

In the Matter of

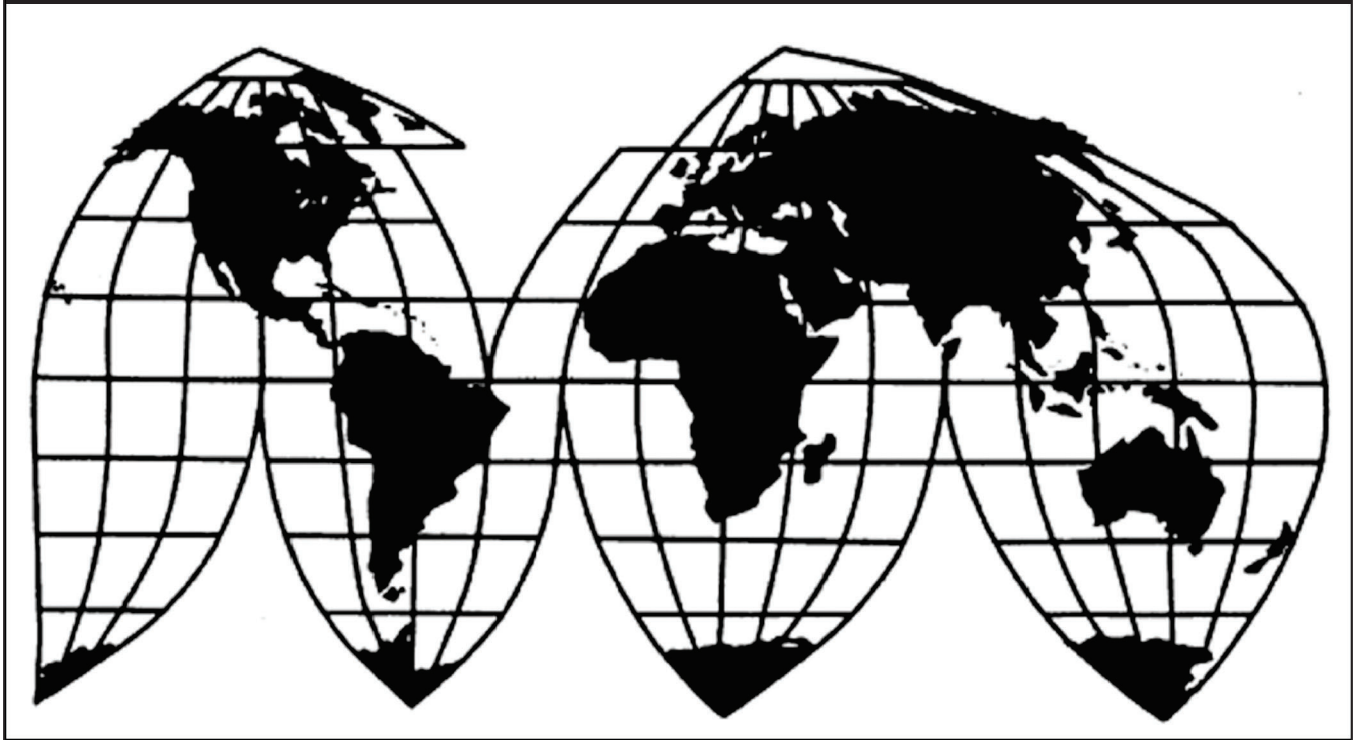
**CERTAIN STAINLESS STEEL PRODUCTS,
CERTAIN PROCESSES FOR MANUFACTURING
OR RELATING TO SAME, AND CERTAIN
PRODUCTS CONTAINING SAME**

337-TA-933

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U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436**

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

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

**Investigation No. 337-TA-933
(Advisory)**

NOTICE OF THE ISSUANCE OF AN ADVISORY OPINION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to issue an advisory opinion in the above-captioned investigation. The Commission concurrently issues the advisory opinion and terminates the advisory opinion proceeding.

FOR FURTHER INFORMATION CONTACT: Amanda P. Fisherow, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 10, 2014, based on a complaint filed by Valbruna Slater Stainless, Inc. of Fort Wayne, Indiana; Valbruna Stainless Inc., of Fort Wayne, Indiana; and Acciaierie Valbruna S.p.A. of Italy (collectively, "Valbruna"). 79 *Fed. Reg.* 61339 (Oct. 10, 2014). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation named as respondents Viraj Profiles Limited of Mumbai, India ("Viraj"); Viraj Holdings P. Ltd. of Mumbai, India; Viraj - U.S.A., Inc. of Garden City,

New York; Flanschenwerk Bebitz GmbH of Könnern, Germany; Bebitz Flanges Works Pvt. Ltd. of Maharashtra, India; Bebitz U.S.A. of Garden City, New York; and Ta Chen Stainless Pipe Co., Ltd. of Tainan, Taiwan and Ta Chen International, Inc. of Long Beach, California. *Id.* The Office of Unfair Import Investigations also was named as a party to the investigation. *Id.*

On December 8, 2015, the administrative law judge (“ALJ”) (Judge Essex) issued an initial determination (“ID”) (Order No. 17) finding Viraj in default for spoliation of evidence and ordering the disgorgement of complainants’ operating practices in Viraj’s possession. On February 8, 2016, the Commission determined to review Order No. 17, and, in its notice of review, determined to affirm the default finding against Viraj. 81 *Fed. Reg.* 7584 (Feb. 12, 2016). The Commission also requested briefing from the parties on certain other issues on review, and requested briefing from the parties, interested government agencies, and any other interested persons on the issues of remedy, the public interest, and bonding. *Id.*

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

On May 25, 2016, the Commission modified the reasoning underlying the default finding in Order No. 17 and vacated the ID’s disgorgement order. The Commission terminated the investigation with a finding of violation of section 337 as to Viraj. The Commission also issued a limited exclusion order and a cease and desist order.

On June 22, 2016, Viraj filed a request for an advisory opinion pursuant to Commission Rule 210.79. On July 6, 2016, Valbruna opposed the request. On July 13, 2016, Viraj filed a motion for leave to file a reply to Valbruna’s opposition. On July 21, 2016, Valbruna filed an opposition to Viraj’s motion. The Commission grants Viraj’s motion.

The Commission has determined that Viraj’s request complies with the requirements for issuance of an advisory opinion under Commission Rule 210.79. Accordingly, the Commission has determined to issue an advisory opinion.

Having considered the parties’ filings, the Commission has determined that Viraj has not provided sufficient information to determine whether any stainless steel products sought to be imported by Viraj would be covered by the limited exclusion order. The Commission’s opinion on violation requires that Viraj establish “that *specific products* that it seeks to import are not manufactured using any of the trade secrets identified in Valbruna’s complaint.” Comm’n Op. at 31. Here, Viraj has not provided sufficient information to establish that specific stainless steel products would be manufactured without the benefit of Valbruna’s trade secrets. The reasons for the Commission’s determinations are set forth in the accompanying Advisory Opinion.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton". The signature is stylized and cursive.

Lisa R. Barton
Secretary to the Commission

Issued: September 14, 2016

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION NOTICE** has been served by hand upon the Commission Investigative Attorney, Reginald D. Lucas, Esq., and the following parties as indicated, on **September 14, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

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On Behalf of Respondents Viraj Profiles Limited:

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

In the Matter of

**CERTAIN STAINLESS STEEL
PRODUCTS, CERTAIN PROCESSES
FOR MANUFACTURING OR
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**Investigation No. 337-TA-933
(Advisory)**

COMMISSION ADVISORY OPINION

I. BACKGROUND

The Commission instituted an investigation on October 10, 2014, based on a complaint filed by Valbruna Slater Stainless, Inc. of Fort Wayne, Indiana; Valbruna Stainless Inc., of Fort Wayne, Indiana; and Acciaierie Valbruna S.p.A. of Italy (collectively, "Valbruna"). 79 *Fed. Reg.* 61339 (Oct. 10, 2014). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation named as respondents: Viraj Profiles Limited of Mumbai, India; Viraj Holdings P. Ltd. of Mumbai, India; Viraj - U.S.A., Inc. of Garden City, New York; Flanschenwerk Bebitz GmbH of Könnern, Germany; Bebitz Flanges Works Pvt. Ltd. of Maharashtra, India; Bebitz U.S.A. of Garden City, New York; and Ta Chen Stainless Pipe Co., Ltd. of Tainan, Taiwan and Ta Chen International, Inc. of Long Beach,

California. *Id.* The Office of Unfair Import Investigations also was named as a party to the investigation. *Id.*

On December 8, 2015, the administrative law judge (“ALJ”) issued an initial determination (“ID”) (Order No. 17) finding Viraj Profiles Limited (“Viraj”) in default for spoliation of evidence and ordering the disgorgement of complainants’ operating practices in Viraj’s possession. On February 8, 2016, the Commission determined to review Order No. 17, and, in its notice of review, determined to affirm the default finding against Viraj. 81 *Fed. Reg.* 7584 (Feb. 12, 2016). The Commission also requested briefing from the parties on certain other issues on review, and requested briefing from the parties, interested government agencies, and any other interested persons on the issues of remedy, the public interest, and bonding. *Id.*

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

On May 25, 2016, the Commission modified the reasoning underlying the default finding in Order No. 17, vacated the ID’s order of disgorgement, and terminated the investigation with a finding of violation of section 337 as to Viraj. The Commission issued a limited exclusion order (“LEO”) prohibiting the unlicensed entry of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same manufactured or sold by Viraj using any of the misappropriated trade secrets identified in the complaint (“the Valbruna Trade Secrets”). The LEO includes a provision requiring that “[p]rior to the importation of stainless steel product that may be subject to this Order, the importer or Respondent must seek a ruling from the Commission to determine whether the stainless steel product sought to be

imported is covered by this Order.” LEO at ¶3. The Commission also issued a cease and desist order (“CDO”).

On June 22, 2016, Viraj filed a request for an advisory opinion pursuant to Commission Rule 210.79. Viraj seeks an advisory opinion that will declare that stainless steel billets and ingots that have been melted, refined, and cast by an unrelated third-party are products not covered by the Commission’s orders. On July 6, 2016, Valbruna opposed the request. On July 13, 2016, Viraj filed a motion for leave to file a reply to Valbruna’s opposition. On July 21, 2016, Valbruna filed an opposition to Viraj’s motion. The Commission grants Viraj’s motion for leave to file a reply to Valbruna’s opposition.

Commission rule 210.79 states, in relevant part:

Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether any person’s proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930, would be in the public interest, and would benefit consumers and competitive conditions in the United States, and whether the person has a compelling business need for the advice and has framed his request as fully and accurately as possible. . . .

19 C.F.R. §210.79.

II. SUMMARY OF THE PARTIES’ ARGUMENTS

A. Viraj’s Request for an Advisory Opinion

Viraj requests that the Commission issue its requested advisory opinion in an expedited manner pursuant to the ITC Pilot Program¹ or in the alternative expedite the advisory opinion pursuant to Commission Rule 210.2. Viraj Request at 1, 14-15. Viraj asserts that this request is

¹ https://www.usitc.gov/press_room/featured_news/pilot_program_will_test_expedited_procedures_usitc.htm.

a purely legal issue and the advisory opinion should be handled by the Office of the General Counsel without a hearing. *Id.* at 14-15.

Viraj asserts that stainless steel products manufactured by Viraj or its affiliates from stainless steel billets and ingots purchased from unaffiliated stainless steel manufacturers are not stainless steel products subject to the Commission's orders. *Id.* at 2. Viraj contends that the Valbruna Trade Secrets associated with the LEO relate only to the "melting" stage of the stainless steel manufacturing process (stage 2 of a five stage manufacturing process). *Id.* at 3 (citing Comm'n Op. at 6). Viraj admits that it is involved in each of the five stages of manufacturing, but under the procedure it now proposes, Viraj would purchase ready-made billets and ingots, and perform only stages 3, 4, and 5 of manufacturing. *Id.* at 4. Viraj asserts that it will not be involved in the "melting" of the third-party billets and ingots, and therefore these products would not be products manufactured using the Valbruna Trade Secrets. *Id.* at 4-5. Viraj contends that the protocol it proposes ensures that stainless steel subject to the LEO is not incorporated into the products Viraj will import. *Id.* at 5. This protocol includes:

STEP 1 (Purchasing): Viraj will purchase, at arms-length, in market transactions, stainless steel billets and ingots from independent, unaffiliated, third-party stainless steel manufacturers.

1.a For the purpose of this proposal, third-party stainless steel manufacturers will include only companies: (i) in which Viraj, any parent or subsidiary or affiliates or shareholders (not including any shareholders who own less than 1% of the shares of, and have no role in the management of, Viraj) of Viraj (or members of their immediate families), have no ownership or other financial interest (and never had any such ownership or financial interest); and (ii) that were in the business of manufacturing stainless steel billets and ingots as of the date of the LEO.

1.b Viraj will (i) place normal market orders for the stainless steel billets and ingots to be purchased from the third-party stainless steel manufacturers; (ii) pay cash, cash equivalents, or normal commercial credit terms for the stainless steel billets and ingots (no product will be acquired in exchange for Viraj manufactured stainless steel or in other exchange or barter transactions); and, (iii) the supplier of the steel billets

and ingots will provide a receipt showing the purchase was a normal, arms-length transaction.

1.c Viraj will (i) order the stainless steel billets and ingots from the third-party stainless steel manufacturers as per international standard grade numbers and the specifications provided by the customers of Viraj, and (ii) not supply processes or formulas for stainless steel to the third-party stainless steel manufacturers.

1.d Viraj, as part of its order or contract with the third-party stainless steel manufacturers, will obtain a representation that the stainless steel billets and ingots being sold to Viraj are made from the manufacturers' own processes and equipment and with technology and intellectual property that the manufacturers own, properly license, or may otherwise lawfully use.

STEP 2 (Delivery and Handling): Viraj will take delivery of stainless steel billets and ingots purchased from the third-party stainless steel manufacturers, and will handle such stainless steel billets and ingots while in Viraj's possession, such that the stainless steel billets and ingots purchased from the third-party stainless steel manufacturers will be kept separate from, and not commingled with, any stainless steel product – billets and ingots – made from Viraj melted stainless steel. To ensure segregation, Viraj will implement measures (described below) for visibility and traceability of materials.

2.a Viraj, as part of its order or contract with the third-party stainless steel manufacturers, will require that the stainless steel billets and ingots being sold to Viraj for further manufacture for the U.S. market are ordered and invoiced separately from any other product being purchased by or delivered to Viraj, specifically under separate invoices and delivery tickets.

2.b Upon receipt and delivery of the stainless steel billets and ingots from third-party stainless steel manufacturers, Viraj will keep the third-party stainless steel separate from any stainless steel melted by Viraj. Specifically, the third-party stainless steel will not be allowed into, or in areas adjacent to the melt shop facilities where Viraj conducts stainless steel melting, de-carbonization or initial casting or pouring activities.

2.c At all times the third-party stainless steel in Viraj's possession, will have each container, pallet, or other lot of the third-party stainless steel, and each lot of any products made from such third-party stainless steel, marked to identify it as (or as made from) non-Viraj melted stainless steel.

2.d Viraj will adopt separate codes (or code prefixes or suffixes), so that third-party stainless steel billets and ingots and stainless steel products made from third-party stainless steel, can be identified as being, or having been, made from non-Viraj melted stainless steel.

2.e The third-party heat numbers of the billets and ingots purchased from third party manufacturers (as indicated on the mill test certificates from the third-party manufacturers) will be tracked end to end in Viraj operations and included on the mill test certificates supplied by Viraj for final products made from billets or ingots purchased from third party stainless steel manufacturers.

STEP 3 (Recordkeeping and Compliance): Viraj will obtain and keep records sufficient to show compliance with the above requirements and will engage an independent audit company to verify Viraj's compliance with these procedures.

3.a Viraj will obtain and keep records, including orders, purchase invoices, delivery tickets, shipping records, inventory records, shop processing records and sales invoices, sufficient to show compliance with the above procedures.

3.b Viraj will hire a third-party compliance company to verify that Viraj is complying with all these procedures. The compliance company will (i) be experienced in monitoring and certifying compliance with manufacturing activities; (ii) will have open access to Viraj's facilities where the third-party stainless steel is kept or processed; and, (iii) will inspect and certify Viraj's ordering, receipt, storage, handling and shipment of third-party stainless steel billets and ingots and stainless steel products made from third-party stainless steel.

STEP 4 (Certification): Viraj will provide a certification with all products subject to this protocol, certifying that the products comply with the protocol. Such certification will enable U.S. Customs and Border Protection ("CBP") to readily and efficiently enforce the LEO while allowing importation of products subject to the protocol without excessive burden.

Id. at 7-10.

Viraj argues that its request falls within the requirements for requesting an advisory opinion. *Id.* at 10-13. Thus, Viraj argues that an advisory opinion will facilitate enforcement of section 337. *Id.* at 11. Viraj explains that the Commission's orders cover certain stainless steel products, but not others, and an advisory opinion would provide clear delineation of the stainless steel products that fall outside the scope of the orders. *Id.* Viraj also argues that an advisory opinion is in the public interest because it would prevent the Commission's orders from being extended to cover products that do not utilize the Valbruna Trade Secrets. *Id.* at 11-12. Viraj

further argues that an advisory opinion will benefit consumers and competitive conditions by allowing the importation of non-infringing stainless steel. *Id.* at 12-13.

Last, Viraj asserts that it has a compelling business need for an advisory opinion because, under the LEO, it is prohibited from importing any stainless steel product into the U.S. that may be subject to the LEO. *Id.* at 13. In addition, Viraj asserts that an advisory opinion would give CBP the guidance necessary to properly enforce the LEO. *Id.* Viraj contends it “cannot reasonably undertake contracting with third-party suppliers and the other proposed steps set forth herein unless it knows it would be able to import [products] into the U.S. [by] following such protocol.” *Id.*

B. Valbruna’s Response to Viraj’s Request for an Advisory Opinion

Valbruna argues that the Commission should not grant Viraj’s request for an advisory opinion because there is no factual basis to support it. Valbruna Response at 1. Valbruna contends that Viraj has not framed its request as fully and accurately as possible because it has not come forward with sufficient facts to establish that the products it seeks to import are not covered by the Commission’s orders. *Id.* at 2-3. Valbruna argues that Viraj’s credibility in this investigation is tainted because it was found to have spoliated evidence. Based on that finding the Commission fashioned a remedy requiring Viraj to obtain a ruling before importing any stainless steel that may be the subject of the LEO. *Id.* Valbruna asserts that neither the Commission nor Valbruna can assess Viraj’s contentions without specific, verifiable information regarding the manufacturing protocol and the stainless steel articles at issue. *Id.* at 3. Valbruna notes that Viraj has not identified any specific stainless steel product already manufactured using its proposed protocol and has not submitted any actual articles. *Id.* Valbruna argues that advisory opinions are not appropriate for such a hypothetical scenario. *Id.*

Valbruna further argues that the requested advisory opinion would not facilitate enforcement of section 337. *Id.* at 5. Specifically, Valbruna argues that Viraj's request would undermine the enforcement of section 337 and the orders that issued in this investigation because it would permit Viraj to import stainless steel products merely by self-certifying them as compliant with its hypothetical protocol. *Id.* Valbruna asserts that this is not what the Commission contemplated. *Id.*

Valbruna also argues that the requested advisory opinion is not in the public interest. *Id.* Valbruna asserts that the issuance of the LEO and CDO in this investigation was a result of Viraj's deliberate and wholesale spoliation of crucial evidence. *Id.* at 6. Valbruna argues that to adopt Viraj's proposed protocol, the Commission would have to take Viraj's word that it will comply with its proposed protocol. *Id.* Valbruna contends that there is no public interest in allowing Viraj to sidestep its obligation to prove that the goods it seeks to import were not made using the Valbruna Trade Secrets. *Id.*

Valbruna contends that there is no evidence that Viraj's proposed conduct would benefit consumers or competitive conditions. *Id.* Valbruna argues that the assertions that Viraj makes that competitive conditions would be served are conclusory and unsupported. *Id.* Valbruna notes that as the Commission's orders currently stand there is no negative impact on U.S. consumers. *Id.* at 6-7.

Valbruna asserts that there is no compelling business need for the requested advisory opinion. *Id.* at 7. Valbruna argues that it is not enough that Viraj would have the ability to import stainless steel products if the requested advisory opinion issues because if that were the case, every party requesting an advisory opinion would have a compelling business need. *Id.* Valbruna explains that Viraj is not investing in expensive plant and equipment to manufacture

the proposed articles but instead proposes to outsource a stage of the manufacturing process to an unaffiliated entity and adopt a compliance mechanism. *Id.* at 7-8.

Valbruna argues that Viraj's misappropriation is not limited to a single stage of the manufacturing process as Viraj asserts. *Id.* at 8. Valbruna contends that Viraj gained knowledge from its misappropriation that has carried over into other aspects of the manufacturing process and into its sale of stainless steel products in the United States and therefore Viraj's entire manufacturing and distribution process is tainted. *Id.* at 8-10. Valbruna further argues that Viraj misappropriated Valbruna's customer lists, and this misappropriation has given Viraj an advantage in selling stainless steel to Valbruna's customers in the United States. *Id.* at 9-10. Therefore, Valbruna asserts that outsourcing stage 2 will not address Viraj's unfair conduct. *Id.* at 10.

Valbruna argues that the Commission has the discretion not to issue an advisory opinion. *Id.* Valbruna contends that Viraj has only proposed a hypothetical protocol and "has come forward with no actual facts to show whether its proposed conduct would violate the remedial orders in this case." *Id.* Valbruna asserts that an advisory opinion would be premature and a waste of Commission resources. *Id.*

However, Valbruna argues that if the Commission determines to issue an advisory opinion, that it should be referred to an ALJ because there are numerous questions of fact. *Id.* at 11. For example, Valbruna explains that it is unknown what information would be provided to the third-party manufacturers, or how the Commission could verify that Viraj or its agents provided no information derived from the Valbruna Trade Secrets to the third-party manufacturer. *Id.* Accordingly, Valbruna asserts that the ALJ is best positioned to address Viraj's request. *Id.* at 12.

C. Viraj's Motion For Leave to File a Reply to Complainant Valbruna's Opposition to Viraj's Request for an Advisory Opinion

Viraj filed a motion for leave to file a reply to address three issues: (1) Valbruna's contention that the scope of the LEO extends beyond stage 2 of the manufacturing process; (2) Valbruna's attempt to prevent Viraj from using the advisory opinion process which the Commission ordered Viraj to use; and (3) Valbruna's argument that the requested importations will rely on Viraj's own certification. Viraj Reply at 1.

Viraj contends that Valbruna's argument improperly expands the scope of the LEO. *Id.* at 2. Viraj notes that the LEO excludes only products manufactured using the Valbruna Trade Secrets during stage 2 of the stainless steel manufacturing process and that those Trade Secrets are identified in the complaint. *Id.* at 2-3. Viraj argues that the Commission's opinion is clear on this point and the Commission should disregard Valbruna's arguments that other steel products and customer lists are covered by the LEO. *Id.* at 3-5.

Viraj also argues that its request for an advisory opinion is sufficiently framed. *Id.* at 5. Viraj explains that under the Commission's orders, there are clearly products that may be, but are not in fact, within the scope of the LEO, and an advisory opinion "delineating the indicia of non-infringement is appropriate." *Id.*

Viraj contends that the circumstances of this investigation are unique, and Viraj should be allowed to seek and obtain the advisory opinion that the Commission has required in the LEO for importing stainless steel not incorporating the Valbruna Trade Secrets. *Id.* at 6. Viraj asserts that Valbruna's argument that the Commission should decline to even open an advisory opinion proceeding, not only flies in the face of Commission policy, but would in effect bar the importation of products not incorporating the Valbruna Trade Secrets—contrary to the Commission's statutory authority. *Id.*

Viraj further asserts that Valbruna's argument that Viraj must submit some specific article in order to obtain an advisory opinion is ill-founded. *Id.* at 7. Viraj explains that Valbruna has alleged that after completion of the stage 2 melting process, the stainless steel products cannot be modified to another product that would infringe the Valbruna Trade Secrets. *Id.* at 7-8 (citing Complaint at ¶23). Viraj also asserts that contracting with third-parties prior to an advisory opinion is not practicable because the contract would have to incorporate provisions which require Commission approval. *Id.* at 8. Viraj also argues that it is impractical to submit a sample of every stainless steel grade each time it needs to source from a new third-party manufacturer. *Id.* Therefore, Viraj asserts that the requested advisory opinion is necessary and proper. *Id.*

Last, Viraj asserts that its proposed protocol does not rely on self-certification as Valbruna contends. *Id.* Specifically, Viraj explains that the written terms of the proposed purchase contracts with the independent third-party manufacturers would verify that no Valbruna Trade Secrets were used in making the purchased steel. *Id.* In addition, there would be independent monitoring by a compliance company as well as Viraj's documentary records. *Id.* Viraj asserts that Valbruna disregards the specific details of the proposed procedures to conclude that Viraj would be self-certifying. *Id.* at 9. Viraj argues that based on its protocol, the Commission will know who the third parties are and what their relationship with Viraj entails. *Id.* at 9-10. Therefore, Viraj asserts that under the proposed procedures, the assurances are not solely Viraj's self-certification. *Id.* at 10.

D. Valbruna's Opposition to Viraj's Motion for Leave to File a Reply

Valbruna argues that the Commission should deny Viraj's motion for leave to file a reply. Valbruna first argues that Viraj's motion repeats arguments previously made in its June 22, 2016 request, "adding little or nothing new." Valbruna Motion Opposition at 1.

Second, Valbruna contends that Viraj mischaracterizes its own protocol concerning certification. *Id.* at 2. Valbruna notes that Viraj fails to mention that step 4 of its proposed protocol provides that "Viraj will provide a certification with all products subject to this protocol, certifying that the products comply with the protocol." *Id.* Valbruna asserts that this step only requires Viraj to make this certification upon importation and then the burden would shift to Valbruna, after importation, to prove that the protocol was not satisfied. *Id.* Valbruna contends that under this protocol, the Commission and Valbruna must rely on Viraj's "recordkeeping" even though the LEO was issued as a sanction for Viraj's spoliation. *Id.* at 2-3.

III. ANALYSIS

Commission Rule 210.79, 19 C.F.R. § 210.79, requires the Commission to consider various factors in determining whether to institute an advisory opinion including the following: (1) whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930; (2) whether the issuance of such an advisory opinion would be in the public interest; (3) whether the issuance of such an advisory opinion would benefit consumers and competitive conditions in the United States; and (4) whether the requestor has a compelling business need for the advice and has framed his request as fully and accurately as possible.

In the underlying investigation, the Commission issued an LEO prohibiting Viraj (and its affiliates) from importing stainless steel products using any of the Valbruna Trade Secrets for a

period of 16.7 years. LEO ¶ 1. In addition, the Commission required that prior to the importation of any stainless steel products that may be subject to the LEO, Viraj (including its affiliated companies and importers) must seek a ruling from the Commission to determine whether the stainless steel product sought to be imported is covered by the LEO. LEO ¶ 3. In view of this pre-importation requirement that Viraj must seek a ruling from the Commission regarding its proposed stainless steel products, we agree there is a compelling business need for the advisory opinion. In addition, it would be beneficial to consumers and competitive conditions in the United States if stainless steel products that are demonstrably free of the use of the Valbruna Trade Secrets were allowed to be imported. An advisory opinion may also facilitate the enforcement of the LEO. The public interest would also be served by allowing Viraj to import steel products upon a determination that specific steel products are manufactured without the benefit of the Valbruna Trade Secrets. As discussed below in more detail, Viraj has framed its request as a protocol by which it proposes to import steel that it asserts would not fall within the scope of the LEO. Accordingly, the Commission has determined to issue an advisory opinion. Because no fact finding is necessary to render this opinion, this matter has not been delegated to OUII or an ALJ.

The Commission Opinion accompanying the LEO explicitly states that “Viraj Profiles will bear the burden of demonstrating, in ancillary proceedings before the Commission, that *specific products* that it seeks to import are not manufactured using any of the trade secrets identified in Valbruna’s complaint.” Comm’n Op. at 31 (emphasis added). The Commission found that this provision was warranted because “it (1) reduces the burden on CBP, which would otherwise be responsible for making a decision on importation without the benefit of a factual record and decision by the ALJ and the Commission; (2) places the burden on Viraj Profiles to

establish that the goods it seeks to import were not manufactured using knowledge from its misappropriation of Valbruna's trade secrets and prevents circumvention of the exclusion order, while maintaining fairness to Viraj Profiles; and (3) gives Valbruna the opportunity to respond and contest any issues or evidence raised by Viraj Profiles." *Id.* at 32. The Commission further stated that "[s]hould the Commission determine that particular products are outside the scope of the limited exclusion order, Viraj Profiles or the importer may certify to Customs that future shipments are identical to the products adjudicated in an ancillary proceeding before the Commission." *Id.*

Viraj's request provides scant information concerning its proposed course of action. The request does not identify the "specific products" it alleges are outside the scope of the Commission's orders, but instead proposes a four-step protocol for the Commission to consider without any factual context or detail, or any supporting documentation. For example, Viraj's request does not disclose (1) any specific third-party manufacturers from whom it seeks to purchase steel billets or ingots, or (2) any specific third-party certification company, thereby preventing the Commission from verifying that the manufacturer and/or third-party certifier are actually unrelated third-parties. Viraj also proposes no means, mechanism, or documentation for the Commission or Valbruna to validate Viraj's allegation that steel manufactured using Viraj's proposed protocol does not utilize the Valbruna Trade Secrets. Moreover, Valbruna's response identifies additional data and information that would aid the Commission's determination as to whether any stainless steel products produced by Viraj are outside the scope of the order. Viraj does not dispute that such supporting information and documentation would be relevant and material, other than contesting that a product sample is not necessary. Accordingly, the Commission has determined that Viraj has not provided sufficient information for the

Commission to determine whether any specific stainless steel products sought to be imported by Viraj would be covered by the LEO.

By order of the Commission.

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

Lisa R. Barton
Secretary to the Commission

Issued: October 14, 2016

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ADVISORY
OPINION** has been served by hand upon the Commission Investigative Attorney, Reginald D.
Lucas, Esq., and the following parties as indicated, on **October 14, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

Gregory J. Spak, Esq.
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005

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On Behalf of Respondents Viraj Profiles Limited:

Lizbeth R. Levinson, Esq.
KUTAK ROCK LLP
1625 Eye Street NW, Suite 800
Washington, DC 20006

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 Via Express Delivery
 Via First Class Mail
 Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Investigation No. 337-TA-933

**NOTICE OF THE COMMISSION'S FINAL DETERMINATION FINDING A
VIOLATION OF SECTION 337; ISSUANCE OF A LIMITED EXCLUSION ORDER
AND CEASE AND DESIST ORDER; TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has found a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in this investigation and has issued a limited exclusion order prohibiting importation of certain stainless steel products manufactured by or on behalf of respondent Viraj Profiles Limited ("Viraj Profiles") using the complainant's misappropriated trade secrets. The Commission has also issued a cease and desist order directed to Viraj Profiles. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Lucy Grace D. Noyola, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3438. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 10, 2014, based on a complaint filed by Valbruna Slater Stainless, Inc. of Fort Wayne, Indiana; Valbruna Stainless Inc., of Fort Wayne, Indiana; and Acciaierie Valbruna S.p.A. of Italy (collectively, "Valbruna"). 79 *Fed. Reg.* 61339 (Oct. 10, 2014). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States

after importation of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation names as respondents (1) Viraj Profiles of Mumbai, India; Viraj Holdings P. Ltd. of Mumbai, India; Viraj - U.S.A., Inc. of Garden City, New York; (2) Flanschenwerk Bebitz GmbH of Könnern, Germany; Bebitz Flanges Works Pvt. Ltd. of Maharashtra, India; Bebitz U.S.A. of Garden City, New York; and Ta Chen Stainless Pipe Co., Ltd. of Tainan, Taiwan and Ta Chen International, Inc. of Long Beach, California. *Id.* The Office of Unfair Import Investigations also was named as a party to the investigation. *Id.*

On December 8, 2015, the administrative law judge (“ALJ”) issued an initial determination (“ID”) (Order No. 17) granting in part Valbruna’s motion for default and other relief. The ALJ found that Viraj Profiles acted in bad faith in spoliating evidence and that a sanction of default against Viraj Profiles was warranted. On February 8, 2016, the Commission determined to review Order No. 17, and, in that notice of review, determined to affirm the default finding against Viraj Profiles, noting that supplemental reasoning would be provided in a forthcoming opinion. 81 *Fed. Reg.* 7584 (Feb. 12, 2016). The Commission also requested briefing from the parties on certain issues on review, and requested briefing from the parties, interested government agencies, and any other interested persons on the issues of remedy, the public interest, and bonding. *Id.*

On February 18, 2016, the parties filed initial written submissions addressing the Commission’s questions and remedy, the public interest, and bonding. Also, on February 18, 2016, several non-parties filed responses to the Commission’s February 8, 2016 notice, including Forging Industry Association, Central Wire Inc., Sumiden Wire Products Corporation, Tree Island Steel, Tri Star Metals, LLC, Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc. On February 24, 2016, U.S. Representatives Tim Murphy and Peter J. Visclosky, the respective Chairman and Vice Chairman of the Congressional Steel Caucus, also filed a response to the Commission’s February 8, 2016 notice. On February 25, 2016, the parties filed reply submissions. Also, on February 25, 2016, several non-parties filed reply submissions, including American Wire Producers Association, Alloy Screen Works, Inc., Cincinnati Metals Inc., Kerkau Mfg., Carpenter Technology Corporation, Crucible Industries LLC, Electralloy (G.O. Carlson Inc., Co.), North American Stainless, Outokumpu Stainless USA, LLC, and Universal Stainless & Alloy Products, Inc. On February 25, 2016, U.S. Senator Joe Donnelly of Indiana also filed a response to the Commission’s February 8, 2016 notice.

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

Having examined the record of this investigation, including the various IDs and the parties’ submissions, the Commission has determined to vacate the portions of Order No. 17 with respect to (1) disgorgement and (2) denial of Valbruna’s request for leave to assert additional operating

practices.

The Commission has determined the appropriate remedy is a limited exclusion order prohibiting, for 16.7 years from the date of the order, the entry of stainless steel products manufactured by or on behalf of Viraj Profiles using any of the misappropriated trade secrets identified in Valbruna's complaint (*see* Compl. ¶¶ 27-33, 51 and accompanying exhibits). The Commission has also determined to issue a cease and desist order prohibiting Viraj Profiles from, *inter alia*, importing or selling the subject products. The Commission has determined that the public interest factors enumerated in section 337(d) and (f), 19 U.S.C. §§ 1337(d), (f), do not preclude the issuance of the limited exclusion order or the cease and desist order. The Commission has determined to apply a bond in the amount of 13.4 percent of the entered value of excluded products imported or sold during the period of Presidential review (19 U.S.C. § 1337(j)).

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

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

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

Lisa R. Barton
Secretary to the Commission

Issued: May 25, 2016

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Reginald D. Lucas, Esq., and the following parties as indicated, on **May 25, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

Gregory J. Spak, Esq.
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005

- ~~Via Hand Delivery~~
 ~~Via Express Delivery~~
 ~~Via First Class Mail~~
 Other: _____

On Behalf of Respondents Viraj Profiles Limited:

Lizbeth R. Levinson, Esq.
KUTAK ROCK LLP
1101 Connecticut Ave., NW, Suite 1000
Washington, DC 20036-4374

- ~~Via Hand Delivery~~
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 Other: _____

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

In the Matter of

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

Investigation No. 337-TA-933

LIMITED EXCLUSION ORDER

The Commission has found Viraj Profiles Limited (“Respondent”) in default for spoliation of evidence. The Commission has thereby determined that there is a violation of Section 337 in the unlawful importation, sale for importation and sale after importation by Respondent of stainless steel products manufactured by or on behalf of Respondent using any of the misappropriated trade secrets identified in the complaint (*see* Compl. ¶¶ 27-33, 51 and accompanying exhibits) (“Valbruna Trade Secrets”).

The Commission has determined that the appropriate form of relief includes a limited exclusion order prohibiting the unlicensed entry of stainless steel products manufactured using any of the Valbruna Trade Secrets by or on behalf of Respondent, or its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns.

The Commission has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the limited exclusion order. Finally, the Commission has determined that the bond during the period of Presidential review shall be in the amount of 13.4 percent of the entered value of the stainless steel products subject to this Order.

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

1. Stainless steel products manufactured using any of the Valbruna Trade Secrets by or on behalf of, or imported by or on behalf of, Respondent, or its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for a period of 16.7 years from the effective date of this Order, except under license of the owner of the Valbruna Trade Secrets, or as provided by law.

2. In accordance with 19 U.S.C. § 1337(1), the provisions of this Order shall not apply to stainless steel products that are imported by and for the use of the United States, or imported for, and to be used for, the United States with authorization or consent of the Government.

3. Prior to the importation of stainless steel product that may be subject to this Order, the importer or Respondent must seek a ruling from the Commission to determine whether the stainless steel product sought to be imported is covered by this Order.

4. After a Commission determination under paragraph 3 of this Order, persons seeking to import stainless steel products that are potentially subject to this Order may be required to certify to U.S. Customs and Border Protection (“CBP”) that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not subject to this Order based on the Commission’s determination. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

5. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon CBP.

7. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: May 25, 2016

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served by hand upon the Commission Investigative Attorney, Reginald D. Lucas, Esq., and the following parties as indicated, on **May 25, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

Gregory J. Spak, Esq.
WHITE & CASE LLP
701 Thirteenth Street, NW
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On Behalf of Respondents Viraj Profiles Limited:

Lizbeth R. Levinson, Esq.
KUTAK ROCK LLP
1101 Connecticut Ave., NW, Suite 1000
Washington, DC 20036-4374

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Investigation No. 337-TA-933

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Viraj Profiles Limited of Mumbai, India cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for stainless steel products manufactured by or on behalf of Viraj Profiles Limited using any of the misappropriated trade secrets identified in the complaint (*see* Compl. ¶¶ 27-33, 51 and accompanying exhibits) (“Valbruna Trade Secrets”) in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I.
Definitions

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainant” shall collectively mean Valbruna Slater Stainless, Inc. and Valbruna Stainless Inc. of 2400 Taylor Street, Fort Wayne, Indiana 46802, and Acciaierie Valbruna S.p.A. of Viale della Scienza 25, Vicenza 36100, Italy.
- (C) “Respondent” shall mean Viraj Profiles Limited of 10, Imperial Chambers, 1st Floor, Wilson Road, Ballard Estate, Mumbai 400038, India.

(D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.

(E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.

(G) The term "covered products" shall mean stainless steel products manufactured by or on behalf of Viraj Profiles using any of the Valbruna Trade Secrets.

II. Applicability

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

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order. For a period of 16.7 years from the day after issuance of this Order, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, sell, or otherwise transfer (except for exportation) in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or

(E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

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

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that they have no inventory of covered products in the United States.

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

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer

to the investigation number (“Inv. No. 337-TA-933”) in a prominent place on the cover pages and/or the first page. (See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant’s counsel.¹

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

VI. Recordkeeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in

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

Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII.
Service of Cease and Desist Order

Respondent is ordered and directed to:

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

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

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

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect for 16.7 years from the date of issuance of this Order.

VIII.
Confidentiality

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

IX.
Enforcement

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

X.
Modification

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

XI.
Bonding

The conduct prohibited by section III of this order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent posting of a bond in the amount of 13.4 percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.


The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by Complainant in connection with the issuance of

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

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

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

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: May 25, 2016

² *See* note 1 above.

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served by hand upon the Commission Investigative Attorney, Reginald D. Lucas, Esq., and the following parties as indicated, on **May 25, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

Gregory J. Spak, Esq.
WHITE & CASE LLP
701 Thirteenth Street, NW
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On Behalf of Respondents Viraj Profiles Limited:

Lizbeth R. Levinson, Esq.
KUTAK ROCK LLP
1101 Connecticut Ave., NW, Suite 1000
Washington, DC 20036-4374

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PUBLIC VERSION

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

In the Matter of

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

Investigation No. 337-TA-933

COMMISSION OPINION

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

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

PUBLIC VERSION

I. BACKGROUND

A. Procedural History

On October 10, 2014, the Commission instituted this investigation based on a complaint filed by Valbruna Slater Stainless, Inc. of Fort Wayne, Indiana; Valbruna Stainless Inc., of Fort Wayne, Indiana; and Acciaierie Valbruna S.p.A. of Vicenza, Italy (collectively, “Valbruna”). 79 *Fed. Reg.* 61339 (Oct. 10, 2014). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation names as respondents (1) Viraj Profiles of Mumbai, India; Viraj - U.S.A., Inc. of Garden City, New York (“Viraj USA”) (collectively, “Viraj”); Viraj Holdings P. Ltd. of Mumbai, India;¹ (2) Flanschenwerk Bebitz GmbH of Könnern, Germany (“Bebitz Germany”); Bebitz Flanges Works Pvt. Ltd. of Maharashtra, India (“Bebitz India”); Bebitz U.S.A. of Garden City, New York (collectively, “Bebitz”); and (3) Ta Chen Stainless Pipe Co., Ltd. of Taiwan, Taiwan and Ta Chen International, Inc. of Long Beach, California (“Ta Chen International”) (collectively, “Ta Chen”) (all collectively, “Respondents”). *Id.* The Office of Unfair Import Investigations (“OUII”) also was named as a party to the investigation. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Asserted Trade Secrets

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

II. STANDARD ON REVIEW

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

III. ANALYSIS

A. Sanctions and Other Relief for Spoliation of Evidence

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

1. The Sanction ID's Findings

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

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

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

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

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

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

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

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

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

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

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

Id. at 36-37.

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

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

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

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

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

Id. at 40-41.

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

(continued)

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

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

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

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

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

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

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

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

Id.

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

3. Sanction for Spoliation of Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Disgorgement Order

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

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

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

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

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

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

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

B. Remedy, the Public Interest, and Bonding

1. Limited Exclusion Order

Section 337(d)(1) provides that, “[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States” 19 U.S.C. § 1337(d)(1). Commission Rule 210.16(c) provides that, after a respondent has been found in default by the Commission, it “may issue an exclusion order . . . affecting the defaulting respondent.” 19 C.F.R. § 210.16(c). The Commission has “broad discretion in selecting the form, scope[,] and extent of the remedy.” *Viscofan, S.A. v. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986).

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

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

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

a) Covered Operating Practices

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

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

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

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

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

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

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

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

b) Covered Products

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

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

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

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

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

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

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

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

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

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

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

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

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

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

]. *Id.*

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

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

c) Covered Entities

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

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

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

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

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

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

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

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

d) Exclusion Period

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

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

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

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

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

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

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

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

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

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

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

2. Cease and Desist Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. The Public Interest

Sections 337(d) and (f), as well as Commission Rule 210.16(c), direct the Commission to consider certain public interest factors before issuing a remedy. 19 U.S.C. §§ 1337(d), (f); 19 C.F.R. § 210.16(c). These public interest factors include the effect of any remedial order on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Bonding

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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IV. CONCLUSION

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

By order of the Commission.

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

Lisa R. Barton
Secretary to the Commission

Issued: June 9, 2016

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Reginald D. Lucas, Esq., and the following parties as indicated, on **June 9, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Investigation No. 337-TA-933

**NOTICE OF COMMISSION DETERMINATION TO REVIEW
AN INITIAL DETERMINATION GRANTING IN PART A MOTION FOR DEFAULT
AND OTHER RELIEF AND, ON REVIEW, TO AFFIRM THE DEFAULT FINDING;
SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER
REVIEW AND ON REMEDY, PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination ("ID") (Order No. 17) by the presiding administrative law judge ("ALJ") finding Viraj Profiles Limited ("Viraj") in default for spoliation of evidence and ordering the disgorgement of complainants' operating practices in Viraj's possession. On review, the Commission has determined to affirm the default finding as to Viraj. The Commission requests certain briefing from the parties on the remaining issues under review, as indicated in this notice. The Commission also requests briefing from the parties and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Lucy Grace D. Noyola, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3438. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on October 10, 2014, based on a complaint filed by Valbruna Slater Stainless, Inc. of Fort Wayne, Indiana; Valbruna Stainless Inc., of Fort Wayne, Indiana; and Acciaierie Valbruna S.p.A. of Italy (collectively, “Valbruna”). 79 *Fed. Reg.* 61339 (Oct. 10, 2014). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stainless steel products, certain processes for manufacturing or relating to same, and certain products containing same by reason of the misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The notice of investigation names as respondents Viraj Profiles Limited of Mumbai, India; Viraj Holdings P. Ltd. of Mumbai, India; Viraj - U.S.A., Inc. of Garden City, New York; Flanschenwerk Bebitz GmbH of Könnern, Germany; Bebitz Flanges Works Pvt. Ltd. of Maharashtra, India; Bebitz U.S.A. of Garden City, New York; and Ta Chen Stainless Pipe Co., Ltd. of Tainan, Taiwan and Ta Chen International, Inc. of Long Beach, California (“Ta Chen”). *Id.* The Office of Unfair Import Investigations (“OUII”) also was named as a party to the investigation. *Id.*

On September 8, 2015, Valbruna filed a motion for default and other relief for Viraj’s failure to make and cooperate in discovery, intentional concealment and failure to preserve dispositive evidence, and misrepresentations to Valbruna and the Commission. On September 17, 2015, OUII filed a response in support of Valbruna’s motion. On September 18, 2015, Viraj filed a response opposing the motion.

On December 8, 2015, the ALJ issued the subject ID (Order No. 17), granting in part Valbruna’s motion for default and other relief. The ALJ found that Viraj acted in bad faith in spoliating evidence and that a sanction of default against Viraj was warranted. The ALJ also ordered Viraj to disgorge any Valbruna operating practices in its possession. The ALJ denied Valbruna’s request to assert certain operating practices that the ALJ had previously excluded.

On December 16, 2015, Viraj filed a petition for review. Ta Chen also filed a petition for review, arguing that it is entitled to an evidentiary hearing. On December 23, 2015, Valbruna and OUII each filed responses to both petitions. Valbruna’s response included a request for immediate entry of relief against Viraj.

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID. Specifically, the Commission has determined to review the ID’s finding of default for spoliation of evidence as to Viraj and the ID’s order that Viraj disgorge any Valbruna operating practices in its possession. On review, the Commission affirms the default finding, with supplemental reasoning described in a forthcoming opinion. The Commission clarifies that the default finding against Viraj does not preclude the remaining respondents from participating in an evidentiary hearing and contesting the allegations at issue in the investigation. The Commission expects the stay of the procedural schedule to be lifted.

In connection with its review, the Commission requests responses to the following questions only. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

1. Please provide an analysis of the Commission's authority to (1) order Viraj to disgorge any Valbruna operating practices in its possession as a sanction for spoliation of evidence and (2) enforce such an order. Discuss the Commission's jurisdiction to order disgorgement by a foreign entity.
2. Please discuss whether the circumstances here provide the grounds for the issuance of immediate entry of relief against Viraj under Commission Rule 210.16(c).

In connection with the final disposition of Order No. 17, the Commission may determine that immediate relief against Viraj is warranted. If so, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue a cease and desist order that could result in Viraj being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. Please include in the submission a discussion of the appropriate duration of the remedy, if any, supported by the factual record. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (Dec. 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

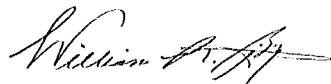
WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainants are requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS numbers under which the accused products are imported, and provide identification information

for all known importers of the subject articles. Initial written submissions and proposed remedial orders must be filed no later than close of business on **Thursday, February 18, 2016**. Initial written submissions by the parties shall be no more than 40 pages, excluding any attachments or exhibits. Reply submissions must be filed no later than the close of business on **Thursday, February 25, 2016**. Reply submissions by the parties shall be no more than 25 pages, excluding any attachments or exhibits. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-933") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.



William R. Bishop
Supervisory Hearings and Information Officer

Issued: February 8, 2016

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Reginald D. Lucas, Esq., and the following parties as indicated, on **February 8, 2016**.



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

**On Behalf of Complainants Valbruna Slater Stainless, Inc.,
Valbruna Stainless Inc., and Acciaierie Valbruna S.p.A. :**

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**On Behalf of Respondents Viraj Profiles Limited, Viraj
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Inv. 337-TA-933

**ORDER NO. 17: INITIAL DETERMINATION GRANTING IN PART VALBRUNA'S
MOTION FOR DEFAULT AND OTHER RELIEF**

(December 8, 2015)

I. INTRODUCTION

On September 8, 2015, complainants Valbruna Slater Stainless, Inc.; Valbruna Stainless, Inc.; and Acciaierie Valbruna S.p.A.'s (collectively, "Valbruna" or "Complainants") filed a motion for default and other relief for the alleged failure of respondent Viraj Profiles Limited ("Viraj")¹ to make and cooperate in discovery, intentional concealment and failure to preserve dispositive evidence, and misrepresentations to Valbruna and the Court. (Motion Docket No. 933-034.) Specifically, Valbruna alleges that the forensic inspection ordered by the ALJ on July 2, 2015 (Order No. 10 ("Forensic Inspection Order")) establishes that Viraj acquired and used the Valbruna operating practices and "exposes Viraj's alleged concerted effort throughout this case to conceal case-dispositive evidence, manipulate the fact record, and withhold discovery that Viraj was required to preserve and produce." (Mot. Memo. ("Memo") at 1.)

On September 17, 2015, the Commission Investigative Staff ("Staff") filed a response in support of Valbruna's motion.

¹ Respondents Viraj Holdings P. Ltd., Viraj-USA, Inc.; Flanschenwerk Bebitz GmbH; Bebitz Flangs Works Pvt. Ltd.; Bebitz U.S.A.; and Ta Chen Stainless Steel Pipe Co. are not subject of the instant motion.

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On September 18, 2015, Viraj filed a response whereby it acknowledged that the forensic inspection of Shilpi Mathur's computer revealed noncompliance by Viraj with certain of its discovery obligations and, therefore, sanctions may be warranted. However, Viraj argues that Valbruna's proposed sanction of default judgment is not justified in this instance. (Opp. at 1.) Specifically, Viraj argues that alternative sanctions, such as, *inter alia*, a finding that Viraj's use and receipt of Valbruna's operation practices has been established, are a more appropriate remedy. (Opp. at 11-13.)

On September 25, 2015, Valbruna filed a motion for leave to file a reply and reply in support of its motion for default ("Reply"). (Motion No. 933-037.) The motion states that Viraj opposes the motion and that Staff would not take a position on the motion.

On October 7, 2015, Viraj filed a response opposing Motion No. 933-037.² As of the date of this order, no other responses were received. Motion No. 933-037 is hereby GRANTED.

On November 13, 2015, Viraj filed a motion for leave to file supplemental material in support of its opposition to Valbruna's motion for default wherein Viraj argued its good cause to supplement and also set forth arguments relating to the supplemental material ("Supp."). (Motion No. 933-041.)

On November 23, 2015, Staff and Valbruna filed their respective responses to Viraj's motion to supplement as well as the substance of Viraj's arguments ("Staff Resp. Supp." and "Viraj Resp. Supp.", respectively.). Motion No. 933-041 is hereby GRANTED.

² On September 30, 2015, new counsel filed a notice of appearance for the Viraj Respondents and the Bebitz Respondents. (See Notice of Appearance by Kutak Rock filed on October 8, 2015.)

II. FACTUAL BACKGROUND

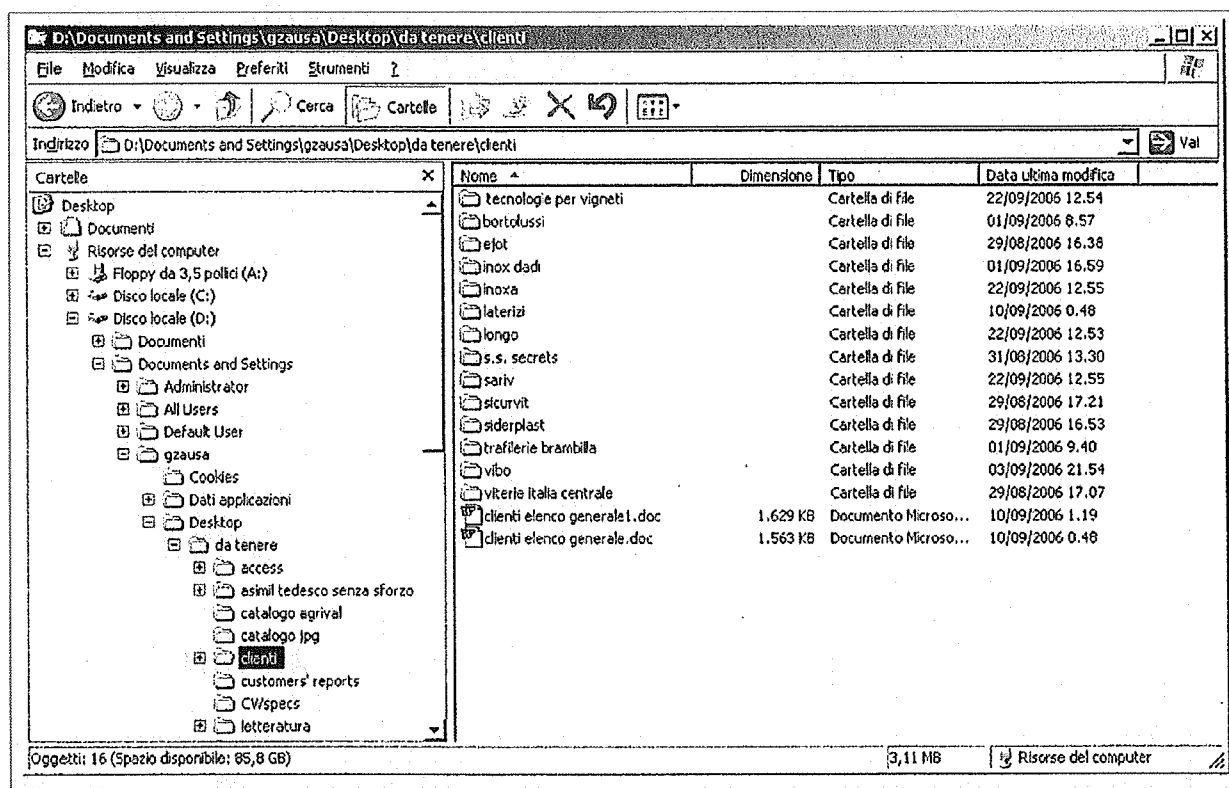
On September 5, 2014, Valbruna filed a complaint with the U.S. International Trade Commission pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, alleging violations of Section 337 based upon the importation into the United States, the sale for importation, and/or the sale within the United States after importation of certain stainless steel products manufactured using Valbruna's allegedly misappropriated trade secrets. (*See* Compl. at 16.) On October 10, 2014, the current investigation was instituted via publication in the *Federal Register*. (79 Fed. Reg. 61339 (October 10, 2014).) The Notice of Investigation identifies the respondents as Viraj Profiles Limited, Viraj Holdings P.Ltd.,³ Viraj – U.S.A., Inc. (collectively, the “Viraj Respondents”), Flanschenwerk Bebitz GmbH, Bebitz Flanges Works Pvt. Ltd., and Bebitz U.S.A. (collectively, the “Bebitz Respondents”), and Ta Chen International, Inc., Ta Chen Stainless Pipe Co., Ltd. (collectively, the “Ta Chen Respondents” or “Ta Chen”) (all collectively, “Respondents”). Staff was also identified as a party to the investigation. (*Id.*)

Valbruna alleges that Respondents took and used its trade secrets to make stainless steel by inducing a former employee of Valbruna Italy, Giancarlo Zausa, to steal Valbruna's practices for making stainless steel, as well as its customer lists. (Memo. at 1.) Mr. Zausa was convicted in an Italian Court of the theft of Valbruna's know-how and customer lists. (Compl. at ¶ 72; Ex. 22.) While Viraj had denied ever receiving Valbruna's Operating Practices, there no longer appears to be any dispute as to the facts leading up to this investigation and what has occurred since the investigation was instituted.

³ According to the Viraj Respondents' Response to the Complaint and Notice of Investigation, “Viraj Holdings P. Ltd.” does not exist. (Respondents Viraj Profiles Limited's and Viraj – USA, Inc.'s Response to the Notice of Investigation and Confidential Complaint Filed By the Valbruna Complainants at 1.)

A. Mr. Zausa and Valbruna

On August 31, 2006, while employed by Valbruna, Mr. Zausa downloaded Valbruna's Operating Practices to a specific electronic folder on his company-issued laptop. (Memo. at 4; Ex. P at 8-9.) After Mr. Zausa resigned from Valbruna in September 2006, Valbruna's Information Technology ("IT") personnel were preparing to reissue Mr. Zausa's laptop when they discovered a folder entitled "da tenere" ("to keep," in English) on the computer. (Memo. Ex. P at Q&A 25-27.) That folder contained another folder entitled "s.s. secrets" as evidenced in the screenshot below (*Id.* at Q&A 28):



(Memo. Ex. Q.) This "s.s. secrets" folder allegedly included more than three hundred of Valbruna's confidential Operating Practices for making various grades of stainless steel. (Memo., Ex. P at Q&A 30-51; Ex. R, CDX-0004.9C.) Valbruna notes that it identifies its

stainless steel grades by alphanumeric names such as “AISL.XLS,” “aim1.xls,” or “APML.XLS.” (*Id.*; see also Ex. S, CX-1548C at 7.) The electronic files identified in the “s.s secrets” folder contain, for example “141N.XLS”; “212MN.XLS”; “ACMV.XLS”; and “aim1.xls,” which correspond to Valbruna’s Operating Practices:

Nome	Dimensione	Tipo	Data ultima modifica
141N.XLS	109 KB	Foglio di lavoro Micr...	31/08/2006 12:40
212MN.XLS	97 KB	Foglio di lavoro Micr...	31/08/2006 12:40
214MN.XLS	102 KB	Foglio di lavoro Micr...	31/08/2006 12:40
214MNC.XLS	99 KB	Foglio di lavoro Micr...	31/08/2006 12:40
214MNCN.XLS.xls	102 KB	Foglio di lavoro Micr...	31/08/2006 12:40
312el.XLS	107 KB	Foglio di lavoro Micr...	31/08/2006 12:40
A253MA.XLS	115 KB	Foglio di lavoro Micr...	31/08/2006 12:40
ACMV.XLS	97 KB	Foglio di lavoro Micr...	31/08/2006 12:40
ACNW.XLS	94 KB	Foglio di lavoro Micr...	31/08/2006 12:40
aim1.xls	105 KB	Foglio di lavoro Micr...	31/08/2006 12:40
aim2.xls	105 KB	Foglio di lavoro Micr...	31/08/2006 12:40
aimr.xls	106 KB	Foglio di lavoro Micr...	31/08/2006 12:40
alav.xls	109 KB	Foglio di lavoro Micr...	31/08/2006 12:40
alwa.xls	106 KB	Foglio di lavoro Micr...	31/08/2006 12:40
Alp.xls	115 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AIPDE.XLS	107 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AIS01.XLS	120 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AIS.XLS	107 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISC.XLS	110 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISDE.XLS	106 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISII.XLS	108 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISk2.xls	110 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISI1.XLS	109 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISL.XLS	100 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AMN			
AISLDE1.XLS	107 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLDE.XLS	106 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLEI2.XLS	106 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISIF13.XLS	112 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLEL.XLS	113 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLFI.XLS	113 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLF.XLS	112 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLr.XLS	112 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AISLN.XLS	111 KB	Foglio di lavoro Micr...	31/08/2006 12:40
AIsnerv.XLS	112 KB	Foglio di lavoro Micr...	31/08/2006 12:40

(Memo., Ex. R (only AISL.LXS highlighted) (emphasis original).) Valbruna’s server logs showed that the operating practices had been downloaded from a password-protected folder on the Valbruna server between 12:39 PM and 12:49 PM on August 31, 2006, which matched the date and time of the files in the “s.s secrets” folder found on Mr. Zausa’s Valbruna laptop. (*Id.* at Ex. P at Q&A 44-51.) Valbruna also discovered that Mr. Zausa had downloaded customer lists as well. (*Id.* at Ex. P at Q&A 52-62.)

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After Valbruna discovered the unauthorized information on Mr. Zausa's computer, they notified the Italian authorities on September 23, 2006. (*Id.* at Ex. P at Q&A 68.) After conducting a raid on Mr. Zausa's home and seizing several electronic devices, the authorities discovered electronic media including a folder entitled, "s.s. secrets" – the name of the folder initially discovered on Mr. Zausa's company-issued computer. (*Id.* at Q&A 77-79.) However, while the Italian authorities confiscated most of the electronic media, they did not confiscate all of the media since Mr. Zausa maintained a hidden USB device including Valbruna's Operating Practices and eventually delivered approximately 200 Operating Practices to Viraj. (*Id.*, Ex. V at VALBRUNA0002931-2) Mr. Zausa testified that in late 2006, he met with Neeraj Kocchar, the owner of Viraj, in Amsterdam and gave him a USB device that contained approximately 150 of Valbruna's Operating Practices. (*Id.* at VALBRUNA00022912-3.) Mr. Zausa testified that he met with several Viraj representatives while in India in late 2006, including Mr. Neeraj Okchar, Mr. Rahul Suri, and Ms. Shilpi Mathur, who he identified as a Viraj engineer "responsible for developing new grades of stainless steel" at Viraj. (*Id.* at VALBRUNA00029914-5.) Mr. Zausa testified that when he visited India in November 2006, Ms. Mathur "already had in her hands part of the manufacturing cycles" from his earlier delivery to Mr. Kochar in Amsterdam. (*Id.* at VALBRUNA0002915.) Mr. Zausa's relationship with Respondents, including a second delivery of Valbruna's materials in Bombay in 2008, continued until 2010 when he was "dismissed." (*Id.* at VALBRUNA00029916.)

In 2009, Italian authorities convicted Mr. Zausa of the theft of Valbruna's know-how and customer lists. (Compl. at ¶ 72; Ex. 22.)

In 2014, Italian authorities convicted Viraj and its General Manager, Mr. Rahul Suri, of the theft of Valbruna's know-how and customer lists. (Compl. at ¶ 73; Ex. 9.)

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Italian authorities are currently investigating and prosecuting Neeraj Raja Kochhar, Viraj India's Chairman and Managing Director, and Dhruv Kochhar, Bebitz Germany's Managing Director. (Compl. ¶ 74.)

B. Forensic Inspection

On July 2, 2015, the ALJ granted Valbruna's motion to allow forensic inspection of the electronic devices and email accounts of six current and former employees of Respondents who allegedly received or came into possession of the trade secrets at issue in this investigation. (Order No. 10.) The protocol adopted in Order No. 10 required Respondents to identify "[a]ll computers and storage media in Respondents' possession, custody, or control that have been used since August 2006" by the six named custodians, including the required identification of "other personal storage media including USB drives" (Order No. 10 (incorporating Attachment A of Motion No. 933-015).)

Valbruna retained the services of Mr. J. Christopher Racich to perform the forensic inspection of Respondents' electronic devices. (Mot. at Ex. C.) Certain devices were forensically imaged in Germany on July 27, 2015 and between August 3 and 7, 2015 in India, and Mr. Racich performed an analysis of the information gathered from these images. (*Id.*)

Mr. Racich's forensic inspection focused specifically on the computer of Ms. Shilpi Mathur, the head of Research and Development and Quality Assurance for Viraj. It revealed the following: (1) that a new operating system was installed on Ms. Mathur's computer on October 19, 2014; (2) the existence of a folder entitled "s.s. secrets" on Viraj's network; (3) user "Mathur" attached a USB device and accessed Excel files that have the same name as those identified by Valbruna as containing its stainless steel operating practices; and (4) the existence of numerous USB drives, which were used by the named custodians but had not been identified

or produced by Respondents in accordance with the forensic inspection order. (*Id.* at Ex. C at ¶¶ 17(a)-(d); 55.) The evidence shows further that Ms. Mathur is the only person with access to her computer. (Memo. at Ex. F at 158:20-25.)

1. New Operating System

On October 19, 2014, the evidence shows that a new operating system was installed on Ms. Mathur's computer, which was a few weeks after the Complaint in this investigation was served; three days after Valbruna served its initial requests and interrogatories; and three days after Viraj received its U.S. counsel's emails regarding the duty to preserve all documents and tangible things in the company's possession, custody and control. (Memo. at Ex. C at ¶ 20; Opp. at Declaration of Jeremy W. Dutra ("Dutra Decl.") at ¶ 5, Conf. Ex. A.) The new operating system installed on Ms. Mathur's computer permanently overwrote and destroyed previously existing active data. (Memo. at Ex. C at ¶ 20; Opp. at 9.)

2. "s.s secrets" folder

After the installation, the evidence shows a "link file" (shortcut) was copied to Ms. Mathur's hard drive that pointed to another folder titled "s.s. secrets." (Memo. Ex. C at ¶ 23.) The full path to the link file was: IT0006_MATHUR_Shilpi_LT1_500GB\F\Lenovo\E Drive\Mathur mam\D driv\E Drive\D Drive\my doc1\Shortcut to s.s. secrets.lnk. (*Id.* at ¶ 21.) Thus, if the "s.s. secrets" folder shortcut was clicked on, the corresponding folder would open without having to navigate directly to the file's ultimate location. (*Id.* ¶¶ 22-23) The evidence shows that the link file's last written date was June 28, 2008, which means that it must have existed in another location as of June 28, 2008 before it was copied to Ms. Mathur's computer with the new operating system. (*Id.* at ¶ 24.)

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While the precise location of the “s.s. secrets” folder is unknown, the metadata from the link file points to a folder that was connected to the computer via a network path at the following: “DATA\Desktop\backup up to 231206\s.s. secrets” with a share name of “\MATHUR\C\$”. (*Id.* at ¶ 25.) This shows that when the link file was last written on June 12, 2008, a “s.s. secrets” folder existed on a computer with the name of MATHUR that was shared through the network thereby indicating that the “s.s. secrets” shortcut had access to the “s.s. secrets” folder through the network. (*Id.* at ¶ 26.) The metadata of the shortcut further shows that the “s.s. secrets” folder was created on December 12, 2007 and last written to on April 17, 2008. (*Id.* at ¶ 28.)

Mr. Racich further notes that the naming protocol used for the “s.s secrets,” *i.e.*, “231206,” indicates that it may have been originally created on December 23, 2006. (*Id.* at ¶ 27.)

3. Excel Files

Mr. Racich’s forensic analysis further showed that at least three USB devices accessed and used on Ms. Mathur’s computer that contained files with names identical to Valbruna’s operating practices or words in Italian. (*Id.* at ¶¶ 29-53.)

The evidence shows that on December 4, 2014, three Excel files were opened from an external Seagate USB device that contained the same file names as Valbruna’s operating practices, namely “141N.XLS,” “ACMV.XLS,” and “aim1.xls.” (*Id.* at ¶ 33.) The file paths for these documents were:

- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\ACMV.XLS
- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\aim1.xls
- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\141N.XLS

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(*Id.* at ¶¶ 31-33; 38.) The metadata shows that the Seagate USB device was created on October 19, 2013. (*Id.* at ¶ 37.)

On December 4, 2014, another Excel file entitled “ACMV.xls” was opened from a Kingston USB device. (*Id.* at ¶ 41.) The evidence shows that this file has an identical name to one of Valbruna’s operating practices. (*Id.* at ¶ 42.) The evidence further shows that the Excel file was created on the Kingston USB device a few minutes after it was opened on the Seagate USB device indicating that “ACMV.xls” was saved from the Seagate USB device to the Kingston USB device on December 4, 2014. (*Id.* at ¶ 44.)

On April 29, 2015, another Excel file entitled “CMXC.XLS” was opened from an HP USB device. (*Id.* at ¶ 46.) The evidence shows that this file has an identical name to a Valbruna operating practice. (*Id.* at ¶ 47.)

Mr. Racich further identified another unidentified USB device attached to Ms. Mathur’s computer that contained files in Italian and the names of Valbruna’s operating practices “AIM1,” “AIMR,” and “NTR50.doc.pdf”:

- E:\SS1\letteratura\AIM1 data sheet.pdf
- E:\SS1\letteratura\AIM1.doc
- E:\SS1\letteratura\AIM1.pdf
- E:\SS1\letteratura\AIM1 english.doc
- E:\SS1\letteratura\AIMR data sheet.pdf
- E:\SS1\letteratura\NTR50.doc.pdf

(*Id.* at ¶¶ 50-53.)

4. Additional USB devices

Mr. Racich identified that at least 36 different USB devices were attached to the computer of Ms. Shilpi Mathur between October 28, 2014 and July 27, 2015. (*Id.* at ¶¶ 17(d), 55.) As of the date of the instant motion, Valbruna had not yet received the USB devices identified by Mr. Racich. (Mot. at 8.)

5. Chemistries

As a result of the forensic inspection, Viraj also produced a document entitled “STD. OF CHEMISTRY.xlsx” and was stored on Ms. Mathur’s computer in a folder titled “Development of new grades.” (Reply at Ex. 1, CX-1553C (Racich WS) at Q&A 60; Ex. 2, CX-3168C.) The evidence shows that the chemistries contained on this Excel spreadsheet are identical to the aim chemistries of 22 Valbruna operating practices. (*Id.* at Ex. 4, CDX0014.1C-.9C (demonstratives of Valbruna and Viraj chemistries).)

C. Deposition of Mr. Racich

On October 29, 2015, Viraj deposed Mr. Racich and both Valbruna and Staff participated in the deposition.

1. Supplementation

Viraj argues that it has good cause to submit the supplementation based on Mr. Racich’s deposition testimony. (Supp. at 3.) Viraj notes that this was its first opportunity to cross examine Mr. Racich on his opinions and that the information disclosed in his testimony goes “directly to the basis of the Valbruna Motion.” (*Id.*) First, Viraj argues that the supplementation is necessary because the first forensic expert that it hired to rebut Mr. Racich’s testimony was unable to sign on to the Protective Order in this Investigation due to Valbruna’s objection and, consequently, Viraj was unable to rebut Mr. Racich’s testimony in its original response. (Supp.

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at 3-4.) Second, Viraj argues that Mr. Racich's testimony "elaborates" and "undermines" Valbruna's assertion that Ms. Mathur's computer was intentionally overwritten. (*Id.* at 4.) Viraj asserts that given the extreme remedy sought by Valbruna, the ALJ should have all available evidence before him before making a decision on the Motion for Default. (*Id.* at 4-5.) As such, Viraj argues that supplementation is warranted.

Valbruna argues that supplementation with Mr. Racich's testimony is not warranted because Mr. Hards, Viraj's forensic expert, had access to a redacted version of the Motion for default and Mr. Racich's affidavit and, moreover, Mr. Hards could have signed on to the Protective Order, but never did. (Valbruna Resp. Supp. at 11-12.) Valbruna notes that its objection related to the disclosure of Mr. Racich's witness statement and that it sought additional reassurances from Viraj regarding Mr. Hards' role in Viraj's own forensic inspection. (*Id.* at 12, note 5.) Valbruna further argues that Viraj failed to seek to take Mr. Racich's deposition before filing its response and, further, never sought leave to extend the response deadline in order to do so. (*Id.* at 12.) As such, Valbruna argues that no good cause exists to permit Viraj to supplement its response. Staff agrees that Viraj should not be permitted to supplement its response. (Staff Resp. Supp. at 1-2.)

As set forth *supra*, the ALJ granted Viraj's motion for leave to supplement. Given the severity of the remedy sought by Valbruna's motion, the ALJ believes that he should have a complete and full understanding of the facts before deciding on the motion for default, which includes Viraj's cross-examination of Mr. Racich.

2. Deposition Testimony

On October 29, 2015, Viraj and Staff took the deposition testimony of Mr. Racich. (Supp. at Ex. A.) While the deposition lasted the entire day, the relevant portions highlighted by Viraj are as follows:

- Mr. Racich “cannot state that every active file on the Mathur computer were [sic] overwritten, and that at most a single partition on the Mathur computer would have been affected by the operating system installation.”

Pages 46:19-47:8;

Q ...Is it your testimony that the operating system that was installed here overwrote every active file that was on that computer prior to October 19th, 2014?

A Overwrote every active file? No, I'm not saying it overwrote every active file.

No.

Q Okay. So that statement where it says, "The active installation overwrote that data," it didn't overwrite all of the data. Correct?

A I don't know. I can't tell at this point, because -- I can't tell what was on there prior -- prior to that.

Page 47:15-19

Q Okay. You don't have any personal knowledge as to why there was a new installation of an operating system on, according to your date, October 19th, do you?

A No, I don't.

Page 260:12-17

Q Okay. You would agree with me, sir, that whichever one of the partitions it was installed on, installing the OS on that system would not necessarily obliterate or wipe out the data on the other partition. True?

A That's true.

Page 264:3-9

Q Okay. And I think we've asked this. You would agree that installing the OS on one of the many partitions would not obliterate or wipe out data on the others. Correct?

A If there are multiple partitions, just the installation of the operating system doesn't necessarily change anything on another partition.

(Viraj. Supp. Resp. at 8-9.)

- Mr. Racich “could not explain, why thousands of files pre-dating the operating system installation remain in the unallocated space on the Mathur computer (referred to as

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IT006), and confirmed that he has no firsthand knowledge that anybody was affirmatively taking steps to remove or wipe unallocated space:"

Pages 80:22-82:3

Q The unallocated space on IT006 wasn't 100 [percent] empty, was it?

A It was not 100 percent empty, no.

Q Okay. Would you agree that it is impossible for a user to know where previously deleted information was stored?

A Yes, from the point of like where in an unallocated space, yes.

Q Okay. And that's why you'd have to, if you wanted to make sure everything was completely wiped clean, make sure 100 percent of that space was filled. Correct?

A If you wanted to be sure and you knew what you were doing --

Q Right.

A -- and you're doing it in a way that you're being absolutely positive that all the data is removed, then you would either have to -- you have to empty everything out and overwrite it, either with a tool or filling it up with new data.

Q Right. And that's because the user has no ability to determine what parts of unallocated space would be overwritten by new data. Is that correct?

A That's -- yes.

Page 235:2-22

Q Okay. Question 69 [referring to Mr. Racich's Witness Statement]: "Can you draw any conclusions from your findings regarding the unallocated space on IT006?" Answer: "In my experience, this is a -- this unusual lack of residual data in unallocated space is consistent with this being taken to remove or wipe unallocated space." Did I read that correctly?

A Yes.

Q You would agree with me, sir, that there are other possible explanations for this?

A There could be, yes.

Q More than one. Correct?

A It's possible.

Page 274:1-10

Q Take a look at Exhibit 6. And I'll represent to you that these are the file carving results in the unallocated space for computer IT006. And there are [242,984]14 files in that unallocated space. Would you consider that to be almost nothing?

MR. GAGEN: Objection. Form.

THE WITNESS: No, but I don't know where this came from.

(*Id.* at 9-10.)

- Mr. Racich "conceded that, had Viraj intended to destroy evidence, better tools were available than using an operating system installation:"

Pages 62:22-64:8

Q Okay. There are more effective ways of removing data from a computer. In fact, isn't there certain types of software that specifically does that?

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A Yes.

A Yes. There's lots of tools that are designed to overwrite data in different manners on a computer. They can be used to destroy specific files. They can be used to destroy the entire hard drive. They can be used to only target unallocated space. They can get rid of file -- cluster tips on files. So there's lots of different tools. Eraser is very common one that's free. CCleaner, does a -- puts itself forth to do that and does a good job, as far as removing certain information. Those are the two that I see. DBAN is another, that's a full-data destroyer, as far as volumes and hard drives. There's lots of tools. There -- you could probably find 50 separate tools. Evidence Eliminator is a tool. It doesn't work that well anymore, but it used to be used commonly.

Q And through your forensics review -- and you, I mean your company -- you saw no evidence of any of those tools being used. Is that correct?

A No, we did not see that.

Page 232:10-18

Q Okay. Regarding Question No. 68, did you undertake any analysis to look for applications that might be used to wipe or clean the data? I think you said you didn't.

A No, I did take the -- I did look for it.

Q And you didn't see any evidence of it?

A No, there was no -- ...there was no evidence of that.

(*Id.* at 10-11.)

- Mr. Racich “offered no explanation as to why, if a person intended to conceal evidence, he or she would reload the evidence onto a computer immediately after having wiped it:”

Page 97:5-98:2

Q Okay. And can you help me understand, if somebody was trying to, let's say, overwrite, or to use your words, permanently overwrite any reference to a link file shortcutting to s.s. secrets or any reference to s.s. secrets, why that person or someone would then put that information back on that computer?

MR. GAGEN: Objection. Format.

THE WITNESS: I don't believe that would be a good decision if they were doing that.

BY MR. BOYCE:

Q Nonlegal, it doesn't make any sense, does it?

A The way you're phrasing it, yeah, it doesn't make any sense.

(*Id.* at 11.)

- Mr. Racich performed “a less than full forensic review:”

Page 177:3-9

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Q Okay. But you don't believe -- and you can take a second, you've got both of those in front of you -- that you distinguished in either your witness statement, the text, or your affidavit, the text, whether you were looking at magnetic drives or solid state drives?

A No, I don't believe I did.

Pages 200:14-201:21

Q Okay. Now, with respect to a full forensic review, if there was unallocated space -- are you with me so far?

A Yes.

Q -- you should be or a forensic expert should be able to determine exactly how much unallocated space there was. Correct?

A In terms of gigabytes, yes.

Q Okay.

A It's fairly straightforward process.

Q Okay. How much unallocated space was there on IT007?

A I don't know off -- off the top of my head. That's something that I could easily figure out, but I don't know.

Q What about IT008?

A I don't know.

Q What about IT009?

A I don't know.

Q What about IT016?

A I don't know.

Q And IT006?

A I don't know.

Q Okay. Correct me if I'm wrong, I know that you talked about unallocated space in your affidavit, and at various points in your witness statement. You didn't articulate or reveal how much unallocated space there was for any of those devices, did you?

A No.

Page 229:8-20

Q Okay. Going back to a previous answer where you say "virtually no text," were you looking for English text?

A Looking for English text, yes. And as well, I understand that the users may be writing in other languages. But there's certain other information that's not -- especially with regards to websites, that is still in English. So that was the primary review.

Q Okay. Again, you're back to the primary. You didn't do a review for non-English text, did you?

A Specifically for -- no, I -- no.

(*Id.* at 11-12.)

III. ARGUMENTS

Valbruna argues that Mr. Racich's forensic inspection shows that Viraj acquired and used Valbruna's operating practices. (Memo. at 12.) At a minimum, Valbruna argues that Viraj had access to at least the following operating practices: 141N, 212MN, ACMV, AIM1 and CMXC, but asserts that the evidence indicates that Viraj had access to all of the operating practices that Mr. Zausa stole from Valbruna, *e.g.*, the "s.s. secrets" folder whose name is identical to that of the folder found on Mr. Zausa's computer. (*Id.*) Valbruna further argues that Ms. Mathur's repeated accessing of these operating practices indicates that Viraj used this knowledge in its production of steel. Ms. Mathur is the head of Research and Development and Quality Assurance at Viraj. As such, she is the most knowledgeable person at Viraj on how the company makes it stainless steel and is designated as Viraj's 30(b)(6) witness on the subject. (*Id.* at 13; Ex. J.)

Valbruna argues that despite having these operating practices in its possession, Viraj concealed and failed to produce evidence that it acquired and used Valbruna's operating practices. (*Id.* at 14.) Viraj repeatedly and falsely stated that it had never acquired Valbruna's operating practices in discovery responses to interrogatories, requests for documents and in deposition testimony. (*Id.* at 14-15.)

Valbruna further asserts that Viraj not only failed to fully disclose that it had Valbruna's operating practices, it also failed to preserve evidence since (1) assuming Viraj was true in its representations, Viraj is no longer in possession or control of the relevant USB devices discussed above and (2) any evidence was destroyed when the new operating system was installed on Ms. Mathur's computer. (*Id.* at 16-17.)

Viraj's actions amount to spoliation of evidence, and Valbruna argues that default is the appropriate sanction. (*Id.* at 18.) Valbruna argues that Viraj failed to comply with the ALJ's

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order compelling discovery by (1) refusing to disclose the identity of all electronic devices on which Valbruna's operating practices were saved; (2) failing to preserve some or all of these devices (Respondents have stated "those devices no longer exist" (Ex. N, Resp. to Valbruna's Mot. to Compel Forensic Inspection, at 18)); (3) failing to make all electronic devices used by Ms. Mathur and the other five individuals available for forensic inspection; and (4) failing to produce the operating practices and other documents contained on these devices that would have been captured by the search terms in the court-ordered inspection protocol. (*Id.* at 18.)

Valbruna argues that Viraj's misconduct warrants default, namely (1) Viraj's failure to preserve and its destruction of electronic storage devices and the Valbruna operation practices saved on them and (2) Viraj's refusal to produce Valbruna's operating practices. (*Id.* at 19.)

As for the first basis, namely its duty to preserve and destruction of USB devices, Valbruna argues that (1) Viraj had a duty to preserve its computer, USB Devices and other electronic media; (2) it failed to preserve the devices with a culpable state of mind; and (3) Valbruna's operating practices are relevant and Valbruna has suffered prejudice. (*Id.* at 19-24.)

Regarding Viraj's refusal to produce Valbruna's operating practices, Valbruna argues that any late production of those operating practices by Viraj at this point would be prejudicial and that such a production cannot cure that prejudice. (*Id.* at 24-25.) Valbruna further argues that any late production cannot be trusted given Viraj's previous conduct in this investigation. (*Id.* at 25.)

Valbruna argues that while the ALJ may "tailor" sanctions, default is the most appropriate remedy in this instance. (*Id.* at 27.) In the alternative, Valbruna argues that the ALJ find that (1) Viraj has received and is using the Valbruna operating practices and (2) preclude Viraj from arguing that Valbruna's operating practices are trade secrets and were

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misappropriated. (*Id.* at 26-27.) Valbruna further seeks (1) disgorgement of any Valbruna operating practices in Viraj's possession; (2) permission to assert Valbruna's previously excluded operating practices; and (3) any additional relief it may deem necessary upon completion of its forensic inspection. (*Id.* at 27-29.)

In its response, Viraj concedes that the forensic inspection indicates that Viraj possessed certain Valbruna operating practices. (*Opp.* at 7.) However, Viraj argues that the forensic inspection does not justify Valbruna's inference that Viraj actually used the operating practices to make stainless steel. (*Id.* at 8-9.) Viraj argues that there is conflicting expert testimony as to whether Viraj's stainless steel uses Valbruna's operating practices. (*Id.*) Viraj asserts that the sanction of default judgment is not appropriate. (*Id.* at 8.) Rather, Viraj asserts that there are less severe sanctions that are appropriate and available, namely (1) a finding for purposes of this Investigation that Viraj had possession of Valbruna operating practices; (2) a finding for purposes of this Investigation that Valbruna operating practices were accessed through a computer owned by Viraj India; (3) an adverse inference for purposes of this Investigation that the Valbruna operating practices asserted in this Investigation were used by Viraj India; and (4) requiring Viraj India to compensate Valbruna its reasonable litigation expenses deemed appropriate by the forensic inspection results. (*Id.* at 13.) Viraj further argues that the results of the forensic inspection do not warrant permitting Valbruna to add its previously excluded operating practices since there is nothing in the forensic inspection that would affect the decision to exclude the operating practices. (*Id.* at 13-14.)

Staff supports the finding of default against Viraj. (*Staff Resp.* at 1.) Specifically, Staff agrees that Viraj has engaged in spoliation and should be sanctioned. (*Id.* at 9.) Staff argues that (1) Viraj had control over the evidence and had an obligation to preserve the evidence at the time

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it was destroyed or not preserved; (2) the information was destroyed or not preserved with a culpable state of mind; and (3) the destroyed evidence is highly relevant to Valbruna's trade secret misappropriation claim. (*Id.* at 10-15.) Staff argues that default is warranted in light of the apparent bad faith involved with Viraj's conduct. (*Id.* at 16.) Staff further notes that should the ALJ decline to find default, adverse inference that Viraj received and used Valbruna's operating practices is warranted. (*Id.* at 16, note 15.) Staff argues that Viraj has failed to offer any explanation of its conduct in this investigation and that the prejudice resulting from Viraj's actions cannot be overcome by Viraj. (*Id.* at 17-18.) Staff further argues that while lesser sanctions are available, any sanction less than default would fail to serve as an effective deterrent to future bad-faith spoliation. (*Id.* at 18-19.) Staff argues, in the alternative, that Viraj violated the ALJ's forensic inspection order by possibly withholding the relevant USB devices discussed *supra*. (*Id.* at 19-20.) Should this be true, Staff argues that the withholding of these devices would be in direct violation of the ALJ's forensic inspection order and Viraj should be sanctioned accordingly.

In its Reply, Valbruna argues that the evidence shows that Viraj not only had access to Valbruna's trade secret, but that it also used them in making their own grades of stainless steel. (Reply at 2.) Valbruna points to specific chemistries of 22 of Viraj's operating practices that are identical to Valbruna's own chemistries. (*Id.* at 3-5.) Valbruna further argues that Viraj's data sheets, which contain Viraj's operating practices for manufacturing steel angles in various sizes, are remarkably similar to those used by Valbruna and the evidence shows that Viraj's data sheets were created in September 2006, when Mr. Zausa left Valbruna. (*Id.* at 5-6.) Moreover, Valbruna argues that Mr. Racich's forensic inspection showed that Viraj had saved Valbruna's steel making know-how and accessed them from multiple computers and USB devices over the

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course of several years. (*Id.* at 6-7.) Valbruna argues that Viraj has failed to take full responsibility for its conduct in this investigation and that Viraj has, instead, chosen to remain silent. (*Id.* at 9-12.) Valbruna further asserts that default is the only appropriate sanction as it follows the Commission's decision to find respondents in default in *Opaque Polymers*, Inv. No. 337-TA-883, and that Viraj's litigation misconduct has tarnished all aspects of this Investigation. (*Id.* at 14-16.) Valbruna further argues that a finding of default is necessary in order to deter similar conduct in the future. (*Id.* at 17-18.) Finally, Valbruna urges the ALJ to reinstate the excluded operating practices. (*Id.* at 18-19.)

In its opposition to Valbruna's Reply, Viraj argues that the reply is not warranted because Valbruna could have made the same arguments in its original motion. (*See generally* Reply Opp.) Viraj makes no arguments relating the substance of Valbruna's Reply. (*Id.*)

In its supplement, Viraj argues that Mr. Racich's affidavit in support of the motion for default is "flawed." (Supp. at 7-8.) Specifically, Viraj argues that Mr. Racich overstated his assertions that the Mathur computer was overwritten and that Mr. Racich "cannot state that every active file on the Mathur computer were [sic] overwritten, and that at most a single partition on the Mathur computer would have been affected by the operating system installation." (*Id.* at 8-9.) Viraj further argues that Mr. Racich could not explain why thousands of files that pre-dated the operating system remained in an unallocated space or why better programs that could destroy evidence (other than installing a new operating system) were not used. (*Id.* at 8-10.) Viraj further argues that Mr. Racich was unable to provide a reason as to why Ms. Mathur would reload the evidence onto the computer after having sought to destroy that evidence. (*Id.* at 11-12.) Finally, Viraj argues that lesser sanctions are warranted and that "discovery issues" have no bearing on the remaining issues in the Section 337 investigation. (*Id.* at 12-13.)

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As noted above, both Valbruna and Staff opposed permitting Viraj to supplement its response. Valbruna and Staff also set forth their substantive responses to the arguments set forth in Viraj's motion to supplement. Specifically, Valbruna argues that nothing in Mr. Racich's deposition undermines the statements in his affidavit or written testimony. (Valbruna Resp. Supp. at 2.) Valbruna explains in detail how the active data on an individual's computer would be deleted when a new operating system is installed. (*Id.* at 2-5.) Valbruna further argues that Viraj clearly failed in its duty to preserve evidence by inexplicably allowing the installation of the new operating system. (*Id.* at 5-7.) Valbruna further argues that Viraj's supplement fails to address the actions that it took in concealing and destroying evidence. (*Id.* at 7-9.) Valbruna further notes that Viraj's arguments for less severe sanctions are similar to those proposed in its original response and should be rejected for the same reasons set forth in Valbruna's Reply. (*Id.* at 9-11.) Valbruna argues that default judgment is the appropriate sanction. (*Id.* at 9-11.)

Staff similarly argues that the information set forth in Viraj's supplement fails to rebut Valbruna's arguments and Mr. Racich's findings from his forensic inspection. (Staff. Resp. Supp. at 8-10.) Staff further argues that Viraj misconstrued Valbruna's forensic evidence and fails to identify any inaccuracies or inconsistencies with Mr. Racich's testimony that would undermine Valbruna's accusations. (*Id.* at 10-11.) Staff argues that default judgment is the appropriate sanction. (*Id.* at 12-14.)

IV. ANALYSIS

A. APPLICABLE LAW

1. Sanctions

The ALJ's authority to impose sanctions stem from Commission Rule 210.16, which addresses default and states, in relevant part:

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A party may be found in default as a sanction for abuse of process, under §210.4(c), or failure to make or cooperate in discovery, under §210.33(b).

19 C.F.R. § 210.16 (a)(2).

Commission Rule 210.33(b) addresses sanctions for the failure to make or cooperate in discovery. Specifically, it states:

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

- (1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;
- (2) Rule that for the purposes of the investigation the matter or matters concerning the order or subpoena issued be taken as established adversely to the party;
- (3) Rule that the party may not introduce into evidence or otherwise rely upon testimony by the party, officer, or agent, or documents, or other material in support of his position in the investigation;
- (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (5) Rule that a motion or other submission by the party concerning the order or subpoena issued be stricken or rule by initial determination that a determination in the investigation be rendered against the party, or both; or
- (6) Order any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure. Any such action may be taken by written or oral order issued in the course of the investigation or by inclusion in the initial determination of the administrative law judge. It shall be the duty of the parties to seek, and that of the administrative law judge to grant, such of the foregoing means of relief or other appropriate relief as may be sufficient to compensate for the lack of withheld testimony, documents, or other evidence. If, in the administrative law

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judge's opinion such relief would not be sufficient, the administrative law judge shall certify to the Commission a request that court enforcement of the subpoena or other discovery order be sought.

19 C.F.R. §210.33(b).

2. Spoliation

Spoliation “is the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Certain Opaque Polymers*, Inv. No. 337-TA-883, Order No. 27 (October 20, 2014) (“Opaque Polymers”), at 4 (*citing Micron Tech., v. Rambus, Inc.*, 645 F. 3d 1311, 1320 (Fed. Cir. 2011)). The duty to preserve attaches not just when suit is filed, but whenever a party knows or should know that evidence may be relevant to anticipated litigation. *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001); *see also Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir.1998) (“This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation ... as for example when a party should have known that the evidence may be relevant to future litigation.”); *MOSAID Techs. Inc. v. Samsung Elecs. Co.*, 348 F.Supp.2d 332, 336 (D.N.J.2004) (noting that a litigant “is under a duty to preserve what it knows, or reasonably should know, will likely be requested in reasonably foreseeable litigation”); *Pueblo of Laguna v. United States*, 60 Fed.Cl. 133, 135 (2004) (“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation—most commonly when suit has already been filed, ... but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation.”)

In order to show that spoliation conduct warrants the sanctions, “a party must show: (1) that the party having control over the evidence had an obligation to preserve it at the time it was

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destroyed or materially altered; (2) that the records were destroyed or materially altered with a ‘culpable state of mind’ and (3) that the destroyed or materially altered evidence was ‘relevant’ to the claim or defense of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable fact finder could conclude that it would support that claim or defense.” *Opaque Polymers* at 7-8 (citing *Jandreau v. Nicolson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007)). More specifically, to warrant the sanction of dismissal, there must be a showing of clear and convincing evidence of bad-faith spoliation and prejudice to the opposing party. *Micron v. Rambus*, 645 F.3d 1311, 1328-29 (Fed. Cir. 2011).

As noted above, the obligation to preserve the evidence falls on the party having control over the evidence. A party has a duty to preserve relevant electronic records, including email correspondence and back-up media, when anticipating litigation. (*Opaque Polymers* at 5 (citing *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 441 (Feb. 28, 2007).) In determining when the duty triggers, the Federal Circuit has stated that “[t]his is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation.” *Micron*, 645 F.3d at 1320. “[T] duty exists, for a defendant, at the latest, when the defendant is served with the complaint.” *Stanley v. Creative Pipe, Inc.*, 269 F.R.D. 497, 522 (E.D. Va 2010) (citations omitted).

In order to find that a party acted with a “culpable state of mind,” most courts require a finding of bad faith before imposing any sort of sanction for spoliation. *Stanley*, 269 F.R.D. at 529. The Federal Circuit has held that to find bad-faith, the court must find that the spoliating party “intended to impair the ability of the potential defendant to defend itself.” *Micron*, 645 F.3d at 1326 (citations omitted). “The fundamental element of bad faith spoliation is advantage-

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seeking behavior by the party with superior access to information necessary for the proper administration of justice.” *Id.* The focus is on the “intent” of the acting party – not whether the party “knew or should have known.” *Id.* at 1327 (“On remand, the district court should limit its bad faith analysis to the proper inquiry: whether Rambus ‘intended to impair the ability of the potential defendant to defend itself,’ without regard to whether Rambus ‘should have known’ of the propriety of its document destruction.”) (internal citations omitted).

The final consideration is whether the spoliated evidence is relevant to the investigation and whether the loss of that evidence is prejudicial. *Opaque Polymers* at 15 (citations omitted). The spoliated evidence is relevant if “a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.” *Id.* (citing *Stanley v. Pipe*, 269 F.R.D. at 531). The loss of such evidence is prejudicial when “the party claiming spoliation cannot present ‘evidence essential to its underlying claim.’” *Stanley*, 269 F.R.D. at 532. “In satisfying that burden, a party must only ‘come forward with plausible, concrete *suggestions* as to what [the destroyed] evidence *might have been*.” *Micron*, 645 at 1328.

If it is shown that spoliator acted in bad faith, the spoliator bears the “heavy burden” to show a lack of prejudice to the opposing party because “[a] party who is guilty of ...intentionally shredding documents... should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import.”

Id. (citations omitted). In other words, “if a party acted in bad faith in failing to preserve evidence then relevance and prejudice are presumed.” *Opaque Polymers*, at 17. Where there is such a presumption, the spoliating party may rebut this presumption by showing “that the innocent party has not been prejudiced by the absence of the missing information.” *Stanley*, 269 F.R.D. at 532.

B. ANALYSIS

1. Viraj's obligation to preserve the evidence at the time it was destroyed or materially altered

There appears to be no dispute that Viraj was in control of Ms. Mathur's laptop and the USB devices that were attached to it. (*See generally* Viraj's Response and Supplemental Response.⁴) Thus, the evidence undisputedly shows that Viraj was in control of the computers, electronic devices, and email accounts and servers that were subject to the forensic inspection and that it was in control of them when they were altered or destroyed. In particular, there is no dispute that Ms. Mathur's laptop computer and USB devices found to have been attached to said laptop were in Viraj's control at least since Viraj's duty to preserve was triggered. Moreover, that duty to preserve the evidence was triggered not only when Viraj was served with the Complaint, but Viraj was further made aware of its obligation by its previous counsel on October 16, 2014 – just days after the investigation was instituted on October 10, 2014. (Viraj Resp. at Ex. A.)

As for the additional requested USB devices per the ALJ's forensic inspection order, the ALJ notes that Viraj has not yet produced those USB devices, nor has it provided any explanation as to why the USB devices have yet to be produced, especially in light of Mr. Racich's forensic inspection which revealed that USB devices were used despite Viraj's representations to the contrary. Regardless as to the current state of the devices, the evidence

⁴ The ALJ notes that there are new and different arguments raised by Viraj in its supplement that are in conflict with its original response, *e.g.*, "Specifically, Viraj in its September 18, 2015, Response to Valbruna's Motion acknowledged that the forensic evidence detailed in the Racich Affidavit appears to show that files with characteristics mirroring those of files misappropriated from Valbruna by Giancarlo Zausa were accessed on the Mathur computer in 2014. Viraj has not, and does not, concede that Valbruna's interpretation of the meaning and significance of this information is correct."

The ALJ declines to consider any new arguments raised in Viraj's supplement that are in conflict with its original response. The purpose of the supplementation was limited to submitting any **new** information that may have been learned from Mr. Racich's deposition. It was **not** an opportunity for Viraj or its new counsel to file a different response in an attempt at a do-over.

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clearly shows that at least the four USB devices outlined in Mr. Racich's forensic inspection exist, and Viraj had a duty and obligation to preserve those devices.

Therefore, the ALJ finds that Viraj had an obligation to preserve and not alter the computers and storage devices in its possession or control.

2. Culpable state of mind

The ALJ finds that the evidence shows that Viraj acted with a culpable state of mind. Here, the focus is on Viraj's intent in destroying or altering Ms. Mathur's computer and destroying or withholding the USB devices and whether such an intent was advantage seeking or blameworthy. *See Micron*, 645 F.3d at 1326 ("The fundamental element of bad faith spoliation is advantage-seeking behavior by the party with superior access to information necessary for the proper administration of justice."); *Opaque Polymers* at 12 ("I adopt here what I believe to be the more reasoned position that spoliation sanctions may be imposed as long as the destruction of evidence was 'blameworthy' (*i.e.*, with fault), with the degree of culpability impacting the severity of the sanction."). In other words, the question before the ALJ is whether Viraj's behavior was in bad faith. *Micron*, 645 F.3d at 1328-9 (there must be a showing of clear and convincing evidence of bad-faith spoliation and prejudice to the opposing party).

The significance of Ms. Mathur and her laptop computer in this investigation is undoubtedly clear: Ms. Mathur is the head of Research and Development and Quality Assurance at Viraj. (Memo. at Ex. V, CX-0168C at 58-59.) Any information relating to Viraj's manufacturing processes and new production grades of stainless steel are her responsibility. (*Id.*) Indeed, Viraj identified her as the most knowledgeable person on how it makes steel and designated her as the corporate representative on metallurgical and steelmaking processes. (Memo. at Ex. J.) In other words, the information that was at the very heart of this investigation

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– Viraj’s steel manufacturing process—would have been Ms. Mathur’s responsibility. It follows that any information Ms. Mathur had access to or reviewed relating to steel manufacturing is relevant to this investigation and the type of evidence that Viraj would have been obligated to preserve. This would include her laptop computer as well as any other electronic and storage devices that she used in fulfilling her role.

Nevertheless, despite the importance of Ms. Mathur’s laptop computer to this investigation and despite having been specifically advised by their counsel on the duty to preserve evidence, Viraj inexplicably installed a new operating system on Ms. Mathur’s computer thereby effectively overwriting any information stored on that computer. Viraj submits no explanation in either its Response or its Supplement for its actions. Moreover, the timing in which the installation of the operating system occurred is highly suspicious. The new operating system was installed on October 19, 2014 only nine (9) days after the investigation was instituted (October 10, 2014) and only three (3) days after Viraj received its litigation hold instructions from its U.S. counsel (October 16, 2014). Viraj provides no explanation as to why Ms. Mathur’s computer needed a new operating system installed or why that installation occurred after this investigation had been instituted and after its U.S. counsel advised it of its duty to preserve evidence.

The similarities between the files accessed from Ms. Mathur’s computer, the files on the USB devices attached to said computer, and the information stolen by Mr. Zausa on behalf of Viraj further indicate a culpable state of mind. Specifically, Ms. Mathur accessed files in a “s.s. secrets” folder, which was the exact same name that Mr. Zausa labelled his folder on his own USB device that he used to download Valbruna’s steel making chemistries. (Memo. at Ex. Q; Ex. P at 30-51; Ex. R, CDX-0004.9C; Ex. C at ¶¶ 21-28.) The evidence further shows that Ms.

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33. The following is a list of the files that are known to have been accessed by the user “Mathur” from the E:\:

- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets(b)\SS Secret Chemistries\212MN.XLS
- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\ACMV.XLS
- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\aim1.xls
- E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\141N.XLS

(Memo. Ex. P at ¶ 33 (Racich Affidavit); *see also* Ex. P at Ex. 6.)

Moreover, the file sizes of these Excel files accessed by Ms. Mathur on her computer are identical to the file sizes of the identically named Excel files downloaded by Mr. Zausa.

- “212MN.XLS”:

E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets(b)\SS Secret Chemistries\212MN.XLS	10/19/2013 10:41:54 AM	12/31/2014 4:22:40 PM	98816
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(Ex. P at ¶ 38 (summary of the metadata for files accessed by user “Mathur”); *see also* Ex. P at Ex.6.)

The screenshot shows a Windows file explorer window with the following path: s.s. secrets > C > Documents and Settings > gzausa > Desktop > da tenere > clienti > s.s. secrets. A list of files is visible, including 141N.XLS, 212MN.XLS, 214MN.XLS, 214MNC.XLS, 214MNCwXLS.xls, 312el.XLS, A253MA.XLS, ACMV.XLS, ACNW.XLS, aim1.xls, aim2.xls, aimr.xls, aimrs.xls, aimu.xls, Aip.xls, AIPDE.XLS, AIS.XLS, AIS01.XLS, AISC.XLS, AISDE.XLS, AISH.XLS, AISH1.XLS, AISH2.xls, AISL.XLS, and AISLDE.XLS. A '212MN.XLS Properties' dialog box is open, displaying the following information:

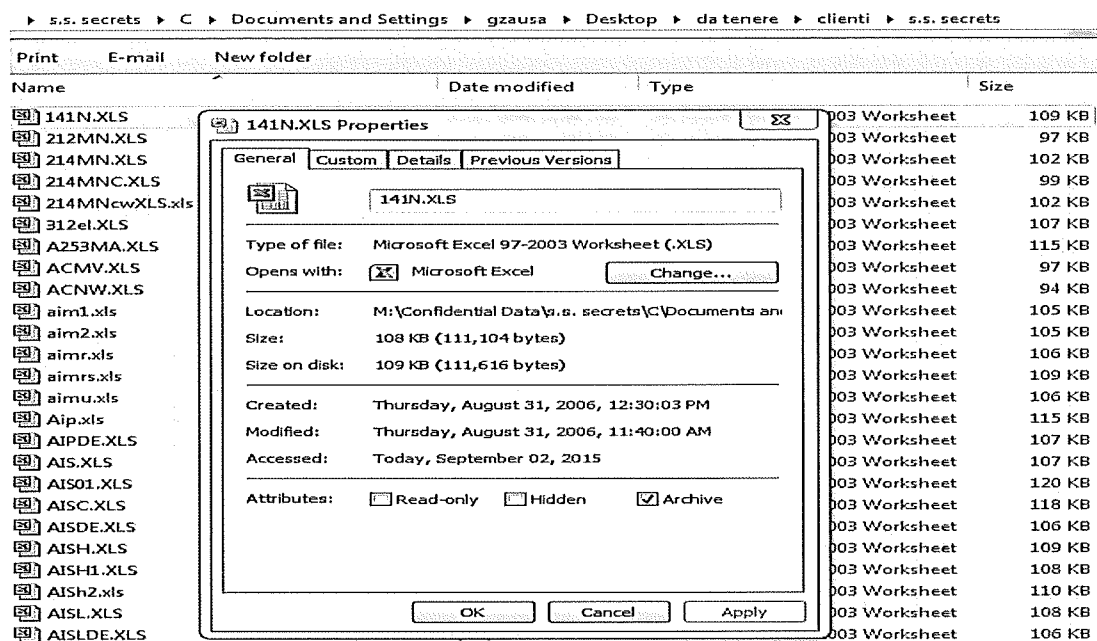
- General tab selected
- File name: 212MN.XLS
- Type of file: Microsoft Excel 97-2003 Worksheet (.XLS)
- Opens with: Microsoft Excel
- Location: M:\Confidential Data\s.s. secrets\C\Documents and Settings\gzausa\Desktop\da tenere\clienti\s.s. secrets\212MN.XLS
- Size: 96.5 KB (98,816 bytes)
- Size on disk: 97.0 KB (99,328 bytes)
- Created: Thursday, August 31, 2006, 12:30:03 PM
- Modified: Thursday, August 31, 2006, 11:40:00 AM
- Accessed: Today, September 02, 2015
- Attributes: Read-only, Hidden, Archive

(Memo. Ex. G at ¶¶ 4-5.)

- “141N.XLS”:

E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\141N.XLS	10/19/2013 10:41:04 AM	12/4/2014 1:30:45 PM	111104
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(Memo. at Ex. P at ¶ 38 (summary of the metadata for files accessed by user “Mathur”); *see also* Ex. P at Ex.6.)



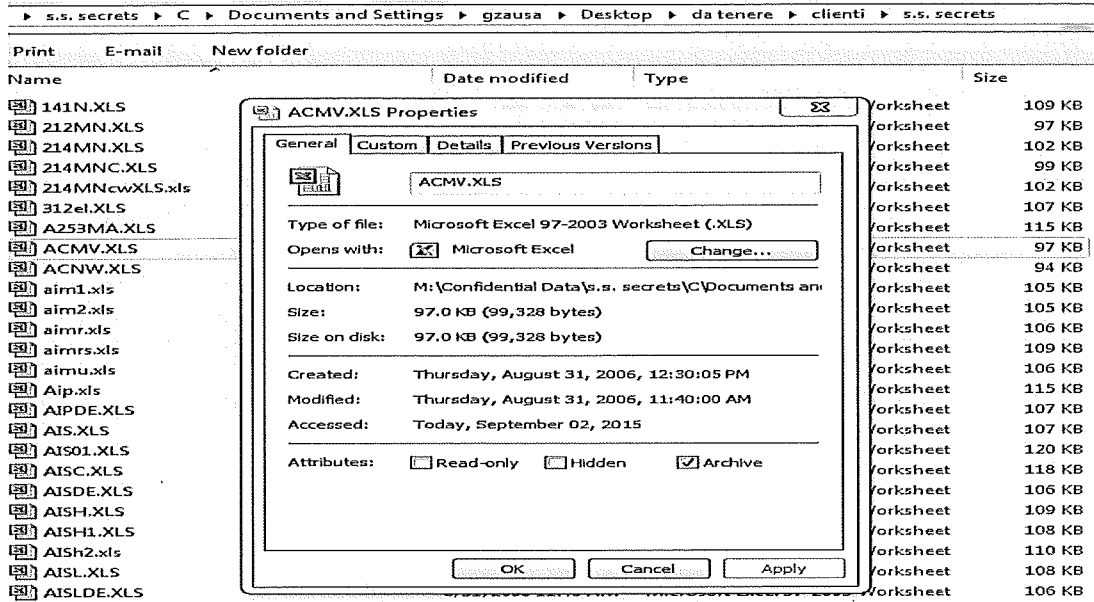
(Memo. Ex. G at ¶¶ 4-5.)

- “ACMV.XLS”:

E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\ACMV.XLS	10/19/2013 10:41:04 AM	12/4/2014 1:31:51 PM	99328
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(Memo. at Ex. P at ¶ 38 (summary of the metadata for files accessed by user “Mathur”); *see also* Ex. P at Ex.6.)

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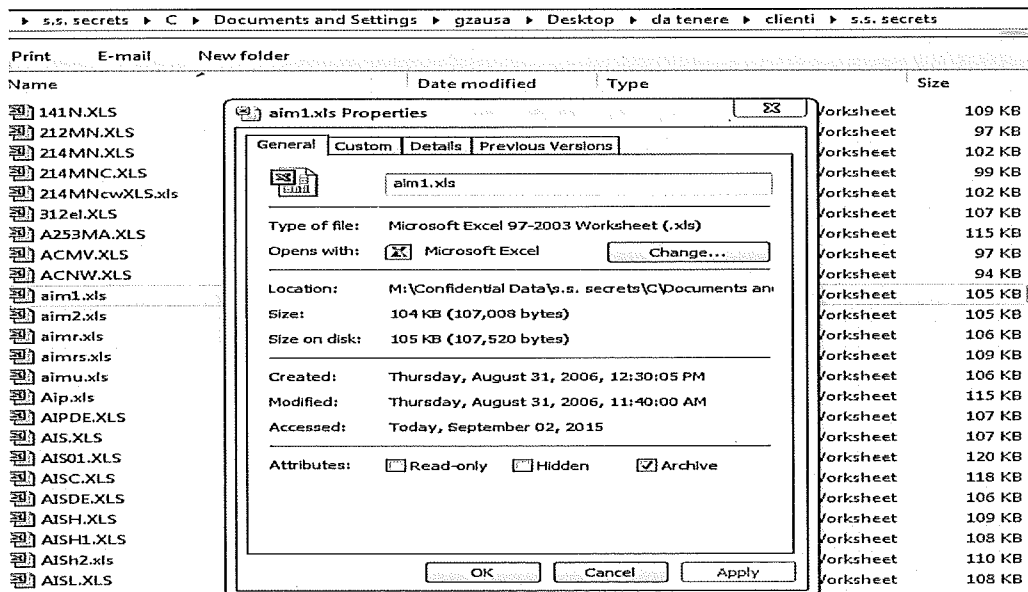
(Memo. Ex. G at ¶¶ 4-5.)

- “aim1.xls”:

E:\IMPORTANT\R&D File for Project 30.09.2013\s.s. secrets\aim1.xls	10/19/2013 10:41:04 AM	12/4/2014 1:31:30 PM	107008
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(Memo. at Ex. P at ¶ 38 (summary of the metadata for files accessed by user “Mathur”); *see also*

Ex. P at Ex.6.)



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(Memo. Ex. G at ¶¶ 4-5.)

Given the identical names and size of the files stolen by Mr. Zausa and accessed by Ms. Mathur on her computer, the motivation behind the sudden installation of a new operating system on Ms. Mathur's computer becomes clear – Viraj deliberately sought to destroy any evidence that Ms. Mathur accessed these folders and files. While there may be a plausible explanation for Viraj's conduct, Viraj has been silent on the subject in both its Response and its Supplement.

Similarly, Viraj's conduct relating to the USB devices is highly suspect. The ALJ ordered Viraj to produce USB devices. However, Viraj represented to the ALJ, Valbruna and Staff that those devices no longer existed. (Memo. at Ex. N at 18.) At a minimum, the evidence shows that there are at least 3 USB devices that contained information identical (both in name and in file size) to the information stolen by Mr. Zausa. Viraj's continued failure to produce said devices, despite evidence of their existence, or provide any explanation further supports a finding of culpability on Viraj's part.

Taken as a whole, the entirety of Viraj's actions, especially as it relates to Ms. Mathur's laptop and the USB devices she used, indicates that Viraj acted with a culpable state of mind. Clearly, Viraj intended to erase any evidence of Ms. Mathur's access and use of the "s.s. secrets" folder and information disclosed therein by installing the new operating system. Viraj further hoped that a blanket denial of the existence of any USB devices would further shield its activities. Absent any explanation from Viraj as to reasons behind its actions, the only inference that can be drawn is that Viraj acted with a culpable state of mind in destroying the evidence.⁵

⁵ The ALJ further notes that this conclusion is supported by the testimony and conviction of Mr. Giancarlo Zausa as well as the head of Viraj India, Mr. Rahul Suri. (Compl. ¶¶ 72-73; Exs. 9 and 22.) While the Italian court conviction is certainly not binding on the Commission, a review of that tribunal's fact finding efforts reveals a

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The ALJ further finds that Viraj's supplement did little to discredit Mr. Racich's work. As Valbruna and Staff correctly noted, the bulk of Viraj's supplement focused on the installation of a new operating system on Ms. Mathur's computer. However, the ALJ finds little in the cross-examination that discredits Mr. Racich's work or his affidavit. Rather, the bulk of Viraj's questioning appears to focus less on Mr. Racich's actual methodology and conclusions and instead focuses on speculation and topics of little probative value.

First, Viraj attempts to discredit Mr. Racich's statement that "any active data that may have been in existence on IT006 prior to this time would have been deleted" by noting that Mr. Racich concedes that not every active file was overwritten. The ALJ finds such an argument unpersuasive – what matters is that *some* data was overwritten – it does not matter that not every single possible file in every single possible partition in Ms. Mathur's computer was lost. There is no dispute that some data was lost – data that was clearly the subject of a litigation hold. The fact that not every single active file was overwritten does not negate the fact that the installation of the new operating system erased relevant evidence that Viraj had a duty to preserve.

Similarly, the fact that there were better programs out there or that other files that predated the operating system installation still remained on the computer does not change the fact that certain data was overwritten with the operating system installation and, further, that Mr. Racich's forensic inspection revealed that that lost data appears to be the very trade secrets at issue. Indeed, Viraj's argument regarding the pre-dated files cuts both ways – if Ms. Mathur was able to save those files, then why was the other information that was identical to that of Valbruna's trade secrets suddenly missing from the laptop after the new operating system was

thorough investigation into the events leading to the conviction. The resulting convictions clearly support Valbruna's allegation that Viraj had access to its steel making trade secrets and used them.

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installed. Why did Ms. Mathur deliberately keep some information while deleting other information?

The ALJ further finds Mr. Racich's inability to explain why someone would "reload" evidence onto a computer if they were trying to conceal it or his lack of firsthand knowledge as to whether Viraj was seeking to affirmatively remove or wipe space to be of little probative value as well. Mr. Racich is a forensic expert in this investigation – his expertise is not in motive guessing. Indeed, even if Mr. Racich had provided an explanation, the ALJ would have given it no weight since it would be nothing more than mere speculation.

In sum, the ALJ found little in the portions of Mr. Racich's deposition testimony relied upon by Viraj that would discredit the work that he performed or raise any question as to the validity of his results and conclusions.

The ALJ notes that in Viraj's original response and in the supplemental response there is a glaring lack of explanation of the installation of the new operating system on Ms. Mathur's computer *especially in light of the litigation hold*. There is no explanation as to why Ms. Mathur's computer was not put aside and a new computer issued to her if she was having problems with her old operating system. There is no explanation that this was a routinely scheduled upgrade for all of Viraj's computers (but even if there was, Ms. Mathur's computer should not have been upgraded given what happens with the operating system installation). Ms. Mathur is a key player in this investigation – she is tasked with making Viraj's stainless steel. There can be no question that any information in her possession would be highly relevant to this investigation. There has been no explanation from Viraj as to its actions. The ALJ can only assume that it knew exactly what it was doing in installing the operating system and withholding (or destroying) USB devices.

The ALJ finds that Viraj acted in bad faith.

3. Relevancy and prejudice

Here, there is no question that the information deleted from Ms. Mathur's computer and the information contained on the missing USB devices are relevant to this investigation. As set forth above, Ms. Mathur is the head of Research and Development and Quality Assurance for Viraj. There can be no question that any information in her possession is highly relevant to Valbruna in proving its trade secret case. Indeed, that information is not only relevant for Valbruna, but also relevant and necessary for the Staff and the ALJ in conducting a thorough and complete investigation. *Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 525-526 (D. Md. 2010) ("For the judicial processes to function properly, the court must rely 'in large part on the good faith and diligence of counsel and the parties in abiding by these rules [of discovery] and conducting themselves and their judicial business honestly.' The court's inherent authority to impose sanctions for spoliation of evidence is a means of preserving 'the integrity of the judicial process' so that litigants do not lose 'confidence that the process works to uncover the truth.'") (citations omitted) (emphasis original).

The evidence shows that the information contained at least 4 chemistries that were identical to those stolen by Mr. Zausa. The loss of this information directly undermines Valbruna's ability to show that Viraj stole its steel making processes and, further, that Viraj used the information in making its own steel. As noted above, the ALJ found that Viraj acted in bad faith in destroying or altering the evidence. Viraj has not, however, come forth with any explanation as to what the destroyed information might have been. Again, as with its glaring lack of explanation in installing a new operating system and withholding USB devices, Viraj

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presents no explanation in its Response or Supplement as to why the deleted information may have been deleted. (*See generally* Viraj. Resp. and Viraj Supp.)

Therefore, the ALJ finds that the information lost on Ms. Mathur's computer as well as on the missing USB devices is highly relevant to this investigation. The ALJ further finds that the loss of such information is prejudicial to Valbruna, Staff and the ALJ.

4. Conclusion

As set forth above, the ALJ finds that (1) Viraj had a duty to preserve the destroyed and missing evidence; (2) Viraj destroyed or withheld that evidence with a culpable state of mind and in bad faith; and (3) the destroyed or withheld information is relevant and its loss is prejudicial to Valbruna. In sum, the ALJ finds that Viraj's conduct in this investigation was in bad faith and is so egregious as to warrant sanctions.

C. APPROPRIATE SANCTIONS

The ALJ found that Viraj's conduct in this investigation in spoliating evidence is worthy of sanctions. The ALJ turns now to the appropriate sanction for Viraj's conduct.

As noted *supra*, Valbruna and Staff argue that default is the most appropriate sanction. (Mot. At 19; Staff Resp. at 1.) Viraj argues, however, that less severe sanctions are warranted, namely (1) a finding that Viraj had possession of Valbruna's operating practices; (2) those operating practices were accessed through a computer owned by Viraj; (3) Valbruna's operating practices were used by Viraj; and (4) compensating Valbruna for reasonable litigation expenses for the forensic inspection. (Viraj Resp. at 13-14.)

The ALJ finds that the most appropriate sanction in this instance is a finding of default against Viraj. As set forth in detail *supra*, Viraj's conduct in this investigation is so egregious

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and prejudicial as to warrant a finding of default as a sanction for its blatant misconduct. Viraj was aware of its duty to preserve evidence at least since being notified of such an obligation by its U.S. counsel, Squire Patton Boggs, on October 16, 2014.⁶ Nevertheless, despite this notification, only 3 days later, Ms. Mathur's computer had a new operating system installed by Viraj. Additionally, despite this notification, Viraj failed to preserve the USB devices, especially those used by Ms. Mathur on her computer. This installation is without explanation and on the computer of the person in charge of Research and Development and Quality Assurance for Viraj -- this was not some low level employee receiving a routine update. At the very least, Ms. Mathur's computer should have immediately been set aside if there was a technical issue that precluded her from using it. However, there is no explanation as to why Viraj installed a new operating system on Ms. Mathur's computer or any explanation as to why the USB devices have not been produced. Moreover, there is complete silence from Viraj in the face of the results of the forensic inspection – Viraj is silent on its motives for its actions and silent on what information was destroyed. This lack of explanation can only lead to one conclusion: Viraj deliberately destroyed evidence with the intent of undermining Valbruna's ability to prove its trade secret case. Indeed, up until the results of the forensic inspection were revealed, Viraj continued to deny that it used Valbruna's steel making trade secrets despite an independent judicial tribunal's finding that it stole and was in possession of such information. Moreover, even faced with the glaring revelation of its misconduct, Viraj continues to remain silent and seeks to prolong this investigation to its advantage. Such conduct is the exact sort of conduct sanctions are intended to deter. *Stanley*, 269 F.R.D. at 525-6.

⁶ This date gives Viraj India the benefit of the doubt that it was unaware of its obligations under U.S. law. However, even with this assumption, Viraj must have been aware that its actions were under suspicion since the Italian authorities began their investigation in 2006.

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The ALJ further finds that default is the appropriate sanction given what little effort was required of Viraj to meet its obligation to preserve the destroyed evidence. The main focus of the spoliation centers around a single laptop computer and 4 USB devices. Viraj could have easily set aside Ms. Mathur's laptop computer and collected any and all USB devices that she used. However, rather than meet this discovery obligation at little to no cost or effort, Viraj instead inexplicably installed a new operating system on Ms. Mathur's computer and avoided collecting or destroyed USB devices. Indeed, it required more effort to destroy or hide the evidence rather than simply preserving it – in this instance, setting a laptop computer and USB ports on a single shelf in one person's office. When the efforts necessary to preserve evidence are so minimal, the failure to do is all the more inexcusable.

As for lesser sanctions, which include proceeding to an evidentiary hearing, the ALJ declines to allow Viraj to continue to use Valbruna's trade secrets by forcing the parties to an evidentiary hearing. The outstanding issues, *i.e.*, injury, domestic industry, whether the steel making processes are trade secrets, simply pale in comparison to the misconduct by Viraj. The ALJ finds that prolonging this investigation simply gives Viraj additional time to continue to misappropriate and use Valbruna's trade secrets. The evidence against Viraj is so overwhelming and its conduct is so egregious that the ALJ finds that the best and only sanction is a finding of default. Indeed, given the extent of Viraj's misconduct, the ALJ finds that all aspects of the investigation have been tainted since it will never be clear whether the record before the ALJ and the Commission is complete and accurate. In other words, Viraj's credibility in this investigation is tainted – consequently, any findings or evidence that rely on representations from Viraj will be highly suspect and of doubtful veracity. Moreover, as Staff correctly noted, Commission precedent allows for a finding of default regardless as to whether other issues, such as injury, had

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not yet been decided. *See Certain Opaque Polymers, Comm'n Op.*, (April 30, 2015) (affirming the ALJ's finding of default in Order No. 27).

V. CONCLUSION

The ALJ does not regularly issue sanctions in his investigations for misconduct. Indeed, in his nearly eight years at the Commission, the ALJ has only issued sanctions a handful of times despite presiding over nearly 90 investigations.

However, the ALJ finds that the evidence of Viraj's misconduct in this investigation undoubtedly warrants sanctions and that the misconduct was so egregious and in such bad faith as to warrant a sanction of default. The blatant disregard Viraj has displayed for the rules of this Commission and the U.S. judicial system cannot be understated – Viraj was aware of its duty to preserve, but deliberately and continuously chose to ignore these duties. Furthermore, despite being presented with evidence of its misconduct, Viraj provides no explanation for its conduct and, further, continues to try to deny that it had acted improperly by retaining new counsel and asserting different arguments through the new counsel. Indeed, Viraj's conduct in this investigation and its complete lack of regard for rules is exactly the type of conduct that must be deterred in order to preserve the integrity of Section 337 Investigations at the U.S. International Trade Commission.

Therefore, the ALJ hereby GRANTS IN PART Motion No. 933-034. Specifically, the ALJ finds that Viraj has acted in bad faith in spoliating evidence and finds that the conduct warrants the sanction of default. The ALJ further ORDERS Viraj to disgorge any Valbruna operating practices in its possession.

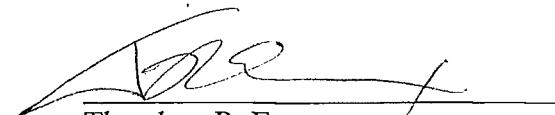
[REDACTED]

The ALJ DENIES, however, Valbruna's request to add the excluded operating practices. The ALJ finds that this ruling in Order No. 12, namely Valbruna's failure to show good cause for the late additions, is unaffected by the results of the forensic inspection.

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

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. Any party seeking to have any portion of this document deleted from the public version thereof shall also submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED


Theodore R. Essex
Administrative Law Judge

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

Inv. No. 337-TA-933

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached ORDER 17 has been served by hand upon the Commission Investigative Attorney **Reginald Lucas, Esq.** and the following parties as indicated, on **December 22, 2015.**



Lisa R. Barton, Secretary
U.S. International Trade Commission
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