith Broadbent, Commissioner
Rhonda Schmittlein, Commissioner
Jason Kearns, Commissioner

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436
www.usitc.gov

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

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CONTROL SYSTEMS, NETWORKING
EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Investigation No. 337-TA-1074

**ISSUANCE OF A GENERAL EXCLUSION ORDER AND
A CEASE AND DESIST ORDER; TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order ("GEO") denying entry of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe complainant's asserted trademarks. The Commission has also issued a cease and desist order ("CDO") directed to respondent Fractioni (Hongkong) Ltd. ("Fractioni"). The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708-4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 16, 2017, based on a complaint filed by Complainant Rockwell Automation, Inc. of Milwaukee, Wisconsin ("Complainant" or "Rockwell"). See 82 Fed. Reg. 48113-15 (Oct. 16,

2017). The complaint, as supplemented, alleges violations of section 337 based on the infringement of certain registered trademarks and copyrights and on unfair methods of competition and unfair acts in the importation or sale of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, the threat or effect of which is to destroy or substantially injure an industry in the United States. *See id.* The notice of investigation identifies fifteen respondents: Can Electric Limited of Guangzhou, China (“Can Electric”); Capnil (HK) Company Limited of Hong Kong (“Capnil”); Fractioni of Shanghai, China; Fujian Dahong Trade Co. of Fujian, China (“Dahong”); GreySolution Limited d/b/a Fibica of Hong Kong (“GreySolution”); Huang Wei Feng d/b/a A-O-M Industry of Shenzhen, China (“Huang”); KBS Electronics Suzhou Co, Ltd. of Shanghai, China (“KBS”); PLC-VIP Shop d/b/a VIP Tech Limited of Hong Kong (“PLC-VIP”); Radwell International, Inc. d/b/a PLC Center of Willingboro, New Jersey (“Radwell”); Shanghai EuoSource Electronic Co., Ltd of Shanghai, China (“EuoSource”); ShenZhen T-Tide Trading co., Ltd. of Shenzhen, China (“T-Tide”); SoBuy Commercial (HK) Co. Limited of Hong Kong (“SoBuy”); Suzhou Yi Micro Optical Co., Ltd., d/b/a Suzhou Yiwei Guangxue Youxiangongsi, d/b/a Easy Microoptics Co. LTD. of Jiangsu, China (“Suzhou”); Wenzhou Sparker Group Co. Ltd., d/b/a Sparker Instruments of Wenzhou, China (“Sparker”); and Yaspro Electronics (Shanghai) Co., Ltd. of Shanghai, China (“Yaspro”). *See id.* The Office of Unfair Import Investigations (“OUII”) is also a party in this investigation. *See id.*

Nine respondents were found in default, namely, Fractioni, GreySolution, KBS, EuoSource, T-Tide, SoBuy, Suzhou, Yaspro and Can Electric (collectively, “the Defaulted Respondents”). *See* Order No. 17 (Feb. 1, 2018), *unreviewed*, Comm’n Notice (Feb. 26, 2018); Order No. 32 (June 28, 2018), *unreviewed*, Comm’n Notice (July 24, 2018). In addition, five unserved respondents (Capnil, Dahong, Huang, PLC-VIP, and Sparker) were terminated from the investigation and one respondent (Radwell) was terminated based on the entry of a consent order. *See* Order No. 41 (July 17, 2018), *unreviewed*, Comm’n Notice (Aug. 13, 2018); Order No. 42 (July 20, 2018), *unreviewed*, Comm’n Notice (Aug. 15, 2018).

On October 23, 2018, the ALJ issued a final initial determination (“FID”) finding a violation of section 337 by the Defaulted Respondents based on the infringement of Complainant’s asserted trademarks, namely, U.S. Trademark Reg. Nos. 1172995, 696401, 693780, 1172994, 712800, 712836, 2510226, 2671196, 2701786, and 2412742. The ALJ also recommended that the Commission: (1) issue a GEO; (2) issue a CDO against defaulted respondent Fractioni; and (3) set a bond at 100% of the entered value of the infringing products during the period of Presidential review. No petitions for review of the subject FID were filed.

On December 20, 2018, the Commission issued a notice determining not to review the FID. *See* 83 Fed. Reg. 67346-48 (Dec. 28, 2018). The Commission’s determination resulted in a finding of a section 337 violation. *See id.* The Commission’s notice also requested written submissions on remedy, the public interest, and bonding. On February 15, 2019, Complainant and OUII submitted written submissions and on February 22, 2019, OUII submitted a reply submission in response to the Commission’s notice.

As explained in the Commission's Opinion issued concurrently herewith, the Commission has determined that the appropriate remedy in this investigation is: (1) a GEO prohibiting the unlicensed entry of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe Complainant's asserted trademarks, pursuant to 19 U.S.C. 1337(d)(2), and (2) a CDO directed to defaulted respondent Fractioni, pursuant to 19 U.S.C. 1337(f)(1). The Commission has also determined that the bond during the period of Presidential review pursuant to 19 U.S.C. 1337(j) shall be in the amount of 100 percent of the entered value of the imported articles that are subject to the GEO. The Commission has further determined that the public interest factors enumerated in subsections 337(d)(1) and (f)(1) (19 U.S.C. 1337(d)(1), (f)(1)) do not preclude the issuance of the GEO and CDO.

Commissioner Schmittlein disagrees with the Commission's decision not to issue cease and desist orders against all of the defaulting respondents under section 337(g)(1), and her views have been filed on EDIS.

The Commission's opinion and orders were delivered to the President and to the United States Trade Representative on the day of issuance.

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 'Lisa R. Barton'.

Lisa R. Barton
Secretary to the Commission

Issued: April 8, 2019

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
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NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on **April 8, 2019**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

Adam D. Swain
ALSTON & BIRD LLP
950 F Street NW
Washington, DC 20004

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Respondents

Fractioni (Hongkong) Ltd.
#327 Siping Road
Shanghai 200092
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

GreySolution Limited d/b/a Fibica
Unit B601, 6/F Block A
Universal Ind. Ctr.
19-25 Shan Mei St Sha Tin,
Fo Tan, Hong Kong

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

KBS Electronics Suzhou Co, Ltd.
Block 7&43, No. 328 Hengyong Road,
Jiading district, Shanghai, China, 201806

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

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Certificate of Service – Page 2

Shanghai EuoSource Electronic Co., Ltd
Block 43, No. 328, Hengyong Road
Jiading District
Shanghai, China 201806

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

ShenZhen T-Tide Trading co., Ltd.
Room A-60S, Block.lexi.
Minle industrial park
Mei Ban Road '
Longhua District, Shcnzhen 51803 1
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

SOBuyCommercial (HK) Co. Limited
Flat B G/F Yeung Yiu Chung (No. 6)
Ind. Bldg. No. 19 Chetmg Shun Street
Lai Chi Kok Kowloon
Hong Kong

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Suzhou Yi Micro Optical C0., Ltd.
d/b/a Suzhou Yiwei Guangxue Youxiangongsi
d/b/a Easy Micro-optics C0. LTD.
Office Building 5F, 91 Weixin Rd
Suzhou, SIP, Jiangsu
China, 215021

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Yaspro Electronics (Shanghai) Co., Ltd.
Room 1808E,,No. 488, Vaohua Road
Pudong New District
Shanghai, China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Can Electric Limited
No. 2 Danan Rd, Yueziu District
Guangzhou, Guangdong, 510115
China

- ☐ Via Hand Delivery
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☐ Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, DC

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GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, or sale within the United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that are covered by one or more of U.S. Trademark Registration Nos. 1,172,995; 696,401; 693,780; 1,172,994; 712,800; 712,836; 2,510,226; 2,671,196; 2,701,786; and 2,412,742 (collectively, “Asserted Trademarks”).

Having reviewed the record of this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined pursuant to 19 U.S.C. § 1337(d)(2), that a general exclusion from entry for consumption is necessary (1) to prevent circumvention of an exclusion order limited to products of named persons or entities and (2) because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products.

Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed entry of industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe one or more of the Asserted Trademarks.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d)(1) do not preclude the issuance of the general exclusion order. The Commission has further determined that a bond in the amount of 100% of the entered value of the infringing articles will be required during the period of Presidential review.

Accordingly, the Commission hereby **ORDERS** that:

1. Industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe one or more of the Asserted Trademarks (“infringing articles”) are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, except under license of the trademark owner or as provided by law, until such date as the Asserted Trademarks are abandoned, canceled, or rendered invalid or unenforceable.
2. Notwithstanding paragraph 1 of this Order, infringing articles are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption under bond in the amount of one hundred (100) percent of the entered value of the infringing

products pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 Fed. Reg. 43251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this Order. All entries of infringing articles made pursuant to this paragraph are to be reported to U.S. Customs and Border Protection (“CBP”) in advance of the date of the entry, pursuant to procedures CBP establishes.

3. At the discretion of CBP and pursuant to procedures that it establishes, persons seeking to import infringing articles that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to infringing articles imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

5. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).
6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon CBP.
7. Notice of this Order shall be published in the Federal Register.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Secretary to the Commission

Issued: April 8, 2019

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Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on **April 9, 2019**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

Adam D. Swain
ALSTON & BIRD LLP
950 F Street NW
Washington, DC 20004

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Respondents

Fractioni (Hongkong) Ltd.
#327 Siping Road
Shanghai 200092
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

GreySolution Limited d/b/a Fibica
Unit B601, 6/F Block A
Universal Ind. Ctr.
19-25 Shan Mei St Sha Tin,
Fo Tan, Hong Kong

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☐ Other: _____

KBS Electronics Suzhou Co, Ltd.
Block 7&43, No. 328 Hengyong Road,
Jiading district, Shanghai, China, 201806

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☐ Other: _____

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Block 43, No. 328, Hengyong Road
Jiading District
Shanghai, China 201806

- ☐ Via Hand Delivery
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☐ Other: _____

ShenZhen T-Tide Trading co., Ltd.
Room A-60S, Block.lexi.
Minle industrial park
Mei Ban Road '
Longhua District, Shcnzhen 51803 1
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
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☐ Other: _____

SOBuyCommercial (HK) Co. Limited
Flat B G/F Yeung Yiu Chung (No. 6)
Ind. Bldg. No. 19 Chetmg Shun Street
Lai Chi Kok Kowloon
Hong Kong

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Suzhou Yi Micro Optical C0., Ltd.
d/b/a Suzhou Yiwei Guangxue Youxiangongsi
d/b/a Easy Micro-optics C0. LTD.
Office Building 5F, 91 Weixin Rd
Suzhou, SIP, Jiangsu
China, 215021

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Yaspro Electronics (Shanghai) Co., Ltd.
Room 1808E,,No. 488, Vaohua Road
Pudong New District
Shanghai, China

- ☐ Via Hand Delivery
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Can Electric Limited
No. 2 Danan Rd, Yueziu District
Guangzhou, Guangdong, 510115
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UNITED STATES INTERNATIONAL TRADE COMMISSION

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CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Fractioni (Hongkong) Ltd. of Shanghai, China, cease and desist from conducting any of the following activities in the United States: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), and soliciting United States agents or distributors for industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe one or more of U.S. Trademark Registration Nos. 1,172,995; 696,401; 693,780; 1,172,994; 712,800; 712,836; 2,510,226; 2,671,196; 2,701,786; and 2,412,742 (collectively, “the Asserted Trademarks”), in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I. Definitions

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainant” shall mean Rockwell Automation, Inc. of Milwaukee, Wisconsin.

- (C) “Respondent” shall mean Fractioni (Hongkong) Ltd. of Shanghai, China.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the customs laws of the United States.
- (G) The term “covered products” shall mean industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe one or more of the Asserted Trademarks.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

While the Asserted Trademarks remain valid and enforceable, Respondent shall not:

- (A) import, sell for importation, or sell after importation into the United States covered products;
- (B) market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the Asserted Trademarks licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States, as applicable.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2019. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period,

and (b) the quantity in units and value in U.S. dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1074") in a prominent place on the cover pages and/or the first page. *See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf. Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI. Record-Keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business,

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII (C) shall remain in effect until the Asserted Trademarks have been abandoned, canceled, or rendered invalid or unenforceable.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section V of this Order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 Fed. Reg. 43251 (Jul. 21, 2005)), subject to Respondent posting of

a bond in the amount of 100 percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an

² *See* Footnote 1.

order issued by the Commission based upon application therefore made by Respondent to the Commission.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton
Secretary to the Commission

Issued: April 8, 2019

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on **April 9, 2019**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

Adam D. Swain
ALSTON & BIRD LLP
950 F Street NW
Washington, DC 20004

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Respondents

Fractioni (Hongkong) Ltd.
#327 Siping Road
Shanghai 200092
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

GreySolution Limited d/b/a Fibica
Unit B601, 6/F Block A
Universal Ind. Ctr.
19-25 Shan Mei St Sha Tin,
Fo Tan, Hong Kong

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

KBS Electronics Suzhou Co, Ltd.
Block 7&43, No. 328 Hengyong Road,
Jiading district, Shanghai, China, 201806

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

Certificate of Service – Page 2

Shanghai EuoSource Electronic Co., Ltd
Block 43, No. 328, Hengyong Road
Jiading District
Shanghai, China 201806

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

ShenZhen T-Tide Trading co., Ltd.
Room A-60S, Block.lexi.
Minle industrial park
Mei Ban Road '
Longhua District, Shcnzhen 51803 1
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

SOBuyCommercial (HK) Co. Limited
Flat B G/F Yeung Yiu Chung (No. 6)
Ind. Bldg. No. 19 Chetmg Shun Street
Lai Chi Kok Kowloon
Hong Kong

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Suzhou Yi Micro Optical C0., Ltd.
d/b/a Suzhou Yiwei Guangxue Youxiangongsi
d/b/a Easy Micro-optics C0. LTD.
Office Building 5F, 91 Weixin Rd
Suzhou, SIP, Jiangsu
China, 215021

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Yaspro Electronics (Shanghai) Co., Ltd.
Room 1808E,,No. 488, Vaohua Road
Pudong New District
Shanghai, China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Can Electric Limited
No. 2 Danan Rd, Yueziu District
Guangzhou, Guangdong, 510115
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN INDUSTRIAL AUTOMATION
SYSTEMS AND COMPONENTS THEREOF
INCLUDING CONTROL SYSTEMS,
CONTROLLERS, VISUALIZATION
HARDWARE, MOTION AND MOTOR
CONTROL SYSTEMS, NETWORKING
EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Investigation No. 337-TA-1074

COMMISSION OPINION

On December 20, 2018, the Commission issued a notice determining not to review a final initial determination (“FID”) by the presiding Administrative Law Judge (“ALJ”) in the above-identified investigation, finding a violation of section 337 of the Tariff Act, as amended, 19 U.S.C. § 1337 (“section 337”), by the defaulted respondents based on the infringement of Complainant’s asserted trademarks. *See* 83 Fed. Reg. 67346-48 (Dec. 28, 2018). The Commission’s notice also requested written submissions on remedy, the public interest, and bonding. This investigation is now before the Commission on a final determination on remedy, the public interest, and bonding.

Upon consideration of the ALJ’s recommendations on remedy, the public interest, and bonding, as well as the written submissions received, the Commission has determined to issue: (1) a general exclusion order (“GEO”) prohibiting the unlicensed importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe Complainant’s asserted trademarks, and (2) a cease and

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desist order (“CDO”) directed to respondent Fractioni (Hongkong) Ltd. (“Fractioni”). The Commission also finds that the public interest does not preclude the issuance of the GEO and CDO. The Commission further sets a bond in the amount of 100 percent of the entered value of the infringing articles imported during the period of Presidential review.

I. BACKGROUND

A. Procedural Background

By publication in the Federal Register on October 16, 2017, the Commission instituted Investigation No. 337-TA-1074, based on a complaint filed by Rockwell Automation, Inc. of Milwaukee, Wisconsin (“Rockwell” or “Complainant”). *See* 82 Fed. Reg. 48113-15 (Oct. 16, 2017). The complaint, as supplemented, alleges violations of section 337 based on the infringement of certain registered trademarks and copyrights and on unfair methods of competition and unfair acts in the importation or sale of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, the threat or effect of which is to destroy or substantially injure an industry in the United States. *See id.* Specifically, the complaint alleges: (1) the infringement of certain registered trademarks under Section 32(1) of the Lanham Act, 15 U.S.C. § 1114(1), through the importation and/or sale of certain gray market Rockwell products in violation of section 337(a)(1)(C) (*see* Complaint at ¶¶ 3, 4); (2) the infringement of certain registered copyrights through the importation and/or sale of certain industrial controllers in violation of section 337(a)(1)(B) (*see* Complaint at ¶¶ 5, 6); and (3) unfair competition by respondents through their tortious interference with known contracts between Rockwell and its authorized foreign distributors, and through the inducement of breaches of the end user license agreement that end users must enter into before downloading

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the necessary Rockwell copyrighted firmware, in violation of section 337(a)(1)(A) (*see* Complaint at ¶¶ 7-9). The asserted trademarks are U.S. Trademark Reg. Nos. 1172995, 696401, 693780, 1172994, 712800, 712836, 2510226, 2671196, 2701786, and 2412742. *See* Complaint at ¶ 63; FID at 5. The asserted trademarks correspond to the Allen-Bradley®, A-B®, Rockwell Automation®, and ControlLogix® marks. *See id.* And the asserted copyrights correspond to firmware for CompactLogix® and ControlLogix® controllers. *See* Complaint at ¶ 73; FID at 5-6.

The notice of investigation identified the following fifteen respondents: Can Electric Limited of Guangzhou, China (“Can Electric”); Capnil (HK) Company Limited of Hong Kong (“Capnil”); Fractioni of Shanghai, China; Fujian Dahong Trade Co. of Fujian, China (“Dahong”); GreySolution Limited d/b/a Fibica of Hong Kong (“GreySolution”); Huang Wei Feng d/b/a A-O-M Industry of Shenzhen, China (“Huang”); KBS Electronics Suzhou Co, Ltd. of Shanghai, China (“KBS”); PLC-VIP Shop d/b/a VIP Tech Limited of Hong Kong (“PLC-VIP”); Radwell International, Inc. d/b/a PLC Center of Willingboro, New Jersey (“Radwell”); Shanghai EuoSource Electronic Co., Ltd of Shanghai, China (“EuoSource”); ShenZhen T-Tide Trading co., Ltd. of Shenzhen, China (“T-Tide”); SoBuy Commercial (HK) Co. Limited of Hong Kong (“SoBuy”); Suzhou Yi Micro Optical Co., Ltd., d/b/a Suzhou Yiwei Guangxue Youxiangongsi, d/b/a Easy Microoptics Co. LTD. of Jiangsu, China (“Suzhou”); Wenzhou Sparker Group Co. Ltd., d/b/a Sparker Instruments of Wenzhou, China (“Sparker”); and Yaspro Electronics (Shanghai) Co., Ltd. of Shanghai, China (“Yaspro”). *See id.* In addition, the Office of Unfair Import Investigations (“OUII”) is a party in this investigation. *See id.*

On February 1, 2018, the ALJ issued an ID finding respondents Fractioni, GreySolution, KBS, EuoSource, T-Tide, SoBuy, and Suzhou in default. *See* Order No. 17 (Feb. 1, 2018),

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unreviewed, Comm’n Notice (Feb. 26, 2018). On June 28, 2018, the ALJ issued an ID finding respondents Yaspro and Can Electric in default.¹ *See* Order No. 32 (June 28, 2018), *unreviewed*, Comm’n Notice (July 24, 2018). On July 17, 2018, the ALJ issued an ID terminating the investigation as to unserved respondents, namely, Capnil, Dahong, Huang, PLC-VIP, and Sparker. *See* Order No. 41 (July 17, 2018), *unreviewed*, Comm’n Notice (Aug. 13, 2018). On July 20, 2018, the ALJ issued an ID terminating Radwell based on entry of a consent order. *See* Order No. 42 (July 20, 2018), *unreviewed*, Comm’n Notice (Aug. 15, 2018).

On October 23, 2018, the ALJ issued the FID finding a violation of section 337 by the Defaulted Respondents. Specifically, the ALJ determined that the Defaulted Respondents violated the Lanham Act by their sale and importation of gray market products infringing Complainant’s asserted trademarks, but that Complainant failed to establish its two other claims, namely, the infringement of Complainant’s asserted copyrights and tortious interference with Complainant’s contracts. The ALJ also recommended that the Commission: (1) issue a GEO; (2) issue a CDO against respondent Fractioni; and (3) set a bond during the period of Presidential review at 100 percent of the entered value of the infringing products. No petitions for review of the FID were filed.

On October 25, 2018, the Commission issued a notice requesting statements on the public interest (“PI Notice”). *See* 83 Fed. Reg. 54777-78 (Oct. 31, 2018). On November 23, 2018, Complainant and OUII submitted briefs in response to the PI Notice.

On December 20, 2018, the Commission issued a notice determining not to review the FID. *See* 83 Fed. Reg. 67346-48 (Dec. 28, 2018). The Commission’s determination resulted in

¹ Hereinafter, the “Defaulted Respondents” refers to Fractioni, GreySolution, KBS, EuoSource, T-Tide, SoBuy, Suzhou, Yaspro and Can Electric.

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a finding of a section 337 violation. *See id.* The Commission's notice also requested written submissions on remedy, the public interest, and bonding. *See id.* On February 15, 2019, Complainant and OUII submitted written submissions,² and on February 22, 2019, OUII submitted a reply submission³ in response to the Commission's notice.

B. Domestic Industry Products

The domestic industry products are Rockwell's industrial automation systems which include programmable controllers, human machine interfaces, motors, drives, motor control systems, networking equipment, input/output modules, power supplies, and signaling devices. Complaint at ¶ 76. All the domestic industry products bear the asserted trademarks. *See id.*

C. The Accused Products

The accused products are gray market Rockwell products that are unauthorized for sale in the United States and that differ from genuine Rockwell products in several respects, including: lack of manufacturer's warranty, lack of product recall notices, lack of product safety notices, differences in customer support, lack of quality control, hardware with unlicensed software/firmware, differences in quality, and lack of an intellectual property indemnity. *See* Complaint at ¶¶ 3, 92-163.

II. DISCUSSION AND ANALYSIS

In a Section 337 proceeding, the Commission has "broad discretion in selecting the form, scope, and extent of the remedy." *See Viscofan, S.A. v. United States Int'l Trade Comm'n*, 787

² *See* Complainant's Submission on Remedy, the Public Interest, and Bonding (EDIS Doc. No. 667312) (hereinafter, "Complainant Br."); and OUII's Statement on Remedy, the Public Interest, and Bonding (EDIS Doc. No. 667241) (hereinafter, "OUII Br.>").

³ *See* OUII's Reply Statement on Remedy, the Public Interest, and Bonding (EDIS Doc. No. 667854) (hereinafter, "OUII Reply Br.>").

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F.2d 544, 548 (Fed. Cir. 1986). In this investigation, the ALJ recommended that the Commission: (1) issue a GEO; (2) issue a CDO against respondent Fractioni; and (3) set a bond at 100 percent of the entered value of the infringing products during the period of Presidential review.

A. General Exclusion Order

Because respondent Radwell appeared and participated in the investigation, section 337(d)(2), not section 337(g)(2), governs the issuance of a GEO. *See Certain Mobile Device Holders & Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 21-22 (Mar. 22, 2018) (“*Mobile Device Holders*”); *Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate and Products Containing Same*, USITC Inv. No. 337-TA-489, Comm’n Op. at 4-5 (July 26, 2004) (“*Sildenafil*”).⁴ Subsection (d)(2) provides that “[t]he authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2); *see also* 19 C.F.R. § 210.50(c).

The Commission has determined to adopt the ALJ’s recommendation that the Commission issue a GEO. *See* RD at 60-62. The Commission finds that undisputed, reliable, probative, and substantial evidence supports the FID’s determination that Rockwell established a section 337 violation by the Defaulted Respondents based on Rockwell’s trademark infringement

⁴ Nevertheless, there is no difference between the requirements of section 337(d)(2) and section 337(g)(2) as both require that a violation of section 337 be found by “substantial, reliable, and probative evidence.” *See Sildenafil*, Comm’n Op. at 4-5.

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claim and that the domestic industry requirement is satisfied for that claim. In addition, the Commission agrees with the ALJ that the requirements of section 337(d)(2) are met and that the issuance of a GEO is warranted in this investigation.

As the ALJ noted, “the Defaulted Respondents do not manufacture the Rockwell products at issue but rather acquire these products abroad and resell them into the United States” and “[t]his does not require any substantial investment in infrastructure or equipment, and it would not be difficult for the Defaulted Respondents to sell the same products under different names.” See RD at 61 (citing CX-1042C at Q/A 162 (Prowse⁵)). In fact, as the ALJ continued, “[s]ome of the Defaulted Respondents already operate under several different names,” and, for example, “the products purchased from Yaspro were actually invoiced by KBS, and payment was accepted by EuoSource.” See *id.* (citing CX-27C, ¶¶ 27-28, Ex. W-3 (KBS invoice), Ex. W-4 (Yaspro contract), Ex. W-6 (EuoSource payment acceptance)). Thus, the Commission agrees with the ALJ that “[t]he low barriers to entry and Respondents’ use of multiple different entities to sell and import products supports a finding that a limited exclusion order would be easily circumvented.” See *id.* (citing *Mobile Device Holders*, Comm’n Op. at 22); accord Complainant Br. at 3-6; OUII Br. at 6-9 (citing *Certain Inkjet Ink Supplies and Components Thereof*, Inv. No. 337-TA-730, Comm’n Op. at 4-5 (Feb. 24, 2012)); see also 19 U.S.C. § 1337(d)(2); 19 C.F.R. § 210.50(c).

The Commission also agrees with the ALJ that “[t]h[e] evidence supports a finding that there is a pattern of violation and it is difficult to identify the source of infringing products.” See RD at 62 (citing *Mobile Device Holders*, Comm’n Op. at 22-23; *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 14, 2015 WL 5000874 (Jun. 26,

⁵ Dr. Stephen Prowse is one of Complainant Rockwell’s experts.

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2015) (“*Loom Kits*”)); *accord* Complainant Br. at 6-8; OUII Br. at 8-9; *see also* 19 U.S.C. § 1337(d)(2); 19 C.F.R. § 210.50(c). As the ALJ noted, “Dr. Prowse identified over 44,000 results in a recent search on eBay.com for relevant ‘Allen Bradley’ products in ‘new’ condition,” and “over 13,800 results in a recent search on Alibaba.com.” *See* RD at 62 (citing CX-1042C at Q/A 159 (Prowse)). The ALJ also noted that “it is difficult to identify the source of unauthorized Rockwell products” due to “the use of aliases on eBay and Alibaba and the fact that account and seller information is self-furnished on these online marketplaces.” *See id.* (citing CX-1042C at Q/A 157 (Prowse)). Still further, the ALJ notes Rockwell’s “difficulty in this investigation of effecting service on respondents who were identified online by Rockwell prior to filing the complaint.” *See id.*

Thus, in view of the foregoing evidence, the Commission has determined to issue a GEO pursuant to 19 U.S.C. § 1337(d)(2).

B. Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a CDO as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(f)(1); *see also* 19 U.S.C. § 1337(g)(1) (directing the Commission to issue an exclusion order, a cease and desist order, or both, against a defaulting respondent). The Commission generally issues a CDO directed to a defaulting respondent when the evidence shows that the respondent maintains a commercially significant inventory of imported infringing products in the United States or has significant domestic operations that could undercut the remedy provided by an exclusion order. *See, e.g., Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm’n Op., 2017 WL 8683854, *16 (Feb. 13, 2017) (“*Electric Skin Care Devices*”).

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The Commission has determined to adopt the ALJ's recommendation that the Commission issue a CDO against respondent Fractioni but not against Can Electric, EuoSource, and Yaspro. *See* RD at 63-64.⁶

Specifically, the Commission agrees with the ALJ that "Rockwell has only identified evidence of significant domestic operations with respect to Fractioni." *See id.* at 64; *accord* OUII Br. at 9-11. As the ALJ noted, Fractioni's website states that "[they] have thousands of quality industrial parts available from [their] warehouses in USA, Taiwan, Hong Kong, and China" and "at least 10 units each for all products listed in store." *See* RD at 64 (citing CX-44). The ALJ further noted that "[a]nother part of Fractioni's website identifies the location of a warehouse in 'San Jose, USA.'" *See id.* (citing CX-874); *accord* Complainant Br. at 10. The Commission finds that the foregoing evidence supports the ALJ's conclusion that the existence of significant domestic inventories may be inferred with respect to respondent Fractioni. *See id.* (citing *Certain Arrowheads with Deploying Blades and Components Therefor and Packaging Thereof*, Inv. No. 337-TA-977, Comm'n Op. at 21 (Apr. 28, 2017)).

The Commission also agrees with the ALJ that the record does not support the issuance of a CDO against Can Electric, EuoSource, or Yaspro, because "Rockwell does not identify any evidence beyond the existence of English language websites and shipments from abroad." *See id.* Rockwell argues that Yaspro, Euosource, and Can Electric have significant U.S. operations, "contributing to the 'unending stream of infringing products from foreign manufacturers.'" *See* Complainant Br. at 10-11 (citing *Electric Skin Care Devices*, Comm'n. Op. at 32). Although Rockwell identifies significant U.S. sales of infringing products by Yaspro, Euosource, and Can

⁶ Commissioner Schmidlein supports issuing all four of the requested CDOs—against respondents Fractioni, Can Electric, EuoSource, and Yaspro—for the reasons provided in her separate views.

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Electric, *see* Complainant Br. at 10-11, Rockwell provides no evidence that those sales were made from U.S. inventories. *Compare Electric Skin Care Devices*, 2017 WL 8683854, *17; *accord* OUII Reply Br. at 3; *see also id.* at 2 (“Rockwell did not proffer any evidence of any shipments made by Yaspro, EuoSource, or Can Electric from a U.S. business address.”).

Accordingly, the Commission has determined to issue a cease and desist order against respondent Fractioni but not against Yaspro, Euosource, or Can Electric.

C. Public Interest

Before issuing a GEO, the Commission must “consider[] 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.” *See* 19 U.S.C. § 1337(d)(1). “[T]he statute does not require the Commission to determine that a remedial order would advance the public interest factors but rather requires the Commission to consider whether issuance of such an order will adversely affect the public interest factors.” *Loom Kits*, Comm’n Op., 2015 WL 5000874, *9 (citation omitted).

The Commission directed “the presiding Administrative Law Judge [to] take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1).” *See* 82 Fed. Reg. 48114 (Oct. 16, 2017). The Commission has determined to adopt the ALJ’s recommendation that the “issuance of remedial orders in this investigation would not be contrary to the statutory public interest factors.” *See* RD at 67.

With respect to the first public interest factor, public health and welfare, the Commission agrees with the ALJ that “[t]here is no evidence that a remedial order would have any adverse

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effect on public health and welfare,” but rather “remedial orders would likely promote public safety because purchasers of unauthorized Rockwell products do not receive safety-related notices . . . and Rockwell is unable to provide the same quality control and customer support for unauthorized products.” *See id.* at 66 (citing CX-1042C at Q/A 170 (Prowse)); *accord* OUII Br. at 12; Complainant Br. at 12.

As to the second public interest factor, competitive conditions in the U.S. economy, the Commission also agrees with the ALJ that issuing remedial orders would not have an adverse effect on the competitive conditions in the U.S. economy. As the ALJ noted, “Radwell⁷ has alleged in a separate investigation that Rockwell’s business practices are anticompetitive and in violation of U.S. antitrust laws, . . . but [the ALJ found] insufficient evidence in the record here to determine whether remedial orders issued in the present investigation would implicate the competitive concerns raised in that investigation.” *See* RD at 66 (referring to *Certain Programmable Logic Controllers (PLCs), Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1105); *see also* OUII Br. at 12 (“OUII is unaware of any evidence that the competitive conditions in the U.S. economy would be affected if remedial orders issued in this Investigation.”); Complainant Br. at 13 (“There is no evidence that prices of Genuine Rockwell Products or industrial automation products would increase whatsoever, nor is there any argument made, let alone supporting proof, that there would be a shortage of industrial automation products generally.”).

With respect to the third public interest factor, relating to the production of like or directly competitive articles in the United States, the Commission agrees with the ALJ that

⁷ As noted in Section I(A), *supra*, Radwell was terminated from the investigation after entry of a consent order.

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“[t]here is no evidence that Rockwell would be unable to meet the market demand for products that would be excluded by any remedial order.” *See* FID at 66. As the ALJ noted, “Dr. Prowse identified several competitors in the industrial automation industry producing like or directly competitive articles.” *See id.* (citing CX-1042C at Q/A 172 (Prowse)); *accord* OUII Br. at 13 (“Rockwell can meet the demand for Allen-Bradley products in the U.S. market. After all, the accused Unauthorized Rockwell Products . . . were manufactured and supplied by Rockwell in the first instance.”); Complainant Br. at 13 (“[T]here are a number of competing industrial automation suppliers that offer either identical or like or competitive features to the Unauthorized Rockwell Products, so that the desired remedy will not impact the availability of industrial automation systems.”) (citing CX-1042C at Q/A 172 (Prowse)).

Lastly, with respect to the fourth public interest factor, *i.e.*, the effect on United States consumers, the Commission agrees with the ALJ that “[t]he only adverse effect to U.S. consumers would be the increased prices that consumers would pay for authorized Rockwell products, as opposed to unauthorized Rockwell products.” *See* RD at 66. But as the ALJ noted, “the benefit of lower prices to consumers does not outweigh the benefit of providing complainants with an effective remedy for an intellectual property-based section 337 violation.” *See id.* (citing *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Comm’n Op. at 27 (Aug. 28, 2009)); *accord* OUII Br. at 14-15 (“By allowing intellectual property rights to be violated for the sake of providing some consumers with lower prices in the short run ultimately does not benefit U.S. consumers, as it reduces incentives for innovators to invest not only the financial resources, but time and effort into developing new technologies and improving processes that ultimately advance the greater good.”) (citing CX-1042C at Q/A 173 (Prowse)); Complainant Br. at 14 (“In the long run, protection of intellectual property rights fosters research

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and development of new technologies and leads to greater competition in the marketplace, while also preventing the unfair trade of products.”) (citing CX-1042C at Q/A 173 (Prowse)).

Thus, based on the record of this investigation, the Commission has determined that the public interest factors do not preclude the issuance of the remedial orders discussed above.

D. Bond During Period of Presidential Review

During the 60-day period of Presidential review under 19 U.S.C. § 1337(j), “articles directed to be excluded from entry under subsection (d) . . . shall . . . be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury.” *See* 19 U.S.C. § 1337(j)(3). “The Commission typically sets the bond based on the price differential between the imported infringing product and the domestic industry article or based on a reasonable royalty. However, where the available pricing or royalty information is inadequate, the bond may be set at one hundred (100) percent of the entered value of the infringing product.” *Loom Kits*, Comm’n Op., 2015 WL 5000874, *11 (citations omitted). The Commission has set a 100% bond in cases where respondents have defaulted and provided no discovery regarding pricing, precluding any reliable determination of an appropriate bond amount. *See id.* at *12.

The Commission has determined to adopt the ALJ’s recommendation that the Commission set a bond of 100 percent during the period of Presidential review. *See* RD at 65. As the ALJ noted, “calculating a sales price differential between unauthorized and authorized Rockwell products is impractical because the prices of these products vary substantially.” *See id.* (citing CX-1042C at Q/A 167-68 (Prowse)). The Commission also agrees with the ALJ that “there is no evidence in the record for any comparable royalty.” *See id.*; *accord* OUII Br. at 11; Complainant Br. at 14.

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Thus, the Commission has determined to set the bond at 100 percent of the entered value of the infringing products during the period of Presidential review.

III. CONCLUSION

For the foregoing reasons, the Commission has determined to issue: (1) a GEO prohibiting the importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies that infringe Complainant's asserted trademarks, and (2) a CDO against respondent Fractioni. The Commission has also determined that the public interest does not preclude the issuance of the GEO and CDO. The Commission has further determined to set the bond at 100 percent of the entered value of the infringing products during the period of Presidential review.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton
Secretary to the Commission

Issued: April 23, 2019

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

In the Matter of

**CERTAIN INDUSTRIAL AUTOMATION
SYSTEMS AND COMPONENTS
THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS,
VISUALIZATION HARDWARE,
MOTION AND MOTOR CONTROL
SYSTEMS, NETWORKING
EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Investigation No. 337-TA-1074

**DISSENTING VIEWS OF COMMISSIONER
RHONDA K. SCHMIDTLEIN ON CEASE AND DESIST ORDERS**

I write separately because I support issuing all four of the cease and desist orders (CDOs) requested by complainant in this investigation. I find the majority's decision to deny the full scope of the requested CDO relief inconsistent with our governing statute, 19 U.S.C. § 1337. I therefore respectfully dissent on the denial of the full scope of the CDO relief requested. In particular, I dissent from the majority's decision declining to issue CDOs against three respondents—Can Electric, EuoSource, and Yaspro—and I concur with the majority's decision to issue a CDO against respondent Fractioni, although based on a different rationale.

It is undisputed that the requested CDO relief is governed by subsection (g), paragraph (1), of the Tariff Act, 19 U.S.C. § 1337(g)(1). In *Certain Electric Skin Care Devices and Certain Arrowheads with Deploying Blades and Components Thereof*, I explained my view that section 337(g)(1) requires the Commission to issue a requested CDO upon finding a violation. See Inv. No. 337-TA-959, Comm'n Op., Separate Views of Chairman Schmidtlein (Feb. 13, 2017) (Public Version); Inv. No. 337-TA-977, Comm'n Op., Dissenting Views of Chairman Schmidtlein (April 28, 2017) (Public Version). Specifically, subsection (g), paragraph (1), provides:

**(g) Exclusion from entry or cease and desist order; conditions
and procedures applicable**

(1) If—

(A) a complaint is filed against a person under this section;

(B) the complaint and a notice of investigation are served
on the person;

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(C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;

(D) the person fails to show good cause why the person should not be found in default; and

(E) the complainant seeks relief limited solely to that person;

the Commission shall presume the facts alleged in the complaint to be true and ***shall, upon request, issue*** an exclusion from entry or ***a cease and desist order***, or both, limited to that person unless, after considering the effect of such exclusion or order 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, the Commission finds that such exclusion or order should not be issued.

19 U.S.C. § 1337(g)(1) (emphasis added).

As I explained in my separate views in *Electric Skin Care Devices* and *Arrowheads*, Congress's use of the language "shall, upon request, issue" in section 337(g)(1) requires the Commission to issue a CDO against a defaulting respondent when the conditions listed in subparagraphs (A)-(E) are met, the complaint alleges a violation of section 337, and consideration of the public interest factors does not preclude such a remedy. Here, it is undisputed that the conditions of subparagraphs (A)-(E) are satisfied and that the complaint alleges a violation of section 337 against each of the defaulting respondents. It is also undisputed that the public interest factors do not preclude remedial relief of any kind.

The nondiscretionary duty under section 337(g)(1) to issue CDO relief requested by a complainant against defaulting respondents, absent public interest considerations to the contrary, is highlighted when contrasted with the permissive language used in section 337(f)(1), which governs the issuance of CDOs against participating respondents. *Compare* 19 U.S.C. § 1337(g)(1) *with* 19 U.S.C. § 1337(f)(1). Subsection (f), paragraph (1), states:

(f) Cease and desist orders; civil penalty for violation of orders

(1) In addition to, or in lieu of, taking action under subsection (d) or (e) of this section, the Commission ***may issue*** and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the

PUBLIC VERSION

United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. . . .

19 U.S.C. § 1337(f)(1) (emphasis added).¹ Thus, absent public interest considerations to the contrary, section 337(f)(1) requires some relief against a participating respondent, but leaves it to the discretion of the Commission to decide whether to issue an exclusion order, a CDO, or both.

Congress knows how to confer discretion upon the Commission when it wishes; it did so in section 337(f)(1) with its use of the term “may,” but it chose not to use that term in section 337(g)(1). The use of different terms in provisions addressing the same subject matter but in a different context (defaulting respondents versus participating respondents) underscores that the different terms were intended to have different meanings. See *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969, 1977 (2016) (“Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.”); see also *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (“The word ‘shall’ generally imposes a nondiscretionary duty.”). Thus, whereas section 337(f)(1) requires some relief against participating respondents but grants the Commission discretion choose whether to issue a CDO as part of that relief, section 337(g)(1) requires the Commission, when requested, to issue CDOs against defaulting respondents. Indeed, the phrase “upon request” in section 337(g)(1) is unnecessary if Congress intended to confer discretion upon the Commission.² See *Bilski v. Kappos*, 561 U.S. 593, 607-08, 130 S. Ct. 3218, 3228 (2010) (discussing the statutory construction canon that guides “against interpreting any statutory provision in a manner that would render another provision superfluous”); see also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77, 123 S. Ct. 1655, 1661 (2003) (“Absent a statutory text or structure that requires us to depart from normal rules of construction, we should not construe the statute in a manner that is strained and, at the same time, would render a statutory term superfluous.”).

Interpreting the remedial language in section 337(g)(1) to be the same as section 337(f)(1), and thereby requiring support in the record for significant domestic inventory or business operations as a prerequisite for a CDO, as the majority does, may have the perverse effect of making it harder for a complainant to obtain a CDO against a foreign defaulting respondent than against a foreign participating respondent. This is because without discovery the

¹ Subsection (f), paragraph (1), references subsection (d), which governs the issuance of limited exclusion orders against participating respondents found to be in violation of section 337: See 19 U.S.C. § 1337 (f)(1) (“In addition to, or in lieu of, taking action under subsection (d)”); 19 U.S.C. § 1337(d)(1) (“If the Commission determines . . . that there is a violation of this section, it **shall** direct that the articles concerned . . . be excluded from entry into the United States[.]”) (emphasis added). Subsection (f), paragraph (1), must therefore be read together with subsection (d).

² Congress added subsection (g) to the statute in 1988. There would have been no need to add the remedial language in subsection (g), paragraph (1), for defaulting respondents if Congress intended to grant the Commission the same discretion that appears in subsection (f), paragraph (1).

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complainant may have no basis to marshal the evidence currently needed to obtain relief. The legislative history of section 337(g)(1) makes clear that this potential difficulty was the motivation for adding section 337(g)(1) and reflects Congress's intent to provide the maximum relief requested against defaulters. *See* H.R. Rep. No. 100-40, at 160-61 (1987) ("[The] new subsection . . . *requires* the Commission . . . *upon request*, to issue relief against the defaulting respondents. . . . This amendment is motivated by the fact that discovery is usually difficult or impossible to obtain from respondents who have chosen not to participate in a section 337 investigation.") (emphasis added). The fact that the Commission is issuing a general exclusion order does not change the statutory analysis. Therefore, in my view, the Commission is required to issue the requested CDO relief, including the CDOs against Can Electric, EuoSource, and Yaspro.

Additionally, even if one assumes that the statute confers discretion upon the Commission, it is unnecessary for the Commission to have to infer the existence of a commercially significant U.S. inventory in order to issue the CDOs requested here. Rather, the complaint and supporting evidence in this case show sales activities by Can Electric, EuoSource, and Yaspro directed to the United States as to the infringing grey market goods. *See* Complaint, ¶¶ 36-37 and Exs. 26-28; ¶¶ 52-53 and Exs. 26, 32-34; ¶¶ 61-62 and Exs. 26, 36-37 (alleging Can Electric, EuoSource, and Yaspro sell unauthorized grey market goods). These sales activities provide a basis to issue CDOs against Can Electric, EuoSource, and Yaspro without having to infer the existence of a U.S. inventory. By requiring more than what has been demonstrated, the majority effectively penalizes the complainant for the respondents' failure to respond or participate, which should be avoided.

Ultimately, because I believe the Commission must issue the four CDOs that complainant requested, I respectfully dissent from Section II(B) of the Commission's Opinion.

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on **April 24, 2019**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

Adam D. Swain
ALSTON & BIRD LLP
950 F Street NW
Washington, DC 20004

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☒ Via Express Delivery
☐ Via First Class Mail
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Respondents

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Shanghai 200092
China

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☒ Via Express Delivery
☐ Via First Class Mail
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GreySolution Limited d/b/a Fibica
Unit B601, 6/F Block A
Universal Ind. Ctr.
19-25 Shan Mei St Sha Tin,
Fo Tan, Hong Kong

- ☐ Via Hand Delivery
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KBS Electronics Suzhou Co, Ltd.
Block 7&43, No. 328 Hengyong Road,
Jiading district, Shanghai, China, 201806

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☐ Other: _____

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Inv. No. 337-TA-1074

Certificate of Service – Page 2

Shanghai EuoSource Electronic Co., Ltd
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SOBuyCommercial (HK) Co. Limited
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Ind. Bldg. No. 19 Chetmg Shun Street
Lai Chi Kok Kowloon
Hong Kong

- ☐ Via Hand Delivery
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☐ Via First Class Mail
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d/b/a Easy Micro-optics C0. LTD.
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☐ Via First Class Mail
☐ Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN INDUSTRIAL AUTOMATION
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Investigation No. 337-TA-1074

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW A
FINAL INITIAL DETERMINATION FINDING A SECTION 337
VIOLATION BY THE DEFAULTED RESPONDENTS**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review a final initial determination ("FID") of the presiding administrative law judge ("ALJ") finding a section 337 violation by the Defaulted Respondents. The Commission also requests written submissions, under the schedule set forth below, on remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708-4716. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 16, 2017, based on a complaint filed by Complainant Rockwell Automation, Inc. of Milwaukee, Wisconsin. See 82 Fed. Reg. 48113-15 (Oct. 16, 2017). The complaint, as supplemented, alleges violations of section 337 based on the infringement of certain registered trademarks and copyrights and on unfair methods of competition and unfair acts in the importation or sale of certain industrial automation systems and components thereof including

control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, the threat or effect of which is to destroy or substantially injure an industry in the United States. *See id.* The Notice of Investigation identifies the following respondents: Can Electric Limited of Guangzhou, China ("Can Electric"); Capnil (HK) Company Limited of Hong Kong ("Capnil"); Fractioni (Hongkong) Ltd. of Shanghai, China ("Fractioni"); Fujian Dahong Trade Co. of Fujian, China ("Dahong"); GreySolution Limited d/b/a Fibica of Hong Kong ("GreySolution"); Huang Wei Feng d/b/a A-O-M Industry of Shenzhen, China ("Huang"); KBS Electronics Suzhou Co, Ltd. of Shanghai, China ("KBS"); PLC-VIP Shop d/b/a VIP Tech Limited of Hong Kong ("PLC-VIP"); Radwell International, Inc. d/b/a PLC Center of Willingboro, New Jersey ("Radwell"); Shanghai EuoSource Electronic Co., Ltd of Shanghai, China ("EuoSource"); ShenZhen T-Tide Trading co., Ltd. of Shenzhen, China ("T-Tide"); SoBuy Commercial (HK) Co. Limited of Hong Kong ("SoBuy"); Suzhou Yi Micro Optical Co., Ltd., d/b/a Suzhou Yiwei Guangxue Youxiangongsi, d/b/a Easy Microoptics Co. LTD. of Jiangsu, China ("Suzhou"); Wenzhou Sparker Group Co. Ltd., d/b/a Sparker Instruments of Wenzhou, China ("Sparker"); and Yaspro Electronics (Shanghai) Co., Ltd. of Shanghai, China ("Yaspro"). *See id.* In addition, the Office of Unfair Import Investigations is also a party in this investigation. *See id.*

Nine respondents were found in default, namely, Fractioni, GreySolution, KBS, EuoSource, T-Tide, SoBuy, Suzhou, Yaspro and Can Electric (collectively, "the Defaulted Respondents"). *See* Order No. 17 (Feb. 1, 2018), *unreviewed*, Comm'n Notice (Feb. 26, 2018); Order No. 32 (June 28, 2018), *unreviewed*, Comm'n Notice (July 24, 2018). Furthermore, five unserved respondents (Capnil, Dahong, Huang, PLC-VIP, and Sparker) were terminated from the investigation, and one respondent (Radwell) was terminated based on the entry of a consent order. *See* Order No. 41 (July 17, 2018), *unreviewed*, Comm'n Notice (Aug. 13, 2018); Order No. 42 (July 20, 2018), *unreviewed*, Comm'n Notice (Aug. 15, 2018).

On October 23, 2018, the ALJ issued the subject FID finding a violation of section 337 by the Defaulted Respondents and recommending that the Commission: (1) issue a general exclusion order; (2) issue a cease and desist order against Defaulted Respondent Fractioni; and (3) set a bond at 100 percent of the entered value. No petitions for review of the subject FID were filed.

The Commission has determined not to review the subject FID.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) 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 (Dec. 1994) (Comm'n Op.).

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 against a defaulting respondent, 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.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The 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 or disapprove the Commission's action. 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: 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. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS numbers under which the accused products are imported and to supply the names of known importers of the infringing articles.

Written submissions must be filed no later than close of business on January 11, 2019. Reply submissions must be filed no later than the close of business on January 18, 2019. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in the FID. No further submissions on any of 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 and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1074") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/secretary/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. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. 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^[1], solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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: December 20, 2018

^[1] All contract personnel will sign appropriate nondisclosure agreements.

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Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Notice** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on **December 21, 2018**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

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On Behalf of Respondents Radwell International, Inc.:

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Respondents

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☐ Other: _____

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Certificate of Service – Page 2

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ShenZhen T-Tide Trading co., Ltd.
Room A-60S, Block.lexi.
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Mei Ban Road '
Longhua District, Shcnzhen 51803 1
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- ☐ Via Hand Delivery
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☐ Other: _____

SOBuyCommercial (HK) Co. Limited
Flat B G/F Yeung Yiu Chung (No. 6)
Ind. Bldg. No. 19 Chetmg Shun Street
Lai Chi Kok Kowloon
Hong Kong

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Suzhou Yi Micro Optical CO., Ltd.
d/b/a Suzhou Yiwei Guangxue Youxiangongsi
d/b/a Easy Micro-optics CO. LTD.
Office Building 5F, 91 Weixin Rd
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**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
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Inv. No. 337-TA-1074

Certificate of Service – Page 3

Shanghai, China

Can Electric Limited
No. 2 Danan Rd, Yueziu District
Guangzhou, Guangdong, 510115
China

☐ Other: _____

☐ Via Hand Delivery

☐ Via Express Delivery

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☐ Other: _____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN INDUSTRIAL AUTOMATION
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NETWORKING EQUIPMENT, SAFETY
DEVICES, AND POWER SUPPLIES**

Inv. No. 337-TA-1074

**INITIAL DETERMINATION ON VIOLATION OF SECTION 337; AND
RECOMMENDED DETERMINATION ON REMEDY, BONDING,
AND THE PUBLIC INTEREST**

Administrative Law Judge Dee Lord

(October 23, 2018)

On the Briefs:

For Complainant Rockwell Automation, Inc.:

Adam D. Swain, Esq. and Thomas W. Davison, Esq. of Alston & Bird LLP in Washington, DC;
Paul J. Tanck, Esq., Gregory J. Carbo, Esq., and Neal J. McLaughlin, Esq. of Alston & Bird LLP
in New York, NY.

For the Commission Investigative Staff:

Brian B. Koo, Esq., Jeffrey T. Hsu, Esq. and Margaret D. Macdonald, Esq. of the Office of
Unfair Import Investigations, U.S. International Trade Commission of Washington, DC.

PUBLIC VERSION

Pursuant to the Notice of Investigation (Oct. 10, 2017) and Commission Rule 210.42, this is the administrative law judge's final initial determination and recommended determination in the matter of *Certain Industrial Automation Systems and Components Thereof including Control Systems, Controllers, Visualization Hardware, Motion Control Systems, Networking Equipment, Safety Devices, and Power Supplies*, Inv. No. 337-TA-1074. 19 C.F.R. § 210.42(a)(1)(i).

For the reasons discussed herein, it is my final initial determination that there is a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and/or the sale within the United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion control systems, networking equipment, safety devices, and power supplies.

PUBLIC VERSION

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The following abbreviations may be used in this Initial Determination:

Tr.	Transcript
WS	Witness Statement
DWS	Direct Witness Statement
RWS	Rebuttal Witness Statement
JX	Joint Exhibit
CX	Complainant's exhibit
CPX	Complainant's physical exhibit
CDX	Complainant's demonstrative exhibit
RX	Respondent's exhibit
RPX	Respondent's physical exhibit
RDX	Respondent's demonstrative exhibit
CPHB	Complainant's pre-hearing brief
CIB	Complainant's initial post-hearing brief
CRB	Complainant's reply post-hearing brief
RPHB	Respondent's pre-hearing brief
SPHB	Staff's pre-hearing brief
SB	Staff's post-hearing brief

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I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on October 10, 2017, in response to a complaint alleging violations of section 337 of the Tariff Act of 1930, as amended, by reason of infringement of U.S. Trademark Reg. Nos. 1172995, 696401, 693780, 1172994, 712800, 712836, 2510226, 2671196, 2701786, and 2412742; and U.S. Copyright Reg. Nos. TX0008389890, TX0008389887, TX0008390098, TX0008390094, TX0008390077, TX0008390088, TX0008390116, and TX0008390111. The Commission ordered that an investigation be instituted to determine:

- (a) whether there is a violation of subsection (a)(1)(C) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, by reason of infringement of the '995 trademark; the '401 trademark; the '780 trademark; the '994 trademark; the '800 trademark; the '836 trademark; the '226 trademark; the '196 trademark; the '786 trademark; and the '742 trademark; and whether an industry in the United States exists as required by subsection (a)(2) of section 337;
- (b) whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, by reason of infringement of the '890 copyright; the '887 copyright; the '098 copyright; the '094 copyright; the '077 copyright; the '088 copyright; the '116 copyright; and the '111 copyright; and
- (c) whether there is a violation of subsection (a)(1)(A) in the importation or sale of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies, by reason of unfair methods of competitions and unfair acts, the threat or effect of which is to destroy or substantially injure an industry in the United States

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Notice of Investigation at 2-3. The Commission further ordered:

Pursuant to Commission Rule 210.50(b)(1), 19 C.F.R. 210.50(b)(1), the presiding Administrative Law Judge shall take evidence or other information and hear arguments from the parties or other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. sections 1337(d)(1), (f)(1), (g)(1)

Id. at 3. The investigation was instituted upon publication of the Notice of Investigation in the *Federal Register* on Monday, October 16, 2017. 82 Fed. Reg. 48113-15 (2017); *see* 19 C.F.R. § 210.10(b).

The Complainant is Rockwell Automation, Inc. (“Rockwell”). Notice of Investigation at 3. The Office of Unfair Import Investigations was named as a party in this investigation. *Id.* at 5. The complaint named fifteen respondents, *id.* at 3-5, but only one respondent filed an answer, Radwell International, Inc. (“Radwell”). Response to the Complaint and Notice of Investigation (Oct. 31, 2017). On February 1, 2018, Respondents Fractioni (Hongkong) Ltd.; GreySolution Limited d/b/a Fibica; KBS Electronics Suzhou Co., Ltd.; Shanghai EuoSource Electronic Co., Ltd.; ShenZhen T-Tide Trading Co., Ltd.; SoBuy Commercial (HK) Co. Limited; and Suzhou Yi Micro Optical Co., Ltd. were found to be in default. Order No. 17 (Feb. 1, 2018), *not reviewed by Comm’n Notice* (Feb. 26, 2018). On June 28, 2018, Respondents Yaspro Electronics (Shanghai) Co. Ltd. and Can Electric Limited were found to be in default. Order No. 32 (June 28, 2018), *not reviewed by Comm’n Notice* (July 24, 2018). On July 17, 2018, Respondents Capnil (HK) Company Limited; Fujian Dahong Trade Co., Ltd.; Huang Wei Feng d/b/a A-O-M Industry; PLC-VIP Shop d/b/a VIP Tech Limited; and Wenzhou Sparker Group Co. were terminated from the investigation based on Rockwell’s withdrawal of its allegations. Order No. 41 (July 17, 2018), *not reviewed by Comm’n Notice* (Aug. 13, 2018). On July 20,

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2018, Radwell was terminated from the investigation pursuant to a consent order. Order No. 42 (July 20, 2018), *not reviewed by* Comm’n Notice (Aug. 15, 2018).

Prior to being terminated from the investigation, Radwell filed a pre-hearing brief (RPHB) on June 25, 2018. Rockwell also filed a pre-hearing brief (CPHB) on June 25, 2018. Staff filed a pre-hearing brief (SPHB) on July 13, 2018.

On July 12, 2018, summary determination was granted with respect to the economic prong of the domestic industry requirement for nine of the asserted trademarks. Order No. 39 (July 12, 2018), *not reviewed by* Comm’n Notice (Aug. 14, 2018).

Because there are no active respondents remaining in the investigation, the evidentiary hearing was suspended pursuant to Order No. 42 (July 20, 2018). Rockwell moved for leave to file a motion for summary determination of violation by the remaining defaulted respondents on July 24, 2018, which was denied pursuant to Order No. 43 (Aug. 3, 2018). Rockwell and the Staff agreed to proceed with a hearing on the written record, based on the pre-hearing briefs that had already been filed and the evidence, including witness statements, that had already been submitted. Order No. 44 (Aug. 14, 2018). Rockwell filed its initial post-hearing brief (CIB) on Friday, August 24, 2018. Staff filed its post-hearing brief (SB) on Wednesday, September 5, 2018. Rockwell filed a reply post-hearing brief (CRB) on September 12, 2018.

B. The Private Parties

1. Complainant

Complainant Rockwell Automation, Inc. (“Rockwell”) is a corporation organized and existing under the laws of Delaware with its principal place of business in Milwaukee, Wisconsin. CIB at 7; Complaint ¶ 14.

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2. Respondents

Nine defaulted respondents remain in this investigation: Can Electric Limited (“Can Electric”); Fractioni (Hongkong) Ltd. (“Fractioni”); GreySolution Limited d/b/a Fibica (“GreySolution”); KBS Electronics Suzhou Co, Ltd. (“KBS”); Shanghai EuoSource Electronic Co., Ltd. (“EuoSource”); ShenZhen T-Tide Trading Co., Ltd. (“T-Tide”); SoBuy Commercial (HK) Co. Limited (“SoBuy”); Suzhou Yi Micro Optical Co., Ltd. (“Yi Micro”); and Yaspro Electronics (Shanghai) Co., Ltd. (“Yaspro”) (collectively, the “Defaulted Respondents”).

Can Electric is a Chinese company located in Guangzhou, China, offering products for sale to United States customers at www.can-electric.com and Alibaba.com. Complaint ¶ 36. Fractioni is a Chinese company located in Shanghai, China, offering products for sale to United States customers at fractioni.com and on eBay.com. *Id.* ¶¶ 40-41. GreySolution is a Chinese company located in Hong Kong, offering products for sale to United States customers on eBay.com. *Id.* ¶¶ 44-45. KBS is a Chinese company located in Shanghai, China, offering products for sale to United States customers on Alibaba.com. *Id.* ¶ 47. EuoSource is a Chinese company located in Shanghai, China, offering products for sale to United States customers at www.euosource.com and Alibaba.com. *Id.* ¶ 52. T-Tide is a Chinese company located in Shenzhen, China, offering products for sale to United States customers on eBay.com. *Id.* ¶ 54. SoBuy is a Chinese company located in Hong Kong, offering products for sale to United States customers on eBay.com. *Id.* ¶¶ 55-56. Yi Micro is a Chinese company located in Suzhou, China, offering products for sale to United States customers on eBay.com. *Id.* ¶¶ 57-58. Yaspro is a Chinese company located in Shanghai, China, offering products for sale to United States customers at www.yaspro.com and Alibaba.com. *Id.* ¶ 61.


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C. Products at Issue

The products at issue in this investigation are from Rockwell's Allen-Bradley® industrial automation product line. Complaint ¶ 76; CIB at 4. This includes programmable controllers, visualization hardware, motors, safety devices, and power supplies. *Id.* ¶¶ 76-86.

1. Asserted Trademarks

Rockwell asserts ten of its registered trademarks, U.S. Trademark Reg. Nos. 1172995, 696401, 693780, 1172994, 712800, 712836, 2510226, 2671196, 2701786, and 2412742, described below:

Trademark	Reg. No.	Exhibit	Example Embodiment
A-B (and Design)	1172995	JX-0002	
A-B (and Design)	696401	JX-0003	
A-B (and Design)	693780	JX-0004	
ALLEN-BRADLEY	1172994	JX-0005	ALLEN-BRADLEY
ALLEN-BRADLEY	712800	JX-0006	
ALLEN-BRADLEY	712836	JX-0007	
ROCKWELL AUTOMATION	2510226	JX-0008	ROCKWELL AUTOMATION
ROCKWELL AUTOMATION	2671196	JX-0009	
ROCKWELL AUTOMATION	2701786	JX-0010	
CONTROLLOGIX	2412742	JX-0011	CONTROLLOGIX

Complaint ¶ 63; CIB at 9.

2. Asserted Copyrights

Rockwell asserts eight of its registered copyrights, Copyright Reg. Nos. TX0008389890, TX0008389887, TX0008390098, TX0008390094, TX0008390077, TX0008390088, TX0008390116, and TX0008390111, described below:

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Name	Reg. No.	Reg. Date	1st Pub. Date	Exhibit
Firmware (Version 16) for CompactLogix® L3x Controllers	TX0008389890	Aug. 1, 2017	Jan. 31, 2007	JX-0012
Firmware (Version 16) for ControlLogix® L6 Controllers	TX0008389887	Aug. 1, 2017	Jan. 31, 2007	JX-0013
Firmware (Version 20) for CompactLogix® L3x Controllers	TX0008390098	Aug. 9, 2017	Dec. 15, 2011	JX-0014
Firmware (Version 20) for CompactLogix® L3y Controllers	TX0008390094	Aug. 9, 2017	Dec. 15, 2011	JX-0015
Firmware (Version 20) for ControlLogix® L6 Controllers	TX0008390077	Aug. 9, 2017	Dec. 15, 2011	JX-0016
Firmware (Version 20) for ControlLogix® L7 Controllers	TX0008390088	Aug. 9, 2017	Dec. 15, 2011	JX-0017
Firmware (Version 30) for CompactLogix® L3y Controllers	TX0008390116	Aug. 9, 2017	Dec. 15, 2011	JX-0018
Firmware (Version 30) for ControlLogix® L7 Controllers	TX0008390111	Aug. 9, 2017	Dec. 8, 2016	JX-0020

Complaint ¶ 73; CIB at 9.

D. Evidentiary Record

Pursuant to Order No. 43 (Aug. 3, 2018) and Order No. 44 (Aug. 14, 2018), all of Rockwell's submitted exhibits, including witness statements, were received into evidence. Pursuant to Order No. 46 (Sept. 7, 2018), three additional exhibits were admitted at Staff's request, RX-0054C, RX-0064C, and RX-0505C. An additional exhibit from Rockwell, CX-1189, was admitted pursuant to Order No. 47 (Oct. 16, 2018).

In addition, pursuant to Commission Rule 210.39(a), the record includes "all pleadings, the notice of investigation, motions and responses, all briefs and written statements, and other documents and things properly filed with the Secretary, in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record (including physical exhibits), and any other items certified into the record by the administrative law judge or the Commission." 19 C.F.R. § 210.38(a).

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II. JURISDICTION

In order to have the power to decide a case, a court or agency must have both subject matter jurisdiction and jurisdiction over either the parties or the property involved. 19 U.S.C. § 1337; *Certain Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, Commission Memorandum Opinion, 215 U.S.P.Q. 229, 231 (1981). Section 337 confers subject matter jurisdiction on the Commission to investigate, and if appropriate, to provide a remedy for, unfair acts and unfair methods of competition in the importation, the sale for importation, or the sale after importation of articles into the United States. *See* 19 U.S.C. §§ 1337(a)(1)(A), (B), and (C). The Federal Circuit has held that a complainant's allegation that respondents import accused products is sufficient to confer subject matter jurisdiction pursuant to section 337. *Amgen Inc. v. Int'l Trade Comm'n*, 565 F.3d 846, 854 (Fed. Cir. 2009). In addition, the Commission has *in rem* jurisdiction over imported articles. *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 985-86 (C.C.P.A. 1981) (holding that the ITC's jurisdiction over imported articles is sufficient to exclude such articles).

Rockwell attached evidence to its complaint showing that each of the Defaulted Respondents imported Rockwell products. CIB at 16-17, 61-62; CX-0027C (Complaint, Confidential Exhibit 26); Supplement to Complaint (Sept. 29, 2017).¹ Rockwell has also

¹ These attachments to the complaint are declarations by Adam D. Swain, an attorney representing Rockwell, and Rockwell's expert, Dr. Stephen Prowse, relies on CX-0027C as evidence of Rockwell products offered for sale. CX-1042C at Q/A 28, 156, 159, 162. The exhibits attached to these declarations are the evidence of importation and sale by Defaulted Respondents that was relied upon in Rockwell's complaint.

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identified evidence that certain respondents sold additional Rockwell products [REDACTED]. CPX-0039C.²

For Fractioni, Rockwell's complaint identified the purchase of a "New Allen-Bradley AB Contact Block 800F-X10, 1-Year Warranty!" from eBay on July 20, 2017, which arrived in the United States on July 27, 2017. CX-0027C, Ex. A. Rockwell further identified the purchase of a "New Factory Sealed Allen-Bradley AB Controller 1756-L7SP, 1-Year Warranty!" from eBay on August 21, 2017. *Id.*, Ex. B. Rockwell also identifies records showing sales of a few thousand Rockwell products from Fractioni [REDACTED], dating from 2011 to 2016. CPX-0039C.

For GreySolution, Rockwell identified the purchase of a "New CompactLogix Allen Bradley AB 1769-ECL Programmable Logic Controller" from eBay on August 2, 2017, which arrived in the United States on August 15, 2017. CX-0027C, Ex. C. Rockwell further identified the purchase of a "New in Sealed Box" Allen Bradley 1756-L7SP Safety Controller from eBay on August 21, 2017, which arrived in the United States on August 29, 2017. *Id.*, Ex. D.

For SoBuy and T-Tide, Rockwell identified the purchases of a "NEW Allen Bradley 1745-TOP Terminal Block," a "New 1PC In Box 1734-TB3 Allen Bradley PLC Module Screw Terminal," and a "New In Box Allen Bradley PLC Module Terminal Base Unit 1734-TB" from eBay on July 20, 2017, each of which arrived in the United States on July 26, 2017. CX-0027C, Exs. E, F, G. Rockwell further identified the purchase of a "New in box" AB Allen Bradley 1756-L7SP GuardLogix Safety Controller from eBay on August 22, 2017, which was delivered in the United States on August 29, 2017. *Id.*, Ex. D. Rockwell also identified the purchase of a

² CPX-0039C contains importation data [REDACTED] compiled in a spreadsheet prepared by Rockwell's expert, Dr. Stephen Prowse. CX-1042C at Q/A 32-34.

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“New” Allen Bradley 1769 L16ER CompactLogix Safety Controller from eBay on September 1, 2017. *Id.*, Ex. X.

For Yi Micro, Rockwell identified the purchase of “ONE New AB Allen Bradley 1734-TOP Terminal Base in Box” from eBay on July 20, 2017, which was delivered in the United States on August 8, 2017. CX-0027C, Ex. I. Rockwell also identified the purchase of a “NEW Allen Bradley AB 1769-ECL” from eBay on July 20, 2017, which was delivered in the United States on July 24, 2017. *Id.*, Ex. J. Rockwell further identified the purchase of a “NEW AB Allen Bradley 1756-L7SP GuardLogix Safety Controller 1756” from eBay on July 20, 2017, which was delivered in the United States on August 29, 2017. *Id.*, Ex. K.

For Can Electric, Rockwell identified the purchase of two 1756-L7SP modules from plc-vip.com on August 29, 2017. CX-0027C, Ex. R. These modules were delivered in the United States on or about September 11, 2017. Supplement to Complaint (Sept. 29, 2018), Ex. R.

For KBS, Euosource, and Yaspro, Rockwell identified the purchase of an Allen-Bradley CompactLogix 1756-L7SP on Alibaba.com on September 3, 2017. CX-0027C, Ex. W. This product arrived in the United States on or about September 11, 2017. Supplement to Complaint (Sept. 29, 2018), Ex. W. In addition, Rockwell identifies the sale of several hundred Rockwell products from Yaspro [REDACTED] between 2014 and 2017, including a sale of five 802T-NX159 products on December 28, 2017. CPX-0039C.

Based on this evidence of importation and sales, I find that the Commission has subject matter jurisdiction and *in rem* jurisdiction over the imported Rockwell products.

III. TRADEMARK INFRINGEMENT

A. Legal Standard

Section 337 makes unlawful, *inter alia*, “the importation into the United States, the sale for importation, or the sale within the United States after importation . . . of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946 [15 U.S.C.A. 1051 et seq.].” 19 U.S.C. § 1337(1)(C). “Thus, section 1337 grants the ITC the power to prevent the importation of goods that, if sold in the United States, would violate one of the provisions of the federal trademark statute, the Lanham Act.” *Bourdeau Bros. v. Int’l Trade Comm’n*, 444 F.3d 1317, 1320 (Fed. Cir. 2006).

Gray market goods are “‘produced by the owner of the United States trademark or with its consent, but not authorized for sale in the United States.’” *Id.* (quoting *Gamut Trading Co. v. U.S. Int’l Trade Comm’n*, 200 F.3d 775, 777 (Fed. Cir. 1999)). The sale of articles known as gray market goods may violate the Lanham Act. The cause of action arising under section 337 from importation of gray market goods typically involves goods manufactured abroad but bearing a U.S. trademark. “Generally, gray market goods are defined as ‘genuine goods that . . . are of foreign manufacture, bearing a legally affixed foreign trademark that is the same mark as is registered in the United States; gray goods are legally acquired abroad and then imported without the consent of the U.S. trademark holder.’” *SKF USA Inc. v. Int’l. Trade Comm’n*, 423 F.3d 1307, 1312 (Fed. Cir. 2005) (quoting *Gamut*, 200 F.3d at 778). A similar action may be brought by a trademark holder who produces goods domestically and whose products are re-sold without authorization. *E.g., Bose Corp. v. Ejaz*, 732 F.3d 1726-27 (1st Cir. 2013); *Mary Kay, Inc. v. Weber, Inc.*, 661 F.Supp.2d 632, 642 (N.D. Tex. 2009) (citing *Warner-Lambert Co. v. Northside Development Corp.*, 86 F.3d 3, 6 (2nd Cir. 1996)).

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Until the Supreme Court's decision in *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923), "the prevailing rule in the United States was that the authorized sale of a validly trademarked product, anywhere in the world, exhausted the trademark's exclusionary rights; thus the holder of the corresponding registered United States trademark was believed to have no right to bar the importation and sale of authentically marked foreign goods." *Gamut*, 200 F.3d at 778. Since *Bourjois*, the courts have recognized "that the reputation and goodwill of the holder of the corresponding United States mark warrants protection against unauthorized importation of goods bearing the same mark, although the mark was validly affixed in the foreign country." *Id.* As a result, the courts will exclude gray market goods "when there are material differences between the domestic product and the foreign product bearing the same mark." *Id.* at 779. The protection afforded against gray market infringement extends to the importation of "genuine, but unauthorized" products when such imports "differ materially from authentic goods authorized for sale in the domestic market." *Societe Des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 638 (1st Cir. 1992).

A material difference is one that relates to "the quality and nature of the product bearing the mark." *Gamut*, 200 F.3d at 779. "The rationale behind preventing importation of these goods is that the public associates a trademark with goods having certain characteristics. To the extent that foreign goods bearing a trademark have different characteristics than those trademarked goods authorized for sale in the United States, the public is likely to become confused or deceived as to which characteristics are properly associated with the trademark,

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thereby possibly eroding the goodwill of the trademark holder in the United States.” *Bourdeau*, 444 F.3d at 1320 (citing *Gamut*, 200 F.3d at 778-79).³

The threshold for finding materiality is low, “requiring no more than showing that consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product, for such difference would suffice to erode the goodwill of the domestic source.” *SKF USA Inc. v. Int’l. Trade Comm’n*, 423 F.3d 1307, 1313 (Fed. Cir. 2005). “[D]ifferences that may be readily apparent to consumers may nevertheless be material.” *Gamut*, 200 F.3d at 781. The trademark itself has been held to create consumer expectations which, when defeated, may erode “the trademark holder’s reputation and goodwill.” *Id.* (citations omitted). Material differences may be physical as well as non-physical. *SKF*, 423 F.3d at 1312-14 (holding that nonphysical characteristics include services provided after sale). “[S]imilar goods lacking those associated characteristics may be believed by consumers to have originated from the trademark owner and, lacking such traits, may mislead the consumer and damage the owner’s goodwill.” *Id.* at 1312 (quoting *Gamut*, 200 F.3d at 779). *See also Nestle*, 982 F.2d at 639 n.7 (“[D]ifferences in, say, warranty protection or service commitments—may well render products non-identical in the relevant Lanham Act sense.”). Once material differences are established, there is no burden on the trademark holder to demonstrate actual consumer confusion. “In a gray market goods case, ‘a material difference

³ Courts have viewed the material differences doctrine as an “exception” to the first sale bar. *See* SB at 18-21 and n. 7. In two recent decisions concerning intellectual property, the Supreme Court applied the first sale bar to overseas sales. *Impression Prods., Inc. v. Lexmark Int’l, Inc.*, 137 S.Ct. 1523 (2017) (Patent Act); *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351 (2013) (Copyright Act). It is unclear how these cases may apply, if at all, to claims of trademark infringement based on gray market sales.

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between goods simultaneously sold in the same market under the same name creates a presumption of consumer confusion as a matter of law.” *Bose*, 732 F.3d at 27 (quoting *Nestle*).⁴

In addition to establishing material differences, a complainant in a case of gray market infringement must demonstrate that “all or substantially all” of its authorized sales are accompanied by the asserted material differences. *Bourdeau*, 444 F.3d at 1321; *SKF*, 423 F.3d at 1315. “If less than all or substantially all of a trademark owner’s products possess the material difference, then the trademark owner has placed into the stream of commerce a substantial quantity of goods that are or may be the same or similar to those of the importer, and then there is no material difference.” *SKF*, 423 F.3d at 1315. As stated by the Federal Circuit: “To permit recovery by a trademark owner when less than ‘substantially all’ of its goods bear the material difference from the gray goods [] would allow the owner itself to contribute to the confusion by consumers that it accuses gray market importers of creating.” *Id.*

B. Validity and Ownership

Rockwell is the owner of the entire right and title to and interest in the asserted trademarks. CX-1037C (Michael WS) Q/A at 41-44. Trademark registration certificates for the asserted trademarks create a statutory presumption that each of the marks is valid, that Rockwell is the owner of the mark, and that Rockwell has the exclusive right to use the registered mark. JX-0002-JX-0011; 15 U.S.C. § 1057(b). *See Lovely Skin, Inc. v. Ishtar Skin Care Prods, LLC*, 745 F.3d 877, 882 (8th Cir. 2014). No party has challenged the validity and enforceability of the asserted trademarks, and the trademarks are therefore presumed to be valid. *See Lannom Mfg.*

⁴ The First Circuit opined in *Nestle* that the alleged infringer, “of course, may attempt to rebut this presumption . . . but in order to do so he must be able to prove by preponderant evidence that the differences are not of the kind that consumers, on average, would likely consider in purchasing the product.” 982 F.2d at 641.

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Co. v. Int'l Trade Comm'n, 799 F.2d 1572, 1579-80 (Fed. Cir. 1986) (precluding Commission from finding a patent invalid when no defense of invalidity was raised).

C. Accused Products

Rockwell sells its products under a variety of brand names directly and through a network of authorized distributors, both domestically and abroad. CX-1037C (Michael WS) at Q/A 55, 56. Rockwell makes the same products for sale in the U.S. and overseas, but it sells its products overseas at lower prices than consumers pay in the U.S. *Id.* at Q/A 57. This price structure makes it possible for overseas actors to purchase Rockwell products at lower prices and re-sell them in the U.S. at a profit.

The Defaulted Respondents each sold at least one item over the internet to counsel for Rockwell and its agents. CIB at 18, *see* CX-0027C.0002. These sales form the basis of Rockwell's gray market infringement allegations. The marks at issue are "A-B," "ALLEN-BRADLEY," "ROCKWELL AUTOMATION" and "CONTROLLOGIX," CIB at 9, which must appear on the product itself or its packaging. CX-1012C.0015-0019) (Rockwell Automation Global Product Marking Requirements).

Details regarding the Defaulted Respondents' importations are set forth in CX-0027C and CPX-0039C, and are summarized in the table below.

Respondent	Act	Unauthorized Rockwell Products	Proof of Importation
Fractioni (Hong Kong) Ltd. – <i>Defaulted</i>	<ul style="list-style-type: none">• Selling for importation• Importing• Sale after importation	"New Allen-Bradley AB Contact Block 800F-X10, 1-Year Warranty!" "New Factory Sealed Allen-Bradley AB Controller 1756-L7SP, 1-Year Warranty!" CPX-0039C shows the sale and importation of [REDACTED]	CX-0027C at ¶¶2-3 and Exs. A-1, A-2, A-3, A-4, B-1, and B-2; CPX-0039C

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		products from Fractioni [REDACTED]	
GreySolution Ltd. d/b/a Fibica – <i>Defaulted</i>	<ul style="list-style-type: none"> • Selling for importation • Importing • Sale after importation 	<p>“New CompactLogix Allen Bradley AB 1769-ECL Programmable Logic Controller”</p> <p>“New in Sealed Box” Allen Bradley 1756-L7SP Safety Controller</p>	CX-0027C at ¶¶4-5 and Exs. C-1, C-2, C-3, C-4, C-5, C-6, D-1, D-2, D-3
ShenZhen T-Tide Trading co., Ltd. - <i>Defaulted</i> SoBuy Commercial (HK) Co. Ltd. – <i>Defaulted</i>	<ul style="list-style-type: none"> • Selling for importation • Importing 	<p>“NEW Allen Bradley 1734-TOP Terminal Block”</p> <p>“New IPC In Box 1734-TB3 Allen Bradley PLC Module Screw Terminal”</p> <p>“New In Box Allen Bradley PLC Module Terminal Base Unit 1734-TB”</p> <p>“New in box” AB Allen Bradley 1756-L7SP GuardLogix Safety Controller</p> <p>“New” Allen Bradley CompactLogix 1769 L16ER CompactLogix Safety Controller</p>	CX-0027C at ¶¶6-10 and Exs. E-1, E-2, E-3, F-1, F-2, F-3, G-1, G-2, H-1, H-2, H-3, and X-1
Suzhou Yi Micro Optical Co., Ltd. d/b/a Suzhou Yiwei Guangxue Youxiangongsi – <i>Defaulted</i>	<ul style="list-style-type: none"> • Selling for importation • Importing 	<p>“ONE New AB Allen Bradley 1734-TOP Terminal Base In Box”</p> <p>“NEW Allen Bradley AB 1769-ECL”</p> <p>“NEW AB Allen Bradley 1756-L7SP GuardLogix Safety Controller 1756⁵”</p>	CX-0027C at ¶¶11-13 and Exs. I-1, I-2, I-3, I-4, J-1, J-2, J-3, K-1, and K-2
Can Electric Ltd. – <i>Defaulted</i>	<ul style="list-style-type: none"> • Selling for importation • Importing 	<ul style="list-style-type: none"> • 1756-L7SP Modules (x2) 	CX-0027C at ¶¶21-22 and Exs. R-1 and R-2; EDIS Doc. No. 624329, Sept. 9, 2017 Supplement to the Complaint at ¶30, R-3

⁵ Paragraph 13 of CX-0027C inadvertently listed “ONE New AB Allen Bradley 1734-TOP Terminal Base In Box” instead of “NEW AB Allen Bradley 1756-L7SP GuardLogix Safety Controller 1756.” See CX-0027C, Ex. K-1 (CX-0027C.0119). CIB at 17 n.6.

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<p>KBS Electronics Suzhou Co., Ltd. – <i>Defaulted</i></p> <p>Yaspro Electronics (Shanghai) Co., Ltd. – <i>Defaulted</i></p> <p>Shanghai EuoSource Electronic Co., Ltd. – <i>Defaulted</i></p>	<ul style="list-style-type: none"> • Selling for importation • Importing 	<p>1756-L7SP</p> <p>CPX-0039C shows the sale and importation of [REDACTED] products from Yaspro [REDACTED]</p>	<p>CX-0027C at ¶¶27-28 and Exs. W-1, W-2, W-3, W-4, W-5, W-6, and W-7; EDIS Doc. No. 624329, Sept. 9, 2017 Supplement to the Complaint at ¶31, W-8; CPX-0039C</p>
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For example, Complainants purchased a 1756-L7SP from each of the defaulting respondents (CX-0027C at ¶3 (Fractioni Ltd.), ¶5 (GreySolution d/b/a Fibica), ¶9 (ShenZhen T-Tide Trading Co., Ltd and SoBuy Commercial (HK) Co. Limited), ¶13 (Suzhou Yi Micro Optical Co., Ltd), ¶21-22 (Can Electric Limited) ¶¶27, 28 (KBS Electronics Suzhou Co, Ltd; Yaspro Electronics (Shanghai) Co., Ltd. Shanghai EuoSource Electronic Co., Ltd.); EDIS Doc. No. 624329, Sept. 9, 2017 Supplement to the Complaint at ¶¶30-31). The 1756-L7SP bears the A-B, ALLEN-BRADLEY, and ROCKWELL AUTOMATION Asserted Trademarks (CX-0027C at CX-0027C.0119, CX-0027C.0026, CX-0027C.0031, CX-0027C.0059, CX-0027C.0090, CX-0027C.0092, CX-0027C.0154).

Staff disagrees with Rockwell on whether there is evidence of importation by each respondent of items bearing the CONTROLLOGIX trademark. SB at 24-25. Staff maintains that Rockwell has demonstrated only that respondents Fractioni and Yaspro imported a product bearing the CONTROLLOGIX trademark, citing CPX-0039C (spreadsheet showing [REDACTED] alleged purchases of imported gray market products). Staff says there is no evidence that Rockwell’s 1756L controllers bear the CONTROLLOGIX mark on the packaging, noting that the 1756-L7SP actually bears the “GuardLogix” name. *Id.* (citing CX-0053C.0003). Staff asserts correctly that the product or packaging must bear the trademark. CX-1012C.0015-0019.

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In reply, Rockwell contends that all of its 1756-L61 controllers bear the CONTROLLOGIX trademark. *See* CRB at 10. No evidence, however, links importation of the 1756-L61 controller with respondents other than respondents Fractioni and Yaspro. I agree with Staff that Rockwell has failed to demonstrate infringement of the CONTROLLOGIX trademark by respondents other than Fractioni and Yaspro.

D. Material Differences

Rockwell points to several “material differences” between the accused items sold on the gray market and the items sold with Rockwell’s authorization. Each of these “material differences” is non-physical and arises from Rockwell’s corporate policies with respect to unauthorized sales. The asserted differences are (1) lack of manufacturer’s warranty; (2) lack of probable cause reporting; (3) lack of product safety advisories and product notices; (4) lack of quality control; (5) lack of customer support; (6) lack of licensed software/firmware; (7) lack of intellectual property indemnity; and (8) sale of counterfeit goods. CIB at 21-44.

1. Lack of Manufacturer’s Warranty

Rockwell’s warranty provides full replacement or remanufacture. CX-1037C (Michael WS) at Q/A 75, 131-134; JX-0268 (“The following manufacturer’s warranty is extended to customers purchasing Allen-Bradley® or Rockwell Software™ products (including related services) directly from Rockwell Automation or an authorized Allen-Bradley distributor.”). Rockwell asserts that its warranty procedures are specific to Rockwell, involving internal testing equipment and protocols as well as design updates. CX-1037C (Michael WS) at Q/A 135-136; JX-0268; CX-1185C (Martin WS) at Q/A 23-26, 35). Rockwell will not warrant products that it does not sell itself or that are not sold by an authorized distributor. CX-1037C (Michael WS) at

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Q/A 135; JX-0268C; CX-1185C (Martin WS) at Q/A 18. No contradictory evidence appears in the record.

None of the respondents is an authorized distributor. Accordingly, none of the products sold by respondents is covered by Rockwell's warranty. The evidence shows that no respondent does or could offer an equivalent warranty. As discussed above, the courts have recognized as material warranty provisions that differ between the products sold by the trademark holder and products sold by accused infringers. Rockwell surveyed consumers and found that a large majority (78%) view warranty protection as important to the decision to purchase a Rockwell product. *See* CX-1041C (Franklyn WS) at Q/A 24, 68-69.

2. Lack of Probable Cause Reporting

Rockwell explains that when it receives a product for warranty work, it collaborates with its customer to determine the cause of any problem. CX-1037C (Michael WS) at Q/A 138; CX-1185C (Martin WS) at Q/A 35, 38. This process, according to Rockwell, prevents or minimizes future product failures. There is no evidence that respondents offer similar services and Rockwell contends that, even if they did, such services would be inferior to Rockwell's. There is no evidence in the record to the contrary. Based on its experience and on feedback, Rockwell maintains that its methods of failure analysis are important to customers. *Id.* at Q/A 38, 55. Rockwell's survey shows that 87% of those responding rated as important "Equivalent accompanying post-sales services." CX-1041C (Franklyn WS) at Q/A 68-69. I agree that this is a material difference.

3. Lack of Product Safety Advisories and Product Notices

Rockwell monitors feedback on its products directly and through its authorized dealers, and tracks problems through its own research and development activities. CX-1038C (DeVilbiss

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WS) at Q/A 9. This enables Rockwell to notify its customers of problems through Product Safety Advisories (“PSAs”) and Product Notices (“PNs”). *Id.* at Q/A/11. Rockwell distributes these notices using contact information from customers who purchase products directly from Rockwell or through its authorized distributors. *Id.* at Q/A 13-16. Rockwell notifies affected customers by mail, working with authorized distributors who are contractually required to provide customer information for such purposes. *Id.* at Q/A 13-16; CX-0734C. The information in PSAs and PNs also includes tracking data for the specific product affected by the notice, which enables the customer to identify the product and assists in providing solutions. *Id.* at Q/A 23-26.

Authorized distributors are contractually obligated to provide the identity of their customers to Rockwell, allowing the customer to receive notices of PSAs and PNs. Rockwell does not send notices to customers who purchase from unauthorized dealers. *Id.* at Q/A 9, 12-14, 16. Customers can sign up to receive such notices, but Rockwell states they are unlikely to do so. *Id.* at Q/A 21.

Rockwell maintains that not receiving PSAs and PNs harms the consumer, because the notices may involve “critical safety and commercial issues.” *Id.* at Q/A 10, 30. Rockwell’s customer concerns surveys support the materiality of such notices. *Id.* at Q/A 31. A survey conducted by Rockwell’s expert “found that 91% of those surveyed stated that receiving safety recall information was important or very important to their purchasing decision.” CX-1041C (Franklyn WS) at Q/A 68-69. I find that the lack of notice of PSAs and PNs for products purchased from unauthorized purveyors of Rockwell products is material.

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4. Lack of Quality Control

Rockwell's authorized distributors "all enter into contracts with Rockwell" to obtain the right to sell genuine Rockwell products. CX-1037C (Michael WS) at Q/A 60, 62, 64, 66-68, 75. The contracts obligate authorized distributors to maintain quality controls "in the sale, shipping, handling, installation, support for, and marketing of" genuine Rockwell products. *See Id.* at Q/A 152; JX-0337C; CX-0940C; CX-0988C; CX-0989C; CX-0990C; CX-0991C; CX-0993C; CX-0994C; CX-0995C; CX-0996C; CX-0997C; CX-0998C; CX-0999C; CX-1000C; CX-1001C, CX 1002C; CPX-037C). Because many Rockwell products "include electronic equipment or other sensitive parts that are vulnerable to shock, vibration, compression, temperature, contamination, moisture, and electrostatic discharge and can be permanently damaged or weakened, sometimes, without any observable way to detect such weakening," the authorized distributors' quality controls are important. CX-1037C (Michael WS) at Q/A 151-152. Rockwell employs personnel to monitor the operations of authorized distributors to ensure compliance, and maintains audit rights with respect to quality control procedures. *Id.* at Q/A 157.

Rockwell also discontinues products that are defective and instructs its authorized distributors to pull products from the shelves when necessary, and monitors the inventory held by authorized distributors, to permit notification of products with issues requiring remediation. *Id.* at Q/A 152, 155. No evidence in the record contradicts Rockwell's assertions in this regard.

I find that Rockwell's evidence concerning quality control procedures demonstrates that these characteristics are material, and distinguishes products sold by authorized Rockwell dealers from products that are not authorized to be sold by Rockwell. The evidence shows that quality control procedures are important to customers. *Id.* at Q/A 153; CX-1041C (Franklyn WS) at

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Q/A 68-69 (88% of customers rate as important “New-in-box and in the manufacturer’s packaging;” 68% rate as important “Direct sourcing from the manufacturer.”).⁶

5. Lack of Customer Support

Rockwell trains its own employees and those of its authorized distributors to provide pre- and post-sale customer support. CX-1037C (Michael WS) at Q/A 165-166, 170. These services are undisputed. Rockwell maintains that they can be provided only by Rockwell and its authorized distributors, and there is no evidence in the record concerning any customer support procedures that may be provided by respondents. Customer support is material to consumers. Rockwell’s expert found that 87% of those surveyed stated that post-sales services are important or very important to the purchasing decision. CX-1041C (Franklyn WS) at Q/A 68-69.

6. Hardware with Lack of Licensed Software/Firmware

Certain Rockwell products require firmware to operate, but the firmware is not pre-installed. “[O]nly Genuine Rockwell Products purchased through a Rockwell AD (authorized distributor) or directly from Rockwell itself are eligible to have licensed firmware; Unauthorized Rockwell Products are not eligible to have the licensed firmware.” SB at 33 (citing CX-1023). CX-1023 is a Rockwell Automation End User License Agreement (“EULA”), in which the user agrees to the terms and conditions set by Rockwell concerning use of the software provided.

For example, firmware for Rockwell’s programmable logic controllers (“PLCs”) must be downloaded from Rockwell. CX-1037C (Michael WS) at Q/A 177-182. The EULA states that

⁶ In a previous investigation, the Commission took no position on whether the alleged infringer’s “lack of quality control over gray market [] distribution, storage, and transportation constitutes a material difference for gray market infringement analysis.” *Certain Cigarettes and Packaging Thereof* (“Cigarettes”), Inv. No. 337-TA-643, Comm’n Op., 2009 WL 6751505 at *8 (Oct. 1, 2009).

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only purchasers from authorized Rockwell distributors are entitled to download the necessary firmware. *Id.* at Q/A 182. Rockwell maintains that its customers are ethical and “thousands” of them “accept the terms of Rockwell’s EULA when they download firmware from Rockwell’s website every week.” CIB at 39 (citing CX-1037C (Michael WS) at Q/A 182.

Based on the dollar amount of allegedly infringing sales, however, *see* CX-1042C (Prowse WS) at Q/A 125 ([REDACTED]), thousands of “unethical” customers also must be downloading the firmware. Staff’s contention that “the installation of firmware in order to be operational [is] *per se* significant to customers,” SB at 33, misses the point, which is not whether consumers want the purchased item to work, but whether they are willing to download the firmware in order to make it work, irrespective of whether they obtained the product from an authorized seller. Apparently, large numbers of buyers are not deterred by Rockwell’s EULA from downloading the firmware necessary to operate their purchases. Rockwell presents no survey results or other objective evidence of materiality concerning whether it is important to a consumer to download authorized software/firmware, as opposed to unauthorized firmware, as long as the product using the firmware is operational. Rockwell has not carried its burden to demonstrate materiality with respect to this characteristic.

7. Lack of Intellectual Property Indemnity

Subject to its terms, Rockwell indemnifies purchasers of genuine Rockwell products against claims of infringement of intellectual property rights. CX-1037C (Michael WS) at Q/A 188; CX-1022C at 4-5. Rockwell states that the indemnity is valuable to customers, *see* CX-1037C (Michael WS) at Q/A 191, but Rockwell presents no survey results or other objective evidence of materiality. Rockwell therefore has not carried its burden with respect to this characteristic.

8. Sale of “Counterfeit” Goods

Rockwell relies on anecdotal evidence regarding purchasers who thought they were buying new products but were supplied with outdated or broken items. CIB at 41-44. Although Rockwell describes such instances as sales of “counterfeit” products, *id.*, these instances do not describe gray market infringement. The products in these instances simply were not as advertised, *e.g.*, “new.” The relevant inquiry to establish liability under a gray market theory, as discussed above, is the existence of material differences between the product authorized for sale and the unauthorized product that may confuse a buyer. False statements *about* a product may give rise to a different cause of action, but do not constitute material differences between an authorized product and a gray market product.

In sum, I find that Rockwell has demonstrated material differences with respect to importations by defaulting respondents based on lack of manufacturer’s warranty, lack of probable cause reporting, lack of product safety advisories and product notices, lack of quality control, and lack of customer support.⁷

E. Authorized Sales

As discussed above, where a trademark owner itself sells or authorizes the sale of a substantial number of gray market goods, such sales may defeat a claim of trademark

⁷ Radwell maintained during the period of its participation in the investigation that the differences identified above were not material to sophisticated consumers of Radwell products, who neither expected nor wanted Rockwell warranties, customer service, *etc.* Gray market infringement cases do not rely on the actual expectation of actual customers to determine the materiality of product differences, as discussed above. In any event, I find no survey or other objective evidence in this record concerning respondents’ customers’ expectations regarding the products they bought.

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infringement. The trademark holder bears the burden of demonstrating that substantially all of its own sales were accompanied by the material differences. *Bourdeau*, 444 F.3d at 1325.

During this investigation, former respondent Radwell maintained that Rockwell permits a substantial number of products to be re-sold by original equipment manufacturers (“OEMs”), which sales, like the sales made by the respondents, lack the material differences discussed above. In other words, Radwell alleged that Rockwell itself introduces a substantial number of gray market products into commerce. Radwell Mem. in Opposition to Rockwell Motion for Summary Determination Re “Authorization” to Sell Rockwell Products (Motion Docket No. 1074-024) at 1-2 (“Radwell Opp. to MSD”), addressed in Order No. 33 (Jun. 29, 2018).⁸ To be clear, these items are genuine Rockwell products sold by Rockwell or its authorized dealers and allegedly re-sold by OEMs (or others, *see infra*), without the original Rockwell warranty and other material differences described above. Radwell maintained that Rockwell condones such sales, and thus that Rockwell cannot recover for alleged gray market infringement.

Rockwell responds with several arguments. First, Rockwell argues that sales by OEMs do not count as gray market sales because “the doctrine of first sale likely applies to those sales.” CIB at 45 (quoting *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Comm’n

⁸ As stated above, Commission Rule 210.39(a) defines the record as “all pleadings, the notice of investigation, motions and responses, all briefs and written statements, and other documents and things properly filed with the Secretary, in addition to all orders, notices, and initial determinations of the administrative law judge, orders and notices of the Commission, hearing and conference transcripts, evidence admitted into the record (including physical exhibits), and any other items certified into the record by the administrative law judge or the Commission.” 19 C.F.R. § 210.38(a). Because the hearing in this case, which was conducted by written submissions, did not include a submission by Radwell, which withdrew from the investigation before hearing, the decision draws on pertinent portions of the record that were submitted before the hearing. The remaining parties, Rockwell and Staff, were on notice that this decision would be based on the entire record. *See* Order No. 43 at 6.

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Op., 2004 WL 1598763 at *17 (June 30, 2004)). Rockwell's reliance on the first sale doctrine conflicts with the underlying premise of gray market infringement. Rockwell and Staff have maintained throughout this investigation that the first sale bar does not apply where re-sold products are materially different, *i.e.*, the products lack the Rockwell warranty, customer services, *etc.* Using the logic espoused by Rockwell and Staff, that material differences constitute an *exception* to the first sale bar, it cannot be the case that OEM sales are entirely excluded from the calculation of gray market sales *because* of the first sale bar.

To the extent that sales by OEMs may be in a separate category from sales by Radwell or by the Defaulted Respondents, such a distinction would need to be based on a showing that the OEMs do not re-sell Rockwell products with material differences to consumers. If it were demonstrated that OEMs did make such sales, the sales would count against Rockwell's claim of gray market infringement. This presents a fact issue, rather than a blanket exception for OEMs.

I address below the factual question of whether substantial amounts of infringing products enter the marketplace through re-sales by OEMs and others. After that discussion, I address the question whether such sales are made with Rockwell's consent, express or implied.

In addition to the sales by OEMs, former respondent Radwell maintained that Rockwell sells substantial amounts of products to value-added systems integrators ("VARs"), who market systems incorporating Rockwell products along with those of other manufacturers into large, complex machines and systems. Radwell Pre-Hearing Brief ("Radwell Brief") at 26. According to Radwell, [REDACTED] the Allen-Bradley products placed into commerce by Rockwell reach their end users through such VAR sales. *Id.* (citing RX-0505C). Radwell asserted that none of the VAR sales are accompanied by the alleged "material differences." Radwell pointed, for example, to the lack of a warranty, which attaches only to products bought directly from

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Rockwell or an authorized distributor (which a VAR is not). *See id.* at 27 (citing RX-1891C (Rockwell Warranty)). Radwell asserted that VARs are permitted to sell stand-alone Rockwell products to customers for use “as needed” for integration into systems solutions. *Id.* at 28. Radwell disputed Rockwell’s characterizations of VAR sales as sales by OEMs and argued that, even assuming OEMs should be excluded from the calculation, [REDACTED] Rockwell’s sales to end users “indisputably” were made by VARs. *Id.* *See* Radwell Opp. to MSD, Ex. 6 (Rockwell sales chart).⁹

Rockwell responds that the vast majority of sales by OEMs and VARs take place in the context of commercial transactions involving complex items that incorporate Rockwell products into larger products or systems. Rockwell argues that consumers of “black box” items or complex systems will not be confused by the inclusion of Rockwell products that do not carry a Rockwell warranty, for example. They will expect (according to Rockwell) that the supplier of the black box item will address quality issues, even if the problem arises from a Rockwell part.¹⁰

The record is unclear as to the kinds of sales that are made by OEMs and VARs, however, and is almost entirely silent as to the actual expectations of the customers who buy Rockwell products from OEMs and VARs. Part of the confusion arises from bewildering terminology. The term OEM stands for original equipment manufacturer, but it is questionable whether the equipment means a “black box,” finished good, a system, a panel, or something else.

⁹ Radwell also alleged that [REDACTED] CX-1185C (Martin WS) at Q/A 66-71, 19-49, 76-77.

¹⁰ Staff proposes this analogy: “Apple is not ‘reselling’ a Qualcomm semiconductor chip or a Samsung display screen when a consumer purchases an iPhone that incorporates those components” SB at 35.

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The term VAR is used in the record in at least a couple of different ways. In one exhibit, the term VAR represents “value add systems integrator (as that term is generally defined in the industry) for manufacturing information and automation control solutions.” CX-0759C.0002, ¶ 7.3. As explained by one Rockwell witness, a VAR is not selling a box; the VAR is selling a system that is customized to the needs of the consumer. Radwell Opp. Ex. 3 (Moriarty Dep.) at 121:9-12 (“They’re selling a solution.”). Staff, on the other hand, says VAR stands for “Value Added Resellers, which include, but are not limited to, panel builders, systems integrators, and original equipment manufacturers” SB at 35.

To compound the confusion in terminology, Rockwell uses the two terms, OEMs and VARs, interchangeably. *E.g.*, CIB at 45 (“As with the OEMs at issue in *Certain Bearings*, sales by VARs involve the incorporation of a Rockwell Genuine Product into a larger, more complex machine or system.”). *See* Radwell Opp. Ex. 3 (Moriarty Dep.) at 30:15-16 (“I was told yesterday by [Rockwell witness] Mr. Michael that Mr. Michael considers OEMs VARs.”). It does not appear, however, that the terms OEM and VAR are necessarily synonymous. An OEM sells only parts incorporated into a black-box, mass-produced finished product. *See* Radwell Brief at 33. A VAR, on the other hand, may sell stand-alone Rockwell products to the VAR’s customer as spare parts. Radwell Opp. Ex. 2 (Michael Dep.) at 205:6-9. In addition, there seem to be many different categories of VARs. *See* Radwell Opp. Ex. 6 (sales chart listing sales by “A&E, EPC,” “Consultant,” “Contractor,” “Educational Inst.,” “End User,” “Non-authorized Distr,” “OEM,” “Panel Builder,” “RA Authorized Distr,” “System Integrator,” and “Unknown”). Most VARs and OEMs are not contractually bound to Rockwell in any way; they are simply customers. Radwell Opp. Ex. 2 (Michael Dep.) at 205:15-21.

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Some VARs do have a contractual relationship with Rockwell, however. Rockwell maintains that there are about 2,400 systems integrator companies in “our program.” Radwell Opp. Ex. 3 (Moriarty Dep.) at 30:20-21. Of these, some 300 are “recognized end solution partners” listed on Rockwell’s website. Radwell Opp. at 29; *see, e.g.*, Moriarty Dep. at 37:25-38:1. The “recognized system integrators” who partner with Rockwell have contractual obligations under Rockwell’s “Recognized System Integrator Program.” *See* CX-0759C. Among these obligations is that the VAR “will resell Products, including spare parts, only as part of the solution it offers to customers. [The VAR] is not authorized to and will not resell Products on a stand-alone basis.” CX-0759C.0003. The remaining 2,100 VARs in Rockwell’s “program” do not seem to have those contractual obligations.

This is a confusing record. VARs who have no contractual obligation to Rockwell may be selling a large number of products into the gray market, as Radwell alleged. Radwell argued that Rockwell provides discounts to favored VARs to incentivize them to sell Rockwell products. *See* RPHB at 30 (citing RX-2190C (Moriarty Dep.) at 82:3-83:1, 212:2-8).¹¹ But Radwell did not identify any specific instance in which a VAR re-sold a stand-alone Rockwell product. Rockwell, on the other hand, has submitted evidence that such sales are not approved by Rockwell, expressly or impliedly, even if they occur.

Sales of materially different goods do not count against the trademark owner unless they were made with the owner’s consent, express or implied. The Commission borrows from the law of agency to determine if sales by a third party should be attributed to the trademark owner. *Cigarettes*, 2009 WL 6751505 at *4. “Apparent authority is created when: ‘[T]he principal,

¹¹ Radwell’s proposed exhibits were not admitted into evidence. The pertinent excerpts from the Moriarty deposition are found at Radwell Opp. Ex. 3.

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either intentionally or by lack of ordinary care, induces third persons to believe that an individual is his agent even though no actual authority, express or implied, has been granted to such individual.” *Id.* (quoting *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Comm’n Remand Op. at 16 (Sept. 18, 2008)).

Rockwell makes the case that its OEMs and VARs are not authorized to re-sell products on the open market, [REDACTED]

[REDACTED] CX-0983C.0004. The contracts with “Recognized System Integrators” contain a similar limitation. CX-1003C.0003. No evidence appears in the record of any action or behavior by Rockwell that could be interpreted as permitting stand-alone sales of Rockwell products by parties other than Rockwell or its authorized distributors. There is evidence to the contrary, showing that Rockwell actively polices non-compliance by VARs. *See* CIB at 47 (citing two examples of VARs with whom Rockwell ceased doing business when it learned they were re-selling stand-alone Rockwell products); CX-1183C (Bentley WS) at Q/A 18-29. Further, Rockwell submits evidence that stand-alone re-sales are insubstantial. Rockwell states that sales of spare parts by OEMs constitute less than [REDACTED] of OEM sales. CX-1182C (Penick WS) at Q/A 26, 31. One VAR says its sales of spare parts would amount to [REDACTED] sold by the entity. CX-0561C (Tinsley Decl.) at ¶ 15.

In sum, Rockwell has demonstrated that substantially all of its authorized sales bear the material differences that distinguish them from the items sold by respondents. Rockwell has thus shown gray market infringement by all of the Defaulted Respondents. As discussed above, all of the Defaulted Respondents infringe the first nine asserted trademarks, covering the A-B,

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ALLEN-BRADLEY, and ROCKWELL AUTOMATION marks. Fractioni and Yaspro further infringe the CONTROLLOGIX trademark.

F. Domestic Industry

The domestic industry requirement under section 337 arises from the statutory language governing intellectual property-based proceedings in subsection 337(a)(2), which requires that a complainant establish that “an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Subsection (3) of section 337(a) provides:

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

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

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

19 U.S.C. § 1337(a)(3). The domestic industry requirement consists of an “economic prong” and a “technical prong.” *Certain Stringed Musical Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 13, 2009 WL 5134139, at *10 (May 16, 2008). The “economic prong” of the domestic industry requirement is satisfied when it is determined that the economic activities and investments set forth in one of the subprongs of subsection 337(a)(3) has taken place. *Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm’n Op. at 21 (Nov. 1996). The “technical prong” is satisfied when the articles at issue are protected by the asserted intellectual property, *i.e.*, they bear the asserted trademarks. *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Initial Determination at 90 (June 29, 2012), *not reviewed in relevant part by* Comm’n Notice (Aug. 30, 2012).

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As discussed above, Mr. Michael testified that “[a]ll Rockwell Products sold by Rockwell bear the Asserted Trademarks,” and accordingly, these products satisfy the technical prong of the domestic industry requirement. CX-1037C (Michael DWS) at Q/A 45. No party raised any dispute that the technical prong is satisfied. CIB at 54; *see* SB at 39-40; RPHB at 62.

Pursuant to Order No. 39, summary determination was granted with respect to the economic prong of the domestic industry requirement for the ControlLogix® and PanelView® product lines that Rockwell identified as bearing asserted trademark registration nos. 1172995, 696401, 693780, 1172994, 712800, 712836, 2510226, 2671196, and 2701786. Order No. 39 at 10-15 (July 12, 2018), *not reviewed by* Comm’n Notice (Aug. 14, 2018). Rockwell submits that the economic prong is also satisfied with respect to trademark registration no. 2412742, which is the ControlLogix® mark. CIB at 73-75. Because the economic prong was found to be satisfied with respect to the ControlLogix® product line on summary determination, this finding also applies to the ControlLogix® mark.¹² Accordingly, the economic prong of the domestic industry requirement is satisfied with respect to all of the asserted trademarks.

Rockwell has thus established the existence of a domestic industry in the asserted trademarks pursuant to section 337(a)(2).

¹² There appears to be some discrepancy between Mr. Michael’s testimony that “[a]ll Rockwell Products sold by Rockwell bear the Asserted Trademarks,” CX-1037C (Michael DWS) at Q/A 45, and Rockwell’s arguments that associate the ControlLogix® mark with only the ControlLogix® products. CIB at 73-75; *see* SB at 40 (“The tenth Asserted Trademark to CONTROLLOGIX, Registration No. 2412742, is used only on the ControlLogix® product line.”). Regardless of whether the ControlLogix® mark appears on any other products, the domestic industry requirement is satisfied for this mark by Rockwell’s investments in the ControlLogix® products, which were found to be significant in Order No. 39.

IV. COPYRIGHT INFRINGEMENT

Rockwell accuses each of the Defaulted Respondents of copyright infringement based on the importation of accused products that are used with copyrighted software that is downloaded in the United States after importation. CIB at 54-62; SB at 40-47.

A. Legal Standard

Rockwell's asserted claim against the Defaulted Respondents is one of contributory copyright infringement under section 337(a)(1)(B)(i), which prohibits "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that — (i) infringe . . . a valid and enforceable United States copyright registered under title 17." 19 U.S.C. § 1337(a)(1)(B)(i). In *Suprema Inc. v. International Trade Comm'n*, the Federal Circuit affirmed the Commission's application of this subsection of the statute to induced and contributory patent infringement. 796 F.3d 1338, 1347 (Fed. Cir. 2015).¹³

¹³ In *Suprema*, the Federal Circuit relied on the statutory definitions of induced and contributory patent infringement in sections 271(b) and (c) of the Patent Act. *Id.* at 1347 (citing 35 U.S.C. § 271(b) ("Whoever actively induces infringement of a patent shall be liable as an infringer."), § 271(c) ("Whoever offers to sell or sells ... a component of a patented machine ... shall be liable as an infringer.")). There is no corresponding statutory language in the Copyright Act, although a cause of action for contributory copyright infringement has been recognized through common law principles of vicarious liability. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (1984). Because contributory copyright infringement arises under common law rather than by statute, it is not clear whether the precedent in *Suprema* extends to a claim of contributory copyright infringement under section 337(a)(1)(B)(i). Nevertheless, Rockwell would likely have a cause of action under subsection (a)(1)(A), as the Commission has previously recognized contributory copyright infringement as an "unfair act" under the pre-1988 version of section 337. See *Certain Personal Computers and Components Thereof*, Inv. No. 337-TA-140, USITC Pub. No. 1504, Comm'n Op. at 27-40 (March 1984); see Initial Determination, 1983 WL 207160, *8-15 (Dec. 9, 1983) ("Infringement under Section 501(a) of the Copyright Act may be 'direct' or 'contributory.'").

The same federal common law of contributory copyright infringement would apply under either section 337(a)(1)(A) or (a)(1)(B). See *TianRui Group Co. Ltd. v. Int'l Trade Comm'n*, 661

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Under the Copyright Act, Title 17 of the U.S. Code, copyright owners have exclusive rights, including the right “(1) to reproduce the copyrighted work in copies” and “(3) to distribute copies . . . of the copyrighted work to the public by sale or transfer of ownership” 17 U.S.C. § 106. “Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright. 17 U.S.C. § 501(a).

“One infringes contributorily by intentionally inducing or encouraging direct infringement.” *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*, 545 U.S. 913, 930 (2005). To establish contributory infringement, the copyright holder must demonstrate an underlying direct infringement. *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 937 (9th Cir. 2010). In the context of patent infringement, the Federal Circuit has held that induced infringement “requires knowledge that the induced acts constitute . . . infringement.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). Courts have applied this standard in the context of copyright infringement, holding that it is not enough to prove that an inducer “should have known” of infringement but that “proving contributory infringement requires proof of at least willful blindness; negligence is insufficient.” *BMG Rights Management (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 310 (4th Cir. 2018).

B. Asserted Copyrights

Rockwell asserts eight registered copyrights: Copyright Reg. Nos. TX0008389890 (JX-0012), TX0008389887 (JX-0013), TX0008390098 (JX-0014), TX0008390094 (JX-0015),

F.3d 1322, 1327-28 (Fed. Cir. 2011) (applying “federal common law” to a case of trade secret misappropriation). The only substantive difference between an (a)(1)(A) and (a)(1)(B) claim would be the standards for establishing a domestic industry, but because Rockwell has asserted a tortious interference claim based on its copyrighted software under subsection (a)(1)(A), an analysis of the relevant domestic industry has been briefed under both standards and is addressed herein. *See infra.*, section V.D.

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TX0008390077 (JX-0016), TX0008390088 (JX-0017), TX0008390116 (JX-0018), and TX0008390111 (JX-0020). The copyright registration certificates in the record establish that Rockwell is the owner of each of these copyrights, and pursuant to the Copyright Act, the certificates are *prima facie* evidence of their validity. 17 U.S.C. § 410(c). No party has challenged the validity of the asserted copyrights. *See* SB at 44. Accordingly, the asserted copyrights are presumed valid. *See Lannom Mfg. Co. v. Int'l Trade Comm'n*, 799 F.2d 1572, 1579-80 (Fed. Cir. 1986) (precluding Commission from finding a patent invalid when no defense of invalidity was raised).

Each of the asserted copyrights protects a version of firmware for certain of Rockwell's controller products. CIB at 9; CX-1037C at Q/A 217-18. Copyright Reg. No. TX0008389890 protects firmware version 16 for CompactLogix® L3x Controllers, Copyright Reg. No. TX0008389887 protects firmware version 16 for ControlLogix® L6 Controllers, Copyright Reg. No. TX0008390098 protects firmware version 20 for CompactLogix® L3x Controllers, Copyright Reg. No. TX0008390094 protects firmware version 20 for CompactLogix® L3y Controllers, Copyright Reg. No. TX0008390077 protects firmware version 20 for ControlLogix® L6 Controllers, Copyright Reg. No. TX0008390088 protects firmware version 20 for ControlLogix® L7 Controllers, Copyright Reg. No. TX0008390116 protects firmware version 30 for CompactLogix® L3y Controllers, and Copyright Reg. No. TX0008390111 protects firmware version 30 for ControlLogix® L7 Controllers. *Id.*

C. Accused Products

The Defaulted Respondents are accused of infringing different asserted copyrights based on the products they have imported. CIB at 61-62.

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Fractioni is accused of infringing Copyright Reg. Nos. TX0008389890 and TX0008390098 based on sales of four Allen Bradley 1769-L32E ControlLogix® controllers. *Id.*; CPX-0039C. Fractioni is also accused of infringing Copyright Reg. Nos. TX0008389887 and TX0008390077 based on sales of four Allen Bradley 1756-L61 ControlLogix® controllers. *Id.* Fractioni is further accused of infringing Copyright Reg. Nos. TX0008390088 and TX0008390111 based on its sale of an Allen Bradley 1756-L7SP ControlLogix® Safety Controller. *Id.*; *see* CX-0027C, Ex. B.

GreySolution is accused of infringing Copyright Reg. Nos. TX0008390088 and TX0008390111 based on its sale of an Allen Bradley 1756-L7SP ControlLogix® Safety Controller. *Id.*; *see* CX-0027C, Ex. D.

SoBuy and T-Tide are accused of infringing Copyright Reg. Nos. TX0008390094 and TX0008390116 based on their sale of an Allen Bradley 1769-L16ER CompactLogix® Safety Controller. *Id.*; *see* CX-0027C, Ex. E. SoBuy and T-Tide are also accused of infringing Copyright Reg. Nos. TX0008390088 and TX0008390111 based on their sale of an Allen Bradley 1756-L7SP GuardLogix® Safety Controller. *Id.*; *see* CX-0027C, Ex. X.

Can Electric is accused of infringing Copyright Reg. Nos. TX0008390088 and TX0008390111 based on its sale of two Allen Bradley 1756-L7SP ControlLogix® Safety Controller. *Id.*; *see* CX-0027C, Ex. R.

KBS, Euosource, and Yaspro are accused of infringing Copyright Reg. Nos. TX0008390088 and TX0008390111 based on their sale of one Allen Bradley 1756-L7SP ControlLogix® Safety Controller. *Id.*; *see* CX-0027C, Ex. W.¹⁴

¹⁴ Rockwell also alleges that “Yaspro continue[s] to sell Unauthorized Rockwell Copyright Products to this day,” citing a URL that appears to point to a search on Yaspro’s web site. CIB

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In the copyright infringement section of their briefs, neither Rockwell nor Staff identify any product sold by Yi Micro. CIB at 61-62; SB at 45. As discussed above in the context of trademark infringement, however, a product purchased from Yi Micro was misidentified in the Complaint—Yi Micro had offered for sale an Allen Bradley 1756-L7SP GuardLogix® Safety Controller, which would use firmware that infringes Copyright Reg. Nos. TX0008390088 and TX0008390111. *See* CX-0027C, Ex. K.^{15,16}

D. Underlying Direct Infringement

“To establish secondary infringement, [a copyright holder] must first demonstrate direct infringement.” *MDY Industries*, 629 F.3d at 937; *see also Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 386 (3rd Cir. 2016) (“[T]o prove a claim of contributory or vicarious infringement, a plaintiff must first show direct infringement by a third party.”); *La Resolana Architects, PA v. Reno, Inc.*, 555 F.3d 1171, 1181 (10th Cir. 2009) (“[B]oth contributory and vicarious infringements require someone to have directly infringed the copyright.”).

The requirement to prove an underlying direct infringement is well-established in patent infringement cases involving induced and contributory infringement. *See Certain Automated Teller Machines, ATM Products, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-972, Initial Determination at 150-58 (Nov. 30, 2016) (discussing legal standards for

at 62 n.13. This evidence is not part of the record and will not be considered as part of this determination. The Rockwell product identified in the newly admitted exhibit, CX-1189, is not accused of copyright infringement.

¹⁵ *See supra*, n.5.

¹⁶ In its post-hearing brief, Rockwell argues that Yi Micro “sell[s] Unauthorized Rockwell Copyright Products to this day,” but cites only to two recent eBay listings that were not admitted into evidence and only show evidence of offers for sale without evidence of importation into the United States. CIB at 62 n.12.

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induced and contributory patent infringement). This direct infringement may be proven either by specific instances of infringement or by circumstantial evidence showing the accused device “necessarily infringes the patent in suit.” *ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007). Circumstantial evidence must show that at least one person directly infringed an asserted claim during the relevant time period. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1318 (Fed. Cir. 2009).

Although the issue of underlying direct infringement was briefed extensively in the context of a summary determination motion, *see* Order No. 38 (July 12, 2018), neither Rockwell nor Staff addressed the issue in their post-hearing briefs. *See* CIB at 54-62; SB at 40-47. The only reference to direct infringement in Rockwell’s post-hearing brief is in its recitation of legal standards, where Rockwell acknowledges that “[t]o establish a claim of contributory infringement, a complainant must show: ‘(1) a third party directly infringed the plaintiff’s copyright’” CIB at 57-58 (quoting *Leonard*, 834 F.3d at 387).

In their pre-hearing briefs, Rockwell and Staff indicated that they intended to prove direct infringement through circumstantial evidence surrounding Radwell’s sale of Rockwell products. CPHB, Vol. III at 7-10; SPHB at 52-53. Rodney Michael, Rockwell’s Director of Global Market Access, testified that Rockwell’s ControlLogix® and CompactLogix® controllers are sold without firmware and are inoperable without downloading the necessary firmware. CX-1037C at Q/A 177-80. Rockwell’s expert, Dr. Prowse, identified [REDACTED] Rockwell products recently sold by Radwell that are associated with firmware protected by the asserted copyrights. CX-1042C at Q/A 117. The total value of these products was over [REDACTED] with purchase prices ranging from [REDACTED]. *Id.* From this evidence, Rockwell argued that “[i]t is impossible to conclude that *not a single user* of any of these [REDACTED] products [REDACTED]

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██████ ever used these products.” CPHB at 9-10 (emphasis in original). Staff argued that “[t]he only reasonable conclusion to be drawn is that end users who purchase the unauthorized Rockwell Copyright Products from Radwell necessarily download the firmware in the United States from Rockwell’s website and infringe one or more of the Asserted Copyrights.” SPHB at 53.

The circumstantial evidence cited by Dr. Prowse may have been sufficient to support a finding of direct infringement by Radwell’s customers, but there is no comparable circumstantial evidence regarding the Defaulted Respondents’ sales. With respect to GreySolution, SoBuy, T-Tide, Can Electric, KBS, Euosource, Yaspro, and Yi Micro, Rockwell has only identified the sale of one or two accused products. Products purchased from GreySolution, SoBuy/T-Tide, and Yi Micro were delivered to what appears to be a residential address in Alexandria, Virginia. *See* CX-0027C, Exs. D-3, E-2, K-2.¹⁷ There is no evidence that these products were ever used in an industrial setting—the photographs attached to the Complaint only show unopened packages. *Id.* A declaration attached to the Complaint states that these products were purchased at the direction of Rockwell’s counsel, for the purpose of filing the complaint in this investigation, not for any industrial use. *Id.*, Decl. of Adam Swain. The circumstantial evidence in the record thus makes it unlikely that any copyrighted firmware was ever downloaded on these imported products.¹⁸

¹⁷ A second product was purchased from SoBuy/T-Tide, a 1756-L7SP controller, but there was no evidence attached to the complaint showing that it arrived in the United States. *See* CX-0027C, Ex. X. Similarly, there is no evidence that a 1756-L7SP controller purchased from Fractioni arrived in the United States. *See Id.*, Ex. B.

¹⁸ Even if firmware were downloaded onto these products, it is not clear that the download would constitute copyright infringement, because Mr. Swain was acting on behalf of Rockwell, the copyright owner.

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The products purchased from Can Electric and KBS/Euosource/Yaspro were shipped to a business address in Laurel, Maryland. *See* CX-0027C, Exs. R-1, W-6. Again, however, the photographs attached by Rockwell only show unopened packages. *See* Supplement to Complaint (Sept. 29, 2018), Ex. R-3, W-8. The addressee on these two packages was redacted from Rockwell's filing, although the payment record for the Euosource order identifies the addressee as "Adam Swain." CX-0027C, Exs. W-3, W-6. Mr. Swain is an attorney for Rockwell in this investigation,¹⁹ and the circumstantial evidence surrounding these sales thus similarly points to a conclusion that it is unlikely that copyrighted firmware was ever downloaded on these imported products.

With respect to Fractioni, Rockwell identifies additional evidence of accused products that were sold [REDACTED]. *See* CPX-0039C. Specifically, importation data [REDACTED] shows four Allen Bradley 1769-L32E ControlLogix® controllers sold by Fractioni [REDACTED] on April 21, 2011. *Id.*²⁰ It also shows four Allen Bradley 1756-L61 ControlLogix® controllers sold by Fractioni [REDACTED], with three sold on April 21, 2011, and one sold on June 15, 2011. *Id.*²¹ Rockwell does not allege any direct infringement [REDACTED], however, and there is no evidence that [REDACTED] ever downloaded firmware for the products that it purchased from Fractioni. Dr. Prowse's analysis of [REDACTED] copyright infringement was limited to products acquired after

¹⁹ *See supra*, n.18.

²⁰ Although Rockwell accuses these products of infringing two asserted copyrights, only the earlier copyright could have been infringed at the time of this sale in April 2011, because Version 20 of the firmware for L3x controllers was not published until December 2011, more than seven months later. *See* JX-0014.

²¹ Only the earlier of the two asserted copyrights could have been infringed at the time of this sale in April and 2011, because Version 20 of the firmware for L6 controllers was not published until December 2011. *See* JX-0016; *see supra*, n.20.

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March 2015, placing these 2011 Fractioni sales outside the scope of his testimony. *See* CX-1042C (Prowse DWS) at Q/A 117-18. There is no evidence of direct infringement with respect to these Fractioni imports, and accordingly, Rockwell has not shown direct infringement of any asserted copyright in connection with products sold by any of the Defaulted Respondents.

E. Contributory Infringement

Separate from the showing of direct infringement, Rockwell must show that each respondent “knowingly takes steps that are substantially certain to result in such direct infringement.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1171 (9th Cir. 2007). To satisfy this knowledge requirement, Rockwell and Staff point to evidence in the record that several of the defaulted respondents are experienced in the industrial supply business. CIB at 60-61; SB at 46-47. Public documents from websites associated with some of the respondents were attached to the Complaint, showing that these respondents are professional suppliers of industrial parts: CX-0028 (www.can-electric.com); CX-0033 (www.euosource.com); CX-0037 (www.yaspro.com); CX-0044 (fractioni.com). A page associated with Can Electric at alibaba.com states that Can Electric is a “professional global automation supplier, built on over 10 years of experience.” CX-0029. A page associated with EuoSource offers “[c]ustomer service in 1-4 hours” and an “[e]xperienced technical [*sic*] support team.” CX-0035. Yaspro’s homepage claims “a proven history of high quality, performance, and reliability,” and states that “[a]ll the parts will be tested before shipment.” CX-0037. The eBay listing associated with respondent Fractioni contains the statement: “We been in this factory/process automation business for 19 years.” CX-0027C, Ex. B-1. Rockwell argues that experienced professional suppliers such as these would know that Rockwell products are sold in an unusable state that requires the download of Rockwell’s firmware. CIB at 60. As discussed above, Mr. Michael

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testified that the products at issue are inoperable without downloading the necessary firmware. CX-1037C at Q/A 177-80. The firmware can be downloaded from Rockwell's website, which "requires users to affirmatively consent to Rockwell's EULA [End User License Agreement], which prohibits download and use of the firmware unless the product for which it was downloaded was purchased from Rockwell or an Authorized Distributor." *Id.* at Q/A 186.

I agree with Rockwell and Staff that the cited evidence is sufficient to show that Fractioni, Can Electric, and KBS/Euosource/Yaspro had knowledge that firmware would be required to use Rockwell's products. Neither Rockwell nor Staff cite any similar evidence for GreySolution, SoBuy/T-Tide, or Yi Micro, however.

Merely showing these respondents' knowledge of Rockwell's firmware is not sufficient to prove contributory infringement. Rockwell must further show that the respondents knew that a customer's download would constitute copyright infringement. As discussed by the Federal Circuit, "*Grokster* has clarified that the intent requirement for inducement requires more than just intent to cause the acts that produce direct infringement." *DSU Medical Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006) (citing *Grokster*, 545 U.S. at 936). "The plaintiff has the burden of showing that the alleged infringer's actions induced infringing acts and that he knew or should have known his actions would induce actual infringements." *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 554 (Fed. Cir. 1990). In the context of Rockwell's allegations, this would require evidence that the respondents knew their customers would not be authorized to download the copyrighted firmware. Rockwell identifies circumstantial evidence of this knowledge with respect to Yaspro, noting that Yaspro purports to have tested the products, and any testing would require downloading Rockwell firmware, including review of the EULA. CIB at 61. These statements from Yaspro's website appear to be advertising

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puffery, however, and I cannot conclude that Yaspro downloaded any Rockwell firmware and reviewed the EULA based solely on a statement that, “[a]ll the parts will be tested before shipment.” CX-0037. The evidence that Rockwell and Staff cite with respect to Can Electric and Fractioni is even less convincing, merely identifying Rockwell products on an “advantage Product-List,” CX-0028, and stating: “We been in this factory/process automation business for 19 years.” CX-0027C, Ex. B-1. These statements on the websites and eBay listings of the Defaulted Respondents are not reliable, and in some cases are demonstrably false, such as Fractioni’s representation that “[w]e only source direct from manufacturers themselves or authorized distributors.” *Id.*

In the alternative, Rockwell argues that all of the respondents would have been on notice that they were inducing copyright infringement after service of the complaint, service occurred after the alleged acts of inducement.²² Rockwell has thus failed to carry its burden to show the requisite knowledge for proving contributory infringement. Accordingly, because there is no evidence of underlying direct infringement and insufficient evidence of knowledge by the Defaulted Respondents, Rockwell has failed to prove contributory copyright infringement.

²² Fractioni’s alleged sale for importation occurred on August 21, 2017; Fractioni was not served the Complaint until October 10, 2017. The alleged importation by Yi Micro occurred on August 29, 2017; Yi Micro was served the Complaint on October 10, 2017. Can Electric’s alleged importation occurred on September 11, 2017; Can Electric was served the Complaint on December 22, 2017. The alleged importation by KBS/Euosource/Yaspro occurred on September 11, 2017; KBS and Euosource were served the complaint on October 10, 2017, while Yaspro was served on December 22, 2017.

F. Domestic Industry

Rockwell previously moved for summary determination on the economic prong of the domestic industry requirement, but the motion was denied with respect to the asserted copyrights. Order No. 39 (July 12, 2018).

1. Technical Prong

Rockwell relies on Mr. Michael's testimony to establish that certain of its products are protected by the asserted copyrights. CX-1037C at Q/A 214-226. Each asserted copyright corresponds to a version of firmware that is used in certain ControlLogix® and CompactLogix® controllers. *Id.* at Q/A 217. Copyright Reg. Nos. TX0008389887 and TX0008390077 protect firmware for ControlLogix® L6 Controllers, Copyright Reg. Nos. TX0008390088 and TX0008390111 protect firmware for ControlLogix® L7 Controllers, Copyright Reg. Nos. TX0008389890 and TX0008390098 protect firmware for CompactLogix® L3x Controllers, and Copyright Reg. Nos. TX0008390094 and TX0008390116 protect firmware for CompactLogix® L3y Controllers. *Id.* at Q/A 218. There is no contrary evidence in the record, and accordingly, Rockwell has satisfied the technical prong of the domestic industry requirement for each of the asserted copyrights.

2. Economic Prong

Rockwell submits that it has satisfied the domestic industry requirement with respect to each asserted copyright under subsections (B) and (C) of section 337(a)(3). CIB at 76-79. Rockwell's asserted investments are divided between two of its product lines that practice the asserted copyrights: (1) the ControlLogix® product line, which is manufactured, assembled, and tested entirely in Rockwell's Twinsburg, Ohio facility; and (2) the CompactLogix® product line,

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which is manufactured overseas but was designed, developed, and tested in the United States.

Id. at 66-70.

a. ControlLogix® Products

For the ControlLogix® product line, Rockwell identifies [REDACTED] manufacturing labor expenditures between FY 2013 and FY 2017. CX-1042C (Prowse DWS) at Q/A 70; *see also* Order No. 39 at 10. An additional [REDACTED] was spent on capital expenditures in that timeframe for the ControlLogix® product line. *Id.* Rockwell reported warranty and repair expenditures in a shorter timeframe, with warranty expenditures for the ControlLogix® product line [REDACTED] from FY 2015 to FY 2017, and repair expenditures [REDACTED]. *Id.* at Q/A 76; *see* Order No. 39 at 10. Rockwell invested [REDACTED] in internal labor costs for research and development for the ControlLogix® product line from FY 2015 to FY 2017. *Id.* at Q/A 98; *see* Order No. 39 at 10. There was no challenge to these expenditures by Radwell or Staff in the context of Rockwell's motion for summary determination, and these amounts formed the basis for finding that Rockwell had satisfied the economic prong with respect to trademarks associated with the ControlLogix® products. Order No. 39 at 10-11 ("Rockwell's investments in manufacturing, service and repair, and research and development are significant enough to establish a domestic industry with respect to the ControlLogix® product line under subsection (B) of section 337(a)(3)."). These expenditures total [REDACTED] for the ControlLogix® product line.

Rockwell also asserts certain investments in planned labor services and field labor, which were not tracked by product line and were thus excluded from the domestic industry analysis on summary determination. *See* Order No. 39 at 13-14. Mr. Michael identified [REDACTED] U.S. field labor and [REDACTED] planned service labor from FY 2015 to 2017. CX-1037C

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(Michael DWS) at Q/A 247 (citing CPX-0031C). Mr. Michael also testified that “[REDACTED]
[REDACTED]
[REDACTED].” *Id.* at Q/A 243. Mr. Michael reviewed Rockwell sales data to determine that [REDACTED] Rockwell’s sales revenue from FY 2014 to 2017 was attributable to the ControlLogix® product line. *Id.* at Q/A 245. Dr. Prowse used these sales figures to allocate the field labor and planned service labor expenditures to the ControlLogix® products. CX-1042C (Prowse DWS) at Q/A 77.

The Commission has recognized that “[a] sales-based allocation may be applied to determine the investments ‘relating to the articles protected by the patent.’” *Certain Collapsible Sockets for Mobile Electronic Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm’n Op. at 16 (July 9, 2018) (quoting 19 U.S.C. § 1337(a)(3)). But as discussed in Order No. 39, a sales-based allocation does not appear to be a reliable method for apportioning Rockwell’s service and repair expenditures between different product lines. Order No. 39 at 13-14. There are large discrepancies between the sales reported for different Rockwell product lines and the warranty and repair expenditures that are tracked by product line. *Id.* Mr. Michael identifies sales revenue for ControlLogix® products [REDACTED] that is more than double the sales revenue for PanelView® products [REDACTED], but the relationship between these products is reversed for repairs—repair expenditures for the PanelView® products [REDACTED] are more than five times the repair expenditures for the ControlLogix® products [REDACTED]. *Compare* CX-1037C (Michael DWS) at Q/A 245 to Q/A 251. This inverse relationship between repair expenditures and sales revenue makes it unlikely that a sales allocation would be reliable.

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In its post-hearing brief, Rockwell submits that the discrepancy can be explained by the fact that “PanelView products are product visualization devices with touchscreen displays, which may be more susceptible to breakage.” CIB at 72. In recognition of this fact, Rockwell no longer relies on the PanelView® products as part of its asserted domestic industry. *Id.* Withdrawing the PanelView® products does not correct Dr. Prowse’s misallocation, however—Rockwell’s post-hearing brief relies on the same sales-based allocations for the ControlLogix® and CompactLogix® products that were cited in Rockwell’s motion for summary determination and in Dr. Prowse’s witness statement. *Id.* at 68. These allocations remain unreliable for the reasons discussed in Order No. 39. Based on Rockwell’s representation that the PanelView® products are likely to require more repairs, a reliable allocation of planned service and field labor would assign a greater proportion of these expenses to the PanelView® products, and a smaller proportion to the ControlLogix® products. Without making any such correction, Dr. Prowse’s allocations are likely to have overstated the service expenditures that can be properly attributed to ControlLogix® products by a significant amount. The amount of field labor and planned service labor that Rockwell attributes to the ControlLogix® products is therefore unreliable, and these expenditures will not be counted as part of Rockwell’s asserted domestic industry. This leaves a total of [REDACTED] Rockwell’s labor expenditures for the ControlLogix® product line, as discussed above.

Not all of Rockwell’s ControlLogix® products use the copyrighted firmware, and it is therefore necessary to allocate these expenditures to the relevant domestic industry products. Dr. Prowse allocated Rockwell’s ControlLogix® expenditures between products associated with the copyrighted firmware, CX-1042C at Q/A 101, but Staff identified an inaccuracy in Dr. Prowse’s calculations where he relied on an incorrect value for the total sales of

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ControlLogix® products. SB at 60-62; CIB at 70-72. Correcting for this mistake, Rockwell and Staff submit that the L6 products account for [REDACTED] ControlLogix® sales over the relevant period, while the L7 products account for [REDACTED] ControlLogix® sales. *Id.* A sales allocation appears to be a reliable method to apportion Rockwell's labor expenditures among different ControlLogix® products. Applying these percentages to the [REDACTED] total results in [REDACTED] expenditures for the L6 products and [REDACTED] for the L7 products.

Rockwell and Staff assert that these investments represent "significant employment of labor or capital" pursuant to section 337(a)(3)(B). CIB at 76-78; SB at 60-62. As recognized in Order No. 39, the ControlLogix® product line is manufactured entirely in the United States, and all hardware design and prototyping as well as software development is performed in the United States. CX-1037C (Michael DWS) at Q/A 228, 252-54; Order No. 39 at 10-11. Dr. Prowse reviewed the labor costs for manufacturing several ControlLogix® products, finding that the domestic labor expenditure was between approximately [REDACTED] of the total cost of goods sold. CX-1042C (Prowse DWS) at Q/A 87. One of the products he reviewed was an L7 product, the ControlLogix® 1756-L71 (PN-114304), for which the domestic labor expenditure was [REDACTED] of the total cost of goods sold. CIB at 77.²³ The qualitative and quantitative factors for Rockwell's investments in the L6 and L7 products are thus similar to what was discussed in Order No. 39 for the ControlLogix® line overall. *See* Order No. 39 at 10-11. Accordingly, for the reasons discussed in Order No. 39, Rockwell has satisfied the domestic industry requirement for the ControlLogix® L6 and L7 products under section 337(a)(3)(B).

²³ Rockwell also submits that its total domestic investment in ControlLogix® products is approximately [REDACTED] of total sales revenue, but when the field labor and planned service labor expenditures are removed from the total, this is reduced to approximately [REDACTED].

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b. CompactLogix® Products

The CompactLogix® products are not manufactured in the United States, and Rockwell's domestic industry in these products relies on investments in engineering, research, and development, and investments in warranty and repair services. CIB at 66-72. As discussed above, Rockwell's engineering and R&D investments are tracked by product line—there were expenditures [REDACTED] in R&D labor for the CompactLogix® products between FY 2015 and 2017. CX-1037C (Michael DWS) at Q/A 257-58 (citing CPX-0034C). Warranty and repair services are also tracked by product line, with [REDACTED] warranty expenditures and [REDACTED] repair expenditures for the CompactLogix® products between FY 2015 and 2017. *Id.* at Q/A 250, 251 (citing CPX-0034C). Rockwell also asserts investments in planned labor services and field labor, but as discussed above, Rockwell's allocation of these expenditures to different product lines is unreliable. For the same reasons discussed above in the context of the ControlLogix® products, it is likely that the sales-based allocation of these expenditures to CompactLogix® products greatly overstates the amount that actually relates to these products. Accordingly, the total domestic industry expenditures that can be reliably attributed to the CompactLogix® products is [REDACTED] from FY 2015 to 2017.

Rockwell and Staff allocated the CompactLogix® expenditures to the specific L3x and L3y models that use the copyrighted firmware. SB at 60-62; CIB at 70-72. As discussed above, Dr. Prowse's allocation used inaccurate sales data, and after correcting for this mistake, Rockwell and Staff agree that L3x sales account for [REDACTED] CompactLogix® sales while L3y sales account for [REDACTED] CompactLogix® sales. *Id.* As discussed above, a sales allocation is appropriate for distributing expenditures between different models within a Rockwell product

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line, and the allocation yields [REDACTED] expenditures for the CompactLogix® L3x products and [REDACTED] expenditures for the CompactLogix® L3y products.

Rockwell and Staff submit that these expenditures are significant under sub-prong (B) of section 337(a)(3) and substantial under sub-prong (C). CIB at 78-79; SB at 60-62, 64-65. The investments cited by Rockwell are relatively small in comparison to the sales revenue for these products, with the amounts cited above representing only [REDACTED] of the total value of CompactLogix® sales—even if the additional planned service and field labor expenditures were included, domestic expenditures only represent [REDACTED] of the value of CompactLogix® sales. CIB at 78-79. Mr. Michael provides additional evidence of qualitative significance, explaining that “[t]he ControlLogix® product line is conceived, designed, developed, and tested in the United States by employees located in Milwaukee, Wisconsin, and Mayfield Heights, Ohio.” CX-1037C at Q/A 252. He further explains that “[t]hese activities include all hardware design and prototyping as well as software.” *Id.*

In the context of sub-prong (B), the qualitative factors do not compensate for the quantitatively small investments in domestic labor and capital. The facts surrounding the CompactLogix® products are similar to those considered by the Commission in *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing the Same* (“*Solid State Storage*”), where the administrative law judge’s finding of no domestic industry was affirmed with respect to a product designed in the United States but manufactured overseas. Inv. No. 337-TA-1097, Comm’n Op. at 31-35 (Jun. 29, 2018). In *Solid State Storage*, the complainant relied on evidence similar to Rockwell’s, asserting that management and design decisions occurred in the United States. *Id.* at 31-32. The Commission found that there was insufficient evidence to find a domestic industry where there was no comparison between foreign

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and domestic expenditures, no value-added analysis, and no comparison between expenditures on the asserted products and expenditures on other products. *Id.* at 34-35. The only quantitative comparison offered by Rockwell here is evidence that the domestic expenditures account for a small percentage of a CompactLogix® product's sales price. Based on the evidence in the record, it is likely that the amount of domestic labor and capital employed by Rockwell for the CompactLogix® product line is a small fraction of its foreign investments in the manufacture of these products, and accordingly, I find that Rockwell's investments are not significant under sub-prong (B).

The majority of Rockwell's domestic expenditures in the CompactLogix® product line also qualify under sub-prong (C)—the largest category of CompactLogix® investments are [REDACTED] [REDACTED] invested in engineering, research, and development. CX-1037C (Michael DWS) at Q/A 257-58 (citing CPX-0034C). This [REDACTED] can be allocated between the L3x products [REDACTED] and the L3y products [REDACTED] using the sales allocation discussed above. *See* SB at 64. Mr. Michael explains that “[t]hese activities include all hardware design and prototyping as well as software.” CX-1037C at Q/A 252. He further testifies that “over [REDACTED] of our R&D worldwide occurs in the United States.” *Id.* at Q/A 254. Also, “Rockwell's investments in R&D labor are [REDACTED] devoted to software efforts (versus hardware efforts), which include investments in the R&D of the copyrighted firmware at issue.” *Id.* at Q/A 259. Based on Mr. Michael's testimony, the asserted R&D investments meet the nexus requirement for sub-prong (C) because they are “closely related to and enable exploitation of” the copyrighted software. *Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same, and Components Thereof* (“Marine Sonar”), Inv. No. 337-TA-921, Comm'n Op. at 65 (Jan. 6, 2016). Moreover, Rockwell's R&D

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expenditures are substantial under sub-prong (C) because “[t]he entirety of those expenditures is attributable to [] domestic investment in research and development and engineering.” *Id.* In addition, “substantially all of the research and development and engineering for the [] products was conducted in the United States.” *Id.* As the Commission recognized in *Marine Sonar*, this is a “classic case” for the application of sub-prong (C) “in which the complainant is engaged in substantial research and development involving the asserted [intellectual property].” *Id.* at 65-66. *See also Certain Automated Teller Machines, ATM Products, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-972, Initial Determination at 196-98 (Nov. 30, 2016) (finding domestic industry under sub-prong (C) where the development of a patented module “was almost entirely domestic”), *not reviewed by* Comm’n Notice (Jan. 30, 2017). Accordingly, because the evidence shows that Rockwell’s development of the copyrighted software occurred almost exclusively in the United States, I find that the [REDACTED] R&D investments attributable to L3x products and the [REDACTED] R&D investments attributable to L3y products are substantial under sub-prong (C).

Rockwell has thus shown the existence of a domestic industry with respect to all of its asserted copyrights.

V. TORTIOUS INTERFERENCE

Rockwell accuses each of the Defaulted Respondents of tortious interference with Rockwell’s End User License Agreement (“EULA”). CIB at 79-87; SB at 74-79. Staff further accuses the Defaulted Respondents of tortious interference with Rockwell’s distributor agreements. SB at 67-74.

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A. Legal Standard

Subsection (a)(1)(A) of section 337 prohibits “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is . . . to destroy or substantially injure an industry in the United States.” 19 U.S.C. § 1337(a)(1)(A). Claims under subsection (a)(1)(A) may be based on causes of action recognized under federal common law. *Tianrui*, 661 F.3d at 1327-28.

Tortious interference with contract is a common law cause of action. The Restatement (Second) of Torts (“Restatement”) § 766 (1979) describes the tort as follows: “One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.” Clearly, “[t]he cause of action is for pecuniary loss resulting from the interference.” Restatement, § 766 cmt. t; *see Bressler v. American Federal of Human Rights*, 44 Fed.Appx. 303, 341 (10th Cir. 2002) (citing Restatement, § 766 cmt. t).

Courts interpreting this section of the Restatement have identified five elements that a plaintiff must prove for a claim for tortious interference: “(1) there was a contract, (2) about which the particular defendant knew, (3) an intentional act that was a significant factor in causing the breach of contract, (4) the act was without justification, and (5) it caused injury.” *WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012) (“Delaware courts follow Section 766 of the Restatement (Second) of Torts in assessing a tortious interference claim”); *see also Blizzard Entertainment Inc. v. Ceiling Fan Software LLC*,

28 F.Supp.3d 1006, 1015 (C.D.Cal. Sept. 23, 2013) (applying California law to a claim of tortious interference with a EULA: “[t]he elements . . . for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.”).

B. Tortious Interference with EULA

Rockwell accuses the Defaulted Respondents of tortious inference with the EULA by their sale and importation of ControlLogix® and CompactLogix® controllers that require copyrighted firmware—these same products were accused of copyright infringement. *See supra*, section IV.C. As described by Mr. Michael, these products are inoperable without downloading the necessary firmware. CX-1037C at Q/A 177-80. Moreover, when the firmware is downloaded from Rockwell’s website, it “requires users to affirmatively consent to Rockwell’s EULA, which prohibits download and use of the firmware unless the product for which it was downloaded was purchased from Rockwell or an Authorized Distributor.” *Id.* at Q/A 186. This is stated explicitly in subsection 4.2.g of the EULA, which provides: “You may download and use Software for a Rockwell Automation product only if such product has been legitimately acquired directly from an authorized Rockwell Automation source. All other downloads and use thereof is strictly prohibited” CX-1023 at 3. The Defaulted Respondents are not authorized distributors for the accused products, and accordingly, any download of firmware by a customer would be a breach of the EULA.

As discussed above, however, Rockwell has failed to show that any firmware was downloaded in connection with any of the products sold by the Defaulted Respondents, because

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the products at issue were purchased by Rockwell's counsel for the purpose of filing the complaint, rather than for any industrial use. *See supra*, section IV.D. There is thus no evidence that any customer of the Defaulted Respondents entered into the EULA—or breached it.

Rockwell has thus failed to establish the first prerequisite for a tortious interference claim: the existence of a contract that was breached. The existence of Rockwell's EULA is not in dispute, but a contract is not formed between Rockwell and a customer until the customer downloads firmware and accepts the EULA. *See* CX-1023 (“You accept and agree to be bound by the terms of this EULA by downloading, installing, copying, or otherwise using the software.”). Rockwell has not adduced any evidence that a customer of any of the Defaulted Respondents has taken this step to enter into a contract with Rockwell. The Defaulted Respondents cannot be found liable for tortious interference on this record.

Rockwell attempts to overcome this lack of evidence by pointing to its allegations in the Complaint, asking the administrative law judge to presume the facts alleged in the Complaint to be true. CIB at 84-87. This presumption only applies to the issuance of a limited exclusion order against a defaulted respondent, however, pursuant to Commission Rule 210.16(c)(1) and section 337(g)(1) of the statute. 19 C.F.R. § 210.16(c)(1); 19 U.S.C. § 1337(g)(1). The statutory requirements for issuing a limited exclusion under section 337(g)(1) do not require a finding of a violation, and Commission Rule 210.16(c) explains that the Commission may issue an exclusion order immediately upon a finding of default. *Id.* The issuance of an exclusion order under section 337(d) requires a determination of violation, however, and the statute requires that such determinations be made “on the record.” 19 U.S.C. § 1337(c), (d).²⁴ And in accordance with

²⁴ The Commission has held that a general exclusion order may issue against defaulted respondents under section 337(d)(2) “when a violation is established based on reliable, probative,

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Commission Rule 210.37, “[t]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” 19 C.F.R. § 210.37(a). A finding of violation by the Defaulted Respondents cannot be based merely on allegations in the complaint—there must be evidence that each of the Defaulted Respondents interfered with a Rockwell contract, and Rockwell has not carried its burden with respect to the EULA.

C. Tortious Interference with Distributor Agreements

Staff separately alleges that the Defaulted Respondents interfere with Rockwell’s agreements with its distributors. SB at 67-74. Staff submits that Rockwell enters into distribution agreements and other contracts with its authorized distributors. *Id.* at 67-68. Several of these agreements are in the record, including an agreement between Rockwell and [REDACTED] [REDACTED] (CX-0757C) and sample agreements with system integrators (CX-0759C) and OEMs (CX-0761C).²⁵ According to Mr. Michael, these agreements restrict sales to certain designated geographic areas and prohibit the sale of stand-alone products to resellers. CX-1037C at Q/A 267-69. Staff argues that the Defaulted Respondents “must have been aware” of these distribution agreements, but the evidence does not support this assertion. SB at 68-69. Staff cites generally to the experience of the Defaulted Respondents in the industry of selling automation products, such as Fractioni’s representation that they “have been in this factory/process automation business for 19 years.” CX-0027C, Exhibit A-1, B-1. Fractioni further claims that they “only source direct from manufacturers themselves or authorized distributors.” *Id.* Staff cites Can Electric’s claim to be a “professional

and substantial evidence.” *Certain Mobile Device Holders & Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 21-22 (Mar. 22, 2018).

²⁵ Staff’s brief also cites to an exhibit JX-0034, which has been withdrawn.

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global automation supplier, built on over 10 years of experience.” CX-0029. EuoSource was established in 2003 and claims to source products from “2000+ suppliers [to] . . . help you to get any components which is difficult to get.” CX-0033; CX-0035. Yaspro represents that it provides “worldwide customer service” and “[t]echnology support.” CX-0037. Staff thus contends that “it is highly unlikely that these Defaulted Respondents did not know that Rockwell’s Authorized Distributors were contractually prohibited from selling Rockwell products to resellers.” SB at 69.²⁶

Staff does not identify any evidence in the record that any Defaulted Respondent had knowledge of the terms of any Rockwell distributor agreement, however. “It is a simple proposition that a person cannot intentionally interfere with a contract that he knows nothing about.” *Trump Taj Mahal Assocs. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143, 1164 (D.N.J. 1991) (citing Restatement of Torts (Second) § 766, comment i (1977)). Evidence of experience in the industry does not prove knowledge of Rockwell’s distributor contracts. The testimony of Mr. Michael and the distributor agreements in the record are marked confidential and appear to prohibit the disclosure of their terms to third parties. See CX-0757C at 9.1.1 [REDACTED].

There is no evidence that Rockwell’s contractual prohibitions were widely known to entities like the Defaulted Respondents, and when Radwell was asked about its first knowledge of such contractual terms in an interrogatory, it answered: [REDACTED]

[REDACTED]

[REDACTED]

²⁶ Staff does not cite any similar evidence for Respondents GreySolution, SoBuy, T-Tide, KBS, or Yi Micro.

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████████████████████ CX-0069C at 53-54 (Interrogatory No. 41). Staff does not explain how the Defaulted Respondents would have been privy to contractual terms ██████████

████████████████████.

Moreover, Staff has not identified any specific contract with any specific Rockwell Authorized Distributor that is tied to any Defaulted Respondents' alleged tortious interference. There is no evidence in the record showing how the Defaulted Respondents obtained any of the accused products. Staff argues that the only way the Defaulted Respondents could have obtained Rockwell products was through tortious interfere with one of Rockwell's authorized distributors. *See* SB at 68 ("Defaulting Respondents necessarily cause a Rockwell AD, VAR, or other counterparty to an agreement with Rockwell to violate its contract with Rockwell."). But Staff fails to name any specific distributors and does not identify any particular contracts that are allegedly breached. In District Courts, "tortious interference claims are routinely dismissed where the plaintiff fails to name specific contractual relationships that the defendant allegedly interfered with." *Nyambal v. Alliedbarton Sec. Servs., LLC*, 153 F. Supp. 3d 309, 316 (D.D.C. 2016). This type of generalized allegation is not sufficient to prove a violation of section 337, which requires a showing that the alleged unfair act is related to a specific importation or sale for importation. *See Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Order No. 103 at 35 n.20 (Oct. 2, 2017) (rejecting Staff's argument that a complainant "need not necessarily identify an individualized shipment" to prove importation), *not reviewed by* Comm'n Notice (Nov. 1, 2017). The evidence in the record here falls far short of proving a violation based on tortious interference with contract.

D. Injury to Domestic Industry

Section 337(a)(1)(A) requires a complainant to show that the “threat or effect” of the alleged unfair act is “to destroy or substantially injure an industry in the United States.” 19 U.S.C. § 1337(a)(1)(A). This requires a causal nexus between the unfair acts and the injury. *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 30, 2005 WL 2866049, at *27 (July 25, 2005) (citations omitted).

Rockwell submits that unauthorized sales by the Defaulted Respondents cause substantial financial harm through lost sales, harm to good will and customer relationships, and Rockwell’s expenditure of resources to combat unauthorized sales. CIB at 86-87; SB at 77-79. As discussed above, however, the majority of the Defaulted Respondents’ products accused of copyright infringement were purchased by Rockwell’s counsel for the purpose of this litigation. *See supra*, section IV.D. These purchases do not represent lost sales for Rockwell and could not have caused harm to Rockwell’s good will or customer relationships. Although the purchases do represent part of Rockwell’s efforts to combat unauthorized sales, Rockwell provides no accounting of these expenditures as it relates to the Defaulted Respondents, and it is not clear that such litigation expenditures would qualify as substantial injury to Rockwell’s domestic industry. *See John Mezzalingua Assoc., Inc. v. Int’l Trade Comm’n*, 660 F.3d 1322 (Fed. Cir. 2011) (affirming the Commission’s discounting of litigation expenses to establish a domestic industry).

Rockwell’s evidence of injury is based largely upon Dr. Prowse’s analysis of products imported by Radwell. CX-1042C (Prowse DWS) at Q/A 111-146. With respect to the products accused of copyright infringement, Dr. Prowse considered [REDACTED] products imported by Radwell between 2015 and 2017. *Id.* at Q/A 117. None of the Defaulted Respondents’ products were

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considered as part of Dr. Prowse's analysis, and Rockwell fails to establish any nexus between the products imported by the Defaulted Respondents and the claimed injury to domestic industry. Even if Rockwell had presented evidence to establish a nexus, any injury would likely be *de minimis*. In connection with its allegations of tortious interference with the EULA, Rockwell has only identified sixteen imported products for eight named respondents. *See supra*, section IV.C. This is a negligible fraction of Rockwell's sales of these products. According to Dr. Prowse, Rockwell earned [REDACTED] revenue from 2014-2017 selling ControlLogix® and CompactLogix® controllers that use the copyrighted firmware. CX-1042C at Q/A 101. Any injury arising from the Defaulted Respondents' sale of sixteen such products could not be substantial in this context.

To support its allegation of tortious interference with distributor agreements, Staff alleges injury to the domestic industry with respect to a broader set of products imported by the Defaulted Respondents. SB at 71-74. In comparison to the analysis above for tortious interference with the EULA, the products are the same for Can Electric and KBS/Euosource, and there is one additional product for GreySolution, three for SoBuy/T-Tide, and two for Yi Micro. *See supra*, section III.C. For these respondents, the analysis of domestic industry is not substantively different from that discussed above—any injury caused by the importation of these products would be *de minimis*. There are a significant number of additional products accused, however, for Fractioni [REDACTED] and Yaspro [REDACTED], based on products that these respondents sold [REDACTED]. *See* CPX-0039C. Neither Rockwell nor Staff address the circumstances of these sales, however, and the arguments raised by the parties with respect to injury do not apply in the case of sales to a reseller [REDACTED]. Sales to [REDACTED] do not represent lost sales for Rockwell or its Authorized Distributors, who are prohibited from

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selling products to resellers. Moreover, Rockwell has no good will or customer relationship with [REDACTED]. Accordingly, Rockwell has failed to carry its burden to show substantial injury caused by any alleged tortious inference by any of the Defaulted Respondents.

VI. RECOMMENDED DETERMINATION

Pursuant to the Commission's order in the Notice of Investigation, I make the following recommended determination on remedy, bonding, and the public interest pursuant to Commission Rules 210.42(a)(1)(ii) and 210.50(b)(1). 19 C.F.R. § 210.50(b)(1).

A. Limited Exclusion Order

Pursuant to Commission Rule 210.16(c)(1) and section 337(g)(1), Rockwell may seek immediate entry of a limited exclusion order against the Defaulted Respondents. 19 C.F.R. § 210.16(c)(1); 19 U.S.C. § 1337(g)(1). In addition, section 337 provides that "[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, 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" 19 U.S.C. § 1337(d)(1). As discussed below, I recommend that the Commission issue a general exclusion order, but if not, the Commission should issue a limited exclusion order against the Defaulted Respondents.

B. General Exclusion Order

Rockwell seeks a general exclusion order (GEO) that will exclude all unauthorized imports of the Rockwell products at issue. CIB at 88-95. Staff agrees that a general exclusion order is appropriate in this investigation. SB at 80-83.

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Pursuant to section 337(d)(2), “[a] general exclusion order may be ordered if: (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2).²⁷ A GEO may issue if either of these conditions is met. *See, e.g., Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm’n Op., 2009 WL 6751505, at *12 (Oct. 1, 2009).

Rockwell submits that a general exclusion order is warranted because an exclusion order limited to the named respondents would be easily circumvented. CIB at 89-90. Dr. Prowse explains that the Defaulted Respondents do not manufacture the Rockwell products at issue but rather acquire these products abroad and resell them into the United States. CX-1042C at Q/A 162. This does not require any substantial investment in infrastructure or equipment, and it would not be difficult for the Defaulted Respondents to sell the same products under different names. *Id.* Some of the Defaulted Respondents already operate under several different names—the products purchased from Yaspro were actually invoiced by KBS, and payment was accepted by Euosource. *See* CX-0027C, ¶¶ 27-28; Ex. W-3 (KBS invoice); Ex. W-4 (Yaspro contract); Ex. W-6 (Euosource payment acceptance). The low barriers to entry and Respondents’ use of multiple different entities to sell and import products supports a finding that a limited exclusion order would be easily circumvented. *See Certain Mobile Device Holders & Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 22 (Mar. 22, 2018) (finding GEO warranted

²⁷ The Commission has authority to issue a GEO under section 337(g)(2) in cases in which all of the respondents default. In cases such as this, however, where some respondents appear and are terminated from the investigation, while others default, the Commission’s authority to issue a GEO stems from section 337(d)(2), not section 337(g)(2). *See Certain Handbags, Luggage, Accessories, and Packaging Thereof*, Inv. No. 337-TA-754, Comm’n Op. at 4-5 & n. 3 (May 30, 2012).

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where “Respondents operate under different names, the number of parties attempting to import products infringing the accused patents is constantly changing and growing, importers continually shift their aliases, and there are low barriers to enter the market, while the demand continues to rise.”).

Rockwell further submits that there has been a pattern of violation based on a large online market for unauthorized Rockwell products. CIB at 90-92. Dr. Prowse identified over 44,000 results in a recent search on eBay.com for relevant “Allen Bradley” products in “new” condition. CX-1042C at Q/A 159. He identified over 13,800 results in a recent search on Alibaba.com. *Id.* Rockwell further submits that it is difficult to identify the source of unauthorized Rockwell products. CIB at 92-94. Dr. Prowse cites the use of aliases on eBay and Alibaba and the fact that account and seller information is self-furnished on these online marketplaces. CX-1042C at Q/A 157. In addition, Rockwell notes the difficulty in this investigation of effecting service on respondents who were identified online by Rockwell prior to filing the complaint. CIB at 93. This evidence supports a finding that there is a pattern of violation and it is difficult to identify the source of infringing products. *See Certain Mobile Device Holders & Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 22-23 (Mar. 22, 2018) (finding GEO warranted where “[b]oth the Commission and [complainant] had difficulty serving some respondents” and “it was difficult to identify each of the numerous parties selling and manufacturing the infringing products.”); *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 14 (Jun. 26, 2015) (finding that “numerous online sales of infringing imported goods can constitute a pattern of violation of section 337.”).

Accordingly, it is my recommended determination that a general exclusion order be issued in this investigation.

C. Cease and Desist Order

Rockwell seeks a cease and desist order against Can Electric, Fractioni, Euosource, and Yaspro, citing these respondents' English language websites that facilitate the sale of Rockwell products in the United States. CIB at 95-96. Staff submits that the record does not support the issuance of cease and desist orders against foreign respondents without evidence of commercially significant inventories. SB at 84-85. Rockwell cites evidence that at least Fractioni claims to have a warehouse in the United States, and argues that the other respondents appear capable of stockpiling inventory in anticipation of an exclusion order. CRB at 11-12.

To obtain a CDO directed to a particular respondent, a complainant must demonstrate that a "commercially significant" inventory of imported, infringing products is in the possession of the respondent or related entities in the United States. *See, e.g., Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. at 21-33 (Feb. 13, 2017) (issuing cease and desist orders against both domestic and foreign defaulted respondents). The Commission presumes the maintenance of commercially significant inventories in the case of domestic defaulted respondents, but there must be evidence of such inventory to support the issuance of a cease and desist order against foreign defaulted respondents. *Id.* at 31-33. In *Certain Arrowheads with Deploying Blades and Components Therefor and Packaging Thereof* ("Arrowheads"), the Commission issued a cease and desist order based on evidence of domestic distribution—the Commission identified one shipment of an infringing article from a business location in the United States to a customer in the United States. Inv. No. 337-TA-977, Comm'n Op. at 21 (Apr. 28, 2017). But against the other foreign defaulted respondents in *Arrowheads*, the Commission declined to issue cease and desist orders because all of their shipments originated overseas. *Id.* at 21-22. The Commission found that

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evidence of English language websites and communications via email to United States customers was not sufficient to establish significant activities in the United States to warrant the issuance of cease and desist orders. *Id.*

Rockwell has only identified evidence of significant domestic operations with respect to Fractioni. In particular, Fractioni's website states: "We have thousands of quality industrial parts available from our warehouses in USA, Taiwan, Hong Kong, and China. We have at least 10 units each for all products listed in store." CX-0044. Another part of Fractioni's website identifies the location of a warehouse in "San Jose, USA." CX-0874. This evidence is sufficient to infer the presence of significant domestic inventories, recognizing that detailed discovery cannot be obtained because Fractioni has defaulted. *See Arrowheads*, Comm'n Op. at 21. With respect to the other defaulted respondents, Rockwell does not identify any evidence beyond the existence of English language websites and shipments from abroad.

Accordingly, I recommend the issuance of a cease and desist order against Fractioni, but not against any of the other defaulted respondents.

D. Bond

If the Commission decides to enter remedial orders, the affected articles still are entitled to entry under bond during the 60-day Presidential review period. 19 U.S.C. § 1337(j)(3). Commission Rule 210.50(a)(3) specifies that the amount of a bond must be "sufficient to protect the complainant from any injury." 19 C.F.R. § 210.50(a)(3). The Commission has set bond amounts based on the price difference between the infringing imports and the domestic industry products or on a reasonable royalty the respondent would otherwise pay to the complainant. *See Certain Inject Ink Supplies And Components Thereof*, Inv. No. 337-TA-691, Comm'n Op. at 15-18 (Nov. 1, 2011). Where the calculation of a price differential is impractical and there is

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insufficient evidence in the record to determine a reasonable royalty, the Commission has set a bond in the amount of 100% of the entered value of the infringing products. *Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same, and Components Thereof*, Inv. No. 337-TA-921, Comm'n Op. at 83-89 (Jan. 6, 2016). The Complainant bears the burden of establishing the need for a bond. *Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-533, Comm'n Op. at 40 (July 21, 2006).

Dr. Prowse submits that calculating a sales price differential between unauthorized and authorized Rockwell products is impractical because the prices of these products vary substantially. CX-1042C at Q/A 167-68. Moreover, there is no evidence in the record for any comparable royalty. Rockwell and Staff thus seek entry of a 100% bond. CIB at 96-97; SB at 86-87. The Commission has set a 100% bond in cases where respondents have defaulted and provided no discovery regarding pricing, precluding any reliable determination of an appropriate bond amount. *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. at 18-19 (Jun. 26, 2015). That is the case here, and accordingly, I recommend that the Commission set a bond in the amount of 100% of entered value.

E. Public Interest

Section 337 mandates consideration of the effect of exclusion on (1) 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 the articles subject to the investigation; and (4) U.S. consumers. 19 U.S.C. § 1337(d)(1). Rockwell and Staff submit that there is no evidence of any significant adverse effect on these public interest factors. See CIB at 97-100; SB at 87-92.

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There is no evidence that a remedial order would have any adverse effect on public health and welfare. To the extent that any such issues are implicated, remedial orders would likely promote public safety because purchasers of unauthorized Rockwell products do not receive safety-related notices such as PSAs and PNs, as discussed above, and Rockwell is unable to provide the same quality control and customer support for unauthorized products. CX-1042C (Prowse WS) at Q/A 170; *see supra*, section III.D.

Radwell has alleged in a separate investigation that Rockwell's business practices are anticompetitive and in violation of U.S. antitrust laws, *Certain Programmable Logic Controllers (PLCs), Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1105, but there is insufficient evidence in the record here to determine whether remedial orders issued in the present investigation would implicate the competitive concerns raised in that investigation.

There is no evidence that Rockwell would be unable to meet the market demand for products that would be excluded by any remedial order. The products at issue were originally manufactured by Rockwell and thus consumers will be able to purchase them directly from Rockwell. Moreover, Dr. Prowse identified several competitors in the industrial automation industry producing like or directly competitive articles. CX-1042C at Q/A 172.

The only adverse effect to U.S. consumers would be the increased prices that consumers would pay for authorized Rockwell products, as opposed to unauthorized Rockwell products. The Commission has held, however, that "the benefit of lower prices to consumers does not outweigh the benefit of providing complainants with an effective remedy for an intellectual property-based section 337 violation." *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Comm'n Op. at 27 (Aug. 28, 2009) (citing earlier Commission opinions issuing exclusion orders).

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Accordingly, it is my recommended determination that issuance of remedial orders in this investigation would not be contrary to the statutory public interest factors.

VII. CONCLUSIONS OF LAW

Based on the foregoing, and the record as a whole, it is my final initial determination that there is a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and/or the sale within the United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion control systems, networking equipment, safety devices, and power supplies.

This determination is based on the following conclusions of law:

1. The Commission has subject matter jurisdiction over this investigation and *in rem* jurisdiction over the imported Rockwell products.
2. There has been an importation into the United States, sale for importation, or sale within the United States after importation of Rockwell products by the Defaulted Respondents.
3. The Defaulted Respondents have violated the Lanham Act by their sale and importation of gray market Rockwell products infringing the asserted trademarks.
4. Rockwell has established a domestic industry in the asserted trademarks.
5. The Defaulted Respondents have not been shown to have infringed the asserted copyrights.
6. Rockwell has established a domestic industry in the asserted copyrights.
7. The Defaulted Respondents have not been shown to have tortiously interfered with Rockwell contracts.
8. Rockwell has not shown substantial injury to a domestic industry in connection with the alleged tortious interference.

I hereby certify the record in this investigation to the Commission with my final initial determination. Pursuant to Commission Rule 210.38, the record further comprises the


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Complaint and exhibits thereto filed with the Secretary and the exhibits attached to the parties' summary determination motions and the responses thereto. 19 C.F.R. § 210.38(a).

Pursuant to Commission Rule 210.42(c), this initial determination shall become the determination of the Commission 45 days after the service thereof, unless a party files a petition for review pursuant to Commission Rule 210.43(a), the Commission orders its own review pursuant to Commission Rule 210.44, or the Commission changes the effective date of the initial determination. 19 C.F.R. § 210.42(h)(6).

Within ten (10) days of the date of this Initial Determination, each party shall submit to the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. *See* 19 C.F.R. § 210.5(f). A party seeking to have a portion of the order deleted from the public version thereof must attach to its submission a copy of the order with red brackets indicating the portion(s) asserted to contain confidential business information.²⁸ The parties' submissions under this subsection need not be filed with the Commission Secretary but shall be submitted by paper copy to the Administrative Law Judge and by e-mail to the Administrative Law Judge's attorney advisor.

SO ORDERED.



Dee Lord
Administrative Law Judge

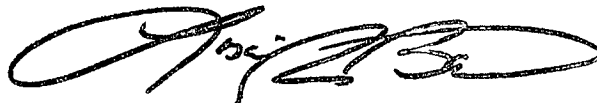
²⁸ To avoid depriving the public of the basis for understanding the result and reasoning underlying the decision, redactions should be limited. Parties who submit excessive redactions may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **INITIAL DETERMINATION** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on **11/15/2018**



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

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☒ Via Express Delivery
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**On Behalf of Respondent Radwell International
d/b/a PLC Center:**

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN INDUSTRIAL AUTOMATION
SYSTEMS AND COMPONENTS
THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS,
VISUALIZATION HARDWARE,
MOTION AND MOTOR CONTROL
SYSTEMS, NETWORKING
EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Investigation No. 337-TA-1074

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL
DETERMINATION GRANTING-IN-PART COMPLAINANT'S MOTION FOR
SUMMARY DETERMINATION THAT IT SATISFIES THE ECONOMIC PRONG OF
THE DOMESTIC INDUSTRY REQUIREMENT**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 39) granting-in-part a motion for summary determination of complainant Rockwell Automation, Inc. of Milwaukee, Wisconsin ("Rockwell") that it has satisfied the economic prong of the domestic industry requirement in the above-caption investigation.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 16, 2017, based on a complaint filed by Rockwell Automation, Inc. of Milwaukee, Wisconsin ("Rockwell"). 82 *Fed. Reg.* 48113-15 (Oct. 16, 2017). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) ("section 337"), in the importation into the United States, the sale for importation, and the sale within the

United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies by reason of infringement of U.S. Trademark Reg. No. 1,172,995; U.S. Trademark Reg. No. 696,401; U.S. Trademark Reg. No. 693,780; U.S. Trademark Reg. No. 1,172,994; U.S. Trademark Reg. No. 712,800; U.S. Trademark Reg. No. 712,836; U.S. Trademark Reg. No. 2,510,226; U.S. Trademark Reg. No. 2,671,196; U.S. Trademark Reg. No. 2,701,786; U.S. Trademark Reg. No. 2,412,742; U.S. Copyright Reg. No. TX0008389890; U.S. Copyright Reg. No. TX0008389887; U.S. Copyright Reg. No. TX0008390098; U.S. Copyright Reg. No. TX0008390094; U.S. Copyright Reg. No. TX0008390077; U.S. Copyright Reg. No. TX0008390088; U.S. Copyright Reg. No. TX0008390116; U.S. Copyright Reg. No. TX0008390084; U.S. Copyright Reg. No. TX0008390111; and U.S. Copyright Reg. No. TX0008390091. *Id.* The notice of investigation named the following respondents: Can Electric Limited of Guangdong, China; Capnil (HK) Company Limited of Hong Kong, China; Fujian Dahong Trade Co., Ltd. of Fujian, China; Huang Wei Feng dba A-O-M Industry of Shenzhen, China; PLC-VIP Shop dba VIP Tech Limited of Hong Kong, China; Radwell International, Inc. dba PLC Center of Willingboro, New Jersey; Wenzhou Sparker Group Co. Ltd. dba Sparker Instruments of Wenzhou, China; Yaspro Electronics (Shanghai) Co. Ltd. of Shanghai, China; and other respondents previously found in default. *Id.*; see Order No. 16 (Feb. 1, 2018) (unreviewed, Notice (Feb. 26, 2018)); Order No. 32 (June 24, 2018) (unreviewed, Notice (July 24, 2018)). The Office of Unfair Import Investigations is a party to the investigation.

On May 25, 2018, Rockwell filed a motion for summary determination that it has satisfied the economic prong of the domestic industry requirement with respect to the asserted trademarks and copyrights. On June 7, 2018, Radwell filed a response in opposition to the motion. On June 7, 2018, OUII filed a response in support of Rockwell's motion. On June 12, 2018, Rockwell filed a reply in support of its motion. On June 26, 2018, Radwell withdrew its opposition as to Rockwell's reliance on its domestic investments with respect to the asserted trademarks.

On July 12, 2018, the ALJ issued the subject ID (Order No. 39), granting Rockwell's motion in part with respect to certain of Rockwell's domestic investments as to the asserted trademarks. Specifically, the ID finds that Rockwell's domestic investments in its ControlLogix® and PanelView® products satisfy section 337(a)(3)(B) (19 U.S.C. 1337(a)(3)(B)). No party petitioned for review of the ID.

The Commission has determined not to review the ID.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 USC 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 'Lisa R. Barton'.

Lisa R. Barton
Secretary to the Commission

Issued: August 14, 2018

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on August 13, 2018.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

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On Behalf of Respondents Radwell International, Inc.:

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Respondents:

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Hong Kong

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**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
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Inv. No. 337-TA-1074

Certificate of Service – Page 2

Fujian Dahong Trade Co., Ltd.
A15-2303 Taihongyu Pushang Road
Cangshan Fuzhou Fujian
Fujian 350008
China

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☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Huang Wei Feng d/b/a A-O-M Industry
Room 201 No. 55 2 Qu,
Tdnqshuiwei, Minzhi,
Longhua, Boa'An, Shenzhen 511700
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

PLC-VIP Shop d/b/a VIP Tech Limited
95 Fuk Wing Street,
Cheung Sha Wan, Kowloon
Hong Kong

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Wenzhou Sparker Group Co. Ltd.
d/b/a Sparker Instruments
Room 503, Oujiang Masion, Wenzhou Road,
Wenzhou, 325000, China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
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Yaspro Electronics (Shanghai) Co., Ltd.
Room 1808E,,No. 488, Vaohua Road
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☐ Other: _____

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN INDUSTRIAL AUTOMATION
SYSTEMS AND COMPONENTS THEREOF
INCLUDING CONTROL SYSTEMS,
CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL
SYSTEMS, NETWORKING EQUIPMENT,
SAFETY DEVICES, AND POWER
SUPPLIES**

Inv. No. 337-TA-1074

**ORDER NO. 39: INITIAL DETERMINATION GRANTING-IN-PART
COMPLAINANT’S MOTION FOR SUMMARY
DETERMINATION THAT IT HAS SATISFIED THE ECONOMIC
PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT**

(July 12, 2018)

On May 25, 2018, Complainant Rockwell Automation, Inc. (“Rockwell”) filed a motion for summary determination that it has satisfied the economic prong of the domestic industry requirement with respect to the asserted trademarks and copyrights (Motion Docket No. 1074-026). Respondent Radwell International, Inc. (“Radwell”) filed a response in opposition on June 7, 2018, but withdrew its opposition in part on June 26, 2018. The Commission Investigative Staff (“Staff”) filed a response in support of the motion on June 7, 2018. Rockwell filed a reply brief on June 12, 2018.


I. BACKGROUND

On October 10, 2017, the Commission ordered the institution of an investigation based on Rockwell’s complaint for alleged violations of section 337 “based upon the importation into the United States, the sale for importation, and the sale within the United States after importation

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of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies” under subsection (a)(1)(B) and (C) of section 337 by reason of infringement of various copyrights and trademarks.¹ 82 Fed. Reg. 48113-15 (Oct. 16, 2017). The scope of the investigation includes a determination of “whether an industry in the United States exists as required by subsection (a)(2) of section 337.” *Id.*

Rockwell relies upon certain of its product lines to establish a domestic industry pursuant to subsection (a)(2) of section 337. With respect to the asserted trademarks, Rockwell relies upon its ControlLogix®, CompactLogix®, and PanelView® product lines:

Name	Reg. No.	Example Embodiment	Domestic Industry Product Lines
A-B (and Design)	1172995		ControlLogix CompactLogix PanelView
A-B (and Design)	696401		
A-B (and Design)	693780		
ALLEN-BRADLEY	1172994	ALLEN-BRADLEY	
ALLEN-BRADLEY	712800		
ALLEN-BRADLEY	712836		
ROCKWELL AUTOMATION	2510226	ROCKWELL AUTOMATION	
ROCKWELL AUTOMATION	2671196		
ROCKWELL AUTOMATION	2701786		

Motion Memo. at 2 (citing Decl. of Rod Michael, ¶18).²

¹ Rockwell’s complaint also alleges violations of subsection (a)(1)(A) of section 337.

² Asserted U.S. Trademark Reg. No. 2,412,742, is not addressed in Rockwell’s motion. *See* Staff Resp. at 3 n.1.

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With respect to the asserted copyrights, Rockwell relies upon its ControlLogix® and CompactLogix® product lines, which include certain copyrighted firmware:

Name	Reg. No.	Representative Product Line
Firmware (Version 16) for ControlLogix® L6 Controllers	TX0008389887	ControlLogix L6 Products
Firmware (Version 20) for ControlLogix® L6 Controllers	TX0008390077	
Firmware (Version 20) for ControlLogix® L7 Controllers	TX0008390088	ControlLogix L7 Products
Firmware (Version 30) for ControlLogix® L7 Controllers	TX0008390111	
Firmware (Version 30) for ControlLogix® L8 Controllers	TX0008390091	ControlLogix L8 Products
Firmware (Version 16) for CompactLogix® L3x Controllers	TX0008389890	CompactLogix L3x Products
Firmware (Version 20) for CompactLogix® L3x Controllers	TX0008390098	
Firmware (Version 20) for CompactLogix® L3y Controllers	TX0008390094	CompactLogix L3y Products
Firmware (Version 30) for CompactLogix® L3y Controllers	TX0008390116	
Firmware (Version 30) for CompactLogix® L3z Controllers	TX0008390084	CompactLogix L3z Products

Motion Memo. at 4 (citing Michael Decl., ¶12).

II. LEGAL STANDARD

The domestic industry requirement under section 337 arises from the statutory language governing intellectual property-based proceedings in subsection 337(a)(2), which requires that a complainant establish that “an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Subsection (3) of section 337(a) provides:

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

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- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). The domestic industry requirement consists of an “economic prong” and a “technical prong.” *Certain Stringed Musical Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 13, 2009 WL 5134139, at *10 (May 16, 2008). The “economic prong” of the domestic industry requirement is satisfied when it is determined that the economic activities and investments set forth in one of the subprongs of subsection 337(a)(3) has taken place. *Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm’n Op. at 21 (Nov. 1996).

Commission Rule 210.18 states that summary determination shall be rendered if the pleadings and evidence “show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(b). The evidence “must be viewed in the light most favorable to the party opposing the motion . . . with doubts resolved in favor of the nonmovant.” *Crown Operations Int’l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (citations omitted); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”). “Issues of fact are genuine only ‘if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.’” *Crown Operations*, 289 F.3d at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary

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judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.” *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998) (citations omitted). “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ and the law requires judgment in favor of the movant based upon facts not in genuine dispute.” *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993) (citations omitted).

III. DISCUSSION

For its domestic industry, Rockwell relies on investments in its ControlLogix®, CompactLogix®, and PanelView® product lines that are alleged to be protected by nine of the asserted trademarks in this investigation. Motion Memo. at 1-3. Rockwell further alleges that certain ControlLogix® and CompactLogix® products are protected by the asserted copyrights. *Id.* at 3-4. Rockwell relies on a declaration by Dr. Stephen D. Prowse, who identifies significant employment of labor and capital with respect to these products. *Id.* at 10-14 (citing Prowse Decl., ¶¶9-38). There is no opposition to Rockwell’s motion with respect to the asserted trademarks, but Radwell opposes the motion with respect to the asserted copyrights.

A. Rockwell’s Domestic Industry Investments

Rockwell relies on three categories of domestic industry investments described by Rodney Michael, Rockwell’s Director of Global Market Access Strategy: (1) manufacturing of certain domestic industry products, (2) customer support and maintenance for its products, and (3) research and development, and engineering of its products. Motion Memo. at 4-9 (citing Michael Decl. ¶¶15-33).

1. Domestic Manufacturing

With respect to the manufacturing of domestic industry products, Mr. Michael explains that “Rockwell’s ControlLogix® and most of its PanelView® product lines are manufactured,

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assembled and tested entirely in Rockwell's Twinsburg, Ohio facility." Michael Decl. ¶15.³ The Twinsburg facility spans over [REDACTED] square feet and includes heavy equipment used for manufacturing Rockwell's products. *Id.* ¶18. The facility also houses [REDACTED] employees, including [REDACTED] engineers, quality control analysts, and technicians that work on the ControlLogix® and PanelView® product lines. *Id.* ¶¶16-17. Mr. Michael further explains that [REDACTED]

[REDACTED]

[REDACTED].” Michael Decl. ¶19.

Dr. Prowse relies on Rockwell's internal tracking for expenditures attributed to the ControlLogix® and PanelView® product lines. Prowse Decl. ¶¶9-11. For the ControlLogix® product line, Dr. Prowse identifies [REDACTED] capital expenditures and [REDACTED] labor expenditures at Twinsburg between FY 2013 and FY 2017. *Id.* ¶¶ 12-13. For the PanelView® product line, Dr. Prowse identifies [REDACTED] capital expenditures and [REDACTED] labor expenditures at Twinsburg between FY 2013 and FY 2017. *Id.*

2. Customer Support and Maintenance

With respect to customer support and maintenance, Mr. Michael states that [REDACTED]

[REDACTED]

Michael Decl. ¶22. For the ControlLogix® product line, warranty expenditures were [REDACTED] from FY 2015 to FY 2017, and repair expenditures were [REDACTED]. Prowse Decl. ¶16. For the PanelView® product line, warranty expenditures were [REDACTED] in the same timeframe, and repair expenditures

³ Rockwell notes that one of its PanelView® products is manufactured overseas, but costs associated with this product have not been counted in the motion. *See* Michael Decl. ¶34.

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were [REDACTED]. *Id.* For the CompactLogix® product line, warranty expenditures were [REDACTED] in this timeframe, and repair expenditures were [REDACTED]. *Id.*

There are additional post-sale services performed by a Planned Labor Services group and a Field Labor group. Michael Decl. ¶¶23-24. Mr. Michael explains that [REDACTED]

[REDACTED]
[REDACTED] *Id.* ¶25.

Dr. Prowse allocated these expenditures based on the sales revenue for each domestic industry product. Prowse Decl. ¶¶17-21. Between FY 2014 and FY 2017, the ControlLogix® product line accounted for [REDACTED] of Rockwell's sales, the CompactLogix® product line accounted for [REDACTED] of sales, and the PanelView® product line accounted for [REDACTED] of sales. *Id.* ¶20.

Applying these allocations to Rockwell's total planned labor and field labor expenditures between FY 2015 and FY 2017, Dr. Prowse estimates that Rockwell incurred [REDACTED] planned labor and [REDACTED] field labor for the ControlLogix® product line, [REDACTED] planned labor and [REDACTED] field labor for the CompactLogix® product line, and [REDACTED] planned labor and [REDACTED] field labor for the PanelView® product line. *Id.* ¶21.

3. Research & Development

Rockwell claims investments in research and development for the ControlLogix®, CompactLogix®, and PanelView® product lines in its facilities in Milwaukee, Wisconsin and Mayfield Heights, Ohio. Michael Decl. ¶¶29-32. For the ControlLogix® product line, all hardware design and prototyping as well as software development is performed in the United States, at both the Milwaukee and Mayfield Heights facilities. *Id.* ¶29. For the PanelView® product line, the vast majority of Rockwell's research and development activities occur at the

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Milwaukee facility, including hardware, firmware, and software development. *Id.* ¶30. For the CompactLogix® product line, design and development of hardware and firmware take place in the Mayfield Heights facility. *Id.*

Rockwell's research and development investments are tracked by project and product line in the ordinary course of business. Michael Decl. ¶33. From FY 2015 to FY 2017, Rockwell invested [REDACTED] in research and development for the ControlLogix® product line, including [REDACTED] internal labor costs and [REDACTED] third party services. Prowse Decl. ¶24, Ex. 3. Over the same time period, Rockwell invested [REDACTED] in research and development for the PanelView® product line, including [REDACTED] internal labor costs and [REDACTED] third party services. *Id.* Rockwell invested [REDACTED] for the CompactLogix® product line, including [REDACTED] internal labor costs and [REDACTED] third party services. *Id.*

B. Significance of Rockwell's Investments

Rockwell contends that it has satisfied the economic prong of the domestic industry requirement through significant employment of labor and capital pursuant to subsection (B) of section 337(a)(3) and substantial investments in engineering and research and development pursuant to subsection (C). Motion Memo. at 10-18. The Commission has recently held, however, that all such expenditures may be counted under subsection (B). *See Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same* ("Solid State Storage Drives"), Inv. No. 337-TA-1097, Comm'n Op. at 14 (Jun. 29, 2018) ("[W]e find that the text of the statute, the legislative history, and Commission precedent do not support narrowing subsections (A) and (B) to exclude non-manufacturing activities, such as investments

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in engineering and research and development.”). Accordingly, all of Rockwell’s asserted investments in the present motion will be counted together under subsection (B).

Rockwell allocates its expenditures among different product lines and specific products protected by the asserted trademarks and copyrights. Motion Memo. at 10-18. This accords with the requirement that domestic industry expenditures be counted “with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned.” 19 U.S.C. § 1337(a)(3). Expenditures may be counted toward satisfaction of the domestic industry prong “as long as those investments pertain to the complainant’s industry with respect to the articles protected by the asserted IP rights.” *Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof*, Inv. No. 337-TA-910, Comm’n Op. at 68, 2015 WL 6755093, at *36 (Oct. 30, 2015); accord, e.g., *Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Prods. Containing the Same, and Components Thereof*, Inv. No. 337-TA-921 (Comm’n Op. at 61) (“Navico’s allocation methodology reasonably approximates the warranty and technical customer support expenditures relating to the LSS-1 product.”) (citing *Certain Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-739, Comm’n Op. at 74-75, 79-81 (June 8, 2012)). Accordingly, Rockwell’s claims will be separately addressed with respect to the asserted trademarks and copyrights, and the products claimed to embody the relevant intellectual property.

1. Domestic Industry in Asserted Trademarks

With respect to its trademark claims, Rockwell relies on investments in its ControlLogix®, CompactLogix®, and PanelView® product lines, all of which are asserted to embody each of the nine trademarks identified in Rockwell’s motion. Radwell has withdrawn its opposition to Rockwell’s motion with respect to the asserted trademarks.

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a) ControlLogix® Products

Relying on the expenditures that Dr. Prowse obtained directly from Rockwell's records that are tracked by product line, Rockwell has made [REDACTED] capital expenditures and [REDACTED] labor expenditures for the manufacture of the ControlLogix® product line between FY 2013 and FY 2017. Prowse Decl. ¶¶12-13. Also, warranty expenditures for the ControlLogix® product line [REDACTED] from FY 2015 to FY 2017, and repair expenditures [REDACTED]. *Id.* ¶16.⁴ In addition, Rockwell invested [REDACTED] in internal labor costs for research and development for the ControlLogix® product line from FY 2015 to FY 2017. *Id.* ¶24.⁵ Neither Radwell nor Staff challenge the reliability of these investments by Rockwell in manufacturing, service and repair, and research and development.

As evidence of significance, Rockwell submits that the ControlLogix® product line is manufactured entirely in the United States, and all hardware design and prototyping as well as software development is performed in the United States. Michael Decl. ¶¶15, 29. The ControlLogix® product line accounted for [REDACTED] of Rockwell's sales between FY 2014 and FY 2017. Prowse Decl. ¶20. Dr. Prowse performed an analysis comparing the domestic labor expenditures to the total cost of goods sold for two ControlLogix® products and found that the domestic labor expenditures accounted for [REDACTED] of the total cost of one product and [REDACTED] of the cost of a second product. *Id.* ¶30. Rockwell further contends that its investments are qualitatively significant because its customer support and maintenance includes engineers who

⁴ Dr. Prowse also estimated expenditures on planned labor services and field labor using a sales allocation, Prowse Decl. ¶¶17-21, but it is not clear that these estimates are reliable, as discussed *infra* in the context of the CompactLogix® products.

⁵ Rockwell also identifies [REDACTED] third party services, but as discussed *infra* in the context of the CompactLogix® products, it is unclear from this record whether these third party services qualify as investments under subsection (B).

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assist customers in installing and running the products and its research and development includes engineers who conceive, design and develop the products. Motion Memo. at 12; Prowse Decl.

¶34.

There is no genuine dispute with respect to the significance of Rockwell's investments in manufacturing, service and repair, and research and development for the ControlLogix® product line. These investments are [REDACTED] dollars and occur entirely in the United States, and sales of ControlLogix® products accounts for a significant proportion of Rockwell's sales. Moreover, Dr. Prowse's analysis shows Rockwell's domestic labor expenditures account for [REDACTED] of the total manufacturing cost, which represents a "value added" consistent with the amount recognized by the Commission in *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm'n Op. at 43 (Aug. 1, 2007) (finding a value added of 34%). These investments are thus quantitatively significant in the context of the manufacturing of the ControlLogix® product line and in the context of Rockwell's overall business. See *Solid State Storage Drives*, Comm'n Op. at 30 (finding domestic industry investments to be significant where revenue from a product accounts for a significant proportion of complainant's total revenue). Rockwell's evidence of qualitative significance further supports this conclusion. Accordingly, Rockwell's investments in manufacturing, service and repair, and research and development are significant enough to establish a domestic industry with respect to the ControlLogix® product line under subsection (B) of section 337(a)(3).

b) PanelView® Products

Rockwell's evidence for the PanelView® products is similar to that discussed above for the ControlLogix® products. Rockwell has made [REDACTED] domestic capital expenditures and [REDACTED] domestic labor expenditures for the manufacture of the PanelView®

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product line between FY 2013 and FY 2017. Prowse Decl. ¶¶12-13. Warranty expenditures for the PanelView® product line in the United States were [REDACTED] from FY 2015 to FY 2017, and repair expenditures were [REDACTED]. *Id.* ¶16. In addition, Rockwell invested [REDACTED] in domestic labor costs for research and development for the PanelView® product line from FY 2015 to FY 2017. *Id.* ¶24. Neither Radwell nor Staff challenge the reliability of these investments in the PanelView® products.

All but one of the PanelView® products is manufactured entirely in the United States. Michael Decl. ¶¶15, 34. The domestic R&D expenditures reflect the vast majority of Rockwell's worldwide R&D expenditures for the PanelView® products. *Id.* ¶30. The PanelView® product line accounted for [REDACTED] of Rockwell's sales between FY 2014 and FY 2017. Prowse Decl. ¶20. Dr. Prowse performed an analysis comparing the domestic labor expenditures to the total cost of goods sold for three PanelView® products and found that the domestic labor expenditures accounted for [REDACTED] of the total cost of these products. *Id.* ¶30. Rockwell further contends that its investments are qualitatively significant because its customer support and maintenance includes engineers who assist customers in installing and running the products and its research and development includes engineers who conceive, design and develop the products. Motion Memo. at 12; Prowse Decl. ¶34.

Rockwell's investments in the PanelView® product line are smaller than its investments in the ControlLogix® product line, and the *indicia* of significance are also weaker. Nevertheless, the manufacturing expenses claimed by Rockwell correspond to PanelView® products that are manufactured entirely in the United States, and Dr. Prowse's analysis shows a modest but substantial "value added" for Rockwell's domestic labor investments. Accordingly, Rockwell's investments in manufacturing are significant enough to establish a domestic industry in the

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PanelView® product line under subsection (B) of section 337(a)(3). The expenditures on service and repair and research and development may not be significant on their own, but these additional investments further support this finding.

c) CompactLogix® Products

The CompactLogix® products are not manufactured in the United States, and Rockwell relies on warranty expenditures [REDACTED] and repair expenditures [REDACTED] [REDACTED] from FY 2015 to FY 2017. Prowse Decl. ¶16. Rockwell also identifies [REDACTED] internal labor costs related to research and development. *Id.* ¶24. The CompactLogix® product line accounted for [REDACTED] of Rockwell's sales between FY 2014 and FY 2017. *Id.* ¶20.

Rockwell's domestic investments in the CompactLogix® products are small in comparison to the ControlLogix® and PanelView® products discussed above, but Rockwell and Staff still contend that these are significant. Motion Memo. at 10-12; Staff Resp. at 12-13. Rockwell's and Staff's calculations rely on counting some additional expenditures, including [REDACTED] [REDACTED] additional investments in service and repair computed by Dr. Prowse's application of a sales allocation. Prowse Decl. ¶21. Although the Commission has recognized that a sales-based allocation can be an appropriate way to allocate investments to a particular domestic industry product, it is not clear that this method is reliable here. *See Certain Collapsible Sockets for Mobile Electronics Devices and Components Thereof* ("Collapsible Sockets"), Inv. No. 337-TA-1056, Comm'n Op. at 16 (July 9, 2018) ("A sales-based allocation may be applied to determine, under each subsection, the investments 'relating to the articles protect by the patent.'"). As argued by Radwell, Rockwell's other service and repair expenditures are not proportional to sales revenue—while the sales revenue for the CompactLogix® and PanelView® products are

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very similar, Rockwell's own service and repair records show investments in the CompactLogix® product line that are ten times smaller than the amount invested for the PanelView® product line. Radwell Opp. at 9-10. A different allocation method would likely reduce the claimed amounts by a substantial margin.

Rockwell also identifies [REDACTED] third party services related to research and development of the CompactLogix® product line. *Id.* ¶27, Ex. 3. But there is not enough evidence in the record to determine whether these third parties provide qualifying "specialized services" or whether these third parties provide generic parts and supplies that do not qualify under subsection (B). *Compare Solid State Storage Drives*, Comm'n Op. at 24-25 (recognizing payments to third parties under subsection (B) where the third parties "provide specialized services" rather than "off-the-shelf" products) *to Collapsible Sockets*, Comm'n Op. at 18-19 (rejecting payments to third party where the complainant "has not shown what portion of its payments [] pertains to labor or capital."). When viewed in the light most favorable to Radwell, these additional investments cannot be reliably counted as part of Rockwell's domestic industry.

Rockwell's reply brief does not address the CompactLogix® products separately, and Dr. Prowse does not provide any quantitative analysis of the significance of Rockwell's investments in the CompactLogix® products separate from the ControlLogix® and PanelView® products. Mr. Michael provides some qualitative evidence, explaining that the domestic research and development activities include design and development of hardware and firmware, and "[a]ll of the fundamental development, decisions and design for . . . CompactLogix® occurs in the United States." Michael Decl. ¶¶30-31. Although Radwell has withdrawn its opposition to the motion with respect to the asserted trademarks, there is insufficient evidence in the record to

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place the CompactLogix® investments in a relevant context to determine the significance of Rockwell's domestic industry with respect to these products.

Nevertheless, because the ControlLogix® and PanelView® products are asserted to practice each of the nine trademarks identified in Rockwell's motion, Rockwell has satisfied the economic prong of the domestic industry requirement with respect to these trademarks.

2. Domestic Industry in Asserted Copyrights

Rockwell contends that the asserted copyrights are embodied in firmware used on particular ControlLogix® and CompactLogix® controllers. Motion Memo. at 3-4. As discussed above, Rockwell has failed to show that its investments with respect to the CompactLogix® products are significant, and Rockwell is relying on those same investments with respect to certain of the asserted copyrights. Accordingly, Rockwell has failed to carry its burden on the economic prong with respect to the asserted copyrights on firmware used in CompactLogix® controllers.

With respect to the firmware used on ControlLogix® controllers, Rockwell relies on Dr. Prowse to allocate its investments in the ControlLogix® product line among specific ControlLogix® products. Prowse Decl. ¶¶29, 36. Dr. Prowse applies a sales-based allocation to divide Rockwell's total investments in the ControlLogix® product line among the ControlLogix® L6, L7, and L8 products that use versions of the copyrighted firmware. *Id.* Dr. Prowse does not identify any source for the percentages he applies for these sales allocations, however, and it is unclear whether his calculations are reliable. When providing a sales allocation for planned labor and field labor, Dr. Prowse referenced Exhibit 1 attached to Rockwell's motion, which shows sales volumes for all of Rockwell's products, including products not asserted as part of the domestic industry in this investigation. *See* Prowse Decl.

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¶20. In contrast, Rockwell did not attach any exhibit reporting sales figures for individual products within the ControlLogix® product line. As a result, there is no evidence in the record regarding the timeframe for the sales figures relied upon in Dr. Prowse's allocation, or even whether the ControlLogix® L6, L7, and L8 products are the only ControlLogix® products sold by Rockwell in the relevant timeframe. On this record, there is no way to determine whether Dr. Prowse's allocations are accurate or reliable. This failure of proof in Rockwell's allocations precludes summary determination with respect to the specific ControlLogix® products that are alleged to embody the asserted copyrights.

IV. CONCLUSION

For the reasons discussed above, Motion Docket No. 1074-026 is GRANTED-IN-PART and DENIED-IN-PART. Pursuant to Commission Rule 210.18(f), it is my initial determination that Rockwell has satisfied the economic prong of the domestic industry requirement with respect to the ControlLogix® and PanelView® products that are alleged to embody each of the nine trademarks identified in Rockwell's motion. 19 U.S.C. § 210.18(f). The motion is denied with respect to the CompactLogix® products and the individual ControlLogix® products alleged to embody the asserted copyrights.

Pursuant to Commission Rule 210.42(h), the initial determination portion of this order shall become the determination of the Commission unless a party files a petition for review pursuant to Commission Rule 210.43(a), or the Commission orders, on its own motion, a review of the initial determination or certain issues herein pursuant to Commission Rule 210.44. 19 C.F.R. §§ 210.42(h), 210.43(a), 210.44.

This order is being issued with a confidential designation, and pursuant to Ground Rule 1.10, each party shall submit to the Administrative Law Judge a statement as to whether or not it

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seeks to have any portion of this order deleted from the public version within seven (7) days.

See 19 C.F.R. § 210.5(f). A party seeking to have a portion of the order deleted from the public version thereof must attach to its submission a copy of the order with red brackets indicating the portion(s) asserted to contain confidential business information.⁶ The parties' submissions under this subsection need not be filed with the Commission Secretary but shall be submitted by paper copy to the Administrative Law Judge and by e-mail to the Administrative Law Judge's attorney advisor.

SO ORDERED.

A handwritten signature in cursive script, appearing to read "Dee Lord", is written over a horizontal line.

Dee Lord
Administrative Law Judge

⁶ Redactions should be limited to avoid depriving the public of the basis for understanding the result and reasoning underlying the decision. Parties who submit excessive redactions may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **Brian Koo, Esq.**, and the following parties as indicated, on 7/20/2018



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Rockwell Automation, Inc.:

Adam D. Swain
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Washington, DC 20004

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☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

**On Behalf of Respondent Radwell International
d/b/a PLC Center:**

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Respondents:

Can Electric Limited
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☒ Via Express Delivery
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Capnil (HK) Company Limited
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☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

**CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND
COMPONENTS THEREOF INCLUDING CONTROL
SYSTEMS, CONTROLLERS, VISUALIZATION
HARDWARE, MOTION CONTROL SYSTEMS,
NETWORKING EQUIPMENT, SAFETY DEVICES, AND
POWER SUPPLIES**

Inv. No. 337-TA-1074

Certificate of Service – Page 2

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A15-2303 Taihongyu Pushang Road
Cangshan Fuzhou Fujian
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Huang Wei Feng d/b/a A-O-M Industry
Room 201 No. 55 2 Qu,
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95 Fuk Wing Street,
Cheung Sha Wan, Kowloon
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