

PUBLIC VERSION

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

In the Matter of

**CERTAIN AUTOMATED PUT WALLS
AND AUTOMATED STORAGE AND
RETRIEVAL SYSTEMS, ASSOCIATED
VEHICLES, ASSOCIATED CONTROL
SOFTWARE, AND COMPONENT
PARTS THEREOF**

Investigation No. 337-TA-1293

COMMISSION OPINION

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I. INTRODUCTION

On June 1, 2023, the Commission determined to review in part the final initial determination (“ID”) issued by the presiding chief administrative law judge (“CALJ”) on March 31, 2023. 88 Fed. Reg. 37271-73 (June 7, 2023). 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, with respect to U.S. Patent Nos. 8,622,194 (“the ’194 patent”) and 10,576,505 (“the ’505 patent”) (collectively, the “Asserted Patents”). This opinion sets forth the Commission’s reasoning in support of that determination.

II. BACKGROUND

A. Procedural History

On January 21, 2022, the Commission instituted this investigation based on a complaint filed by OPEX Corporation (“OPEX”) of Moorestown, New Jersey on December 22, 2021, as supplemented,¹ to determine:

whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2)² by reason of infringement of one or more of claims 1-28 of the ’601 patent [U.S. Patent No. 8,104,601]; claims 1-5 and 8-25 of

¹ OPEX submitted letters supplementing the complaint on January 10 and January 11, 2022. *See* EDIS Doc. ID Nos. 759970, 760204, 760248.

² Pursuant to Commission Rule 210.10(b)(1), paragraph (2) of the NOI provides the following plain language description of the accused products or category of accused products, which defines the scope of the investigation:

automated put walls and automated storage and retrieval systems; vehicles associated with these automated put walls and automated storage and retrieval systems; control software associated with these automated put walls and automated storage and retrieval systems; and component parts of these automated put walls and automated storage and retrieval systems.

87 Fed. Reg. 4291 (Jan. 27, 2022); *see* 19 C.F.R. § 210.10(b)(1).

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the '740 patent [U.S. Patent No. 8,276,740]; claims 1-10, 12-17, 19, and 20 of the '194 patent [U.S. Patent No. 8,622,194]; and claims 1-5, 7-9, and 11-21 of the '505 patent [U.S. Patent No. 10,576,505]; and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

87 Fed. Reg. 4290-91 (Jan. 27, 2022). The notice of investigation (“NOI”) named as respondents: (1) HC Robotics (a.k.a. Huicang Information Technology Co., Ltd.) (“HC Robotics”) of Hangzhou City, Zhejiang Province, China; and (2) Invata, LLC (d/b/a Invata Intralogistics) (“Invata”) of Conshohocken, Pennsylvania (collectively, “Respondents”). *Id.* The Office of Unfair Import Investigations is not a party to this investigation. *Id.*

The parties submitted a joint claim construction chart on June 24, 2022, and an updated chart on August 31, 2022. *See* EDIS Doc. Nos. 773900, 779184. The parties submitted opening claim constructive briefs on September 6, 2022, and responsive briefs on September 19, 2022. The CALJ then held a *Markman* hearing on September 27, 2022.

On September 13, 2022, the Commission terminated the investigation as to the accused OmniSort Generation 1 products (*see infra* at Section II.D) based on a consent order. Order No. 10 (Aug. 12, 2022), *unreviewed by* Comm’n Notice (Sept. 13, 2022).

On October 11, 2022, the Commission terminated the investigation as to (i) the '601 patent, (ii) the '740 patent, (iii) asserted claims 2-4, 6, 10, 12-17, 19, and 20 of the '194 patent, and (iv) asserted claims 14, 17, and 21 of the '505 patent based on OPEX’s partial withdrawal of the complaint. Order No. 12 (Sept. 23, 2022), *unreviewed by* Comm’n Notice (Oct. 11, 2022). Consequently, the following asserted claims remain at issue in this investigation:

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Asserted Patent	Remaining Asserted Claim(s)
'194 patent	1, 5, and 7-9
'505 patent	1-5, 7-9, 11-13, 15-16, and 18-20

ID at 164.

The CALJ held an evidentiary hearing from November 28 – December 1, 2022. *See* Tr. 1-947. On December 19, 2022, the Commission determined that the technical prong of the domestic industry requirement is satisfied in this investigation as to the remaining asserted patents—*i.e.*, the '194 and '505 patents. *See* Order No. 17 (Nov. 23, 2022), *unreviewed by* Comm'n Notice (Dec. 19, 2022).

On March 31, 2023, the CALJ issued the final ID on violation, finding that Respondents violated section 337 as to both Asserted Patents. Specifically, the ID finds that: (i) OPEX has standing to assert both the '194 and '505 patents; (ii) Respondents directly infringe asserted claims 1 and 5 of the '194 patent and asserted claims 1-5, 7-9, 11-13, 15-16, and 18-20 of the '505 patent; (iii) Respondents both induced and contributed to the infringement of asserted claims 1 and 5 of the '194 patent and asserted claims 1-5, 7-9, 11-13, 15-16, and 18-20 of the '505 patent; (iv) no asserted claims of the '194 patent or '505 patent are invalid as obvious; and (v) OPEX has satisfied the domestic industry (“DI”) requirement as to both patents. ID at 164-65.

The ID also includes the CALJ’s recommended determination (“RD”) on remedy and bonding. The RD recommends that, should the Commission determine that a violation of section 337 has occurred, the Commission should: (i) issue a limited exclusion order (“LEO”) against the Respondents’ infringing products; (ii) issue a cease and desist order (“CDO”) against each of

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the Respondents; and (iii) set a 100 percent bond for importations of infringing products during the period of Presidential review. RD at 165-69.³

On April 14, 2023, Respondents filed a petition seeking review of certain findings in the ID, including claim construction, infringement, validity, and the economic prong of the domestic industry requirement.⁴ On April 26, 2023, OPEX filed a response opposing Respondents' petition.⁵

The Commission did not receive 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. See 88 Fed. Reg. 23689 (Apr. 18, 2023).

On June 1, 2023, the Commission determined to review the final ID in part with respect to the ID's finding that OPEX has satisfied the economic prong of the DI requirement. 88 Fed. Reg. 37271-73. The Commission also determined to correct three typographical/clerical errors on pages 8, 35, and 38 of the ID. *Id.* The Commission determined not to review the remaining findings in the ID. *Id.* The Commission's notice requested written submissions on remedy, the public interest, and bonding, and did not request briefing on any issue under review. *See id.*

³ The Commission did not direct the CALJ to take public interest evidence or provide findings and recommendations concerning the public interest (*see* 87 Fed. Reg. 4290-91 (Jan. 27, 2022)), and the RD therefore does not address the public interest (*see* RD at 165-69).

⁴ Petition for Review of Initial Determination by Respondents Invata, LLC and HC Robotics (Apr. 14, 2023) ("RPet").

⁵ Complainant OPEX Corporation's Response to Respondents Invata, LLC and HC Robotics' Petition for Review of the Initial Determination (Apr. 26, 2023) ("CPResp").

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On June 15, 2023, OPEX⁶ and Respondents⁷ each filed initial briefs on remedy, the public interest, and bonding. On June 22, 2023, OPEX⁸ and Respondents⁹ each filed reply briefs.

B. Overview of the Technology

The technology at issue relates to automated material-handling systems—commonly known as “automated put walls”—that receive, sort, and store items (*e.g.*, mail or small consumer goods) in destination areas (*e.g.*, storage bins) until the items are later retrieved. *See, e.g.*, CIPHB¹⁰ at 2. More particularly, in typical automated put walls, an item is received into the system at an induction location, scanned, and assigned a specific destination area on the put wall. *Id.* at 2-4. The item is then transferred onto a robotic vehicle that is movable along a track and operable via the system’s control software. *Id.* The item’s destination area is then transmitted to the robotic vehicle, which moves along the track to the indicated destination area where it deposits the item before returning to the induction location to receive another item. *Id.* Automated put walls are used extensively in the e-commerce industry (*e.g.*, in Amazon’s order-

⁶ Complainant OPEX Corporation’s Opening Submission on Remedy, Bonding, and Public Interest Requested in the Commission’s Notice of Commission Determination to Review-in-Part (June 15, 2023) (“CIBr.”).

⁷ Respondents’ Initial Written Submission in Response to the Commission’s Notice of Review of Final Initial Determination (June 15, 2023) (“RIBr.”).

⁸ Complainant OPEX Corporation’s Reply Submission on Remedy, Bonding, and Public Interest Requested in the Commission’s Notice of Commission Determination to Review-in-Part (June 22, 2023) (“CRBr.”).

⁹ Respondents’ Reply Written Submission in Response to the Commission’s Notice of Review of Final Initial Determination (June 22, 2023) (“RRBr.”).

¹⁰ Complainant OPEX Corporation’s Initial Post-Hearing Brief on Issues for which It Bears the Burden of Proof (Dec. 16, 2022) (“CIPHB”).

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fulfillment centers), where various items that are the subject of individual purchase orders are gathered, sorted, and later retrieved for packing and shipping. *Id.* at 3.

C. The Asserted Patents

The two remaining patents in this investigation—the '194 and '505 patents—are members of the same patent family and both claim priority to U.S. Provisional Application No. 60/884,766, which was filed on January 12, 2007. CX-0085 ('194 patent) at cover page; CX-0086 ('505 patent) at cover page. The application resulting in the '505 patent (U.S. Application No. 16/039,713) is a continuation of the application that resulted in the '194 patent (U.S. Application No. 13/631,817). *Id.* The two patents thus share essentially the same specification. *Compare* CX-0085 with CX-0086.

The Asserted Patents explain that manually sorting items is laborious and time consuming, yet “the known [automated sorting] systems suffer from several problems; the most significant are cost and size.” *See, e.g.,* CX-0086, 1:40-41, 1:56-67. As the Asserted Patents further explain, “ma[n]y large organizations have extensive storage areas in which numerous items are stored,” but

[s]orting and retrieving items from the hundreds or thousands of storage areas requires significant labor to perform manually, and the known systems of automatically handling the materials are either very expensive or have limitations that hamper their effectiveness.

Id. at 1:63-2:1.

The Asserted Patents thus address “a need in a variety of material handling applications for automatically storing and/or retrieving items” in a labor-, space-, and cost-efficient manner. *See* CX-0086 at 2:1-3. The proposed solution is illustrated in Figure 1 (reproduced below), which shows “a perspective view of a sorting apparatus.” *Id.* at 2:31.

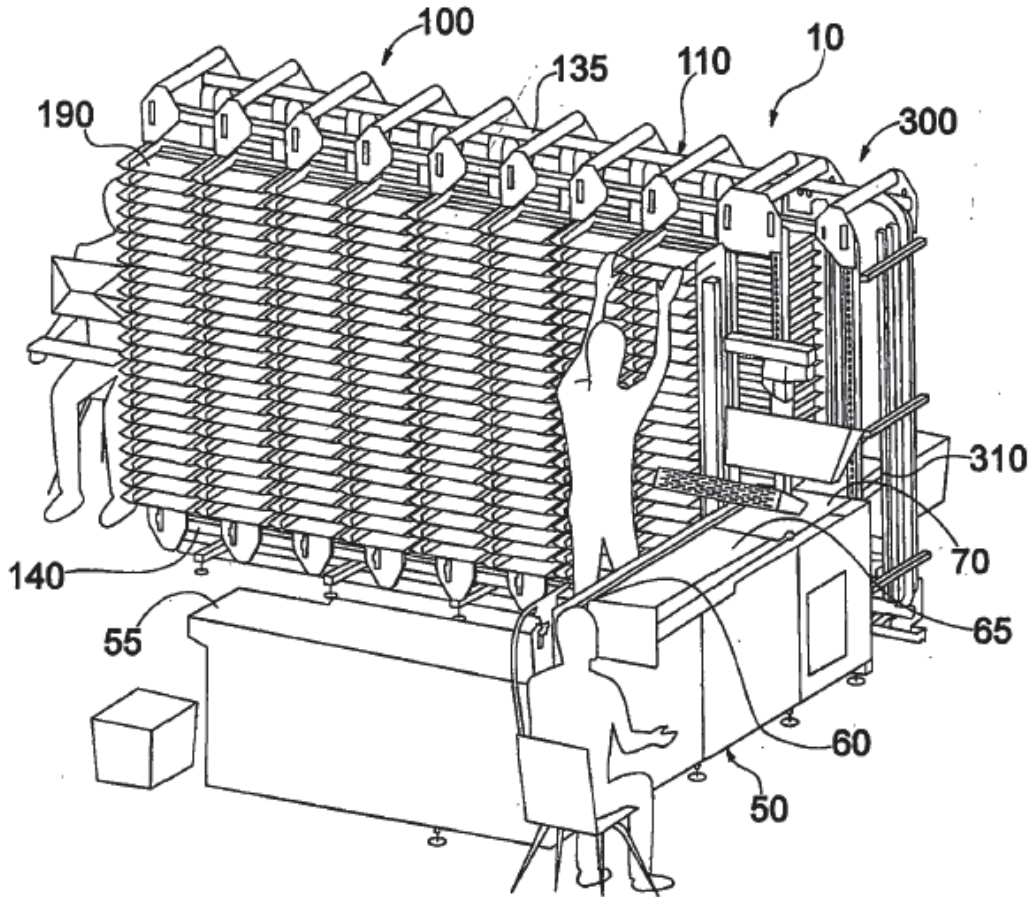


Fig. 1

Id., Fig. 1.

The '194 patent, titled "Material Handling Apparatus for Delivering or Retrieving Items," issued on January 7, 2014, from U.S. Application No. 13/631,817, filed on September 28, 2012. CX-0085 at cover page. OPEX asserts that Respondents' products infringe claims 1, 5, and 7-9 of the '194 patent. ID at 6.¹¹ The asserted claims of the '194 patent are directed to "material

¹¹ OPEX relied on these same claims to prove satisfaction of the technical prong of the DI requirement as to the '194 patent. *See* Order No. 17 (Nov. 23, 2022), *unreviewed by* Comm'n Notice (Dec. 19, 2022).

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handling system[s] for delivering a plurality of items to or from a plurality of destination areas.”
Id. at 6-8.

The ’505 patent, titled “Material Handling Apparatus for Delivering or Retrieving Items,” issued on March 3, 2020, from U.S. Application No. 16/039,713, filed on July 19, 2018. CX-0086 at cover page. OPEX asserts that Respondents’ products infringe claims 1-5, 7-9, 11-13, 15-16, 18-20 of the ’505 patent. ID at 8.¹² The asserted claims of the ’505 patent are directed to “[a] delivery vehicle operable with a material handling system.” *Id.* at 8-11.

D. The Accused Systems

OPEX accused Respondents of infringing the ’194 and ’505 patents by making, importing, and selling the OmniSort Generation 2 systems (the “Accused Systems”).¹³ ID at 11. The Accused Systems are designed and manufactured by respondent HC Robotics. *Id.* at 12 (citing Tr. (Zhu) at 246:5-6, 246:23-27:1, 259:12-13). Respondent Invata, while “not involved in the design, manufacture, or research and development” of the Accused Systems, “commissioned three OmniSort Generation 2 systems from HC Robotics in the United States,” including the two systems that Invata sold to Fanatics, Inc.¹⁴ and installed in its facility located in Aberdeen, Maryland. *Id.* (citing Tr. (Labib) at 486:18-487:5, 500:15-501:5, 509:15-510:1, 510:9-14).

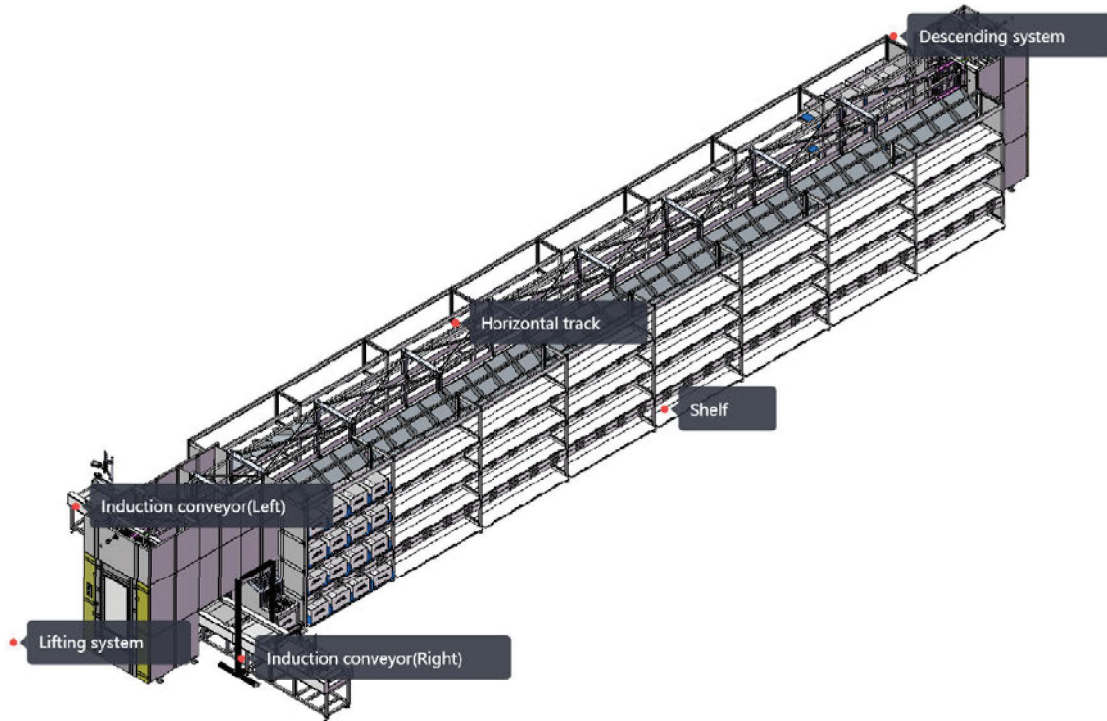
¹² OPEX relied on these same claims to prove satisfaction of the technical prong of the DI requirement as to the ’505 patent. *See* Order No. 17 (Nov. 23, 2022), *unreviewed by* Comm’n Notice (Dec. 19, 2022).

¹³ As noted previously, the parties agreed to a consent order stipulation regarding the accused OmniSort Generation 1 systems. Order No. 10 (Aug. 12, 2022), *unreviewed by* Comm’n Notice (Sept. 13, 2022).

¹⁴ Fanatics, Inc. (“Fanatics”) is an online retailer focusing on licensed sports apparel. *See* <https://www.fanatics.com/>.

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The Accused Systems contain a put wall, bins to hold customer orders, robots as delivery vehicles, and elevators that raise and lower the robots within the system. *Id.* at 10 (citing Tr. (Labib) at 487:9-14). An exemplary OmniSort Generation 2 system is shown below:



CX-0144C.0009. An exemplary delivery vehicle for the OmniSort Generation 2 system installed at the Fanatics facility in Aberdeen, Maryland is shown in the annotated photograph below:

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CX-0300C; *see* CPX-0002 (OmniSort Generation 2 vehicle).

E. The Domestic Industry Products

OPEX identified two versions of its Sure Sort System—Sure Sort and Sure Sort XL (the “DI Products”)—as practicing the ’194 and ’505 patents. ID at 12. The Commission granted summary determination that the technical prong of the domestic industry requirement is satisfied as to the ’194 and ’505 patents by the DI Products. *See* Order No. 17 (Nov. 23, 2022), *unreviewed by* Comm’n Notice (Dec. 19, 2022).

The DI Products are small-item sorting systems capable of sorting multiple items to multiple different destinations using iBot vehicles. ID at 13 (citing Tr. (Sorensen) at 290:4-297:14). An exemplary DI Product is shown below:

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CX-0108.0005. An exemplary delivery vehicle for the DI Products (the “Sure Sort iBOT robotic vehicle”) is shown below:



CX-0107; *see* CPX-0001 (SureSort iBOT); CPX-0003 (SureSort XL iBOT).

III. COMMISSION REVIEW OF THE FINAL ID

When the Commission reviews an initial determination, in whole or in part, it reviews the determination *de novo*. *Certain Soft-Edged Trampolines & 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-

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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 take no position on specific issues or portions of the initial determination,” and “may make any finding or conclusions that in its judgment are proper based on the record in the proceeding.” *Id.*; *see also Beloit Corp. v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir. 1984).

IV. ANALYSIS

The Commission’s findings, conclusions, and supporting analysis follow. The Commission affirms and adopts the ID’s findings, conclusions, and supporting analysis that are not inconsistent with the Commission’s opinion.

A. Economic Prong of the Domestic Industry Requirement

1. The Final ID

The ID finds that OPEX has satisfied the economic prong of the DI requirement under section 337(a)(3)(A) and (B) through significant investment in plant and equipment and significant employment of labor and capital, respectively, with respect to the articles protected by the Asserted Patents. ID at 146-64; *see* 19 U.S.C. § 1337(a)(3)(A)-(B).

a. OPEX’s Cognizable U.S. Investments

With respect to section 337(a)(3)(A), the ID finds that OPEX operates “four U.S. facilities used to research, design, develop, manufacture, and support the [DI] Products” and “together, these four facilities provide approximately [REDACTED] square feet appropriately allocated

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to the [DI] Products.”¹⁵ ID at 142. The ID finds that OPEX proved “at least [REDACTED] in plant and equipment expenses with respect to articles protected by the Asserted Patents,” which are comprised of “lease costs associated with the [DI] Products as well as the cost of utilities and equipment allocable to the [DI] Products.” *Id.* at 146 (citing CIPHB at 110-31). The ID includes the following chart summarizing OPEX’s domestic investments in plant and equipment allocable to the Asserted Patents in 2020 and 2021:

Expense Category	2020 DI Product investments	2021 DI Product investments	Total
305 Commerce Lease	[REDACTED]	[REDACTED]	[REDACTED]
2801 Summit Lease	[REDACTED]	[REDACTED]	[REDACTED]
825 Hylton Lease	[REDACTED]	[REDACTED]	[REDACTED]
835 Lancer Lease	[REDACTED]	[REDACTED]	[REDACTED]
Utilities	[REDACTED]	[REDACTED]	[REDACTED]
Equipment	[REDACTED]	[REDACTED]	[REDACTED]
Totals	[REDACTED]	[REDACTED]	[REDACTED]

Id. at 155.

With respect to section 337(a)(3)(B), the ID finds that OPEX has “the equivalent of approximately [REDACTED] full-time employees at [its four] facilities appropriately allocated to engineering, manufacturing, producing, and servicing the [DI] Products” and that “[a]ll of these employees are located in the United States.” ID at 142. The ID finds that OPEX demonstrated approximately [REDACTED] in labor and capital expenses with respect to the DI Products. *Id.* at 155. The ID includes the following chart summarizing OPEX’s domestic investments in its

¹⁵ OPEX’s four U.S. facilities are abbreviated in the ID (and in OPEX’s evidence) as follows: (1) 305 Commerce Drive, Moorestown, NJ 08057 (“305 Commerce”); (2) 2801 Summit Avenue, Plano, TX 75074 (“2801 Summit”); (3) 825 Hylton Road, Pennsauken Township, NJ 08110 (“825 Hylton”); and (4) 835 Lancer Drive, Moorestown, NJ 08057 (“835 Lancer”). ID at 142. CX-0235C (Sims Decl.) ¶¶ 26, 28, 30, 31.

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employment of labor and capital allocable to the Asserted Patents in 2020 and 2021, which total \$46,561,649:

Expense Category	2020 Total DI Product Salary and Benefit Cost	2021 Total DI Product Salary and Benefit Cost
Engineering Labor		
Manufacturing Labor		
Production Labor		
Installation, Commission, and Integration Labor		
Service and Repair Labor		
Capital Investments		
Totals		

Id. at 159-60. Respondents challenged OPEX’s allocation methods on various grounds, including that “OPEX did not remove certain sales, marketing, and other expenses that OPEX’s employees engage in.” ID at 145 (quoting RRB at 37). The ID rejects Respondents’ arguments inasmuch as Respondents did not show that “such activity was anything other than *de minimis*” and that OPEX employees were “still engaged in support for the Domestic Industry Products.”

Id. Respondents also objected to the inclusion of OPEX’s investments in “other sales, human resources, and travel expenses as well as building spaces used for non-warehouse automation purposes.” *Id.* The ID dismisses these arguments finding that “the evidence shows that OPEX did allocate space at each of its facilities between that used for Domestic Industry Products and that used for other purposes” stating that “where a complainant is plainly not a mere importer, as here, there is no reason why all of the complainant’s activities relating to the Domestic Industry Products should not be included as part of the domestic industry. The reality is that investments in sales, human resources, and travel are necessary to maintain a competitive position in the market for the patented technology.” *Id.*

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b. Significance Analysis

The ID finds that OPEX’s investments of approximately [REDACTED] in plant and equipment expenses and approximately [REDACTED] in labor and capital expenses with respect to the DI Products are both qualitatively and quantitatively significant under 19 U.S.C. § 1337(a)(3)(A) and (B). ID at 160.

The ID finds that, qualitatively, “OPEX is an innovator in warehouse automation technology and brings this technology to market and to U.S. customers in part through these investments.” ID at 160 (citing Tr. (Stevens) at 61:17-62:13, 66:23-68:9, 72:11-73:23, Tr. (Akemann) at 194:16-197:8). The ID also finds that the DI Products “reflect ongoing innovation and new product development, which are important to OPEX and its competitive position.” *Id.* (citing Tr. (Akemann) at 194:16-197:8).

Moreover, the ID finds, OPEX’s evidence “has appropriately demonstrated the nature and relative importance of its domestic activities in view of the relevant industry.” ID at 160 (citing *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 45-46 (Aug. 1, 2007)). In particular, the ID finds that:

- “The market has seen a recent increased adoption of warehouse automation products, and OPEX’s investments [in] the [DI] Products are important for OPEX to stay competitive in that market.”
- OPEX “domestically employs workers at every stage of the life cycle of those products, from engineering, piece parts manufacturing, and production through installation, service, repair and support.”
- OPEX “invested nearly [REDACTED] in [DI] Product plant and equipment and nearly [REDACTED] in [DI] Product labor and capital for 2020 and 2021 alone.”
- OPEX “has been making and selling the [DI] Products since 2017.”

Id. at 160-61 (citing Tr. (Akemann) at 194:16-197:8; CX-1420 (Abramovitz); CX-1425

(Maradana); CX-1426 (Nordhaus); CX-1427 (Top 50 Companies of 2018); CX-1428 (MHI

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Innovation Award at MODEX 2020); CX-1441 (Top 50 Warehouse Automation Companies); Tr. (Stevens) at 66:23-68:9; CPX-0263 (OPEX Introduces SureSort at ProMat 2017)).

With respect to the quantitative analysis, the ID finds that OPEX's relied-upon activities "are significant in comparison with OPEX's foreign activities" where (i) [REDACTED] percent of OPEX's employees are based in the U.S., including [REDACTED] percent of its engineering, manufacturing, production, and service and repair employees for the DI Products, and (ii) [REDACTED] percent of OPEX's total facility square footage is located in the U.S., including [REDACTED] percent of its engineering, manufacturing, and production facilities for the DI Products. ID at 161 (citing Tr. (Akemann) at 197:6-198:12).

The ID further finds that the DI Products "are significant to OPEX as a whole." ID at 161. According to the ID, (i) the DI Products' sales revenue "increased as a proportion of total OPEX sales revenue, from approximately [REDACTED] in 2020 to approximately [REDACTED] in 2021," (ii) "U.S. sales revenue for the [DI] Products comprised approximately [REDACTED] of OPEX's worldwide warehouse automation revenue in 2020-2021," and (iii) "[w]orldwide sales revenue for the [DI] Products comprised [REDACTED] of OPEX's worldwide warehouse automation revenue for 2020-2021." *Id.* (citing Tr. (Akemann) at 197:6-198:12; CX-0200C (OPEX Financial Reports for 2021); CX-1551C (OPEX Full Year Consolidated Results (09-30-2021)); CX-0356C (OPEX Fiscal Year End 2020 (09-2020)); CX-0355C (OPEX Full Year Consolidated Results (09-30-2020))). The ID also notes that the DI Products "are OPEX's [REDACTED]." *Id.* at 162 (citing Tr. (Akemann) at 73:2-11, 120:20-121:21; CX-0200C (OPEX Financial Reports for 2021)).

Respondents argued below that OPEX "failed to perform appropriate comparisons regarding its data, and thus failed to provide a sufficient quantitative or qualitative analysis," and

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that “OPEX’s qualitative arguments do not demonstrate significance because they at best show that the share of the [DI] Products’ investments within the company have increased.” ID at 162 (citing RRP HB¹⁶ at 39-40). Regarding OPEX’s quantitative arguments, Respondents also contended that OPEX provided no comparison to the marketplace to place OPEX’s sales in an appropriate context. *Id.* (citing RRP HB at 39-40).

The ID finds, however, that:

Respondents provide no evidence showing that OPEX’s investments are not significant nor an analysis showing a context in which the investments made by OPEX are not significant. *See generally* [RRPHB at 39-40]. As noted above, OPEX has adduced evidence demonstrating ██████████ in plant and equipment and ██████████ in labor and capital for the Domestic Industry Products in the U.S. for 2020 and 2021. **Such investments are *per se* significant.**

ID at 162 (emphasis added).

As to Respondents’ assertion that OPEX “failed to present relevant comparisons,” the ID finds the assertion “belied by the record.” ID at 162. According to the ID,

For example, OPEX compared its domestic activities to its foreign activities in several contexts: ██████████ percent of OPEX’s employees are based in the U.S., including ██████████ of its engineering, manufacturing, production, and service and repair employees for the Domestic Industry Products, and ██████████ of OPEX’s total facility square footage is located in the U.S., including ██████████ of OPEX’s engineering, manufacturing, and production facilities for the Domestic Industry Products.

Id. (citing Tr. (Akemann) at 197:6-198:12).

The ID notes that Respondents (i) cite “no Commission determination in which the Commission found an industry having ██████████ of its manufacturing, engineering, and production in the United States failed to meet the ‘significant’ standard,” and (ii) “neither presented an economic expert to opine on the issue nor asked OPEX’s economic expert, Dr. Akemann, about

¹⁶ Respondents’ Post-Hearing Responsive Brief (Dec. 30, 2022) (“RRPHB”).

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his opinion that OPEX has made significant domestic investments with respect to the [DI] Products.” ID at 163 (citing RRP HB at 38-39; *see generally* Tr. (Akemann) at 206-15 (Respondents’ cross-examination)).

c. OPEX’s Domestic Industry on the Date It Filed the Complaint

Respondents argued below that OPEX fails to show that a DI existed on the date it filed its complaint (December 22, 2021) because OPEX provided no financial metrics after September 30, 2021, the close of its fiscal year 2021. ID at 163 (citing RRP HB at 33-35); *see* RPreHB¹⁷ at 148 (citing *Certain Video Game Systems & Controllers*, Inv. No. 337-TA-743, Comm’n Op. at 5 (Jan. 20, 2012) (“*Video Game Systems*”), *aff’d*, *Motiva, LLC v. ITC*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013)). Respondents contended that this three-month gap in data before the filing of the complaint “dooms” OPEX’s domestic industry showing. *Id.*

The ID finds that Respondents’ argument has no merit because, unlike *Video Game Systems*, this is not a case where “developments after the filing of the complaint may be relevant to domestic industry, such as when a complainant ceases to make cognizable investments related to the protected article.” ID at 163 (citing *Video Game Systems*, Comm’n Op. at 5, *aff’d*, *Motiva*, 716 F.3d at 601 n.6). The ID credits testimony from Dr. Akemann who “confirmed in an interview with Mr. Doug Hendry, OPEX’s Director of Manufacturing, that the square footage used by OPEX’s Manufacturing and Production departments and the number of employees in the Manufacturing department were [REDACTED] in 2022 to date, as compared to 2021.” ID at 163-64 (citing Tr. (Akemann) at 160:7-25, 199:24-200:7). The ID also credits testimony from Mr. Greg Fahnestock, OPEX’s Senior Director of Warehouse Automation Service and Support, “that the number of ICI [Installation, Commissioning, and Integration] employees [REDACTED] between

¹⁷ Respondents’ Prehearing Brief (Nov. 3, 2022) (“RPreHB”).

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December 2021 and August 2022.” *Id.* at 164 (citing CX-1568C (Fahnestock Dep. Tr.) at 64:3-8).

The ID notes that, “[o]n the other hand, despite having the opportunity to gather supporting evidence (if any) in discovery, Respondents adduced no evidence at the hearing that OPEX’s domestic industry changed between September and December 2021.” ID at 164 (citing Order No. 18 at 2-3 (“Respondents deposed all the witnesses in question and had sufficient opportunity to gather and test the evidence at issue during the fact discovery and expert discovery periods.”)). The ID notes that Respondents also failed to “impeach the credibility of either Dr. Akemann or the OPEX staff in question.” *Id.*

The ID concludes that, “[v]iewing the evidence as a whole, I determine that a domestic industry relating to articles protected by the Asserted Patents existed on the date the complaint was filed in this investigation.” ID at 164.

2. Respondents’ Petition for Review

Respondents argued in their petition that the ID errs in finding that OPEX’s domestic investments “are *per se* significant.” RPet. at 74-75. Respondents also argued that the ID’s comparisons “are not meaningful” for determining quantitative significance,¹⁸ because, under the ID’s reasoning, “any complainant that manufactures and sells its products primarily in the United States would have most of its workforce and facilities and most of its sales revenue in the United States, thus satisfying the economic prong of the domestic industry requirement,” which “cannot be correct because the plain statutory language requires ‘significant’” investments under section 337(a)(3)(A) and (B). *Id.* at 79-80 (noting that the legislative history does not indicate that

¹⁸ Respondents did not challenge the ID’s finding that OPEX’s investments are qualitatively significant. *See* RPet. at 1-84.

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domestic manufacturing and sales, by themselves, would be considered “significant”) (citing H. Rep. 100-40 at 154-58 (1987); S. Rep. 100-71 at 127-30 (1987)). Respondents also noted that the ID’s analysis does not include any of the four quantitative significance comparisons listed in *Certain Carburetors & Prods. Containing Such Carburetors*.¹⁹ *Id.* at 79-80 (citing Inv. No. 337-TA-1123, Comm’n Op. at 9, 19 (Oct. 28, 2019) (“*Carburetors*”)).

Respondents further argued that the ID errs in finding that OPEX demonstrated that a domestic industry relating to the DI Products existed on the date it filed its complaint (December 22, 2021) because OPEX provided no financial metrics after September 30, 2021, the close of its fiscal year 2021. RPet. at 75-78. More specifically, Respondents argued that

The [ID’s] cited evidence, at best, suggests that OPEX has similar square footage and number of manufacturing and ICI employees in 2022 compared to 2021 for *all* products. It does not, however, address the square footage and employees as related to the *DI* products.

Id. at 76 (Respondents’ emphases).

3. OPEX’s Response

OPEX contends that the ID does not err in finding significance because “it is clear in context that the ID thoroughly analyzed the magnitude of OPEX’s investment, quantitatively and qualitatively, in ‘consideration of the nature and importance of the complainant’s activities to the patented products in the context of the marketplace or industry in question’ and found them significant after a well-reasoned ‘assessment of the relative importance of the domestic activities.’” CPResp. at 94 (quoting *Certain Printing & Imaging Devices & Components*

¹⁹ Respondents listed the following comparison types: “(1) comparing a complainant’s domestic expenditures to its foreign expenditures, (2) comparing domestic expenditures to sales of protected articles, (3) comparing labor costs to gross sales, and (4) quantifying the value added.” RPet. at 79-80 (citing *Carburetors*, Comm’n Op. at 9, 19).

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Thereof, Inv. No. 337-TA-690, Comm'n Op. at 31 (Feb. 17, 2011); *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 884 (Fed. Cir. 2015)).

OPEX argues that the ID correctly finds quantitative significance based on: “1) OPEX’s domestic activity dedicated to the DI Products in comparison to OPEX’s foreign activity; 2) the DI Products in comparison to OPEX’s business as a whole; and 3) the amount of OPEX’s DI investments.” CPResp. at 98 (citing ID at 161). OPEX disagrees that every complainant that “manufactures and sells its products primarily in the United States” would satisfy this analysis, arguing that “such a complainant might not expend analogous investment amounts or, simply because they manufacture and sell in the U.S., does not mean that their products would have the same relative importance to the company, let alone be its [REDACTED].” *Id.* (citing RPet. at 78; ID at 162.) OPEX also argues that Respondents inaccurately depict the evidence, because “OPEX does *not merely* manufacture [REDACTED] of its DI Products in the U.S. and [REDACTED] sell them here. . . . OPEX *manufactures, produces, and researches and develops* its DI Products [REDACTED] in U.S., with additional U.S.-based employees dedicated to the DI Products’ installation, commission, integration, service, and repair.” *Id.* (citing RPet. at 78; ID at 142-60; *see* CX-0235C (Sims Decl.)) (OPEX’s emphases). OPEX also notes that Respondents cite no caselaw substantiating their claim that the ID’s relied-upon numerical comparisons are “not meaningful,” and argues that *Carburetors* does not require that quantitative significance analyses exclusively use the four comparison types Respondents list. *Id.* at 98-99 (citing *Carburetors*, Comm’n Op. at 19).

OPEX further argues that it submitted sufficient evidence to meet its burden of demonstrating that a domestic industry relating to the DI Products existed as of the date it filed its Complaint. CPResp. at 94-97. According to OPEX:

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As OPEX has repeatedly explained, it presented non-financial data relevant to its DI investments, including personnel, square footage, lease costs, and salary information, that was current as of the days and weeks leading up to the December 22, 2021 filing of the Complaint. (HT, 107:4-108:11, 111:17-120:15, 142:15-144:16; CX-0113C at 1 n.2; CPreHB at 336; CIPostHB at 144.) But, as OPEX’s 2021 fiscal information was not documented in anticipation of litigation, and the company’s fiscal year runs from October 1 through September 30, there was an irrelevant, less than three month gap between the last financial spreadsheet upon which OPEX relied and the filing date of the Complaint. (CX-0113C at 1 n.2.) *See Certain Stringed Musical Instrs. & Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 26 (May 16, 2008) (complainants need not provide a “precise accounting” of investments, “as most people do not document their daily affairs in contemplation of possible litigation”).

Id. at 94-95. OPEX notes that Respondents cite no case law “that a three-month gap between the relied-upon financial data and the date of the complaint ‘dooms’ a domestic industry case” or “that contemporaneous non-financial DI evidence such as square footage and employee headcount should be disregarded when considering whether a complainant proved domestic industry as of the date of the complaint.” *Id.* at 95. OPEX also argues that Respondents incorrectly assert that the evidence of OPEX’s continuing investments did not relate to the DI Products. *Id.* at 96 (citing *Tr. (Akermann)* 199:24-200:7).

4. Analysis

When a section 337 investigation is based on allegations of patent infringement, the complainant must show that an industry “relating to the articles protected by the patent . . . exists or is in the process of being established” in the United States. 19 U.S.C. § 1337(a)(2); *John Mezzalingua Assocs., Inc. v. Int’l Trade Comm’n*, 660 F.3d 1322, 1331 (Fed. Cir. 2011). 19 U.S.C. § 1337(a)(3). This domestic industry requirement of section 337 is often described as having a “technical prong” and an “economic prong.” *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295, 1298 (Fed. Cir. 2013).

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The “economic prong” requires, with respect to the articles protected by a patent, either: (a) “significant investment in plant and equipment”; (b) “significant employment of labor or capital”; or (c) “substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing.” 19 U.S.C. § 1337(a)(3). These activities must be related to the articles protected by the particular patent(s) at issue. *Certain Stringed Musical Instruments & Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 13 (May 16, 2008). There is no minimum monetary expenditure required to show that an investment is “substantial” or “significant”; rather, this is a fact-dependent inquiry will depend on the industry in question, the complainant’s relative size, and other factors. *Id.* at 25-26.

The Commission has determined to take no position on the following portion of the ID.²⁰

And where a complainant is plainly not a mere importer, as here, there is no reason why all of the complainant’s activities relating to the Domestic Industry Products should not be included as part of the domestic industry. The reality is that investments in sales, human resources, and travel are necessary to maintain a competitive position in the market for the patented technology.

²⁰ Commissioners Karpel and Schmidlein would affirm the ID’s statement pertaining to the inclusion of all of OPEX’s investments in the articles that practice the asserted patents as consistent with the language of section 337(a)(3) and judicial precedent. In their view, the statute does not require the exclusion of the claimed plant and equipment investments and employment of labor and capital with respect to articles protected by the asserted patents including sales and marketing, human resources, travel, and non-warehouse automation activities that were considered in OPEX’s domestic industry investments in the ID. *See Certain Artificial Eyelash Extension Systems, Products Containing Same, and Components Thereof*, Inv. No. 337-TA-1226, Separate Views of Commissioners Karpel and Schmidlein, at 35-36 (Oct. 24, 2022). In this investigation, the ID correctly rejected Respondents’ arguments that inclusion of OPEX’s expenditures in sales and marketing, human resources, travel, and non-warehouse automation activities was improper. Moreover, OPEX has proven that it conducts ██████████ activities relating to the protected articles in the United States, beginning with R&D and engineering and continuing through commercializing and manufacturing, warehousing, installation, commissioning, and servicing those protected articles. OPEX’s investments in plant and equipment and labor and capital relating to the protected articles show that OPEX is not a “mere importer” as the ID correctly found.

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ID at 145. The Commission has further determined to strike the ID’s finding that OPEX’s plant and equipment investments [REDACTED] and labor and capital investments [REDACTED] are “*per se* significant.” *Id.* at 162. This language suggests, contrary to Federal Circuit precedent and prior Commission decisions, that the absolute magnitude of investments can be dispositive of the economic prong determination, with no context-dependent considerations. *See Lelo*, 786 F.3d at 883-84 (noting that the Commission “[has] found that the word ‘significant’ denote[s] ‘an assessment of the *relative* importance of the domestic activities’”) (quoting *Certain Concealed Cabinet Hinges & Mounting Plates*, Inv. No. 337-TA-289, Comm’n Op., 1990 WL 10608981, at *11 (Jan. 8, 1990)); *Certain Child Resistant Closures with Slider Devices Having a User Actuated Insertable Torpedo for Selectively Opening the Closures & Slider Devices Therefor*, Inv. No. 337-TA-1171, Comm’n Op. at 16, 2020 WL 5701025, at *10 (Sept. 18, 2020) (striking the ID’s statement that “[i]t is further determined that the magnitude and quantity of these expenses and investments *alone is significant and substantial in any context.*”) (emphasis in original) (citing *Lelo*, 786 F.3d at 883-84).

The Commission, however, has determined to otherwise affirm the ID’s findings that the record evidence demonstrates that OPEX’s investments in plant and equipment [REDACTED] and employment of labor and capital [REDACTED] are qualitatively and quantitatively significant. In particular, the evidence shows that in 2020 and 2021, a major fraction ([REDACTED] percent) of OPEX’s worldwide employees are located in the U.S., including [REDACTED] of OPEX’s employees involved in the engineering, manufacturing, production, and service and repair of the DI products, and an [REDACTED] fraction ([REDACTED] percent) of OPEX’s worldwide facility square footage is located in the U.S., including [REDACTED] of OPEX’s facility square footage involved in the engineering, manufacturing, and production for the DI Products. ID at 162 (citing Tr.

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(Akemann) at 197:6-198:12). Moreover, each and every category of expenditure, including plant, equipment, labor, and capital (*supra*, pp. 14-15), demonstrate marked [REDACTED] year over year. *See Lelo*, 786 F.3d at 883 (requiring a “quantitative analysis in order to determine whether there is a ‘significant’ increase or attribution by virtue of the claimant’s asserted commercial activity in the United States.”). The Commission thus determines that OPEX’s investments are significant within the context of OPEX’s operations.^{21, 22}

As to the ID’s analysis of whether OPEX demonstrated that a domestic industry relating to the DI Products existed on the date it filed its Complaint (December 22, 2021), the Commission has determined to adopt the ID’s analysis with the following supplements to the ID’s discussion, and to affirm the ID’s conclusion that a domestic industry existed at that time with respect to the protected articles.²³ ID at 163-64. As discussed *supra*, Respondents argued

²¹ Commissioner Kearns takes no position on the ID’s findings of quantitative significance based on the importance of the DI Products to OPEX as a whole. *See* ID at 161-62. A firm’s operations in engineering, researching, developing, and producing a product [REDACTED] in the United States, with the attendant significant investments in plant and equipment and employment of labor and capital, would be no less a domestic industry if the firm also had larger operations on other product lines. Thus, this mode of comparison could put large firms with many product lines at a disadvantage in demonstrating a domestic industry compared to small, focused firms.

²² Commissioner Kearns notes that where the DI products are [REDACTED] engineered, researched, developed, and manufactured in the United States, as the record indicates is the case here (and which Respondents do not contest), the value added by the domestic operations will usually be significant.

²³ Although a domestic industry is assessed from the perspective of the time of the filing of the complaint, there is no requirement that the investments relied upon to satisfy the domestic industry requirement must be incurred *only* at the time the complaint is filed, and not prior to that date. Commission precedent establishes that a domestic industry may be established “based on past significant or substantial investments relating to articles protected by the patent.” *See Certain Television Sets, Television Receivers, Television Tuners, & Components Thereof*, Inv. No. 337-TA-910, Comm’n Op. at 69-70 (Oct. 30, 2015) (discussing Commission precedent related to considering past investments).

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in their petition, *inter alia*, that the ID’s cited evidence “does not . . . address the square footage and employees as related to the DI products” after September 30, 2021 (the close of OPEX’s 2021 fiscal year). *See* RPet. at 76. OPEX, however, submitted with its Complaint a declaration from Mr. John Sims, OPEX’s Chief Financial Officer, that includes OPEX’s facility square footage and employee headcounts attributable to the DI Products through November/December of 2021. *See* CX-0113C (Sims Decl.) at 1 n.2 (Dec. 17, 2021) (“The non-financial data in this declaration (*i.e.*, facility square footages, employee counts, etc.) are accurate to the best of my knowledge and information as of the date they were compiled from OPEX’s corporate records and management/supervisory employees *in November – December of 2021.*”) (emphasis added), 17-19 (square footage), 19-21 (employee headcounts). OPEX also submitted during the investigation an updated declaration from Mr. Sims on these issues. *See* CX-0235C (Sims Updated Decl.) (Aug. 3, 2022). This evidence undermines Respondents’ bald contention that no domestic industry existed with respect to the protected articles on December 22, 2021, the date the Complaint was filed.

Accordingly, the Commission has determined to affirm, with the supplemental analysis above, the ID’s finding that OPEX has satisfied the economic prong of the DI requirement. The Commission therefore finds a violation of section 337 by Respondents with respect to the infringing OmniSort Generation 2 systems.

B. Correction of Typographical Errors

The Commission has determined to correct the following six typographical errors in the ID as indicated.²⁴

²⁴ Underlined text is inserted, while ~~struck through~~ text is deleted.

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First, on page 5 of the ID:

Invata has commissioned three OmniSort Generation 2 systems from HC Robotics in the United States, including ~~a~~two systems that Invata sold to a company called Fanatics and that Invata built and installed for Fanatics in Aberdeen, Maryland. *Id.* at 486:18-487:5; 509:15-510:1, 510:9-14.

ID at 5.

Second, on page 8 of the ID:

The ~~194~~ 505 patent expires on January 14, 2028. *See* Compl. ¶ 58.

ID at 8.

Third, on page 12 of the ID:

However, Invata has commissioned three OmniSort Generation 2 systems from HC Robotics in the United States, including the two systems that Invata sold to Fanatics and installed in Aberdeen, Maryland. *Id.* at 486:18-487:5; 509:15-510:1, 510:9-14.

ID at 12.

Fourth, on page 35 of the ID:

First, as explained above, the applicant's remarks with respect to Deandrea and Holland during prosecution of the '883 and '844 patents, respectively, did not rise to the level of clear and unmistakable disclaimer. *See supra* Sec. VI.A.2.

Id. at 35.

Fifth, on page 38 of the ID:

For the reasons set forth below, I find that OPEX has shown infringement for ~~each of those~~ claims 1 and 5.

Id. at 38.

Sixth, on page 155 of the ID:

I find that OPEX has demonstrated [REDACTED] million in labor and capital expenses with respect to articles protected by the Asserted Patents.

Id. at 155.

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V. 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. 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, unless, after considering the [public interest], it finds that such articles should not be excluded from entry.” 19 U.S.C. § 1337(d)(1).

a. The RD

OPEX argued, and Respondents did not dispute, that an LEO would be an appropriate remedy if a violation is found. RD at 165 (citing RPreHB at 154; RRP HB at 40). The RD thus recommends entry of an LEO against the Respondents barring the importation of infringing articles. *Id.* The RD is silent as to whether any exemptions to the LEO are warranted consistent with the Commission’s holding that public interest is the sole statutory basis for authorizing exemptions from a remedial order.^{25, 26} *See Certain Cloud-Connected Wood-Pellet Grills &*

²⁵ Because public interest was not delegated to the ALJ in this investigation, the ALJ was not authorized to make findings or recommendations relating to public interest. *See* 87 Fed. Reg. at 4290-91. Likewise, Respondents could not have submitted evidence into the record at the hearing nor argued before the CALJ that any LEO should include any exemptions or carve-outs predicated upon public interest.

²⁶ Commissioners Karpel and Kearns disagree with the Commission majority’s position that public interest is the sole statutory ground for exemptions from the scope of remedial orders. As they explained in *Grills*, the Commission’s reviewing court has stated that the Commission has “broad discretion in selecting the form, scope, and extent of the remedy.” *Grills*, Comm’n Op. at 11-12 n.10 (quoting *Viscofan, S.A. v. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986) (citing *Canadian Tarpoly Co. v. Int’l Trade Comm’n*, 640 F.2d 1322, 1326 (CCPA 1981); *Sealed*

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Components Thereof, Inv. No. 337-TA-1237, Comm’n Op. at 11 n.9, 2022 WL 1732625, at *6 n.9 (May 24, 2022).

b. Respondents’ Submissions

Respondents argue that any LEO should include an exemption allowing for certain “warranty repairs and service.” RIBr. at 2-3. Respondents seek this exemption “for customers who have already received an Accused Product,” and allege it “would in no way unduly harm OPEX and would allow Respondent Invata to fulfill its contractual obligations with respect to the Accused Products.” RRBr. at 1 (citing CX-1570C (Labib Dep. Tr.) at 69:11-20 (discussing a “support contract” between Invata and Fanatics²⁷ under which Invata is “required to provide support for the Generation II system once it goes live”)).

c. OPEX’s Submissions

OPEX argues that the Commission’s standard LEO should issue with no exemptions. CIBr. at 3-4. In its reply submission, OPEX contends that Respondents failed to present evidence to justify an exemption for certain “warranty repairs and service”:

For example, Respondents provided no evidence of: (1) any previous support imports or customer use of the alleged support provision, (2) the extent of Respondents’ alleged support obligation, the nature of the

Air Corp. v. Int’l Trade Comm’n, 645 F.2d 976, 989 (CCPA 1981); *Jacob Siegel Co. v. Federal Trade Comm’n*, 327 U.S. 608, 611-13 (1946)). Moreover, they observed that “the Commission has repeatedly indicated that it has granted warranty and repair exemptions ‘when unopposed, in view of the public interest, or upon some showing of a need for service and repair.’” *Grills*, Comm’n Op. at 11 n.10 (quoting *Certain Robotic Vacuum Cleaning Devices & Components Thereof Such as Spare Parts*, Inv. No. 337-TA-1057, Comm’n Op. at 58-59 and nn.25-27 (Feb. 1, 2019) (collecting cases); *Certain Variable Speed Wind Turbine Generators & Components Thereof*, 337-TA-1218, Comm’n Op. at 24, 33-49 (Jan. 18, 2022); *Certain Audio Players & Controllers, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-1191, Comm’n Op. at 25-26 (Feb. 1, 2022)).

²⁷ Respondents acknowledge that only two (2) units of the infringing OmniSort Generation 2 systems have been sold in the U.S., both to the same customer—Fanatics. RIBr. at 2, 4; RRBr. at 1.

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support they intend to or are obligated to provide, or customer expectations of support, (3) the need for Respondents' products or parts to satisfy the alleged support obligation, (4) the lack of alternative sources of replacement products or parts, or (5) any harm that will befall U.S. consumers in the absence of a service and repair exemption. Instead, Respondents merely claim that "Invata currently has a contract with its customers for support of the installed units," without citing that contract or any of its provisions. (Respondents' Submission at 2.)

CRBr. at 4. OPEX also argues that that "there is no evidence that Invata *currently* has any [contractual] support obligations to Fanatics—the lone Omnisort Generation 2 customer in the U.S." *Id.* More specifically, in response to Respondents' reliance on testimony from Mr. Ayman Labib, Invata's Chief Technical Officer, that Fanatics will receive support "for as long as they pa[y] for it," OPEX notes that "there is no evidence that Fanatics has done so or continues to do so." *Id.* at 5 (quoting (Tr. (Labib) at 511:2-8). OPEX also notes that Fanatics "did not submit a statement on the public interest or otherwise detail any harm it will suffer in the absence of a service and repair exception." *Id.*

d. Analysis

The Commission has determined to issue an LEO against Respondents barring the importation of automated put walls and automated storage and retrieval systems, vehicles associated with these automated put walls and automated storage and retrieval systems, control software associated with these automated put walls and automated storage and retrieval systems, and component parts of these automated put walls and automated storage and retrieval systems that are covered by one or more of claims 1 and 5 of the '194 patent and claims 1-5, 7-9, 11-13, 15-16, and 18-20 of the '505 patent, pursuant to section 337(d)(1).²⁸ 19 U.S.C. § 1337(d)(1).

²⁸ OPEX's proposed LEO (CIBR, Ex. A) includes a definition of "covered articles" that is different from the plain language description of the accused products set forth in the Commission's NOI, which defines the scope of this investigation. 87 Fed. Reg. 4291. OPEX

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The Commission has also determined to include in the LEO an exemption for parts necessary to repair or service covered products purchased by consumers prior to the date of the remedial orders, provided that the repair or service is pursuant to a warranty for the covered product (discussed *infra*, Section V.B.4, in connection with the public interest analysis).

Although not requested by the parties, the Commission also includes in the LEO the Commission’s standard certification provision. To be clear, as the Commission previously held, “[t]he standard certification ‘does not apply to redesigns that have not been adjudicated as non-infringing.’” *See Automated Teller Machines, ATM Modules, Components Thereof, & Prods. Containing the Same*, Inv. No. 337-TA-972, Comm’n Op. at 27, 2017 WL 11198798, at *17 (June 12, 2017); *see id.* at *17, n.18 (“The standard provision does not allow an importer to simply certify that it is not violating the exclusion order. [CBP] only accepts a certification that the goods have previously been determined by CBP or the Commission not to violate the exclusion order.”).

2. Cease and Desist Orders

Section 337(f)(1) provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a CDO as a remedy for violation of section 337. 19 U.S.C. § 1337(f)(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 that could undercut the remedy provided by an exclusion order.²⁹

does not offer a justification for the difference. The issued LEO describes the covered articles pursuant to the plain-language description in the NOI.

²⁹ When the presence of infringing domestic inventory or domestic operations related to infringing articles is asserted as the basis for a CDO under section 337(f)(1), Commissioner Schmidlein does not adopt the view that the inventory or domestic operations needs to be “commercially significant” in order to issue the CDO. *See, e.g., Certain Magnetic Tape*

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See, e.g., *Certain Table Saws Incorporating Active Injury Mitigation Technology & Components Thereof*, Inv. No. 337-TA-965, Comm’n Op. at 4-6 (Feb. 1, 2017) (“*Table Saws*”); *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)). 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)).

a. The RD

The RD finds that Respondents “maintain a commercially significant inventory of infringing products in the U.S. or have significant domestic operations that could undercut the remedy provided by a [LEO].” RD at 166 (citing Tr. (Akemann) at 203:6-13). According to the RD, Respondents imported three units of their infringing OmniSort Generation 2 systems into the U.S., two units were sold, and the third unit, which is the subject of a cancelled customer sale, is retained by Invata. *Id.* (citing Tr. (Labib) at 509:11-14, 509:19-510:1, 510:9-14; CX-1570C (Labib Dep. Tr.) at 16:4-12). The RD finds that, in “the context of this industry, which deals in expensive, customized sorting systems, this domestic inventory of one system is

Cartridges & Components Thereof, Inv. No. 337-TA-1058, Comm’n Op. at 65, n.24 (Mar. 25, 2019); *Table Saws*, Comm’n Op. at 6-7, n.2 (Feb. 1, 2017). In Commissioner Schmidlein’s view, the presence of some infringing domestic inventory or domestic operations related to infringing articles, regardless of its commercial significance, provides a basis to issue a CDO. *Id.*

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commercially significant.” *Id.* As the RD explains, “Invata’s one infringing unit in inventory represents 33% of the total imported Gen 2 units, and 50% of all units sold to date” and “[p]re-built inventory in this industry is uncommon.” *Id.* at 166-67 (citing Tr. (Akemann) at 202:3-203:05; Tr. (Sims) at 105:6-14; CX-1570C (Labib Dep. Tr.) at 183:13-184:2). The RD also finds that “the sales price of the Gen 2 (over \$250,000) supports the commercial significance of the inventory.” *Id.* at 167 (citing Tr. (Akemann) at 202:3-203:05; Tr. (Labib) at 504:6-12; CX-0148C; CX-0149C; CX-0150C-CX-0154C; CX-0161C-CX-0165C; CX-0389C; CX-0391C; CX-0400C). The RD further finds that “OPEX and Respondents are direct competitors, which raises the potential for harm to OPEX if Invata sells the system it holds in inventory.” *Id.* (citing Tr. (Stevens) at 88:3-92:15; Tr. (Akemann) at 203:22-204:11, 232:21-23; Tr. (Labib) 499:17-21; CX-0148C-CX-0165C; CX-0381C; CX-0389C; CX-0391C; CX-0400C).

Respondents argued below that a CDO is inappropriate because the unit in inventory is “not saleable.” *Id.* (citing RRP HB at 40). The RD finds, however, that “Respondents have pointed to no evidence to support this argument” and, indeed, “Invata’s corporate witness testified that the unit could be sold if they ‘found the right fit.’” *Id.* (citing Tr. (Labib) at 510:12-17; *see also* RRP HB at 40). The RD also finds that “Invata has continued to seek such a fit, planning future Gen 2 installations for existing customer Fanatics, and offering to sell Gen 2 systems to potential U.S. customers Sephora and Amazon, in direct competition with OPEX.” *Id.* (citing Tr. (Labib) at 509:2-8, 510:18-511:1, 511:9-512:7, 513:19-21).

The RD thus recommends issuing “a [CDO] against Respondents in the event a violation is found.” *Id.*

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b. Respondents' Submissions

Respondents repeat their arguments before the CALJ that a CDO directed to Invata is inappropriate because the single infringing unit in Invata's possession is "not saleable" and does not amount to a commercially significant inventory. RIBr. at 3-4. As to HC Robotics, Respondents argue that the ID "cites to nothing in the record indicating that HC Robotics maintains any inventory in the U.S." and "specifically finds that the only unit in any inventory in the U.S. is being retained by Invata." *Id.* at 3 (citing RD at 166-67 ("Invata retained one of those units, which was previously subject to a cancelled customer sale.")). Lastly, Respondents contend that "[i]f an LEO issues and the Commission allows an exception for warranty service, any [CDO], if issued, should likewise allow warranty repair and servicing." RRBr. at 1-2.

c. OPEX's Submissions

OPEX argues that the Commission should issue a CDO against each Respondent with no exemptions. CIBr. at 4-5. OPEX contends that the RD correctly finds that the one infringing unit in Invata's inventory is indeed "saleable" given Mr. Labib's admissions that Invata could sell the unit if it "found the right fit." CRBr. at 8 (citing CX-1570C (Labib Dep. Tr.) at 72:5-10; Tr. (Labib) at 510:15-17). OPEX also argues that "[w]hether the inventory is one unit or one million units, there is no question that inventory comprising 50% of total U.S. sales and 33% of total U.S. imports is 'commercially significant,' as the CALJ correctly found." *Id.* at 9.

OPEX further argues that Respondents ignore that a CDO is appropriate when respondents either "maintain commercially significant inventories in the United States *or have significant domestic operations that could undercut the remedy provided by an exclusion order.*" CRBr. at 9 (quoting RD at 166 (citing *Certain Air Mattress Systems, Components Thereof, & Methods of Using the Same*, Inv. No. 337-TA-971, Comm'n Op. at 49 (May 17, 2017)))

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(OPEX’s emphasis). OPEX submits that Invata has significant domestic operations because it “is incorporated and based in Pennsylvania, and has commissioned, sold, built, and installed (with the help of HC Robotics) all of the infringing Omnisort Generation 2 systems in the U.S. to date.” *Id.* at 9-10 (citing ID at 5). As to HC Robotics, OPEX submits:



Id. at 10 (OPEX’s emphasis).

d. Analysis

The Commission has determined to issue a CDO against each of the Respondents. The record shows that Respondents either “maintain a commercially significant inventory of infringing products in the U.S. or have significant domestic operations that could undercut the remedy provided by a [LEO].” RD at 166 (citing Tr. (Akemann) at 203:6-13).

The Commission further agrees with the RD’s finding that, in “the context of this industry, which deals in expensive, customized sorting systems, [Invata’s] domestic inventory of one system is commercially significant.” *Id.* This conclusion is supported by the RD’s underlying findings that (i) Invata’s one infringing unit “represents 33% of the total imported Gen 2 units, and 50% of all units sold to date,” (ii) “[p]re-built inventory in this industry is uncommon,” (iii) “the sales price of the Gen 2 (over \$250,000) supports the commercial significance of the inventory,” and (iv) the fact that OPEX and Respondents are direct competitors “raises the potential for harm to OPEX if Invata sells the system it holds in inventory.” *Id.* at 166-67 (citations omitted).

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The Commission is unpersuaded by Respondents' argument that the infringing unit held by Invata is "not saleable," which is belied by Mr. Labib's admissions and the fact that Invata has "continued to seek such a fit, including planning future Gen 2 installations for existing customer Fanatics, and offering to sell Gen 2 systems to potential U.S. customers Sephora and Amazon." RD at 167 (citing Tr. (Labib) at 509:2-8, 510:12-511:1, 511:9-512:7, 513:19-21).

The Commission also agrees with the RD's finding that both Respondents "have significant domestic operations that could undercut the remedy provided by [an LEO]." RD at 166. Respondents do not challenge this finding in their briefing. *See* RIBr. at 3-4; RRBr. at 1-2. Nor do Respondents address the record evidence demonstrating HC Robotic's involvement in installing the infringing OmniSort Generation 2 systems in the U.S., including its practice of sending an engineer to visit U.S. customer sites to assist Invata with the installations. *See id.*; CRBr. at 9 (citing CX-1572C (Zhu Dep. Tr.) at 39:17-40:5, 40:13-16, 42:7-18, 42:21-43:8; *see also* CX-1571C (Matthews Dep. Tr.) at 12:21-13:20 (confirming that HC Robotics had a "representative on-site" at Fanatics in Aberdeen, Maryland to help install Omnisort Generation 2)).

Accordingly, the Commission has determined to issue CDOs against both Invata and HC Robotics.³⁰ In addition, as with the LEO, the Commission has determined to include in the CDOs an exemption for parts necessary to repair or service covered products purchased by consumers prior to the date the orders become final, as well as domestic activities necessary to repair or service such covered products, provided that the repair or service is pursuant to a

³⁰ Commissioner Schmidlein supports issuance of the CDOs against Invata and HC Robotics due to their domestic operations related to the infringing OmniSort Generation 2, regardless of the commercial significance of the operations. Commissioner Schmidlein also supports issuance of the CDO against Invata due to its maintenance of infringing inventory in the United States, regardless of the commercial significance of the inventory.

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warranty for the covered product (discussed *infra*, Section V.B.4, in connection with the public interest).

B. Public Interest

Section 337 requires the Commission, upon finding a violation of section 337, to issue an LEO “unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.” 19 U.S.C. § 1337(d)(1). Similarly, the Commission must consider these public interest factors before issuing a CDO. 19 U.S.C. § 1337(f)(1).

Under appropriate facts and circumstances, the Commission may determine that no remedy should issue because of the adverse impacts on the public interest. *See, e.g., Certain Fluidized Supporting Apparatus & Components Thereof*, Inv. Nos. 337-TA-182/188, USITC Pub. 1667, Comm’n Op. at 1-2, 23-25 (Oct. 1984) (finding that the public interest warranted denying complainant’s requested relief). Moreover, when the circumstances of a particular investigation require, the Commission has tailored its relief in light of the statutory public interest factors. For example, the Commission has allowed continued importation for ongoing medical research, exempted service parts, grandfathered certain infringing products, and delayed the imposition of remedies to allow affected third-party consumers to transition to non-infringing products. *E.g., Certain Microfluidic Devices*, Inv. No. 337-TA-1068 Comm’n Op. at 1, 22-48, 53-54, 2020 WL 225020, at *1, *12-*24, *27 (Jan. 10, 2020) (analyzing the public interest, discussing applicable precedent, and ultimately issuing a tailored LEO and a tailored CDO); *Certain Road Milling Machines & Components Thereof*, Inv. No. 337-TA-1067, Comm’n Op. at 32-33, 2019 WL 8883974, at *17 (Aug. 7, 2019) (exempting service parts); *Certain Personal Data & Mobile Comm’n Devices & Related Software*, 337-TA-710, USITC Pub. No. 4331,

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Comm'n Op. at 72-73, 80-81 (June 2012) (delaying imposition of remedy) *Certain Baseband Processor Chips & Chipsets, Transmitter, & Receiver (Radio) Chips, Power Control Chips, & Prods. Containing Same, Including Cellular Tel. Handsets*, 337-TA-543, USITC Pub. No. 4258, Comm'n Op. at 150-51 (Oct. 2011) (grandfathering certain products).

The statute requires the Commission to consider and make findings on the public interest in every case in which a violation is found regardless of the quality or quantity of public interest information supplied by the parties. 19 U.S.C. § 1337(d)(1), (f)(1). Thus, the Commission publishes a notice inviting the parties as well as interested members of the public and interested government agencies to gather and present evidence on the public interest at multiple junctures in the proceeding.³¹ *See, e.g.*, 19 C.F.R. § 210.50(a)(4); 88 Fed. Reg. 37271-73 (June 7, 2023). The Commission did not receive submissions on the public interest from the parties pursuant to Commission Rule 210.50(a)(4). The Commission also did not receive any submissions on the public interest from members of the public or government agencies in response to the Commission's *Federal Register* notice. *See* 88 Fed. Reg. 23689 (Apr. 18, 2023).

In response to the Commission's notice of review, only OPEX submitted arguments on the public interest. *See* CIBr. at 7-12. Respondents explicitly state that they "take no position on any public interest issue," but request an exemption for certain "warranty repairs and service." RIBr. at 2-3, 5; RRBr. at 1-2.

1. Public Health and Welfare

The first public interest factor is the effect of the remedy on "the public health and welfare." 19 U.S.C. § 1337(d)(1), (f)(1). The Commission has historically examined a remedy's

³¹ The Commission did not direct the CALJ to make any public interest findings. *See* 87 Fed. Reg. at 4290-91.

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effect on the public health and welfare by looking to whether “an exclusion order would deprive the public of products necessary for some important health or welfare need[.]” *Spanston, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1360 (Fed. Cir. 2010).

OPEX argues that issuing the requested remedial orders “would have no material effect on the public health or welfare in the U.S.” because the orders “would not implicate national energy crises or national security interests” and Respondents’ infringing articles are not “medical devices, pharmaceuticals, vaccines, or otherwise health-related.” CIBr. at 10. Respondents provide no argument or evidence to the contrary.

The Commission finds that the evidence of record does not indicate that issuing the remedial orders in this investigation would be contrary to the public health and welfare.

2. Competitive Conditions in the United States

The second public interest factor is the effect of the remedy on “competitive conditions in the United States economy.” 19 U.S.C. § 1337(d)(1), (f)(1). OPEX argues that although Respondents have imported only three (3) units of the infringing OmniSort Generation 2 systems to date, OPEX “manufactures and sells hundreds of its competing Sure Sort and Sure Sort XL products in the U.S. every year.” CIBr. at 10 (citations omitted). OPEX also argues:

Given that Respondents’ [sic] copied critical aspects of the infringing Omnisort system from Sure Sort (*see, e.g.*, Tr. (Zhu) at 229:21-230:14, 231:18-232:7, 232:17-20), there can be no doubt that Sure Sort and Sure Sort XL are like or directly competitive articles. Indeed, Respondents targeted OPEX’s existing and potential customers for Omnisort sales. (*See, e.g.*, ID at 167 (“Invata has continued to seek such a fit, planning future Gen 2 installations for existing customer Fanatics, and offering to sell Gen2 systems to potential U.S. customers Sephora and Amazon, in direct competition with OPEX.”) (citations omitted).) And given OPEX’s Sure Sort and Sure Sort XL manufacturing capacity and ability to quickly scale that capacity to meet demand with its existing facilities and workforce, there can be no doubt that OPEX could replace the subject articles in a commercially reasonable time.

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Id. at 10-11. OPEX also contends—and Respondents do not dispute—that “[t]hird parties such as Berkshire Grey,³² Beumer,³³ Eurosort,³⁴ Honeywell Intelligrated,³⁵ and Warehouse Automation AI³⁶ also sell products in the U.S. that could replace Respondents’ subject articles[,]” and that those entities “could also increase their manufacturing capacity to meet that level of increased demand in a commercially reasonable time.” *Id.* at 11 n.5.

The Commission finds that this factor does not weigh against the issuance of a remedy. OPEX submits persuasive evidence (which Respondents do not dispute) that reasonable substitutes exist for the articles subject to the exclusion order and cease and desist orders, and that either OPEX and/or other manufacturers operating in the relevant market have the capacity to replace the subject articles once they are excluded. RD at 166 (“Respondents have imported three units of their Gen 2 product into the U.S.”). Accordingly, the Commission finds that the evidence of record shows that excluding Respondents’ infringing products would not adversely affect competitive conditions in the United States.

3. The Production of Like of Directly Competitive Articles in the United States

The third public interest factor is the effect of the remedy on “the production of like or directly competitive articles in the United States.” 19 U.S.C. § 1337(d)(1), (f)(1). As described above, OPEX argues (and Respondents do not dispute) that (i) OPEX’s Sure Sort and Sure Sort

³² <https://www.berkshiregrey.com/solutions/ecommerce-fulfillment-automation/>.

³³ <https://www.beumergroup.com/i/ecommerce/>.

³⁴ <https://www.eurosort.com/application/e-commerce/>.

³⁵ <https://sps.honeywell.com/us/en/products/automation>.

³⁶ <https://www.warehouseautomation.ai/>.

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XL products are like or directly competitive articles vis-à-vis Respondents' infringing OmniSort Generation 2 systems, (ii) OPEX manufactures hundreds of those products in the U.S. every year, and (iii) OPEX can "quickly scale that [manufacturing] capacity to meet demand with its existing facilities and workforce" in order to "replace the subject articles in a commercially reasonable time." CIBr. at 10-11.

The Commission thus finds that the evidence of record as to this factor does not counsel against issuing the remedial orders in this investigation.

4. United States Consumers

The fourth and final public interest factor is the effect of the remedy on "United States consumers." 19 U.S.C. § 1337(d)(1), (f)(1). OPEX argues that "any potential effect on the U.S. consumers from the exclusion of Respondents' subject articles would be minimal at most" because Respondents' articles "do not implicate any public health or welfare concerns" and "U.S. consumers would not be deprived of like or directly competitive products given the readily available alternatives from OPEX and others." CIBr. at 11. OPEX further argues:

Respondents have only sold the infringing Omnisort Gen 2 system to one U.S. customer—Fanatics, a commercial retailer of sports apparel. (*See, e.g.,* Tr. (Labib) at 486:18-487:8, 508:6-8.) And there is no evidence that OPEX's requested remedies will hinder Fanatics from effectively conducting its business and serving its U.S. customers. This further confirms that OPEX's requested remedies would not negatively affect any U.S. consumers.

Id. at 11-12.

The Commission finds that this factor does not warrant denial of remedial relief. As noted above, the record demonstrates that there are numerous alternatives to the infringing systems available to U.S. consumers. Moreover, as described below, the Commission includes

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exemptions to the remedial orders for certain “warranty repairs and service,” as requested by Respondents, to further protect domestic consumers.³⁷

Specifically, the Commission has determined to include exemptions to the remedial orders for repairs and service, under warranty terms, of the infringing systems purchased by Fanatics prior to the issuance date of the remedial orders as requested by Invata and supported by evidence that the infringing articles were sold to Fanatics with a warranty.³⁸ In deciding whether to tailor Commission remedial orders to allow an exemption for repairs and service, the Commission considers the need for and appropriate scope of such an exemption. When considering the potential harm to U.S. consumers by virtue of the remedial orders, the Commission considers (as it has in past investigations), among other things, evidence in the record regarding the expectation of consumers with regard to repair and replacement, which can be demonstrated by the price of the device and the existence and terms of any available warranties for the device. *See Certain Fitness Devices, Streaming Components Thereof, & Sys. Containing Same*, Inv. No. 337-TA-1265, Comm’n Op. at 89-92, 2023 WL 2675127, at *57-*59 (Mar. 23, 2023) (“*Fitness Devices*”); *Certain Robotic Floor Cleaning Devices & Components*

³⁷ Respondents’ requested exemption is limited to “warranty repairs and service” for “customers who have already received an Accused Product” in order to “allow Respondent Invata to fulfill its contractual obligations with respect to the Accused Products.” RIBr. at 2-3; RRBr. at 1 (citing CX-1570C (Labib Dep. Tr.) at 69:11-20 (discussing a “support contract” between Invata and Fanatics under which Invata is “required to provide support for the Generation II system once it goes live”)).

³⁸ Commissioner Karpel would grant the exemption from the remedial orders for repair of systems that have been purchased with warranties during the period of Presidential review. She bases this determination on harm to consumers that would necessarily occur when they lawfully purchase the systems during the Presidential review period under warranty and then they cannot have their systems repaired if they are broken or otherwise in need of repair after purchase under the warranty.

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Thereof, Inv. No. 337-TA-1252, Comm’n Op. at 76-82, 2023 WL 3033552, at *45-*47 (Apr. 13, 2023) (“*Robotic Cleaners*”).

The Commission finds³⁹ that the lone U.S. consumer of the infringing OmniSort Generation 2 systems—Fanatics, Inc.—may be harmed by the exclusion of parts for warranty repair of the infringing systems that it has already purchased. Relevant to the Commission’s consideration in particular is the cost of the infringing systems and Fanatics’ expectation that its systems, if they fail, can be repaired or serviced. *See Fitness Devices*, Comm’n Op. at 89-92. Here, the sales price of the infringing systems is approximately \$250,000, which is a significant amount. *See* RD at 167, 169. The Commission has previously included repair and service exemptions for products in much lower price ranges to mitigate any harm to consumers. *See, e.g., Fitness Devices*, Comm’n Op. at 91 (sales price of \$1,495); *Robotic Cleaners*, Comm’n Op. at 78 (sales price of about \$499).

Additionally, the record demonstrates that the infringing systems purchased by Fanatics do, in fact, carry warranties, which supports a finding that Fanatics expects its systems to be repaired and serviced, if needed, while those systems are under warranty. *See* CX-0148C.0001.⁴⁰ [REDACTED]

³⁹ Information on warranties for the infringing systems purchased by Fanatics was obtained from third party Fanatics in discovery and submitted into the record by complainant as hearing exhibits. The Commission strongly encourages parties and affected third parties to submit fulsome briefing and supporting evidence regarding impacts on U.S. consumers and other statutory public interest factors, including when seeking an exemption from the scope of any remedial orders.

⁴⁰ A Services Agreement dated March 25, 2021, between Invata and Fanatics includes [REDACTED] stating in relevant part:

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED] CX-0148C.0024 (SOW #1, dated March 25, 2021); CX-0149C.0011 (SOW #2, dated March 2, 2022). Neither Invata nor Fanatics has asked for an exemption outside of parts and repair required under warranty or indicated that there is any expectation of Fanatics being able to service or repair the infringing systems after the warranties expire. Therefore, the exemption in the remedial orders is limited to the warranty periods of the respective infringing systems.

Accordingly, in view of the record as described above, the Commission has determined to include exemptions to the remedial orders that allow for importation of parts⁴¹ and domestic activities necessary to repair or service the infringing systems still under warranty and purchased prior to issuance of the remedial, but only to the extent the systems are still covered by a warranty and only as required under that warranty.

With these exemptions in place, the Commission's remedy will not adversely affect U.S. consumers to an extent that rises to a public interest concern. For U.S. consumers wishing to purchase an automated put wall after the remedial orders become final, as discussed in more detail above, consumers have suitable alternatives to the infringing systems available from

[REDACTED]

CX-0148C.0001 (§ 1.f). [REDACTED]
[REDACTED] CX-1571C (Matthews Dep. Tr.) at 74:24-75:12.

⁴¹ Respondents do not seek, and the Commission does not grant, an exemption for replacements of the whole OmniSort Generation 2 system.

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OPEX and third parties. *See, e.g., Certain Personal Data & Mobile Communications Devices & Related Software*, Inv. No. 337-TA-710, Comm'n Op. at 69, 2011 WL 12488979, at *40 (Dec. 29, 2011) (“[T]he mere constriction of choice cannot be a sufficient basis for denying the issuance of an exclusion order.”).

5. Conclusion

For the reasons set forth above, the Commission finds that the consideration of the public interest factors does not warrant denying the remedial orders.

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 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.

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24, 2009) (“*Liquid Crystal Display Modules*”). 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).

1. The RD

OPEX requested a bond of 100 percent in view of (i) a lack of evidence from which to determine a reasonable royalty or reliable price information, and (ii) evidence of direct competition between OPEX and Respondents and the pricing variation of the relevant systems. CIPHB at 149-50. Respondents argued that “reliable price information exists as to the accused products and, therefore, any bond should be calculated based on the price differential between those products (\$260,000) and OPEX’s comparable products [REDACTED].” RRP HB at 40.

The RD finds that the record supports a bond of 100 percent to protect OPEX from injury. RD at 167-69 (citing Tr. (Akemann) at 205:10-19). The RD finds that there is “no evidence from which to ascertain a reasonable royalty rate or reliable price information because pricing varies from unit to unit depending on the size and complexity of an installation.” *Id.* at 168 (citing Tr. (Sims) at 105:6-14; Tr. (Akemann) at 204:12-205:9). The RD notes that “OPEX and Respondents are direct competitors, but Invata [also] bundles other equipment and services with the infringing Gen 2 systems in its offerings and pricing, and does not offer the Gen 2 system as its own line item.” *Id.* (citing Tr. (Stevens) at 88:3-92:15; Tr. (Akemann) at 203:22-204:11, 232:21-23; Tr. (Labib) at 483:10-484:11, 499:17-21, 504:13-505:5; CX-0148C-CX-0165C; CX-0381C; CX-0389C; CX-0391C; CX-0400C; CX-1570C (Labib Dep. Tr.) at 216:20-217:3; CX-0130C). The RD finds that “Invata paid HC Robotics \$264,544.99 for the Gen 2 system intended for Fanatics’ Jacksonville, Florida, facility and a total of \$534,804 for the two

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Gen 2 systems currently installed in Fanatics' Aberdeen, Maryland, facility.” *Id.* at 169 (citing Tr. (Labib) at 504:6-12; CX-1570C (Labib Dep. Tr.) at 220:8-14; CX-0132C). The RD explains that “OPEX, on the other hand, [REDACTED] [REDACTED].” *Id.* (citing Tr. (Sims) at 105:15-20; CX-0357C; CX-0358C; CX-0356C; CX-0200C).

The RD further notes that “prices vary from unit to unit of the [DI] Products based on the installation requirements for customer-specific configurations, as the range of revenues per invoice in evidence shows.” RD at 169 (Tr. (Stevens) at 75:4-76:4, 105:6-20; CX-0357C; CX-0358C). The RD thus concludes that “[g]iven these complexities, a reasonable direct price comparison was not possible with the available data.” *Id.* (Tr. (Akemann) at 204:21-205:09).

2. Respondents' Submissions

Respondents reiterate their argument presented to the CALJ that any bond should be calculated based on the price differential between the products at issue:

[T]he ID found that a reasonable direct price comparison was not possible with the available data. *See* ID at 169. But reliable price information exists as to the accused products. For example, the Accused Product sells for around \$260,000 and OPEX's comparable products sell for around [REDACTED], which is a difference of [REDACTED]. Tr. (Labib) at 504:6-8 (price for an OmniSort); CI[PH]B at 149 (“OPEX . . . benchmarks its Sure Sort pricing at roughly [REDACTED]”). The comparison is apt because, when tested, the Accused Product performs better than OPEX's competing products while still being less expensive. CX-1570C (Labib Dep. Tr.) at 175:20-177:12 (indicating that OmniSort handles a greater payload and can handle higher throughput than a comparable OPEX system.) Therefore, any bond should be calculated based on the price differential between the products compared, so [REDACTED] per unit sold.

RIBr. at 4; *see* RRBr. at 2.

3. OPEX's Submissions

OPEX argues that the RD correctly recommends a 100 percent bond. CIBr. at 12; CRBr. at 12-13. OPEX contends that the RD properly rejects “Respondents' faulty comparison,

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primarily because it is not actually based on the price of either of OPEX’s domestic industry products,” but rather the “‘benchmark’ (*i.e.*, not a real price) for the less expensive of OPEX’s two domestic industry products,” which is “not an appropriate basis from which to calculate a bond.” CRBr. at 12-13 (quoting RD at 169 (finding that OPEX [REDACTED] [REDACTED]’ “prices vary from unit to unit . . . based on the installation requirements for customer-specific configurations”)).

4. Analysis

The Commission has determined to impose a bond in the amount of 100 percent of the entered value of the subject articles during the period of Presidential review. The RD finds, and the Commission agrees, that a bond is necessary to prevent harm to OPEX because the undisputed evidence shows that (i) OPEX and Respondents are direct competitors and (ii) customers can purchase Respondents’ infringing systems at a lower price compared to OPEX’s DI Products. RD at 168-69 (citations omitted).

With respect to determining the bond amount, there is no evidence in the record to determine a reasonable royalty. RD at 168. (citing Tr. (Akemann) at 204:12-205:9). Further, the record establishes that calculating a price differential is impractical where, as here, the RD correctly finds, “[t]here is no evidence from which to ascertain . . . reliable price information [of the DI Products] because pricing varies from unit to unit depending on the size and complexity of an installation,” which is customer-specific, and the “benchmark” pricing of the DI Products themselves are considerably different. *Id.* (citing Tr. (Sims) at 105:6-14; Tr. (Akemann) at 204:12-205:9; Tr. (Stevens) at 75:4-76:4, 105:6-20; CX-0357C; CX-0358C; CX-0356C; CX-0200C). The Commission agrees with the RD’s finding that, given these complexities, a

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reasonable direct price comparison is not possible with the available data. *Id.* (citing Tr. (Akemann) at 204:21-205:09). The Commission is not persuaded by Respondents' alternative price differential scheme (resulting in a bond of ██████████ per unit sold) because it ignores the above complexities and, as OPEX notes, is based solely on OPEX's benchmark price of its less expensive DI Product. RIBr. at 4; CRBr. at 12-13.

Accordingly, absent the ability to determine a reasonable royalty or price differential, imposition of a bond of 100 percent is appropriate in this investigation. *See Liquid Crystal Display Modules*, Comm'n Op. at 6-7 ("We see no reason to deviate from our practice of imposing a 100 percent bond where there is insufficient evidence in the record to determine a reasonable royalty rate, and the record indicates that the calculation of a price differential is impractical.").

VI. CONCLUSION

The Commission has considered all of the other arguments by the parties and does not find them persuasive. Therefore, for the reasons set forth herein, the Commission determines that OPEX has established a violation of section 337 by Respondents with respect to claims 1 and 5 of the '194 patent and claims 1-5, 7-9, 11-13, 15-16, and 18-20 of the '505 patent. Accordingly, the investigation is terminated with a finding of a violation of section 337. The Commission determines that: (1) the appropriate remedy is an LEO directed against Respondents' infringing products and a CDO directed against each of Respondents; (2) the public interest does not preclude this remedy; and (3) the bond during the period of Presidential review is set in the amount of one hundred percent (100%) of the entered value of the infringing articles.

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By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', enclosed within a circular scribble.

Lisa R. Barton
Secretary to the Commission

Issued: August 17, 2023

CERTAIN AUTOMATED PUT WALLS AND AUTOMATED STORAGE AND RETRIEVAL SYSTEMS, ASSOCIATED VEHICLES, ASSOCIATED CONTROL SOFTWARE, AND COMPONENTS PARTS THEREOF

Inv. No. 337-TA-1293

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served via EDIS upon the following parties as indicated, on **August 17, 2023**.



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