

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN TONER SUPPLY
CONTAINERS AND COMPONENTS
THEREOF (II)**

Investigation No. 337-TA-1260

COMMISSION OPINION

On March 30, 2022, the Commission determined to review in part the initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on February 11, 2022. 87 Fed. Reg. 19707-09 (Apr. 5, 2022). On review, the Commission has determined that there has been a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”), with respect to U.S. Patent Nos. 8,565,649 (“the ’649 patent”); 9,354,551 (“the ’551 patent”); and 9,753,402 (“the ’402 patent”) (collectively, “the Asserted Patents”).

In particular, the Commission affirms, with a modified analysis, the ID’s findings that the economic prong of the domestic industry (“DI”) requirement has been satisfied under section 337(a)(3)(A) and (B)¹ with respect to the Asserted Patents. The Commission also corrects two typographical errors on pages 50 and 58 of the ID, as explained below.

This opinion sets forth the Commission’s reasoning in support of its determinations. In addition, the Commission adopts the findings in the ID to the extent such findings are not inconsistent with this opinion.

¹ As discussed below at n.10, Commissioner Kearns finds the economic prong satisfied under section 337(a)(3)(A) and takes no position with respect to section 337(a)(3)(B). *See Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1422 (Fed. Cir. 1984).

I. PROCEDURAL HISTORY

On April 13, 2021, the Commission instituted this investigation based on a complaint filed by complainants Canon Inc., Canon U.S.A., Inc. (“CUSA”), and Canon Virginia, Inc. (“Canon Virginia”) (collectively, “Canon”). 86 Fed. Reg. 19287-88 (Apr. 13, 2021). The complaint, as supplemented, alleges violations of section 337 based on the importation into the United States, the sale for importation, and the sale within the United States after importation of certain toner supply containers and components thereof (“Accused Products”) by reason of infringement of certain claims of thirteen patents: U.S. Patent Nos. 10,209,667; 10,289,060; 10,289,061; 10,295,957; 10,488,814; 10,496,032; 10,496,033; 10,514,654; 10,520,881; the ’649 patent; the ’551 patent; and the ’402 patent. *Id.* at 19287. The complaint further alleges that a “domestic industry” exists. *Id.*

Pursuant to Commission Rule 210.10(a)(6) (19 C.F.R. § 210.10(a)(6)), the Commission instituted two separate investigations based on the complaint and defined the scope of the present investigation as whether there is a violation of section 337 based on the allegations of infringement as to the asserted claims of the ’649, ’551, and ’402 patents with respect to the accused products identified in the notice of investigation (“NOI”). *Id.*² The NOI named eleven respondents: (1) Sichuan XingDian Technology Co., Ltd. (“Sichuan XingDian”) of Sichuan, China; (2) Sichuan Wiztoner Technology Co., Ltd. (“Sichuan Wiztoner”) of Sichuan, China; (3) Anhuiyatengshang-maoyouxiangongsi (“Yatengshang”) of Ganyuqu, China; (4) ChengDuXiangChangNanShiYou-SheBeiYouXianGongSi (“ChengDuXiang”) of

² The question of whether there is a violation of section 337 based on the allegations of infringement as to the asserted claims of the remaining patents is the subject of the severed investigation based on the same complaint, Inv. No. 337-TA-1259. See 86 Fed. Reg. 19284-86 (Apr. 13, 2021).

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SiChuanSheng, China; (5) Digital Marketing Corporation d/b/a Digital Buyer Marketing Company (“Digital Buyer”) of Los Angeles, California; (6) Do It Wiser, LLC d/b/a Image Toner of Wilmington, Delaware; (7) Hefeierlandianzishangwuyouxiangongsi (“Erlandianzishang”) of Chengdushi, China; (8) MITOCOLOR INC. (“TopInk”) of Rowland Heights, California; (9) Xianshi yanliangqu canqubaihuodianshanghang (“CJ-us”) of Shanxisheng, China; (10) Zhuhai Henyun Image Co., Ltd. (“Zhuhai Henyun”) of Zhuhai, China (collectively, the “Defaulting Respondents”); and (11) Shenzhen Keluodeng Kejiyouxiangognsi (“KenoGen”) of Guangdong, China. *Id.* The Office of Unfair Import Investigations (“OUII”) is also named as a party. *Id.* at 19287-88.

On May 27, 2021, the Commission granted Canon’s motion to amend the complaint and NOI to change the identification of Do It Wiser, LLC d/b/a Image Toner to Do It Wiser, Inc. d/b/a Image Toner (hereinafter, “Do It Wiser”) and to make related changes in paragraph 31 of the complaint. Order No. 6 (May 17, 2021), *unreviewed by* 86 Fed. Reg. 29806-07 (June 3, 2021).

On September 7, 2021, the Commission terminated the following asserted claims from the investigation based on Canon’s withdrawal of the complaint as to those claims: (i) claim 2 of the ’649 patent; (ii) claims 2, 3, 6, and 7 of the ’551 patent; and (iii) claims 25-27, 39-41, and 46 of the ’402 patent. Order No. 10 (Aug. 12, 2021), *unreviewed by* Comm’n Notice (Sept. 7, 2021).

That same day, the Commission terminated respondent KenoGen from the investigation based on Canon’s withdrawal of the complaint as to KenoGen. Order No. 12 (Aug. 13, 2021), *unreviewed by* Comm’n Notice (Sept. 7, 2021). As a result, the ten Defaulting Respondents are the only respondents remaining in this investigation.

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On October 29, 2021, the Commission found the Defaulting Respondents in default for failing to respond to the complaint and NOI and failing to show cause why they should not be found in default. Order No. 15 (Sept. 29, 2021), *unreviewed by Comm'n Notice* (Oct. 29, 2021).

On October 1, 2021, Canon filed a motion seeking summary determination that the Defaulting Respondents have violated section 337 and requesting the ALJ to recommend that the Commission issue a general exclusion order (“GEO”) and cease and desist orders (“CDOs”) against certain respondents, and set a one hundred percent (100%) bond for any importations of infringing goods during the period of Presidential review.³ On October 25, 2021, OUII filed a response supporting Canon’s motion and requested remedial relief.⁴ No Defaulting Respondent filed a response to Canon’s motion.

On February 11, 2022, the ALJ issued the subject ID and Recommended Determination (“RD”) granting Canon’s motion and finding violations of section 337 by the Defaulting Respondents. Specifically, the ID finds that: (i) the Commission has subject matter, personal, and in rem jurisdiction in this investigation; (ii) Canon has standing to assert the Asserted Patents; (iii) Canon has satisfied the importation requirement as to all Defaulting Respondents; (iv) the Accused Products practice claims 1, 6, 7, 12, 25, and 26 of the ’649 patent, claims 1, 4, and 5 of the ’551 patent, and claims 1, 15-18, 32, 36, and 37 of the ’402 patent; (v) Canon has satisfied the technical prong of the DI requirement with respect to the Asserted Patents; (vi) Canon has satisfied the economic prong of the DI requirement with respect to the Asserted

³ Canon’s Motion for Summary Determination of Violations and Recommended Determination on Remedy and Bonding (Oct. 1, 2021). In support of its motion, Canon also submitted a Memorandum in Support and Statements of Undisputed Material Fact.

⁴ Commission Investigative Staff’s Response to Complainants’ Motion for Summary Determination of Violation of Section 337 and for a Recommended Determination on Remedy and Bonding (Oct. 25, 2021).

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Patents; and (vii) no claim of the Asserted Patents has been shown invalid. The RD recommends that the Commission (i) issue a GEO, (ii) issue CDOs against eight respondents⁵, and (iii) set a 100 percent bond for any importations of infringing products during the period of Presidential review.

No party petitioned for review of the ID.

The Commission did not receive any submissions on the public interest from the parties pursuant to Commission Rule 210.50(a)(4) (19 C.F.R. § 210.50(a)(4)). The Commission also did not receive any submissions on the public interest from members of the public in response to the Commission’s *Federal Register* notice. 87 Fed. Reg. 9379-80 (Feb. 18, 2022).

On March 30, 2022, the Commission determined to review the ID in part with respect to the ID’s finding that Canon has satisfied the economic prong of DI requirement. 87 Fed. Reg. 19707-09 (Apr. 5, 2022) (“WTR Notice”). The Commission further requested briefing on remedy, bonding, and the public interest. *Id.*

On April 13, 2022, Canon filed its initial written response to the Commission’s request for briefing.⁶ OUII filed its initial written response that same day.⁷

⁵ The RD recommends that CDOs issue as to the following eight respondents: (1) Digital Buyer; (2) Do It Wiser; (3) TopInk; (4) Sichuan XingDian; (5) Sichuan Wiztoner; (6) Yatengshang; (7) ChengDuXiang; and (8) Erlandianzishang. RD at 73-75.

⁶ Canon’s Initial Written Submission on the Remedy, the Public Interest, and Bonding (Apr. 13, 2022) (“Canon IR”).

⁷ Response of the Office of Unfair Import Investigations to the Commission’s Request for Written Submissions on Remedy, the Public Interest, and Bonding (Apr. 13, 2022) (“OUII IR”).

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On April 20, 2021, Canon filed its reply submission.⁸ That same day, OUII filed its reply submission.⁹

II. COMMISSION REVIEW OF THE ID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Soft-Edged Trampolines and Components Thereof*, Inv. No. 337-TA-908, Comm'n Op. at 4 (May 1, 2015). 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 & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 9-10 (July 1997) (quoting *Certain Acid-Washed Denim Garments & Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 5 (Nov. 1992)). With respect to the issues under 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 also “may make any finding or conclusions that in its judgment are proper based on the record in the proceeding.” *Id.*

⁸ Canon’s Reply Submission on Remedy, the Public Interest, and Bonding (Apr. 20, 2022) (“Canon Reply”).

⁹ Reply of the Office of Unfair Import Investigations to the Commission’s Request for Written Submissions on Remedy, the Public Interest, and Bonding (Apr. 20, 2022) (“OUII Reply”).

III. ANALYSIS¹⁰

The Commission affirms the ID's finding that Canon satisfied the economic prong of the DI requirement under section 337(a)(3)(A).¹¹ *See* ID at 48-53, 57-60; Keegan Decl. ¶¶ 35-37, 40, 44-60, 63-64, 66-67, 69-70, 73-87; Keegan Exs. 4, 7-13, 15-25; Keegan Appxs. 1-2; Domon Decl. ¶ 19; Domon Ex. 1; Mukai Decl. ¶ 12; Mukai Ex. 2. Specifically, as the ID finds, Canon made the following cognizable investments in domestic plant and equipment:

- “Applying the [REDACTED] production-based discount rate [to the [REDACTED] ft²], as of the filing of the complaint, Canon Virginia used about [REDACTED] ft² of its Newport News facility to manufacture [and warehouse DI] Products.” ID at 51 (citing Keegan Decl. ¶ 47).
- “Applying the [REDACTED] production-based discount rate [to the [REDACTED] ft² of storage space], as of the complaint, about [REDACTED] ft² of the [REDACTED] ft² was allocated for the storage of [DI] Product inventory.” *Id.* (citing Keegan Decl. ¶ 50).

¹⁰ Chair Kearns finds the economic prong of the DI requirement met under section 337(a)(3)(A) based on the ID's factual findings as to Canon's cognizable investments in domestic plant and equipment (which it uses to manufacture the DI products in the United States), quantitative significance of those investments based on a comparison of those investments to the total market value of the DI products (as discussed on pp. 10-11 of this opinion), and the qualitative significance of these investments (as discussed on p. 11). He takes no position on quantitative significance in the context of Canon's worldwide operations or in the context of total U.S. sales of products manufactured both domestically and overseas that are covered by the Asserted Patents (as discussed on p. 10). He notes that these sorts of comparisons could place a company with substantial operations both in the United States and overseas at a disadvantage in proving satisfaction of the economic prong in comparison to a purely domestic company with identical or similar operations in the United States; he does not believe such a result is warranted by the statute or its legislative history.

Because Commissioner Kearns finds the economic prong satisfied under section 337(a)(3)(A), he needs not and does not reach the issue of whether it is satisfied under section 337(a)(3)(B) (although he notes that, on this record, Canon may well satisfy this subsection). He joins this section of the Commission's views to the extent that it is not inconsistent with this footnote.

¹¹ Commissioner Stayin writes separately regarding his view of the economic prong of the domestic industry requirement of Section 337. For the reasons stated therein, Commissioner Stayin joins the Commission's determination that Canon satisfied the domestic industry requirement pursuant to sections 337(a)(3)(A) and (B).

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- “Applying the 7.48% area-based discount rate, the Toner Plant, which is used mostly for the manufacture of [DI] Products, was valued at about \$9.1 million.” *Id.* at 52 (citing Keegan Decl. ¶ 52).
- “Based on the 7.48% area-based discount rate, Canon Virginia spent about \$ [REDACTED] on maintenance and repair of its Toner Plant in 2020.” *Id.* (citing Keegan Decl. ¶ 54).
- Using the [REDACTED] % production-based discount rate, the value of the equipment allocated to the production of [DI] Products was about \$ [REDACTED] of the \$ [REDACTED] [REDACTED] total related to toner supply container production.” *Id.* at 53 (citing Keegan Decl. ¶ 58).
- “Based on the 7.48% area-based discount rate, Canon Virginia spent about \$ [REDACTED] on maintenance and repair of the equipment attributable to the Toner Plant in 2020.” *Id.* (citing Keegan Decl. ¶ 60).

In addition, Canon’s domestic manufacturing facilities include “[REDACTED]

[REDACTED]

[REDACTED]

” and Canon “[REDACTED]

[REDACTED]” to package all the DI products in its domestic facilities. *Id.* at 52

(citing Keegan Decl. at ¶ 55).

The Commission also affirms the ID’s finding that Canon satisfied the economic prong of the DI requirement under section 337(a)(3)(B). *See id.* at 53-60; Keegan Decl. ¶¶ 35-37, 40, 63-64, 66-67, 69-70, 73-87; Keegan Exs. 4, 15-25; Keegan Appxs. 1-2; Domon Decl. ¶ 19; Domon Ex. 1; Mukai Decl. ¶ 12; Mukai Ex. 2. Specifically, as the ID finds, Canon made the following cognizable investments in domestic labor and capital:

- “Applying the [REDACTED] % production-based discount rate [to those [REDACTED] individuals], as of the filing of the complaint, Canon Virginia employed about [REDACTED] personnel and [REDACTED] in connection with the [DI] Products, of which about [REDACTED] and [REDACTED] were dedicated to manufacturing activities; about [REDACTED] were dedicated to engineering activities, and about [REDACTED] were dedicated to warehousing activities.” ID at 54 (citing Keegan Decl. ¶ 66).

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- As of the date of the complaint, there were about [REDACTED] personnel and [REDACTED] conducting manufacturing activities related to the DI Products. *Id.* (citing Keegan Decl. ¶¶ 69-70; *see* Keegan Ex. 15).
- “Applying the [REDACTED] % production-based discount rate, as of the complaint, about [REDACTED] personnel performed services related to [DI] Products in [the Chemical Product Engineering division¹²].” *Id.* at 55 (citing Keegan Decl. ¶ 75).
- “Applying the [REDACTED] % production-based discount rate, as of the filing of the complaint, about [REDACTED] personnel performed services related to [the DI Products] in [the Manufacturing Engineering division, Chemical Automation Maintenance & Engineering division, Advanced Manufacturing Technology division, and Toner Automation Maintenance & Engineering division¹³].” *Id.* at 55-56 (citing Keegan Decl. ¶ 78).
- “Applying the [REDACTED] % production-based discount rate, as of the filing of the complaint, about [REDACTED] personnel performed services related to the [DI] Products in [the Chemical Quality Management division¹⁴].” *Id.* at 56 (citing Keegan Decl. ¶ 81).

¹² The Chemical Product Engineering division “performs activities relating to [DI] Products such as [REDACTED]

[REDACTED]. *Id.* at 55 (citing Keegan Decl. ¶ 76; *see* Keegan Exs. 16-17).

¹³ These four divisions “perform activities relating to the [DI] Products, such as [REDACTED]

[REDACTED]” *Id.* at 56 (citing Keegan Decl. ¶ 79; *see* Keegan Exs. 18-20). The Advanced Manufacturing Technology division “additionally [REDACTED]

[REDACTED]” *Id.* (citing Keegan Decl. ¶ 79; *see* Keegan Exs. 21-23). Further, “in 2021, the Advanced Manufacturing Technology Division [REDACTED]

[REDACTED]” *Id.* (citing Keegan Decl. ¶ 79).

¹⁴ The Chemical Quality Management division “performs activities relating to the [DI] Products such as [REDACTED]

[REDACTED]” *Id.* at 56 (citing Keegan Decl. ¶ 82; *see* Keegan Ex. 24).

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- “Applying the [REDACTED] % production-based discount rate, as of the filing of the complaint, about [REDACTED] personnel performed warehousing operations related to [the DI Products].” *Id.* at 57 (citing Keegan Decl. ¶ 84).
- “Applying the [REDACTED] % production-based discount rate, Canon Virginia spent about \$ [REDACTED] on the labor pool in 2020 related to [DI] Products, of which about \$ [REDACTED] was dedicated to the labor pool for manufacturing and engineering.” *Id.* (citing Keegan Decl. ¶ 87).

The Commission affirms the ID’s findings that Canon’s domestic investments in plant and equipment and in labor and capital are quantitatively significant in the context of Canon’s worldwide operations and U.S. sales. *Id.* at 58-60. Specifically, Canon’s domestic production of its DI products represents a major fraction of Canon’s worldwide production of products covered by the Asserted Patents. *Id.* (citing Domon Decl. at ¶ 19; Domon Exhibit 1). Further, Canon’s DI products comprise [REDACTED] of all products sold in the United States and covered by the Asserted Patents. *Id.* In addition, while Canon manufactures the same models covered by the Asserted Patents both inside and outside the United States, Canon domestically manufactured [REDACTED] products having those model numbers and sold in the United States. *Id.* (citing Mukai Decl. at ¶ 12; Mukai Exhibit).¹⁵

The Commission further finds that Canon’s domestic investments are quantitatively significant based on a comparison of those investments (\$9.1 million for plant, \$ [REDACTED] for manufacturing and packaging equipment, \$ [REDACTED] for salary and benefits for [REDACTED]

¹⁵ Although the Commission affirms the ID’s finding that Canon’s investments are significant based on the contextual analysis above, consistent with Canon’s position in this investigation, whether the domestic industry requirement has been established is determined in each investigation based on “an examination of the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 39 (Aug. 1, 2007). While the Commission affirms the ID’s contextual analysis above of worldwide operations and total U.S. sales of products manufactured domestically and those abroad, there is no requirement for such an analysis (or a requirement for any specific contextual analysis) to satisfy the domestic industry requirement.

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personnel and [REDACTED] to the total market value of the DI products (\$[REDACTED]) manufactured in the United States in 2020 ([REDACTED] toner supply containers at CUSA's average sales price per container for 2020 Q4). *See* ID at 52-53, 57-58; *see also* Keegan Decl. ¶¶ 35, 52, 58. This comparison of domestic plant and equipment and labor and capital values to total market value of the domestically-manufactured DI products comports with other Commission approaches to quantitative significance determinations, such as comparing a complainant's domestic expenditures with the complainant's domestic revenues for the domestic industry articles. *See, e.g., Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 27-28 (Feb. 17, 2011); *Certain Optoelectronic Devices for Fiber Optic Communications, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-860, Comm'n Op. at 18-19 (Apr. 17, 2014); *Certain Magnetic Data Storage Tapes and Cartridges Containing the Same*, Inv. No. 337-TA-1012, Comm'n Op. at 117-118, 120-121 (Mar. 8, 2018). The Commission finds that this comparison, *inter alia*, demonstrates the quantitative significance of Canon's plant and equipment and labor and capital investments.

The ID also correctly finds that Canon's domestic investments in plant and equipment and labor and capital related to its DI products are qualitatively significant. *See id.* at 59. Specifically, the ID finds, "Canon's activities are core manufacturing activities that produce patented articles, converting parts and materials into saleable, useful products" and "[s]uch activities have long been recognized as a domestic industry within the meaning of section 337." *Id.* at 59-60 (citing *Certain Magnetic Data Storage & Tapes & Cartridges Containing the Same (II)*, Inv. No. 337-TA-1076, Initial Determination and Recommended Determination at 158, 160-61 (Oct. 25, 2018), *unreviewed in pertinent part* by 84 Fed. Reg. 10532-33 (Mar. 21, 2019); *see Lelo v. Int'l Trade Comm'n*, 786 F.3d 879, 882-83 (Fed. Cir. 2015); *Certain Movable Barrier*

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Operator Sys. & Components Thereof, Inv. No. 337-TA-1118, Comm'n Op. at 33 (Jan. 12, 2021)).

The Commission also corrects the following two typographical errors in the economic prong section:

- On page 50, line 1, the statement “[REDACTED] % of the Domestic Industry Products” is changed to “[REDACTED] % of the toner supply containers.” *Compare* ID at 49-50 (“Thus, about [REDACTED] % of the Domestic Industry Products made by Canon in Virginia in 2020 were Domestic Industry Products.”), *with* Keegan Decl. ¶ 40 (“Thus, about [REDACTED] % of the CVI Toner Supply Containers made by CVI in Virginia in 2020 were Covered CVI Toner Supply Containers.”).
- On page 58, line 11, the statement “\$[REDACTED]” is changed to “\$[REDACTED],” which is the amount of Canon’s maintenance and repair costs of its manufacturing and packaging equipment in 2020 that is attributable to the DI products. *Compare* ID at 58 (Canon Virginia’s “manufacturing and packaging equipment . . . proportionally cost about \$[REDACTED] for maintenance and repair in 2020.”), *with id.* at 53 (“Based on the 7.48% area-based discount rate, Canon Virginia spent about \$[REDACTED] on maintenance and repair of the equipment attributable to the Toner Plant in 2020.”) *and* Keegan Decl. ¶ 60 (“Applying the 7.48% area-based discount rate, [Canon Virginia] spent about \$[REDACTED] on maintenance and repair of the equipment attributable to the Toner Plant in 2020.”).

IV. REMEDY, THE PUBLIC INTEREST, AND BONDING

A. Remedy

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).

1. General Exclusion Order

In an investigation where no respondent appears to contest the complainant’s allegations, a violation of section 337 must be established by “substantial, reliable, and probative” evidence before the Commission can issue a general exclusion order. Specifically, section 337(g)(2) provides:

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(2) In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if—

- (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
- (B) such a violation is established by substantial, reliable, and probative evidence, and
- (C) the requirements of subsection (d)(2) are met.

19 U.S.C. § 1337(g)(2); *see also Certain Arrowheads with Acuate Blades and Components*

Thereof, Inv. No. 337-TA-1033, Comm'n Op. at 4 (May 1, 2018). Section 337(d)(2) provides:

The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—

- (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
- (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2). Satisfaction of either criterion is sufficient for imposition of a GEO, subject to a consideration of the public interest. *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm'n Op. at 24 (Oct. 1, 2009).

a. A GEO is Necessary to Prevent Circumvention of an LEO

The Commission finds that the record shows that a GEO is an appropriate remedy and is needed to prevent circumvention of a limited exclusion order (“LEO”). *See* RD at 63-67. The Commission agrees with the RD’s finding that the Defaulting Respondents are likely to circumvent an LEO by, among other actions, masking their identities or the sources of their products; using unmarked, generic, and/or reseller-branded packaging with no apparent origin markings; using various corporate names and complex corporate structures; and operating through internet websites, which often fail to identify the true owner and which allow sellers of

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aftermarket toner supply containers to easily close one website and open a new website through which to conduct their operations. *Id.* at 63-64. The Commission further finds that evidence proffered by Canon shows the defaulting respondents, like many manufacturers and sellers of infringing toner supply containers, try to remain unidentifiable and hide the sources of their products. *Id.* at 64-67.

Accordingly, the Commission finds that the conditions for obtaining a GEO under section 337(d)(2)(A) are satisfied because the evidence demonstrates that the Defaulting Respondents have been shown to use multiple practices that would circumvent an LEO.

b. There is a Pattern of Violation of Section 337 with Respect to the Asserted Patents and It Is Difficult to Identify the Source of Infringing Product

The Commission also finds there is a widespread pattern of violation with respect to the Asserted Patents. *Id.* at 68-69; 19 U.S.C. § 1337(d)(2)(B). The Commission finds that there is evidence showing a widespread pattern of importation and sale of infringing toner supply containers. RD at 68-69. Also, as the RD notes, there are at least ten entities in this investigation that have imported products, and Do It Wiser has also been a defaulting respondent in another investigation (*see Certain Toner Cartridges, Components Thereof, and Systems Containing Same*, Inv. No. 337-1174, 85 Fed. Reg. 76599 (Nov. 30, 2020)). *Id.* The Commission further finds that foreign manufacturers, such as the Wiztoner Respondents, have significant production capacity so as to enable widespread violation of the patents. *Id.* at 69.

The Commission finds it is difficult to identify sources of the infringing products because the Defaulting Respondents tend to ship in generic, unmarked packaging that obscures the source, and the importers also use complex business arrangements that make enforcement difficult. *Id.* at 69-72. The Commission finds that internet sales compound the difficulty in

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identifying the source, and many websites offer aftermarket toner supply containers for sale without any identifying information regarding the manufacturer(s). *Id.*

Accordingly, the Commission finds that the conditions for obtaining a GEO under section 337(d)(2)(B) are satisfied because the evidence demonstrates that there is a pattern of violation and the sources of infringing product are difficult to identify.

c. Definition of “Covered Articles”

Pursuant to Commission Rule 210.10(b)(1) (19 C.F.R. § 210.10(b)(1)) and as stated in the NOI, the plain language description of the accused products or category of accused products, which defines the scope of this investigation, is: “toner supply containers and components thereof that are sold as replacements for Canon toner supply containers used in Canon copy machines.” 86 Fed. Reg. at 19287.

Canon and OUII agree that a GEO should issue in this investigation, but disagree regarding the definitions of “covered articles” and “covered products” in the remedial orders. Canon IR, App. 1 at ¶¶ 1-4, App. 2 at Part I.(G); Canon Reply at 2-5; OUII IR at Att. A, p. 2, Att. B., p. 2; OUII Reply at 2-5. Canon’s initial proposed GEO did not include a definition of the “covered articles” and instead described the excluded products as “toner supply containers and components thereof,” which is the caption of this investigation. Canon IR, App. 1 at ¶¶ 1-4. In its reply, Canon argued for an alternative definition for “covered articles” and “covered products.” Canon Reply at 4-5. OUII consistently argued that “covered articles” and “covered products” should be defined according to the plain language description of the accused products in the NOI. OUII IR at Att. A, p. 2, Att. B., p. 2; OUII Reply at 2-5. The plain language description and Canon’s alternative definition are as follows:

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Plain Language Description	Canon's Alternative Definition
“toner supply containers and components thereof that are sold as replacements for Canon toner supply containers used in Canon copy machines”	“toner supply containers and components thereof that are sold or to be sold as alternatives to Canon-made toner supply containers”

86 Fed. Reg. at 19287; Canon Reply at 4-5.

The Commission finds that the plain language description in the NOI should be used to define the “covered articles” and “covered products” in the remedial orders. Canon offers no persuasive justification for any of the proposed revisions to the plain language description published in the NOI, and the Commission disagrees that Canon’s alternative definition provides more clarity as to the scope of covered articles subject to the remedial orders.

First, it is unclear what Canon intends to cover with the addition of “to be sold.” To the extent this is an effort to capture infringing products that are not labeled as Canon-replacements until after importation, the Commission notes that “are sold” covers infringing products regardless of when they are marked or otherwise identified as replacements for Canon toner supply containers. Canon has also provided a long list of known importers, which will assist enforcement of the orders. Canon IR at 60, App. 10. And, as detailed below, the Commission is issuing eight cease and desist orders, as Canon requested, which will also mitigate potential circumvention on this basis.

Second, Canon offers no explanation for revising the description of the covered articles to include “alternatives” instead of “replacements” to Canon toner supply containers. *See* Canon Reply at 4-5. Absent any explanation as to why this revision is necessary or appropriate, the Commission declines to depart from the language in the NOI.

Third, Canon argues that referring to “*Canon-made*” rather than “*Canon*” toner supply containers “clarifies that the analysis should focus on whether Canon made the toner supply

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container referenced in the definition, irrespective of how it was branded.” Canon Reply at 5. To the extent there are “Canon-made” toner supply containers that may be used as references but are not readily identifiable as Canon products, Canon can submit that information to U.S. Customs and Border Protection to aid enforcement.

Fourth, Canon suggests the Commission abandon the qualifier “used in Canon copy machines” as redundant, and so as to avoid potential circumvention by importers referring to compatibility with Canon *printers* or some other term. Canon Reply at 3, 5. However, Canon’s assertion is inconsistent with the testimony of Canon’s expert, Dr. Lux, who describes the technology in this investigation as toner supply containers for use in Canon copiers, not printers. *See* Lux Decl. at ¶¶ 25-26, 49 (identifying specific Canon copy machines in which the Accused Products are used). Moreover, Canon argued and presented evidence showing that all of the Accused Products “are identical in structure and differ only in the size of the container and the color of the toner contained within.” ID at 15-16 (citing Lux Decl. at ¶¶ 82-83 and 48, 50, 53, 56, 50). Thus, any infringing product that is compatible with both Canon *printers* and Canon *copy machines* would meet the plain language definition.

Accordingly, the Commission finds that the terms “covered articles” and “covered products” as used in the remedial orders should be defined according to the plain language description in the NOI.

2. Cease and Desist Orders

In addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue CDOs as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(g)(1). CDOs 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

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that could undercut the remedy provided by an exclusion order. *See, e.g., Certain Table Saws Incorporating Active Injury Mitigation Technology & Components Thereof* (“*Table Saws*”), Inv. No. 337-TA-965, Comm’n Op. at 4-6 (Feb. 1, 2017); *Certain Protective Cases & Components Thereof*, Inv. No. 337-TA-780, USITC Pub. No. 4405, Comm’n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners & Scan Engines, Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-551, Comm’n Op. at 22 (June 24, 2007)).

In the case of named respondents in the United States who have been found in default or who have not participated in the investigation, the Commission has inferred commercially significant domestic inventories or significant domestic operations with respect to the infringing articles. *See, e.g., Certain Earpiece Devices and Components Thereof*, Inv. No. 337-TA-1121, Comm’n Op. at 41-42 (Nov. 8, 2019); *Certain Hand Dryers and Housing for Hand Dryers* (“*Hand Dryers*”), Inv. No. 337-TA-1015, Comm’n Op. at 24 (Oct. 30, 2017); *Certain Mobile Device Holders and Components Thereof* (“*Mobile Device Holders*”), Inv. No. 337-TA-1028, Comm’n Op. at 27 (Mar. 22, 2018); *Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, and Components Thereof* (“*Agricultural Tractors*”), Inv. No. 337-TA-486, Comm’n Op. at 18 (Aug. 19, 2003); *Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same*, Inv. No. 337-TA-413, USITC Pub. No. 3307, Comm’n Op. at 17-18 (May 2000). Complainants bear the burden on this issue. “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.” *Table Saws*, Comm’n Op. at 5 (citing *Certain Integrated Repeaters, Switches, Transceivers, & Prods. Containing Same*, Inv. No. 337-TA-435, USITC Pub. No. 3547 (Oct. 2002), Comm’n Op. at 27 (Aug. 16, 2002); *see also* H.R. REP. No. 100-40, at 160 (1987)).

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Canon requests that the Commission issue CDOs against the following respondents: the Domestic Defaulting Respondents, the Wiztoner Respondents, Yatengshang, ChengDuXiang, and Erlandianzishang. Canon IR at 52-55; Canon Reply at 1-5. Canon argues the CDOs are necessary in view of those eight respondents' significant inventories of infringing products and/or significant domestic operations. Canon IR at 52-55. Canon also argues that the undisputed facts set forth in Canon's complaint are presumed true as against the Defaulting Respondents. *Id.* at 52, n.7 (citing 19 U.S.C. § 1337(g)(1); *Certain Digital Photo Frames & Image Display Devices & Components Thereof*, Inv. No. 337-TA-807, Comm'n Op. at 10-11 (Mar. 27, 2013)).

OUII agrees that the Commission should issue CDOs against eight of the Defaulting Respondents per Canon's request, specifically, the Domestic Defaulting Respondents, the Wiztoner Respondents, Yatengshang, ChengDuXiang, and Erlandianzishang. OUII IR at 11-14; OUII Reply at 3-5.

The Commission finds that the appropriate remedy includes cease and desist orders as to the Domestic Defaulting Respondents, the Wiztoner Respondents, Yatengshang, ChengDuXiang, and Erlandianzishang. *See* RD at 72-75. The Domestic Defaulting Respondents are domestic entities, the Commission finds it appropriate here to infer commercially significant U.S. inventories. *See Hand Dryers*, Comm'n Op. at 24 (citing *Agricultural Tractors*, Comm'n Op. at 17-18); *Mobile Device Holders*, Comm'n Op. at 24; *see also* RD at 73.

As for the Wiztoner Respondents, Yatengshang, ChengDuXiang, and Erlandianzishang, the record indicates that infringing products were shipped from an Amazon fulfillment center in Kentucky, from which they conduct at least domestic distribution operations. RD at 73-75. Given this, it is appropriate for the Commission to presume they have commercially significant

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domestic inventories of infringing Accused Products in the United States. *See, e.g., Hand Dryers*, Comm'n Op. at 10.¹⁶

B. Public Interest

Before issuing exclusion orders, the Commission must “consider[] the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” *See* 19 U.S.C. § 1337(g)(1). Similarly, the Commission must consider these public interest factors before issuing a CDO. *Id.*; 19 U.S.C. § 1337(f)(1). “[T]he statute does not require the Commission to determine that a remedial order would advance the public interest factors but rather requires the Commission to consider whether issuance of such an order will adversely affect the public interest factors.” *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. at 15 (June 26, 2015).¹⁷

¹⁶ Commissioners Schmidlein and Karpel agree that section 337(g)(1) is the appropriate authority for the issuance of the requested CDOs but their reasoning differs from the Majority. Specifically, they support issuance of the CDOs against the Domestic Defaulting Respondents, Wiztoner, Yatengshang, ChengDuXiang, and Erlandianzishang because the criteria for issuance of CDOs under subsection 337(g)(1)(A)-(E) are met as to these respondents. 19 U.S.C. § 1337(g)(1)(A)-(E). Each of those respondents was named in the complaint and each was served or refused service of the complaint and notice of investigation. *See* Order No. 15 (Sept. 29, 2021), *unreviewed by Comm'n Notice* (Oct. 29, 2021). Each of those respondents also failed to show good cause why they should not be held in default for failing to respond to the complaint and notice of investigation. *See id.* These findings satisfy subsections 337(g)(1)(A)-(D). Canon requested CDOs limited to each of these respondents in its initial submission on remedy, bonding, and the public interest thus satisfying subsection 337(g)(1)(E). Given that subsections 337(g)(1)(A)-(E) are satisfied, the statute directs the Commission to issue the requested CDOs, subject to consideration of the public interest. The public interest factors as detailed in Section IV.B *infra* do not support a finding that CDOs directed to the Domestic Defaulting Respondents, Wiztoner, Yatengshang, ChengDuXiang, and Erlandianzishang in this investigation would be contrary to the public interest. Accordingly, Commissioners Schmidlein and Karpel support issuance of the CDOs under section 337(g)(1) for the reasons provided in this footnote.

¹⁷ The Commission did not direct the ALJ to make any public interest findings.

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The record in this investigation contains no evidence that a GEO or CDOs would adversely affect the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. *See* 19 U.S.C. § 1337(g)(1). In their submissions in response to the WTR Notice, both Canon and OUII contend that the statutory public interest factors do not warrant denying a remedy. Canon IR at 55-58; Canon Reply at 5; OUII IR at 14-16; OUII Reply at 5. In addition, the Commission requested submissions from interested government agencies and any other interested persons with respect to the public interest. *See* 87 Fed. Reg. 9379-80 (Feb. 18, 2022). No third party filed a submission in response to the Commission's notice.

The toner supply containers and components at issue are used as replacements for Canon toner supply containers in Canon copy machines. There is no evidence that these products are necessary to fulfill any public health, safety, or welfare needs. Canon IR at 55-58; Canon Reply at 5; OUII IR at 14-16; OUII Reply at 5. In addition, the record shows that Canon has sufficient capacity to readily replace the infringing products at issue if they are excluded thereby offering consumers a ready supply of these articles. *See* Canon IR at 57-58. Domestic production of like products would also not be adversely affected by these remedial orders. Finally, there is no evidence that the remedial orders would impact competitive conditions in the United States economy. *See id.*

Accordingly, the Commission finds that the statutory public interest factors do not preclude issuance of a GEO or the CDOs.

C. Bonding

If the Commission enters an exclusion order or a cease and desist order, a respondent may continue to import and sell its products during the 60-day period of Presidential review under a bond in an amount determined by the Commission to be “sufficient to protect the

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complainant from any injury.” 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3). 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 and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, & Prods. Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, 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 & Prods. 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 reasonable royalty, the Commission has imposed a 100 percent bond. *See, e.g., Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods Using the Same*, Inv. No. 337-TA-634, Comm’n Op. at 6-7 (Nov. 24, 2009). The complainant, however, bears the burden of establishing the need for a bond. *Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-533, USITC Pub. No. 3975, Comm’n Op. at 40 (July 21, 2006).

Here, the RD recommends a bond in the amount of 100 percent of the entered value of the Accused Products during the period of Presidential review as requested by Canon and OUII. RD at 75-77; Canon IR at 58-59; OUII IR at 16-17; OUII Reply at 6. The Commission agrees that a bond in the amount of one hundred percent (100%) of the entered value of the Accused Products is appropriate. The Defaulting Respondents did not provide discovery in this investigation. Thus, there is a lack of reliable pricing information in the record. However, Canon’s evidence shows that “the pricing of the accused products varies significantly from one

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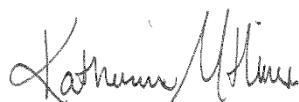
respondent to another and from OEM pricing within the same cartridge models.” RD at 76; Canon IR at 59. OUII agrees with Canon that that the Accused Products are sold over a broad and inconsistent range of prices. OUII IR at 16-17; OUII Reply at 6.

Accordingly, the Commission has determined to set the bond of 100 percent of the entered value of the Accused Products.

V. CONCLUSION

For the reasons set forth herein, the Commission determines that Canon has established a violation of section 337 by the Defaulting Respondents with respect to claims 1, 6, 7, 12, 25, 26 of the ’649 patent; claims 1, 4, 5 of the ’551 patent; and claims 1, 15, 16, 17, 18, 32, 36, 37 the ’402 patent. Accordingly, the investigation is terminated with a finding of violation of section 337. The Commission determines that the appropriate remedy is a GEO that excludes from entry for consumption into the United States toner supply containers and components thereof that infringe one or more of the asserted claims of the Asserted Patents, as set forth in more detail in the accompanying order. The Commission has also determined to issue CDOs directed to the following eight Defaulting Respondents: Digital Buyer, Do It Wiser, TopInk, Sichuan XingDian, Sichuan Wiztoner, Yatengshang, ChengDuXiang, and Erlandianzishang. The Commission has determined that the public interest does not preclude issuance of these remedial orders. Finally, the Commission has determined to set a bond of 100 percent of the entered value of the Accused Products during the period of Presidential review.

By order of the Commission.



Katherine M. Hiner
Acting Secretary to the Commission

Issued: August 3, 2022

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Concurring views of Commissioner Randolph J. Stayin:

I write separately to express my view of the evidence and analysis required to determine whether a complainant has satisfied the economic prong of the domestic industry requirement in investigations arising out of the alleged infringement of a patent, copyright, trademark, mask work, or design, codified at 19 U.S.C. § 1337(a)(3).

Congress has provided that a domestic industry shall be considered to exist if, in the United States, with respect to the articles protected by the relevant intellectual property, there is (a) “significant investment in plant and equipment”; (b) “significant employment of labor or capital”; or (c) “substantial investment in its exploitation, including engineering, research and development, or licensing.” *Id.*, § 1337(a)(3)(A)-(C). The Commission has often characterized the test for a domestic industry as looking to the “nature and significance” of a complainant’s investments. However, in my view, the application of this test by the Commission has become overly complicated, inconsistently applied, and far afield from the inquiry Congress has instructed the Commission to undertake.

In my view, the Commission’s analysis should begin by evaluating whether the complainant has identified investments with respect to the domestic industry product that fit into the statutory categories (*i.e.*, plant, equipment, labor, capital, engineering, research and development, or licensing). Whether, for a particular product or industry, investments qualify under these categories may be case-specific and depend on the realities of the marketplace. I believe it is not necessary for the Commission to finely parse a complainant’s list of purportedly qualifying investments. If, for example, a complainant chooses to present its case at a high level of generality or without segregating non-qualifying expenses, the complainant runs the risk the Commission will find the complainant did not meet its burden.

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Once the qualifying investments have been identified, the Commission should evaluate whether the qualifying investments are qualitatively and quantitatively significant (for subsections (A)-(B)) or substantial (for subsection (C)). Consistent with past Commission practice, I believe qualifying investments under subsection (C) should be afforded less weight the further removed the activities are from the patented features of the domestic industry product, and in some contexts, may be too far removed to be credited at all. In my view, framing the significance analysis should be left to the complainant. Frameworks such as “value-added” analysis may be useful to demonstrate significance in particular cases, but in my view are neither necessary nor always sufficient. If, based on the totality of the evidence, the Commission does not find complainant’s contextual analysis persuasive, the Commission should find no domestic industry.

In this case, in my view, based on the totality of the record, Complainants have met their burden to show a domestic industry exists. Canon allocated its expenditures to the domestic industry products using methodologies grounded in the facts of this investigation and supported by record evidence. Canon provided detailed information regarding the facilities in the United States where it manufactures domestic industry products with a market value exceeding \$ [REDACTED] [REDACTED]. Canon spends approximately \$ [REDACTED] for salary and benefits for more than [REDACTED] [REDACTED] employees in the United States devoted to the manufacturing and engineering of the domestic industry products. The ID sets forth a variety of contextual analysis that helps to illustrate the qualitative and quantitative significance of these expenditures, although in my view the significance of these expenditures is plainly evident from their nature (manufacturing) and amount. Accordingly, I find it unnecessary to engage in the parsing of the ID reflected by the Commission’s Opinion here (and in other recent matters), but I join the Commission’s

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determination that Canon has shown a domestic industry exists for purposes of sections 337(a)(3)(A) and (B).