

PUBLIC VERSION

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

In the Matter of

**CERTAIN STAINLESS STEEL
PRODUCTS, CERTAIN PROCESSES
FOR MANUFACTURING OR
RELATING TO SAME, AND CERTAIN
PRODUCTS CONTAINING SAME**

Investigation No. 337-TA-933

COMMISSION OPINION

On December 8, 2015, the presiding administrative law judge (“ALJ”) issued an initial determination (“ID”) finding respondent Viraj Profiles Limited (“Viraj Profiles”) in default for spoliation of evidence and ordering the disgorgement of complainants’ operating practices in Viraj Profiles’ possession. Order No. 17, at 41 (Dec. 8, 2016). The Commission determined to review these issues. 81 *Fed. Reg.* 7584 (Feb. 12, 2016). In the notice of review, the Commission determined to affirm the default finding as to Viraj Profiles, with modified reasoning to be included in a subsequent opinion, and requested briefing on certain issues under review. *Id.* On April 4, 2016, the Commission determined not to review an ID terminating all respondents except Viraj Profiles. Notice (Apr. 4, 2016).

Having considered the record of this investigation, including the various IDs and the parties’ submissions, the Commission has determined to modify the reasoning of the default finding in Order No. 17 as discussed herein, and to vacate the portions of Order No. 17 with respect to (1) disgorgement and (2) denial of Valbruna’s request for leave to assert additional operating practices. The Commission, therefore, determines to terminate the investigation with a finding of a violation of section 337 as to Viraj Profiles.

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I. BACKGROUND

A. Procedural History

On October 10, 2014, the Commission instituted this investigation based on a complaint filed by Valbruna Slater Stainless, Inc. of Fort Wayne, Indiana; Valbruna Stainless Inc., of Fort Wayne, Indiana; and Acciaierie Valbruna S.p.A. of Vicenza, Italy (collectively, “Valbruna”). 79 *Fed. Reg.* 61339 (Oct. 10, 2014). The complaint alleged violations 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 the sale within the United States after importation of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation names as respondents (1) Viraj Profiles of Mumbai, India; Viraj - U.S.A., Inc. of Garden City, New York (“Viraj USA”) (collectively, “Viraj”); Viraj Holdings P. Ltd. of Mumbai, India;¹ (2) Flanschenwerk Bebitz GmbH of Könnern, Germany (“Bebitz Germany”); Bebitz Flanges Works Pvt. Ltd. of Maharashtra, India (“Bebitz India”); Bebitz U.S.A. of Garden City, New York (collectively, “Bebitz”); and (3) Ta Chen Stainless Pipe Co., Ltd. of Taiwan, Taiwan and Ta Chen International, Inc. of Long Beach, California (“Ta Chen International”) (collectively, “Ta Chen”) (all collectively, “Respondents”). *Id.* The Office of Unfair Import Investigations (“OUII”) also was named as a party to the investigation. *Id.*

¹ According to Viraj, Viraj Holdings P. Ltd. does not exist. Respondents Viraj Profiles Limited’s and Viraj-U.S.A., Inc.’s Response to the Notice of Investigation and Confidential Complaint Filed by the Valbruna Complainants, at 1.

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On December 8, 2015, the ALJ issued an ID (Order No. 17 or “Sanction ID”) granting in part Valbruna’s motion for default and other relief against Viraj Profiles for spoliation of evidence. The ALJ found that Viraj Profiles acted in bad faith in spoliating evidence and that a sanction of default against Viraj Profiles was warranted. On December 16, 2015, Viraj filed a petition for review of the Sanction ID.² Ta Chen also filed a petition for review, arguing that it is entitled to an evidentiary hearing.³ On December 23, 2015, Valbruna and OUII each filed responses to both petitions.^{4,5}

On February 8, 2016, the Commission determined to review the Sanction ID. 81 *Fed. Reg.* at 7584. In its notice of review, the Commission affirmed the default finding, noting that supplemental reasoning would be provided in a forthcoming opinion. *Id.* The Commission clarified that the default finding against Viraj Profiles did not preclude the remaining respondents from participating in an evidentiary hearing and contesting the allegations at issue in the investigation. *Id.* The Commission also requested briefing from the parties on the issue of

² Respondent Viraj Profiles Limited’s Petition for Commission Review of the ALJ’s Initial Determination Imposing Default (“Viraj Pet.”).

³ The Ta Chen Respondents’ Petition for Review of Order No. 17 (“Ta Chen Pet.”).

⁴ Valbruna’s Response to Viraj Profile Limited’s Petition for Review of the Initial Determination (Order No. 17) (“Valbruna Resp.”); Valbruna’s Response to the Ta Chen Respondents’ Petition for Review of the Initial Determination (Order No. 17); Response of the Office of Unfair Import Investigations to the Private Parties’ Petitions for Review of the Initial Determination (Order No. 17) (“OUII Resp.”).

⁵ Valbruna’s response included a request for immediate entry of relief against Viraj Profiles under Commission Rule 210.16(c)(1). The Commission requested additional briefing on this issue. 81 *Fed. Reg.* at 7584. However, this issue is now moot in view of the Commission’s determination to grant partial termination as to all respondents except Viraj Profiles. Notice (Apr. 4, 2016). The Commission, therefore, does not address any arguments relating to immediate entry of relief in this opinion.

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disgorgement, and requested briefing from the parties, interested government agencies, and any other interested persons on the issues of remedy, the public interest, and bonding. *Id.* at 7584-85.

On February 18, 2016, the parties filed initial written submissions addressing the Commission's questions and on remedy, the public interest, and bonding.⁶ Also, on February 18, 2016, several non-parties filed responses to the Commission's February 8, 2016 notice, including the Forging Industry Association, Central Wire Inc., Sumiden Wire Products Corporation, Tree Island Steel, Tri Star Metals, LLC, Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc.⁷ On February 24, 2016, U.S. Representatives Tim Murphy and Peter J. Visclosky, the respective Chairman and Vice Chairman of the Congressional Steel Caucus, also filed a response to the Commission's February 8, 2016 notice.⁸

⁶ Valbruna's Written Submission on Certain Issues Under Review and Remedy, Public Interest, and Bonding ("Valbruna Br."); Viraj Respondents' Submission to the Commission Concerning Remedy and Other Issues ("Viraj Br."); Bebitz Respondents' Submission to the Commission Concerning Remedy and Other Issues ("Bebitz Br."); The Ta Chen Respondents' Submission on the Issues Under Review and on Remedy, Bonding, and the Public Interest ("Ta Chen Br."); Brief of the Office of Unfair Import Investigations on the Issues Under Review and on Remedy, Bonding, and Public Interest ("OUII Br.").

⁷ Letter from Forging Industry Association ("FIA Ltr.") (Feb. 18, 2016); Letter from Central Wire Inc., Sumiden Wire Products Corporation, Tree Island Steel, Tri Star Metals, LLC ("Wire Producers Ltr.") (Feb. 18, 2016); Letter from Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc. ("Bar Producers Ltr.") (Feb. 18, 2016).

⁸ Letter from U.S. Congressmen Tim Murphy and Peter J. Visclosky ("Murphy/Visclosky Ltr.") (Feb. 24, 2016).

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On February 25, 2016, the parties filed reply submissions.⁹ Also, on February 25, 2016, several non-parties filed reply submissions, including the American Wire Producers Association, Alloy Screen Works, Inc., Cincinnati Metals Inc., Kerkau Mfg., Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc.¹⁰ On February 25, 2016, U.S. Senator Joe Donnelly of Indiana also filed a response to the Commission's February 8, 2016 notice.¹¹

On March 3, 2016, the ALJ issued an ID (Order No. 19) granting Valbruna's motion for partial termination of the investigation based on withdrawal of the complaint against all respondents except Viraj Profiles. On April 4, 2016, the Commission determined not to review Order No. 19. Notice (Apr. 4, 2016).

⁹ Valbruna's Consolidated Reply Submission on Certain Issues Under Review and Remedy, Public Interest, and Bonding ("Valbruna Reply"); Viraj Respondents' Reply Submission Concerning Remedy and Other Issues ("Viraj Reply"); Bebitz Respondents' Reply Submission Concerning Remedy and Other Issues ("Bebitz Reply"); The Ta Chen Respondents' Reply Submission on the Issues Under Review and on Remedy, Bonding, and the Public Interest ("Ta Chen Reply"); Reply Brief of the Office of Unfair Import Investigations on the Issues Under Review and on Remedy, Bonding, and Public Interest ("OUII Reply").

¹⁰ AWPAs Rebuttal Submission on Remedy and Public Interest ("AWPA Sub.") (Feb. 25, 2016); Letter from Alloy Machine Works, Inc. ("Alloy Machine Ltr.") (Feb. 25, 2016); Letter from Cincinnati Metals, Inc. ("Cincinnati Metals Ltr.") (Feb. 25, 2016); Letter from Kerkau Mfg. ("Kerkau Ltr.") (Feb. 25, 2016); Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc. ("Bar Producers Rebuttal Ltr.") (Feb. 25, 2016).

¹¹ Letter from U.S. Senator Joe Donnelly ("Donnelly Ltr.") (Feb. 25, 2016).

B. The Asserted Trade Secrets

The asserted trade secrets consist of (1) Valbruna's know-how in manufacturing stainless steel products as documented in its operating practices and (2) Valbruna's customer lists. Compl. ¶¶ 26-40 (citing Exh. 5-9, 13). Valbruna's know-how at issue in this investigation relates to the melting stage (also referred to as stage 2) of manufacturing stainless steel products, and encompasses the precise quantity and mix of inputs and optimal processing times and temperatures. *Id.* ¶¶ 27-28. The melting stage results in semi-finished stainless steel, such as billets or ingots. *Id.* ¶ 23. Valbruna's customer lists at issue include two customer databases containing customer names, contact information, payment terms, and other commercially valuable information. *Id.* ¶¶ 34-36.

II. STANDARD ON REVIEW

The Commission's review is conducted *de novo*. *Certain Polyethylene Terephthalate Yarn and Products Containing Same*, Inv. No. 337-TA-457, USITC Pub. No. 3550 (Oct. 2002), Comm'n Op. at 9 (June 18, 2002). Upon review, "the Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046 (July 1997), Comm'n Op. at 9-10 (June 26, 1997) (quoting *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, USITC Pub. No. 2576 (Nov. 1992), Comm'n Op. at 5 (Aug. 28, 1992)). Upon review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge." 19 C.F.R. § 210.45(c). "The Commission may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding." *Id.*

III. ANALYSIS

A. Sanctions and Other Relief for Spoliation of Evidence

The Sanction ID discusses in detail the discovery-related misconduct in this investigation. The Commission adopts all of the Sanction ID's factual findings. The Commission also affirms, with the modifications below, the Sanction ID's default finding against Viraj Profiles for spoliation of evidence, but vacates the Sanction ID's order that Viraj Profiles disgorge any Valbruna operating practices in its possession.

1. The Sanction ID's Findings

Valbruna alleged that Viraj Profiles took its trade secrets by inducing a former employee of Valbruna, Giancarlo Zausa, to steal Valbruna's operating practices for making stainless steel, as well as its customer lists. Order No. 17, at 3. According to Valbruna, in August 2006, just before he resigned from Valbruna, Mr. Zausa downloaded customer lists and more than 300 of Valbruna's confidential operating practices. *Id.* at 4-5. The electronic files containing Valbruna's operating practices had been saved on Mr. Zausa's work laptop in a folder entitled "s.s. secrets." *Id.* In 2009, an Italian court convicted Mr. Zausa of theft of Valbruna's know-how and customer lists. *Id.* at 6. In 2014, the Italian court convicted the General Manager of Viraj Profiles of the same crime. *Id.* The Italian authorities are currently investigating and prosecuting the Chairman and Managing Director of Viraj Profiles and the Managing Director of Bebitz Germany. *Id.* at 7.

On July 2, 2015, the ALJ ordered the forensic inspection of the electronic devices and email accounts of six current and former employees of Bebitz and Viraj, including Shilpi Mathur, the head of Research and Development and Quality Assurances at Viraj Profiles. Order No. 10. Specifically, the order required Respondents to identify "[a]ll computers and storage media in Respondents' possession, custody, or control that have been used since August 2006,"

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by the six named custodians, including any “personal storage media including USB drives,” and to make available the identified electronic devices for inspection and copying to an expert. *See id.* at 7 (adopting protocol set forth in Exhibit A of Motion No. 933-015).

In response, Respondents prepared a list of the computers and other electronic assets that they identified as covered by the order. *See* Exh. C to Memorandum in Support of Valbruna’s Motion for Default and Other Relief (“Valbruna Mot.”), Racich Witness Statement, ¶ 9; Exh. B to Valbruna Mot., July 9, 2015 email from J. Gagen; Exh. C to Valbruna Mot., Exh. 3, July 13, 2016 lists. Valbruna’s expert, J. Christopher Racich, performed a forensic inspection of the computers and other electronic assets that were identified and produced. Order No. 17, at 7. The forensic inspection of Ms. Mathur’s computer revealed the following:

- On October 19, 2014, a few weeks after the complaint in this investigation was served, three days after Valbruna served its initial document requests and interrogatories, and three days after Viraj Profiles’ U.S. counsel provided notice to Viraj Profiles of its duty to preserve all documents and tangible things in its possession, a new operating system was installed on Ms. Mathur’s computer. *Id.* at 8, 27. The new operating system permanently overwrote and destroyed previously existing active data. *Id.* at 8, 29, 35.
- Metadata associated with a shortcut link file on Ms. Mathur’s computer indicated that a folder titled “s.s. secrets” had existed on Ms. Mathur’s computer as early as December 2007 and was shared on Viraj Profiles’ computer network. *Id.* at 8-9. This folder had the same name as the folder on Mr. Zausa’s work laptop containing Valbruna’s confidential operating practices. *Id.* at 29.
- After the operating system installation, between October 28, 2014, and July 27, 2015, at least thirty-six different USB storage devices were attached to Ms. Mathur’s computer. *Id.* at 9-11. Three of the USB devices contained files with filenames and file sizes identical to the Valbruna operating practices downloaded by Mr. Zausa. *Id.* at 9-10, 30-34. A fourth USB device contained six files with filenames corresponding to Valbruna’s operating practices. *Id.* at 10.

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Viraj Profiles did not identify or produce any of the thirty-six devices attached to Ms. Mathur's computer during discovery or as required by Order No. 10. *Id.* at 7-11, 27.¹² After the forensic inspection, Viraj Profiles represented that the USB devices no longer exist. *Id.* at 34.

The Sanction ID found that, based on the undisputed evidence, Viraj Profiles had control of Ms. Mathur's computer and the USB devices that were attached to it at all relevant times. *Id.* at 27. The Sanction ID also found that Viraj Profiles had a duty to preserve and to not alter the computer and the USB devices after Viraj Profiles was served with the complaint in this investigation and that Viraj Profiles was informed of that duty by its previous counsel on October 16, 2014, just days after the investigation was instituted. *Id.* at 27-28.

The Sanction ID found that Viraj Profiles destroyed or withheld evidence with a culpable state of mind. *Id.* at 28. The Sanction ID found that the following factors indicated a culpable state of mind: the significance of Ms. Mathur and her computer; the timing of the operating system installation; the similarities between the files accessed from Ms. Mathur's computer, the files on the USB devices attached to Ms. Mathur's computer, and the information stolen by Mr. Zausa on behalf of Viraj Profiles; Viraj Profiles' failure to produce the USB devices attached to Ms. Mathur's computer; and Viraj Profiles' silence as to its actions. *Id.* at 28-34. The Sanction ID concluded Viraj Profiles' conduct was in bad faith:

The ALJ notes that in [Viraj Profiles'] original response and in the supplemental response there is a glaring lack of explanation of the installation of the new operating system on Ms. Mathur's computer *especially in light of the litigation hold*. . . . Ms. Mathur is a key player in this investigation—she is tasked with

¹² Valbruna argues in its petition response that Viraj also failed to produce thirty-four USB devices that were attached to the computer of Viraj's owner, Neeraj Kochhar. Valbruna Resp. at 3-4, 26-27. Because the USB devices used by Mr. Kochhar were not a basis of Valbruna's motion for default or the Sanction ID, the Commission does not consider them here.

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making [Viraj Profiles'] stainless steel. There can be no question that any information in her possession would be highly relevant to this investigation. There has been no explanation from Viraj [Profiles] as to what happened, why it happened, and who was involved. The ALJ can only assume that it knew exactly what it was doing in installing the operating system and withholding (or destroying) USB devices. The ALJ finds that Viraj [Profiles] acted in bad faith.

Id. at 36-37.

The Sanction ID further found that Viraj Profiles "did little to discredit" Mr. Racich's work or his affidavit. *Id.* at 35-36. The Sanction ID found that the bulk of Viraj Profiles' cross-examination of Mr. Racich focused on speculation and topics of little probative value, instead of his methodology and conclusions. *Id.* at 35.

The Sanction ID found that the information deleted from Ms. Mathur's computer and the information contained on the missing USB devices are highly relevant to the investigation and prejudicial to Valbruna, OUII, and the ALJ. *Id.* at 37-38. Specifically, the Sanction ID found the loss of at least four files that were identical to those stolen by Mr. Zausa "directly undermines Valbruna's ability to show that Viraj [Profiles] stole its steel making processes and, further, that Viraj [Profiles] used the information in making its own steel." *Id.* The Sanction ID noted that Viraj Profiles did not come forward with any explanation as to what the destroyed information might have been. *Id.*

Based on the evidence above, the Sanction ID found Viraj Profiles' conduct to be "so egregious and prejudicial" as to warrant a finding of default as a sanction. *Id.* at 38-39. In considering lesser sanctions,¹³ the Sanction ID stated:

¹³ The Sanction ID noted Viraj argued for lesser sanctions, namely, compensation to Valbruna for reasonable litigation expenses for the forensic inspection, as well as adverse findings that (1) Viraj had possession of Valbruna's operating practices, (2) those operating practices were accessed through a computer owned by Viraj, and (3) Viraj used Valbruna's operating practices.

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As for lesser sanctions, which include proceeding to an evidentiary hearing, the ALJ declines to allow Viraj [Profiles] to continue to use Valbruna's trade secrets by forcing the parties to an evidentiary hearing. The outstanding issues, *i.e.*, injury, domestic industry, whether the steel making processes are trade secrets, simply pale in comparison to the misconduct by Viraj [Profiles]. The ALJ finds that prolonging this investigation simply gives Viraj [Profiles] additional time to continue to misappropriate and use Valbruna's trade secrets. The evidence against Viraj [Profiles] is so overwhelming and its conduct is so egregious that the ALJ finds that the best and only sanction is a finding of default. Indeed, given the extent of [Viraj Profiles'] misconduct, the ALJ finds that all aspects of the investigation have been tainted since it will never be clear whether the record before the ALJ and the Commission is complete and accurate. In other words, [Viraj Profiles'] credibility in this investigation is tainted—consequently, any findings or evidence that rely on representations from Viraj [Profiles] will be highly suspect and of doubtful veracity. Moreover, as [OUII] correctly noted, Commission precedent allows for a finding of default regardless as to whether other issues, such as injury, had not yet been decided.

Id. at 40-41.

The Sanction ID found that Viraj Profiles acted in bad faith in spoliating evidence and that Viraj Profiles' conduct warrants the sanction of default. *Id.* at 41. The Sanction ID also ordered Viraj Profiles to disgorge any Valbruna operating practices in its possession. *Id.* The Sanction ID, however, denied Valbruna's request to assert certain operating practices that the ALJ had previously excluded. *Id.* at 19, 42. It also expressly stated that the respondents other than Viraj Profiles "are not subject of the instant motion." *Id.* at 1 n.1. The Sanction ID made no findings as to any other respondent.

(continued)

Order No. 17, at 38. The Sanction ID also noted that Valbruna argued in the alternative for adverse findings that (1) Viraj received and is using Valbruna's operating practices and (2) Valbruna's operating practices are trade secrets and were misappropriated. *Id.* at 18-19.

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2. The Commission's Authority to Impose Sanctions for Spoliation

Section 337(h) authorizes the Commission to issue sanctions “for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure.” 19 U.S.C. § 1337(h). Commission Rule 210.33 provides a non-exhaustive list of sanctions that the Commission may order, including “any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure.” 19 C.F.R. § 210.33. Rule 210.33 reads in relevant part as follows:

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§ 210.33 Failure to make or cooperate in discovery; sanctions.

(a) *Motion for order compelling discovery.* A party may apply to the administrative law judge for an order compelling discovery upon reasonable notice to other parties and all persons affected thereby.

(b) *Non-monetary sanctions for failure to comply with an order compelling discovery.* If a party or an officer or agent of a party fails to comply with an order including, but not limited to, an order for the taking of a deposition or the production of documents, an order to answer interrogatories, an order issued pursuant to a request for admissions, or an order to comply with a subpoena, the administrative law judge, for the purpose of permitting resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply, may take such action in regard thereto as is just, including, but not limited to the following:

- (1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;
- (2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;
- (3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;
- (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or
- (6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure.

Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

Id.

Order No. 10 required Viraj Profiles to identify and make available for forensic inspection all electronic devices, including USB drives, in Viraj Profiles' possession, custody, or control that have been used since August 2006 by certain current and former employees, including Ms. Mathur. Order No. 10, at 7 (adopting protocol set forth in Exhibit A of Motion No. 933-015). The evidence shows that at least thirty-six USB devices were used on Ms. Mathur's computer during the relevant time period and thus subject to identification and forensic inspection under Order No. 10. *See* Exh. C to Valbruna Mot., Racich Witness Statement, ¶¶ 17, 55; Order No. 17, at 11, 27. Viraj Profiles did not identify or produce for inspection any of these devices. Instead, two weeks after Order No. 10 issued, Viraj Profiles told Valbruna that there were *no applicable* storage media used by Ms. Mathur since 2006. Exh. B to Valbruna Mot., July 9, 2015 email from J. Gagen; Exh. C to Valbruna Mot., Exh. 3, July 13, 2016 lists, at 2. Viraj Profiles does not dispute this evidence, much less contend it had complied with Order No. 10. Thus, the Commission finds that Viraj Profiles failed to comply with Order No. 10.

3. Sanction for Spoliation of Evidence

To prove that sanctions are warranted for spoliation of evidence that was ordered to be produced, a party must show: “(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed or materially altered; (2) that the records were destroyed or materially altered with a ‘culpable state of mind’ and (3) that the destroyed or materially altered evidence was ‘relevant’ to the claim or defense of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable fact finder could conclude that it would support that claim or defense.” *Certain Opaque Polymers* (“*Opaque Polymers*”), Inv. No. 337-TA-883, ID at 7-8 & n.3 (Oct. 30, 2014) (citing cases), *aff'd in relevant part by* Comm'n Op. at 12-19 (Apr. 30, 2015). Thus, “spoliation sanctions may be imposed as long as

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the destruction of evidence was ‘blameworthy’ (*i.e.*, with fault), with the degree of culpability impacting the severity of the sanction.” *Id.* at 12.

The Federal Circuit has held that a sanction of dismissal or default “should not be imposed unless there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party.” *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328-29 (Fed. Cir. 2011); *see also id.* at 1327 (“A determination of bad faith is normally a prerequisite to the imposition of dispositive sanctions for spoliation.”).¹⁴ “To make a determination of bad faith, the district court must find that the spoliating party ‘intended to impair the ability of the potential defendant to defend itself.’ The fundamental element of bad faith spoliation is advantage-seeking behavior by the party with superior access to information necessary for the proper administration of justice.” *Id.* at 1326 (internal citations omitted); *see also Opaque Polymers*, ID at 80 (same).

Viraj Profiles acknowledged that its conduct warrants sanctions. *See* Viraj Profiles Limited’s Response to Valbruna’s Motion for Default and Other Relief, at 2. Viraj Profiles also does not dispute the Sanction ID’s findings that Viraj Profiles had control of the evidence at issue, that Viraj Profiles had a duty to preserve the evidence when it was destroyed, that

¹⁴ The Sanction ID misstates that “most courts require a finding of bad faith before imposing any sort of sanction for spoliation.” *See* Order No. 17, at 25 (citing *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 529 (E.D. Va. 2010)). Instead, *Victor Stanley* stated that “a ‘distinct minority’ of courts ‘require a showing of bad faith before any form of sanction is applied.’” 269 F.R.D. at 529 (quoting *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 266 (Fed. Cl. 2007)); *see also Opaque Polymers*, ID at 11 (“On one end of [the] spectrum, actually representing a distinct minority, are courts that require a showing of bad faith before any form of sanction is applied.” (quoting *United Med. Supply Co.*, 77 Fed. Cl. at 266-67)). Accordingly, the Commission vacates the Sanction ID’s statement that “most courts require a finding of bad faith before imposing any sort of sanction for spoliation.”

spoliation took place, that the destroyed evidence was relevant, and that the destruction was prejudicial to Valbruna.¹⁵

Viraj Profiles argues, however, that the Sanction ID's finding of bad faith is conclusory and not supported by clear and convincing evidence. Viraj Pet. at 19-23. Viraj Profiles maintains that default was unwarranted because numerous files were unaffected by the operating system installation and remained on Ms. Mathur's computer, the operating system installation occurred before the issuance of the forensic inspection order, and that Viraj Profiles provided other substantial discovery. *Id.* at 20-21. Viraj Profiles also argues that the evidence could reasonably support an inference that Viraj Profiles acted with a "blameworthy, but not bad-faith, state of mind." *Id.* at 21-22.

The Commission rejects these arguments. In addition to the reasons explained by the Sanction ID (Order No. 17, at 27-41), the Commission finds that Viraj Profiles engaged in a course of conduct in which it lied about its document production, obstructed the judicial proceedings, and intentionally destroyed evidence during the investigation. Viraj Profiles' failure to identify and produce for forensic inspection thirty-six USB devices in violation of Order No. 10—although certainly sufficient for sanctions—was just the tip of the iceberg because the forensic inspection revealed much more misconduct.

¹⁵ As a bad faith actor, Viraj Profiles bears a heavy burden to show a lack of prejudice. *See Micron Tech.*, 645 F.3d at 1328 ("If it is shown that the spoliator acted in bad faith, the spoliator bears the heavy burden to show a lack of prejudice to the opposing party because [a] party who is guilty of . . . intentionally shredding documents . . . should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import." (internal quotation marks omitted)); *Opaque Polymers*, ID at 15-17, 93. Viraj Profiles did not come forward with any evidence that the destroyed or missing documents are not relevant or not prejudicial. Thus, the Commission finds that Viraj Profiles failed to rebut the presumption of prejudice and relevancy.

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The additional misconduct included numerous false representations by Viraj Profiles in this investigation. It repeatedly denied—at times, under oath—that it had taken or had in its possession Valbruna’s operating practices. *See, e.g.*, Exh. 25 to Valbruna Resp., CX-1578C, [

]; Exh. 21 to Valbruna Resp., CX-349C, [

]; Exh. 22 to Valbruna Resp., CX-1290C, [

]; Exh. 24 to Valbruna Resp., Dec. 23, 2014 Letter, at 3-4.

Viraj Profiles also opposed forensic inspection with false representations to the ALJ that it had conducted all the necessary searches and produced all relevant documents, when, in fact, it had not. *See, e.g.*, Exh. 28 to Valbruna Resp., Respondents’ Opposition to Valbruna’s Motion to Compel Forensic Inspection of Electronically Stored Information of Certain Viraj and Bebitz Custodians, at 1-2, 6, 8.

In addition, Viraj Profiles destroyed information stored on the computer of Ms. Mathur—who is the head of Research and Development and Quality Assurance at Viraj Profiles and Viraj Profiles’ corporate representative on its metallurgical and steelmaking processes—by installing a

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new operating system on Ms. Mathur's computer only nine days after the investigation was instituted and only three days after Viraj Profiles received litigation hold instructions from its U.S. counsel. Order No. 17, at 28-29.

Against this backdrop of misrepresentations and information destruction, Viraj Profiles has remained silent, providing no explanation in its response and supplemental response to Valbruna's motion as to (1) why the operating system was installed on Ms. Mathur's computer, (2) why that installation occurred when it did, (3) its failure to produce the USB devices, and (4) what information was destroyed. *Id.* at 29, 34, 39. The evidence as a whole supports only one reasonable inference: that Viraj Profiles destroyed evidence during the investigation with the intent to impair the ability of Valbruna to prove its claim. *See id.* at 34, 36.

Viraj Profiles argues that the Sanction ID's finding of bad faith and default is unsupported by law. Viraj Pet. at 22-26. Viraj Profiles argues that the Sanction ID erred in imposing the "sanction of last resort" where default has been rejected in district court cases involving more egregious behavior. *Id.* at 22-23. Viraj Profiles argues that a bad faith finding alone is not sufficient to justify default where a "lesser sanction" is available to redress any prejudice suffered by Valbruna. *Id.* at 23-26.

Viraj Profiles, however, confuses sanctions issued under Commission Rule 210.33 and Rule 37 of the Federal Rules of Civil Procedure with sanctions issued pursuant to a court's inherent authority (contempt). Whereas Rule 37 "expressly authorizes dismissal or default for noncompliance with a discovery order," default imposed under a court's inherent power "is not grounded in rule or statute and must be exercised with particular restraint." *Shepherd v. Am. Broadcasting Cos.*, 62 F.3d 1469, 1480 (D.C. Cir. 1995); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

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Viraj Profiles cites a number of district court cases in which a motion for default was denied. Viraj Pet. at 22-23. However, those cases either were decided under the court's inherent authority, not under Rule 37, or did not involve a violation of a discovery order. See *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 803 F. Supp. 2d 469, 499 (E.D. Va. 2011) ("inherent power");¹⁶ *Bruno v. Bozzuto's, Inc.*, Civ. No. 3:09-cv-00874, 2015 WL 1862990, at *1 (M.D. Pa. Apr. 23, 2015) (involving inherent authority because spoliation occurred before lawsuit was filed); *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010) (identifying no specific discovery order that had been violated); *Quantlab Techs. Ltd. (BGI) v. Godlevsky*, No. 4:09-CV-4039, 2014 WL 651944, at *10 (S.D. Tex. Feb. 19, 2014) (same; noting that *Rimkus* did not involve "violation of an express discovery order"); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 194 (D.S.C. 2008) ("inherent power"). In addition, each of these cases involved findings of minimal prejudice based on the availability of substantial evidence to prove the affected party's case¹⁷—grounds that Viraj Profiles does not assert here.

¹⁶ Although *E.I. du Pont* refers to "litigation hold orders," those are not orders of the court, but internal memoranda to the party's personnel. 803 F. Supp. 2d at 479.

¹⁷ See *E.I. du Pont*, 803 F. Supp. 2d at 508 ("[M]any deleted items were recoverable because of the preservation of [defendant's] back-up tapes. The recovery of the deleted information has provided [plaintiff] with much information to help prove its case and to meet [defendant's] defenses."); *Bruno*, 2015 WL 1862990, at *7 (noting that affected party obtained information necessary to prove its case from third parties and was "now able to assert its primary defenses"); *Rimkus*, 688 F. Supp. 2d at 644 ("Between the records the defendants did produce, the deleted records [plaintiff] obtained from other sources, and other evidence of the contents of deleted lost records, [plaintiff] has extensive evidence it can present."); *Quantlab*, 2014 WL 651944, at *17 ("[I]t is still somewhat speculative that [the evidence in question] would have ended up as a part of [plaintiff's] case. As such, the Court is able to conclude only that they were moderately relevant and their loss moderately prejudicial."); *Nucor Corp. v. Bell*, 251 F.R.D. at 196 (noting that plaintiff had "considerable evidence" available to support its misappropriation argument).

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Viraj Profiles also argues a sanction lesser than default, namely, an adverse ruling that Viraj Profiles' receipt and use of Valbruna's operating practices is established, would be effective to restore Valbruna to the same position it would have been absent the discovery violations. Viraj Pet. at 23-25. According to Viraj Profiles, a default sanction is not tailored to redress the specific conduct at issue where the information that was destroyed "relates to but a single element" of a section 337 trade secret claim (receipt and use of a trade secret). *Id.* at 24, 26.

As an initial matter, Viraj Profiles cites no authority requiring the ALJ or the Commission to consider lesser sanctions under Rule 37 based on the egregious discovery abuse here. The cases Viraj Profiles cites to the contrary at pages 23-24 of its petition all involved sanctions issued under the court's inherent authority, not Rule 37, and thus are not controlling here. *See Micron*, 645 F.3d at 1326 ("inherent authority"); *Lab. Corp. of Am. v. United States*, 108 Fed. Cl. 549, 558 (2012) (noting that it was unclear that sanctions under Rule 37 were available in a bid protest, and relying instead on inherent authority).

A finding of default is appropriate for at least three reasons. First, sanctions lesser than a finding of default, such as monetary sanctions or adverse rulings, would not adequately protect Valbruna's interest or remedy the prejudice Valbruna suffered from Viraj Profiles' conduct. In particular, an adverse ruling limited to the issue of Viraj Profiles' receipt and use of Valbruna's operating practices, as requested by Viraj Profiles, would not address the unknown amount of information that was stored on Ms. Mathur's computer before the operating system installation or on the USB devices attached to Ms. Mathur's computer. Due to the nature of the spoliation, there is no record of every document that was destroyed. As Valbruna notes, the operating system installation on Ms. Mathur's computer and the disappearance of the thirty-six USB

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storage devices attached to her computer make it impossible to know the full range of evidence that Viraj Profiles spoliated and all affected aspects of Valbruna's claim. *See* Valbruna Resp. at 40. The adverse ruling proposed by Viraj Profiles does not compensate for the totality of what the destroyed or missing documents might have revealed. The inability to determine what was destroyed or lost was entirely of Viraj Profiles' doing.

Second, a sanction of default is necessary to deter similar spoliation of evidence and discovery order violations and to protect the integrity of judicial proceedings. The Supreme Court explained that the purpose of Rule 37 sanctions is "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). The Federal Circuit and other courts of appeals also have upheld default sanctions under Rule 37 to protect the integrity of judicial proceedings. *See Monsanto Co. v. Ralph*, 382 F.3d 1374, 1381 (Fed. Cir. 2004) ("[T]he judicial system cannot tolerate litigants who flagrantly refuse to comply with the orders of the court and who refuse to make discovery, for delay and evasion are added burdens on litigation, causing a waste of judicial and legal time, are unfair to the litigants and offend the administration of justice." (quoting *Denton v. Mr. Swiss of Missouri, Inc.*, 564 F.2d 236, 241 (8th Cir. 1977)); *Weisberg v. Webster*, 749 F.2d 864, 872 (D.C. Cir. 1984) ("We encourage such [dismissal] orders. Litigants who are willful in halting the discovery process act in opposition to authority from the court and cause impermissible prejudice to their opponents." (quoting *G-K Props. v. Redevelopment Agency*, 577 F.2d 645, 647 (9th Cir. 1978))). The adverse ruling proposed by Viraj Profiles amounts to a penalty that is no worse than what it contends the destroyed or missing documents would have revealed, without a deterrent effect. It would encourage, rather than discourage, a party to

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destroy or not produce critical evidence to avoid a finding of violation. *See Arista Records, LLC v. Tschirhart*, 241 F.R.D. 462, 465 (W.D. Tex. 2006) (“One who anticipates that compliance with discovery rules and the resulting production of damning evidence will produce an adverse judgment, will not likely be deterred from destroying that decisive evidence by any sanctions less than the adverse judgment [it] is tempted to thus evade.”); *Phillips Elecs. N. Am. Corp. v. BC Technical*, 773 F. Supp. 2d 1149, 1213 (D. Utah 2011) (“The court must not inherently reward the misbehavior of companies and individuals who want to destroy incriminating evidence rather than produce it and have a judgment entered against them . . .”).

Third, the Commission already addressed and rejected Viraj Profiles’ “single element” argument in *Opaque Polymers*. In that investigation, the respondents similarly asserted that the spoliated evidence “relates to only one element” of the complainant’s trade secret claim (namely, theft of the trade secret) and argued that default is inappropriate because the spoliated evidence would not have proved every element of the complainant’s trade secret misappropriation claims. *Opaque Polymers*, Comm’n Op. at 16-17. The Commission rejected respondents’ argument as rendering the waiver provided by Commission Rule 210.16(b)(4) “meaningless.” *Id.* at 18. Similarly, here, the Commission finds that, based on the default finding as to Viraj Profiles, the allegations in the complaint are presumed to be true and Valbruna need not establish the merits of every element of its trade secret misappropriation claims.

Viraj Profiles also challenges the default finding on other grounds: (1) the Sanction ID improperly considered and relied on the opinion of Valbruna’s forensics expert, Mr. Racich, and (2) the Sanction ID improperly found Viraj Profiles in default before ruling on Respondents’

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motion that Valbruna's claims are time-barred.¹⁸ Viraj Pet. at 26-32. The Commission addresses each argument below.

The Commission finds that the Sanction ID did not err in relying on Mr. Racich's expert testimony in granting default against Viraj Profiles. The Commission finds that the Sanction ID considered and properly rejected Viraj Profiles' objections to Mr. Racich's expert testimony. In particular, the Sanction ID stated that Viraj Profiles "did little to discredit Mr. Racich's work" and that the bulk of Viraj Profiles' questioning of Mr. Racich "focus[ed] less on Mr. Racich's actual methodology and conclusions and instead focuse[d] on speculation and topics of little probative value." Order No. 17, at 35; *see also id.* at 36 (finding "little in the portions of Mr. Racich's deposition testimony relied upon by Viraj [Profiles] that would discredit the work that he performed or raise any question as to the validity of his results and conclusions").

Also, Viraj Profiles' argument that Valbruna or Mr. Racich's witness statement does not comply with *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), or the ALJ's Ground Rules is without any basis. *See* Viraj Pet. at 26-28. Mr. Racich's witness statement includes, among other things, his opinions, the basis and reasons underlying his opinions, and the data or other information he considered in forming his opinions—contents that are consistent with the requirements of *Daubert* and Ground Rule 6. Although not clearly articulated, Viraj Profiles' argument appears to be that Mr. Racich's theory can be tested only if the steps he performed can be verified without redoing the steps he performed. *See* Viraj Pet. at 27-28 (citing Racich Dep. 161:14-162:13). That notion is not supported by any fair reading of *Daubert*.

¹⁸ Viraj Profiles also makes various remedy-related arguments against default. Viraj Pet. at 32-39. Those arguments are discussed below in the context of remedy.

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Similarly unfounded is Viraj Profiles' suggestion that Mr. Racich was obligated to speak to Valbruna personnel regarding the electronic devices of *Viraj Profiles*. See Viraj Pet. at 28. Although Ground Rule 9.4.1.2 requires a witness statement to "reflect the testimony of the witness and not that of counsel or other persons," that rule must be read in conjunction with Ground Rule 6 and the Federal Rules of Evidence. See Ground Rule 6 (containing no requirement for personal knowledge); Fed. R. Evid. 602 (stating that personal knowledge "does not apply to a witness's expert testimony"); Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.").

The Commission also finds that the Sanction ID did not err in finding Viraj Profiles in default before ruling on Respondents' pending motion for summary determination on its statute of limitations defense. That motion had not been adjudicated by the ALJ, and thus was not properly before the Commission. The Commission, therefore, declines to address the merits of the motion. As to the procedural issue that Viraj Profiles raises, Viraj Profiles points to no authority that requires the ALJ to rule on Respondents' time-bar motion before ruling on Valbruna's default motion. Viraj Profiles' argument that a court must address the applicable statute of limitations before reaching the merits of the case misses the point. The default finding against Viraj Profiles is not on the merits, but based on Viraj Profiles' failure to make or cooperate in discovery. See 19 C.F.R. §§ 210.16(a)(2), 210.33(b).

4. Disgorgement Order

The parties dispute the Commission's authority to issue and enforce a disgorgement order. Valbruna argues that the Sanction ID's disgorgement order is an appropriate discovery sanction under section 337(h), Commission Rule 210.33(b)(6), and Rule 37 of the Federal Rules of Civil Procedure. Valbruna Br. at 28-29. Viraj Profiles disagrees, arguing that the disgorgement order is beyond the Commission's statutory authority and jurisdiction. Viraj Br. at

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20. Viraj Profiles argues that section 337 limits the Commission's powers to issuing exclusion orders and cease and desist orders. *Id.* at 18. Ta Chen and Bebitz generally join or defer to Viraj Profiles' arguments, but Ta Chen adds that it is not aware of any authority that would support the Commission's jurisdiction to order disgorgement by a foreign entity. Ta Chen Br. at 8; Bebitz Br. at 1-2. OUII also argues that the Commission lacks the authority to order Viraj Profiles to disgorge any Valbruna operating practices in its possession as a sanction for spoliation of evidence. OUII Br. at 4. OUII argues that Commission Rule 210.33 is directed to parties in the discovery phase of an investigation before the ALJ and that the Commission has no authority to order or enforce disgorgement where discovery has been completed and the Commission has affirmed the default finding against Viraj Profiles. OUII Reply at 10-11. OUII argues that, at this stage, the Commission's authority is limited to issuing exclusion orders and cease and desist orders. *Id.*

The parties confuse the relief available under section 337(h) and Rule 210.33 for discovery violations and the relief available under section 337(d) and (f) for section 337 violations. The ALJ ordered disgorgement not as a remedy for a section 337 violation, but as a sanction for Viraj Profiles' spoliation of evidence and discovery violation. *See* Order No. 17, at 22-24 (citing Rule 210.33(b) as authority to issue sanctions).¹⁹

The purpose of Rule 210.33 is to "permit[] resolution of relevant issues and disposition of the investigation without unnecessary delay despite the failure to comply." 19 C.F.R. § 210.33(b). The Commission's finding of default disposes of violation issues in the

¹⁹ The ALJ generally has authority to issue a recommended determination on remedy for a section 337 violation only after issuance of an initial determination on a section 337 violation, which did not occur here. *See* 19 C.F.R. § 210.42(a)(1)(ii).

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investigation with respect to Viraj Profiles despite its failure to comply with Order No. 10, rendering disgorgement unnecessary here.²⁰

Accordingly, the Commission has determined to vacate the portion of the Sanction ID that orders Viraj Profiles to disgorge any Valbruna operating practices in its possession.

B. Remedy, the Public Interest, and Bonding

1. Limited Exclusion Order

Section 337(d)(1) 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). Commission Rule 210.16(c) provides that, after a respondent has been found in default by the Commission, it “may issue an exclusion order . . . affecting the defaulting respondent.” 19 C.F.R. § 210.16(c). The Commission has “broad discretion in selecting the form, scope[,] and extent of the remedy.” *Viscofan, S.A. v. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986).

For the reasons explained below, the Commission has determined to issue a limited exclusion order excluding the entry of stainless steel products manufactured using any of the trade secrets Valbruna identifies in its complaint (*see* Compl. ¶¶ 27-33, 51 and accompanying

²⁰ Thus, the Commission disagrees with Valbruna’s argument that the disgorgement order is necessary and appropriate because it would require Viraj Profiles to comply with Order No. 10 compelling respondents to produce certain electronic devices. *See* Valbruna Br. at 29. Valbruna’s other arguments (that disgorgement would protect Valbruna’s interests; remedy the evidentiary prejudice caused by Viraj Profiles’ concealment and spoliation, and deter future respondents from engaging in similar conduct) do not establish the need for disgorgement, particularly where the ultimate sanction of default has already been imposed.

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exhibits) by or on behalf of Viraj Profiles, or its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns.²¹

a) Covered Operating Practices

The parties dispute which trade secrets are at issue in this investigation and specifically whether the trade secrets encompassed by a limited exclusion order should be limited to certain Valbruna operating practices. Viraj Profiles, Ta Chen, and OUII argue that a limited exclusion order should cover only the forty-seven operating practices identified by Valbruna in Exhibit A of its January 13, 2015 interrogatory responses. Viraj Br. at 3-5; Ta Chen Br. at 24-25; OUII Reply at 13 & n.8. They argue that such an order is consistent with the ALJ's rulings striking untimely asserted operating practices and prohibiting Valbruna from relying on other operating practices in the investigation. *See id.* Valbruna argues that it specifically identified 335 misappropriated operating practices in Exhibit 13 to the complaint and that the Commission must presume this allegation is true due to Viraj Profiles' default. Valbruna Reply at 4. Valbruna argues that it should not be bound to its January 13, 2015 identification because that identification was made based on a tainted factual record; it would have continued to assert all of the operating practices it identified in its complaint had it known of the information that Viraj Profiles had concealed and destroyed. *Id.* at 4-6.

The procedural history with respect to Valbruna's asserted operating practices is as follows. On September 5, 2014, Valbruna alleged in its complaint that Mr. Zausa "transferred" certain operating practices to Viraj, and referred to Exhibit 13 listing 335 operating practices.

²¹ Valbruna's requested limited exclusion order and cease and desist order do not appear to cover the customer lists identified in its complaint. To the extent that Valbruna desires such coverage, modification proceedings at the Commission are available. 19 C.F.R. § 210.76.

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Compl. ¶ 51 & Exh. 13. On January 12, 2015, the ALJ ordered Valbruna to identify on January 13, 2015, all operating practices that it was asserting against respondents. Order No. 6, at ¶ 18(b). Valbruna also committed itself to a “final” identification of the asserted operating practices by January 13, 2015. Order No. 12, at 4. On January 13, 2015, Valbruna identified forty-seven operating practices. *Id.* at 2; Exh. A to OUII Reply, Valbruna’s Supplemental Responses and Objections to Viraj’s Interrogatory Nos. 2, 3-5, 9-11, 14, 18-22, 25, 28, and 38 (“Valbruna Jan. 13, 2015 Rog. Resp.”), Exh. A.²² On July 29, 2015, the ALJ struck Valbruna’s identification of thirteen additional operating practices as untimely and lacking good cause, and precluded Valbruna from advancing any further arguments related to the thirteen operating practices. Order No. 12, at 4-6 (finding that Valbruna failed to explain how alleged difficulties in obtaining discovery from Respondents prevented timely identification of operating practices). On September 8, 2015, Valbruna moved for default and other relief, including leave to assert the thirteen operating practices excluded under Order No. 12, arguing that the forensic inspection revealed that Viraj Profiles had not produced all the information Valbruna could have used to fully identify the operating practices in Viraj Profiles’ possession. Valbruna Mot. at 28-29. On December 9, 2015, the ALJ denied Valbruna’s request for leave because “Valbruna’s failure to show good cause for the late additions[] is unaffected by the results of the forensic inspection.” Order No. 17, at 42.

Having been found in default, Viraj Profiles cannot contest any allegations at issue in the investigation and any factual allegations in the complaint are “presumed to be true” with respect

²² Valbruna’s January 13, 2015 interrogatory responses also referred to Exhibit 13 to its complaint (listing 335 operating practices) to identify and describe the misappropriated trade secrets. *See* Valbruna Jan. 13, 2015 Rog. Resp. at No. 2.

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to Viraj Profiles. *See* 19 C.F.R. §§ 210.16(b)(4), (c)(1). The record is tainted by the egregious spoliation, as the Sanction ID found and the Commission agreed. The Commission finds that, due to Viraj Profiles' spoliation, Valbruna did not have a full and fair opportunity to develop an evidentiary record through discovery, which significantly hampered its ability to support its allegations as to the specific trade secrets that Viraj Profiles stole.

Therefore, the Commission finds that the limited exclusion order covers stainless steel products manufactured using any of the trade secrets Valbruna identifies in its complaint (*see* Compl. ¶¶ 27-33, 51 and accompanying exhibits), and is not limited to only the forty-seven trade secrets identified by Valbruna in Exhibit A of its January 13, 2015 interrogatory responses. In addition, the Commission vacates the portions of the Sanction ID denying Valbruna leave to assert the thirteen operating practices excluded under Order No. 12.

b) Covered Products

The parties dispute the appropriate scope of products subject to a limited exclusion order. Specifically, Valbruna argues that a limited exclusion order should exclude all stainless steel products manufactured by or on behalf of, or imported by or on behalf of, Viraj Profiles and its affiliated and related companies, whereas Viraj Profiles and OUII argue the order should be limited to products that are manufactured using Valbruna's trade secrets. *See* Valbruna Br. at 5, 8; Viraj Reply at 8-14; OUII Reply at 3. Viraj Profiles, Bebitz, and Ta Chen argue that a limited exclusion order should cover only the types of stainless steel that Valbruna produces in the United States and that compete with imported stainless steel produced by Viraj Profiles, whereas Valbruna and OUII oppose such a limitation. *See* Viraj Br. at 1, 9-10; Viraj Reply at 5-6; Bebitz Reply at 9; Ta Chen Br. at 12-23; Valbruna Reply at 3, 9-13; OUII Reply at 13-15.

The Commission also received comments from certain non-parties supporting Valbruna's proposed exclusion order: (1) Carpenter Technology Corporation, Crucible Industries LLC,

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Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc., all of whom are U.S. producers of stainless steel bars, and (2) the American Wire Producers Association, an international trade association representing between 80 and 90 percent of the production of carbon, alloy, and stainless steel wire and wire products in the United States. Bar Producers Rebuttal Ltr. at 4; AWPB Sub. at 1.

A limited exclusion order directed to stainless steel manufactured using the asserted trade secrets by or on behalf of, or imported by or behalf of, Viraj Profiles and its affiliated companies, parents, subsidiaries, licensees, or other related business entities is consistent with the Commission's orders issued in trade secret-based investigations. *See Opaque Polymers, Limited Exclusion Order* (Apr. 17, 2015); *Certain Crawler Cranes and Components Thereof* ("Crawler Cranes"), Inv. No. 337-TA-887, Limited Exclusion Order (Apr. 16, 2015); *Certain Cast Steel Railway Wheels, Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Limited Exclusion Order (Feb. 16, 2010).

The "production" order proposed by Valbruna, which would exclude all stainless steel manufactured or imported by Viraj Profiles, regardless of whether the stainless steel is made using Valbruna's asserted trade secrets, is inappropriate here. As noted by Valbruna, the Commission issued such an order in *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product* ("Sausage Casings"), Inv. No. 337-TA-148/169, USITC Pub. No. 1624 (Dec. 1984), Comm'n Action and Order, at 6 (Nov. 26, 1984), *aff'd by Viscofan*. The Commission in that investigation based its determination in part on an inability to determine whether the casings were manufactured by a process that incorporates the misappropriated trade secrets. *Id.* Based on the limited record in this investigation, the Commission may not be faced with the same inability here. *See, e.g.,* Exh. Q to Ta Chen Br., O'Hara Witness Statement, at

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Q/A 113-145 (describing visual inspection using scanning electron microscope), 646 (describing review of Viraj Profiles documentation). As discussed below, under the limited exclusion order the Commission is issuing, Viraj Profiles will bear the burden of demonstrating, in ancillary proceedings before the Commission, that specific products that it seeks to import are not manufactured using any of the trade secrets identified in Valbruna's complaint. The Commission notes that, in affirming the order issued in *Sausage Casings*, the Federal Circuit recognized that the respondent, upon a proper showing, would be permitted to import products that are shown *not to use* the misappropriated trade secrets. *See Viscofan*, 787 F.2d at 550. The Commission's order here is thus consistent with *Viscofan* and Commission precedent in making clear at the outset that products that do not use the misappropriated trade secrets are not subject to the limited exclusion order.

Valbruna also argues that the limited exclusion orders issued in recent trade-secret based investigations would be ineffective because Viraj Profiles (1) cannot be trusted to comply with such a "use" order and will offer "false denials and representations" to argue that its products are exempt, (2) cannot "unlearn" the knowledge acquired from its misappropriation and extricate it from its stainless steel manufacturing process, and (3) can easily circumvent a "use" order because U.S. Customs and Border Protection ("CBP") would not be able to determine whether a particular imported product was made using a Valbruna trade secret. Valbruna Br. at 6, 8-15. The Bar Producers and the American Wire Producers Association, both non-parties to the investigation, agree with Valbruna. Bar Producers Rebuttal Ltr. at 4; AWPA Sub. at 3-4.

OUII argues that, in light of the extraordinary facts of this investigation, including the default finding as to Viraj Profiles and the absence of an evidentiary record related to the trade secrets at issue, Viraj Profiles should be required to obtain a ruling (via an advisory opinion or

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modification proceeding) from the Commission prior to the importation of stainless steel that may be subject to the exclusion order. OUII Br. at 8 (citing *Opaque Polymers*, Comm'n. Op. at 23). OUII also argues that a CBP certification process should be available only after a Commission determination that the product is not covered by the exclusion order. *Id.* OUII argues that its proposed exclusion order effectively addresses the concerns raised by Valbruna. OUII Reply at 4-6.

The Commission finds that the circumstances justifying Viraj Profiles' default and the limited record developed as a consequence warrant a requirement that Viraj Profiles obtain a ruling from the Commission before importing any stainless steel that may be subject to the exclusion order. This requirement is warranted because it (1) reduces the burden on CBP, which would otherwise be responsible for making a decision on importation without the benefit of a factual record and decision by the ALJ and the Commission; (2) places the burden on Viraj Profiles to establish that the goods it seeks to import were not manufactured using knowledge from its misappropriation of Valbruna's trade secrets and prevents circumvention of the exclusion order, while maintaining fairness to Viraj Profiles; and (3) gives Valbruna the opportunity to respond and contest any issues or evidence raised by Viraj Profiles. *See id.*; *Opaque Polymers*, Comm'n Op. at 23-24. Also, the Commission notes that any importer of Viraj Profiles stainless steel may request an advisory opinion as to whether its products are subject to the exclusion order. *See* 19 C.F.R. § 210.79(a). Should the Commission determine that particular products are outside the scope of the limited exclusion order, Viraj Profiles or the importer may certify to Customs that future shipments are identical to the products adjudicated in an ancillary proceeding before the Commission.

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With respect to the limitations requested by Viraj Profiles, Bebitz, and Ta Chen, the Commission rejects their request to limit the scope of the limited exclusion order to certain product forms or types. Viraj Profiles argues that a limited exclusion order should not cover products manufactured using pre-existing or newly developed knowledge, publicly available or third-party formulas, and operating practices that cannot be used with Viraj Profiles' equipment. Viraj Br. at 6-9. However, as both Valbruna and OUII note, these arguments concern whether Valbruna's operating practices are trade secrets or whether Viraj Profiles uses Valbruna's trade secrets and therefore relate to issues that Viraj Profiles has waived by default. *See* 19 C.F.R. §§ 210.16(b)(4), (c)(1); *Opaque Polymers*, Comm'n Op. at 19-20 (considering and rejecting arguments made in remedy briefing that go to the merits); Valbruna Reply at 2-3, 10, 13-14; OUII Reply at 13-15 & n.11. To the extent that Ta Chen, which is not subject to the same waiver, echoes Viraj Profiles' arguments (*see* Ta Chen Br. at 25), Ta Chen provides no authority to support its attempt to collaterally attack the default finding as to Viraj Profiles. In any event, the issue of whether particular products that Viraj Profiles, or a third party importer, seeks to import are covered by the exclusion order can be resolved in an ancillary proceeding before the Commission.²³

Viraj Profiles, Bebitz, and Ta Chen also argue that any remedy should be commensurate with the scope of the domestic industry and cover only the products that Valbruna produces in the United States and that compete with imported stainless steel produced by Viraj Profiles and Bebitz. *See* Viraj Br. at 9-10; Viraj Reply at 5-6; Bebitz Reply at 9; Ta Chen Br. at 12-23.

²³ Such an ancillary proceeding could also address, for example, whether certain Viraj Profiles grades of steel are manufactured using operating practices that are not included in the 335 operating practices asserted in Valbruna's complaint.

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Specifically, they argue that a limited exclusion order should not cover [

]. *Id.*

Unless there are public interest concerns, the Commission sees no reason to exempt from any limited exclusion order products that may not compete with the asserted domestic industry products. Viraj Profiles, Bebitz, and Ta Chen do not cite any authorities that require the scope of the remedy to be commensurate with or tailored to the domestic industry products at issue. They also do not point to any cases in which the Commission has carved out products from the scope of a remedial order simply because they do not compete with the asserted domestic industry products. Instead, the authorities cited by Viraj Profiles and Ta Chen address the domestic industry requirement as an element of a section 337 violation, not necessarily what is required for remedy. *See* Viraj Reply at 5; Ta Chen Br. at 20.

Therefore, the Commission declines to include an exemption in the limited exclusion order for any specific Viraj Profiles stainless steel products.

c) Covered Entities

Valbruna argues that a limited exclusion order should apply to Viraj Profiles' affiliated companies, parents, subsidiaries, licensees, contractors, and other related business entities, and their successors and assigns. Valbruna Br. at 18. Valbruna argues that this is consistent with limited exclusion orders issued by the Commission in trade secret-based investigations. *Id.* Bebitz opposes the application of the standard exclusion order language to it and its downstream products because it argues such language could ensnare Bebitz's imports even though it is not an affiliate or a related company of Viraj Profiles. Bebitz Reply at 3, 6, 10; *see also* The Bebitz Respondents' Petition for Commission Review of the ALJ's Initial Determination Granting Valbruna's Motion for Partial Termination of the Investigation, at 16-18.

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Valbruna argues that Bebitz is an affiliate of Viraj Profiles based on the following evidence: (1) Viraj Profiles' audited financial statement identify Bebitz as a "related party"; (2) Bebitz is owned and controlled by Dhruv Kochhar, the son of Viraj Profiles' owners, Neeraj and Renu Kochhar; (3) Dhruv Kochhar purchased Bebitz in 2004 purportedly with a "loan" from his father; (4) according to a third-party KPMG report, Viraj Profiles acquired Bebitz Germany in 2004; (5) Indian employees work at the Bebitz Germany plant; and (6) Bebitz purchases stainless steel from Viraj Profiles, sells stainless steel scrap and products to Viraj Profiles, uses Viraj Profiles' logistics including "trucks," "warehouses," and "equipment", and shares an office, officers, and directors with Viraj Profiles in the United States. Valbruna Br. at 20-21. Valbruna argues that Viraj Profiles has a history of forming and dissolving entities, making strategic investments in suppliers or customers, and organizing and reorganizing operating companies, and has shown a proclivity to use corporate entities to obscure their activities. *Id.* at 19-22.

OUII also argues that Bebitz is an affiliate of Viraj Profiles based on its financial statements and the father-son relationship between Bebitz's owner and Viraj Profiles' chairman and managing director. OUII Reply at 19 & n.15.

Bebitz argues that Valbruna wrongly seeks to encompass Bebitz within the scope of an exclusion order as an alleged affiliate of Viraj Profiles even though Bebitz has not been found in default, has no common shareholders or owners with Viraj Profiles, and does not exercise any corporate control over Viraj Profiles, and vice versa. Bebitz Reply at 1-7. Bebitz argues that, whereas Viraj Profiles produces raw and semi-finished steel, Bebitz produces only downstream products such as stainless steel flanges and fittings. *Id.* at 2. As a result, Bebitz argues that its downstream products should not be included within a limited exclusion order. *Id.* at 2-3 & n.3

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(citing *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008)). Bebitz argues that a mere father-son relationship between the primary shareholder and officer of Viraj Profiles and the owner of Bebitz is not sufficient to establish an affiliate relationship between the entities. *Id.* at 5. Bebitz argues that Viraj Profiles' identification of Bebitz as a related party in its audited financial statement is also not sufficient because that identification was pursuant to Indian law, which requires that each Indian company report all purchase and sales transactions with companies that are controlled by a relative or a relative's relative. *Id.* at 6. Bebitz argues that such evidence does not establish that Viraj Profiles and Bebitz are related companies under U.S. law. *Id.*

The Commission need not decide whether Bebitz is an affiliate of Viraj Profiles. The record shows, and the parties do not dispute, that Bebitz produces only downstream stainless steel products, such as stainless steel flanges and fittings, and does not produce raw and semi-finished steel, such as that produced by Viraj Profiles. *See* Exh. A to Bebitz Reply, The Bebitz Respondents' First Supplemental Responses and Objections to Valbruna's First Set of Interrogatories, at Nos. 1, 2, 7. Under *Kyocera*, the downstream products of any non-respondents cannot be subject to an exclusion order. 545 F.3d at 1356-58. Further, the evidence shows that Bebitz's manufacturing process does not include the melting stage covered by Valbruna's asserted trade secrets. *Id.* at No. 7 ("Bebitz India and Bebitz Germany do not perform Step 1 or Step 2 of the stainless steel manufacturing process"); *id.* at No. 12 ("Bebitz Respondents respond that they do not have a melt shop."). In fact, Valbruna concedes that "Bebitz does not melt, refine, or cast stainless steel," but rather "purchases semi-finished stainless steel from Viraj [Profiles] and other companies, which it forms into products like

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flanges, bars, and fittings.” Valbruna Br. at 4. Valbruna’s complaint similarly alleges that Viraj India is the only respondent that melts stainless steel. *See* Compl. ¶¶ 24-25.

Based on the available record and the fact that Bebitz has been terminated from the investigation, the Commission finds that the limited exclusion order does not cover Bebitz’s downstream products. However, to the extent that Bebitz chooses to import Viraj Profiles’ covered stainless steel products into the United States, it is subject to the limited exclusion order, as is any non-respondent.

d) Exclusion Period

For a violation of section 337 involving trade secrets, “the duration of relief in a case of misappropriation of trade secrets should be the period of time it would have taken respondent independently to develop the technology using lawful means.” *Viscofan*, 787 F.2d at 550; *see also Certain Rubber Resins and Processes for Manufacturing Same (“Rubber Resins”)*, Inv. No. 337-TA-849, Comm’n Op. at 82-83 (Feb. 26, 2014). The Commission has previously set the exclusion period to begin with the issuance of the order. *See Rubber Resins*, Comm’n Op. at 83 & n.11.

Valbruna argues that a limited exclusion order should be effective for at least sixteen years, which Valbruna argues reflects the approximate time it spent developing the operating practices identified in the complaint. Valbruna Br. at 15 (citing Exh. W, Exh. 4 to Compl. (listing development times and an average of 16.7 years)). Valbruna further argues that a single exclusion period for the multiple trade secrets is appropriate in this investigation. *Id.* OUII argues the exclusion period should be fourteen years, based on other evidence in the record that contains development times corresponding to the names of Valbruna’s operating practices. OUII Br. at 9; OUII Reply at 9. Viraj Profiles argues that the exclusion period here should be no more than 6 months to 2 years, based in part on its own experience with developing its grades. Viraj

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Br. at 12-15. Viraj Profiles argues that the development periods proposed by Valbruna and OUII are overstated because they reflect the time Valbruna used certain formulas for its stainless steel, not the time it took Valbruna to develop any formulas, as well as the time Valbruna spent on numerous grades of steel not at issue in this investigation. Viraj Reply at 14-15. Viraj Profiles also argues that that the exclusion period should take into account Valbruna's "long delay between the alleged misappropriation and the commencement of the proceeding." Viraj Br. at 2, 16-17. Ta Chen argues that Valbruna's development time is not reliable or persuasive evidence of what Viraj Profiles' development time would be. Ta Chen Br. at 25.

In determining the appropriate duration of a limited exclusion order, the Commission has considered the time it took the complainant to develop the trade secrets. *See, e.g., Rubber Resins*, Comm'n Op. at 83; *Crawler Cranes*, Comm'n Op. at 70-71 (May 6, 2015). Valbruna's complaint alleges that it spent 16.7 years developing the misappropriated operating practices. *See* Compl. ¶ 33 (citing Exh. 4); *see also id.* ¶ 27.

Further, the record developed since the filing of the complaint is consistent with that allegation. The record shows that Valbruna's operating practices are "written procedures which provide the detailed processing instructions and specifications for making each grade of stainless steel" and that they are used to achieve consistent output and for making quality steel. Exh. V to Valbruna Br., CX-1548C, Alghisi Witness Statement, at Q/A 40-41. The record also shows that Valbruna developed the information in its operating practices over many years through an iterative process of trial and error, and through research and development involving collaboration between the Valbruna quality department and the melt shop. *Id.* at Q/A 47, 52, 71. The Commission finds that Valbruna reasonably calculated a development period starting from the first casting of the grade through 2006 to incorporate all process improvements over time, rather

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than focusing only on the time it took to develop the grade itself.²⁴ The Commission also notes that Valbruna's calculation is conservative because, for some grades, it includes only the time it spent developing the operating practices after the first manufacture of its grades and does not include the time it spent developing the grades themselves. *See* Valbruna Br. at 17 n.5 (explaining why the development times for certain grades are zero).

The evidence relied upon by Valbruna accounts for Valbruna's iterative trial and error process by calculating the average number of years Valbruna spent manufacturing the grades of stainless steel corresponding to the misappropriated operating practices. *See* Valbruna Br. at 17 (citing Exh. W to Valbruna Br., Exh. 4 to Compl.). The Commission, therefore, finds that the evidence supports Valbruna's proposed development period. *See id.*

The Commission is not persuaded by Viraj Profiles' arguments for an exclusion period of 6 months to 2 years for at least three reasons. First, its position is partly premised on arguments that it did not use Valbruna's trade secrets, an issue, as previously discussed, that was established by Viraj Profiles' default. *See* Viraj Br. at 13-14; 19 C.F.R. §§ 210.16(b)(4), (c)(1). Second, Viraj Profiles has not shown that its experience with, and average time spent on, developing *its* grades necessarily reflects the time it would have spent developing *Valbruna's* operating practices for manufacturing certain stainless steel grades. Third, Viraj Profiles provides no legal basis for its argument that the exclusion period should be based on when Valbruna filed its

²⁴ Viraj Profiles argues that a development period keyed to Valbruna's first production date is not reliable evidence of what Viraj Profiles' development period would be. Viraj Br. at 16. However, the case it cites as support not only involved facts and evidence not present here, but was vacated by the Supreme Court. *See Syntex Ophthalmics, Inc. v. Novicky*, 745 F.2d 1423, 1436 & n.26 (Fed. Cir. 1984), *vacated by* 105 S.Ct. 1740 (Mar. 18, 1985); Valbruna Reply at 25 n.15.

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complaint, and does not explain how such a time period (or one starting from when the trade secrets misappropriation took place) reflects the time Viraj Profiles would have taken to independently develop Valbruna's trade secrets. *See* Viraj Br. at 2, 10, 16-17.

Therefore, the Commission finds that an exclusion period of 16.7 years is reasonable.

2. Cease and Desist Order

Valbruna seeks a cease and desist order directed against Viraj Profiles. Valbruna Br. at 22. Viraj Profiles and OUII oppose the issuance of a cease and desist order. Viraj Reply at 16-18; OUII Br. at 10.

Section 337(f)(1) provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for a violation of section 337. 19 U.S.C. § 1337(f)(1). Cease and desist orders are generally issued when, with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order. *See, e.g., Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, USITC Pub. No. 4405 (July 2013), Comm'n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. at 22 (June 14, 2007)); *Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, And Components Thereof* ("Agricultural Tractors"), Inv. No. 337-TA-486, USITC Pub. No. 3625, Comm'n Op. at 17 (July 14, 2003). A complainant seeking a cease and desist order must demonstrate, based on the record, that this remedy is necessary to address the violation found in the investigation so as to not undercut the relief provided by the exclusion order. *Certain Integrated Repeaters, Switches, Transceivers, and Products Containing Same*, Inv. No. 337-TA-435, USITC Pub. No. 3547 (Oct. 2002), Comm'n Op. at 27 (Aug. 16, 2002) ("[C]omplainants bear the burden of

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proving that respondent has such an inventory. Because complainants failed to sustain their burden, we have determined not to issue a cease and desist order.”); *see also* H.R. Rep. No. 100-40, at 160 (1987) (“When the Commission determines that both remedies [*i.e.*, an exclusion order and cease and desist order] are necessary, it should be without legal question that the Commission has authority to order such relief.”).

In investigations in which a domestic respondent is found in default, the Commission presumes the presence of commercially significant inventories in the United States to warrant a cease and desist order. *See Agricultural Tractors*, Comm. Op at 18. As for defaulting foreign respondents, the Commission has declined to draw adverse inferences regarding the presence of domestic inventories in the United States. *See id.* at 18-20. Rather, the Commission has examined, for example, whether the complaint alleges facts showing that the defaulting foreign respondent or its agents maintain commercially significant inventories in the United States with respect to the articles found in violation. *Id.* (declining to issue a cease and desist order against foreign defaulting respondents because the complaint allegations did not aver commercially significant inventories nor support such an inference).²⁵

²⁵ *See also Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, USITC Pub. No. 4376 (Feb. 2013), Comm’n Op. at 7-8 (Oct. 5, 2011) (issuing cease and desist orders against foreign defaulting respondents where the evidence showed that their distributors included the domestic respondents that were agents of the foreign respondents and that maintained commercially significant inventories in the United States for those foreign entities); *Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, Inv. No. 337-TA-449, USITC Pub. No. 3530 (Aug. 2002), Comm’n Op. at 7 (July 26, 2002) (issuing a cease and desist order against foreign respondent based its U.S. distributor’s (which was not a respondent in the investigation) maintenance of commercially significant inventory in the United States).

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As noted above, Viraj Profiles has been found by the Commission to be in default based upon its spoliation of evidence during discovery in this investigation. In view of that finding of violation, the Commission presumes that all facts in the complaint are true. Here, unlike in *Agricultural Tractors*, Valbruna alleged in the complaint that Viraj Profiles exports directly to the United States to its U.S. affiliate, Viraj USA, which serves as its consignee, and provided voluminous evidence of importation of steel products accused in this investigation. Compl. ¶ 68 & Exh. 17. Valbruna alleged in the complaint that the proposed respondents' unfair acts have given the respondents, including Viraj Profiles, "the ability to accumulate significant inventories in the U.S. of stainless steel products resulting in [] lost sales for Valbruna." *Id.* ¶ 93.

In addition, Valbruna asserts in its remedy briefing that a cease and desist order is warranted "in view of [Viraj Profiles'] significant domestic commercial activities which, if permitted to continue, will undermine the effectiveness of the [limited exclusion order]." Valbruna Br. at 22. Valbruna argues that all contacts with Viraj customers in the United States are handled either directly by Viraj Profiles employees in India or Viraj Profiles' sales agent in the United States. *Id.* at 3, 22-23. Valbruna argues that, by virtue of Viraj Profiles' default, Viraj Profiles has been found to misappropriate Valbruna's customer lists, as alleged in paragraphs 34-41, 45, 52-59, and 62 of the complaint, and issuance of a cease and desist order is the only effective remedy for Viraj Profiles' misconduct with regard to the customer lists because a limited exclusion order will not prevent Viraj Profiles from continuing to use the customer lists to solicit Valbruna's U.S. customers. *Id.* at 23.

In response to Valbruna's request for a cease and desist order, OUII states that there is no commercially significant inventory in the United States held by Viraj Profiles. OUII Reply at 10. Therefore, OUII submits that a cease and desist order directed to Viraj Profiles is not

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warranted. *Id.* However, the evidence relied upon by OUII only addresses whether Viraj USA has any commercially significant inventory, not Viraj Profiles (which is responsible for all sales in United States). *See* Exh. J to Ta Chen Br., CX-1552C, Button Witness Statement, at Q/A 68-69, 329-331; CDX-3.115C. In addition, the testimony relied upon by OUII was obtained amidst severe discovery abuses by Viraj Profiles, which as noted above, denied Valbruna its full and fair opportunity to litigate all the issues in this investigation due to Viraj Profiles' spoliation. Moreover, despite referencing OUII's recommendation to not issue a cease and desist order, Viraj Profiles did not provide any support in its remedy briefing to the Commission in stating it does not maintain commercially significant inventory in the U.S. *See* Viraj Br. at 3; Viraj Reply at 16-18.

The remaining discussion in Viraj Profiles' opposition to Valbruna's arguments in support of the issuance of a cease and desist order go to the merits of whether Valbruna's customer lists are trade secrets and whether Valbruna has proven a domestic industry—issues that Viraj Profiles has waived by virtue of its default. *See* Viraj Reply at 16-18. To the extent that Viraj USA, which is not subject to the same waiver, echoes Viraj Profiles' arguments, Viraj USA cannot collaterally attack the default finding as to Viraj Profiles.

Accordingly, based on the record in this investigation, the Commission concludes that Viraj Profiles maintains commercially significant inventories in the United States, and therefore a cease and desist order directed against Viraj Profiles is appropriate.^{26, 27}

²⁶ Commissioner Schmidlein supports issuance of the cease and desist order in this investigation. In her view, the cease and desist order is supported by two grounds: (1) the presence of domestic inventory; and (2) domestic sales activity.

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First, Commissioner Schmidtlein agrees with the Commission that the allegations in the complaint (presumed to be true) as to the presence of domestic inventory provide a basis for issuing the cease and desist order. She, however, finds it unnecessary to presume or confirm the existence of a “commercially significant” inventory because a commercially significant domestic inventory is not a statutory requirement. *See* 19 U.S.C. § 1337(f)(1). Indeed, the statutory language leaves it to the discretion of the Commission and does not establish any particular test or standard for issuing a cease and desist order aside from consideration of the public interest factors. *See Gamut Trading Co. v. Int’l Trade Comm’n*, 200 F.3d 775, 784 (Fed. Cir. 1999) (explaining that the Commission has broad discretion in selecting a remedy). From a practical standpoint, in cases where the level but not the existence of domestic inventory is disputed, Commissioner Schmidtlein fails to see the value gained by requiring parties and the Commission to expend time and resources addressing the extent of domestic inventory levels as a predicate to issuing cease and desist orders. In her view, such a requirement unnecessarily carries risk for the complainant since even the presence of one subject product in domestic inventory can undercut the exclusion order and prevent complete relief to the complainant. Thus, Commissioner Schmidtlein finds that the presumption of some inventory, regardless of the commercial significance, provides a basis to issue the cease and desist order.

Second, Commissioner Schmidtlein supports the cease and desist order on the additional basis that the record shows that Viraj Profiles engages in domestic sales activities with respect to the subject products. For example, the record shows that Viraj Profiles and its salespeople, including William Wuerthner, are in direct contact with U.S customers and handle sales of Viraj Profiles’ stainless steel products in the United States. *See, e.g.,* Exh. F to Valbruna Br., Tannan Dep. 83:19-84:21; Exh. I to Valbruna Br., Wuerthner Dep. 14:25-16:5, 20:5-8; Exh. J to Valbruna Br., Viraj Profiles “Contact Us” website (listing Mr. Wuerthner’s information); Exh. H to Valbruna Br., R. Kochhar Dep. 15:21-24. This is the basis relied upon by Valbruna in requesting a cease and desist order in this investigation. Valbruna Br. at 22-23. It is not clear why the Commission does not rely on the domestic sales activities as a basis for issuing the order.

Finally, Commissioner Schmidtlein does not join the Commission’s statement that a complainant seeking a cease and desist order must demonstrate that the remedy is “necessary” to address the violation found in the investigation. It is unclear what the Commission intends to convey by the statement, but on its face it appears to limit the broad discretion granted to the Commission under section 337(f)(1). In Commissioner Schmidtlein’s view, the House committee report cited by the Commission as support does not address the standard for determining whether a cease and desist order should issue. *See* H.R. Rep. No. 100-40, at 160 (1987). Instead, the committee report simply explains that the amendments to section 337(f)(1) under the Omnibus Trade and Competitiveness Act of 1988 authorize the Commission to issue both a cease and desist order and an exclusion order to remedy the same unfair act. *See id.* at 22, 159.

3. The Public Interest

Sections 337(d) and (f), as well as Commission Rule 210.16(c), direct the Commission to consider certain public interest factors before issuing a remedy. 19 U.S.C. §§ 1337(d), (f); 19 C.F.R. § 210.16(c). These public interest factors include the effect of any remedial order on 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. *Id.*

The Commission did not instruct the ALJ to issue a recommended determination concerning the public interest in this investigation. *See* 19 C.F.R. § 210.50(b)(1).

Valbruna argues that there is a strong public interest in protecting intellectual property rights and that its proposed remedial orders would not have any adverse impact on the statutory public interest factors. Valbruna Br. at 24. Valbruna argues that its proposed remedial orders do not implicate any concerns of inadequate supply in the United States or public health or welfare. *Id.* Valbruna argues that the U.S. market for stainless steel is highly competitive, with numerous sources of supply both within and outside of the United States. *Id.* at 25.

Viraj Profiles argues that an “exclusion order that includes any Viraj [Profiles] stainless steel unrelated to the alleged trade secrets or that does not incorporate current trade secrets would harm the public by removing from United States commerce and consumers stainless steel

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²⁷ Commissioner Kieff agrees that all facts alleged in the complaint are presumed to be true in the context of default, and joins the Commission’s determination to issue a cease and desist order as to respondent Viraj Profiles found in default in this case, but does not join the reasoning offered by the Commission regarding other presumptions, practice, burdens and the like, for similar reasons Commissioner Kieff recently offered in more detail in the 934 investigation. *See Certain Dental Implants*, Inv. No. 337-TA-934, Comm’n Op., Additional Views of Commissioner Kieff (May 11, 2016).

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products untainted by Complainants' allegations in this investigation and as to which they are entitled to no trade secret protection." Viraj Br. at 21.

Ta Chen argues that, "in the interest of the public," the Commission should consider its arguments not to impose a remedy "beyond that necessary to effectuate the statutory purpose of protecting the domestic industry, properly defined" and to take a "cautious approach" in view of Valbruna's (now successful) motion to terminate the only respondents "capable" of asserting defenses to Valbruna's trade secret misappropriation claim. Ta Chen Br. at 27-28. Ta Chen acknowledges that its arguments "do not directly address" the statutory public interest factors. *Id.*

OUII argues that excluding the Viraj Profiles products at issue is unlikely to have any significant impact on the statutory public interest factors. OUII Br. at 11. OUII argues that there is no evidence that U.S. demand for the products at issue cannot be met by numerous other suppliers, such as Valbruna. *Id.* OUII argues that Valbruna and third parties have the ability and ample capacity to replace the products at issue in a commercially reasonable time in the United States if they are excluded and that the U.S. stainless steel market for the articles at issue is highly competitive with numerous sources of supply both within and outside of the United States. *Id.* at 12.

The Commission also received comments on the public interest from various non-parties.

The Forging Industry Association ("FIA") is a trade association representing the interests of the North American forging industry, including twenty-five companies that manufacture or are capable of manufacturing stainless steel flanges, forgings, and fittings in the United States. FIA Ltr. at 1-2. The FIA states that excluding the subject products would not have an adverse effect on the public interest because adequate sources of supply exist. *Id.* at 2. The FIA states

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that American forgers have ample capacity to replace the subject products and could do so in “short order.” *Id.* The FIA also states that significant capacity to manufacture flanges, forgings, and fittings exists outside of the United States. *Id.*

Central Wire Inc., Sumiden Wire Products Corporation, Tree Island Steel, and Tri Star Metals, LLC (“the Wire Producers”) together represent the majority of U.S. production of stainless steel wire. Wire Producers Ltr. at 1 & n.1. The Wire Producers state that Viraj Profiles accounted for a substantial share of U.S. imports of stainless steel wire from India during the past two years. *Id.* at 3. The Wire Producers state that an increase in imports from India has coincided with aggressive pricing that was consistently lower than imports from other countries. *Id.* The Wire Producers state that a limited exclusion order would not have a negative effect on the statutory public interest factors. *Id.* at 4. The Wire Producers state that they have sufficient excess capacity to supply customer requirements for stainless steel wire without any disruptions if Viraj Profiles were to be excluded from the U.S. market. *Id.* The Wire Producers state that they offer the same stainless steel wire products and shipping through the same channels of distributions as Viraj Profiles in the U.S. market. *Id.* The Wire Producers state that there are multiple countries that export stainless steel wire to the United States. *Id.* The Wire Producers state that stainless steel wire is used to make a multitude of products that are used in significant applications across various industries and, thus, is an important industry to the U.S. economy. *Id.* at 4-5.

Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc. (collectively, “Bar Producers”) make the same statements as the Wire Producers but with respect to stainless steel bar. Bar Producers Ltr. at 3-4. The Bar Producers

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add that Viraj Profiles did not provide any support for its contention that a remedy “unrelated to the trade secret misappropriation” would harm the public and also did not refute the comments by the Bar Producers regarding their capacity to supply customers if product were not available from Viraj Profiles. *Id.* at 5.

The American Wire Producers Association (“AWPA”) makes many of the same statements as the Wire Producers and the Bar Producers but with respect to stainless steel wire. AWPA Sub. at 4-6. The AWPA adds that four of its members submitted comments stating that they alone have sufficient capacity to replace any stainless steel wire supplied in the U.S. market by Viraj Profiles and that the additional capacity at eight other members of the AWPA would only increase the amount of available supply. *Id.* at 5.

Alloy Machine Works, Inc. (“Alloy Machine”) is a U.S. producer of stainless steel well screens that purchases semi-finished stainless products from Viraj USA and other suppliers. Alloy Machine Ltr. at 1. Alloy Machine states that, if Viraj stainless steel products “were suddenly not available in the U.S. market, there would not be sufficient supply of stainless steel products” for it and other distributors to efficiently or effectively supply their customers. *Id.* Alloy Machine states that a shortage would have a negative impact on the availability of stainless materials, including higher prices to U.S. end users, damage to this sector of the U.S. economy, and harm to competitive conditions in the U.S. economy. *Id.* Alloy Machine states that these negative consequences would be directly contrary to the public interest. *Id.* Alloy Machine asks that the Commission protect the U.S. economy and U.S. business and consumers and not exclude Viraj stainless steel products from the U.S. market. *Id.*

Cincinnati Metals Inc. is a distributor of stainless steel products that purchases semi-finished and finished stainless products from Viraj and other foreign suppliers. Cincinnati

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Metals Ltr. at 1. Cincinnati Metals Inc. makes the same statements and requests as Alloy Machines, but adds that that a shortage would have a negative impact on the quality of stainless materials. *Id.* at 1-2.

Kerkau Mfg. is a U.S. producer of stainless steel flanges that purchases semi-finished and finished stainless products from Viraj, Bebitz, and other suppliers. Kerkau Ltr. at 1. Kerkau Mfg. makes the same statements and requests as Alloy Machines and Cincinnati Metals but with respect to flanges. *Id.* at 1-2.

U.S. Representatives Tim Murphy and Peter J. Visclosky are the respective Chairman and Vice Chairman of the Congressional Steel Caucus. Murphy/Visclosky Ltr. at 2. The Representatives state that Viraj Profiles is, by far, the largest Indian producer of stainless steel long products. *Id.* The Representatives state that the trade secrets at issue “go to the essence of Valbruna’s melt process, and have therefore benefitted virtually every product Viraj has exported to the U.S., including stainless bar, stainless rod, stainless angle and stainless wire.” *Id.* The Representatives state that Valbruna either manufactures or directly sells stainless bar, stainless rod, stainless angle, and stainless wire in the United States in direct competition with Viraj Profiles and that Viraj Profiles cannot be permitted to benefit from its violation of the law. *Id.* The Representatives state that excluding a producer that has “no regard to the laws or the procedures associated with those laws” is consistent with the public interest. *Id.*

U.S. Senator Joe Donnelly of Indiana states that the nation’s trade laws must be vigorously defended. Donnelly Ltr. at 1. The Senator states that the success of the steel industry is crucial to Indiana’s continued economic success and that one quarter of all steel produced in the United States is made in Indiana. *Id.* The Senator states that a level playing field is necessary for the domestic steel industry to compete globally. *Id.* The Senator states that the

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public interest requires “an effective and enforceable remedy in cases where there is clear evidence of unfair trade.” *Id.*

There is no evidence that a limited exclusion order and a cease and desist order would negatively impact competitive conditions in the United States economy. Rather, the record shows that the U.S. market for stainless steel products is highly competitive, with numerous sources of supply both within and outside of the United States. *See* Exh. NN to Valbruna Br., Complainants’ Statement Regarding the Public Interest, at 3.

The record shows that a limited exclusion order and a cease and desist order would not negatively impact United States consumers or the production of like or directly competitive articles in the United States. Valbruna and numerous third parties, including Central Wire Inc., Sumiden Wire Products Corporation, Tree Island Steel, Tri Star Metals, LLC, Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, Universal Stainless & Alloy Products, Inc., and members of two trade associations, have stated that they sufficient capacity to manufacture and replace the products supplied by Viraj Profiles in a commercially reasonable time if they are excluded from entry into the United States. *See id.* at 2-3; Exh. 27 to Compl., Viero Declaration, ¶ 31; FIA Ltr. at 2; Wire Producers Ltr. at 4; Bar Producers Ltr. at 4; AWPA Sub. at 4-5. Three of Viraj Profiles’ customers, Alloy Machine, Cincinnati Metals Inc., and Kerkau Mfg., disagree, stating that there would not be sufficient supply of stainless steel products and that exclusion of Viraj Profiles’ products would result not only in a shortage, but also higher prices and lower quality materials. *See* Alloy Machine Works Ltr. at 1; Cincinnati Metals Ltr. at 1-2; Kerkau Ltr. at 1-2. These submissions provide no facts or details regarding the products referenced in their submissions. The Commission is not persuaded by the

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generalized statements of Viraj Profiles' customers, particularly in light of the statements by several suppliers, including Valbruna, that they have the ability and ample capacity to replace the products subject to exclusion in a commercially reasonable time in the United States. The evidence also shows that the stainless steel sold by Viraj Profiles is not unique to it. *See* Exh. 27 to Compl., Viero Declaration, ¶ 30.

There is also no evidence in the record showing that a limited exclusion order and a cease and desist order would negatively impact the public health and welfare. *See* Exh. NN to Valbruna Br., Complainants' Statement Regarding the Public Interest, at 2.

Accordingly, the Commission finds that the statutory public interest factors do not preclude the issuance of remedial orders.

4. Bonding

Pursuant to section 337(j)(3), the administrative law judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from injury. *Id.*; 19 C.F.R. §§ 210.42(a)(1)(h), 210.50(a)(3). The complainant bears the burden of establishing its request for an appropriate bond amount to be imposed on respondents' continued activities during the Presidential review period based on the record. *Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-533, USITC Pub. No. 3975 (Apr. 2008), Comm'n Op. at 39-40 (July 21, 2006) ("In our view, the complainant has the burden of supporting any proposition it advances, including the amount of the bond.").

When reliable price information is available in the record, the Commission has often set the bond in an amount that would eliminate the price differential between the domestic product

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and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949 (Jan. 1996), Comm'n Op. at 24 (Jan. 16, 1996). The Commission also has used a reasonable royalty rate to set the bond amount where a reasonable royalty rate could be ascertained from the evidence in the record. *See, e.g., Certain Audio Digital-to-Analog Converters and Products Containing Same*, Inv. No. 337-TA-499, Comm'n Op. at 25 (Mar. 3, 2005). Where the record establishes that the calculation of a price differential is impractical or there is insufficient evidence in the record to determine a price differential or a reasonable royalty, the Commission has imposed a 100 percent bond. *See, e.g., Certain Liquid Crystal Display Modules, Products Containing Same, and Methods Using the Same*, Inv. No. 337-TA-634, Comm'n Op. at 6-7 (Nov. 24, 2009).

Valbruna argues that the Commission should set a bond in the amount of 100 percent in light of the Viraj Profiles' bad faith conduct or, in the alternative, 13.4 percent. Valbruna Br. at 25. Valbruna argues that, because Viraj Profiles is in default, it should be treated no differently than if it had not participated at all in the investigation. *Id.* at 26. In the alternative, Valbruna argues that, based on the available record on the price differential between Valbruna's products and those manufactured by Viraj Profiles, the bond should be set at 13.4 percent. *Id.* at 26-27. Valbruna argues that 13.4 percent is the volume-weighted average of the price differences based on Ta Chen's total volumes of round bar, angles, and flat bar products produced by Viraj Profiles across nineteen shared customers. *Id.* Valbruna argues that the 7.5 percent bond amount proposed by Ta Chen and OUII is based only on round and square bar products. Valbruna Reply at 31. Valbruna argues that a remand for hearing on bond is not necessary. *Id.* Valbruna argues

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that Bebitz should be subject to the same bond to the extent it chooses to ship stainless steel products manufactured by Viraj Profiles to the United States. *Id.* at 33.

Viraj Profiles argues that it should not be subject to a bond requirement because it is not a “direct importer” of stainless steel into the United States. Viraj Br. at 20. Viraj Profiles argues that, in any event, a bond of zero or a minimal amount should be imposed because only some Viraj Profiles products compete with Valbruna’s products in the United States and that the pricing differential between those products is not significant. *Id.* at 21. Viraj Profiles argues that Valbruna’s proposed 100 percent bond is not supportable. Viraj Reply at 20.

Ta Chen argues that, if the Commission determines to require a bond, it should be no more than 7.5 percent as calculated by Respondents’ expert, Mr. Klett. Ta Chen Br. at 27. Ta Chen argues that the bond amounts argued by Valbruna’s experts do not account for the price variation among different product grades, categories, and dimensions or the timing of the sale. *Id.* at 26-27 (citing *Certain Tape Dispensers* (“*Tape Dispensers*”), Inv. No. 337-TA-354, USITC Pub. No. 2786 (June 1994), Comm’n Op. at 7 (May 5, 1994); *Certain High Intensity Retroreflective Sheeting* (“*Retroreflective Sheeting*”), Inv. No. 337-TA- 268, USITC Pub. No. 2121 (Sept. 1988), Comm’n Op. at 12 (July 15, 1988)).

OUII argues that a bond rate of 7.5 percent is appropriate based on Mr. Klett’s expert opinion, which includes information for establishing a bond rate based on price differential. OUII Br. at 13; OUII Reply at 10. In particular, OUII argues that Mr. Klett’s methodology appropriately controls for timing of the sale and differences in product dimensions. OUII Br. at 13.

Bebitz also argues that it should not be subject to a bond requirement. Bebitz Br. at 3. Bebitz argues that, if the Commission enters an exclusion order or a cease and desist order that is

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“applicable to imports by Bebitz,” then an evidentiary hearing should be held to determine the appropriate bond amount. *Id.* at 4. Bebitz argues that the bond should be zero or, at most, 7.5 percent as suggested by OUII. Bebitz Reply at 9.

As an initial matter, the Commission disagrees with Valbruna’s argument that Viraj Profiles’ default automatically results in the imposition of a 100 percent bond. Although the Commission has imposed a 100 percent bond due to a lack of pricing information where defaulting parties have failed to participate in the investigation (*see Agricultural Tractors*, Comm’n Op. at 22-23), here, there is pricing information in the record. Indeed, Valbruna provided substantial evidence with respect to prices for comparable Viraj Profiles and Valbruna products in the United States, allowing the Commission to calculate an appropriate bond. The Commission thereby rejects Valbruna’s request for the imposition of 100 percent bond based upon the mere act of default.

In addition, the Commission finds that a 7.5 percent bond as proposed by Respondents and OUII is also not appropriate here. The evidence shows that Mr. Klett arrived at his 7.5 percent calculation as follows:

To help control for price differences that might arise due to large differences in transaction size, I only consider monthly comparisons with larger volumes for both [Valbruna] and [Ta Chen International] (500 pounds) for square bars and round bars with diameters in the range of 2.5 inches to 8.0 inches. On this basis, I estimate a median bonding rate of 7.5 percent for square bars and round bars.

Exh. K to Ta Chen Br., RX-3493C, Klett Rebuttal Witness Statement, at Q/A 221. As a general matter, it was reasonable for Mr. Klett to account for pricing differences due to variations in transaction size. *See Tape Dispensers*, Comm’n Op. at 7 (“Because list prices for tape dispensers vary in relation to the volume of dispensers purchased, we selected a price comparison made at an intermediate volume level.”); *Retroreflective Sheeting*, Comm’n Op. at 12 (comparing average list prices of respondents’ and complainants’ sheeting, consistent with other Commission

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decisions that compared price differences for sales of products when sold in equivalent quantities). However, in doing so, Mr. Klett did not consider products such as angle and flat bars or products of other dimensions. The bond should be set at a level sufficient to prevent harm to the complainant. Respondents' and OUII's proposed bond amount of 7.5 percent does not account for other products alleged to use Valbruna's trade secrets.

The Commission finds that the more appropriate bond is 13.4 percent, as initially proposed in the alternative by Valbruna, because the analysis in arriving at that number accounts for more of the products at issue here and, further, uses a volume-weighted average that appears to account for variation in volume. *See* Exh. J to Ta Chen Br., CX-1552C, Button Witness Statement, at Q/A 337 ("The volume-weighted average of [the] price differences, based on Ta Chen's total volumes of all round bar, angles, and flat bar to all customers, is 13.4% . . ."). The Commission has previously stated that a "weighted average is a reliable price because it reflects not only the range of prices for sales, but also the volume of sales at each price point." *Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof*, Inv. No. 337-TA-422, USITC Pub. No. 3332 (July 2000), Comm'n Op. at 10-11 (June 19, 2000) (stating preference of a weighted average over a simple average).

Accordingly, the Commission has determined, based on the evidentiary record, to set a bond in the amount of 13.4 percent of the entered value of excluded products imported or sold during the period of Presidential review.²⁸

²⁸ The Commission, thus, finds that an evidentiary hearing to determine an appropriate bond amount is unnecessary.

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IV. CONCLUSION

The Commission has determined to vacate the portions of the Sanction ID with respect to (1) disgorgement and (2) denial of Valbruna's request for leave to assert additional operating practices. The Commission has also determined to terminate the investigation with a finding of a violation of section 337 by Viraj Profiles. The Commission adopts all findings and conclusions in the Sanction ID that are not inconsistent with this opinion.

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: June 9, 2016

**CERTAIN STAINLESS STEEL PRODUCTS, CERTAIN
PROCESSES FOR MANUFACTURING OR RELATING TO
SAME AND CERTAIN PRODUCTS CONTAINING SAME**

Inv. No. 337-TA-933

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, Reginald D. Lucas, Esq., and the following parties as indicated, on **June 9, 2016**.



Lisa R. Barton, Secretary
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