

In the Matter of

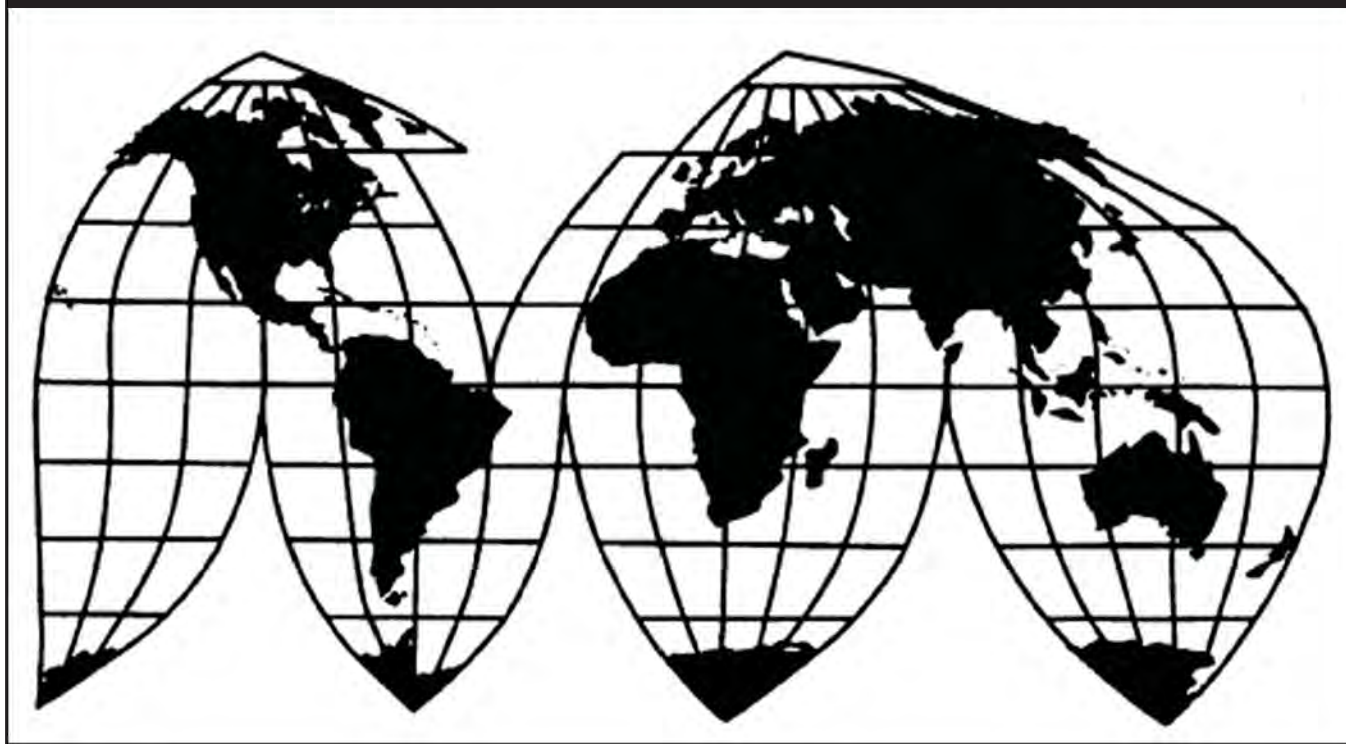
**CERTAIN RUBBER RESINS AND
PROCESSES FOR MANUFACTURING
SAME**

337-TA-849

Publication 4816

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U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN RUBBER RESINS AND
PROCESSES FOR MANUFACTURING
SAME**

Inv. No. 337-TA-849

**NOTICE OF COMMISSION DETERMINATION TO AFFIRM-IN-PART AND
REVERSE-IN-PART THE FINAL INITIAL DETERMINATION OF THE
ADMINISTRATIVE LAW JUDGE AND TO TERMINATE THE INVESTIGATION
WITH A FINDING OF VIOLATION WITH RESPECT TO CERTAIN RESPONDENTS;
ISSUANCE OF LIMITED EXCLUSION ORDER**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to affirm-in-part and reverse-in-part the final initial determination (“final ID”) of the administrative law judge (“ALJ”) in the above-identified investigation and to terminate the investigation with a finding of violation with respect to certain respondents. The Commission has issued a limited exclusion order.

FOR FURTHER INFORMATION: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3065. 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 June 26, 2012, based on a complaint filed on behalf of SI Group, Inc. of Schenectady, New York (“SI Group”) on May 21, 2012, as supplemented on June 12, 2012. *77 Fed. Reg.* 38083-84 (June 26, 2012). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“Section 337”), in the sale for importation, importation, or sale after importation into the United States of certain rubber resins by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United

States. The Commission's notice of investigation named as respondents Red Avenue Chemical Corp. of America of Rochester, New York; Thomas R. Crumlish, Jr. of Rochester, New York; Precision Measurement International LLC of Westland, Michigan; Sino Legend (Zhangjiagang) Chemical Co., Ltd. of Zhangjiagang City, China; Sino Legend Holding Group, Inc. c/o Mr. Richard A. Peters of Kowloon, Hong Kong; Sino Legend Holding Group Ltd. of Hong Kong; HongKong Sino Legend Group, Ltd. of North Point, Hong Kong; Red Avenue Chemical Co. Ltd. of Shanghai, China; Ning Zhang of North Vancouver, Canada; Quanhai Yang of Beijing, China; and Shanghai Lunsai International Trading Company of Shanghai City, China. A Commission investigative attorney participated in this investigation.

On January 14, 2013, the Commission issued notice of its determination not to review an ID to amend the complaint and notice of investigation to add Red Avenue Group Limited of Kowloon, Hong Kong; Sino Legend Holding Group Inc. of Majuro, Marshall Islands; Gold Dynasty Limited c/o ATC Trustees (Cayman) Limited of Grand Cayman, Cayman Islands; Elite Holding Group Inc. c/o Morgan & Morgan Trust Corporation (Belize) Limited of Belize City, Belize as respondents. 78 *Fed. Reg.* 3817-18 (January 17, 2013).

On June 17, 2013, the presiding ALJ issued his final ID, finding a violation of Section 337. On July 1, 2013, SI and the Respondents filed petitions for review. On July 9, 2013, SI, the Respondents, and the Commission investigative attorney filed responses thereto. On July 16, 2013, Respondents filed a notice of new authority. On July 24, 2013, the Complainant submitted an objection to the notice of new authority.

The following parties and members of the public have submitted statements on the public interest: the Complainant (July 17, 2013); the New York State Chemical Alliance (August 14, 2013); and the American Chemistry Council (August 14, 2013).

On September 9, 2013, the Commission issued notice of its determination to review the final ID in its entirety and to solicit briefing on the issues on review and on remedy, the public interest, and bonding. 78 *Fed. Reg.* 56734-36 (Sept. 13, 2013). On September 23, 2013, each of the parties filed a written submission, and on September 30, 2013, each of the parties filed a reply submission.

After considering the written submissions on review and the record in this investigation, the Commission has determined to affirm-in-part and reverse-in-part the final ID of the ALJ and to terminate the investigation with a finding of violation of Section 337. Specifically, the Commission has found the following respondents in violation: Precision Measurement International LLC of Westland, Michigan; Sino Legend (Zhangjiagang) Chemical Co., Ltd. of Zhangjiagang City, China; Sino Legend Holding Group, Inc. of Kowloon, Hong Kong; Sino Legend Holding Group Ltd. of Hong Kong; Red Avenue Chemical Co. Ltd. of Shanghai, China; Shanghai Lunsai International Trading Company of Shanghai City, China; Red Avenue Group Limited of Kowloon, Hong Kong; and Sino Legend Holding Group Inc. of Majuro, Marshall Islands. After considering the submissions of the parties on remedy, the public interest, and bonding, the Commission has determined to issue a limited exclusion order for a period of ten (10) years prohibiting the unlicensed importation of rubber resins made using any of the SP-1068 Rubber Resin Trade Secrets that are manufactured by, for, or on behalf of violating respondents or any of their affiliated companies, parents, subsidiaries, licensees, contractors, or other related

business entities, or their successors or assigns. The Commission has determined that the public interest factors of 19 U.S.C. § 1337(d) do not preclude the issuance of a remedy. The Commission has further determined that the covered products may be imported during the period of Presidential review pursuant to 19 U.S.C. § 1337(j) under bond in the amount of 19% of entered value.

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
Acting Secretary to the Commission

Issued: January 15, 2014

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

In the Matter of

**CERTAIN RUBBER RESINS AND
PROCESSES FOR MANUFACTURING
SAME**

Investigation No. 337-TA-849

LIMITED EXCLUSION ORDER

Having reviewed the record and submissions in this investigation, the Commission has found Precision Measurement International LLC of Westland, Michigan; Sino Legend (Zhangjiagang) Chemical Co., Ltd. of Zhangjiagang City, China; Sino Legend Holding Group, Inc. of Kowloon, Hong Kong; Sino Legend Holding Group Ltd. of Hong Kong; Red Avenue Chemical Co. Ltd. of Shanghai, China; Shanghai Lunsai International Trading Company of Shanghai City, China; Red Avenue Group Limited of Kowloon, Hong Kong; and Sino Legend Holding Group Inc. of Majuro, Marshall Islands (collectively, "Respondents") in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337). Specifically, the Commission has found the aforementioned Respondents to have violated Section 337 in the unlawful importation, sale for importation, and sale after importation of certain rubber resins made using any of Complainant's trade secrets (the "SP-1068 Rubber Resin Trade Secrets") asserted in this investigation.

The Commission has also made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a limited exclusion order barring from entry for consumption is necessary, and accordingly, the Commission has determined to

issue a limited exclusion order prohibiting the unlicensed importation of rubber resins made using any of the SP-1068 Rubber Resin Trade Secrets that are manufactured by, for, or on behalf of Respondents or any of their affiliated companies, parents, subsidiaries, licensees, contractors, 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 the issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of nineteen percent (19%) of the entered value.

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

1. Rubber resins that are made using any of the SP-1068 Rubber Resin Trade Secrets by, for, or on behalf of Respondents or any of their affiliated companies, parents, subsidiaries, licensees, contractors, 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 ten (10) years from the effective date of this order, except under license of the owner of the SP-1068 Rubber Resin Trade Secrets asserted in this investigation, or as provided by law.
2. Notwithstanding paragraph 1 of this Order, the aforesaid rubber resins are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption under bond in the amount of nineteen percent (19%) of the entered value, pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)) and the Presidential

Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43,251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty days after the date of receipt of this Order.

3. At the discretion of U.S. Customs and Border Protection (“CBP”) and pursuant to procedures that it establishes, persons seeking to import rubber resins that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to rubber resins imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
5. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission’s Rules of Practice and Procedure (19 C.F.R. § 210.76).

6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and CBP.
7. Notice of this Order shall be published in the *Federal Register*.

By order of the Commission.

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

Lisa R. Barton

Acting to Secretary to the Commission

Issued: January 15, 2014

**CERTAIN RUBBER RESINS AND PROCESSES FOR
MANUFACTURING SAME**

337-TA-849

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **John Shin, Esq.**, and the following parties as indicated, on **January 15, 2014**



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

ON BEHALF OF COMPLAINANT SI GROUP, INC.:

Lawrence T. Kass, Esq.
MILBANK, TWEED, HADLEY & MCCLOY, LLP
One Chase Manhattan Plaza
New York, NY 10005

() Via Hand Delivery
 Via Express Delivery
() Via First Class Mail
() Other: _____

**ON BEHALF OF RESPONDENTS REDAVENUE
CHEMICAL CORP. OF AMERICA, THOMAS R.
CRUMLISH, JR., PRECISION MEASUREMENT
INTERNATIONAL LLC, SINO LEGEND
(ZHANGJIAGANG) CHEMICAL CO., LTD., SINO
LEGEND HOLDING GROUP, INC., SINO LEGEND
HOLDING GROUP LIMITED, HONGKONG SINO
LEGEND GROUP, LTD., RED AVENUE CHEMICAL
CO. LTD, NING ZHANG, QUANHAI YANG, AND
SHANGHAI LUNSAI INTERNATIONAL TRADING
COMPANY:**

Michael R. Franzinger, Esq.
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

() Via Hand Delivery
 Via Express Delivery
() Via First Class Mail
() Other: _____

PUBLIC VERSION

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

In the Matter of

**CERTAIN RUBBER RESINS AND
PROCESSES FOR MANUFACTURING
SAME**

Inv. No. 337-TA-849

COMMISSION OPINION

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On June 17, 2013, the presiding administrative law judge (“ALJ”) (Judge Rogers) issued his final initial determination (“ID”) in this investigation, finding a violation of Section 337. Specifically, the ALJ found misappropriation of trade secrets and injury to a domestic industry as a result thereof.

Having considered the ID, the submissions of the parties, and the relevant portions of the record, the Commission has determined to affirm-in-part and reverse-in-part the final ID. The Commission has determined that there has been misappropriation of trade secrets, that there is actual injury and the threat of injury to a domestic industry, and that certain of the Respondents have violated Section 337 in the importation, sale for importation, or sale after importation of rubber resins. The Commission has determined to adopt the ALJ’s findings that are consistent with the Commission’s opinion as set forth below.

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I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on June 26, 2012, based on a complaint filed on behalf of SI Group, Inc. of Schenectady, New York (“SI Group” or “SI”) on May 21, 2012, as supplemented on June 12, 2012. *77 Fed. Reg.* 38083 (June 26, 2012). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“Section 337”), in the sale for importation, importation, or sale after importation into the United States of certain rubber resins by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. The Commission’s notice of investigation named as respondents Red Avenue Chemical Corp. of America of Rochester, New York; Thomas R. Crumlish, Jr. of Rochester, New York; Precision Measurement International LLC of Westland, Michigan (“PMI”); Sino Legend (Zhangjiagang) Chemical Co., Ltd. of Zhangjiagang City, China (“Sino Legend ZIG” or “Sino Legend”); Sino Legend Holding Group, Inc. c/o Mr. Richard A. Peters of Kowloon, Hong Kong; Sino Legend Holding Group Ltd. of Hong Kong; Hong Kong Sino Legend Group, Ltd. of North Point, Hong Kong; Red Avenue Chemical Co. Ltd. of Shanghai, China; Ning Zhang of North Vancouver, Canada; Quanhai Yang of Beijing, China; and Shanghai Lunsai International Trading Company of Shanghai City, China. A Commission investigative attorney participated in this investigation.

On January 14, 2013, the Commission issued notice of its determination not to review an ID to amend the complaint and notice of investigation to add Red Avenue Group Limited of Kowloon, Hong Kong; Sino Legend Holding Group Inc. of Majuro,

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Marshall Islands; Gold Dynasty Limited c/o ATC Trustees (Cayman) Limited of Grand Cayman, Cayman Islands; and Elite Holding Group Inc. c/o Morgan & Morgan Trust Corporation (Belize) Limited of Belize City, Belize as respondents. 78 *Fed. Reg.* 3817 (January 17, 2013).

On June 17, 2013, the presiding administrative law judge issued his final ID, finding a violation of Section 337. On July 1, 2013, Complainant and the Respondents filed petitions for review. On July 9, 2013, Complainant, the Respondents, and the Commission investigative attorney filed responses thereto.

On July 16, 2013, Respondents filed a notice of new authority, bringing a Chinese decision in a parallel case to the Commission's attention. On July 24, 2013, the Complainant submitted an objection to the notice of new authority, stating that the Chinese decision is not "new" because it issued the same day as the ID and could have been included in Respondents' petition for review, and that Respondents have not challenged the ALJ's order excluding the Chinese legal proceedings from evidence.¹

On July 17, 2013, Complainant filed a statement on the public interest, stating the issuance of a general exclusion order would not adversely affect the public health, safety, or welfare, consumers, or competitive conditions in the United States. On August 14, 2013, the New York State Chemical Alliance ("NYSCA") submitted a statement on the

¹ Respondents argued in their petition that "abstention and international comity warrant dismissal of Complainant's trade secret claims" because a Chinese court has held that Sino Legend did not misappropriate Complainant's alleged trade secrets under Chinese law. Respondents' Petition at 97-98. However, abstention and international comity do not relieve the Commission of its statutory responsibility to determine whether there is a violation of Section 337. 19 U.S.C. § 1337(c); see also *Tiankui Group Co. Ltd. v. International Trade Comm'n*, 661 F.3d 1322, 1327, 1332-33 (Fed. Cir. 2011) (holding that the question of whether there is a violation of Section 337 by reason of misappropriation of trade secrets is governed by (U.S.) federal common law, even where that misappropriation occurs abroad) ("We therefore detect no conflict between the Commission's actions and Chinese law that would counsel denying relief based on extraterritorial acts of trade secret misappropriation relating to the importation of goods affecting a domestic industry.").

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public interest, stating that “it is not in the public interest to allow respondents to benefit financially from the sale of these products in the United States, particularly where there are other domestic manufacturers (beyond SI Group) of the products concerned.” On August 14, 2013, the American Chemistry Council submitted a statement on the public interest, with a text similar to that of the NYSCA letter. On August 21, 2013, U.S. Senator Charles E. Schumer and U.S. Representative Paul D. Tonko filed a joint submission on the public interest noting that “Protecting this domestic industry against unfair competition is in the public interest.”

On September 9, 2013, the Commission issued notice of its determination to review the final ID in its entirety, and requested briefing on the issues on review and on remedy, the public interest, and bonding. On September 23, 2013, each of the parties filed submissions in response to the Commission’s notice, and on September 30, 2013, each of the parties filed submissions in reply thereto.

B. Overview of the Technology

PTOP (p-tert-octyl phenol) tackifiers (also called “novalak resins”) are used to manufacture tires. ID at 5. The tackifier bonds one layer of a tire to another. *Id.* at 6. “Tack” is defined as the force required to pull apart two pre-vulcanized rubber mixtures that have been pressed together under certain defined conditions. U.S. Patent No. 8,030,418, col. 1, lines 46-48.

The process for synthesizing the resins involves two steps: an alkylation reaction followed by a condensation reaction. The alkylation reaction belongs to a class of reactions known as a Friedel-Crafts reaction, *i.e.*, the modification of an aromatic ring by the addition of an alkyl chain (in the presence of an acid catalyst). In the primary

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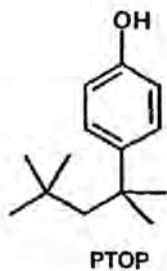
alkylation reaction, Complainant reacts[

]

[

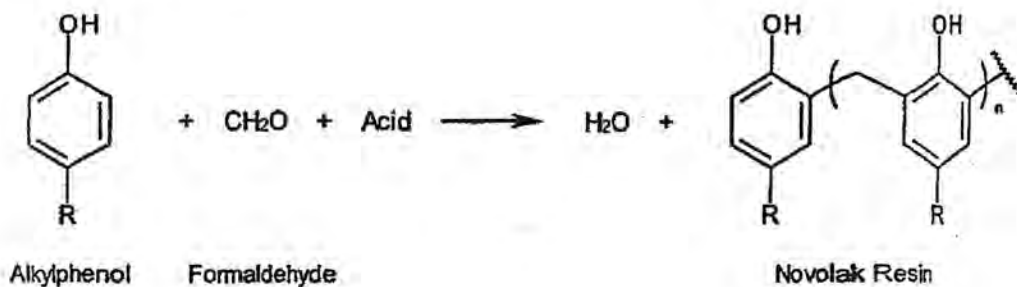
]

ID at 65. The product of this alkylation reaction is PTOp:



See generally Complaint ¶73; ID at 65; RX-510 at SINOZJG_0022250 (discussing Friedel-Crafts reactions); RX-508 at 849RESP 0004657.

In the condensation reaction, the PTOp (*i.e.*, the product of the alkylation reaction) is further reacted with formaldehyde to form a resin (by the cross linking of aromatic rings into a polymer):



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where the alkylphenol is PTOP and where the acid is[] See Complaint ¶¶72-73; ID at 244. The use of a substituted phenol (to which class PTOP belongs) in a condensation reaction has been previously studied. Cf. RX-291 at 1:10-15; 2:13 (U.S. Patent No. 3,005,797, issued in 1961) (using an octyl phenol).

Complainant has alleged as trade secrets the use of[

] Complainant has several patents on various aspects of the technology, but states that certain features of its process are not contained in its patents or published patent applications. The parties further dispute whether and to what extent aspects of the process can be reverse-engineered from the final product. In all, Complainant has asserted the existence of 7 alkylation trade secrets, 10 condensation trade secrets, and that the overall combination of the 17 individual trade secrets is itself a protectable trade secret.

C. Accused Products

The accused products are Respondents' resins designated as SL-1801, SL-1801 LFP, SL-1802, SL-1802 LFP, and SL-7015. ID at 6. The ALJ found arguments relating to SL-1805 to be waived. *Id.* at 6-7. The SL-1805 product was not mentioned in Complainant's or Respondents' petitions for review or their responses, or in their submissions in response to the Commission Notice of Review; thus, the Commission affirms waiver as to SL-1805. We address whether SL-7015 is still part of the

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investigation in the section on injury, *infra*, as argued by Complainant in its contingent petition for review.

II. STANDARD FOR DETERMINATION ON REVIEW

Once the Commission has determined to review the decision of the ALJ, the agency has all of the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. 5 U.S.C. § 557(b); *Certain Acid-Washed Garments and Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 4-5 (Aug. 6, 1992). Commission Rule 210.45(c) implements 5 U.S.C. § 557(b). In other words, once the Commission decides to review the decision of the ALJ, the Commission may conduct a review of the findings of fact and conclusions of law presented by the record under a *de novo* standard.

III. DISCUSSION

A. The Law of Trade Secrets

Misappropriation of trade secrets is a method of unfair competition defined by the common law. *TianRui Group Co. Ltd. v. ITC*, 661 F.3d 1322, 1327 (Fed. Cir. 2011). Paragraph (a)(1)(A) of Section 337 governs the importation of articles derived from common law forms of unfair competition:

Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E), into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

- (i) to destroy or substantially injure an industry in the United States;
- (ii) to prevent the establishment of such an industry; or
- (iii) to restrain or monopolize trade and commerce in the United States.

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19 U.S.C. § 1337(a)(1)(A). Therefore, there is a requirement not only that the complainant demonstrate the existence of a domestic industry, but also that there be actual substantial injury or the threat of substantial injury to a domestic industry.

In *TianRui*, the Federal Circuit held that “a single federal standard, rather than the law of a particular state, should determine what constitutes a misappropriation of trade secrets sufficient to establish an ‘unfair method of competition’ under section 337.” 661 F.3d at 1327. Sources of applicable law include the Uniform Trade Secrets Act (“UTSA”) and federal common law.

The elements of misappropriation of trade secrets are as follows: (1) the existence of a process that is protectable as a trade secret (*e.g.*, that is (a) of economic value, (b) not generally known or readily ascertainable, and (c) that the complainant has taken reasonable precautions to maintain its secrecy); (2) that the complainant is the owner of the trade secret; (3) that the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means; and (4) that the respondent has used or disclosed the trade secret causing injury to the complainant. *Certain Sausage Casings*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (nonreviewed in pertinent part); UTSA, § 1(4).

B. Which Alkylolation Steps are Protectable as Trade Secrets?

1. []

The ALJ found that [] is a trade secret and used by the Complainant. ID at 113-114. (citing CX-1570C, QQ.74, 83). The ALJ found that Complainant had taken steps to protect the secrecy of the []

[] and had made a *prima facie* case of showing that the [] is not

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generally known or ascertainable. *Id.* at 114-116 (citing CX-1570C, Q. 7). The ALJ also relied on the finding that there was a lack of competitors and that other resins were inferior in quality. The ALJ found that the Respondents failed to rebut the complainant's *prima facie* showing that the [] is not generally known or readily ascertainable. *Id.* at 117-118 (citing, *inter alia*, Tr. at 844:25-845:1; CX-1570C, Q.16). The ALJ rejected Respondents' argument that the [] in the alkylation reaction could be determined through reverse engineering based on the [] in the finished resin. *Id.* at 118-19 (citing CX-1570, Q.96). Finally, the ALJ found that the [] had economic value. *Id.* at 119-122.

Respondents argue that the ALJ erred in finding the existence of a trade secret in the [] because the Complainant is not entitled to claim a property right to a single value where the art discloses a range of values and the alleged secret falls within that range. Resps. Pet. at 14-15. Respondents rely on *Ultimax Cement Manuf. Corp. v. CTS Cement Manuf. Corp.*, 587, F.3d 1339, 1354-56 (Fed. Cir. 2009), and characterize the case in a parenthetical as an affirmance by the Federal Circuit of a district court's dismissal on summary judgment of a trade secret claim where the specific ratio of ingredients fell within the range of ratios disclosed in a patent. *Id.* at 15. Respondents state that Complainant's []

[] *Id.* at 15-16 (citing RX-510 [] and U.S. Patent No. 2,739,172).

Complainant argues that, to the contrary, the Federal Circuit has held that a plaintiff was entitled to trade secret protection for a specific value in a range in a case governed by the Uniform Trade Secrets Act (UTSA) based on testimony that the particular value was "very novel" and "very, very unusual." *Id.* at 31 (citing *BBA*

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Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC, 303 F.3d 1332, 1340 (Fed. Cir. 2002). Both the Complainant and the IA argue that the ALJ found that [] allows Complainant to make a superior product, and should be affirmed. *Id.* at 33 (citing ID at 120); IA Resp. at 9, 16.

The Commission affirms the ALJ's finding and adopts the ALJ's reasoning, set forth in the ID at 113-122. We agree with the ALJ that Complainant's asserted [] is protectable as a trade secret. While certain publications (Kirk-Othmer (RX-510) and RX-512) disclose [] Dr. Swager conceded that they do not disclose [] Tr. at 845:2-848:3 (discussing RDX-5C (graphically representing RX-510, RX-514, RX-293, and RX-512)).

Respondents cite the Federal Circuit's decision in *Ultimax Cement Manuf. Corp. v. CTS Cement Manuf. Corp.*, 587 F.3d 1339, 1354-56 (Fed. Cir. 2009), for the proposition that no one can claim a trade secret in a specific value where that value is part of a published range. In *Ultimax*, the Court explained that the district court stated on summary judgment that "the claimed trade secret of the use of a combination of lithium carbonate and citric acid in calcium sulphoaluminate cement had been publicly disclosed in a Japanese patent, [and] even if Plaintiffs were permitted to define the secret as a more specific ratio of the two compounds, the publication of the more general combination in the Japanese patent encompassed the specific ratio." Respondents understand this to mean that [] could not be protected as a trade secret because it was "encompassed" by a published range.

Complainant argues that other cases support trade secret protection for [] where a range is known, citing the Federal Circuit's decision in *BBA Nonwovens*

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Simpsonville, Inc. v. Superior Nonwovens, LLC, 303 F.3d 1332, 1340 (Fed. Cir. 2002).

However, *BBA Nonwovens* does not address the question of whether protection of a specific value is precluded by a published range. Rather, in that case, the Court merely cited an expert who stated that the elements in a combination were “very novel,” “really quite unusual,” and “very, very unusual.” *Id.*

The *BBA Nonwovens* decision indicates that if there is something special about the specific value [] then it may be protectable as a trade secret even where a range is known. The evidence shows that there is something special about []

[] ID at 113-14; 119. Indeed, the ALJ found that Dr. Banach explained that []

[] was first used in 1990 and was the “result of substantial expenditure on research and development by SI Group.” ID at 119 (quoting CX-1565C, Q.94). The ALJ did not make factual findings about whether Complainant still uses [] but the evidence shows that [] was at the very least used successfully for 15 years, and with [] Therefore, one can infer that Complainant believed that there is something beneficial about []

Respondents have not proven that they could have reverse-engineered [] Dr. Swager conceded that his calculations were based on certain assumptions, and Dr. Hamed testified that “you would have to already know the process used to make the final resin product in order to make a correlation” between a sample of the finished product and [] CX-1570C at Q.96. As discussed in the section on misappropriation, Respondents used this exact [] in their 2006 experiments.

The Commission concludes that the ALJ was correct in finding that [] was entitled to trade secret protection.

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2. []

The ALJ found that using [] in the alkylation reaction is a trade secret and used by the Complainant. ID at 131-35. The ALJ found that Complainant has taken reasonable steps to protect the secrecy of the process. *Id.* at 132. The ALJ reaffirmed his findings in other sections regarding the lack of competition and inferior resins of competitors as putative support for the *prima facie* case that the process is not generally known or ascertainable. *Id.* Finally, the ALJ found that the use of [] is a valuable trade secret. *Id.* at 133-35.

Respondents argue that the ALJ erroneously found that [] is a trade secret. ID at 131-35. Respondents state that it is obvious that any chemical process must have []

[] Resps. Pet. at 21 (citing RX-421C (Swagger Witness Statement), Q.108-17; RDX-7C). The Commission affirms the ALJ's finding and adopts the ALJ's reasoning, set forth in the ID at 131-135. Respondents cite the testimony of Dr. Swager who opined that [] was superior to other possible [] However, Dr. Hamed testified that Dr. Swager did not consider []

[] CX-1570C at Q.101. The Commission finds that the ALJ was correct in holding that [] is entitled to trade secret protection.

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3. Use of []

The ALJ found that the use of [] in the preparation of [] is not a trade secret. The ALJ found that Complainant made a *prima facie* case that the process was not generally known or readily available based on the same evidence of lack of competition as for other steps in the process, but found that the Respondents successfully rebutted the *prima facie* case. ID at 141. The ALJ relied on a 1990 article which reported that [] and an internal Complainant document acknowledging [] *Id.* at 141-42 (RX-508 at 849RESP_0004654); 144 (citing RX-146 at SIGITC0000053452).

Complainant argues that the ALJ erred in finding the use of [] is not a trade secret. The Complainant argues that the literature commonly recommends []

[] Comp. Pet. at 4, 6-7 (citing CX-1570C at Q.21). The Complainant also argues that there is no teaching to [] However, this argument confuses the order of the steps. The [] is used to [] and the company would decide whether to [] Whether [] would not change []

[] The ALJ properly relied on the 1990 article in finding that it was generally known that [] ID at 141-42 (citing RX-508 at 849RESP_0004654). The Commission concludes that the

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ALJ was correct in finding that the use of [] is not protectable as a trade secret.

Therefore, the Commission affirms the ALJ's finding and adopts the ALJ's reasoning, set forth in the ID at 141-145.

4. Use of []

The ALJ found that Complainant's process of [] is a trade secret and used by the Complainant. ID at 159-63. The ALJ found that Complainant made a *prima facie* showing that the process was not generally known or readily ascertainable based on the same evidence of lack of competition set forth for other steps. *Id.* at 160. The ALJ concluded that the []

[] includes a goal not accounted for by Dr. Swager, Respondents' expert, *i.e.*, [] *Id.* at 161-62. Finally, the ALJ found that the [] step had economic value. *Id.* at 162-63.

Respondents argue that Complainant's alleged [] trade secret is based on common sense and basic chemistry. Resps. Pet. at 27. Respondents argue that it is absurd to provide protection for []

[] *Id.* at 28 (citing RX-421C at Q.159).

Respondents argue that Complainant has not shown that [] is not generally known. *Id.*

The Commission affirms the ALJ's finding and adopts the ALJ's reasoning, set forth in the ID at 159-163. The ALJ's findings support that [] was more than just the [] because it included []

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[
] *i.e.*, more than just [] Tr. at
819. This means that there is a complex [
] which is protectable as a trade secret.
Complainant does not engage in the conventional [
] but rather the [] is a complex [
] CX-1565C, Q. 83; Tr. at 232:24-233:6; 820:3-
5. [] CX-
1570C, Q.24-28. Complainant's [] process is [
] CX-1570C,
Q. 24. Mr. McAllister stated that "a large amount of work that was done to [
] So it
wasn't a straightforward []" Tr. 236:2-7.
The Commission concludes that the ALJ was correct in finding that the [
] is protectable as a trade secret.
5. []
The ALJ found that the [] is
not a trade secret because it is dictated by [] and is disclosed in the literature.
ID at 168-71. The ALJ found that Complainant made a *prima facie case* that the
[] was not generally known or readily ascertainable based
on the same evidence of lack of competition set forth for other steps, but the ALJ found
that the Respondents rebutted this *prima facie* showing. *Id.* at 168-69. The Commission
affirms the ALJ's finding that the [] is not

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protectable as a trade secret and adopts the ALJ's reasoning, set forth in the ID at 168-171. Moreover, the Complainant did not petition for review of the ALJ's finding and did not raise the issue in its briefing on review. Therefore, this issue is waived.

6. []

The ALJ found that the [] for the alkylation reaction was not a trade secret. The ALJ found that Complainant had made a *prima facie* case that [] was not generally known or readily ascertainable based on the same evidence of lack of competition set forth for other steps, but found that Respondents rebutted this showing with a number of printed references. *Id.* at 177-78. The ALJ further found that the Complainant failed to show how this process has economic value but found that the Complainant has taken reasonable steps to protect this limitation.

The Commission affirms the ALJ's finding that the [] of the alkylation reaction was not protectable as a trade secret and adopts the ALJ's reasoning, set forth in the ID at 177-181. Moreover, the Complainant did not petition for review of the ALJ's finding, and did not raise the issue in its briefing on review. Therefore, the issue is waived.

7. []

The ALJ found that the combination of the following four features are a trade secret: []

]

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[] ID at 194-98. The ALJ found that Complainant made a *prima facie* showing that the limitation was not generally known or readily ascertainable for the same lack of evidence of competition as for the other steps. *Id.*

Respondents argue that the ALJ incorrectly concluded that aspects of Complainant's [] were protectable as trade secrets. Resps. Pet. at 33. Respondents argue that the ALJ erred in finding that Complainant made a *prima facie* showing that [] were not generally known based on the lack of competition absent a nexus between the lack of competition and the alleged trade secret. *Id.* (citing ID at 195; *Buffets*, 73 F.3d at 968-69 (9th Cir. 1996)). Respondents assert that [] was conventional, and that Complainant did not claim that any special [] *Id.* at 35 (citing RX-422 at Q290-91).

The Commission affirms the ALJ's finding and adopts the ALJ's reasoning, set forth in the ID at 194-198. The evidence supports the ALJ's findings that the use of [] are part of a protectable trade secret based on Complainant's experience that [] Respondents argue in their petition that [] is standard, but Dr. Hamed testified that '[

] CX-1570, Q.33. Respondents are correct, however, that the [] is sold as a standard [] and that it is standard for there to be [] RX-422C at 34, 290-91. Nevertheless, the assertion of a trade secret is with respect to the combination of elements, including [] As noted by the Complainant and

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the IA, the ALJ found the combination of elements, including [] to be a trade secret because the configuration offered [] ID at 197 (citing CX-1596C, Q.41; CX-608C). The Commission concludes that the ALJ was correct in finding that the [] is protectable as a trade secret.

C. Which Condensation Steps are Protectable as Trade Secrets?

1. Use of []

The ALJ found that the use of []

[] is a trade secret and used by the Complainant. ID at 212-17.

The ALJ found that Complainant made a *prima facie* showing that the use of []

[] was not generally known or readily ascertainable based on the same evidence of lack of competition as for other steps. *Id.* at 213. The ALJ found that Respondents **did** not rebut this *prima facie* showing. The ALJ found that Complainant has taken reasonable steps to protect the secrecy of its process and that the use of [] has economic value. *Id.* at 217.

Respondents argue that the ALJ's determination is contrary to Complainant's admissions that the use of [] is ascertainable through testing. Resps. Pet. at 43. Respondents argue that it was undisputed that resins made using [] will contain [] and Dr. Banach, Complainant's employee, testified that one can test for residuals in Complainant's product (SP-1068) which will tell them whether they are using [] *Id.* at 43-45 (citing RX-1C (Banach Depo. Tr.) at 249:6-251:6; Tr. at 184:4-23 (confirming deposition testimony)). Respondents acknowledge the ALJ's conclusion that testing

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would not differentiate between [] and [] *id.* at 46, or that testing would not differentiate the two without reference samples, *id.* at 47, and argue that this is a litigation-inspired distinction and further aver that the ALJ is making a distinction between [] *Id.* at 45-46. Finally, Respondents argue that the ALJ was wrong to conclude that the use of [] was not well known in the industry. *Id.* at 48 (citing RX-510 at SINOZIG_0022260).

Respondents also argue that the '217 patent is still relevant and has not been waived. Resps. Sub. at 10. Respondents assert that although the ALJ distinguished the '217 patent because it was directed to phenol-aldehyde type resins that can be used for a variety of end uses, the underlying chemical reaction between []

]to make resins had been known for a long time. *Id.* Respondents further argue that testing would allow one to reverse engineer the use [] *Id.* at 12.

Complainant argues that the ALJ was correct in determining that the use of [] is not ascertainable through testing. Complainant points out that the [] *Id.* at 56 (citing CX-1570C at Q.37; CX-1565C at Q.13; Tr. at 183:5-184:3). Complainant argues that it would not be possible to reverse engineer the finished product unless one already knew that [] *Id.* at 57 (citing CX-1570C at Q97). Complainant further argues that one would not be able to distinguish between the use of [] and [] without knowing [] *See Id.* at 57-58 (discussing Tr. 181:12-21; 182:11-16; 436:18-464:18). Similar to the Complainant, the IA states that the ALJ properly rejected the possibility of reverse-engineering, finding

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that reverse engineering cannot differentiate between [] and []
[] IA Resp. at 22 (citing ID at 214-17).
The ALJ found that the use of []
in the condensation reaction was a trade secret. The question presented by the petitions is
whether the use [] was generally known or readily ascertainable. The
ALJ observed that the Encyclopedia of Chemical Technology, RX-510 (“Kirk-Othmer”),
teaches that []

[] (citing RX-510 at SINOZJG_0022260). We agree that Kirk-Othmer does not
teach []

The ‘217 patent mentioned the use of []
[] We agree with Complainant and the IA
that Respondents waived reliance on the ‘217 patent because Respondents failed to
include the ‘217 patent in their petition for review. 19 C.F.R. § 210.43.

There remains the question of whether [] was
“readily ascertainable” by reason of reverse engineering. Complainant has argued that
that reverse engineering could reveal [] but would not reveal that
[] See ID at 214. On examination of
the review briefing and on inspection of Respondents’ emails with non-party Sumitomo,
we disagree with the ALJ because it appears that the analytical chemists inferred the
possible use of [] from the reverse engineering, i.e., [] We are

² Red Avenue hired Sumitomo to attempt to analyze Complainant’s product. Sumitomo analyzed the infra-
red spectrum of the product. On August 25, 2006, Sumitomo concluded that []

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not persuaded by Complainant's argument that Respondents did not appreciate that they were examining [] Indeed, Sumitomo appreciated that it was "a []" and then went on to describe [] lit observed based on the chemical fingerprint.³

Moreover, even if we agreed with Complainant, Complainant has not proven the independent economic value of [] Complainant has adduced testimony that [] yields tackier tackifier but Complainant has not proven that [] is superior to [] given that Sumitomo [] See CX-1584C at 849RESP_0010291.

The ALJ also concluded that the reverse engineering was unsuccessful because there could be an alternative source of [] ID at 214. We disagree with the ALJ that this rendered the reverse engineering unsuccessful in the sense that the use of [] was still "readily ascertainable." This infrared examination of the fingerprint of SP-1068 could be followed by experimentation to verify the process, and

[] RX-375C at SINOZIG_0023133. The ALJ found that this was an unsuccessful attempt at reverse-engineering SP-1068 because Sumitomo inferred [] and because the alternative explanations undercut the guess that [] ID at 214. As discussed herein, we conclude that this evidence demonstrates that the use of [] was readily ascertainable. CX-1584C (using PTO as an abbreviation for p-tert octyl phenol).

³ In some sense this issue may narrow down to whether there is a difference between "a []" and "[]" i.e., whether the article "a" that accompanies "[]" in the Sumitomo email changes the meaning of "[]" to something that is [] Complainant relies on testimony that the presence of [] does not allow one to tell the difference between [] and completely [] Comp. Resp. to Pet. at 57 (citing Tr. at 192:4-22). However, the Sumitomo email uses the word [] and Complainant, who bears the ultimate burden of persuasion, has not proven that "[]" in "a []" means something [] In other words, the testimony of what one may learn from reverse engineering seems to conflict with the actual inference made by Sumitomo.

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such verification would not detract from the fact that the use of “[]” was readily ascertainable from the infrared examination by analytical chemists.

We conclude that the Red-Avenue-Sumitomo reverse-engineering demonstrates that the use of “[]” was readily ascertainable but that other process steps, such as the use of “[]” were not, as explained elsewhere.

For these reasons, the Commission has determined to reverse the ALJ’s finding that Complainant has proven the existence of a trade secret in the use of “[]”

2. []

The ALJ found that the use of “[]” is not a trade secret. ID at 229-30. The ALJ found that Complainant used “[]” in its Shanghai plant from 2004-07. *Id.* at 230. The ALJ found that Complainant made a *prima facie* showing that “[]” was not generally known or readily ascertainable based on the same evidence of lack of competition set forth with respect to the other steps, but found that Respondents successfully rebutted the showing. *Id.* Namely, the ALJ found that Complainant’s patents disclose the use of “[]” *Id.* at 231 (citing U.S. Patent Nos. 8,030,418 (“the ‘418” patent”) and 7,425,602). Nevertheless, the ALJ found that the use of “[]” had economic value and that Complainant took reasonable steps to protect this process. ID at 234-35.

Complainant argues that the ALJ correctly found that U.S. Patent No. 7,772,345 (the “‘345 patent”) does not disclose the use of “[]” but erred in finding that the ‘418 and ‘602 patents do. Comp. Pet. at 8-9. As to the ‘418 patent, Complainant argues that

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Respondents' misappropriated the trade secret before the November 6, 2008, publication of the application that led to the '418 patent. *Id.* at 9. Complainant argues that Respondents misappropriated and used the [] trade secret in Nov. 2006, before the publication of the application which resulted in the '418 patent. *Comp. Sub.* at 31 (citing CX-1570C at Q.137; ID 515-16). Complainant argues that even if the information is now public, the UTSA permits the issuance of an injunction to negate the head start that a misappropriator gained. *Id.* at 10 (citing, *inter alia*, UTSA Sec. 1 cmt. (1985)).

The Commission affirms the ALJ's finding set forth in the ID at 229-235 that the use of [] was well known. In fact, Complainant's own patent, U.S. Patent No. 7,425,602, discloses the use of [] RX-498 (the '602 patent) at [] Tr. at 149; Tr. at 141-42; *see also* Tr. at 392. The Commission concludes that the use of the [] was not protectable as a trade secret.

3. []

The ALJ found that the use of [] is a trade secret and used by the Complainant. ID at 244-50. The ALJ found that the [] in U.S. Patent No. 8,030,418 ("the '418 patent") is [] whereas in Complainant's process it is [] and as a result the '418 patent does not disclose [] *Id.* at 246 (citing RX-3 at [] Respondents' Post-Hearing Brief at 56-57). The ALJ further found that the '418 process is directed to the use of [] and does not address the use of [] The ALJ found that Complainant has taken reasonable steps to protect the secrecy of its process. *Id.* at 245. The ALJ found that

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Complainant made a *prima facie* showing of [] based on the same evidence of lack of competition set forth for the other steps. *Id.* at 245.

The ALJ found economic value to [] and that the improvement to Complainant's process was the "result of substantial expenditure on research and development [and] leveraged years of practical experience at the company running the alkylation and condensation reactions." ID at 248-49 (citing CX-1565C, Q.97).

Respondents argue that the ALJ erred because the [] which is equivalent to [] is generally known because "[] appears in Complainant's U.S. Patent No. 8,030,418, *i.e.*, []" Resps. Pet. at 50-51 (citing RX-421C at Q316-32; Tr. at 138:16-139:14).

Respondents assert that Complainant has not proven that the [] is an improvement over the [] especially where Complaints admit that the [] *Id.* Respondents further argue that the ALJ erred in finding the '418 patent inapplicable because it was directed to [] rather than [] *Id.* at 52. Respondents counter that the '418 patent does not specify [] and Complainant []

[] *Id.* Respondents further argue that in making a public disclosure in a patent, Complainant has not followed the requirement of UTSA Sec. 1(4)(ii) to take reasonable steps to maintain secrecy. *Id.* at 53.

The Commission affirms the ALJ's finding, set forth in the ID at 244-250. Complainant's [] is [] CX-1565C, Q.22. Respondents have not shown that this was generally known or readily ascertainable. As to Respondents' reliance on the '418 patent, the ALJ found that the '418 patent disclosed

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[] ID at 246 (discussing RX-3 (the '418 patent) at [] Tr. at 194:18-195:11 (Banach); RX-421C at Q.318 (Swager); Respondents' Post-Hearing Br. at 56-57). Although the disclosed [] the ALJ found that the [] were different because Complainant uses [] We agree. Although in our view, the use of [] is not protectable as a trade secret, the [] is different [] and Complainant has shown that it has [] [] would have different composition than the [] in the patent. See Tr. 196:14-23. The [] therefore has independent economic value. We conclude that [] is protectable as a trade secret.

4. The Use of []

The ALJ found that the use of [] is not a trade secret but is used by the Complainant. ID at 257-60. The ALJ found that Complainant made a *prima facie* showing that the use of [] was not generally known or readily ascertainable based on the same evidence of lack of competition set forth with respect to the other steps but the ALJ found that the Respondents successfully rebutted the *prima facie* showing. The ALJ found that U.S. Patent No. 7,425,602 ("the '602 patent") teaches the use of [] ID at 259 (citing Tr. at 150:17-25; 368:23-396:6). Nevertheless, the ALJ found that the use of [] has economic value, *Id.* at 260, and that the Complainant took reasonable steps to protect its processes. *Id.* at 261.

Complainant argues that [] combined with [] avoids the need to [] Comp. Pet. at 15 (citing

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CX-1570C at Q.43). Complainant suggests that the ALJ erred in dismissing differences between the '602 patent and Complainant's process, *i.e.*, that Complainant's process uses [] and [] *Id.* at 16.

The Commission affirms the ALJ's finding and adopts the ALJ's reasoning, as set forth in the ID at 257-261. The ALJ was correct in finding that the '602 patent teaches [] ID at 259 (citing Tr. at 150:17-25; 368:23-396:6); RX-498 (the '602 patent) at 4:58-60. We conclude that the use of [] is not protectable as a trade secret. Further, Complainant has failed to prove that the use of [] has significance to the condensation process.

5. []

Although the ALJ found that the use of [] was not a trade secret, the ALJ found that the use of [] was entitled to protection as a trade secret and was used by the Complainant. ID at 268-72. The ALJ found that Complainant had made a *prima facie* showing that []

was not generally known because of the same evidence of lack of competition set forth with respect to the other steps, and found that Respondents did not rebut this showing. *Id.* at 268. The ALJ found that the [] had economic value and that Complainant had taken reasonable steps to protect the process. *Id.* at 270-72.

Respondents argue that the ALJ erred in finding []

[] to be a trade secret because Complainant has admitted that [] is equivalent to [] which Complainant disclosed in the '379 patent application. Resps. Pet. at 54-57 (citing RX-355 at [] CX-1570C at Q.47; RX-302 []). Both the Complainant and the IA argue that the ALJ

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properly concluded that the '602 patent does not disclose [] because the '602 patent is directed to [] IA Resp. at 26 (citing ID at 270). The IA states that Dr. Swager's testimony in support of Respondents' argument was conclusory whereas Dr. Banach gave unrebutted testimony regarding the difference in chemistry between [] *Id.* at 26-27 (citing ID at 270).

As discussed below, the Commission reverses the ALJ's determination that the use of [] was entitled to protection as a trade secret. Complainant uses []

[] ID at 268, which Complainant has admitted is equivalent to [] RX-555C at 51 n.12 (Complainant's Seventh Supplemental Response to Respondents' First Set of Interrogatories). The '602 patent discloses [] *See* RX-498 (the '602 patent) at 5:5-14. Complainant states that it uses [] which it states is different than [] although Dr. Banach conceded that [] ID at 263; CX-1570C at Q.47; RX-421C, Q.354; Tr. at 148:1-5. The ALJ found that the '602 patent discloses a similar [] but does not so do with [] ID at 270 (citing Tr. 853:13-23). However, Complainant has admitted that []

[] *See* Comp. Resp. to Pet. at 65 ("Therefore, as stated in SI's interrogatory responses, it is equivalent to state [] RX-555C at 51, n.12."). Indeed, the [] *See* ID at 260 (discussing CX-1565C, Q.28). Thus, contrary to the ALJ's finding, it is irrelevant,

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for purposes of the asserted trade secret, whether [] because the

[] Further, to the extent that there is

difference between [] and []

] Complainant has not proven that this difference has an independent economic value. For these reasons, the Commission has determined to reverse the ALJ's finding that [] is protectable as a trade secret.

6. []

The ALJ found that the use of []

] was entitled to protection as a trade secret. ID at 281-87. The

ALJ found that the Complainant used a [] at its

Shanghai plant between 2004 and 2007, and has otherwise used []

] *Id.* at 281. The ALJ found that Complainant has taken reasonable steps to protect the secrecy of its process. *Id.* at 282.

The ALJ found that the Complainant made a *prima facie* showing based on the same evidence of lack of competition set forth for other steps and found that the Respondents had not rebutted that showing. *Id.* at 282-83.

The ALJ observed that U.S. Patent Application No. 2007/0060718 A1 discloses a similar [] but found that []

] *Id.* at 283. The ALJ noted that []

] The ALJ therefore concluded that [] was not generally known or readily ascertainable. The ALJ found that [] has economic value. *Id.* at 286.

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Respondents argue that Complainant's '718 published patent application disclosed[] Resps. Pet. at 58-59. Respondents acknowledge the ALJ's reasoning that the '718 patent application did not disclose[] but argue that the '718 application is not limited to[] because it did not disclose[] *Id.* at 59. In response to the Commission's question as to whether Respondents benefited from a lead time before the publication of the '718 application, Respondents argue that[] was already known and typical, as evidenced by the '718 application and that Complainant's [] was[] and distributed to customers. Resps. Reply Sub. at 20-21 and n.18 (citing Tr. at 443:16-21; JX-7C; RX-496).

Complainant and the IA argue that the disclosure of the '718 application is not applicable to Complainant's[] because it does not disclose[] *Id.*; IA Resp. at 28 (citing ID at 283-84); IA Reply Sub. at 11. Complainant argues that Complainant uses[] and that Dr. Swager conceded that[] *Id.* at 69 (citing ID at 284). Complainant argues that its[] trade secret is not readily ascertainable through reverse engineering. *Id.* Complainant argues that the ALJ properly refused to credit the testimony of Dr. Swager that reverse engineering of[] was possible, and that any such reverse engineering was merely theoretical rather than actual. *Id.* at 69-70 (discussing ID at 286; Tr. at 862:24-863:5).

The Commission reverses the ALJ, ID at 281-287, and finds that there is not a trade secret in[] because it was generally known or readily

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ascertainable. The background of the '718 patent application indicates that it was already known in the art, *i.e.*, before the '718 application, that [

] RX-496 (the '718 application) at []

(“[

]). Dr. Banach, Complainant's employee, confirmed that

[] was typical and in use: “the patent states that typical commercial ones are [

]’ Tr. 146:22-147:11; *see also* RX-531 (Pat. Appl. No.: 09/734,734, Published

Jun. 21, 2001) [

] RX-291 (U.S. Patent No. 3,005,797, issued 1958) at SINOZJG 0023310 [

]. Further, to the extent that Complainant's

[] may be slightly different, Complainant has not proven

independent economic value in such a difference.

7. []

The ALJ found that the []

used in Complainant's Shanghai facility is a trade secret, *i.e.*, [

] ID at 289-92. The ALJ found that Complainant made a *prima facie* showing that the [] was not generally known or readily ascertainable

based upon the same evidence of lack of competition set forth for other steps and found

that Respondents had not rebutted this showing. ID at 290. The ALJ found that the '345

patent did not disclose [] and rejected Respondents' argument that [

] is required by [] because he

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found Dr. Swager's testimony to be unsupported. *Id.* at 290-91. The ALJ found that the [] has economic value. *Id.* at 291-92.

Respondents assert that the difference between the alleged trade secret and the '345 patent was "razor thin" and the Complainant offered no meaningful evidence demonstrating that the [] had any independent value. Resps. Sub. at 13-14. Respondents state that the ALJ found that the value of the alleged trade secret was to []

[] *Id.* (citing ID at 292). Respondents argue that this problem and solution was disclosed in the '345 patent (RX-497 at []), and that the [] does not relate to Complainant's point of distinction from the '345 patent, *i.e.*, that []

] *Id.* at 15.

Complainant asserts that Respondents have no evidence to dispute the ALJ's finding that the '345 patent discloses a different [] than Complainant's trade secret uses. Comp. Resp. at 71. Complainant asserts that Dr. Hamed's argument refutes Dr. Swager's claim that the [] is a common sense choice. *Id.* at 73 (citing CX-1570 at Q.108). Complainant asserts that the disclosure of the '345 patent is not limited to []

] because it also teaches that []

[] *Id.* at 12-13 (citing RX-497, []). The IA argues that the ALJ's conclusion that the trade secret was not generally known or readily ascertainable is not based on clear error, and that the ALJ properly distinguished the '345 patent. IA Sub. at 11 (citing ID at 289-92). The IA

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asserts that the ALJ adequately distinguished the '345 patent from the asserted trade secret and that the ALJ correctly determined that the trade secret has independent economic value based on uncontested testimony from Dr. Banach. IA Reply Sub. at 5 (citing ID at 291-92).

The Commission has determined to reverse the ALJ's holding that the [] is a trade secret. The Complainant's own '345 patent discloses a similar []

[] ID at 290-91 (citing RX-497 at []).

Respondents argue that it would be common sense to [] citing Dr. Swager's testimony. See RX-421C at Q.387 ("It is natural for any chemist to []

[]) The ALJ found Dr. Swager's testimony to be unsupported and conclusory. ID at 291. We disagree. In our view, Dr. Swager provided a reasoned basis for his opinion.

Further, we agree with Respondents that the ALJ's basis for the value of the alleged trade secret was to []

[] that this problem and solution was disclosed in the '345 patent (RX-497 at []), and that the [] does not relate to Complainant's point of distinction from the '345 patent, *i.e.*, that Complainant []

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[] Therefore, we agree with Respondents that Complainant has not proven independent economic value for its asserted trade secret.

For these reasons, the Commission has determined to reverse the ALJ's finding that [] is protectable as a trade secret.

8. []

The ALJ found that [] is not a trade secret and is used by the Complainant. *Id.* at 298-302. The ALJ found that Complainant has taken reasonable steps to protect the secrecy of its process. *Id.* at 299. The ALJ found that Complainant had made a *prima facie* showing that [] is not generally known based on the same evidence of lack of competition set forth with respect to the other steps but the ALJ found that the Respondents successfully rebutted this showing. *Id.* at 299-300. The ALJ found that U.S. Patent Application No. 2001/0004664 ("the '664 application") teaches [] *Id.* at 300. Nevertheless, the ALJ found that the [] has economic value. *Id.* at 301.

Complainant argues that in the relevant literature, [] *Id.* at 17 (citing CX-1570C at Q.52). Complainant argues that [] *Id.* at 18 (citing CX-1570C at Q.52; CX-1565C at Q.30). Complainant argues that the ALJ erred in finding that the '664 application discloses [] because the '664 application

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does not use [] and is conducted on a laboratory scale. *Id.*
at 18-19 (citing CX-1570C at Q.139).

We affirm the ALJ and adopt the ALJ's reasoning, set forth in the ID at 298-302.
The ALJ was correct that U.S. Patent Application No. 2001/0004664 ("the '664
application") teaches [

] ID at 300 (citing RX-531 (the '664 application) at ¶5). We note that the '664
application does not specify []
Nevertheless, the '664 application renders [] readily
ascertainable for [] The Commission concludes
that [] is not protectable as a trade secret.

9. []

The ALJ found that [

] is not a trade secret. ID at 310-

14. The ALJ found that Complainant had made a *prima facie* showing that [

] was not generally known based on the same lack of competition set forth for other
steps but the ALJ found that Respondents successfully rebutted this showing. *Id.* at 311 -

12. The ALJ found that the '718 application teaches [

] *Id.* at 312. Nevertheless, the ALJ found that [

] has economic value. *Id.* at 313-14.

Complainant argues that [

] Comp. Pet. at 20 (citing CX-1570C at Q.109). Complainant

argues that [

]

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[] *Id.* (citing Tr. at 201:14-202:12). Complainant asserts that the ALJ erred in relying on RX-496 (the '718 application) because it was published after the misappropriation occurred and because it discloses different features than Complainant's process. *Id.* at 21.

The Commission affirms the ALJ's finding, set forth in the ID at 310-314, that [

] The [

] ID

at 312 (citing Tr. at 443:16-21; JX-7C). The Commission concludes that the

[] is not protectable as a trade secret.

10. []

The ALJ found that the combination of three features of []

is a trade secret, *i.e.*, (1) [

] (2) [

] and (3) []

ID at 327-31. The ALJ relied on testimony that "[] would be unique." *Id.* at 327-28 (citing CX-1570C, Qs. 56-57). The ALJ found that these features have economic value and that Complainant has taken reasonable steps to protect the secrecy of these features. *Id.* at 329. The ALJ found that Complainant made a *prima facie* showing that the features were not generally known based on the same evidence of lack of competition set forth with respect to the other steps and found that Respondents had not rebutted this showing. *Id.* at 330.

Respondents argue that (1) [

] confirms that

Complainant's use of [

] was conventional; (2) the ALJ erred

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as a matter of law in extending trade secret protection to a combination of known features where Complainant provided no support for a finding that the combination's value exceeded the sum of the values of each individual feature; and (3) Complainant has never claimed that [] as a whole is a trade secret and Complainant should not be allowed to rely on a subset of features if the whole is not a trade secret. Resps. Sub. at 15-16. Respondents argue that each of the features falls in the middle of the conventional range, *i.e.*, for [] and that a specific value in a disclosed range is publicly known. Resps. Sub. at 11; Resps. Reply Sub. at 16-17 (citing RX-532 at 849RESP0000560-61; RX-422C at Q.380-81; RX-270 at 214; RX-505 at 85; *Ultimax Cement Manuf. Corp. v. CTS Cement Manuf. Corp.*, 587 F.3d 1339, 1354-56 (Fed. Cir. 2009)). Respondents state that the component features were chosen by [] , and that [] disclosed [] to Complainant. *Id.* at 16. Respondents argue that there is a heightened standard for combination trade secrets, and that a combination of features must exceed the value of the individual features. Resps. Sub. at 11-12; Resps. Reply Sub. at 17-18 (citing *Strategic Directions Group v. Bristol-Meyers Squibb*, 293 F.3d 1062 (8th Cir. 2002)).

Complainant asserts that [] did not disclose [] and did not alone or in combination with any other reference disclose the combination of []

] *i.e.*, (1)[

] (2)[

]

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[] and (3)[]

Comp. Sub. at 13-14.

Complainant argues that *Ultimax* did not address the situation where a trade secret is a specific value within a previously disclosed range, citing *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303 F.3d 1332, 1340 (Fed. Cir. 2002), and did not address the situation where a trade secret is combined with other features, which as a whole forms a unique trade secret. Comp. Reply Sub. at 8. Complainant, citing *Synthex Ophthalmics, Inc. v. Novicky*, 745 F.2d 1423, 1434 (Fed. Cir. 1984), disagrees with Respondents' assertion that there is a heightened standard for the assertion of combination trade secrets. *Id.* Complainant asserts that Respondents are focused on immaterial differences between their [] and the asserted invention. *Id.* at 9 (citing ID at 562).

The IA makes similar arguments to the Complainant, and states that [] did not disclose [] used by Complainant (or the other features) when it disclosed [] IA Sub. at 12-13; IA Reply Sub. at 5. The IA argues that the ALJ properly relied on the corroborating testimony of Dr. Hamed and Mr. McAllister, in which they opined that the combination of features allows the Complainant to [] *Id.* at 6 (citing ID at 327-331).

The Respondents have demonstrated that [] because [] was using [] RX-532 at 849RESP0000560-61; RX-422C, Q.380-81, [] and the use of [] were publicly known, RX-422C at QQ.354-58, 384-85, and the use of [] is taught

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in textbooks because of the use of [] RX-270 at 212. Complainants have not demonstrated that there was anything unique about []

[]and Complainant has not demonstrated anything unique about the combination of publicly known elements. *Compare BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens, LLC*, 303 F.3d 1332, 1340 (Fed. Cir. 2002) (combination was “very unique”). Indeed, Complainant has not shown independent economic value for []

[]or that the combination of elements has independent economic value. For these reasons, the Commission has determined to reverse the ALJ’s finding that these features of the [] are protectable as a trade secret.

D. Overall Process Flow Trade Secret

The ALJ found that the overall process flow, defined as the seven alkylation reaction features [] combined with the ten condensation reaction features [] is a trade secret.

ID at 342-45. The ALJ found that Complainant practiced each of the individual elements, and has not disclosed the elements. *Id.* at 342. The ALJ found that Complainant made a *prima facie* showing that the overall process flow was not generally known based on the same evidence of lack of competition set forth with respect to the other sections and found that the Respondents have not rebutted this *prima facie* showing. The ALJ found that the combination of seventeen elements is valuable. *Id.* at 344.

Respondents argue that the ID was “wrong” to conclude that Complainant’s so-called “overall process flow” was entitled to trade secret status. Resps. Pet. at 73-75. Respondents argue that the ALJ erred in finding the combination of 17 components to be

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secret where the ALJ found that 7 of the 17 alleged trade secrets were not legitimate. *Id.* at 75 (relying on *Fishing Concepts*, 1985 U.S. Dist. LEXIS 19763 at *13-14; *Arco Indus.*, 633 F.2d at 441-42).

The Commission affirms the ALJ's finding and adopts the ALJ's reasoning set forth in the ID at 342-345. The ALJ did not err in finding that, just as certain elements are unique [

] the combination of elements is also unique.

The Commission concludes that the overall process is protectable as a trade secret.

E. Respondents' Access to the Trade Secrets Through Mr. Xu and Mr. Lai

The ALJ found that Complainant has shown by a preponderance of the evidence that Mr. Jack Xu and Mr. C.Y. Lai, two high-level employees at Complainant's Shanghai subsidiary had unquestioned access to Complainant's trade secrets in the normal course of their employment. ID at 390. The ALJ found that Mr. Xu and Mr. Lai signed confidentiality and noncompetition agreements with Complainant's Shanghai subsidiary but left to work for Respondents where Respondents wrongfully took Complainant's SP1068 trade secrets by unfair means. *Id.* at 390-91; 392 (Lai agreement, CX-256C); 393-94 (Xu agreements, CX-317C at 5 and CX-318C-320C).

The ALJ found that Respondents have failed to explain how they proceeded from their pre-November 2006 parameters to the post-November 2006 parameters that strikingly resemble Complainant's parameters. *Id.* at 406. The ALJ thus found that strong circumstantial evidence compels the conclusion that Respondent Sino Legend ZJG wrongfully took Complainant's trade secrets by unfair means through Mr. Xu and Mr.

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Lai. *Id.* The ALJ found that copying is especially evident in the particular match in the [] in Mr. Fan's notebook, which is exact to the thousandth decimal point. *Id.* (citing Tr. 458:2-24).

The Respondents argue that the ALJ's finding of access by Mr. Xu or Mr. Lai to pre-2000 formulas is unsupported and clear error. Resps. Pet. at 10-13. Respondents state that they do not dispute that Mr. Xu and Mr. Lai saw Complainant's Formula 1 for making SP-1068 and the United States precedent for Formula 1 (post-2000) but argue that there was no evidence that anyone who worked at Sino Legend ever laid eyes on any pre-2000 process information relied on by Complainant. Resps. Pet. at 10-11.

The Commission affirms and adopts the ALJ's findings, set forth in the ID at 390-406. The ALJ was correct in finding that Mr. Lai and Mr. Xu had access to Complainant's trade secrets by virtue of their positions at the Shanghai plant. The email correspondence indicates that Mr. Lai was aware of the use of [] at other facilities even though this was not used in Shanghai. The Commission concludes that Mr. Lai and Mr. Xu had access to Complainant's trade secrets.

F. Respondents' Use of Trade Secrets

The Commission affirms and adopts the ALJ's findings, set forth in the ID at 424-428. The ALJ found that Respondents' processes used Complainant's alleged trade secrets. *Id.* at 424. Based on Dr. Chao's witness statement, the ALJ found that the Key in CDX-001C reflects that Dr. Chao made a comprehensive comparison for each of: (1) the lab scale experiments from Mr. Fan's notebook in 11/2006; (2) Sino Legend's pilot study in 12/2006; (3) Sino Legend's first commercial scale production of SL-1801 in 12/2007; (4) Sino Legend's [] SL-1801 importation batches in 2010-12; (5) Sino

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Legend's [] SL-1801 and SL-1802 importation batches in 2012; and (6) formula 1 with Respondents' products, whether or not included in the tables. *Id.* at 425. The ALJ found that the LFP products were modifications of the original 1801 formula with "low free PTO." *Id.* at 426 (citing Tr. at 461:13-16 and 462:10-17).

The ALJ found that even without the explicit evidence of documentary copying, the later versions of Sino Legend's products were at least derived from misappropriated proprietary information from Complainant. *Id.* at 426.

The ALJ rejected Respondents' argument that the trade secret is a patchwork of formulas from different times, places, and products. *Id.* at 427. The ALJ found that Complainant asserted that its own rubber resins at issue include SP-1068, HRJ-2765, SP-1045, and R-7578, and that it practices variations of the SP-1068 process at its Rotterdam Junction and Shanghai plants. *Id.*

We address the arguments as to whether there is misappropriation of the individual trade secrets (for the alkylation reaction, for the condensation reaction, and for the overall process) in the following sections.

G. Technical Proofs of Misappropriation of Each Alkylation Reaction Alleged Trade Secret

1. [] (and the Issue of the LFP Products)

The ALJ found that Respondents' process for manufacturing [] tackifier resins uses and substantially uses (or is at least derived from) Complainant's trade secret. The ALJ found that a November 8, 2006, experiment from Mr. Fan's lab notebook shows [] *Id.* at 449 (citing CX-32C at SINOZJG_005184, 88; CDX-2C at No. 10; CDX-3C at No. 10; CX-

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1566C, Q.24). The ALJ found that Sino Legend used [] for its December 2006 pilot study. *Id.* (citing CX-1566, Q.24). The ALJ rejected Respondents' argument that the [] would be different when taking into account [] for the reasons discussed with respect to the trade secret [*e.g.*, []], and found that [] would in any event be substantially similar. *Id.* at 450-51. The ALJ rejected Respondents' argument that the LFP (low free PTO) products use a different [] because Dr. Chao testified that they are derived from the same basic process as the SL-1801 and SL-1802 products. *Id.* at 451 (citing Tr. at 461:13-16; 462:10-17).

Respondents assert that there is no evidence that the [] for the LFP products is derived from Complainant's [] Resps. Reply Sub. at 5. Respondents argue that merely because the SL-1801 and 1802 products came first does not mean that the LFP [] was based thereon. *Id.* at 6. Respondents further contend that there is no evidence that the LFP [] was based on an historical formula of Complainant, and that the [] is different from Complainant's. *Id.* at 7.

Respondents argue that Sino Legend's LFP products should be outside the scope of any exclusion order because they argue that changing one component can negate misappropriation. *Id.* at 10 (citing *In re: John Wilson*, 1999 U.S. App. LEXIS 27340 at *5-6 (4th Cir. 1999)). Respondents further argue that the remaining alleged trade secrets, such as [] cannot justify an exclusion order. Resps. Reply Sub. at 9.

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Complainant asserts that the [] used to make the LFP products are based on Complainant's historical formulae which had [] Comp. Sub. at 2-3 (citing CX-1565C at Q.61-62). Complainant asserts that modification does not remove the copied process from the realm of misappropriation because the process is derived from the misappropriated information. *Id.* at 4-6 (citing *Mangren Research and Development Corp. v. National Chem. Co., Inc.*, 87 F.3d 937, 943-45 (7th Cir. 1996); *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F.Supp.2d 463 (N.D.N.Y. 2003); *Pioneer Hi-Bred Int'l v. Holden Foundation Seeds, Inc.*, 35 F.3d 1226, 1239 (8th Cir. 1994); *Agilent Techs., Inc. v. Kirkland, C.A.* No. 3512-VCS, 2010 LW 610725, *22 (Del. Ch. Feb. 18, 2010); *Sokol Crystal Prods, Inc. v. DSC Commc'ns. Corp.*, No. 91-C-974-S, 1993 WL 597382, *3 (W.D. Wis. Mar. 30, 1993)). Similarly, in the IA's view, the importation of Respondents' LFP products violates Section 337 because the process for the LFP products is derived from SI's process and modifications that are based on misappropriated trade secrets do not negate a finding of misappropriation. IA Sub. at 6; IA Reply Sub. at 2.

As set forth in Section III.B.1. *supra*, Complainant has a protectable trade secret in the use of [] As to whether that [] is present in Respondents' processes, the Commission adopts the ALJ's findings, set forth in the ID at 449-452, although the Commission reaches a different conclusion as to the presence of misappropriation with respect to the LFP products. The ALJ was correct in finding that Mr. Fan's lab notebook shows an experiment using [] and a pilot study using [] ID at 449 (citing CX-32C at SINOZJG_005184, 88;

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CDX-2C at No. 10; CDX-3C at No. 10; CX-1566C, Q.24). This is classic misappropriation of trade secrets, with copying down to the thousandth decimal place.

Respondents' LFP products use [] ID at 429. The ALJ found that the LFP products were derived from the experiments [] and were also derived from Complainant's use of [] in Rotterdam Junction. *Id.* Complainant relies on *Mangren Research and Development Corp. v. National Chem. Co., Inc.*, 87 F.3d 937, 943-45 (7th Cir. 1996) (cited in *Certain Cast Steel Railway Wheels, Inv. No. 337-TA-655*, USITC Pub. 4265 (March 19, 2010)), for the proposition that a modification of []

Does not lessen the misappropriation of [] However, Complainants narrowly defined the trade secret as [] in view of the ranges of values which were known in the art. It is inconsistent for Complainants to attempt to capture in application what they gave up in definition. Complainant cannot now argue that the LFP products were derived from a trade secret relating to [] where Complainant has disclaimed [] used by the LFP products in obtaining trade secret protection for [] For these reasons, the Commission has determined to reverse the ALJ's finding of misappropriation of [] with respect to the LFP products. Nevertheless, because Respondents' processes have misappropriated other trade secrets, as set forth *infra*, the LFP products are still subject to exclusion by reason of misappropriation of other trade secrets.

2. []

The ALJ found that Respondents' process for manufacturing [] tackifier resins uses Complainant's trade secret. *Id.* at 463-65. The ALJ relied on Dr. Chao's testimony that Sino Legend ZJG's December 2006 pilot study shows a []

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[] *Id.* (citing CX-60C). The ALJ found that the trade secret does not require a specific [] and because the ALJ found that the evidence shows that Sino Legend does in fact use a []

Respondents argue that Sino Legend has never practiced [] in combination with [] in any commercial production, and that the ALJ only found use in a 2006 pilot study. *Resps. Pet.* at 25. Respondents argue that Sino Legend uses a [] *Id.*

As set forth in Section III.B.2. *supra*, the Commission affirms the ALJ's finding that there is a protectable trade secret in the use of [] As to misappropriation, the Commission affirms the ALJ's finding and adopts the ALJ's reasoning, set forth in the ID at 463-465. We further agree with the IA that no specific [] is required by the trade secret, only the use of []

[] The Commission concludes that Respondents' processes misappropriated the []

3. Use of []

As set forth in Section III.B.3. *supra*, the Commission affirms the ALJ's finding that the use of [] is not a valid trade secret. Therefore, although Respondents use [] ID at 467-468, there is no misappropriation of a protectable trade secret with respect to the use of [] The Commission thus affirms the ALJ's findings of no misappropriation with respect thereto.

4. Use of []

The ALJ found that Respondents' process for manufacturing [] tackifier resins uses Complainant's trade secret. *Id.* at 272. The ALJ relied on Dr.

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Chao's testimony to this effect and on Respondents' First Supplemental Response to Complainant's Requests for Admission that "the process for manufacturing SL-1801

[

]” *Id.* (quoting CX-492C at 51).

Respondents argue that Complainant failed to present sufficient evidence that Sino Legend's [] is the same as Complainant's [] Resps. Pet. at 32. Respondents argue that although Dr. Chao described Respondents' process, he never provided a comparison with Complainant's process and that the ALJ incorrectly placed the burden on Respondents to identify a difference. *Id.* at 32. Respondents further argue that Respondents' LFP products [] that Complainant has never used. *Id.*

As set forth in Section III.B.4. *supra*, the Commission affirms the ALJ's finding that the use of [] is a trade secret. The Commission further affirms and adopts the ALJ's findings, set forth in the ID at 472-480, as to misappropriation. The ALJ was correct in finding that the Respondents' processes [] based on Dr. Chao's testimony. ID at 472-80; CX-1566C, Q.31. The Commission therefore concludes that Respondents' processes have misappropriated []

5. []

As set forth in Section III.B.5. *supra*, the Commission affirms the ALJ's finding that the [] is not a trade secret. Therefore, although Respondents' processes use the same [] as Complainant, ID at 482-484, there is no misappropriation of a protectable trade secret with respect to the []

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[] The Commission thus affirms the ALJ's finding of no misappropriation with respect thereto.

6. []

As set forth in Section III.B.6. *supra*, the Commission affirms the ALJ's finding that the [] is not a valid trade secret.

Therefore, although Respondents use Complainant's method of [

] ID at 487-489, there is no misappropriation of a protectable trade secret with respect to the [] The

Commission thus affirms the ALJ's finding of no misappropriation with respect thereto.

7. The []

The ALJ found that Respondents' process for manufacturing [] tackifier resins substantially uses or is at least derived from Complainant's trade secret

[] *Id.* at

502-503. The ALJ found that credible evidence shows that certain aspects of Sino

Legend ZJG's [] were changed to conform to the [] in

Complainant's plant, *i.e.*, based on a difference between 2005 and 2007. *Id.* (comparing CX-1345C and Tr. 436:3-437:11).

Respondents argue that the ALJ incorrectly found that Sino Legend misappropriated complainant's [] because Respondents state that

there are "dozens of differences" between Complainant's and Respondents' []

Resps. Pet. at 37. Respondents assert that Dr. Chao acknowledged that he did not

compare all aspects of the [] but rather focused on certain aspects. *Id.*

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As set forth in Section III.B.7. *supra*, the Commission affirms the ALJ's finding that the [] is a protectable trade secret. The Commission further affirms and adopts the ALJ's findings that Respondents' processes have misappropriated Complainant's trade secrets with respect to the [] set forth in the ID at 502-505.

The ALJ was correct in finding that credible evidence shows that certain aspects of Sino Legend ZJG's [] were changed to conform to the [] in Complainant's plant. ID at 503. The ALJ relied on Dr. Chao's Witness Statement (CX-1566C). Dr. Chao analyzed Sino Legend's 2005 [] (CX-1345C) and Sino Legend's 2007 [] (CX-57C). Dr. Chao makes a comparison of different metrics inasmuch as the 2005 [] and the 2007 []
D. Nevertheless, Dr. Chao gave the opinion that the 2007 [] appears to copy Complainant's [] as it has the same [] and Sino Legend used the same [] CX-1566C at Q.37. Sino Legend also uses a []
] *Id.* Dr. Chao stated that [] of Sino Legend's []
] *Id.* (relying on CX-0853C, CX-0532C, and CX-0606C). It is immaterial whether there are other differences between the [] not asserted as part of the trade secret. The Commission therefore concludes that the ALJ was correct in finding misappropriation of the []

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H. Technical Proofs of Misappropriation of Each Condensation Reaction Alleged Trade Secret

1. Use[]

As set forth in Section III.C.1. *supra*, the Commission has reversed the ALJ's finding that the use of [] was protectable as a trade secret because of the reverse engineering described above which revealed the use of [] Therefore, although Respondents' processes use [] ID at 514-516, there is no misappropriation of a protectable trade secret with respect to the use of [] The Commission has thus determined to reverse the ALJ's finding of misappropriation with respect thereto.

2. Use of[]

As set forth in Section III.C.2. *supra*, the Commission affirms the ALJ's finding that the use of [] is not a trade secret. Therefore, although Respondents use [] which is equivalent to [] ID at 515, there is no misappropriation of a protectable trade secret with respect to the use of [] The Commission thus affirms the ALJ's finding of no misappropriation with respect thereto.

3. []

The ALJ found that Mr. Fan's notebook indicates experiments from November 10-17, 2006, in which he used [] ID at 519 (CX-1566C, Q.44; CX-32C at 2-9). The ALJ thus found that Respondents used Complainant's [] in the early lab experiments for the production of SL-1801 and in the first commercial scale condensation

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reaction batch of 1802. *Id.* at 519 (citing CX-1566C, Q.44; CX-223C at 2-3; CX-232C at 1-2).

Respondents argue that its [] varies from [] and furthermore the use of [] is exactly consistent with the [] disclosed in Complainant's '418 patent. Resp. Pet. at 53-54.

As set forth in Section III.C.3, *supra*, the Commission affirms the ALJ's finding that there is a trade secret in the [] based on a difference from the '418 patent, which taught [] *i.e.*, that Complainant has optimized [] Further, the Commission affirms and adopts the ALJ's findings, set forth in the ID at 518-520, that Respondents' processes used Complainant's [] in the early lab experiments for the production of SL-1801 and in the first commercial scale condensation reaction batch of 1802. ID at 519 (citing CX-1566C, Q.44; CX-223C at 2-3; CX-232C at 1-2). It is uncontested that the [] is equivalent to [] ID at 244. We agree with the ALJ that there was copying of the [] in the lab notebooks. ID at 244, 402-03. The Commission therefore affirms the ALJ's finding that Respondents' processes misappropriated the []

4. []

As set forth in Section III.C.4, *supra*, the Commission affirms the ALJ's finding that Complainant's use of [] is not a valid trade secret. Therefore, although Respondents' processes use [] ID at 522, there is no misappropriation of a protectable trade secret with respect to the use of

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[] The Commission thus affirms the ALJ's finding of no misappropriation with respect thereto.

5. []

As set forth in Section III.C.5. *supra*, the [] is not protectable as a trade secret. Therefore, although Respondents' processes use a similar [] as Complainant, ID at 525-526, there is no misappropriation of a protectable trade secret with respect to the [] The Commission has thus determined to reverse the ALJ's finding of misappropriation with respect thereto.

6. []

As set forth in Section III.C.6. *supra*, the [] is not protectable as a trade secret. Further, there is no misappropriation because Sino Legend is using a different [] which Complainant asserted is a trade secret. CX-1566C at Q. 50; Tr. 424. The Commission therefore finds that there is no misappropriation of a protectable trade secret with respect to the []

[] The Commission has thus determined to reverse the ALJ's finding of misappropriation with respect thereto.

7. []

As set forth in Section III.C.7. *supra*, the [] is not protectable as a trade secret. Therefore, although Respondents' processes use the same [] as Complainant, ID at 543-45, there is no misappropriation of a protectable trade secret with respect to the []

[] The Commission has thus determined to reverse the ALJ's finding of misappropriation with respect thereto.

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8. Use of []

As set forth in Section III.C.8. *supra*, the Commission affirms the ALJ's finding that [] is not a trade secret.

Therefore, although Respondents' processes use a [] ID at 547-549, there is no misappropriation of a protectable trade secret with respect to the

[] The Commission thus affirms the ALJ's finding of no misappropriation with respect thereto.

9. Use of []

As set forth in Section III.C.9. *supra*, the Commission affirms the ALJ's finding that the use of [] is not a valid trade secret.

Therefore, although Respondents use [] ID at 550-551, there is no misappropriation of a protectable trade secret with respect to the use of

[] The Commission thus affirms the ALJ's finding of no misappropriation with respect thereto.

10. []

As set forth in Section III.C.10. *supra*, the [] is not protectable as a trade secret. Therefore, although Respondents' processes use a similar

[] to Complainant's, ID at 550-551, there is no misappropriation of a protectable trade secret with respect to the [] The Commission

has thus determined to reverse the ALJ's finding of misappropriation with respect thereto.

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I. Technical Proof of Misappropriation of the Overall Process Flow Alleged Trade Secret

The ALJ found that Respondents' process for manufacturing the accused tackifiers use, substantially use, and are substantially derived from Complainant's trade secret, *i.e.*, the combination of the 17 aspects of Complainant's process. ID at 574. The ALJ stated that he relied on the entries in Mr. Fan's notebook, documents relating to the initial pilot study, documents relating to commercial scale production, and the manufacture of SL-1801 and SL-1802. *Id.* at 575.

Respondents argue that they cannot be found to use the alleged "overall process flow" because they are not using all of the 17 alleged individual trade secrets. Resps. **Pet.** at 76. Respondents provide the example that the LFP products do not use [

]*Id.*

Here, even if certain of the 17 individual trade secrets are not protectable individually as trade secrets, or if Respondents have modified certain steps, it is our view that the overall combination of elements is protectable since it incorporates several valid trade secrets and has been misappropriated as discussed above. The Commission therefore affirms and adopts the ALJ's finding, set forth in the ID at 574-575, that Respondents' processes have misappropriated a protectable trade secret in the overall process (except with respect to the LFP products which do not practice the [

]

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J. Affirmative Defenses

1. Independent Development

We address this defense in the sections above with respect to each individual trade secret.

2. Unclean Hands

Respondents argued to the ALJ that Complainant itself improperly obtained and used Sino Legend's confidential process to modify SP1068 in China. ID at 604. The ALJ found this affirmative defense of unclean hands to be "ludicrous." ID at 607. The ALJ found that Respondents have come to this investigation with unclean hands in which "1068" was whited out, refused to provide Mr. Pu's deposition, and a page was torn from Mr. Pu's notebook. *Id.* at 608. The ALJ found that credible evidence shows that Respondents have taken steps to hide the relationships between the parties and the origin of products. *Id.* at 609. The ALJ further found that Respondents failed to provide any support for their very general allegation of unclean hands. *Id.*

No petitions for review were filed and the Respondents did not contest the ALJ's factual finding in their briefing on review. The Commission therefore affirms and adopts the ALJ's fact finding that Respondents have not shown unclean hands on the part of the Complainant.

K. Allocation of the Burden of Proof

The ALJ found that "Complainant has made a *prima facie* showing that its process for making tackifier resins is not generally known." ID at 117. This is part of the ALJ's analysis for each of the trade secrets, for which he individually determined whether Respondents rebutted the *prima facie* showing for each asserted trade secret.

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In reaching his conclusion that Complainant has made a *prima facie* showing that the process is not generally known, the ALJ found that Dr. Hamed testified that “no company (other than Sino Legend) has been able to make a similar product effectively and economically capable of competing with SI Group’s SP-1068 in the United States. This fact provides further support for my opinions that SI Group’s trade secrets provide a clear economic advantage to SI Group and are novel and not generally known.” CX-1570C, Q.7. The ALJ found that Dr. Putnam and Dr. Hart testified that the only competing product, made by Durez, was of inferior quality. ID at 117.

Respondents argue that there is no legally sufficient nexus between the cited evidence of Complainant’s supposed market share and alleged inferior quality of its competitor’s product, on the one hand, and whether each of the alleged trade secrets is generally known or readily ascertainable, on the other. Resps. Sub. at t 27, 29 (citing ID at 116-117, 132, 160, 195, 245, 269, 282-83, 290, 330, 343). Respondents assert that the mere existence of market share and allegations of a competitor’s inferior quality are not enough to establish a *prima facie* showing that a trade secret is not generally known or readily ascertainable. *Id.* at 27. Respondents argue that there must be a “demonstrated relationship” (or nexus) between the lack of success of the plaintiff’s competitors and the secrecy of its alleged trade secret recipes. *Id.* (citing *Buffets v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996)). Thus, the Respondents state that Complainant did not establish a *prima facie* case sufficient to justify shifting the burden onto Respondents to disprove all of the alleged trade secrets. *Id.* at 28.

As noted above, the ALJ found that Complainant made a *prima facie* case of the existence of a trade secret for each of the trade secrets. *E.g.*, ID at 117. The Commission

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affirms the ALJ's finding and adopts his reasoning with the following clarification. Wright & Miller explain that the phrase "proving a prima facie case" is another way of saying that the party has satisfied the burden of production. Wright & Miller, Federal Practice and Procedure § 5122 ("When the party satisfies the burden of production, she is sometimes said to have proved a "prima facie case.") Wright & Miller explain that in this situation, the party that has satisfied its burden of production retains the burden of persuasion, and indeed, proving a "*prima facie*" case does not mean that the party has satisfied the burden of persuasion -- it just means that the party has put in enough evidence to survive a motion for a directed verdict (or summary judgment motion). *Id.* Nevertheless, the opposing parties may very well wish to produce evidence for the contrary position. We thus affirm the ALJ with the clarification that, where the ALJ indicated that Complainant made a *prima facie* case, this means that Complainant satisfied the burden of production and retained the burden of persuasion.

The ALJ held that Complainant made a *prima facie* case that each of the alleged trade secrets was not generally known or readily ascertainable based on testimony that Complainant occupies []% of market share and on testimony that Sumitomo makes an inferior product. Tr. at 528:4-18, 547:22-548:8; CX-1567C at QQ. 147-48; CX-1586C at QQ. 64-66; JX-5C at 5; *see also* CX-1570C, Q.7 (Hamed). The testimony relied on by the ALJ is indirect evidence that Respondents did not know what process Complainant used. Nevertheless, we agree with Respondents that the testimony relied on by Complainant is by itself insufficient to prove that a given asserted trade secret is not generally known by organic chemists or readily ascertainable, because the testimony is conclusory and there is an insufficient nexus between market share and the conclusion

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that each alleged trade secret was not generally known or readily ascertainable.⁴ See *Buffets v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996) (“the court made no finding as to whether the manuals were generally known or readily ascertainable”).

However, there is further evidence, relied on by Complainant, that Respondents did not know what process Complainant used. Specifically, Red Avenue Chemical Co., Ltd. hired analytical chemists at Sumitomo to compare the molecular weight distribution of SP-1068 with that of a “typical” resin, RX-375C at SINOZIG_0023132. The fact that Respondents hired Sumitomo to engage in reverse-engineering of Complainant’s product is evidence that Respondents (and Sumitomo) did not know what process Complainant used and that such information was not public available. The Commission agrees that this is sufficient to satisfy Complainant’s burden of production (with the exception of the use of [redacted]). Such evidence demonstrates a relationship between the success of Complainant’s products and the conclusion that Complainant’s trade secrets were not generally known or readily ascertainable. See *Buffets v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996). The Commission concludes that Complainant still bore the burden of proof and the burden of persuasion of the existence of each trade secret.

L. Domestic Industry and Injury

In order to find a Section 337 violation based on trade secret misappropriation, a complainant must show actual substantial injury, or threat of substantial injury, to a

⁴ On August 25, 2006, Sumitomo concluded that “[

redacted]” *Id.* at SINOZIG_0023133. The ALJ found that this was an unsuccessful attempt at reverse-engineering SP-1068 because Sumitomo inferred the possible use of [redacted] but no one guessed that [redacted] and because the alternative explanations undercut the guess that a [redacted] ID at 214. We conclude that this evidence demonstrates that the use of [redacted] was readily ascertainable.

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domestic industry from the misappropriation. 19 U.S.C. § 1337(a)(1)(A) (“unfair methods of competition . . . the threat or effect of which is -- to destroy or substantially injure an industry in the United States”).

As explained below, the Commission affirms the ALJ’s findings as to the existence of a domestic industry and affirms on modified grounds the ALJ’s findings of actual and threat of injury. The ALJ’s findings that are consistent with this opinion are adopted.

1. Existence of a Domestic Industry

The ALJ found that the relevant domestic industry, based on the scope of the investigation, is rubber resins and that the industry should not be limited to tackifier resins. ID at 620. The ALJ determined that the evidence establishes that a domestic industry exists in the U.S. *Id.* at 620-624. The ALJ specifically found that Complainant maintained []% of the tackifier resin market from 2007 to 2011, manufactured tackifier resin at a facility in Rotterdam Junction, NY, invested millions in research and development at its center in Niskayuna, NY and that Complainant’s investments were substantial. *Id.* No party petitioned for review of these findings. The Commission affirms the ALJ’s findings as to the existence of a domestic industry. ID at 611-624.

2. Injury

a. Actual Substantial Injury

In determining whether unfair acts have substantially injured the domestic industry, the Commission considers a broad range of indicia, including: the volume of imports and their degree of penetration, complainant’s lost sales, underselling by respondents, reductions in complainants’ declining production, profitability and sales,

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and harm to complainant's good will or reputation. *Certain Cast Steel Railway Wheels*, ITC Inv. No. 337-TA-655, Unreviewed Initial Determination at 80 (quoting *Certain Electric Power Tools, Battery Cartridges and Battery Chargers*, Inv. No. 337-TA-284, Unreviewed Initial Determination at 246, USITC Pub. No. 2389 (1991) ("*Electric Power Tools*"). When the complainant alleges actual injury, there must be a causal nexus between the unfair acts of the respondents and the injury. *Bally/Midway Mfg. Co. v. Int'l Trade Comm'n*, 714 F.2d 1117, 1125 (Fed. Cir. 1983).

The ALJ concluded that Respondents have substantially injured the rubber resin industry in the U.S. ID at 648. In reaching his conclusion, the ALJ found that Respondents' importation of SL-1801 and SL-1802 to [] was sufficient to manufacture 50,000 tires and that this was a substantial volume. *Id.* at 651. In 2010 and 2012, Complainant supplied []% of [] U.S. tackifier demand, except for these importations by Respondents. *Id.* In addition, the ALJ determined that Complainant supplies more than []% of the U.S. tackifier demand. *Id.* The ALJ held that the sales by Respondents to [] are actual sales and therefore, there is actual injury to the Complainant. *Id.*

Additionally, the ALJ found that it was more significant that the sales by the Respondents led to the qualification of their products for sale to [] which is Complainant's customer. *Id.* at 651-52. The ALJ determined that the qualification of Respondents to sell to [] represents penetration of the market that is disproportionate to the actual sales. *Id.* at 652. The ALJ found that the evidence shows that Respondents' qualification to sell to [] and their lower prices, allowed [] to apply pressure to Complainants during contract negotiations. *Id.* at 653.

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This pressure led to a lower contract price for Complainant. *Id.* Therefore, the ALJ found that similar to *TianRui*, Complainant experienced actual injury because Respondents undersold their products and Complainant's profits have declined as a result. *Id.* at 654. Complainant also accepted unfavorable payment terms as a result of the negotiations. *Id.* Accordingly, the ALJ found that the price drop and payment terms are directly attributable to Respondents' entry and effect on the U.S. tackifier market and the sale of misappropriated articles resulted in actual injury. *Id.* at 655.

On review, Respondents argue that Complainant's alleged lost sales are to an unrelated third party and that Respondents did not make any sales to [] that created "negotiation pressure" that resulted in injury.⁶ Resps. Pet. at 84. Respondents assert that it was legal error for the ALJ to find an injury to Complainant's domestic industry based on alleged offers for sale, without any lost sales to the Respondents. *Id.* at 85.

Complainant asserts the Commission does not have to find lost sales to find injury. Comp. Resp. at 80. Complainant contends that the Respondents' shipments and qualification of resin made possible the substantial price, revenue and profit reductions that SI suffered in its contract negotiations with [] *Id.* at 81. The importations made by Respondents and the subsequent negotiations caused a loss of \$[] million in tackifier resin profits from [] resulting in actual injury. *Id.* at 81-84.

The IA argues that the ALJ properly considered whether or not Respondents' importations had the threat or the effect of injuring Complainant's domestic industry. IA Resp. at 34. The IA argues that the sale of SL-1801 and SL-1802 is sufficient to

⁶ The parties' arguments are not limited to actual injury and may also be applicable to threat of injury.

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manufacture 50,000 tires and that this is more than a qualification; there was evidence of actual injury when Complainant suffered \$[]million in margin loss based on negotiation pressure from Respondents and a []term was also added to the contract; and there is a causal nexus between Respondents' unfair acts and the injury to Complainant's domestic industry. *Id.* at 34-35.

The Commission finds that the evidence supports a finding of actual substantial injury based on the strong evidence of Respondents underselling and Complainant's reduced profitability. The Commission adopts the ALJ's findings that are consistent with this determination. *Id.* at 651-655. The Commission does not adopt the ALJ's findings that lost sales resulted from Respondents' importations. *Id.* at 651.

Specifically, record evidence shows that Respondents imported tackifer resin into the United States. *E.g.*, CX-103C, CX-104C, CX-105C, CX-106C and CX-107C. The ALJ found that as a result of Respondents' importations, Respondents were qualified by [] Complainant's customer, as a supplier. *Id.* at 651-52; *see also* Tr. at 547:24-548:4; CX-1568C at Q. 56. This qualification allowed Respondents to participate in contract negotiations with [] Respondents thereupon offered [] a reduced price per pound for tackifier resin which the ALJ found allowed [] to apply pricing pressure on Complainant during negotiations of an amended contract resulting in Complainant entering into a contract at a lower level of profitability. *Id.* at 653; Tr. at 536:6-22; 537:8-24; CX-1588C. The contract price that [] obtained from Complainant thus went from \$[] per pound to [] per pound, *see* Tr. at 537:8-24, 540:17-541:20, with a lost margin of \$[] million. Tr. at 536:6-22. Therefore, although Respondents argue that there are no lost sales, the Commission finds that

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Complainant has sustained a showing of actual injury based on underselling and reduced profitability and a causal nexus between the injury and the unfair acts of Respondents.

Accordingly, the Commission affirms the ALJ's conclusion on these grounds.

b. Threat of Substantial Injury

19 U.S.C. § 1337(a)(1)(A) states that “[u]nfair methods of competition and unfair acts in the importation of articles...or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—(i) to destroy or substantially injure an industry in the United States” are unlawful.

In determining whether a threat to substantially injure exists, the Commission considers, *inter alia*, the following indicia:

- (1) substantial foreign manufacturing capacity;
- (2) ability of imported product to undersell the domestic product;
- (3) explicit intention to enter into the U.S. market;
- (4) the inability of the domestic industry to compete with the foreign products because of vastly lower foreign costs of production and lower prices; and
- (5) the significant negative impact this would have on the domestic industry.

Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, 0082 WL 941574, Commission Opinion at *9 (Sept. 1982); *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, 2010 WL 5642165, Comm'n Op. at *33 (Dec. 2010). The threatened injury must also be “substantive and clearly foreseen,” with a causal connection between the action of the respondents and the threatened injury. *Id.*

The ALJ found that Respondents' unfair acts presented a threat to injure or destroy Complainant's domestic industry. *Id.* The ALJ found that Respondents have

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additional manufacturing capability, Respondents are able to undersell Complainant, and Respondents intend to enter the U.S. market. *Id.* at 656-657. The ALJ also found that Complainant's production costs are higher than those of the Respondents, which allows Respondents to undersell Complainant. *Id.* at 658.

The ALJ found that Complainant has not provided any evidence of comparable production costs and only provided general statements. *Id.* However, the ALJ held that Complainant cannot compete with Respondents' lower prices that are due to lower production costs. *Id.* Therefore, the ALJ found that "Respondents' unfair acts have the effect of substantial injury and a tendency to substantially injure SI's domestic industry." *Id.* at 659; *see also id.* at 660.

The Commission adopts the ALJ's analysis and findings for indicia (1) and (3)-(5). ID 655-656, 657-660. Respondents did not challenge these findings. Resp. Pet. at 84-91. With respect to factor (2), the ability of the imported product to undersell the domestic product, we agree with ALJ that this factor is met. Respondents' materials were qualified for sale to [] and they were able to influence the renegotiation of Complainant's contract with [] by offering a lower price (\$[] per pound) for the tackifier resin. *See* CX-1588C at 5; Tr. at 540:17-541:20; CX-1567C at Q. 167-168; CX-1568C at Q. 54-61. The contract price that [] renegotiated with Complainant went from \$[] per pound to \$[] per pound. Tr. at 537:8-24, 540:17-541:20. This will result in a projected \$[] million injury over the contract term, 2013-2017. CX-343C; Tr. 537:8-24. In addition, Complainant agreed to a [] term. CX-1588 at 3; Tr. 541:-542:23. Moreover, we adopt the following of the ALJ's findings:

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Dr. Putnam's un rebutted testimony is that in addition to [] [] has agreed to try Respondents' SL-1801 tackifier resins. (CX-1567C, Qs. 156-158; and JX-25C) Also, the U.S. division of [] has requested internal approval to purchase SL-1801 from Respondents. (Citing CX-1567C, Qs. 156-158; and JX-025C).

Complainant argues reasonably that, as happened with [] it will suffer even more substantial injury if the foregoing customers apply pricing pressure and elect to renew agreements with Complainant only at lower prices. (See CX-1567C, Qs. 150, 180-181)

ID at 657. Based on this evidence, we affirm the ALJ's conclusions:

I find, too, that the threat to injure or destroy the domestic industry is substantive and clearly foreseen as a result of Respondents' unfair acts. The evidence cited, *supra*, establishes that the recently signed amendment to contract between Complainant and [], represents a loss to Complainant of more than [] million dollars per year in annual revenue for a total of at least \$ [] million corresponding to a margin loss of \$ [] million for [] tackifier sales to [], which results from Sino Legend's negotiation pressure.

Sino Legend ZJG's tackifier resin products, SL-1801 and SL-1802, have been certified as meeting []'s specifications and have been approved for sale to []. (CX-1567C, Qs. 149-182; and Tr. at 532:3-11) Respondents have made clear that they intend to use their SL-1801 and SL-1802 products to compete in the United States tackifier market for other customers such as [] and []. (*Id.*, Qs. 150, 156-160; JX-025C) Respondents' tackifier resins will compete directly and be interchangeable with Complainant's tackifier resins. *Id.*

The evidence shows that Respondents have substantial capacity to manufacture their SL-1801 and SL-1802 tackifiers, the ability to import their SL-1801 and SL-1802 tackifiers to undersell SI Group's tackifiers, and an explicit intention to enter into the U.S. market to sell their SL-1801 and SL-1802 tackifiers. (CX-1567C, Qs. 149-182)

ID at 659-60. Accordingly, the Commission finds that there is a threat to substantially injure or destroy Complainant's domestic industry.

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3. SL-7015

The ALJ found that there was “neither argument nor evidence provided by Complainant that Respondents’ importation of the SL-7015 (curing resin) product results in any injury or threat of injury to the domestic industry arising out of ‘unfair acts’ by Respondents. . . . Based upon a record devoid of evidence regarding misappropriation of trade secrets related to curing resins, and more specifically the product identified as SL-7015, I find that there has been no violation of 19 U.S.C. § 1337(a)(1)(A) in the importation of the SL-7015 product.” ID at 647.

Complainant argues that it has consistently alleged SL-7015 of misappropriating its curing resin trade secret and that it provided allegations and evidence of domestic industry in its Complaint and during discovery. Comp. Sub. at 21. Complainant also argues that its discovery requests required Respondents to provide discovery on SL-7015, which Respondents did not do. *Id.* at 22-23. Complainant further contends that it is entitled to relief because Respondents made a decision to assert that they had not imported SL-7015 and refused to engage in discovery. *Id.* at 23. Complainant asserts, and the ALJ found, that Respondents failure to provide discovery prevented SI from addressing SL-7015 substantively in contention interrogatories. *Id.* Complainant explains that by allowing Respondents to violate the ALJ’s discovery order, Respondents will be able to circumvent the Commission’s jurisdiction. *Id.* at 24.

Respondents explain that Complainant did not meet its burden in establishing a section 337 violation for SL-7015. Resps. Sub. at 24. Respondents assert that Complainant did not identify any trade secrets for SP-1045 and provide no comparison between SP-7015 and SP-1045 in briefing or in expert disclosures/testimony. *Id.* at 25.

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Respondents further assert that in response to interrogatories, Complainant did not identify any trade secrets for SP-1045. *Id.* at 25-26. This failure, according to Respondents, deprived the ALJ and Respondents from evaluating Complainant's allegations.

The IA asserts that the ID's finding to not grant relief for SL-7015 is not error. IA Sub. at 22. The IA argues that even though Respondents did not produce discovery on SL-7015, Complainant's failure to identify any trade secrets for SP-1045 deprived the IA, Respondents and the ALJ of the opportunity to investigate or evaluate the allegations with particularity. IA Reply Sub. at 8. The IA argues that without identifying any trade secrets, Complainant cannot establish a section 337 violation. *Id.*

The Commission affirms the ALJ's finding that there is no violation for SL-7015 on modified grounds. ID at 647-648.

The ALJ based his findings that there was no threat of injury or any injury resulting from any unfair acts on the testimony of Quanhai Yang. Mr. Yang testified that Respondents have not manufactured SL-7015 and the ALJ found Mr. Yang's testimony was un rebutted. However, the ALJ found that Mr. Yang's testimony was not credible and that he was an impeached witness in other sections of the ID. ID at 401, 704 n. 106. Therefore, the Commission does not adopt the ALJ's findings that rely on the testimony of Mr. Yang.

In the complaint, Complainant alleged that Respondents had violated its trade secret for SP-1045. The complaint identified SL-7015 as the corresponding accused product. In Complainant's prehearing brief, SP-7015 is only addressed in the remedy section. Complainant's Pre-Hearing. Brief at 397-401. Complainant did not disclose a

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specific process of SP-1045 that they allege Respondents misappropriated. Nor did Complainant provide evidence of injury for SP-1045 in its prehearing brief.

Further, in Complainant's post hearing brief, SP-1045 and SL-7015 are primarily discussed in domestic industry and remedy sections.⁷ Again, Complainant did not disclose a specific process of SP-1045 that they accuse Respondents of misappropriating. In addition, in its Contingent Petition for Review, Complainant still did not present evidence of what process was misappropriated.

The Commission finds that there is no violation of section 337 for SL-7015. Specifically, the Commission finds that there is no evidence or argument that Respondents misappropriated any specific trade secret of SP-1045. In both the pre-hearing and post-hearing briefing, Complainants failed to assert a trade secret that was misappropriated in making SL-7015. Accordingly, Complainants failed to meet their burden of proving that violation of 337 occurred for SL-7015.

M. Which Parties Have Violated Section 337 Through Importation, the Sale for Importation, or the Sale After Importation?

The ALJ found Mr. Yang, Ms. Ning Zhang, Sino Legend ZJG, Sino Legend BVI, Sino Legend Hong Kong, Sino Legend Marshall Islands, Sino Legend Holding Group, Gold Dynasty, Elite, Red Avenue BVI, Red Avenue Hong Kong, and PMI to have misappropriated trade secrets.⁸ ID at 714. The ALJ found that (1) Sino Legend ZJG is a manufacturing company; (2) Mr. Yang is the chairman of Sino Legend ZJG; (3) Ms.

⁷ Complainant presented the allegation that there has been an injury for SP-1045 in its post-hearing brief with respect to lost sales.

⁸ The ALJ did not find Red Avenue America, Shanghai Lunsai, or Thomas Crumlish to be in violation. ID at 714. Thomas Crumlish, whom the ALJ found not to be in violation, is the Chairman or Chief Executive Officer of Red Avenue America. ID at 350. The ALJ stated that Respondents represent that Shanghai Lunsai does not manufacture any tackifiers at issue in this investigation and has not shipped to or received within the United States any tackifiers at issue in this investigation. *Id.*

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Zhang owns and controls Sino Legend ZIG; (4) PMI is the consignee of a shipment of tackifier; (5) Sino Legend Marshall Island shipped tackifiers to the United States; and (6) the other entities found by the ALJ to be in violation are owned or controlled by Mr. Yang and Ms. Zhang. *See* ID at 347-51. The ALJ found that certain of the companies are holding companies which own or control other companies as set forth in the ID at 349-350 (reproducing CX-258C at 3).

Respondents argue that the ALJ improperly applied piercing the corporate veil principles to find individuals Yang and Zhang in violation of Section 337. *Resps. Pet. at 95.* Respondents argue that the ALJ did not discuss piercing the corporate veil other than by summarizing Respondents' arguments, and the Commission has routinely rejected invitations to pierce the corporate veil. *Resps. Pet. at 95 (citing Plastic Food Storage Containers, 1983 WL 206916 at *4; Institution of Section 337 Investigation on Certain Office Desk Accessories, 1983 206953 n.8 (July 1983)).*

Respondents further submit that the record contains no evidence that Sino BVI, Red Avenue BVI, or Red Avenue HK participated in manufacturing or in the importation or sale of such articles, as required by Section 337(a)(1)(A). *Id.* Respondents state that Elite, Gold Dynasty, and Hong Kong SL possess ownership interests in other respondents but the ALJ has provided no basis for piercing the corporate veil, and that these respondents have not participated in manufacturing, importation, or sale. *Id.* at 24.

Respondents argue that consenting to jurisdiction is not a concession of liability and does not trigger a finding of violation. *Resps. Reply Sub. at 12.* Respondents assert that the Complainant and the IA do not attempt to meet the tests for piercing the corporate veil, *i.e.*, do not cite any evidence that the individuals used the corporations as

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an alter ego or acted in an ultra vires manner. *Id.* at 13. Respondents contend that “acting in concert” does not trump the corporate form doctrine or allow individual liability and that the Restatement of Torts does not so provide. *Id.* (citing *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 552-53 (Fed. Cir. 1990)).

Respondents further argue that Complainant points to no evidence that Sino Legend BVI, Red Avenue BVI, Red Avenue HK, Elite, Gold Dynasty, Hong Kong SL, or Shanghai Lunsai manufactured, distributed, or imported the accused tackifiers. *Id.* at 14.

Complainant responds that although personal jurisdiction is not required, Yang and Zhang submitted to the Commission’s personal jurisdiction.⁹ *Comp. Resp.* at 86-87. Complainant further responds that piercing the corporate veil is not required because each has engaged in activities with a sufficient nexus to the importation of the products at issue to be subject to an exclusion order. Complainant rejects as irrelevant Respondents’ argument that Yang and Zhang acted in their official capacities. *Id.* at 88-89 (citing *Floppy Disk Drives*, Inv. No. 337-TA-203, Order No. 11 (Oct. 23, 1984), 1984 WL 273857, at *2). Complainant argues that Respondents’ corporate shell games further justify exercise of the Commission’s personal jurisdiction over Zhang and Yang. *Id.* at 91-92.

On review, Complainant argues that piercing the corporate veil is not required because the Commission has jurisdiction. *Comp. Sub.* at 20-21 (citing the consent orders in *Floppy Disk Drives*, Order No. 22 (Dec. 28, 1984), 1984 WL 273962). Further, Complainant argues that the Commission does not require piercing the corporate veil in

⁹ The IA did not comment on this issue at the petition stage, and his briefing on review is similar to that of Complainant. IA Sub. at 14-21; IA Reply Sub. at 6-7.

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order to find liability of individual respondents if the respondents have acted in concert. Comp. Reply Sub. at 9-10. Complainant recounts Mr. Yang's statement that no agreements are needed for cooperation between RedAvenue and Sino Legend because they are both owned by the same person, Mr. Zhang. Comp. Sub. at 16 (citing CX-1352.1C at 119:4-17).

As to the individual acts, Complainant argues that Mr. Yang was personally involved in recruiting and hiring Xu and trying to hide Xu's involvement with Sino Legend, and that Yang served as the conduit through which Complainant's trade secrets passed. Comp. Sub. at 16-17 (citing CX-938C; CX-153C; CX-1563C at Q.42; CX-1372C; CX-170C; CX-1563C at Q.44; CX-938C; CX-153C; CX-154; ID at 398-404). Complainant argues that Mr. Crumlish owns and manages Red Avenue America, personally managed Sino Legend US's marketing campaign, and served as the U.S. contact for Sino Legend's importation of SL-7015. *Id.* at 17 (citing Tr. at 696:18-20). Complainant argues that Sino Legend ZJG is the undisputed manufacturer of the Sino Legend products at issue. *Id.* at 17. Complainant states that an order against Sino Legend ZJG's parent entities is necessary to provide relief, *i.e.*, Hong Kong Sino Legend; Sino Legend MI, Gold Dynasty, Elite, and Sino Legend BVI. *Id.* Complainant states that PMI is an SL distributor in the United States, which imports and sells SL-1801 in the United States after importation. *Id.* (citing CX-102C; CX-43C; CX-44C). Complainant asserts that Sino Legend HGL is responsible for shipping SL-1801 to PMI. *Id.* (citing CX-44C; CX-46C). Complainant argues that Red Avenue Chemical America is involved in the marketing of SL-1801 to U.S. customers through Mr. Crumlish's activities and was

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the importer and distributor for SL-7015. *Id.* (citing CX-1354C at 273:22-274:6, 274:12-19, 274:25-275:9m 275:15-21; Tr. at 696:14-17, 696:21-697:2; CX-1601C).

Complainant asserts that Lunsai was involved in the misappropriation of trade secrets by Xu and Yang. *Id.* at 16 (citing ID at 398). Complainant argues that Red Avenue HK employs Mr. Xu, handles Sino Legend ZIG's U.S. sales and shares many employees with Sino Legend companies. *Id.* at 17-18 (citing CX-1357.1C at 12:3-7; 23:17-24:5; CDX-6C). Finally, Complainant asserts that Red Avenue BVI provided funding for Tong Yue, which conducted Respondents' pilot studies for "1068 Resin" which became SL-1801. *Id.* at 16-18 (citing CX-1352.1C at 72:10-18, 117:20-118:2, 119:4-10). Complainant argues that each respondent has engaged in activities with a sufficient nexus between their unfair acts and the importation to confer jurisdiction. *Id.* at 18-19 (citing *Certain Floppy Disk Drives and Components Thereof*, Inv. No. 337-TA-203, Order No. 11 (Oct. 23, 1984), 1984 WL 273857, at *2).

We agree with Complainant that the following companies have acted in concert. *See* ID at 576, 707. Respondents admit that four corporate respondents have played roles in manufacturing, distribution, and importation as follows: Sino Legend ZIG (manufacturing); SLHG Ltd. (importation); Sino Legend Marshall Islands (importation); and PMI (importation and sale after importation). Resps. Sub. at 21. There is testimony that Sino Legend ZIG and Red Avenue Hong Kong work together "seamlessly" without any agreement. CX-1352.1C at 119:16-17. PMI is a Sino Legend distributor in the United States, which imports and sells SL-1801 in the United States after importation. CX-102C; CX-43C; CX-44C. Sino Legend HGL is responsible for shipping SL-1801 to PMI. CX-44C; CX-46C. Shanghai Lunsai was involved in the misappropriation of trade

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secrets by Xu. CX-154C; CX-938C. Red Avenue HK employs Mr. Xu, handles Sino Legend ZJG's U.S. sales and shares many employees with Sino Legend companies. CX-1357.1C at 23:17-24:5; CDX-6C. Red Avenue BVI provided funding for Tong Yue, which conducted Respondents' pilot studies for "1068 Resin" which became SL-1801. CX-1352.1C at 72:10-18, 117:20-118:2, 119:4-10.

Neither the ALJ nor any of the parties have attempted to conduct a "piercing the veil" analysis, which would enable the Commission to hold an individual liable for acts done in the course of his employment or to hold a shareholder liable for acts done by a corporation. *Wordtech Systems, Inc v. Integrated Networks Solutions, Inc.*, 609 F.3d 1308, 1313 (Fed. Cir. 2010). In fact, Complainant has not even tried to argue that Mr. Yang or Ms. Zhang used one of the companies as an "alter ego." Further, although Mr. Yang participated in the hiring of Mr. Xu, and companies affiliated with them were involved in misappropriation, Complainant has not met its burden of proving personal responsibility by Mr. Yang or Ms. Zhang for the transfer or copying of Complainant's trade secrets. *Cf. Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1579 (Fed. Cir. 1986) (liability may exist where there is personal responsibility). We disagree with Respondents that the entry of consent orders in *Floppy Disk Drives* demonstrates that jurisdiction is sufficient for entry of an order because a finding of violation is not necessary for entry of a consent order.

Similarly, although the ALJ made findings that there were parent holding companies, Hong Kong Sino Legend, Sino Legend MI, Gold Dynasty, Elite, were part of a convoluted structure of companies, ID at 347-351, mere ownership is not enough to hold a parent corporation liable for the acts of its subsidiaries absent further showing.

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Dow Jones & Co., Inc. v. Ablyse Ltd., 606 F.3d 1338, 1349 (Fed. Cir. 2010). Because the Complainant and the ALJ have not attempted a “piercing the veil” analysis, we do **not** find these parent companies in violation absent other acts. Thus, Sino Legend Marshall Island is in violation, but these other companies affiliated with Sino Legend ZJG are **not**.

We further agree with the ALJ’s finding that Complainant has **not** demonstrated liability by Mr. Crumlish or Red Avenue North America. *See* ID at 350-51; 576.

The following Respondents are therefore in violation and subject to any order as set forth in the remedy section below: Sino Legend ZJG; SLHG Ltd.; Sino Legend Marshall Islands; PMI; Red Avenue Hong Kong; Sino Legend HGL; Shanghai Lunsai; and Red Avenue BVI.

N. Remedy, the Public Interest, and Bonding

Remedy

The ALJ recommended the issuance of a general exclusion order (GEO) extending for a period of ten years commencing on the target date with respect to SL-1801, SL-1801 LFP, SL-1802, and SL-1802 LFP. ID/RD at 700-706. In his analysis, the ALJ found that “Respondents created a convoluted set of corporate structures and relationships that involve a number of entities that manufacture, distribute and import the accused products.” ID/RD at 701. The ALJ recommended that if the Commission determines to issue a limited exclusion order (LEO), that the order be directed to Mr. Yang, Ms. Ning Zhang, Sino Legend ZJG, Sino Legend BVI, Sino Legend Hong Kong,

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Sino Legend Marshall Islands, Sino Legend Holding Group, Gold Dynasty, Elite, Red Avenue BVI, Red Avenue Hong Kong, PMI, and all affiliated companies. ID/RD at 707.

Complainant requests a GEO, or in the alternative an LEO, for a duration of 10-20 years. Comp. Sub. at 36. Complainant argues that the criteria of both Section 337(d)(2)(A) and (B) are met. *Id.* at 37. Complainant likens its predicament to that of the Complainant in *Handbags* where there is no practical way to prevent circumvention of an LEO because of the “shifting sands” of Respondents’ corporate names and forms and because it is difficult to identify the source of goods. *Id.* at 38 (citing *Certain Handbags, Luggage, Accessories and Packaging*, Inv. No. 337-TA-754, 2012 WL 864789 (March 5, 2012)).

Complainant asserts that Respondents’ steps to hide their activities from Complainant supports a GEO. *Id.* at 38. Specifically Complainant argues that Respondents hid the hiring of Jack Xu by hiring him through ZZPE and Shunsai Trading. *Id.* at 39 (citing ID at 702). Complainant contends that Respondents took steps to avoid suspicion about the relationship between its manufacturing and distribution arms, and that emails demonstrate a purposeful effort by Sino Legend to distance itself from Tong Yue and Red Avenue. *Id.* Complainant argues that Respondents engaged in deceit as to the origin of their shipments by preparing labels falsely indicating an origin in the United States. *Id.* at 40 (citing CX-644C; Tr. at 742:19-745:13). Complainant asserts that Respondents engaged in discovery abuses to avoid a full investigation, that they unilaterally withheld discovery for two months at the start of the case, that they avoided disclosure throughout discovery that certain importations were made with [] that they withheld the majority of their documents until after the close of fact discovery, and

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then still withheld email from the critical time period, that they tampered with key documents, and that they withheld discovery regarding SL-7015. *Comp. Sub.* at 41-44.

Complainant argues that Respondents' discovery abuses support a GEO (and LEO) regarding SL-7015. Complainant argues that Respondents had a duty to supplement their discovery responses to reflect three importations of SL-7015. *Id.* at 44-45.

Complainant requests that a GEO contain a certification provision. *Id.* at 46.

Complainant requests in the alternative an LEO that includes the individual Respondents Yang and Zhang because they are concerned that the Respondents may be dissolved and reconstituted as new entities. *Id.*

Complainant argues that any exclusion order should remain in effect for 20 years, or alternatively should remain in effect for at least 10 years. *Id.* at 47. Complainant points to the testimony of Dr. Banach that it took at least 45 years to develop the process that was implemented by Complainant in 2004 and he estimated that it would take 10-20 years of process development to recreate the process from scratch. *Id.* at 49 (citing CX-1565 at Q.100).

Complainant argues that Respondents' sole challenge to a GEO misplaces reliance on *Spray Pumps*. Complainant asserts that while the Commission in the past has considered the *Spray Pumps* factors, the Commission now focuses principally on the statutory criteria. *Comp. Reply Sub.* at 17 (citing *Protective Cases*, Inv. No. 337-TA-780, 2012 WL 5874344, *12 (Nov. 19, 2012) (quoting *Hydraulic Excavators*, Inv. No. 337-TA-582, USITC Pub. 4115, Comm'n Op. at 16-18 (December 2009))).

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Complainant contends that Respondents are proposing to make any exclusion order ineffectively narrow. Comp. Reply Sub. at 19. Complainant argues that Respondents' discovery abuse warrants an injunction, especially in a process of production case where it would be impossible to understand the process at issue. *Id.* Complainant argues that nothing suggests that its [] technology is obsolete. *Id.* at 20 (citing Tr. at 152:16-153:17; 220:25-222:3).

Complainant responds to Respondents' argument that Complainant's [] technology is outdated, and argues that Complainant uses [] solely because of [] and that it still uses [] in China. Comp. Reply Sub. at 20 (citing Tr. at 220:25-222:3; 152:16-153:17). Complainant submits that the Commission should not preclude an exclusion order merely because Complainant does not currently practice all embodiments. *Id.* Complainant submits that neither the UTSA nor the Restatement require current use for trade secret protection. *Id.* (citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 727 and n.6 (7th Cir. 2003)).

Complainant asserts that Mr. Xu's non-disclosure obligations are still in effect (and being breached) today. Comp. Reply Sub. at 21 (citing CX-318C at 2). Complainant states that Mr. Xu's non-disclosure agreement with SI Group committed Xu to permanently refrain from disclosing Complainant's confidential information. Complainant clarifies that Mr. Xu's agreement with SI Group affiliate SISL was limited to 3 years, but that does not take into account his agreement with SI Group which was permanent. *Id.* Complainant further states that the SISL Employee Handbook states a policy which restricts disclosure during or after employment. *Id.* (citing CX-317C at 3; CX-321C at 2; Tr. 294:7-11).

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Complainant counters Respondents' reliance on the testimony of Dr. Swager that the trade secrets could be independently developed in six months, stating that Dr. Swager had little industry experience and that his opinion lacked evidentiary support. *Id.* at 22.

Complainant asserts that the time of exclusion runs from the date of any exclusion order. *Id.* at 24 (citing *Sausage Casings*, Comm'n Op. at 22; *Cast Steel Railway Wheels*, Excl. Order at 2).

The Respondents argue that a general exclusion order is contrary to Commission precedent. Resps. Sub. at 34. Respondents argue that the RD runs afoul of *Spray Pumps* by recommending a GEO despite finding that there was no widespread pattern of unauthorized use, ID at 704-05, and by failing to address whether a GEO would "unintentionally stifle the flow of legitimate trade" by Complainant's competitors unrelated to Respondents including Durez (now owned by Sumitomo Bakelite), Kolon, and other international tackifier producers. *Id.* at 34-35 (citing *Spray Pumps*, 216 USPQ at 473). Respondents further argue that a GEO is not necessary to prevent circumvention because the accused products are shipped in large quantities with bills of lading, such that their identities and sources are easily recognized. *Id.* at 35 (citing CX-106C; CX-110C; CX327C; CX-1578).

Respondents assert that any remedy must be tailored to the specific products and processes subject to underlying misappropriation findings. *Id.* at 35. Respondents argue that a GEO directed to "resins manufactured using the Rubber Resin Trade Secrets" without defining "Rubber Resin Trade Secrets" would open the door to later-defined secrets, and should be limited to "SP-1068 Trade Secrets" defined as "trade secrets found to exist in this investigation." Resps. Reply Sub. at 22-23. Respondents state that

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Complainant seeks an exclusion order directed to SL-7015 when it admits that it never identified any allegedly misappropriated secrets. *Id.* at 23. Respondents request a certification provision permitting them to certify that future imports are beyond the scope of the order. Resps. Sub. at 35.

Respondents argue that the length of any exclusion order should not exceed the time it would take to develop any trade secrets found to have been misappropriated. *Id.* at 36. Respondents contend that Complainant's 2007 process for making SP-1068 is into stale and obsolete, and Complainant itself has made subsequent changes. *Id.* at 36-37. Respondents suggest that Mr. Xu was under no obligation to maintain the confidentiality of any information he learned from Complainant after April 2010 because the contract provided a three year limitation during which Xu was bound by confidentiality. *Id.* at 37-38 (citing *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 609 (7th Cir. 2001); Tr. at 229:12-24; CX-1372C). Respondents state that the nominal length of any remedy should reflect the fact that a party developing a tackifier process in 2006 would have the benefit of all of Complainant's public disclosures and the ability to chemically test samples of SP-1068. Respondents argue that Dr. Swager testified that it would take six months to one year to develop the trade secrets. *Id.* at 39 (citing Tr. at 865:14-866:9 (Swager)). Respondents argue that the ALJ relied on conclusory testimony in arriving at his recommendation of a 10 year exclusion period. *Id.* at 40 (citing CX-1566C at Q.78). Finally, Respondents argue that the remedy should run from the date of the misappropriation, not the date of any issued order. *Id.* at 41 (citing *Viscofan, S.A. v. ITC*, 787 F.2d 544, 551 (Fed. Cir. 1986)).

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The IA is of the view that the appropriate remedy will include a GEO “directed to rubber resins using any of the SP-1068 Rubber Resin Trade Secrets that are manufactured by, for, or on behalf of Respondents or any of their affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or their successors or assigns.” IA Sub. at 28; IA Reply Sub. at 14. The IA agrees with the ALJ that there is a likelihood of circumvention because of the shifting sands of corporate names and structures. IA Reply Sub. at 15. The IA submits that a GEO would be beneficial because it would include manufacture by Respondents through non-party Tongyue, non-party Shanxi Chemical Research Institute, or any other newly formed corporate entity. *Id.* The IA agrees with the ALJ that the record fails to support commercially significant domestic inventories that would warrant the issuance of a cease and desist order. IA Sub. at 28-29.

A general exclusion order may issue if “(A) [it] is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2)(A) and (B).

The ALJ found likelihood of circumvention based on the convoluted corporate structures of the Respondents. ID/RD at 701-02. We disagree. If a limited exclusion order includes those acting on behalf of the named Respondents, this would be sufficient in our view to prevent circumvention of an order. Complainants rely on *Certain Handbags, Luggage, Accessories and Packaging*, Inv. No. 337-TA-754, 2012 WL 864789 (March 5, 2012), in arguing that a GEO is warranted to prevent circumvention of an exclusion order because of the “shifting names” of the corporations. However, the evidence shows that a new manufacturer cannot easily circumvent a limited exclusion

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order because tackifier-manufacturers must qualify their products with a sale to a domestic manufacturer such as [] to demonstrate that their product meets specifications. *See, e.g., CX-1567 at QQ. 30, 36, 148.*

As to the existence of a pattern of violation, the ALJ found that Complainant had not identified any violative acts by nonrespondents and did not recommend the issuance of an exclusion order under Section 337(d)(2)(B). ID/RD at 704-05. We agree.

As to whether it would be difficult to identify the source of “infringing” products, the ALJ did not make specific findings. Complainant states that Respondents have placed some labels on products to indicate a false origin in the United States. However, we do not believe that the tackifiers at issue are a fungible product because tackifier-manufacturers must have qualify their products with a sale to a domestic manufacturer such as [] to demonstrate that their product meets specifications. *See, e.g., CX-1567 at QQ. 30, 36, 148.* Therefore, the identity of the manufacturer is known.

The Commission has therefore determined that the proper remedy is the issuance of a limited exclusion order, which would extend to those selling on behalf of the named respondents.¹⁰

There is one final issue as to remedy -- the duration of any order. The duration of an order in a trade secret misappropriation case is set as the time it would have taken to independently develop the trade secrets. *See Certain Cast Steel Wheels, Inv. No. 337-TA-655, Comm’n Op. at 8-9.* There is a dispute between the parties as to whether the trade secrets would have taken 6 months or 10-20 years to develop, based on testimony.

¹⁰ Complainant has not expressly requested the issuance of a cease and desist order and the ALJ did not recommend a cease and desist order. The IA adds that there is insufficient evidence of domestic inventory and submits that the ALJ was correct not to recommend a cease and desist order. Based on the lack of request and the lack of evidence, the Commission has determined not to issue of a cease and desist order.

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The Commission has determined to set a period of 10 years from the **date of issuance of** the exclusion order. Complainant has adduced expert testimony that the **totality of** asserted trade secrets would take at least 10 years to independently develop given the time it took Complainant to develop the process, even if not all of the **asserted trade** secrets are protectable. CX-1565C at QQ.99-100. The Commission does not find credible the testimony adduced by Respondents that Complainant's process could be independently developed in 6 months. In fact, Respondents were not successful in reverse-engineering most of Complainant's process and resorted to hiring Complainant's employees in order to copy Complainant's processes. Respondents argue that one of the trade secrets (*i.e.*, [] is "obvious" in view of the **economical and** environmental benefits of [] This is speculative, especially because the [] which is part of Complainant's trade secret. ID at 161 (citing Tr. at 818:5-820:5). Sumitomo inferred from reverse-engineering the use of [] but there is no evidence that anyone deduced the use of [] for example.

The Commission therefore concludes that the most reasonable **duration** of the exclusion order is a 10 year remedy. ¹¹

Public Interest

Respondents argue that the ALJ's decision and remedy are in **conflict** with principles of abstention and international comity because a Chinese court proceeding

¹¹ Respondents further argue that the time of exclusion should run from the time of the violation rather than the issuance of the order. Respondents, however, should not be allowed to profit from any delays in the legal process.

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culminated in a judgment adverse to Complainant. Resps. Sub. at 43.¹² Respondents further argue that consumers will have higher prices in the event of an exclusion order because Complainant by its own admission has []% of the market share. *Id.* at 44. Finally, Respondents argue that there is a public interest in enforcing the contracts written by the parties, specifically the three year limitation on disclosure in Mr. Xu's contract, which Respondents argue has now expired. *Id.* at 44.

Complainant's opening submission on review incorporates by reference its statement on the public interest. Comp. Sub. at 50. Complainant's Statement on the Public Interest explains that the imported tires are sold in direct competition with tackifiers made domestically. Comp. Pub. Interest Sub. at 1-2. Complainant states that a GEO would not adversely impact health, safety or welfare, that Complainant's process has environmental benefits because it [] citing CX-1570 at Q.39, and that public interest favors the protection of IP rights. *Id.* at 2. Complainant states

¹² On July 16, 2013, Respondents submitted a paper styled "Respondents' Notice of New Authority" in which they gave notice of a June 17, 2013 Civil Judgment of the Shanghai No. 2 Intermediate People's Court of the People's Republic of China, 2011 HEZMW(Z) CZ No. 50 ("Chinese Judgment"). Respondents state that the legal action leading to the Chinese Judgment is based upon the same allegations of trade secret misappropriation present in the present investigation, and resulted in a finding of no misappropriation.

On July 24, 2013, Complainant submitted a response in objection, arguing that this was not new authority because it issued on the same day as the ID, it is a Chinese decision, and it does not change Chinese law. Comp. Response to Notice of Authority at 1-2. Complainants state that Respondents have not challenged the order given by the ALJ at the pre-hearing conference excluding evidence relating to the Chinese legal proceeding. *Id.* at 3. Complainant argues that the Chinese proceeding was not fair. *Id.* at 4. Complainants submit that comity is an affirmative defense for which Respondents bear the burden. *Id.* at 5. Complainant argues that the United States through its Trade Representative has recently expressed concern about trade secret theft by Chinese companies and that it has been difficult for some U.S. companies to obtain relief [in China]. *Id.* at 6.

On July 25, 2013, the IA submitted a response to the notice of authority, arguing that the appealable Chinese Judgment is of limited or no relevance to the Commission's determination on whether to the Commission's determination or with respect to the ID's conclusion that Respondents have violated Section 337. IA Response to Notice of Authority at 3. The IA states that in *Sausage Casings*, foreign judgments were admitted into the record and given little weight, but that here the ALJ ruled that the Chinese litigation would not be admitted into the record. *Id.* at 4.

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that Durez is a viable alternative to the other products, and the Complainant can also replace the volume sold by Respondents. *Id.* at 3 (citing Tr. at 528:4-18; 529:19-530:5; JX-28C; CX-1568C at 1; Tr. at 555:7-25; CX-306C; CX-843C). Complainant argues that a GEO would have effect on U.S. consumers or competition because an abundant supply of tackifiers will continue to be available in the U.S. market. *Id.* at 5.

Complainant argues that Respondents' defense that international comity and abstention would preclude an exclusion order is unsupported by ITC case law. Comp. Reply Sub. at 24. Complainant asserts that a remedy would favor the public interest because it would foster legitimate competition. *Id.* at 25. Complainant argues that honoring contracts does not detract from the public interest of issuing a remedy because Respondents have no standing to enforce Mr. Xu's contracts, and induced him to breach his contractual obligations. *Id.*¹³

The IA states that the rubber tackifier resins are not the types of products that raise concerns relating to public health and welfare or U.S. consumers. IA Sub. at 29. The IA suggests that the presence of the Durez products in the market which directly compete with Complainant's products minimizes the impact on competitive conditions. *Id.* at 30. As to Respondents' argument that the Commission should abstain because of legal proceedings in China, the IA states that the ID found that there is nothing in the record to suggest that any legal proceedings in China are or would be relevant to a violation of Section 337. IA Reply Sub. at 18. As to Respondents' argument that consumer prices would increase, the IA states that this is an argument that would apply to

¹³ There were three additional public interest submissions on behalf of Complainants, arguing for enforcement of IP rights and stating that Complainant employs workers in New York: by: (1) U.S. Sen. Charles E. Schumer and U.S. Rep. Paul D. Tonko, (2) American Chemistry Council, and (3) New York State Chemical Alliance.

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any case involving the enforcement of valid IP rights, and that the public interest favors the protection of U.S. intellectual property. *Id.*

The Commission has determined that there are no public interest factors which would preclude the issuance of a remedy. None of the parties have identified any public health or welfare considerations. To the extent that environmental issues have been raised, the evidence indicates that Complainant's process uses less formaldehyde than comparable processes. CX-1570 at Q.39.

Issuance of a limited exclusion order would not have an effect on U.S. consumers or competition because an abundant supply of tackifiers will continue to be available in the U.S. market. *Id.* at 5. The Commission agrees with Complainant and the IA that consumer demand can be met by Complainant and by non-party Sumitomo Durez. Durez is a viable alternative to the other products, and the Complainant can also replace the volume sold by Respondents. *Id.* at 3 (citing Tr. at 528:4-18; 529:19-530:5; JX-28C; CX-1568C at 1; Tr. at 555:7-25; CX-306C; CX-843C).

In addition, issuance of an exclusion order would not have a detrimental impact on domestic production of tackifiers.

Further, the Chinese litigation does not preclude issuance of a remedy in this investigation which is an investigation. The Chinese judgment has no bearing on the public interest factors, which the Commission is required by statute to consider in connection with the issuance of a remedy for a violation of Section 337 that has been established based on the administrative record of this proceeding.

Bonding

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The ALJ recommended a bond of \$0.22 per pound of imported tackifier resin (or 19% of the stated value). ID/RD at 713.

Complainant argues that the ALJ properly recommended a bond in the amount of 19% for the reasons set forth in the ID. Comp. Sub. at 50 (citing ID at 711-13).

Respondents argue that a bond is not necessary, but if one is imposed, it should be set at Complainant's admitted reasonable royalty rate of []% *Id.* at 42. Respondents argue that a reliable price comparison is not possible because Respondents' only U.S. sales were for qualifying purposes, and argues that the []% royalty rate from Complainant's agreement with SISL is applicable. *Id.* (citing CX-341C). Respondents suggest that Complainant's recent contract with [] effectively ensures that there will be no injury during the period of Presidential review. *Id.* (citing CX-1588C at 1-2, 5).

The IA supports the ALJ's recommendation of a bond in the amount of 19% because evidence supports a finding of a price differential between SL-1801 and Complainant's as being \$0.22 per pound or 19%. IA Sub. at 31 (citing ID at 711-13).

The Commission agrees with the ALJ that a bond based on the price differential between Respondents' product and Complainant's competing product is appropriate. Respondents' price is based on record evidence of a sale to [] The purpose of the sale has not been shown to disqualify the transaction from consideration for bond. The Commission therefore determines that the appropriate bond is the price difference of 19% of entered value.

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IV. CONCLUSION

The Commission has determined to affirm-in-part and reverse-in-part the final ID of the ALJ, and to find a violation of Section 337 by reason of misappropriation of trade secrets in the importation, sale for importation, or sale within the United States after importation of rubber resins by certain respondents. The Commission has found that Sino Legend ZJG; SLHG Ltd.; Sino Legend Marshall Islands; PMI; Red Avenue Hong Kong; Sino Legend HGL; Shanghai Lunsai; and Red Avenue BVI are in violation of Section 337. The Commission has determined to issue a limited exclusion order.

By order of the Commission.



Lisa R. Barton
Acting Secretary to the Commission

Issued: **FEB 26 2014**

**CERTAIN RUBBER RESINS AND PROCESSES FOR
MANUFACTURING SAME**

337-TA-849

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION [PUBLIC VERSION]** has been served by hand upon the Commission Investigative Attorney, **John Shin, Esq.**, and the following parties as indicated, on **February 26, 2014**.



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

ON BEHALF OF COMPLAINANT SI GROUP, INC.:

Lawrence T. Kass, Esq.
MILBANK, TWEED, HADLEY & MCCLOY, LLP
One Chase Manhattan Plaza
New York, NY 10005

() Via Hand Delivery
(X) Via Express Delivery
() Via First Class Mail
() Other: _____

**ON BEHALF OF RESPONDENTS REDAVENUE
CHEMICAL CORP. OF AMERICA, THOMAS R.
CRUMLISH, JR., PRECISION MEASUREMENT
INTERNATIONAL LLC, SINO LEGEND
(ZHANGJIAGANG) CHEMICAL CO., LTD., SINO
LEGEND HOLDING GROUP, INC., SINO LEGEND
HOLDING GROUP LIMITED, HONGKONG SINO
LEGEND GROUP, LTD., RED AVENUE CHEMICAL
CO. LTD, NING ZHANG, QUANHAI YANG, AND
SHANGHAI LUNSAI INTERNATIONAL TRADING
COMPANY:**

Michael R. Franzinger, Esq.
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

() Via Hand Delivery
(X) Via Express Delivery
() Via First Class Mail
() Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN RUBBER RESINS AND PROCESSES
FOR MANUFACTURING SAME**

Investigation No. 337-TA-849

**NOTICE OF COMMISSION DETERMINATION TO REVIEW THE FINAL INITIAL
DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE; SCHEDULE FOR
FILING WRITTEN SUBMISSIONS ON REVIEW**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the final initial determination (“final ID” or “ID”) in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3065. 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 June 26, 2012, based on a complaint on behalf of SI Group, Inc. of Schenectady, New York (“SI Group” or “SI”) on May 21, 2012, as supplemented on June 12, 2012. *77 Fed. Reg.* 38083 (June 26, 2012). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“Section 337”), in the sale for importation, importation, or sale after importation into the United States of certain rubber resins by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. The Commission's notice of investigation named as respondents Red Avenue Chemical Corp. of America of Rochester, New York; Thomas R. Crumlish, Jr. of Rochester, New York;

Precision Measurement International LLC of Westland, Michigan; Sino Legend (Zhangjiagang) Chemical Co., Ltd. of Zhangjiagang City, China; Sino Legend Holding Group, Inc. c/o Mr. Richard A. Peters of Kowloon, Hong Kong; Sino Legend Holding Group Ltd. of Hong Kong; HongKong Sino Legend Group, Ltd. of North Point, Hong Kong; Red Avenue Chemical Co. Ltd. of Shanghai, China; Ning Zhang of North Vancouver, Canada; Quanhai Yang of Beijing, China; and Shanghai Lunsai International Trading Company of Shanghai City, China. A Commission investigative attorney is participating in this investigation.

On January 14, 2013, the Commission issued notice of its determination not to review an ID to amend the complaint and notice of investigation to add Red Avenue Group Limited of Kowloon, Hong Kong; Sino Legend Holding Group Inc. of Majuro, Marshall Islands; Gold Dynasty Limited c/o ATC Trustees (Cayman) Limited of Grand Cayman, Cayman Islands; and Elite Holding Group Inc. c/o Morgan & Morgan Trust Corporation (Belize) Limited of Belize City, Belize as respondents. 78 *Fed. Reg.* 3817 (January 17, 2013).

On June 17, 2013, the presiding administrative law judge issued his final ID, finding a violation of Section 337. On July 1, 2013, SI and the Respondents filed petitions for review. On July 9, 2013, SI, the Respondents, and the Commission investigative attorney filed responses thereto.

On July 16, 2013, Respondents filed a notice of new authority. On July 24, 2013, the Complainant submitted an objection to the notice of new authority.

The following parties and members of the public have submitted statements on the public interest: the Complainant (July 17, 2013); the New York State Chemical Alliance (August 13, 2013); and the American Chemistry Council (August 14, 2013).

After considering the ID and the relevant portions of the record, the Commission has determined to review the ID in its entirety.

The parties should brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

[CONFIDENTIAL BUSINESS INFORMATION DELETED]

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in a respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for*

Connecting Computers via Telephone Lines, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 9 (December 1994).

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 United States 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: The parties to the investigation are requested to file written submissions on the issues identified in this notice. 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. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the patents expire and the HTSUS subheadings under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on September 23, 2013. Reply submissions must be filed no later than the close of business on September 30, 2012. The written submissions must be no longer than 50 pages and the reply submissions must be no longer than 25 pages. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must do so in accordance with Commission rule 210.4(f), 19 C.F.R. § 210.4(f), which requires electronic filing. The original document and 8 true copies thereof must also be filed on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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

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
Acting Secretary to the Commission

Issued: September 9, 2013

**CERTAIN RUBBER RESINS AND PROCESSES FOR
MANUFACTURING SAME**

337-TA-849

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **John Shin, Esq.**, and the following parties as indicated, on **September 9, 2013**



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

ON BEHALF OF COMPLAINANT SI GROUP, INC.:

Lawrence T. Kass, Esq.
MILBANK, TWEED, HADLEY & MCCLOY, LLP
One Chase Manhattan Plaza
New York, NY 10005

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

**ON BEHALF OF RESPONDENTS REDAVENUE
CHEMICAL CORP. OF AMERICA, THOMAS R.
CRUMLISH, JR., PRECISION MEASUREMENT
INTERNATIONAL LLC, SINO LEGEND
(ZHANGJIAGANG) CHEMICAL CO., LTD., SINO
LEGEND HOLDING GROUP, INC., SINO LEGEND
HOLDING GROUP LIMITED, HONGKONG SINO
LEGEND GROUP, LTD., RED AVENUE CHEMICAL
CO. LTD, NING ZHANG, QUANHAI YANG, AND
SHANGHAI LUNSAI INTERNATIONAL TRADING
COMPANY:**

Michael R. Franzinger, Esq.
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

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

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN RUBBER RESINS AND
PROCESSES FOR MANUFACTURING
SAME

Inv. No. 337-TA-849

INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND

Administrative Law Judge Robert K. Rogers, Jr.

(June 17, 2013)

Appearances:

For Complainant SI Group, Inc. :

Christopher E. Chalsen, Esq.; Lawrence T. Kass, Esq.; Nathaniel T. Browand, Esq.; Jordan P. Markham, Esq.; Jacob Jou, Esq. of Milbank, Tweed, Hadley & McCloy LLP, One Chase Manhattan Plaza, New York, New York 10005.

For Respondents Sino Legend (Zhangjigang) Chemical Co., Ltd., Sino Legend Holding Group, Inc.; Sino Legend Holding Group Limited and Hong Kong Sino Legend Group, Ltd. (collectively "Sino Legend"); Red Avenue Chemical Corp. of America and Red Avenue Chemical Co. Ltd.; Red Avenue Group (collectively "Red Avenue"); Precision Measurement International LLC; Shanghai Lunsai International Trading Company; Gold Dynasty Limited; Elite Holding Group Inc; Thomas R. Crumlish, Jr.; Ning Zhang; Quanhai Yang:

Brian R. Nester, Esq.; Paul Zegger, Esq.; Michael R. Franzinger, Esq.; J. High, Esq.; Peter S. Choi, Esq.; Fitz R. Collings, Esq., of Sidley Austin LLP, 1501 K Street, N.W. Washington, D.C. 20005.

Samuel N. Tiu, Esq.; Yongdan Li, Esq., of Sidley Austin LLP, 555 West Fifth Street, Suite 4000, Los Angeles, California 90013.

Ran Ruixue, Esq., of Jun He Law Offices, China Resources Building, 20th Floor, 8 Jianguomenbei Avenue, Beijing 100005, P.R. China.

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For the Commission Investigative Staff:

John Shin, Esq.; Jeffrey Hsu, Esq.; Dustin Lo, Esq., U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436.

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Pursuant to the Notice of Investigation and Rule 210.42 of the Rules of Practice and Procedure of the United States International Trade Commission, this is the Administrative Law Judge's Final Initial Determination in the matter of Certain Rubber Resins and Processes for Manufacturing Same, Investigation No. 337-TA-849.

The Administrative Law Judge hereby determines that a violation of Section 337 of the Tariff Act of 1930, as amended, has been found in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain rubber resins by reason of misappropriation of trade secrets.

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The following abbreviations may be used in this Initial Determination:

CPX	Complainant's physical exhibit
CDX	Complainant's demonstrative exhibit
CX	Complainant's exhibit
CIB	Complainant's initial post-hearing brief
CRB	Complainant's reply post-hearing brief
RPX	Respondents' physical exhibit
RDX	Respondents' demonstrative exhibit
RX	Respondents' exhibit
RIB	Respondents' initial post-hearing brief
RRB	Respondents' reply post-hearing brief
SIB	Commission Investigative Staff's initial post-hearing brief
SRB	Commission Investigative Staff's reply post-hearing brief
SDX	Commission Investigative Staff's demonstrative exhibit
Dep.	Deposition
JSCI	Joint Stipulation of Contested Issues
JX	Joint Exhibit
Tr. at	Transcript
CPHB	Complainant's pre-hearing brief
RPHB	Respondents' pre-hearing brief
SPHB	Commission Investigative Staff's pre-hearing brief

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I. BACKGROUND

A. Procedural History

On June 20, 2012, the Commission issued a Notice of Investigation in this matter to determine:

[W]hether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain rubber resins and processes for manufacturing same by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States.

(See Notice of Investigation) The investigation was instituted upon publication of the Notice of Investigation in the *Federal Register* on June 26, 2012. See 77 Fed. Reg. 38083-84 (2012); 19 CFR § 210.10(b).

The Complainant is SI Group, Inc., 2750 Balltown Road, Schenectady, NY 12309

(“Complainant”). The Respondents are:

(1) RedAvenue Chemical Corp. of America, 95 Mount Read Boulevard #149, Rochester, NY 14611–1923;

(2) Thomas R. Crumlish, Jr., 2728 Edgemere Drive, Rochester, NY 14612–1151;

(3) Precision Measurement International LLC, 8182 Pickering Place, Westland, MI 48185;

(4) Sino Legend (Zhangjiagang) Chemical Co., Ltd., No. 99, Tianba Road, Yangtze International Chemical Industrial Park, Zhangjiagang City, JiangSu Province, China;

(5) Sino Legend Holding Group, Inc., c/o Offshore Incorporations Limited, Offshore Incorporations Centre, P.O. Box 957, Road Town, Tortola, British Virgin Islands;

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(6) Sino Legend Holding Group Limited, C1, Rm. 1708 Nan Fung Tower, 173 Des Voeux Road Central, Hong Kong;

(7) HongKong Sino Legend Group, Ltd., Flat 01B3 101F, Carnival Commercial Building, 18 Java Road, North Point, Hong Kong;

(8) Red Avenue Chemical Co. Ltd., c/o Offshore Incorporations Limited, Offshore Incorporations Centre, P.O. Box 957, Road Town, Tortola, British Virgin Islands;

(9) Ning Zhang, 668 Beachview Drive, North Vancouver, BC, V7G 1R1 Canada;

(10) Quanhai Yang, Door 1, Unit 08c, Building 2, No. 9 Guanghua Road, Chaoyang District, Beijing, China;

(11) Shanghai Lunsai International Trading Company, Building 7, Unit 102, No. 2899, Chuan Nan Feng Gong Road, Pudong New District, Shanghai City, China;

(12) Red Avenue Group Limited, Unit No. 2218, 22/F, The Metropolis Tower, 10, Metropolis Drive, Hungholm, Kowloon, Hong Kong;

(13) Sino Legend Holding Group, Inc., Ajeltake Road, Ajeltake Island, Majuro, Marshall Islands, MH96960;

(14) Gold Dynasty Limited, c/o ATC Trustees (Cayman) Limited, Clifton House, 75 Fort Street, Grand Canyon, Cayman Islands;

(15) Elite Holding Group Inc., c/o Morgan & Morgan Trust Corporation, (Belize) Limited, Withfield Tower, Third Floor, 4792 Coney Drive, Belize City, Belize.

The Commission Investigative Staff of the Office of Unfair Import Investigations (“Staff”) is also a party in this investigation.

On February 19, 2013, I issued Order No. 33, an order that denied Respondents’ motion to “declassify” reports from the Shanghai Science and Technology Center (“SSTC”), and found

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that the parties failed to establish the relevance, materiality, and reliability of the SSTC reports.

On March 8, 2013, I issued Order No. 37, an order that granted-in-part Complainant's motion to compel discovery and found that Respondents were not required to respond to Complainant's discovery requests regarding any Sino Legend products other than SL-1801, SL-1801LFP, SL-1802, SL-1805, and SL-7015.

On March 14, 2013, I issued Order No. 39, an order that denied Complainant's motion for summary determination of domestic industry and injury.

An evidentiary hearing in this investigation was held on April 1-5, 2013.

B. The Private Parties

1. SI Group, Inc.

Complainant SI Group, Inc. is a corporation organized and existing under the laws of the state of New York, with its principal place of business in Schenectady, NY. (Amended Complaint at ¶ 31)

2. Sino Legend (Zhangjiagang) Chemical Co., Ltd. ("Sino Legend ZJG")

Sino Legend ZJG is a limited liability company organized and existing under the laws of the People's Republic of China, with its principal place of business in Zhangjiagang. (Sino Legend ZJG Response to Amended Complaint at ¶ 41)

3. Sino Legend Holding Group, Inc. ("Sino Legend BVI")

Sino Legend Holding Group, Inc. was a corporation organized and existing under the laws of the British Virgin Islands, and has ceased operations. (Sino Marshall Islands Response to Amended Complaint at ¶ 40; Zhang Response to Amended Complaint ¶ 40)

4. Sino Legend Holding Group Limited

Sino Legend Holding Group Limited is a company with a registered office in Hong

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Kong. (Sino Legend Holding Group Limited Response to Amended Complaint at ¶ 54)

5. HongKong Sino Legend Group Ltd. (“Sino Legend Hong Kong”)

HongKong Sino Legend Group is a company with its principal place of business in Hong Kong. (Sino Legend Hong Kong Response to Amended Complaint at ¶ 44)

6. Sino Legend Holding Group Inc. (“Sino Legend Marshall Islands”)

Sino Marshall Islands is a company with a legal address in Ajeltake Island, Marshall Islands. (Sino Legend Hong Kong Response to Amended Complaint at ¶ 45)

7. Red Avenue Chemical Co. Ltd. (“Red Avenue BVI”)

Red Avenue BVI is a corporation with a registered agent in the British Virgin Islands. (Red Avenue BVI Response to Amended Complaint at ¶ 55)

8. Red Avenue Chemical Corp. of America (“Red Avenue America”)

Red Avenue America is a corporation organized and existing under the laws of New York, with its principal place of business in Rochester, NY. (Red Avenue America Response to Amended Complaint at ¶ 61)

9. Red Avenue Group Limited (“Red Avenue Hong Kong”)

Red Avenue Hong Kong is a limited liability company existing under the laws of Hong Kong with a place of operations in Hong Kong. (Red Avenue Hong Kong Response to Amended Complaint at ¶ 56)

10. Gold Dynasty Limited (“Gold Dynasty”)

Gold Dynasty is a corporation with a registered office address in Grand Cayman, Cayman Islands. (Gold Dynasty Response to Amended Complaint at ¶ 48)

11. Elite Holding Group Inc. (“Elite”)

Elite is a corporation with a registered office address in Belize City, Belize. (Elite

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Response to Amended Complaint at ¶ 49)

12. Shanghai Lunsai International Trading Company (“Shanghai Lunsai”)

Shanghai Lunsai is a corporation with a legal address in Shanghai, China. (Shanghai Lunsai Response to Amended Complaint at ¶ 51)

13. Precision Measurement International LLC (“Precision Measurement”)

Precision Measurement International LLC is a limited liability company organized and existing under the laws of Michigan. (Precision Measurement Response to Amended Complaint at ¶ 66)

14. Ning Zhang

Ning Zhang is the majority shareholder of Red Avenue BVI and the director and sole shareholder of Elite. She maintains both a Canadian and Shanghai address. (Ning Zhang Response to Amended Complaint at ¶¶ 55, 59)

15. Quanhai Yang

Quanhai Yang is the chairman of Respondent Sino Legend ZJG, Respondent Sino Legend BVI, and the chairman of Respondent Sino Legend Marshall Islands. He is also the legal representative of Respondents Shanghai Lunsai International Trading Company. (Quanhai Yang Response to Amended Complaint at ¶ 51)

16. Thomas R. Crumlish, Jr.

Thomas R. Crumlish, Jr. is a citizen of the United States and resides in Rochester, NY. (Thomas Crumlish Response to Amended Complaint at ¶ 62)

C. Overview Of The Technology

Tack is the mechanical strength of the bond that develops when two objects are contacted for a short time under little or no pressure. Tack is important in the manufacture of tires, for

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example, which are manufactured by pressing together layers of various rubber compounds. The rubber compounds contain tackifiers that impart the required adhesion between layers. In order to be tacky, a material must simultaneously possess both liquid-like and solid-like characteristics. The former imparts rapid bond formation, whereas the latter provides resistance to rupture upon loading. (CX-1570C, Q.8)

Synthetic rubbers require active phenolic resins. Phenolic resins are formed by the condensation of phenol (or substituted phenol) with formaldehyde (or a formaldehyde releasing compound), using either basic or acidic catalysis. Alkylated phenols are the most common substitution products. For tackification, the intermediate p-tert-octyl phenol (“PTOP”) is commonly used. When PTOp is condensed with formaldehyde under the appropriate conditions, a good tackifier is produced. (*Id.*)

Complainant’s trade secret process consists of two steps, the alkylation reaction and the condensation reaction. The alkylation reaction is the reaction of {

}, to produce para-octyl phenol (POP). {

} The

condensation reaction is the reaction of {

} to form

tackifier resin and water. (CX-1570C, Q.9)

D. The Accused Products

Complainant accuses Respondents’ products that are manufactured using its SP-1068 process. The accused products in this Investigation include SL-1801, SL-1801 LFP, SL-1802, SL-1802 LFP, and SL-7015. (Amended Complaint at ¶ 119; CIB at 8) Although Complainant also accused SL-1805 in its Amended Complaint, Complainant did not address this product in its post-hearing briefing, and thus I find Complainant has waived its arguments regarding this

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product and it is no longer part of this Investigation. (*Id.*)

II. JURISDICTION

A. Subject Matter Jurisdiction

Complainant's Position: Complainant argues that this action arises under § 337, the trade secrets at issue belong to Complainant, and Respondents' importation of products manufactured using misappropriated Complainant's trade secrets constitute unfair competition and threaten Complainant's domestic industry. Complainant says that the Federal Circuit's *Tianrui* decision makes it unmistakably clear that the Commission has jurisdiction over this investigation, even if the physical acts of misappropriation occurred outside the U.S.

Complainant continues that the *Tianrui* court expressly held that "the Commission has authority to investigate and grant relief based in part on extraterritorial conduct insofar as it is necessary to protect domestic industries from injuries arising out of unfair competition in the domestic marketplace." (Citing *Tianrui Group Co. v. ITC*, 661 F.3d 1322, 1324 (Fed. Cir. 2011))

Complainant says that the court explained: "[T]he question in this case is whether the disclosure of protected information . . . is beyond the reach of section 337 simply because the breach itself took place outside the United States. To answer that question in the affirmative would invite evasion of section 337 and significantly undermine the effectiveness of the congressionally designed remedy." (Citing *id.* at 1333) Complainant continues that for the same policy reasons, Respondents' arguments that that the ITC should *decline* to exercise its jurisdiction, in favor of litigation in China, should also be rejected.

Complainant says that the Federal Circuit rejected *Tianrui*'s argument that U.S. law should not apply to the facts of that case. (Citing *id.* at 1332 ("TianRui argues that the Commission should not be allowed to apply domestic trade secret law to conduct occurring in

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China because doing so would cause improper interference with Chinese law. **We disagree.**") (emphasis added); *id.* at 1337 (“[W]here the question is whether particular conduct constitutes ‘unfair methods of competition’ and ‘unfair acts’ in importation, in violation of section 337, the issue is one of federal law and should be decided under a uniform federal standard”))

Complainant argues that Respondents’ claim that Xu’s¹ labor contract is governed by Chinese law misses the point that his obligations to protect Complainant’s confidential information, such as SP-1068 trade secrets (as opposed to Complainant’s Shanghai Subsidiary’s (also referred to as “SISL”) confidential information, such as customer and business information), arise under a non-disclosure agreement (“NDA”) that Xu signed directly with Complainant, not under Xu’s labor contract with SISL. (Citing CIB at I.D, III.E.1, III.E.2) Complainant says that the Technical License Agreement pursuant to which Complainant transferred its technical information to SISL required such NDAs. Complainant continues that the NDA is governed by U.S. law because the Technical License Agreement that required it was expressly governed by New York law, and the NDA served to protect the intellectual property of Complainant, a New York corporation. Complainant asserts that under article 126 of the Contract Law of the People’s Republic of China, “[w]here parties to a contract involving foreign interests have not” specified the applicable law, “the law of the country in closest relation the contract shall apply.” Complainant reasons that even the Chinese choice-of-law statute recognizes that U.S. law governs Xu’s NDA with Complainant.

Complainant says that Lai signed the same NDA with Complainant (in English). (Citing CIBV at III.E.1; CX-0552 at 15-16) Complainant continues that Lai’s confidentiality obligations

¹ Mr. Xu and Mr. Lai are two former employees of Complainant. Their activities after leaving the employ of Complainant and beginning a working relationship with Respondents are at the center of the misappropriation allegations in this investigation. Their relationships and activities are discussed in depth in Sections IV.B-C, *infra.*

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to Complainant are also governed by U.S. law. Complainant asserts that both NDAs impose permanent obligations to maintain Complainant's trade secrets as confidential.

Complainant says that abstention and international comity are affirmative defenses which have not been proven by Respondents. Complainant argues that Respondents' claim that "all of the evidence and witnesses... are located in China" is contrary to the facts that more documents (including email, *see* CDX-005C) were produced from the U.S. than from China, and most of the relevant witnesses were in the U.S. (as demonstrated by the witnesses called at trial).

Complainant says that Respondents also make no showing that the Chinese court "is competent and abides by basic notions of fairness." Complainant avers that the U.S. has recently expressed concern about "cases in which important trade secrets of U.S. firms have been stolen by... Chinese companies," warning that "[i]t has been difficult for some U.S. companies to obtain relief... despite compelling evidence demonstrating misappropriation or theft" and that China has "a systemic lack of effective protection and enforcement" of IP rights. (Citing Office of the U.S. Trade Representative, *2012 Special 301 Report* at 27, 31)

Respondents' Position: Respondents argue that Complainant's trade secret claims cannot give rise to a Section 337 violation because Section 337(a)(1)(A) does not apply to extraterritorial activity. Complainant alleges that Sino Legend misappropriated Complainant's trade secrets by hiring a former Complainant employee Jack Xu. (Citing Amended Complain at ¶¶ 94, 105, 119) Respondents continue that Complainant claims that through Mr. Xu, Sino Legend began practicing Complainant's trade secret processes for making SP-1068 tackifier resin, and that the importation of Sino Legend resin into the United States violates Section 337(a)(1)(A)'s prohibition against unfair methods of competition in the importation of products. (Citing *id.* at ¶ 28) Respondents argue that the only connection that this alleged conduct has to

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the United States is the less than \$30,000 worth of accused Sino Legend products that were imported—all of the supposedly unfair practices occurred overseas.

Respondents aver that the Supreme Court recently reiterated, “[i]t is a ‘longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” (Citing *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))) Respondents say that this presumption against extraterritoriality reflects the fact that “Congress ordinarily legislates with respect to domestic, not foreign matters.” (Citing *id.*) Respondents continue that a statute presumptively applies to only “‘domestic conditions’” unless the statute reveals a “‘clearly expressed,’ ‘affirmative intention of’ Congress to give the statute extraterritorial reach.” (Citing *id.*) Respondents add that a possible interpretation of statutory language is not sufficient to “override the presumption against extraterritoriality.” (Citing *id.* at 2883) Respondents explain that the statute must provide a “clear indication” that it applies extraterritorially. (Citing *id.*) Respondents say that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.” (Citing *id.* at 2877)

Respondents argue that Section 337(a)(1)(A) provides no affirmative, clearly expressed indication that it applies to conduct occurring extraterritorially; rather, it merely declares unlawful “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States” that would injure a domestic industry or restrain U.S. trade or commerce. (Citing 19 U.S.C. § 1337(a)(1)(A)) Respondents say that nothing in this provision affirmatively reveals a congressional intent to target unfair conduct that occurs outside the United States; rather, Congress focused solely on unfair activity “in the importation of articles” into the United

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States, suggesting that Congress was focused on unfair conduct with ties to the United States, not—as here—supposedly unfair activity occurring entirely in China.

Respondents assert that the Federal Circuit’s decision in *TianRui Group Co. v. ITC*, 661 F.3d 1322 (Fed. Cir. 2011), cannot provide any comfort because that decision conflicts with the Supreme Court’s decision in *Morrison*, 130 S. Ct. 2869. Respondents say that in *TianRui*, the Federal Circuit did not identify any clear textual indication that Congress sought to target unfair practices occurring extraterritorially. (Citing *TianRui*, 661 F.3d at 1339 (Moore, J., dissenting) (“The majority points to no statutory language that expresses the *clear* intent for it to apply to extraterritorial unfair acts.”)) Respondents continue that the court concluded that because importation is an international transaction, Congress must have meant for the statute to apply extraterritorially. (Citing 661 F.3d at 1329) Respondents reason that even if importation is an international transaction, nothing in Section 337(a)(1)(A) indicates that Congress sought to apply this provision to unfair practices occurring outside the United States. Instead, the language of the statute declares unlawful “unfair” methods or practices “in the importation of articles . . . into the United States,” *not* unfair practices *before* importation or *leading to* importation. (Citing 19 U.S.C. § 1337(a)(1)(A)) Respondents say that at most, the Federal Circuit raised the possibility that Section 337(a)(1)(A) applies extraterritorially, and *Morrison* explicitly states that “possible interpretations of statutory language do not override the presumption against extraterritoriality.” (Citing 130 S. Ct. at 2883)

Respondents argue that the Federal Circuit also argued that Section 337(a)(1)(A) does not in fact apply to extraterritorial conduct because this provision is aimed at stopping a domestic injury. (Citing 661 F.3d at 1329) Respondents say that *Morrison* disposes of the Federal Circuit’s contention, explaining that “the presumption against extraterritorial application would

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be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.” (Citing 130 S. Ct. at 2884) Respondents reason that the fact Section 337(a)(1)(A) has a domestic element cannot overcome the presumption that this provision does not address unfair methods or practices occurring overseas. Respondents say that the statutory language gives no indication that Congress meant to target extraterritorial unfair practices. (Citing *TianRui*, 661 F.3d at 1338 (Moore, J., dissenting))

Respondents argue that the Federal Circuit’s reliance on the legislative history and the Commission’s interpretations of Section 337 are equally mistaken. Respondents say that the Federal Circuit’s “legislative history” consists, not of Senate or House Reports, but of mere annual reports to Congress. (Citing 661 F.3d at 1330-32) Respondents continue that this history fails to show how “the *text*” of Section 337(a)(1)(A) overcomes the presumption against extraterritoriality. (Citing *Morrison*, 130 S. Ct. at 2883 (emphasis added); *TianRui*, 661 F.3d at 1341 (Moore, J., dissenting) (“The legislative history, like the plain language of the statute, lacks a *clear* indication that Congress intended § 337 to apply extraterritorially.”)) Respondents say that the Commission’s interpretations cannot overcome the presumption against extraterritoriality, which eliminates any ambiguity in Section 337(a)(1)(A) and makes clear that it does *not* apply to wholly extraterritorial conduct. (Citing *id.* at 2878 (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984))

Respondents argue that even if Section 337(a)(1)(A) *could* reach Complainant’s claims of extraterritorial trade secrets misappropriation, the Commission *should* dismiss, or at a minimum stay, the trade secret claims based on principles of abstention and international comity. (Citing *See Int’l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001)

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(“comity is an affirmative defense”); 19 U.S.C. § 1337(d) (“All legal and equitable defenses may be presented in all cases.”)) Respondents say that Complainant admits that it has filed several actions against Sino Legend ZJG in China alleging that Sino Legend ZJG misappropriated Complainant’s trade secrets by employing Jack Xu. (Citing Amended Complaint at ¶¶ 104, 140) Respondents continue that Complainant attempted to initiate a criminal case against Sino Legend ZJG and Jack Xu in China in 2008 regarding its current trade secret allegations. (Citing *id.* at ¶¶ 21, 104) Respondents add that after an investigation, the Shanghai Public Security Bureau found no factual basis for wrongdoing. (Citing *id.* at ¶ 164) Respondents argue that Complainant later filed a first round of civil actions in China against Sino Legend ZJG and Jack Xu, which went to trial and were subsequently dropped. (Citing *id.* at ¶¶ 165, 172) Respondent say that in 2011, Complainant filed a second round of civil actions in China against Sino Legend ZJG and Jack Xu, which raise the same trade secret allegations at issue here, and which are still ongoing. (Citing *id.* at ¶¶ 172-73) Respondents say that not until May 21, 2012 did Complainant initiate this investigation. (Citing Complaint at 1)

Respondents argue that principles of abstention and international comity warrant dismissal or a stay of Complainant’s trade secret’s claims in light of Complainant’s ongoing Chinese lawsuits. Respondents say that under principles of comity, tribunals typically ““defer to the proceedings taking place in foreign countries.”” (Citing *Int’l Nutrition*, 257 F.3d at 1329 (quoting *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997))) Respondents continue that provided the foreign court is competent and abides by basic notions of fairness, a tribunal in the United States that otherwise has jurisdiction will decline to exercise that jurisdiction out of respect to the foreign court. (Citing *id.*)

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Respondents additionally argue that the abstention doctrine counsels U.S. tribunals to abstain from entertaining a case that parallels an ongoing proceeding in another country. (Citing *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (affirming abstention decision); *Colo. River Water Conversation Dist. v. United States*, 424 U.S. 800, 817 (1976)) Respondents say that when there is a parallel foreign proceeding, a domestic tribunal must balance several factors, including: (1) which court first assumed jurisdiction; (2) the relative inconvenience of the fora; (3) the need to avoid piecemeal litigation; (4) the law providing the rule of decision; (5) whether the foreign action protects the plaintiff's rights; (6) the relative progress of the two proceedings; and (7) the “vexatious or contrived nature of the federal claim.” (Citing *Finova*, 180 F.3d at 898-99; *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23, 26 (1983); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685-86 (7th Cir. 1987) (affirming abstention decision); *Intermedics Infusaid, Inc. v. Regents of the Univ. of Minn.*, 804 F.2d 129, 134-35 (Fed. Cir. 1986) (affirming abstention decision under *Colorado River* factors))

Respondents argue that under these principles of international comity and abstention, the Commission should dismiss—or at a minimum stay—Complainant's trade secret misappropriation claims. Respondents say that before instituting this investigation, Complainant filed a series of civil lawsuits against Sino Legend ZJG in China in beginning in February 2010. (Citing Amended Complaint at ¶¶ 165, 172) Respondents explain that those lawsuits made the same trade secret misappropriation claims that Complainant makes here. (Citing RX-431C (list of { } alleged trade secrets asserted in Chinese litigation); Amended Complaint at ¶ 81 (incorporating by reference RX-431C)) Respondents say that the Chinese proceedings are convenient to both parties, because all of the events surrounding Complainant's allegations of

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trade secret misappropriation occurred in China, and because all of the evidence and witnesses regarding those misappropriation allegations are located in China. Respondents note that Complainant has requested the Court's permission to take a physical exhibit submitted in this Investigation back to China for proceedings there. (Citing Tr. at 945:17-949:4) Respondents reason that the Chinese proceeding (which is nearing completion) should be allowed to move forward without interference by this parallel proceeding.

Staff's Position: Staff asserts that the Commission has subject matter jurisdiction over this dispute pursuant to Section 337(a)(1)(A). (Citing 19 U.S.C. § 1337(a)(1)(A)) Staff says that Section 337 gives the Commission jurisdiction over unlawful activities enumerated in § 1337(a)(1)(A)-(E) "in addition to any other provision of law." (Citing *id.*) Staff continues that the Federal Circuit's *Tianrui* decision makes it clear that the Commission has jurisdiction over this Investigation. Staff says that *Tianrui* expressly held that "the Commission has authority to investigate and grant relief based in part on extraterritorial conduct insofar as it is necessary to protect domestic industries from injuries arising out of unfair competition in the domestic marketplace." (Citing *Tianrui*, 661 F.3d at 1322, 1324) Staff continues that trade secret misappropriation is one of those unlawful activities. Staff adds that in *Amgen Inc. v. United States International Trade Commission*, the Federal Circuit held that the Commission should assume jurisdiction of any well-pled complaint. (Citing 902 F.2d 1532, 1536 (Fed. Cir. 1990))

Analysis and Conclusions: The complaint alleges that Respondents have violated Section 337 by the unlicensed importation, sale for importation, and/or sale after importation of tackifiers made using Complainant's trade secrets. (Amended Complaint at ¶¶ 27-28)

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Respondents argue incorrectly that, because the alleged misappropriation occurred outside of the United States, and the only connection to the United States is the importation of a small amount of products, the Commission does not have subject matter jurisdiction.

In *Tianrui*, the Federal Circuit addressed this specific issue. The Federal Circuit identified the issue as “whether section 337 applies to imported goods produced through the exploitation of trade secrets in which the act of misappropriation occurs abroad.” *TianRui*, 661 F.3d at 1328. In *TianRui*, the alleged act of misappropriation occurred outside of the United States. Based on this, the respondents argued that section 337 is inapplicable because the complainant’s confidential information was disclosed in China. *Id.* The Federal Circuit rejected this argument.

The Federal Circuit reasoned that “section 337 is expressly directed at unfair methods of competition and unfair acts in the importation of articles into the United States. As such, this is surely not a statute in which Congress had only domestic concerns in mind.” *Id.* at 1329 (internal citations and quotations omitted). The Federal Circuit continued that “in this case the Commission has not applied section 337 to sanction purely extraterritorial conduct; the foreign unfair activity at issue in this case is relevant only to the extent that it results in the importation of goods into this country causing domestic injury. In light of the statute's focus on the act of importation and the resulting domestic injury, the Commission's order does not purport to regulate purely foreign conduct.” *Id.* (internal citations and quotations omitted). The Federal Circuit added that “the legislative history of section 337 supports the Commission's interpretation of the statute as permitting the Commission to consider conduct that occurs abroad.” *Id.* at 1330. Because nearly identical facts have been alleged here—misappropriation of trade secrets in China, followed by importation of products made by the trade secrets, which

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then results in harm to the domestic industry², I find that the Commission has subject matter jurisdiction.

Respondents' argument that I should not follow *TianRui* is ludicrous. Respondents cite *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) for support, a case that was decided before *Tianrui*, and was actually considered and cited by the Federal Circuit in the *Tianrui* decision. *TianRui*, 661 F.3d at 1339. Respondents have not set forth a compelling argument why I should ignore the binding precedent established by the Federal Circuit in *TianRui* based on a case that predated *TianRui* and was considered and cited in the *TianRui* decision.

Respondents' alternative argument that the Commission should decline to exercise jurisdiction under the principles of comity and abstention, or stay the proceeding pending completion of the Chinese litigation, is entirely unpersuasive. Although Respondents argue that civil cases have been filed in China and those cases address the alleged misappropriation at issue here, Respondents have failed to show that the civil cases in China address specific issues raised here—importation into the United States of the accused products and harm to the domestic industry as a result of that importation. This investigation has already proceeded through the evidentiary trial and to the issuance of this Initial Determination. Other than a conclusory argument that the Chinese “proceeding (which is nearing completion) should be allowed to move forward without interference by this parallel proceeding,” Respondents offer no justification to stay this investigation at this advanced stage, nor do they offer any concrete evidence regarding when the Chinese proceedings will actually be completed. Respondents also fail to explain how this investigation causes “interference” with the Chinese proceeding. Based upon the

² Regarding injury to the domestic industry, see section V, *infra*.

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foregoing, I find that neither comity nor the principles of abstention weigh in favor of the Commission's declining to exercise jurisdiction.

Based upon all of the foregoing, I find that the Commission has subject matter jurisdiction over this investigation and exercising that jurisdiction is in the public interest.

B. Personal Jurisdiction

Complainant's Position: Complainant argues that because Commission proceedings are *in rem*, personal jurisdiction over the Respondents is not necessary. Complainant says that the presence of the *res* is sufficient to give rise to jurisdiction. (Citing *Steel Rod Treating Apparatus*, Inv. No. 337-TA-97, 8 n.6 (1981) (interlocutory appeal) ("The presence of the *res* can be the necessary 'minimum contact' . . . This is precisely the case with section 337 jurisdiction, where the imported article is either present in the United States or constructively present by virtue of its sale and imminent importation, and where unfair acts related to the imported article are the subject matter of our investigation."); see also *Inkjet Ink Cartridges with Printheads and Components Thereof*, Inv. No. 337-TA-723, 2011 WL 3489151 (June 10, 2011); *In re Certain Minutiae-Based Automated Fingerprint Identification Systems*, Inv. No. 337-TA-156, Order No. 10, 1983 WL 207327 (ITC Aug. 31, 1983))

Complainant asserts that even if personal jurisdiction were required, however, each Respondent has engaged in activities with a sufficient nexus to the importation of the products at issue to be subject to an exclusion order. Complainant says that the Commission has jurisdiction over a respondent if the complainant "set[s] forth sufficient allegations to establish a nexus between the acts of [the] respondent . . . and the importation of the subject merchandise in th[e] investigation." (Citing *Certain Floppy Disk Drives and Components Thereof*, Inv. No. 337-TA-203, Order No. 11 (Oct. 23, 1984), 1984 WL 273857, at *2) "[S]ubject matter jurisdiction as

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defined under § 337(a) ‘is not limited to those acts which occur during the actual physical process of importation. If there is some nexus between the unfair methods or acts and importation, the Commission’s jurisdiction is established.’” (Citing *id.* (quoting *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, Inv. No. 337-TA-99, 218 U.S.P.Q. 832, 835 (April 9, 1982)))

Complainant says that a domestic entity’s actions which to create domestic demand for an infringing (or misappropriated) product give the Commission jurisdiction over the entity, even if it has no involvement in the acts of importation. (Citing *Certain Digital Satellite Receivers*, Inv. No. 337-TA-392, 1997 WL 696255 (Oct. 20, 1997), at *9 (“The Commission has previously held that the scope of section 337 is ‘broad enough to prevent every type and form of unfair practice.’”) (vacated in part on other grounds); *accord Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, 2009 WL 356201 (Feb. 3, 2009), at *5) Complainant adds that when individuals who own or control corporations use them as “shams” or pawns to effectuate their individual ends, Commission precedent supports naming both the corporations and the individuals as respondents. (Citing *Certain Key Blanks*, Inv. No. 337-TA-308, Order No. 5 (Mar. 23, 1980), 1990 WL 710644, at *3 (“The Commission has named individuals as respondents in § 337 investigations involving small, apparently closely held corporate respondents.” (Citing *Certain Bath Accessories And Component Parts Thereof*, Inv. No. 337-TA-306)))

Complainant argues that to the extent that any of the individual respondents in this investigation claim to have acted solely in their capacities as employees or officers, and not in their personal capacities, these are unverifiable, self-serving statements, and are irrelevant under Commission precedent. (Citing *Floppy Disk Drives*, Inv. No. 337-TA-203, Order No. 11 (Oct.

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23, 1984), 1984 WL 273857, at *2 (refusing to terminate the investigation on the basis of individual respondents' assertions that "they have not in their personal capacities engaged in the importation into or sale in the United States of" the accused products); *Bath Accessories*, Order No. 8 (Mar. 9, 1990), 1990 WL 410604, at *1 (disregarding individual respondent's claim that "he did not perform any commercial activities in his individual capacity"))

Complainant argues that the Commission should exercise its jurisdiction over both the individual respondents and the corporate respondents in this case. Complainant says that the corporate respondents are arranged in a complex and convoluted corporate structure, and the Court has noted that the "shifting sands of corporate names, and corporations themselves . . . make it particularly important to include parent, grandparent, and great-grandparent entities as parties respondent . . ." (Citing Order No. 21 at 10-11) Complainant continues that jurisdiction over the individual respondents is similarly important, because the individual respondents are the *only* respondents who cannot be dissolved and re-formed as new entities. Complainant reasons, conversely, that jurisdiction over the corporate respondents remains important because Zhang and Yang sometimes conceal their ownership of companies by placing companies under the nominal ownership of employees. As an example, Complainant says that {

} (Citing CX-1361C at 32:8-34:4)

Complainant asserts that to allow for effective relief, the Commission should exercise its jurisdiction over both the corporate respondents and the individual respondents. (Citing *Certain Key Blanks*, Inv. No. 337-TA-308, Order No. 5 (Mar. 23, 1980), 1990 WL 710644, at *3 ("[A] person shall be joined as a party . . . if in his absence complete relief cannot be accorded among those already parties."); *cf. Certain Airless Spray Pumps and Components Thereof*, Inv. No. 337-

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TA-90, USITC Pub. 1199, at 18 (Nov. 24, 1981) (“[A] domestic patentee should not be compelled to file a series of separate complaints against several individual foreign manufacturers as it becomes aware of their products in the U.S. market. Such a practice would not only waste the resources of the complainant, it would also burden the Commission with redundant investigations.”))

Complainant argues that each of the Respondents has engaged in conduct with a sufficient nexus to importation, sale for importation, or sale within the United States after importation to give rise to ITC jurisdiction.

Complainant says that Ning (Denny) Zhang is the majority shareholder of both Sino Legend ZJG (via a chain of holding companies) and Red Avenue HK, and {

} (Citing CX-1352.1C at 145)

Complainant continues that when Red Avenue BVI created subsidiary Tong Yue Chemical (Yangzhong) Co. Ltd. (“Tong Yue”), Red Avenue and Sino Legend personnel used {

} Complainant says that Sino Legend had access to Tong Yue’s facilities because {

} (Citing CX-1352.1C at 119:16-17)

Complainant argues that Zhang’s majority ownership of the parent companies in the Sino Legend and Red Avenue hierarchies, combined with Yang’s partial ownership and/or management (as director or chairman) of key companies in the Sino Legend hierarchy, enable Yang and Zhang to use all of the companies as pawns to effectuate their individual ends, with no regard for corporate distinctions. Complainant says that Jacky Tang, who is employed only by

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Red Avenue, testified as the corporate witness for Sino Legend on topics relating to US sales and importation, because the person most knowledgeable about Sino Legend's US sales was a Red Avenue employee. (Citing CX-1357.1C at 12:8-11; CX-097C) Complainant continues that the network of Zhang's and Yang's companies now also includes RaChem (Shanghai) Co., Ltd., { } (Citing CX-094C at 1), and which Respondents have refused to provide discovery about, on the grounds that RaChem was not independently named as a respondent. Complainant adds that Zhang is also personally responsible for management and strategic decision-making for the entities, including, for example, regarding Respondents' US marketing campaigns. (Citing CX-254C)

Complainant argues that Yang controls Respondents' vast network of corporations along with Zhang and is similarly responsible for their conduct. Complainant says that Yang built and managed { }. Complainant argues that it was his relationship with { }, that caused { } (Citing CX-1352.1C at 117:20-118:8, 118:21-23) Complainant continues that Yang was personally involved in recruiting and hiring Xu, { }

Complainant says that Yang also served as the conduit through which Complainant's trade secrets passed, as he communicated with both Lai and Xu, and then instructed Sino Legend technical personnel on parameters for conducting experiments and pilot runs for SL-1801. Complainant continues that Yang claimed personal credit for the misappropriated trade secrets by listing himself as the "inventor" on the Sino Legend patent application.

Complainant asserts that Thomas R. Crumlish owns and manages RedAvenue America and personally managed Sino Legend's US PR campaign to drive US demand for Sino Legend

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products and facilitate future importation. (Citing CX-254C, CX-1354.1C at 126:24-128:9) Complainant says that Crumlish has made public statements to encourage U.S. customers to contact him to purchase Sino Legend products. (Citing CX-016C; CX-017; CX-1354.1C at 138:24-139:15, 139:17-140:3) Complainant continues that Crumlish also owns Pyragon, Inc., which was involved in Complainant's former distribution relationship with the Chinese Red Avenue entities. Complainant adds that his ownership of both Red Avenue America and Pyragon allows the companies to cooperate seamlessly, just as Sino Legend and Red Avenue do. As an example, Complaint says that Red Avenue America's employees (even those who do not work for Pyragon) use pyragon.com e-mail addresses rather than rachem.com e-mail addresses, to avoid the need to set up a US-based e-mail server for Red Avenue America. (Citing CX-1354.1C at 24:11-25:11, 82:3-25)

Complainant says that when Zhang was asked whether she still does business with Pyragon, she testified: {

} (Citing CX-1353.1C at 27:21-24) Complainant continues that Crumlish also served as the U.S. contact for Sino Legend's recent importations {

} (Citing Tr. at 696:18-20)

Complainant contends that Sino Legend ZJG is the undisputed manufacturer of the Sino Legend products at issue and jurisdiction over Sino Legend ZJG is therefore proper. Complainant says that Sino Legend ZJG also sells SL-1801 to US-based PMI. (Citing CX-102C) Jurisdiction over Sino Legend ZJG's chain of parent entities, including HK Sino Legend, Sino Legend MI, Gold Dynasty, and Elite is appropriate, and is necessary to ensure that any relief granted is effective. (Citing Order No. 21 at 10-11) Complainant continues that

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jurisdiction over Sino Legend BVI should also be maintained, so that Respondents cannot circumvent an exclusion order by simply reactivating this previously abandoned company.

Complainant says that PMI is a Sino Legend distributor in the US, and it both imports SL-1801 and sells SL-1801 within the US after importation. (Citing CX-102C; CX-043C; CX-044C) Complainant continues that Sino Legend HGL is responsible for shipping SL-1801 to PMI in the US, for resale to US customers. (Citing CX-044C; CX-046C)

Complainant argues that jurisdiction over Red Avenue America is proper, on the basis of Crumlish's activities related to marketing and promotion of Sino Legend's products and brand image. Complainant says that Red Avenue America has expressly accepted responsibility for Crumlish's actions, because Red Avenue America testified (through Crumlish, its corporate representative) that he performed these actions on behalf of Red Avenue America. (Citing CX-1354C at 273:22-274:6, 274:12-19, 274:25-275:9, 275:15-21) Complainant argues that the Commission therefore has jurisdiction over both Red Avenue America and Crumlish.

Complainant adds that {

} (Citing Tr. at 696:14-17, 696:21-

697:2; CX-1601C)

Complainant argues that jurisdiction over Lunsai is proper because of Lunsai's role the misappropriation of Complainant's trade secrets. Complainant says that Sino Legend ZJG and Yang used Lunsai to conceal Xu's employment from judicial authorities in China, {

}

Complainant says that Red Avenue HK is the successor entity to the Red Avenue entity which formerly served as Complainant's Chinese distributor. Complainant continues that Red Avenue HK also currently employs Xu. (Citing CX-096C) Complainant argues that Red

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Avenue HK handles Sino Legend ZJG's US sales. Complainant says that Red Avenue HK employee Jacky Tang testified that he is {
} (Citing CX-1357.1C at 23:17-24:5) Complainant continues that Red Avenue HK shares many employees with Sino Legend companies (who therefore have both Red Avenue and Sino Legend e-mail addresses). (Citing CDX-006C) Complainant adds that Sino Legend and Red Avenue HK are operated together.

Complainant avers that Red Avenue BVI provided the funding to establish {
} SL-1801.

Complainant argues that Red Avenue BVI is therefore at the heart of the misappropriation and jurisdiction over Red Avenue BVI should be maintained so that Respondents cannot circumvent an exclusion order by reactivating this company that they previously abandoned.

Respondents' Position: Respondents argue that Complainant has failed to show that Crumlish, Zhang, and Yang imported, sold for importation, or sold after importation any accused articles in their personal capacities. Respondents say that, like state and federal courts, the ITC requires a party seeking to hold an individual owner or executive responsible for acts performed in a corporate capacity to prove entitlement to pierce the corporate veil. (Citing *Certain Plastic Food Storage Containers*, Inv. No. 337-TA-152, 1983 WL 206916, at *4 (Sept. 1983). Respondents say that in *Plastic Food Storage Containers* and other investigations, the ITC has routinely rejected invitations to pierce the corporate veil. (Citing *id.*; *Institution of Section 337 Investigation on Certain Office Desk Accessories*, 1983 WL 206953 n.8 (July 1983))

Respondents assert that to pierce the corporate veil, the complainant must show that the corporation was merely the officer's "alter ego" such that the officer acted outside the scope of

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his employment. (Citing *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 552 (Fed. Cir. 1990)) Respondents say that “the rule is well settled ... that the mere fact [an individual] owns all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the ... corporation and to treat it as the alter ego of the individual.” (Citing *Wechsler v. Macke Int’l Trade, Inc.*, 486 F.3d 1286, 1295 (Fed. Cir. 2007); *see also In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 419 (S.D.N.Y. 2011) (“It is clear that simply owning, even wholly owning, a subsidiary is insufficient to pierce the corporate veil.”))

Respondents argue, alternatively, that the complainant must show that the corporate structure was a sham that existed merely to shield the shareholders and/or officers from liability for his/her wrongful acts. (Citing *Hoover Group, Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1412 (Fed. Cir. 1996)) Respondents say that “bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence.” (Citing *Wechsler*, 486 F.3d at 1295)

Staff’s Position: Staff reasons that because Section 337 proceedings are *in rem*, *in personam* jurisdiction is unnecessary. (Citing *Certain Inkjet Ink Cartridges with Printheads and Components Thereof*, Inv. No. 337-TA-723, 2011 WL 3489151 (June 10, 2011) (personal jurisdiction not required; complainant established *in rem* jurisdiction over infringing parts, before importation, by ordering parts from foreign defendant)) Staff says that each Respondent has, however, fully participated in the investigation including the hearing held on April 1-5, 2013, thereby submitting to the personal jurisdiction of the Commission. (Citing *Certain Miniature Hacksaws*, Inv. No. 337-TA-237, Initial Determination at p. 4 (Oct. 15, 1986)) Staff concludes,

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as a result, that the Commission has personal jurisdiction over both the corporate Respondents and the individuals who have participated in the investigation.

Analysis and Conclusions: Each of the Respondents (Sino Legend (Zhangjiagang) Chemical Co., Ltd.; Sino Legend Holding Group, Inc. (Marshall); Sino Legend Holding Group Limited; Hong Kong Sino Legend Group Ltd.; Red Avenue Chemical Corp. of America; Red Avenue Chemical Co. Ltd.; Precision Measurement International LLC; Shanghai Lunsai International Trading Company; Thomas R. Crumlish, Jr.; Ning Zhang; Quanhai Yang; Red Avenue Group Limited; Sino Legend Holding Group Inc. (BVI); Gold Dynasty Limited; and Elite Holding Group Inc.) responded to the complaint and notice of investigation, participated in the investigation, made an appearance at the hearing³, and submitted joint post-hearing briefs. Thus, I find that the Respondents submitted to the personal jurisdiction of the Commission. *See Certain Miniature Hacksaws*, Inv. No. 337-TA-237, Initial Determination, 1986 WL 379287 (October 15, 1986).

C. In Rem Jurisdiction

Complainant's Position: Complainant's arguments regarding the products at issue are addressed in Sections II.A and II.B, *supra*, and Sections V.B, and V.C, *infra*.

Respondents' Position: Respondents do not dispute that importation of the Accused Products has occurred. Respondents argue, however, that the quantities imported have been minimal, and U.S. customers ceased ordering shipments of the Accused Products shortly after this investigation was instituted.

³ Appearances were made on behalf of all Respondents with the exception of Gold Dynasty Limited and Elite Holding Group Inc. Counsel did not make an appearance on behalf of Gold Dynasty Limited or Elite Holding Group Inc. at the hearing. (Tr. at 3:1-9) Counsel for Respondents did, however, sign Respondents' post-hearing brief on behalf of Gold Dynasty Limited and Elite Holding Group Inc. (RIB at 151)

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Respondents say that only five shipments of the Accused Products have been imported.

{

} Respondents continue that all imports of the Accused Products occurred between 2010 and 2012.

Respondents argue that the Commission lacks jurisdiction over products that have not been imported. (Citing *Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, Comm'n Op. and Order, 1982 ITC LEXIS 191 at *134 (Jan. 1982); *Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-89, 214 U.S.P.Q. (BNA) 892, 893 (Oct. 29, 1980)) Respondents say that the Complaint references other products such as "SL-1805," but there is no allegation that this product has been imported. Respondents continue that other Sino Legend products, including SL-2101 and SL-2005, are outside the scope of this investigation. (Citing Order No. 37 at 22)

Staff's Position: Staff argues that the Commission has *in rem* jurisdiction over the accused products, which have been imported into the United States. Staff says that the evidence shows that the Respondents have imported into the United States rubber resin tackifiers that were made from a process using, or a process substantially derived from, certain misappropriated trade secrets. (Citing CX-1566C, Q.12; RIB at 19-20 (acknowledging five importations of accused products); CIB at 393-394; CX-231C; CX-104C; CX-113C; CX-119C)

Analysis and Conclusions: I find that the Commission has *in rem* jurisdiction over the SL-1801, SL-1802, SL-1801LFP, SL-1802LFP, and SL-7015 products imported into the United States. Respondents admit that the accused products were imported between 2010 and 2012. (RIB at 17) Respondents "do not dispute that importation of the Accused Products has

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occurred.” (*Id.*) Respondents define the “Accused Products” as “Sino Legend ZJG’s SL-1801, SL-1802, SL-1801LFP, and SL-1802LFP.” (RIB at 11) Thus, Respondents have admitted that SL-1801, SL-1802, SL-1801LFP, and SL-1802LFP have been imported. In Section V.B, *infra*, I find that there is credible evidence that SL-7015 has been imported.

Respondents’ argument that the importation of products was very limited is irrelevant in light of Commission precedent. In *Certain Trolley Wheel Assemblies*, the Commission found that the importation requirement is satisfied by the importation of a single product of no commercial value. 337-TA-161, Comm’n Op. at 7-8 (Nov. 1984). Similarly, an unreviewed Initial Determination in *Certain Purple Protective Gloves*, found that “[a] complainant need only prove importation of a single accused product to satisfy the importation element.” Inv. No. 337-TA-500, Order No. 17, at 5 (Sept. 23, 2004). As a result, I find that the Commission has *in rem* jurisdiction over the SL-1801, SL-1802, SL-1801LFP, SL-1802LFP, and SL-7015 products imported into the United States.

III. EXISTENCE OF TRADE SECRETS

A. Applicable Law

In *TianRui Group Co. Ltd. v. International Trade Comm’n*, the Federal Circuit held that “a single federal standard, rather than the law of a particular state, should determine what constitutes a misappropriation of trade secrets sufficient to establish an ‘unfair method of competition’ under section 337.” 661 F.3d 1322, 1327 (Fed. Cir. 2011). Citing, *inter alia*, *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Products*, Inv. No. 337-TA-148/169, USITC Pub. 1624 (Dec.1984), the Federal Circuit noted that the Commission has long interpreted section 337 to apply to trade secret misappropriation. *Id.* at 1326.

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A trade secret was defined in *Sausage Casings* as:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, a treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business

Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing The Restatement of the Law of Torts § 757, Comment c). Similarly, the Uniform Trade Secret Act (cited with approval by the Federal Circuit in *TianRui* (661 F.3d at 1327-28) defines a Trade Secret as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” U.T.S.A., § 1(4) (as amended, 1985) There is no requirement that complainant actually use the asserted trade secret within the United States. In *TianRui*, the Federal Circuit rejected a bright line test requiring that complainant practice the trade secret within the United States to prove that a domestic industry exists. 661 F.3d at 1335-37.

Sausage Casings identified six relevant factors to determine whether or not a trade secret exists. Specifically, *Sausage Casings* explained that the “[r]elevant factors for determining the existence of a trade secret include: (1) the extent to which the information is known outside of complainant's business; (2) the extent to which it is known by employees and others involved in

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complainant's business; (3) the extent of measures taken by complainant to guard the secrecy of the information; (4) the value of the information to complainant and to his competitors; (5) the amount of effort or money expended by complainant in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”

Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing Restatement of Law of Torts, § 757, Comment b (1939)). These factors are not a six part test which must be met to find a trade secret exists; rather, they are “instructive guidelines for ascertaining whether a trade secret exists.” See, e.g., *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 722 (7th Cir. 2003); see also *Certain Cast Steel Railway Wheels, Certain Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Inv. No. 337-TA-655, Initial Determination at 20 (Oct. 16, 2009).

“Matters of general knowledge in the industry, or those that can be readily discerned are not eligible for trade secret protection.” *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*, 177 U.S.P.Q. 614, 620-21 (D. Ariz. 1973)) “Matters disclosed in patents also will destroy and claims of trade secret.” *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 216 U.S.P.Q. 762, 765 (9th Cir. 1982)). A specific embodiment of general concepts or a combination of elements, some or all of which may be known in the industry may be protectable as a trade secret. *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169,

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Initial Determination (July 31, 1984) (citing *Cybertex Computer Products, Inc. v. Whitfield*, 203 U.S.P.Q. 1020, 1024 (Col. 1977)).

Information that may be eligible for protection as a trade secret may lose that protection if adequate steps are not taken to maintain secrecy. *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984). The burden on complainant is to establish that reasonable precautions were taken to preserve secrecy to ensure that it would be difficult for others to discover the secret without the use of improper means. *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Henry Hope X-Ray Products, Inc. v. Marron Carrell, Inc.*, 216 U.S.P.Q., at 764).

B. Trade Secrets at Issue

1. General Issues

a. Ownership and Standing

Complainant's Position: Complainant contends that there are 17 different aspects of Complainant's SP-1068 process that are trade secrets. (Citing CX-1570C, Q. 15) Complainant adds that an eighteenth trade secret is the overall process flow. (Citing *id.*, Q. 14) Complainant says that a graphical summary of the eighteen trade secrets is provided in CDX-001C. (Citing CX-1570C, Q. 61) Complainant reasons that although each of these { } are individually a "trade secret" or "embodiment of the trade secret," it should be understood that each trade secret or embodiment of the trade secret generally works together with at least one or more of the other aspects in a synergistic manner in the overall process to effectively and consistently produce a high quality product more efficiently than processes in the public domain

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or generally known to Complainant's competitors. (Citing CX-1570C, Q. 14) Complainant argues that each of the eighteen asserted trade secrets was practiced at Complainant's Shanghai Subsidiary between 2004 through 2007. (Citing CX-1570C, Qs. 16-59; CX-1565C, Qs. 10-42) Complainant explains, however, that {

} (Citing CX-1565C, Q. 98)

Complainant asserts that Respondents' criticism of its identification of { } is not well founded. Complainant says that it has consistently identified {

} (Citing CX-581C, CX-653C)

Complainant continues that { } merely highlight additional related information to which Xu had access that allowed Sino Legend to easily tweak the process that it directly copied.

Complainant contends that certain variations on the SP-1068 process { } (Citing CX-1565C, Qs. 43-46, 48-79; CX-1570C, Qs. 62-74, 85-94) Complainant continues that these process variations {

} (Citing CX-1565C, Qs. 10, 66-67; CX-

762C)

{

}

{

}

Complainant argues that the trade secrets at issue belong to Complainant. Complainant says that {

} (Citing CX-1571C, Qs. 43-44; JX-6C; CX-957C)⁴

Complainant continues that before Xu left Complainant's Shanghai subsidiary in 2007, he wrote in an e-mail that {

} (Citing CX-171C)

Complainant says that Respondents speculate that { } was a "improvement" not owned by Complainant and that {

}

⁴{

}

{

}

Complainant argues that “[a] parent and its wholly owned subsidiary have a complete unity of interest,” and therefore are treated as “essentially one and the same entity” in a trade secret standing analysis. (Citing *SI Handling Systems, Inc. v. Heisley*, 658 F.Supp. 362, 370 (E.D. Pa. 1986) (analogizing to *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)))

Complainant asserts that the law does not even require Complainant to actually own the trade secrets at issue in order to establish standing. Complainant explains that although a patent claim requires proof of patent ownership, a trade secret claimant need only demonstrate **possession** of the trade secret. (Citing *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327, 330-33 (4th Cir.2001), *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 43-44 (2d Cir.1999), *Faiveley Transp. USA, Inc. v. Wabtec Corp.*, 2010 WL 4860674 at *7 (S.D.N.Y. Nov. 29, 2010)) Complainant continues that SI’s possession of the trade secrets at issue is undisputed.

Respondents’ Position: Respondents say that in its Complaint and earliest interrogatory response, Complainant identified { } describing what Complainant contended were its alleged trade secrets in this Investigation. Respondents continue that these focused primarily on { } for making Complainant’s SP-1068 tackifier resin, but also included {

⁵ Complainant says that in *Certain Cast Steel Railway Wheels*, the Court rejected the type of attack that Respondents are now making. (Citing Inv. No. 337-TA-655, USITC Pub. 4265 (Oct. 16, 2009), at 14-15) Complainant continues that the Court explained that the respondents “purport[ed] to construe specific portions of licenses and other agreements ...without any citation to testimony or other evidence to support their argument” and “simply criticize[d] the testimony of certain Amsted’s witnesses concerning Amsted’s claim of ownership.” (Citing *Id.*) Complainant adds that the court found that none of Amsted’s asserted trade secrets were “innovations” made by another entity. (Citing *Id.* at 15)

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}. Respondents aver that Complainant has since changed the description and scope of some alleged secrets, and dropped others. Respondents say that among the originally alleged trade secrets that Complainant has now abandoned are:

{

}

Respondents contend that Complainant's original allegations were based on {

} Respondents say that according to

Complainant, {

} (Citing Tr. at 125:16-126:4) Respondents continue that before trial,

Complainant conceded that {

}

Respondents argue that notwithstanding the changes from the originally alleged trade secrets, Complainant provided a modified list of its alleged trade secrets on March 12, 2012 in its response to Respondents Interrogatory No. 6. (Citing RX-555C at 43-55) Respondents say that at the same time, Complainant {

} Respondents explain

that some of these "embodiments" {

} (Citing RX-555C at Appendix A) Respondents

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continue that {

} (Citing RX-555C at Appendix A) Respondents add that

at trial Complainant relied on {

} (Citing CX-1565C Q68-79; CX-

1570C, Qs. 66, 85, 86, 89, and 90) Respondents say that a summary of {

} appears in the charts below, which are taken verbatim (including

footnotes) from Complainant's March 12, 2013 interrogatory response (Citing RX-555C at

Appendix A):

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Respondents say that Complainant relied upon a multitude of { } from different places and times and for different products, including:

{

}

{

}

Respondents argue that Complainant’s reliance on { } for different products from different locations and time periods highlights Complainant’s improper “mixing and matching” approach. Respondents say that Complainant ignores a fatal gap in its proofs, namely, Complainant’s inability to demonstrate that anyone at Sino Legend ever laid eyes on most of { }

Respondents say that Complainant’s description of its alleged trade secrets is { }.⁶ (Citing CIB at 22-31) Respondents continue that Complainant also relies on numerous different { } used by Complainant over a span of decades at its facilities in { } to make SP-1068 and

⁶ {

}

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a variety of other products. Respondents add that Complainant ignores that {

} were never seen by anyone at Sino Legend. Respondents say that for its description of its alleged trade secrets, Complainant relies heavily on the testimony of its expert, Dr. Hamed, who was evasive and argumentative at trial, even contesting that {

} (Citing RIB at 3)

Respondents say that Complainant has relied (*inter alia*) on an obsolete {

} (Citing CX-1565C, Qs. 74-78; CX-1570C, Q. 86)

Respondents continue that {

} Respondents add that

Complainant also relies on {

} (Citing CX-1154C at

SIGITC0000155166) Respondents argue that Complainant lacks standing to assert alleged trade secrets that are owned by { }, including their “improvements” to Complainant’s processes.

Respondents say that Commission Rule 210.12 requires that “every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property.” (Citing 19 C.F.R. § 210.12(a)(7)) Respondents continue that in determining whether this requirement is met, the Commission has applied the standing requirement established by courts in patent infringement cases. (Citing *Certain Catalyst Components and Catalysts for the Polymerization of Olefins*, Inv. No. 337-TA-307, Commission

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Opinion, 1990 ITC LEXIS 224, at *50 (June 18, 1990); *Certain Point of Sale Terminals* Inv. No. 337-TA-524, Order No. 31 (Feb. 7, 2005)) Respondents say that *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 12-17 (Oct. 16, 2009) analyzed standing on the basis of whether the complainant owned the trade secrets at issue.

Respondents argue that {

} Respondents say that there is no

evidence that Complainant developed or used the { } in its U.S. facility, nor is there any evidence that this formula was know-how transferred from Complainant in the U.S. to {

} Respondents continue that

pursuant to Complainant's license agreements, all improvements { } make to

Complainant's processes are *non-exclusively* licensed back to Complainant. (Citing CX-534C

(collection of Complainant's license agreements); CX-957C at SIGITC0000003141)

Respondents conclude that Complainant has failed to make the required showing that it is the

owner or exclusive licensee for its {

}

Respondents assert that Complainant lacks standing with respect to its {

} Respondents say that Complainant devotes only one sentence that

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is even arguably addressed to the question of standing, incorrectly asserting that “each” of the alleged trade secrets “was developed by Complainant {

} (Citing CIB at 22) Respondents disagree,

saying that the cited testimony stops well short of addressing “each” of the alleged trade secrets, and notably omits {

} . (Citing CX-1565C, Q. 98) Respondents continue that

Complainant glosses over its reliance on { } for several of its misappropriation claims. (Citing CIB at 25, 30, 35)

Staff’s Position: Staff notes that Respondents generally contend that “SI’s reliance on {

} for different products from different locations and time periods highlights

Complainant’s misguided ‘mixing and matching’ approach” and cite Complainant’s March 12,

2013 interrogatory response (RX-555C at App. A) for its {

} (Citing RIB at 25-26) Staff

argues that the focus of the inquiry has always been on the SP-1068 trade secrets as exemplified

in {

}

Staff says that Dr. Chao compared the SP-1068 trade secrets { } to Sino

Legend’s incarnations of SL-1801/1802, starting with the earliest evidence from Mr. Fan’s

notebook in November 2006. Staff continues that Dr. Chao’s comparison shows that certain

asserted trade secrets were either identical or substantially similar to Sino Legend’s process, and

that Sino Legend’s LFP variations were derived directly from the SL-1801/1802 predecessors.

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(Citing CX-1566C, Qs. 15, 73-74; CDX-001C) {

} Staff explains that

{ } show how any differences with SL-1801/1802 and LFP versions over time were not unique and independent to Sino Legend, as these differences were more than likely first learned by Jack Xu and C.Y. Lai during their employment with Complainant. Staff continues that it is undisputed that they each had broad access to Complainant's confidential information. As an example, Staff says that both Xu and Lai were aware of {

} (Citing CX-

1566C, Q. 76-77) Staff says that Complainant's SP-1068 trade secrets are reflected in { }
}

Analysis and Conclusions: Commission Rule 210.12(a)(7) requires that:

For every intellectual property based complaint (regardless of the type of intellectual property right involved), include a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property;

19 C.F.R. § 210.12(a)(7). Thus, the Commission Rules require the complainant own the trade secrets at issue or be the exclusive licensee. The cases cited by Complainant address state trade secret laws, or trade secret law generally, not trade secret intellectual property cases before the Commission that apply the Commission Rules. As a result, the holdings in the cases cited by Complainant that indicate that complete ownership of the trade secrets is not needed are not applicable. See *DTM Research, L.L.C. v. AT & T Corp.*, 245 F.3d 327, 330 (4th Cir. 2001) (holding that the plaintiff need only show that it possessed trade secrets); *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 43-44 (2nd Cir. 1999) (Noting that a party must demonstrate "it possessed a trade secret"); *Faiveley Transport USA, Inc. v. Wabtec Corp.*, 758 F.Supp.2d 211, 220 (S.D.N.Y. 2010) ("The Second Circuit has consistently held, however, that

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possession of a trade secret is sufficient to confer standing on a party for a claim of trade secret misappropriation.”).

Applying the standard set forth in the Commission Rules, I find that Complainant owns and has standing to assert the { } trade secrets at issue in this investigation. There are { } that are at the heart of the dispute between the parties—{

} Clear evidence shows that {

}

Mr. Banach credibly testified that in 2004, Jack Xu received {

} (CX-

1565C, Q. 32; CX-756C) Mr. Banach explained that {

} A comparison of { } verifies the

accuracy of Mr. Banach’s testimony and the {

} (CX-756C; CX-581C; JX-010C; JX-011C; CX-1565C, Qs. 12, 32, 33, 43-

44, 48-49)

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In addition to {

}, an email from Mr. Xu confirms {

}

Respondents incorrectly assert that {

} belong to { } and

therefore, Complainant does not have standing to sue. The evidence shows that these technical specifications were developed by Complainant. First, {

} (*Id.*) Respondents have not

cited any evidence {

} Thus, the unrebutted evidence shows that {

}

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Second, although Complainant has relied upon {

} credible and un rebutted testimony establishes that {

} is developed

and owned by Complainant. Mr. Large testified that {

} (CX-1571C, Q. 43) Mr. Large

continued that “SI Group, Inc. is the owner, although the technology is licensed to {

} (*Id.*, Q. 44)

Mr. Large’s testimony is corroborated by licensing agreements between {

} (CX-957C at ¶¶ II.1, II.3) Mr. Large’s

testimony also is corroborated by testimony by Dr. Banach, who testified specifically that {

} (CX-1565C, Q. 98)

Respondents’ attempts to rebut the evidence showing that Complainant owns the trade secrets at issue miss the mark. Respondents parse the testimony of Dr. Banach to argue that it stops “well short” of addressing “each” of the alleged trade secrets, and notably omits {

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} As noted *supra*, Dr. Banach testified that {

{ (CX-1565C, Q. 98) Dr. Banach provided examples of the technology, saying

{

} (*Id.* (emphasis added)) By saying the

technology { } “includes” the key process

parameters “such as . . .,” Dr. Banach was giving examples, not an exhaustive list. Failing to

explicitly include { } within the list of examples does not exclude the

{

} from the {

} for the manufacture of SP-

1068” that was transferred from Complainant. Moreover, as noted *supra*, Mr. Large testified that

{

}

Based upon the foregoing testimony and corroborating evidence, I find that Complainant owns and has standing to assert the { } alleged trade secrets at issue in this investigation.

b. Shifting Burden to Prove Trade Secret Is/Is Not Generally Known

Complainant’s Position: Complainant contends that a uniform federal trade secret standard governs the determination of whether particular conduct constitutes “unfair methods of competition” and “unfair acts” in importation, in violation of section 337, rather than a particular state’s tort law. (Citing *TianRui Group Co. Ltd. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1327 (Fed. Cir. 2011)) Complainant continues that trade secret law varies little from state to state and

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is generally governed by the Uniform Trade Secrets Act (“UTSA”) and the Restatement of Unfair Competition. *Id.* at 1327-28. Complainant says that under the UTSA, “trade secret” means:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Citing Uniform Trade Secrets Act § 1(4)) Complainant continues that the UTSA has been adopted by 47 states. Complainant says that the Restatement defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”

(Citing Restatement (Third) of Unfair Competition § 39 (1995).)

Complainant avers that neither the UTSA nor the Restatement (Third) of Unfair Competition require that a trade secret be continuously used by the trade secret owner. (Citing Restatement (Third) of Unfair Competition § 39 cmt. c (1995) (“The definition of “trade secret” adopted in the Uniform Trade Secrets Act does not include any requirement relating to the duration of the information’s economic value. See Uniform Trade Secrets Act § 1(4) and the accompanying Comment. The definition adopted in this Section similarly contains no requirement that the information afford a continuous or long-term advantage.”); Uniform Trade Secrets Act § 1, cmt. (1985) (“The definition includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will not work could be of great value to a competitor.”))

Complainant says that commission decisions prior to the UTSA and Restatement (Third) of Unfair Competition have referred to six factors set forth in the comments to Restatement of

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Torts § 757 in assessing whether information qualifies as a trade secret. (Citing *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Comm'n. Op. at 52-53 (Dec. 1984)) Complainant continues that courts recognize, however, that the Restatement factors are guidelines and are not to be applied as a list of requisite elements. (Citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 722 (7th Cir. 2003) (citing cases))

Complainant says that “[n]ovelty, in the patent law sense, is not required for a trade secret.” (Citing *Kewanee Oil Co. v. Biscron Corp.*, 416 U.S. 470, 476 (1974); *see also* 2 Rudolf Callmann, *The Law of Unfair Competition, Trademarks and Monopolies* § 14.15, at 14-124 (2003) (“[A] trade secret need not be novel or unobvious.”)) Complainant continues that absolute secrecy is not required, and reasonable efforts to maintain secrecy need not be extravagant. (Citing *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 974 (8th Cir. 2011)) Complainant says that proprietary legends on documents or confidentiality agreements are common factors in determining secrecy. (Citing *id.*) Complainant continues that secrecy is not lost if the holder discloses the trade secret under an implied obligation of confidence. (Citing *Kewanee Oil*, 416 U.S. at 475)

Complainant contends that secrecy may be measured by the time, effort, or expense with which information can be developed through proper means. (Citing *C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1302 (Fed. Cir. 2000) (noting evidence that “it would take years and years to refine such a process” and that others had not developed a workable process)) Complainant continues that the information should “be sufficiently secret to impart economic value because of its relative secrecy.” (Citing *Learning Curve Toys*, 342 F.3d at 722) Complainant adds that secrecy is determined by looking at the claimed trade secret as a whole. (Citing Restatement

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(Third) of Unfair Competition § 39 cmt. f (1995)) Complainant says that “[a] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.” (Citing *3M v. Pribyl*, 259 F.3d 587, 595-96 (7th Cir. 2001); see also *SkinMedica, Inc. v. Histogen Inc.*, 869 F. Supp. 2d 1176, 1194 (S.D. Cal. 2012) (“A trade secret may [be] comprised of partly or entirely non-secret elements and still merit protection.”))

Complainant says that after presenting a *prima facie* case establishing the element of appropriately safeguarding the asserted trade secrets, the burden shifts to the accused to prove their affirmative defenses. (Citing *Injection Research Specialists, Inc. v. Polaris Indus., L.P.*, Nos. 97-1516, 97-1545, 97-1557, 1998 WL 536585, at *8 (Fed. Cir. Aug. 13, 1998))

Complainant continues that whether a matter is generally known or readily ascertainable may properly be characterized as an affirmative defense. (Citing *Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 688 n.9 (D. Minn. 1986); see *Hayes-Albion v. Kuberski*, 311 N.W.2d 122, 127 (Mich Ct. App. 1981), *aff'd in relevant part*, 364 N.W.2d 609 (Mich. 1984) (“Once plaintiff has established that a person in a confidential relationship has stolen its trade secrets or customer lists the burden of going forward with the evidence falls on the guilty party to establish that the trade secrets and customer lists are not in fact secret but are openly known in the trade.”))

Complainant adds that a “wrongdoer who has made an unlawful disclosure of another’s trade secrets cannot assert that publication to escape the protection of trade secret law.” (Citing *Syntex Ophthalmics, Inc. v. Tsuetaki*, 701 F.2d 677, 683 (7th Cir. 1983))

Complainant says that obviousness and combining the teachings of multiple references in a patent law sense does not apply to whether a trade secret is not generally known to and not

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readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use. (Citing *Learning Curve Toys*, 342 F.3d at 724) Complainant continues that the law governing trade secrets does not require complete novelty or nonobviousness in the patent law sense but sufficient novelty to impart economic value to the trade secret holder. (Citing *id.*; see *Kewanee Oil*, 416 U.S. at 476; *Am. Can Co. v. Mansukhani*, 728 F.2d 818, 819 (7th Cir. 1984) (“While others might have discovered such formulations, this is not a patent action and ‘obviousness’ is not the benchmark.”))

Respondents’ Position: Respondents argue that Complainant has the burden of demonstrating that its alleged trade secrets satisfy the applicable legal standards in order to constitute legitimate trade secrets.

Respondents say that the Federal Circuit’s decision in *TianRui* indicates that federal trade-secret law governs this matter. Respondents continue that although the Federal Circuit has not specifically defined what constitutes federal trade secret-law, it has relied upon the Uniform Trade Secrets Act in reviewing trade-secret cases appealed from the International Trade Commission. (Citing *TianRui Group Co. v. ITC*, 661 F.3d 1322, 1327-28 (Fed. Cir. 2011)) Respondents say that the trade secret law of an individual state is inapplicable to Section 337 investigations. (Citing *TianRui*, 661 F.3d at 1327-28)

Respondents say that under the Uniform Trade Secrets Act (“USTA”), a “trade secret” is: information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value,⁷ actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of

⁷ Respondents say that obsolete information, on the other hand, “cannot form the basis for a trade secret claim because the information has no economic value.” (Citing *Fox Sports Net N., L.L.C. v. Minn. Twins P’ship*, 319 F.3d 329, 336 (8th Cir. 2003))

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efforts that are reasonable⁸ under the circumstances to maintain its secrecy.

(Citing U.T.S.A. § 1(4) (1979, as amended 1985))

Respondents contend that to show trade secret misappropriation under the USTA, a plaintiff “must prove two statutory elements: (1) the existence of a ‘trade secret’; and (2) the ‘misappropriation’ of that trade secret by the defendant.” (Citing *Trident Prods. & Servs., LLC v. Canadian Soiless Wholesale, Ltd.*, 859 F. Supp. 2d 771, 778 (E.D. Va. 2012)) Respondents say that to prove the first element, the existence of a trade secret, a plaintiff must prove three factors: “(1) independent economic value; (2) not known or readily ascertainable by proper means; and (3) subject to reasonable efforts to maintain secrecy.” (Citing *id.*; see also *Johnson v. Simonton Bldg. Prods.*, 2011 U.S. Dist. LEXIS 7671, *31-32 (Jan. 26, 2011))

Respondents argue that in general, information is readily ascertainable “if it is available in trade journals, reference books, or published materials” or if “the nature of a product lends itself to being readily copied as soon as it is available on the market.” (Citing comment to U.T.S.A. § 1)

Respondents say that misappropriation arises where a trade secret is acquired or disclosed by “improper means.” Respondents say that “proper means” of ascertaining a trade secret include, but are not limited to, any combination of (1) discovery by independent invention; (2) discovery by reverse engineering; (3) observation of the item in public use or on public display; and (4) obtaining the trade secret from published literature. (Citing Comment to U.T.S.A. § 1 (citing *Restatement of Torts*, § 757, cmnt. (f)))

⁸ Respondents aver that reasonable efforts to maintain secrecy include, for example, “advising employees of the existence of a trade secret, limiting access to a trade secret on ‘need to know basis,’ and controlling plant access.” (Citing comment to U.T.S.A. § 1) Respondents continue that “public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.” (Citing Comment to U.T.S.A. § 1)

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Respondents say that where a trade secret is readily ascertainable by proper means, there can be no misappropriation. Respondents continue that in *Permagrain Products, Inc. v. U.S. Mat & Rubber Co.*, Permagrain alleged trade secrets in the construction process for its laminate flooring. (Citing 489 F. Supp. 108, 112 (E.D. Pa. 1980)) Respondent say that the general process for creating these laminates—the application of pressure and heat to layers glued together—was already known in the industry, but the technique had a low success rate. Although Permagrain’s process was arguably better than the industry standard, the court nevertheless found that it was readily ascertainable by proper means because (1) the component parts of the composition were disclosed in the Permagrain’s advertising, (2) the components could be determined through the application of a solvent to the finished product, and (3) a patent disclosed the process for constructing the flooring from its components, including “the sequence of their assembly, and the ranges of temperatures and pressures required to bond those components together in laminated form.” (Citing *id.*)

Respondents say that a plaintiff must prove that the particular asserted trade secret has independent value. Respondents explain that for example, where “no specific evidence was presented regarding the economic value of” an alleged trade secret, a plaintiff fails in his burden of proof. (Citing *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 421 (E.D. Va. 2004)) Respondents continue, saying that “even if a company has expended significant resources to develop a trade secret on its own, it cannot prevail under [the Uniform Trade Secrets Act] if the barrier to obtaining that trade secret is quite low in reality.” (Citing *Trident Prods.*, 859 F. Supp. 2d at 779)⁹

⁹ Respondents say that for reverse engineering, defendants do not need to match the same level of time, skill, and expense as the plaintiff; ready availability of “relevant information . . . undercuts the possibility of trade secret protection.” (Citing *Flotec, Inc. v. S. Research, Inc.*, 16 F. Supp. 2d 992, 1000 (S.D. Ind. 1998); see also *Surgidey*

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Respondents say that Complainant misstates the applicable trade secret law and burdens of proof. Respondents say that Complainant has alleged that it can establish a *prima facie* case of misappropriation simply by establishing that it “appropriately safeguard[ed] the asserted trade secrets.” (Citing CIB at 20) Respondents continue that the Uniform Trade Secrets Act (“UTSA”) specifies that proof of a protectable trade secret’s existence includes showing that the alleged secret:

- (1) derives independent economic value, actual or potential, ***from not being generally known to or readily ascertainable through appropriate means*** by other persons who might obtain economic value from its disclosure or use;” and
- (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Citing UTSA § 1(4) (emphasis added by Respondents)) Respondents say that Complainant cites to old and unpublished cases to contend that it need only prove element (2) above and that Respondents bear the burden of disproving element (1). (Citing CIB at 20) Respondents continue that Complainant’s contention cannot be reconciled with the UTSA’s plain language or with established federal case law.¹⁰

Corp. v. Eye Tech., Inc., 648 F. Supp. 661, 682 (D. Minn. 1986) (“first and foremost consideration is whether the [] information is readily accessible to a reasonably diligent competitor”)) Respondents continue that for example, if the plaintiff’s product is publicly available, another party may lawfully be able to reverse engineer a particular process or design from the plaintiff’s product at lower expense and with less skill. (Citing *Flotec*, 16 F. Supp. 2d at 1001 (though plaintiff had invested years of effort and money to develop its design, it was easily reverse engineered from publicly available product); *Coenco, Inc. v. Coenco Sales, Inc.*, 940 F.2d 1176, 1179 (8th Cir. 1991) (no trade secret because information was readily accessible from published patents, from “simple observation,” or from reverse engineering)) Respondents say that trade secret law is particularly unsympathetic to claims that involve information that can be “discerned with reasonable effort by inspecting a product available for purchase on the market.” (Citing *Flotec*, 16 F. Supp. 2d at 1000) Respondents say that courts apply this principle to the reverse engineering of either design or process from a finished product. (Citing *id.* at 1001; *Roboserve, Ltd. v. Tom’s Foods, Inc.*, 940 F.2d 1441, 1454-55 (sale of plaintiff’s product removed any trade secret protection as to unpatented parts of design))

¹⁰ Respondents say that Complainant cites as support for its argument *Hayes-Albion v. Kuberski*, 311 N.W.2d 122, 127 (Mich. Ct. App. 1981). Respondents continue that *Hayes-Albion* is outdated because it was decided based on Michigan law prior to the ratification of the UTSA. Respondents say that the portion of *Hayes-Albion* that Complainant quotes is plainly contradicted by subsequent federal court decisions applying the UTSA. Respondents say that under the Michigan UTSA, “[a] plaintiff in a trade secrets case bears the burden of pleading and proving the

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Respondents contend that it is hornbook trade secret law that “the plaintiff must establish that the matter is not generally known in the trade, and meets the other standards for status as a trade secret.” (Citing *Milgrim on Trade Secrets* § 15.01[1][a][ii]; *see also MicroStrategy Inc. v. Wenfeng Li*, 601 S.E.2d 580, 588 (Va. 2004) (applying Virginia UTSA)) Respondents continue that a plaintiff alleging trade secret misappropriation bears “the burden of establishing that the matter sued on is, in fact, a trade secret.” (Citing *Milgrim* §15.01[1][a][vi]; *see also MicroStrategy*, 601 S.E.2d at 588 (plaintiff must prove “the existence of a trade secret”))

Respondents say that burden applies to the first statutory requirement of the UTSA:

Under the first statutory requirement, the information at issue must be sufficiently secret to impart economic value to both its owner and its competitors because of its relative secrecy. This requirement precludes trade secret protection for information generally known within an industry even if not to the public at large. ***A plaintiff ... must prove that the real value of the information lies in the fact that it is not generally known to others who could benefit [from] using it.***

(Citing *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 942 (7th Cir. 1996) (citations omitted, emphasis added by Respondents)) Respondents continue that a plaintiff must put forth, evidence that the alleged trade secret “is not generally known in the industry,” is not “simple common sense,” or readily ascertainable.¹¹ (Citing *Computer Care v. Serv. Sys. Enters.*, 982 F.2d 1063, 1074 (7th Cir. 1992) (applying Illinois UTSA)) Respondents say that the fact a plaintiff is “the first” to use a method “does not establish that the practice is secret.” (Citing *id.*)

specific nature of the trade secret.” (Citing *Dura Global Techs. v. Magna Donnelly Corp.*, 662 F. Supp. 2d 855, 859 (E.D. Mich. 2009); *see also Wilson v. Cont'l Dev. Co.*, 112 F. Supp. 2d 648, 662 (W.D. Mich. 1999).)

¹¹ Respondents say that Complainant misstates the applicable legal standard and confuses independent development and the “readily ascertainable” criterion which precludes trade secret protection, citing several New York cases (which has not adopted the UTSA) and a 1976 Ninth Circuit case that predates the UTSA. (Citing CIB at 112) Respondents continue that Complainant refers to the supposed lack of evidence of reverse engineering by Respondents, but the possibility of easy reverse engineering precludes trade secret status. (Citing *Walker Mfg. v. Hoffmann, Inc.*, 261 F. Supp. 2d 1054, 1081-82 (N.D. Iowa 2003) (“the possibility that certain matters can be discovered by ‘reverse engineering’ is relevant to whether or not they are protectable trade secrets ... even if [the defendant] does not assert ... that it in fact obtained those matters by reverse engineering.”); *see also Trident Prods. & Servs. v. Can. Soiless Wholesale*, 859 F. Supp. 2d 771, 778-79 (E.D. Va.))

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Staff's Position: Staff says that the Federal Circuit confirmed that “section 337 applies to imported goods produced through the exploitation of trade secrets in which the act of misappropriation occurs abroad.” (Citing *TianRui*, 661 F.3d at 1328) Staff continues that trade secret allegations such as those asserted by Complainant are governed by federal common law. (Citing *id.* at 1327) Staff says that, acknowledging that the question was a matter of first impression for the court, the Federal Circuit held that “a single federal standard, rather than the law of a particular state, should determine what constitutes a misappropriation of trade secrets sufficient to establish an ‘unfair method of competition’ under section 337.” (Citing *id.*) Staff states that while trade secret misappropriation is ordinarily a matter of state law, *see Leggett & Plait, Inc. v. Hickory Springs Mfg. Co.*, 285 F.3d 1353, 1360 (Fed. Cir. 2002), the court reasoned that “where the question is whether particular conduct constitutes ‘unfair methods of competition’ and ‘unfair acts’ in importation, in violation of section 337, the issue is one of federal law and should be decided under a uniform federal standard, rather than by reference to a particular state’s tort law.” (Citing *TianRui*, 661 F.3d at 1327; *cf. Group One, Ltd v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1047-48 (Fed. Cir. 2001) (strong interest in uniform rule re: on-sale bar in patent cases justifies reliance on federal common law, generally informed by U.C.C. and Restatements of Contracts))

Staff says that this uniform federal standard is “governed by widely recognized authorities such as the Restatement of Unfair Competition and the Uniform Trade Secrets Act.” (Citing *Tianrui*, 661 F.3d at 1328) Staff continues that these sources outline the general principles that have provided guidance in previous Commission decisions regarding trade secret matters. (Citing *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Comm’n Decision Not to Review Initial

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Determination at 51-53 (Dec. 1984); *Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, Comm'n Op. at 42 (1979)) Staff avers that *TianRui* effectively affirmed the Commission's past practice with regard to trade secret misappropriation claims, and does not represent a change in the applicable law. (Citing 661 F.3d at 1322) Staff concludes that federal common law governs the misappropriation allegations in this proceeding.

Staff says that widely recognized authorities such as the Uniform Trade Secrets Act define trade secret to mean "information, including a formula, pattern, compilation, program device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Citing U.T.S.A., § 1(4) (as amended, 1985) ("UTSA"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 n. 15 (1984) ("[T]he value of a trade secret lies in the competitive advantage it gives its owner over competitors.")) Staff continues that The Commission has referred to six relevant factors set forth in the comments to Restatement of Torts § 757 to determine whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [complainant's] business;
- (2) the extent to which it is known by employees and others involved in [complainant's] business;
- (3) the extent of measures taken by [complainant] to guard the secrecy of the information;
- (4) the value of the information to [complainant] and to [its] competitors;
- (5) the amount of effort or money expended by [complainant] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

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(Citing *Sausage Casings*, Comm'n Op. at 52-53, citing Restatement of Torts, § 757, Comment b (1939); Restatement (Third) of Unfair Competition § 39 (1995) (Reporters' Note, Comment d: "In determining the existence of a trade secret, many cases rely on the factors identified in Restatement of Torts § 757, Comment b (1939)); Milgrim, Trade Secrets, § 2.01 (1980)) Staff adds that through certain states' adoption of the UTSA or Restatement of Torts, the following cases expand upon these six factors. Staff says that some of the factors may not be relevant to a case's particular set of circumstances. (Citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 722 (7th Cir. 2003) (finding that the factors are instructive guidelines and not six prongs that a plaintiff must satisfy))

Staff says that Matters of general knowledge in the industry, or those that can be readily discerned are not eligible for trade secret protection. (Citing *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*, 177 U.S.P.Q. 614, 620-21 (D. Ariz. 1973)) Staff continues that matters disclosed in patents also will destroy any claims of trade secret. (Citing *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 216 U.S.P.Q. 762, 765 (9th Cir. 1982)) Staff notes, however, that a specific embodiment of general concepts or a combination of elements, some or all of which may be known in the industry, may be protectable as a trade secret. (Citing *Cybertek Computer Products, Inc. v. Whitfield*, 203 U.S.P.Q. 1020, 1024 (D. Col. 1977))

Staff says that information that may be eligible for protection as a trade secret may lose that protection if adequate steps are not taken to maintain secrecy. Staff explains that although there must be a substantial element of secrecy, it is not necessary for secrecy to be absolute. (Citing *K-2 Ski Co. v. Head Ski Co., Inc.*, 183 U.S.P.Q. 724, 725-26 (9th Cir. 1974); *Wheelabrator Corp. v. Fogle*, 167 U.S.P.Q. 72 (W.D. La. 1970); *U.S.M. Corp. v. Marson Fastener Corp.*, 204 U.S.P.Q. 233 (Mass. 1979)) Staff says that the burden on complainant is to

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establish that reasonable precautions were taken to preserve secrecy to ensure that it would be difficult for others to discover the secret without the use of improper means. (Citing *Henry Hope*, 216 U.S.P.Q. at 764)

Staff avers that although there is no requirement of novelty or nonobviousness (citing *Learning Curve Toys*, 342 F.3d at 724), a trade secret must be information that is not readily ascertainable or duplicated by a person within the industry. (Citing *George S. May*, 628 N.E.2d at 654) Staff says that after a *prima facie* case is presented establishing appropriate safeguarding of asserted trade secrets, the burden shifts to the accused to prove their affirmative defenses; including that a trade secret is generally known or readily ascertainable, which is an affirmative defense. (Citing *Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 688 n.9 (D. Minn. 1986); *see also Hayes-Albion v. Kuberski*, 311 N.W.2d 122, 127 (Mich Ct. App. 1981), *aff'd in relevant part*, 364 N.W.2d 609 (Mich. 1984)) Staff continues that the question of obviousness and combining the teachings of multiple references in a patent law sense is not applicable to the determination of whether a trade secret is generally known to and readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use. (Citing *See Learning Curve Toys*, 342 F.3d at 724) Staff adds that the law governing trade secrets does not require complete novelty or nonobviousness in the patent law sense but sufficient novelty to impart economic value to the trade secret holder. (Citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974); *Am. Can Co. v. Mansukhani*, 728 F.2d 818, 819 (7th Cir. 1984) (“While others might have discovered such formulations, this is not a patent action and ‘obviousness’ is not the benchmark.”))

Analysis and Conclusions: The only substantive dispute between the parties regarding the relevant law is whether or not a matter being generally known or readily ascertainable is an

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affirmative defense or a factor that must be considered in determining whether a *prima facie* case that a trade secret exists has been established. I find that whether or not a matter is generally known or readily ascertainable is a factor that must be considered in determining whether or not a *prima facie* case has been made that a trade secret exists. *Sausage Casings* made clear that the complainant bears the burden to establish that a trade secret exists and its secrecy has been adequately protected. *Sausage Casings*, Initial Determination (July 31, 1984) (“Union Carbide has not met its burden of establishing the existence and misappropriation of its claimed trade secret in the overall configuration of its shirring machine.”). There, the Initial Determination explained that “matters of general knowledge in the industry, or those that can be readily discerned are not eligible for trade secret protection” and the “burden on complainant is to establish that reasonable precautions were taken to preserve secrecy to ensure that it would be difficult for others to discover the secret without the use of improper means.” *Id.*

As noted *supra*, *Sausage Casings* defined a trade secret as any formula, pattern, device or compilation of information “which gives [the holder] an opportunity to obtain an advantage over competitors *who do not know or use it.*” *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing The Restatement of the Law of Torts § 757, Comment c). *Sausage Casings* went on to explain that “[r]elevant factors for determining the existence of a trade secret include: (1) the extent to which the information is known outside of complainant's business; . . . (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” *Id.* Thus, *Sausage Casings* makes clear that whether or not a matter is generally known or readily ascertainable is a factor that must be considered in determining whether or not a trade secret exists.

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This is to be contrasted with *Sausage Casings*' treatment of defenses on which Respondents bear the burden of proof. *Sausage Casings* explains that respondent bears the burden to establish the use of the secret process is the product of independent development. *Id.* ("When respondent asserts that his use of the secret process is the product of independent development, respondent bears a heavy burden of persuasion to show that independent development.") *Sausage Casings* similarly explains that the issue of unclean hands is an affirmative defense on which Respondents bear the burden of proof. *Id.* ("In any event, a more comprehensive analysis seems warranted to fully and fairly determine the merits of Viscofan's serious affirmative defenses, which it has the burden of proving by a preponderance of the evidence of record.") Based upon all of the foregoing, I find that whether or not a matter is generally known or readily ascertainable is one factor to be weighed in determining whether or not a trade secret exists.

Although it is not an affirmative defense, finding that a matter is generally known or readily ascertainable does, however, defeat an argument that a trade secret exists. *Sausage casings* explained that "[m]atters of general knowledge in the industry, or those that can be readily discerned **are not eligible** for trade secret protection." *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Motorola, Inc. v. Fairchild Camera & Instrument Corp.*, 177 U.S.P.Q. 614, 620-21 (D. Ariz. 1973) (emphasis added)) Similarly, *Sausage Casings* explained that "[m]atters disclosed in patents also will destroy and [sic] claims of trade secret." *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 216 U.S.P.Q. 762, 765 (9th Cir. 1982)).

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The cases cited by Complainant to argue that, whether a matter is generally known or readily ascertainable is an affirmative defense, do not support that conclusion. *Injection Research Specialists, Inc. v. Polaris Industries, L.P.* is an unpublished opinion. In it, the Federal Circuit specifically noted that the defendants in answering the complaint explicitly identified the fact that the alleged confidential and proprietary information is generally known and commonly used was an “affirmative defense.” 1998 WL 536585 at *8 (Fed. Circ. 1998). In contrast, the Respondents here stated that “[i]nclusion of a defense here is not an admission that Respondents bear the burden of proof on the issue.” (e.g., Response of Hong Kong Sino Legend Group Ltd to the Complaint (July 30, 2012))

Complainant’s reliance on *Surgidev Corp. v. Eye Technology, Inc.*, 648 F.Supp. 661, 688 (D. Minn. 1986), is also unpersuasive. *Surgidev Corp. v. Eye Technology, Inc.* is a District Court opinion based on Minnesota state law, and is therefore not binding precedent, and it merely notes that “Commentators have recognized that this first ‘element’ of the trade secret definition may also properly be characterized as an affirmative defense.” 648 F.Supp. 661, 688 (D. Minn. 1986). The “first element” was that “the information must (1) not be generally known or readily ascertainable.” *Id.* Despite the statement that this “element” was an affirmative defense, the District Court’s analysis of the evidence actually addressed whether or not information is generally known or readily ascertainable as one factor to be weighed in deciding whether or not the prima facie case for a trade secret was met. *See id.* at 691-692. Because the District Court did not actually treat the “first element” as an affirmative defense (but as a factor to be weighed), any indication that the “first element” is an affirmative defense is dicta.

Syntex Ophthalmics, Inc. v. Tsuetaki, 701 F.3d 677 (7th Cir. 1983), is a Seventh Circuit Court of Appeals decision that applies Illinois state law and therefore, is not is not binding

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precedent. Moreover, it merely states that “a wrongdoer who has made an unlawful disclosure of another's trade secrets cannot assert that publication to escape the protection of trade secret law. We believe that principle to be equally vital today. To hold otherwise in the instant case would be to permit appellants to profit from their own wrong.” *Id.* at 683. *Syntex Ophthalmics, Inc. v. Tsuetaki* does not discuss the burden of proof or hold that the fact that information was common knowledge was an affirmative defense.¹²

2. { }

a. { }

Complainant's Position: Complainant says that Complainant's SP-1068 process

{

}

Complainant says that any olefin with more than four total carbon atoms containing at least one carbon atom bonded with two or more other carbon atoms is called “iso” in common nomenclature. (Citing CX-1570C, Q. 10) Complainant continues that DIB refers to two specific isomers of the isooctene family. (Citing *id.*; Tr. at 193:18-21) Complainant adds that the

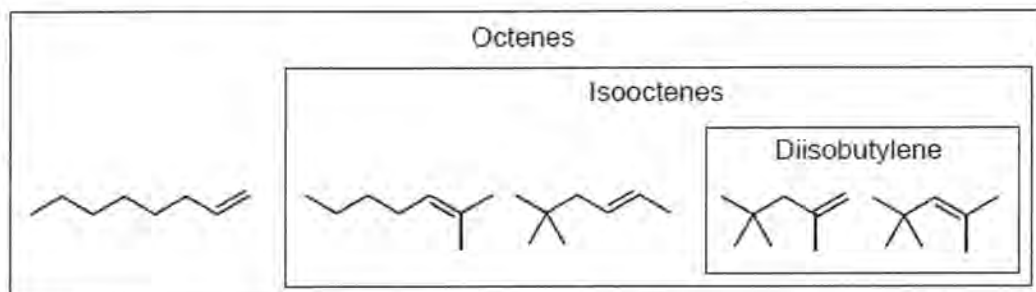
¹² Complainant also cites *Hayes-Albion v. Kuberski*, 108 N.W.2d 122 (Mich. Ct. App. 1981). *Hayes-Albion v. Kuberski* is a Michigan state court case based on Michigan state law, and is therefore irrelevant. *Id.*

¹³ {

}

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relationship between octenes, isooctenes, and DIB is provided below. (Citing *id.*) Complainant says that the four isooctenes shown below are provided as examples; there are many isooctene isomers. (Citing *id.*)



Complainant says that POP is a phenol with an eight carbon alkyl group. (Citing CX-1570C, Q. 11) Complainant continues that PTOP is a specific isomer of POP derived from the reaction of phenol and DIB. (Citing *Id.*; Tr. at 193:22-194:8)

Complainant says that the process for manufacturing { } is set out in { }, which provide instructions for operators to carry out the reaction. (Citing CX-1565C, Q. 10) Complainant continues that there are a number of { } that were used at Complainant's Shanghai subsidiary between 2004 and 2007 but { } during that time. (Citing *id.*) Complainant contends that { }

{

}. (Citing *id.*)

Complainant says that Complainant's Shanghai subsidiary used a {
} between 2004 and 2007. (Citing CX-1570C, Q. 17) Complainant avers that that {

} (Citing

Tr. at 605:1-11; CX-581C; CX-759C; CX-1570C, Q. 17; CX-1565C, Qs. 10-12)

Complainant says that { } cannot
be determined by testing the final resin product. (Citing CX-1570C, Q. 95) {

} (Citing Tr. at 797:14-797:24) Complainant adds that when asked to
perform this "straightforward" calculation at trial, Dr. Swager provided a longwinded and

¹⁴ {

}

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convoluted explanation, riddled with unsupported assumptions, only to conclude: “am I going to hit the exact number you want me to hit? Probably not.” (Citing Tr. at 799:2-804:4)

Complainant says that Respondents argue that Swager’s “guess” was {
} which they say is “devastating” in its closeness to Complainant’s
trade secret { }. (Citing RIB at 29) Complainant disagrees, saying that Swager {
} Respondents say that their
revisionist account not only ignores that he was unable to perform any actual calculations and
jumped directly to a “guess,” but also effectively concedes that Sino Legend’s process uses
Complainant’s { }

Complainant says that Dr. Swager’s statement is flawed at the outset because it assumes
the person doing the reverse engineering knows the process parameters used to make the final
resin product. (Citing CX-1570C, Q. 96) {

}

{

}

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Complainant says that Complainant has used different { } in different plants and at different times. (Citing CX-1570C, Q. 74) Complainant continues that Complainant has accommodated { } in its process by making minor process modifications. (Citing CX-1565C, Qs. 110-112) Complainant avers that { } (Citing CX-1570C, Q. 74; CX-1565C, Qs. 101-109)

Complainant argues that { } does not have a material impact on Complainant's trade secret process for manufacturing SP-1068. (Citing CX-1565C, Q. 108) { }

Complainant says that the reason that { } does not have a material impact on the manufacturing process is that { }

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{

} (Citing *id.*; JX-033C; *see also* CX-1565C, Qs. 61-62; CX-719C)

Complainant contends that Mary Howe-Grant Kroschwitz, ed., “Kirk-Othmer Encyclopedia of Chemical Technology,” vol. 2 (4th ed. 1992) (“Howe”) does not disclose any of Complainant’s trade secrets or make any of them readily ascertainable. (Citing CX-1570C, Q. 117; RX-510) Complainant says that Howe covers a wide variety of topics in general terms. (Citing *id.*) Complainant continues that in a brief section on alkylphenols, Howe summarizes certain aspects, including nomenclature, physical properties, synthesis, reactions of alkylphenols, and the common commercial alkylphenols. (Citing *id.*) Complainant avers that this reference, only provides general teachings in a textbook style; it does not contain specific information about commercial processes to carry out { }, much less information about the { } in Complainant’s process. (Citing *id.*)

Complainant argues that Howe’s alleged teaching { } is inapplicable to Complainant’s process, since Howe’s {

}

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{

} (Citing Tr. at 805:5-

12, 806:18-25; CX-1570C, Q. 117)

Complainant says that U.S. Patent No. 2,739,172 (the “‘172 patent”) discloses a

{

} (Citing RX-

512). Complainant argues that the disclosures of the ‘172 patent are completely inapplicable to

Complainant’s process because {

} (Citing *id.*)

Complainant asserts that the ‘172 patent does not disclose the {

} as used in Complainant’s processes. (Citing *id.*) Complainant says that Dr. Swager acknowledged that the ‘172 patent discloses {

} and does not disclose

{

} (Citing CX-1570C, Q. 118)

Complainant asserts that U.S. Patent No. 2,332,555 (the “‘555 patent”) discloses a process for producing {

}

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{ }. (Citing RX-513) Complainant says that the '555 patent does not provide a method for preparing {

} (Citing CX-1570C, Q. 119)

Complainant contends that U.K. Patent No. 906,219 (the "'219 patent") does not disclose any of Complainant's trade secrets or make any of them readily ascertainable because it is directed to a process of making {

} (Citing RX-514 at 1:63-78; CX-1570C, Q. 120) Complainant says that the {

} (Citing *id.*) Complainant continues that { } could not be used to make SP-1068 because {

} (Citing *id.*) Complainant adds that Dr. Swager admitted that the '219 patent's { } do not include { } (Citing Tr. at 847:7-9)

Complainant argues that U.S. Patent No. 3,037,052 (the "'052 patent") does not disclose Complainant's trade secrets or make any of Complainant's trade secrets readily ascertainable. (Citing CX-1570C, Q. 121) Complainant says that the '052 patent discloses {

}
Complainant says that Respondents attempt to attack Complainant's { } trade

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secret by picking and choosing snippets from various references out of context. Complainant argues that these references are irrelevant to Complainant's process, as Complainant explains above. Complainant adds that the references do not disclose Complainant's {

} (Citing Tr. at 844:19-845:1) Complainant says that referring to Respondents' own demonstrative (SDX-007C), Swager agreed that only two public references cited by Respondents - {

} (Citing *id.* at 846:10-847:6) Complainant says that Swager made a similar concession regarding RX-512. (Citing *id.* at 847:19-848:3) Based on the foregoing, Complainant says that Swager admitted the Respondents' references do not disclose Complainant's { . }

Complainant says its asserted trade secrets, taken as a whole, have demonstrated value in both a qualitative and quantitative sense and on an individual basis are highly useful to effectively manufacture tackifier resins. Complainant says that Complainant's growth illustrates the qualitative value of the asserted trade secrets. {

}

{

{

}

Complainant avers that Complainant derives value from its trade secrets primarily from royalties in the United States from its licensees' sales of {

} tackifiers and by controlling the exploitation of its trade secrets in the United States and abroad. (Citing CX-1567C, Q. 114-122) Complainant says that the present value of the estimated future royalties that Complainant will receive from its foreign licensees, including what is known as the "relief from royalty" method for the implicit value of Complainant's use of its trade secrets in the United States. (Citing *id.*, Q. 120-122) Complainant says that it has licensed its asserted trade secrets to {

} (Citing JX-029C, JX-030C, CX-1419C, CX-1421C, CX-957C, CX-958C, CX-959C, CX-960C, CX-961C, JX-06C, CX-1567C, Q. 121-122) Complainant asserts that Respondents' argument that the scope of these licenses extends beyond the trade secrets should be ignored. Complainant reasons that the asserted trade secrets enable the production of resins and the central value of Complainant's licenses are the right to use the asserted trade secrets. (Citing *id.*, Q. 134) Complainant says that the value of any other know-how or technical information would be negligible. (Citing *id.*)

Complainant asserts that the royalty rates for the use of the technology that vary between {
} are proper and representative. (Citing CX-341C)

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Complainant says that contrary to Respondents' criticisms of Complainant's royalty rates, {

}

and thus these royalty rates are representative. (Citing CX-1567C, Q. 122) Complainant

continues that it is not necessary to {

}

Complainant says that Respondents attempt to de-couple the royalties from the asserted trade secrets by suggesting that royalty payments would outlast the trade secrets is conjecture.

Complainant reasons that { } would not agree to pay for publicly

available information and there is no evidence indicating that SI would continue to seek the

royalties if the trade secrets were deemed published. (Citing CX-1567C, Q. 134) Complainant

adds that the fact that Complainant continues to receive money for information indicates that the

information is not generally known and that it has value in the marketplace, which are the

requirements for a trade secret. (Citing *id.*)

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Complainant argues that the asserted trade secrets give Complainant a competitive advantage in the marketplace. (Citing *Id.*, Q. 135) Complainant says that by owning and maintaining as a secret the leading commercially acceptable tackifier manufacturing process, Complainant causes a prospective market entrant, like Respondents, to invest time, money and effort attempting to research, develop and engineer a tackifier manufacturing process that can compete legitimately. (Citing *id.*) Complainant continues that the delay to the prospective market entrant, and the costs the prospective entrant is required to incur, enable Complainant to maintain or increase its tackifier sales and corresponding profit margins in the United States. (Citing *id.*)

Complainant says that the value of Complainant's competitive advantage attributable to the asserted trade secrets in the United States is { } (Citing *id.*, Qs. 136-140; CX-343C) Complainant argues that Respondents' criticisms of this valuation are incorrect and contradicted by the evidence. {

} Complainant continues that Respondents' complaints about Dr. Putnam's growth rate should be rejected because the rate is reasonable and consistent with historical averages and current projections. (Citing CX-1567C, Qs. 57-67) {

}

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Complainant says that Respondents' contention that there is no evidence of the individual trade secrets providing economic value is demonstrably false. Complainant continues that its asserted trade secrets on an individual basis are highly valuable in the cost effective and efficient manufacture of Complainant's tackifier resins. {

} Complainant says that the other Complainant asserted trade secrets similarly confer valuable advantages, especially when comparable with other possible approaches.

Complainant says that Respondents' argument that a few of the asserted trade secrets do not have economic value because Complainant may not currently be using them should be rejected. Complainant argues that Respondents' attempt to impose requirements that are not called for by applicable law is improper. Complainant says that neither the UTSA nor the Restatement (Third) of Unfair Competition require that a trade secret be continuously used by the trade secret owner. Complainant continues that whether or not Complainant is currently

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using each of the asserted trade secrets is not a prerequisite for having viable and valuable trade secrets. Complainant concludes that the evidence shows that Complainant's asserted trade secrets, both on an individual and collective basis, have substantial economic value to Complainant.

Complainant asserts that it has taken and continues to take prudent and vigilant measures to protect its trade secrets, not only at Complainant's headquarters, but also at Complainant's Shanghai subsidiary and in all of Complainant's other plants. (Citing CX-1566C, Qs. 16-22) Complainant continues that the measures it takes to safeguard the confidentiality of its trade secrets include, for example: confidentiality agreements, non-compete clauses, document and information control procedures, confidential raw material codes, and prompt legal action. (Citing *Id.*) Complainant says that even Mr. Crumlsh confirms that Complainant takes great care to protect its trade secrets. (Citing CX-1354.1C at 59:11-17, 61:17-62:13) Complainant notes that Mr. Crumlsh testified that Complainant is "more careful than most. Other suppliers that we have are sometimes less careful." (Citing *id.* at 62:11-13)

Complainant says that Complainant requires its employees to sign confidentiality and invention assignment agreements. (Citing CX-1569C, Q. 19) {

} Complainant adds that third parties that are given access to Complainant trade secrets (e.g., when required for regulatory compliance) are required to sign strict confidentiality agreements. (Citing CX-1569C, Q. 19; CX-1566C, Q. 17) Complainant says that confidentiality provisions are also made a part of agreements between Complainant and its consultants, suppliers, and customers. (Citing CX-1569C, Q. 19)

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Complainant says that at Complainant's Shanghai subsidiary, further procedures are taken in recognition of the fact that employees may have access both to confidential technical information belonging to Complainant {

} and also to mostly non-technical confidential information belonging to Complainant's Shanghai subsidiary (such as customer information). {

}

Complainant says that because Xu had access to Complainant confidential information such as the SP-1068 process, he signed an NDA with Complainant, requiring him to permanently protect the confidentiality of Complainant's trade secrets. (Citing CX-317C; CX-318C)

Complainant continues that shortly before Xu left Complainant's Shanghai subsidiary in 2007, he confirmed in an e-mail that Complainant's Shanghai subsidiary was "fed by best SII milk," including "technical, engineering, and operation"; "SISL's every step of growth has SII team behind." (Citing CX-171C) {

}

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{

}

Complainant says that the standard labor contract signed by Complainant's Shanghai subsidiary employees includes a confidentiality clause to protect Complainant's Shanghai subsidiary's information. (Citing Tr. at 286:6-9; CX-1563C, Qs. 30-31; CX-1569C, Q. 19)

{

}

{

}

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{

}

Complainant notes that Complainant's Shanghai subsidiary also restricts access to all of Complainant's confidential technical information on an as-needed basis. (Citing CX-1563C, Q.

33) According to Complainant, confidential documents, such as {

} are kept under

lock and key in a file room, access to which is restricted to specifically authorized personnel.

Complainant avers that these confidential documents include but are not limited to {

} Complainant asserts that Mr. Xu, as plant manager,

had full access to the file room and all documents secured therein. (Citing CX-1563C, Qs. 21-25)

{

}

{

} (Citing CX-1563C, Qs. 22-23, 26; Tr.

at 470:8-14) Complainant continues that because of Xu's need to edit confidential documents

such as {

} he could access his own copies

of documents he worked on (on his laptop, for example), without going to the file room. (Citing

Tr. at 207:7-13)

{

}

{

}

Complainant asserts that further measures to protect Complainant's trade secrets include protection of the identity of raw materials using confidential codes. (Citing CX-1566C, Q. 21)

Complainant says that line operators receive only the process instructions they need to do their jobs, and in the instructions they receive, raw material names are replaced with code numbers.

(Citing CX-1563C, Q. 33; CX-1569C, Q. 23; CX-653C at 2-4 {

} Complainant continues that only the General Manager and the Plant Manager would have full access to Complainant's Shanghai subsidiary's confidential technical information.

(Citing CX-1563C, Q. 33)

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Complainant contends that Complainant also protects its trade secrets by taking immediate, diligent legal action upon learning of misappropriation. (Citing CX-1566C, Q. 21) Complainant says that this includes, for example, this Investigation as well as the criminal complaint and civil litigation that Complainant's Shanghai subsidiary previously filed in China.

Respondents' Position: Respondents say that Complainant's description of its {
} deviates from its interrogatory response on March
12, 2013. (Citing CIB at 22-23) {

{

} (Citing RX-555C at 43-44) Respondents argue that that Complainant's { } cannot possibly constitute a legitimate trade secret for the simple reason the { } can be readily ascertained through testing of the final resin product—as Complainant concedes and Dr. Swager confirms.

{

}

¹⁷ {

¹⁸ Respondents say that DiTOP is a dialkylphenol with two octyl (8 carbon chains) groups attached to the phenol molecule. (Citing CX-1565C, Q. 17) Respondents continue that PTOp is a monoalkyl phenol with one octyl group

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{ } Respondents contend that based on {
} found in the final resins it is straightforward to simply {
} used in the { } (Citing RX-421C, Qs. 70-71)

Respondents say that this scientific principle was acknowledged by Complainant through its top chemist Dr. Timothy Banach, who testified that {

} Respondents conclude that Dr. Banach's testimony confirms that it is straightforward to simply {
} found in the final resin. (Citing RX-421C, Qs. 70-71)

Respondents say that counsel for Complainant challenged Dr. Swager on cross examination to { } (Citing Tr.

attached to the "para" position (*i.e.*, the position opposite the OH group) of the phenol molecule. (Citing RX-421C, Q, 50)

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at 797-804) Respondents continue that Complainant's counsel {

} (Citing Tr. at 804:3-4)

Respondents argue that Dr. Swager's testimony is devastating to Complainant's position.

{

}

{

} (Citing

RX-421C, Qs. 27-29) As an example, Respondents say that a 1992 Encyclopedia of Chemical Technology recognizes this conventional practice. (Citing RX-510 (Kirk-Othmer Encyclopedia) at 125 {

}

¹⁹ {

{

} (Citing RX-512 at 4:39-61; RX-421C, Qs. 75-77)²⁰ As another example, Respondents cite United States Patent No. 2,332,555 (which issued in 1943), which discusses {

} (Citing RX-513 at 1:37-2:13; RX-421C, Qs. 78-79)

Respondents argue that other chemists outside the United States also recognized the need to {

} Respondents say that in United Kingdom Patent Application No. 906,219 (published in 1962), the applicants recognized that: {

²⁰ {

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{ } Specifically,
Respondents say that a July 1973 newsletter { } reports

{

{ (Citing RX-421C, Q. 107) Respondents say that Complainant's alleged
secret { } have been recognized by chemists for decades. {

}

²¹ {

}

{

_____ } (Citing RX-
421C, Qs. 62-93) Respondents conclude, as a result, that Complainant's { _____ }
does not meet the standard for a legitimate trade secret.

Respondents say that Complainant's arguments regarding whether or not testing can
reveal { _____ } (Citing CIB at 58-59) overlook that Complainant's alleged trade secret is

²² {

}

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Respondents say that Complainant cannot dispute that numerous publications taught the wisdom of { } Complainant now asserts as its own. (Citing RIB at 30-33)

Respondents continue that Complainant relies upon the testimony of Dr. Hamed, who attempted to distinguish these publications on irrelevant grounds by focusing on aspects of the '172 patent (RX-512), '219 U.K. patent (RX-514) and '555 patent (RX-513) other than {

} Respondents aver that Dr. Swager's conclusions based on these publications stand un rebutted.

Respondents say that the 1992 Encyclopedia of Chemical Technology (RX-510) recognizes the conventional use of {

²³ Respondents say that Complainant admits that di-alkylated phenols are monoreactive and cannot be used alone to make resins. (Citing RX-555C at 45) Respondents aver that tri-alkylated phenols cannot react further at all.

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{

}

Respondents say that a party claiming trade secret misappropriation must prove that each particular asserted trade secret has independent economic value. (Citing *MicroStrategy*, 331 F. Supp. 2d at 421) Respondents continue that no part of Complainant’s claimed evidence of independent economic value addresses the alleged trade secrets individually. Respondents conclude that there is no proof of independent economic value from secrecy associated with each individually claimed process parameter, which is fatal to each of Complainant’s claimed trade secrets of individual process steps and conditions.

Respondents assert that Complainant’s economic expert opines that “the SP-1068 Technology” collectively has value because Complainant receives royalties from {

} and Complainant (purportedly) has a right to control or exclude competition. (Citing CX-1567C, Q. 118) Respondents say that Dr. Seth Kaplan explained that the royalties are not reflective of the value of Complainant’s claimed trade secrets. (Citing RX-423C, Qs. 100-101) Respondents continue that per its license agreements, Complainant would continue to receive these royalties even if all of the alleged trade secrets were published; therefore, Complainant’s royalty income is not value “from secrecy.” (Citing CX-534C) Respondents say that Dr. Kaplan further explained that Complainant’s valuation of the right to control or exclude competition is unreliable because it is based on (1) ignoring {

} (2) projecting the rate of recovery in revenue growth from the 2008 financial crisis far into the future; and (3) speculating, contrary to the evidence, that Complainant’s price in the

²⁴ {

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U.S. market would { } match the margin of its Chinese affiliate in the absence of (assumed) trade secret protection. (Citing RX-423C, Q. 102) Respondents argue that because Complainant’s valuation of “the SP-1068 Technology” collectively is based on flawed assumptions and analysis, the “SP-1068 Technology” collectively also fails to meet the requirement of independent economic value.

Respondents argue that another reason Complainant’s alleged trade secrets do not derive independent economic value from secrecy is that they are not secret. Respondents say that because the alleged trade secrets could be derived relatively easily from public sources and/or permissible reverse engineering, “the inference is that the information was either essentially ‘public’ or is of de minimis economic value.” (Citing *MicroStrategy*, 331 F. Supp. 2d at 416-17) Respondents continue that Complainant’s own public disclosure (through patenting) of aspects of its process undercuts the alleged value of even the unpatented portions, because that disclosure aids in ascertaining other aspects of the process. (Citing *Roboserve*, 940 F.2d at 1454-55) Respondents add that obsolete process steps and conditions that Complainant no longer uses do not satisfy the element of independent economic value. (Citing *Fox Sports Net North, LLC v. Minn. Twins P’ship*, 319 F.3d 329, 336 (8th Cir. 2003); *MicroStrategy*, 661 F. Supp. 2d at 555; *Applied Indus. Materials Corp. v. Brantjes*, 891 F. Supp. 432, 438 (N.D. Ill. 1994)) {

}

Respondents say that they do not dispute that Complainant took some measures to protect aspects of its technology. Respondents continue instead of protecting some aspects of its technology, Complainant has informed the world of many of these aspects through its published patent applications and patents. Respondents add that Complainant’s secrecy measures are

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limited by its contracts with employees—{

}

Staff's Position: Staff asserts that the evidence demonstrates that {

} qualifies as a trade secret. {

}

{

}

Turning to Comment (b), factor 1 of the Restatement of Torts § 757, (extent to which the information is known outside of complainant's business), Staff says that the evidence shows that { } was not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff continues that Dr. Swager testified that { } was not disclosed in the prior art that he cited. (Citing Tr. at 844:12 to 848:3; SDX-007C) Turning to factor 6 (ease or difficulty of proper acquisition or development by the respondent), Staff says that the evidence shows that { } would be difficult to duplicate by others through independent development or reverse engineering, and that achieving the same { } is unlikely to be coincidental. (Citing CX-1570C, Qs. 95-96, 112)

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Staff says that Respondents' expert Dr. Swager opined that {
} could be determined by reverse engineering in a "straightforward" and simple calculation. (Citing RX-421C, Qs. 70-72) Staff continues that under cross-examination, Dr. Swager admitted that even his calculation was not likely to result in {

} "I can do this calculation. You, know, am I going to hit the exact number you want me to hit? Probably not." (Citing Tr. at 803:4-6, 848:8-18) Staff says that Dr. Swager further admitted that he neither personally conducted such an analysis nor relied on any third party analysis. (Citing Tr. at 849:13-850:7) Staff concludes that Dr. Swager, at the most, was describing a "theoretical" methodology, which would take about six months. (Citing Tr. at 862:24-863:5, 859:15-19; Restatement (3rd) of Unfair Competition § 39, Comment f: Requirement of Secrecy ("The theoretical ability of others to ascertain the information through proper means does not necessarily preclude protection as a trade secret. Trade secret protection remains available unless the information is readily ascertainable by such means."))

{

} Staff says that in its view, Dr. Swager's opinion deserves little weight because he did not provide adequate evidence of reverse engineering by Respondents of { } or any other asserted trade secret.

Staff says that with respect to their affirmative defense of independent development, Respondents failed to introduce enough competent evidence to support a finding that Sino

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Legend ZJG independently developed {

} Staff says that Respondent Quanhai Yang, who is

Chairman of the Board at Sino Legend ZJG, agreed during cross-examination by the Staff that

Respondents' independent development defense is inadequate and thus cannot succeed.

Q. So, Mr. Yang, you must admit at this point that the independent-development defense cannot be confirmed with documents and testimony.

A. My understanding is so.

Q. And so your independent-development defense cannot succeed in this investigation.

A. Probably [not] in this investigation.

(Citing Tr. at 765:18-25)

Staff says that this does not appear to be a case where Complainant was merely the first to use otherwise general knowledge. (Citing *George S. May*, 628 N.E.2d at 654) Staff continues that it does not appear that the specific categories of information that qualify as trade secrets are discoverable by reverse engineering; rather, Respondents chose to hire persons with knowledge of Complainant information instead of attempting to reverse engineer the trade secrets. Staff says that the record does not include any evidence of Respondents' reverse engineering of Complainant's processes, or evidence that others have come across the same solutions as Complainant in the 50 years since the first development of the SP-1068 trade secrets. Staff says that even if it were possible to reverse engineer the information, Respondents would not be entitled to this argument if it is clear that they unlawfully misappropriated the information.

(Citing *ILG Indus., Inc. v. Scott*, 273 N.E.2d 393, 397-98 (Ill. 1971) (finding that because the defendants proceeded unlawfully, the court would accept plaintiff's testimony that it would take 18 months to reverse engineer the trade secret))

Staff says Respondents assert that the alleged trade secrets asserted by Complainant are either generally known or readily ascertainable by proper means or were not the subject of

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efforts that were reasonable under the circumstances to maintain their secrecy. Staff disagrees, saying that the evidence shows that { } that the Staff supports as trade secrets are not readily ascertainable from publicly available information. (Citing CX-1570C, Qs. 116-142) Staff says that at the time of its development, the SP-1068 process consisted of technological advancements in the manufacture and quality of tackifier resins. (Citing *id.*) Staff continues that those advancements would not have been publicly known and could not have been easily discernible at the time Complainant built the Rotterdam Junction manufacturing facility in its commercial implementation of the SP-1068 process. (Citing *id.*)

Staff says that in regards to the prior art disclosures proffered by Respondents' expert Dr. Swager, the evidence shows that certain process parameters from certain alleged prior art are taken out of context, without considering whether the references provide any indication that these process parameters would be appropriate for use in Complainant's trade secret processes. (Citing CX-1570C, Q. 116)

Turning to factor 4 of the Restatement of Torts § 757, Comment (b) (value of the information to the complainant and its competitors), Staff says that the evidence supports a finding that { } has value in ensuring the quality of the tackifier product. (Citing CX-1570C, Qs. 16-18) {

} (Citing *id.*) Staff continues that this affects the quality of the final SP-1068 tackifier product. (Citing *id.*) Staff argues that this trade secret provides Complainant with a valuable {

}

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{

}

Staff says that the evidence shows that each trade secret derives economic value from being kept concealed from the general public. Staff continues that while individual raw materials { } and individual manufacturing aspects { } may have been well-known in the industry, the more specific and critical {

} viewed individually and also as a whole were never disclosed to the public. Staff avers that the overall process flow for manufacturing SP-1068 would have an economic value greater than the sum of its parts. (Citing *Cal. Int'l Chem. Co., Inc. v. Sister H. Corp.*, 168 F.3d 498 at *1 (9th Cir. 1999) (rejecting defendant's argument that technology at issue was not unique; finding it unnecessary for a technical process to be "patentable or to be something that could not be discovered by others by their own labor and ingenuity" to receive protection as a trade secret)) Staff says that value is also bestowed upon Complainant in the form of competitive advantage. (Citing *Ruckelshaus*, 467 U.S. at 1012 n. 15 ("[T]he value of a trade secret lies in the competitive advantage it gives its owner over competitors."))

Staff says that Dr. Putnam testified that Complainant derives value from the SP-1068 process technology primarily from three sources: first, Complainant receives royalties in the United States from its licensees' sales of tackifier manufactured by the SP-1068 related process; second, it can control the exploitation of the SP-1068 technology in the U.S., including the ability to prevent the use of the SP-1068 technology to manufacture competing tackifiers; and third, it can control the exploitation of the SP-1068 technology outside of the U.S., which helps determine worldwide tackifier prices. (Citing CX-1567C, Q. 118, Qs.117-140, generally) Staff

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continues that Dr. Putnam testified that the present value of the five year royalty stream from SP-1068 technology is { } (Citing CX-1576C, Q. 133) Staff says that licensing royalties are based on Complainant having licensed its asserted trade secrets to its foreign licensees, which manufacture tackifiers outside of the United States. (Citing JX-029C, JX-030C, CX-1419C, CX- 1421C, CX-957C, CX-958C, CX-959C, CX-960C, CX-961C, and JX-006C) {

}

Staff says that Dr. Putnam also testified that the value of the right to exclude competitors from the U.S. market is worth { } (Citing *id.*, Q. 139) Staff continues that loss or impairment of this competitive edge through misappropriation of Complainant's confidential information would cause injury to Complainant in the form of lost profits and market share. (Citing CX-1567C, Q. 79) Staff concludes that Complainant's asserted trade secrets, taken as a whole, possess value in both a qualitative and quantitative sense.

Staff says that the core value of Complainant's licenses is the right to use the asserted trade secrets. (Citing *id.*, Q. 134) Staff asserts that the evidence shows that {

} would not agree to pay for publicly available information. (Citing *id.*) Staff says that the fact that Complainant continues to receive licensing related revenue for its trade

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secrets indicates that the information is not generally known and that it has value in the marketplace. (Citing *id.*)

Turning to factors 1, 2, and 3 of comment (b) of the Restatement of Torts § 757, Staff says that the evidence shows that access to { } were closely controlled, they were confidential, and they were not made publicly available, and thus the specific amounts of reactants were not disclosed and are not known outside of the Complainant's or its licensees' businesses. (Citing CX-1569C, Qs. 18-24) Staff continues that { } could not be discerned other than through access to Complainant's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff says that Complainant and Complainant's Shanghai subsidiary took reasonable steps under the circumstances to protect the secrecy of its technical formulas and manufacturing processes related to {

} Staff continues that in general, Complainant has the burden to demonstrate that it took adequate steps to reasonably maintain as confidential the information in the asserted trade secrets. (Citing *Arcor, Inc. v. Haas*, 842 N.E.2d 265, 270- 271 (Ill. App. Ct. 2005) (indicia of confidentiality include a confidentiality agreement, limiting digital access to the information by password protection, tracking physical copies or keeping copies in a secure room, and limiting access to information on a need-to-know basis or to only key individuals)) Staff avers that a company needs to take more than one step to reasonably expect information to remain confidential. (Citing *Id.* at 271) Staff says that for a small company, it is enough that only key individuals have access to the information and any disclosure to potential business partners is governed by an oral agreement to confidentiality. (Citing *Learning Curve Toys*, 342 F.3d at 724-

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26) Staff continues that more sophisticated parties will need to take more rigorous steps to maintain confidentiality. (Citing *id.*)

Staff says that Complainant took several steps to reasonably protect its confidential information and trade secrets. {

} Staff asserts that Complainant instituted a variety of confidentiality measures. Staff says that Complainant has a comprehensive document control policy to ensure that documents are secure, identifiable, and available only to authorized Complainant employees. (Citing *id.*, Q. 18) {

}

Staff says that Complainant took other measures to safeguard proprietary information including, for example, the requirement for Complainant's employees to sign confidentiality and invention assignment agreements. (Citing CX-1569C, Q. 19) {

} Staff adds that any third parties that are given access to Complainant trade secrets (e.g., as required for certain regulatory compliance

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measures) are required to sign strict confidentiality agreements. (Citing *id.*) Staff says that confidentiality provisions are also included in agreements between Complainant and its consultants, suppliers and customers. (Citing *id.*) {

}

Staff asserts that Complainant also adopted procedures for controlling access to electronic information. (citing CX-1569C, Q. 21) {

}

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{
} Staff adds that technical documents are usually
blocked with code names and distributed on a need-to-know basis. (Citing *id.*) {

}
Staff asserts that Complainant's Shanghai subsidiary requires its employees to sign confidentiality agreements that have multiple overlapping confidentiality and non-disclosure requirements, in addition to employee policies, handbooks, and training about maintaining Complainant's trade secrets. (Citing CX-1569C, Q. 24) As an example, Staff says Jack Xu executed a Labor Contract (Citing CX-317C), which contains nondisclosure provisions. (Citing *id.*) Staff continues that he also signed a Non-Disclosure Agreement (Citing CX-318C), and a Supplementary Agreement (Citing CX-319C). Staff adds that Jack Xu also signed an agreement to abide by the SI Group China Employee Manual (i.e., the "Employee Handbook"). (Citing CX-320C)

Staff contends that Current employees of Complainant, including Mr. Banach, and former employee of Complainant's Shanghai subsidiary, Mr. Xu, understood that { } and other Complainant/Complainant's Shanghai subsidiary manufacturing related documents were to be kept confidential and were subject to strict confidentiality requirements. (Citing CX-1569C, Qs. 18-24; Tr. at 325:7 to 326:14) Staff says that Complainant required its employees to sign confidential nondisclosure and non-compete agreements when leaving the company, including those employees at Complainant's Shanghai subsidiary, except that Jack Xu refused to discuss

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signing an exit agreement. (Citing CX-1563C, Qs. 39-45) Staff says that while Xu refused to sign a post-employment confidentiality agreement shortly before he left to work for Respondents, the circumstances demonstrate Complainant/Complainant's Shanghai subsidiary's efforts to protect its confidential information from unauthorized disclosure. (Citing *id.*; *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.*, 492 N.E.2d 814, 819 (Ohio 1986) (upholding the trial court's issuance of an injunction notwithstanding Valco's failure to obtain a non-disclosure agreement from the misappropriating employee); *see also Niemi v. NHK Spring Co.*, 543 F.3d 294, 302 (6th Cir. 2008))

{

}

Staff says that even if an employee has signed a confidentiality agreement, Complainant's Shanghai subsidiary only distributes confidential information on an as-needed basis. (Citing CX-1563C, Q. 33) As an example, Staff says that the line operators receive only the process instructions necessary to do their jobs, and in the instructions they receive, raw material names are replaced with code numbers to protect the identities of the raw materials. (Citing *id.*) Staff says that Complainant's Shanghai subsidiary's employee handbook also prohibits employees from simultaneously working for other companies, and prohibits them from

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disclosing Complainant's Shanghai subsidiary confidential information, particularly to third parties, at any time "during employment and after separation." (Citing *id.*, Q. 37; CX-1551C at ¶¶6.2.1 to 6.2.4)

{

}

Staff concludes that Complainant has presented sufficient evidence of security measures at Complainant as well as at Complainant's Shanghai subsidiary to establish that Complainant made reasonable efforts to preserve the secrecy of SP-1068 information.

{

} Staff argues that this first trade secret is critical to the success of the final tackifier product, and that it impacts the other trade secrets in the overall process flow.

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Staff disagrees with Respondents argument that {
} can be readily ascertained through testing of the final resin product. Staff says that Respondents unconvincingly stretch Dr. Banach’s deposition testimony in order to argue this point, even though the weight of the evidence favors the conclusion by Dr. Hamed that the SP-1068 process cannot be reverse engineered. (Citing CX-1570C, Qs. 95-100) {

Staff says that although Respondents’ expert Dr. Swager claimed to be able to perform a “straightforward” calculation to determine { } during the hearing he admitted that even his calculation would not result in { }
“I can do this calculation. You, know, am I going to hit the exact number you want me to hit? Probably not.” (Citing Tr. at 803:4-6, 848:8-18) Staff continues that Dr. Swager further admitted that he had neither personally conducted such an analysis nor had he relied on any third party analysis { } or any other asserted trade secret. (Citing Tr. at 849:13 to 850:7) Staff reasons that Dr. Swager at the most was describing an unproven, undocumented “theoretical” methodology. (Citing Tr. at 862:24-863:5, 859:15-19; Restatement (Third) of Unfair Competition § 39, Comment f: Requirement of Secrecy (“The theoretical ability of others to ascertain the information through proper means does not

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necessarily preclude protection as a trade secret. Trade secret protection remains available unless the information is readily ascertainable by such means.”))

Staff also disagrees with Respondents claim that Complainant’s { } is disclosed in public references. RIPHB at 30-33. Staff says that Dr.Swager admitted that {

} was not disclosed in the public literature that he cited. (Citing Tr. at 844:12-848:3; SDX-007C) Staff continues that the references that Respondents cite, including the Kirk-Othmer Encyclopedia by “Howe” (RX-510), only disclose {

}

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Staff says that the evidence demonstrates that the exact same { } was used in Mr. Fan's first experiment on November 8, 2006, just four days after Jack Xu accessed the same formula on his Complainant laptop. Staff continues that this demonstrates that Sino Legend did not independently develop its process for manufacturing a "copycat" version of SP-1068, but instead used Complainant's trade secrets to do so.

Staff concludes that the weight of the evidence shows that { } was not generally known or readily discernible.

Staff disagrees with Respondents' argument that "no part of SI's claimed evidence of independent economic value addresses the alleged trade secrets individually." (Citing RIB at 77) Staff says that each asserted trade secret has commercial value as does the overall process flow trade secret. Staff explains that Complainant's asserted trade secrets are valuable in the cost effective and efficient manufacture of Complainant's tackifier resins. {

} Staff avers that the other asserted trade secrets similarly confer valuable advantages, especially when compared to other possible approaches. Staff adds that value is also

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bestowed upon Complainant in the form of competitive advantage. (Citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1012 n. 15 (“[T]he value of a trade secret lies in the competitive advantage it gives its owner over competitors.”))

Staff disagrees with Respondents argument that Dr. Putnam’s valuation of Complainant’s SP-1068 technology is incorrect because he used flawed assumptions. (Citing RIB at 78) Staff asserts that Dr. Putnam’s analysis was not flawed. {

} Staff continues that

Respondents’ complaints about Dr. Putnam’s growth rate for the tackifier market should be rejected because the rate is consistent with historical averages and current projections. (Citing CX-1567C, Qs. 57-67)

Staff says that Respondents appear to concede that Complainant took reasonable steps to protect the secrecy of the trade secrets. (Citing RIB at 79 (“Respondents do not dispute that SI took some measures to protect aspects of its technology.”))

Staff disagrees with Respondents’ argument that “SI’s secrecy measures are limited by its contracts with employees – {

} (Citing RIB at 79)

Staff says that Respondents’ argument ignores the direct and circumstantial evidence that Xu communicated Complainant’s trade secret information to Respondents while he was *still working at Complainant* and *prior to his working for Sino Legend* affiliates. Staff says that Xu did in fact breach his existing confidentiality and non-compete provisions of his employment agreements while still employed by Complainant as Complainant’s Shanghai subsidiary’s senior Plant

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Manager. Staff contends that Respondents' argument that Xu is now off the hook for his past violations in 2006-2007 is not supported by the weight of the evidence.

Staff also disagrees with Respondents' contention that Xu's labor contract with Complainant's Shanghai subsidiary (CX-317C) {
} means that Xu was no longer obligated to keep Complainant trade secrets confidential after April 2007. (Citing RIB at 140-141) Staff says that Respondents overlook that there are two separate contracts with Jack Xu: one Non-Disclosure Agreement with Complainant (Schenectady International Inc.) (CX-318C) and the other Labor Contract with Complainant's Shanghai subsidiary (Schenectady International (Shanghai) Co., Ltd.) (CX-317C). Staff explains that Complainant requires its employees to sign both Non-disclosure Agreements as well as Labor Contracts. {

} Staff says

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that Jack Xu's Non-Disclosure Agreement with Complainant (U.S.) is applicable to Complainant's asserted trade secrets in this investigation.

Analysis and Conclusions: I find that { } is a trade secret. { }

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{

}

I also find that Complainant has taken steps to protect the secrecy of {

} Mr. McAllister testified that Complainant requires its employees to sign confidentiality agreements. (CX-1569C, Q. 19) As part of their employment agreements, Mr. Lai and Mr. Xu signed such confidentiality agreements, which Complainant has produced in this case. (See CX-552C at 4, 5, 15-18; CX-317C at SIGITC0000178714; CX-318C) Mr. McAllister further testified that in addition to employees, Complainant requires third parties and consultants, suppliers, and customers that are given access to Complainant's trade secrets to sign confidentiality agreements. (CX-1569C, Q. 19) Additionally, Mr. Lu testified that Complainant's Shanghai subsidiary limits access to confidential information on an as-needed basis (CX-1563C, Q. 33), changes raw material names to codes to protect the confidentiality of the identity of raw materials (CX-1563C, Q. 20), stores confidential documents in a secure file room with logged access (CX-1563C, Q. 21; CX-611C), and has implemented a written document control policy (CX-1563C, Q. 29; CX-316C). Mr. Lu's testimony is

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corroborated by Complainant's production of {
} (CX-611C; CX-316C)

Respondents do not contest this testimony—in fact, Respondents admit that they “do not dispute that SI took some measures to protect aspects of its technology.” (RIB at 79)
Respondents' only argument is that the non-disclosure agreement signed by Mr. Xu was {

} Thus, Mr. Xu's confidentiality obligations {
} and Respondents' arguments are unpersuasive. Based on
the foregoing, the evidence is clear that Complainant has taken reasonable steps to protect the
secrecy of its process, including { }

Complainant has made a *prima facie* showing that {
} is not generally known or readily ascertainable. In *Certain Cast Steel Railway Wheels, Certain Processes For Manufacturing Or Relating To Same And Certain Products Containing Same*, the Initial Determination found that Complainant introduced sufficient evidence in the form of expert testimony that the trade secrets are not “generally known,” and the testimony of a third party that the trade secrets at issue are “not generally well known.” Inv. No. 337-TA-655,

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Initial Determination at 24-25 (Oct. 16, 2009). Specifically, The ID cited testimony from the expert that although his task was not to compute a numerical value for ABC Trade Secrets, in his opinion, “they are valuable for not being generally known. But I am not trying to quantify that value.” *Id.* The ID also cited testimony from the expert that the ABC Trade Secrets in Category 10 are not “generally known.” *Id.* The cited testimony of the third party stated: “Q. Do you think the ABC Process is generally well known? A. It is not generally well known.” *Id.* The Initial Determination found this was sufficient evidence that the trade secrets were not “generally known.” *Id.* at 26. The Commission determined not to review the Final Initial Determination. *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Comm’n Op. (Dec. 23, 2009). On appeal, the Federal Circuit indicated that the findings in the Final Initial Determination “are sufficient to establish the elements of trade secret misappropriation under either Illinois law or the generally understood law of trade secrets, as reflected in the Restatement, the Uniform Trade Secrets Act, and previous Commission decisions under section 337.” *TianRui v. ITC*, 661 F.3d at 1328.

Like the expert in *Certain Cast Steel Railway Wheels*, Dr. Hamed testified that:

I understand that SI Group’s SP-1068 is uniquely positioned in the rubber resin market, and to my knowledge, no company (other than Sino Legend) has been able to make a similar product effectively and economically capable of competing with SI Group’s SP-1068 in the United States. This fact provides further support for my opinions that SI Group’s trade secrets provide a clear economic advantage to SI Group and are novel and not generally known.

(CX-1570C, Q. 7) Dr. Hamed’s testimony is corroborated by the testimony of Dr. Putnam regarding Complainant’s market share. In Section V.B, *infra*, I find that Dr. Putnam offered un rebutted testimony that Complainant maintains a market share of tackifier resins in excess of { } for the period of 2007 through 2011. In Section V.B, *infra*, I also find that Dr. Putnam’s

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testimony is corroborated by documentary evidence. In Section V.C, *infra*, I find that Dr. Putnam and Mr. Hart provided un rebutted testimony that prior to the importation by Respondents, the only competing entity was { } which offered tackifier resin product that was inferior in quality to Complainant's. Based upon the testimony of Dr. Hamed, the corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins, Complainant has made a *prima facie* showing that its process for making tackifier resins is not generally known.

Respondents have failed to rebut this *prima facie* showing by introducing evidence that { } is generally known or readily ascertainable.

Respondents argue that { } is generally known in the industry, as demonstrated by a number of printed publications. These publications fail, however, to disclose {

} Rather, the Kirk-Othmer Encyclopedia (RX-510) discloses { } (RX-510 at 125), U.S. Patent No. 2,739,172 discloses {

} (RX-512 at 3:45-54, 4:40-60; RX-421C, Qs. 75-77), U.S. Patent No. 2,332,555 discloses {

} and U.K. Patent Application No. 906,219 teaches {

{ } (RX-514 at 2:112-121). A July 1973 newsletter from {

and U.S. Patent No. 3,037,052, { } discloses {

(RX-293 at SINOZJG_0022190; RX-421C, Qs. 86-87; RX-515 at 18:65-19:26; RX-421C, Q.

90)

{ } (Tr. at 844:25-845:1) Dr. Swager

also admitted that these two references—RX-510 and RX-512—do not specifically disclose {

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Respondents' arguments that { } can be determined through reverse engineering of the final resin product are also unavailing. Although Dr. Swager alleged that it is straightforward to calculate { } he was unable to do so on cross-examination. Rather, he produced a "guess" { } (Tr. at 803:12-13). To reach this "guess," Dr. Swager had to make numerous assumptions, including { }

{ Other than conclusory testimony that these assumptions are "valid," Dr. Swager does not justify his assumptions. (See Tr. at

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804:4) Moreover, after making these assumptions, Dr. Swager admitted “am I going to hit the exact number you want me to hit? Probably not.” (Tr. at 803:4-6; *see, generally*, Tr. at 797:19-804:4)

Dr. Hamed disputed that { } can be determined through reverse engineering and confirmed certain assumptions are needed to make Dr. Swager’s calculation. Specifically, Dr. Hamed explained that “you would have to already know the process used to make the final resin product in order to make a correlation.” (CX-1570C, Q. 96) Dr. Banach similarly testified that {

} (Tr. at 192:25-193:8) Based upon the foregoing testimony of Dr. Swager, Dr. Hamed and Dr. Banach, I find that the evidence in the record demonstrates that { } cannot be determined through reverse engineering.

Complainant has provided un rebutted evidence that { } is a valuable trade secret which was developed over a number of years. Dr. Hamed offered un rebutted testimony that {

} Similarly, when asked whether or not { } was a critical parameter, Dr. Hamed testified that “[a]ll of the SI Group’s process parameters work in concert to produce a superior tackifier product.” (CX-1570C, Q. 112) Dr. Banach testified that the SP-1068 product was first produced in 1959. (CX-1565C, Q. 88) Dr. Banach explained that { } (CX-1565C, Q. 94) and was the “result of substantial expenditure on research and development by SI Group. Each improvement also leveraged the years of practical experience at the company

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{

}

Respondents do not contest Dr. Hamed’s testimony regarding the value of {
} as it relates to the quality of the resulting tackifier product; rather,
Respondents argue that Complainant failed to assign a specific economic value to this trade
secret. (RIB at 77-79) Respondents’ argument misses the point—Complainant has provided
unrebutted testimony that { } results in a superior
tackifier product.

In *Certain Cast Railway Wheels*, the Initial Determination found that the trade secrets at
issue had value because the individual trade secrets were “useful[.]” to the manufacture of a cast
steel railway wheel and the trade secrets, taken as a whole, have demonstrated value in a
qualitative and quantitative sense, as demonstrated by manufacturing licenses for the trade
secrets. Here, in addition to showing that { } is useful in
the manufacture of tackifier resins (as noted above), Complainant has provided evidence
showing the licensing of the trade secrets as a whole.

Dr. Putnam provided unrebutted testimony that Complainant has licensed the SP-1068
technology {

} (CX-1567C, Qs. 121-122) This testimony is corroborated by copies of the
actual license agreements. (*See, e.g.*, JX-029C at SIGITC0000003106 (disclosing {

} Dr. Putnam also testified that the present value of the licensing revenue stream is
about { } and provided a detailed explanation of his calculations. (CX-1567C, Qs. 123-
133)

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Respondents argue unpersuasively that the royalties are not reflective of the value of the trade secrets and Complainant would continue to receive royalties even if the trade secrets became public. Respondents' expert, Dr. Kaplan, testified that:

Dr. Putnam in effect assumes that all technologies are valued equally. That appears to be a highly questionable assumption, particularly given that SP-1068 is {
}

(RX-423C, Q. 100) Dr. Kaplan continues that:

{
}

(RX-423C, Q. 101) Dr. Putnam explains, however, that he took into account the fact that SP-1068 was not the only product covered by the license—testifying that:

The “apportionment” is already accomplished by limiting the royalty rate to the sales of the Relevant Tackifiers, which I understand to be substantially enabled by the SP-1068 Trade Secrets.

(CX-1567C, Q. 123) Dr. Putnam also testified that {

} (CX-1567C, Q. 122) Respondents have not offered any evidence to rebut this testimony.

Respondents' argument that the agreements would require the payment of royalties even if the trade secrets become public is entirely speculative. {

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} This argument strains reason.

Because Complainant has shown that { } is useful in the production of tackifier resins and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that { } is valuable.

Based upon all of the foregoing, including the importance of { } for obtaining a superior tackifier product, the efforts undertaken by Complainant to develop { } the efforts undertaken to protect the secrecy of { }, and Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that { } is a trade secret.

b. { }

Complainant's Position: Complainant says that Complainant uses {

} Complainant contends that Complainant's Shanghai subsidiary used { } between 2004 and 2007. (Citing CX-1570C, Q. 20; CX-1565C, Q. 16)

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{

} (Citing CX-581C at 3)

Complainant says that Respondents have been unable to find a single prior art reference that discloses {

} Complainant continues

that Dr. Swager admitted at trial that the single reference upon which he relies for his contentions regarding { } does not in fact disclose {

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}

Complainant says that Ma, Yunsheng, et al. “Chemical Engineering Design, Vol. 12(2), 2002, pp. 20-22” (the “Ma reference”) describes {

}

(Citing CX-1570C, Q. 122; CX-613 at 1) Complainant continues that the Ma reference does not suggest using {

}

Complainant says that Respondents cite Ma as their only reference for this trade secret, (Citing Tr. at 811:17-20), and Swager admitted he misconstrued it {

} (citing *id.* at 814:10-815:19)

Complainant continues that Respondents now seek to salvage their reliance on Ma (RIB at at 35), by suggesting it might form the basis for “a simple set of experiments,” (Citing *id.*), but there is no objective evidence anyone has or ever would do such experiments.

Complainant says that Respondents also have failed to establish { } trade secret is readily ascertainable. (Citing RIB 34-36) Complainant says that Respondents resort to an argument requiring a process of elimination to conclude the trade secret is “intuitive.” Complainant argues that this this does not show it is readily ascertainable. (Citing RIB at 36)

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Complainant says that Respondents divine { } only after considering and rejecting each of the other possibilities using the laser vision of hindsight. (citing RIB at 34-35)

Complainant says that without hindsight, ruling out { } would require numerous experiments, (Citing CX-1570C, Q. 101), and there is no objective evidence that even after such experiments others outside Complainant would choose { }

Respondents' Position: {

}

Respondents argue that Complainant cannot legitimately claim {

} is a trade secret. {

²⁵ {

}

that { } Respondents argue that the data { } of the Ma publication illustrates

{ } (Citing *id.*) Respondents say that while Dr. Swager readily conceded that the Ma publication does not expressly recommend { } he concluded that the publication illustrates the logic of using { }

}

Staff's Position: Staff says that {
qualifies as a trade secret. {

}

}

Staff asserts that the evidence shows that {
} was not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff
says that Respondents' expert Dr. Swager conceded that the literature that he pointed to does not
explicitly describe { } including a specific reference by Ma
(CX-613). (Citing Tr. at 812:16 to 813:9) Staff says the evidence shows that {
} would be difficult to duplicate by others through
independent development or reverse engineering {
} (Citing CX-1570C, Qs.
100-101) Staff adds that the evidence is insufficient to support a finding that Sino Legend ZJG

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independently developed { } on its own, or determined it through reverse engineering. (Citing Tr. at 765:18-25)

{

}

Staff says that the use of a { } (Citing CX-1570C, Q. 19) Staff contends that these { } are valuable in { } which directly affects the quality of the final tackifier product. (Citing *id.*) Staff reasons that the trade secret thus provides Complainant with a valuable { }.

Staff says that the evidence shows that Complainant's { } were closely controlled, confidential, and were not made publicly available, and thus { } was never known or disclosed outside of the Complainant's or Complainant's Shanghai subsidiary licensee's businesses. (Citing CX-1569C, Qs. 18-24) Staff continues that { } could not be discerned other than through access to Complainant's { } (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

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Staff disagrees with Respondents' argument that { } flows from known principles of chemistry and is not a trade secret." Staff argues that Respondents' and Dr. Swager's argument is undermined by their failure to point to public literature explicitly describing this concept, and Dr. Swager's testimony in this regard is largely uncorroborated. Staff says that Respondents' only citation is to a reference by Yunsheng Ma, but the Ma reference (CX-613) does not suggest { } (Citing CX-1570C, Q. 122) Staff continues that Dr. Swager conceded that Ma's {

} Staff says that the law governing trade secrets does not require complete novelty or nonobviousness in the patent law sense, but sufficient novelty to impart economic value to the trade secret holder. (Citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974)) Staff concludes that { } was not generally known or readily discernible.

Analysis and Conclusions: I find that { } is a trade secret. Complainant has introduced numerous documents into evidence showing that they have used { } including at their Shanghai plant. { }

²⁶ { }

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{

} Thus, it is clear that Complainant has used {
} for producing SP-1068.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes { } and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that { } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that {

} is not generally known or readily ascertainable.

See Certain Cast Steel Railway Wheels, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Respondents have not offered sufficient evidence to rebut this prima facie

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showing.

The only evidence cited by Dr. Swager in his analysis is an article by Yunsheng Ma entitled "Production of Octylphenol Using Polymer Oil." (RX-421C, Q. 113) Dr. Swager admits, however, that the Ma article does not disclose { } (Tr. at 812:16-813:9) Rather, Dr. Swager says that the Ma article discloses { } which Dr. Swager admits does not need to be done in making a tackifier. (Tr. at 815:20-817:4) Respondents do not cite any other reference as disclosing { } (RIB at 34-36)

Respondents unpersuasively argue that { } flows from known principles of chemistry. To that end, Respondents' expert, Dr. Swager, offered conclusory testimony that { }

{ } (RX-421C, Q. 109) Dr. Swager then offers conclusory testimony { } (RX-421C, Qs. 110-112) Dr. Swager cites no evidence to support his conclusions for { } (See *id.*) Dr. Swager's conclusory testimony is significantly undercut by Respondents inability to identify any references disclosing { } (See RIB at 34-36) Based upon the foregoing, I find that the evidence in the record demonstrates that { } is not known or readily ascertainable.

Complainant introduced un rebutted evidence that { } is a valuable trade secret which was developed over a number of years. Specifically, Dr. Banach said that:

{

}

(CX-1565C, Q. 17) Similarly, Dr. Hamed testified that:

{

}

(CX-1570C, Q. 19) Dr. Banach explained that {

} and was the “result of

substantial expenditure on research and development by SI Group. Each improvement also leveraged the years of practical experience at the company running the alkylation and condensation reactions.” (CX-1565C, Q. 97)

Respondents do not contest Dr. Banach’s and Dr. Hamed’s testimony regarding the value of { } as it relates to the quality of the resulting tackifier product; rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Once again, Respondents’ argument misses the point— Complainant has provided un rebutted testimony that { } results in a superior tackifier product and increases efficiency.

In Section III.B.2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm

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that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that { } results in a superior tackifier product and increases efficiency and { } was the result of substantial expenditure on research and development, and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that the { } is valuable.

Based upon all of the foregoing, including the importance of { } for obtaining a superior tackifier product, the efforts undertaken by Complainant to develop this procedure, the efforts undertaken to protect the secrecy of the procedure, and Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that { } is a trade secret.

c. { }

Complainant's Position: Complainant says that Complainant uses { } (Citing CX-1570C, Q. 21)

Complainant continues that the literature commonly recommends { }

}

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{

}

(Citing CX-1565C, Qs. 74-75; CX-605C at 5; CX-604C)

Complainant argues that Howe does not disclose { } in
a commercial PTOP-based tackifier manufacturing process. Complainant says that Howe
enumerates {

} Complainant continues that Howe teaches some general
reasons for certain { } without any preference for one type of { } (Citing *id.*)

Complainant asserts that Patwardhan is not relevant to Complainant's trade secret
processes. (Citing CX-1570C, Q. 124) Complainant says that Patwardhan concerns the
preparation of {

}

{

}

Complainant contends that Rohm & Haas Promotional Literature, “Ion Exchange Resins - Industrial Processes” (“R&H Literature”) and Newman M. Bortnick et al., “Catalysis by Means of Amberlyst 15, a Macroreticular Sulfonic Acid Cation Exchange Resin (“Bortnick”) does not disclose any of Complainant’s trade secrets and does not make any of Complainant’s trade secrets readily ascertainable in any manner. (Citing CX-1570C, Qs. 127, 130; RX-517; RX-518; RX-503C.) {

}

Complainant asserts that the Rohm Alkylation Webpage does not provide a method {
} (Citing CX-1570C, Q. 123)

Complainant says that the information in the Rohm Alkylation Webpage is inapplicable to Complainant’s process because it is targeted to different processes. (Citing *id.*) Complainant continues that in the enumerated uses of the alkylphenol, the Rohm Alkylation Webpage does

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not disclose { } for manufacturing tackifier resins and the Rohm Alkylation Webpage does not disclose applications relating to tires or rubber. (Citing RX-518)

Respondents' Position: {

Respondents argue that { } is not a trade secret. (Citing RX-421C, Qs. 118-147) Respondents disagree with Complainant's contention that {

²⁷ {

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}

Respondents reason that the use of {

{ to { } was publicly well known long before 2007 and therefore not a trade secret of Complainant. (Citing RX-421C, Qs. 118-147)

Respondents say that Complainant does not (and cannot) dispute that {

} are well known and widely popular for

{

}

Staff's Position: Staff asserts that the evidence fails to show that {

} is a trade

secret. Staff says that {

{ is at least generally known in public literature. (Citing RX-421C, Qs. 118-147; RX-499C; RX-503C; RX-518; RX-146C {

}

Analysis and Conclusions: I find that {
 } is not a trade secret. Complainant has introduced evidence that
it uses { } at its Complainant's Shanghai subsidiary in its { }
process for producing SP-1068. {

} Respondents have not disputed this
testimony or evidence.²⁸

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that
{ } is not generally known or readily ascertainable based upon Dr.
Hamed's testimony that the lack of competing products for SP-1068 (other than products made
by Sino Legend) shows that Complainant's entire process is novel and not generally known,
corroborating evidence that shows that Complainant controls { } of the market share of
tackifier resins, and the evidence that shows Complainant's only competition (other than
Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's
obligation to make a prima facie showing that {

} is not generally known or readily ascertainable. *See Certain
Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).
Respondents have, however, offered sufficient evidence to rebut this prima facie showing.

First, a 1990 article noted that {
 } Specifically, the article discloses {

²⁸ {

}

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(RX-508 at 849RESP_0004654) Second, and similarly, the Rohm & Haas website discloses: {

(RX-518 at SIGITC0000118474)

Complainant's arguments that these references do not disclose { } are unpersuasive. Complainant attempts to distinguish RX-508 based on the scale and { } Neither of these features is required by the alleged trade secret; rather, the alleged trade secret merely requires { } Complainant's arguments are directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Complainant also tries to distinguish RX-508 based on its disclosure of { } Complainant does not, however, explain why the disclosure contained in RX-508—{ } (CIB at 42-44) Unlike the trade secrets at issue in Section III.B.3.c and e, *infra*, which address { } the trade secret here merely requires { }

Dr. Banach provided un rebutted testimony that {

on the foregoing, I find that { } Based
known or readily ascertainable. } is generally

Complainant attempts to distinguish the Rohm & Haas references because they do not provide methods for manufacturing tackifiers. (CIB at 42, 46) Again, this argument misses the point. The production of tackifiers is not required by this trade secret; rather, the alleged trade secret merely requires {

} Complainant's arguments make sense when they are applied to features of the overall process flow trade secret; but they are not pertinent when applied to this particular trade secret.

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{

Complainant's arguments are also belied by its own internal documents. {

} These statements confirm the understanding that {

} was well known in the

industry, as reflected in the references cited by Respondents.

Based upon all of the foregoing, I find that Respondents have rebutted Complainant's prima facie showing that {

} is not generally known in the industry, and find that it is not a trade secret.

I find that { } is not a trade secret because Respondents rebutted Complainant's prima facie showing that it is not generally known.

Assuming, *arguendo*, that Respondents had not rebutted Complainant's prima facie showing, I would find that there is un rebutted evidence that {

} is valuable and Complainant has taken reasonable steps to protect the secrecy of the process step.

PUBLIC VERSION

Complainant introduced un rebutted evidence that {

} is valuable and was developed over a number of years.

Specifically, Dr. Banach explained that {

} and “was the “result of substantial

expenditure on research and development by SI Group. Each improvement also leveraged the

years of practical experience at the company running the alkylation and condensation reactions.”

(CX-1565C, Q. 97)

Respondents do not contest Dr. Banach’s testimony regarding the expenses associated with developing {

} rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79)

Once again, Respondents’ argument misses the point. In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} was the result of substantial

expenditure on research and development, and has shown that its licensing revenue for the trade

secrets as a whole has a significant present value, I find that {

} is valuable.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes {

} and here I incorporate and reaffirm my findings and rationale

regarding the steps Complainant has taken to protect its process.

PUBLIC VERSION

d. { }

Complainant's Position: Complainant says that it {

}

Complainant says that it implemented { } at its Shanghai plant in 2004 through 2006. (Citing CX-1570C, Q. 24; CX-1012C; CX-597C at 14; CX-585C at 6)

{

}

{

}

PUBLIC VERSION

16)

Complainant says that Mr. Yang claims that he, Mr. Pu, and Mr. Sang learned of {
} from Sumitomo in a visit on Nov. 25, 2005. Complainant avers that this testimony is
uncorroborated because the other two did not testify. (Citing CX-1592C, Qs. 58-63 (Chao
analysis of Sumitomo document and Pu deposition testimony, who denied learning such
information from Sumitomo)) {

}

Complainant argues that it is doubtful that Sumitomo would have disclosed any process
information to Yang, Pu, and Sang had it known their visitors would soon become their
competitors. (Citing CX-1592C, Qs. 62, 67) Complainant continues that there is no evidence
that Sumitomo {

.

Respondents' Position: Respondents say that Complainant persists in casting its alleged { } trade secret as { } (CIB at 24), even though Complainant articulated its trade secret as { } in its March 12, 2013 interrogatory response. (Citing RX-555C at 46) {

}

PUBLIC VERSION

{

}

Respondents say that Complainant has attempted to recast its alleged { } as

{

²⁹ {

}

}

PUBLIC VERSION

{

.} (Citing Tr. at 62:25-63:16, 233:7-234:5)

Respondents argue that regardless of the term used, Complainant's simple and conventional { } does not rise to the level of a legitimate trade secret.

{

}

PUBLIC VERSION

{

}

Respondents contend that { } employed by Complainant { } were well known for decades. {

}

{

30 {

}

PUBLIC VERSION

}

Respondents reason that { } employed by Complainant {

} is based on well-known principles and does not

constitute a trade secret. (Citing RX-421C, Qs. 148-190; RDX-011C)

{

}

Staff's Position: Staff argues that { } qualifies as a
trade secret. { }

{

}

Staff asserts that Complainant's {
} was not generally known or readily
discernible, even though it was generally known to { }

PUBLIC VERSION

{ } Staff says that Dr. Hamed testified in general that Dr. Swager and Dr. Thomas have inappropriately mixed and matched various process parameters from the prior art, without considering whether the prior art references provide any indication that these process parameters would be appropriate for use in Complainant's trade secret processes. (Citing *id.*, Q. 116) Staff says that the evidence shows that {

} would be difficult to duplicate by others through independent development or reverse engineering. (Citing CX-1570C, Q. 100) Staff continues that Respondents failed to introduce enough competent evidence to support a finding that Sino Legend ZJG independently developed { } on its own, or determined it through reverse engineering. Staff argues that even though Mr. Yang submitted that he learned of { } reactor from a visit to Sumitomo, Sino Legend did not offer the testimony of any other witness that could corroborate Mr. Yang's understanding, for example, Messrs. Pu, Fan, or Sang, that {

} Staff adds that Mr. Yang did not produce any notes or emails in support of his statement that Sino Legend intended to implement what he allegedly learned from visiting Sumitomo. (Citing RX-416C, Qs. 106-107)

Staff says that { } during the tackifier manufacturing process provides Complainant/Complainant's Shanghai subsidiary with a competitive advantage. (Citing CX-1570C, Qs. 23-28) {

}

PUBLIC VERSION

Staff says that Complainant's Shanghai subsidiary engineering drawings and project plans were closely controlled, confidential, and were not made publicly available, and thus the { } was not disclosed and was never known outside of the Complainant's or its licensees' businesses. (Citing CX-1569C, Qs. 18-24) Staff continues that { } in the SP-1068 process could not be discerned other than through access to Complainant's facilities or confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87) Staff concludes that because the evidence shows that the SP-1068 trade secret with regard to { } was kept secret and not generally known, in the Staff's view, this fourth asserted SP-1068 trade secret qualifies as an individual trade secret.

{

} Staff says that Respondents only point to Dr. Swager's uncorroborated testimony and have not identified any public literature in support of their contention. Staff says that even though Respondents contend that {

} Respondents cannot point to commercial literature detailing any obvious use or guidelines for {

} Staff concludes, as a result, that the weight of the evidence shows that { } qualifies as a trade secret.

PUBLIC VERSION

Analysis and Conclusions: I find that {

} is a trade secret. Complainant's documents confirm that

Complainant's Shanghai facility {

} Respondents do not contest this evidence. Thus, it

is clear that Complainant was {

} at its Shanghai facility as early as { }

{

}

PUBLIC VERSION

Respondents have not introduced any public references that disclose {
} to rebut the prima facie showing by Complainant.

Moreover, although Respondents argue that { } is simple,
conventional, and required by { } Respondents focus on individual
elements of the process. {

} As noted in *Sausage Casings*, however, a combination of elements may still
be protectable as a trade secret even if some or all of the elements are known in the industry.
Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product, Inv.
No. 337-TA-148/169, Initial Determination (July 31, 1984).

Here, the combination of allegedly well-known elements in { } does
more than {

}

PUBLIC VERSION

{ } Combined with the fact that there is no disclosure of { } in literature, I find that Respondents have failed to rebut Complainant’s prima facie showing that { } is not well known.

There is un rebutted evidence that { } from its condensation reaction is valuable and was developed over a number of years. During his deposition, Mr. McAllister testified that {

} Dr. Banach testified that the SP-1068 product was first produced in 1959. (CX-1565C, Q. 88) Dr. Banach explained that { } was first implemented {

} (CX-1565C, Q. 96) and was the “result of substantial expenditure on research and development by Complainant. Each improvement also leveraged the years of practical experience at the company running the alkylation and condensation reactions.” (CX-1565C, Q. 97) The series of emails discussed above corroborates Dr. Banach’s testimony that { } (CX-758C)

Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Respondents’ argument misses the point—Complainant has provided un rebutted evidence that { } reduces the costs of production. In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} reduces the costs of production and was the result of

PUBLIC VERSION

substantial expenditure on research and development, and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that {

} is valuable.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes {

} and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

Based upon all of the foregoing, including the value of { } the efforts undertaken by Complainant to develop this process, the efforts undertaken to protect the secrecy of the process, Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, and the fact that {

} I find that { } is a trade secret.

e. { }

Complainant's Position: {

}

PUBLIC VERSION

Complainant asserts that the R&H Literature and Bortnick do not disclose any of Complainant's trade secrets and does not make any of Complainant's trade secrets readily ascertainable in any manner. (Citing CX-1570C, Qs. 127, 130; RX-517; RX-518; RX-503C)

Complainant says that the R&H Literature and Bortnick promote {

}

Complainant contends that the Rohm Alkylation Webpage does not provide {

}

Complainant argues that the Ma reference describes a 100 ton/annual pilot plant production of purified octylphenol via alkylation of phenol and DIB at Shijianzhuang Refinery in China. (Citing CX-1570C, Q. 122; CX-613 at 1) Complainant says that the Ma reference {

}

Complainant disagrees with Respondents' contention that {
} is "standard industry practice." (Citing RIB at 43) {

} Complainant says that Respondents cite only one reference for this trade secret, and it is wholly inapplicable to Complainant's process, as explained above. Complainant says that most tellingly, Sino Legend itself tried to use a different { }.

Respondents' Position: Respondents argue that Complainant's description of its alleged trade secret { } (Citing CIB at 25) amounts to a virtual concession that trade secret protection is not available. {

} (Citing *id.*) Respondents reason, as a result, that that Complainant admits that { } is driven by the underlying chemistry, which was well-known. (Citing RIB at 43-44)

Respondents disagree with Complainant's assertion that { } is a trade secret (Citing RX-555C at 47). {

)

Respondents say that scientific literature reports the same { } used by
Complainant. (Citing RX-421C, Qs. 192-194; RDX-012C) {

}

{

}

Respondents conclude that {
 }—was publicly known { } and is a function of the
known underlying scientific principles and does not constitute a trade secret. (Citing RX-421C,
Qs. 191-209)

Respondents say that Complainant incorrectly asserts that the Ma publication does not
disclose {

},

PUBLIC VERSION

Staff's Position: Staff contends that the evidence fails to show that {

} is a trade secret. {

} Staff argues that {

} is generally known in the industry. Staff says

that patents and published articles disclose {

} (Citing RX-275; RX-310; RX-421C, Qs. 191-209)

Analysis and Conclusions: I find that {

} is not a trade secret, because it is {

} and is disclosed in literature. Dr. Hamed testified that Complainant's Shanghai

plant {

} (CX-581C at SIGITC0000083443; CX-759C at SIGITC0000164425) Respondents do not dispute this evidence.

The only substantive dispute between the parties is whether or not {

}

is well known in the industry In section III.B.2.a, *supra*, I find that Complainant has made a

prima facie showing that { } is not generally known or readily

ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-

1068 (other than products made by Sino Legend) shows that Complainant's entire process is

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novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that {

} is not

generally known or readily ascertainable. See *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have rebutted this prima facie case by showing that {

} and is disclosed in literature. {

}

Literature cited by Respondents discloses the same {

} Ma, a 2002 publication, describes the production of octylphenol using an alkylation reaction between diisobutylene (DIB) and phenol. It states that:

{

}

(RX-275 at SINOZJC_0021900) Thus, in a alkylation reaction between DIB and phenol, {

} This is the same { } for which Complainant

PUBLIC VERSION

asserts it has a trade secret. Because { } and is disclosed in literature, I find that the sequence is well known in the industry.

Complainant says that Ma does not disclose its { } because Ma is a small scale pilot production and is directed to the production of { }

This argument misses the mark. Complainant explicitly defines this trade secret as: {

} Complainant's argument are more properly directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Based upon all of the foregoing, I find that Respondents have rebutted Complainants' prima facie showing that {

} is not generally known in the industry, and therefore { } is not a trade secret.

Assuming, *arguendo*, that Respondents had not rebutted Complainant's prima facie showing, I would find that there is unrebutted evidence that { } is valuable and Complainant has taken reasonable steps to protect the secrecy of the process step.

³² { }

PUBLIC VERSION

Complainant has provided un rebutted evidence that {

} has value. Dr. Hamed offered un rebutted testimony that {

} (CX-1570C, Q. 29) Respondents do not contest

Dr. Hamed's testimony regarding the value of { } but Respondents argue that

Complainant failed to assign a specific economic value to this process. (RIB at 77-79)

Respondents' argument misses the point—Complainant has provided un rebutted testimony that

{ }

In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that the sequence used is valuable.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes {

} and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

f. { }

Complainant's Position: Complainant says that it {

} (Citing CX-1570C, Q. 31) Complainant continues that Complainant's Shanghai subsidiary {

PUBLIC VERSION

}

Complainant contends that Patwardhan is not relevant to Complainant's trade secret processes. (Citing CX-1570C, Q. 124) Complainant says that Patwardhan concerns {

}

Complainant argues that the Zhang article does not disclose any of Complainant's trade secrets and does not make any of them readily ascertainable. (Citing CX-1570C, Q. 131; RX-301; CX-1062) {

}

Complainant says that the Ma reference describes a 100 ton/annual pilot plant production of purified octylphenol via alkylation of phenol and DIB at Shijianzhuang Refinery in China. (Citing CX-1570C, Q. 122; CX-613 at 1) Complainant says that the Ma reference aims at {

}

Respondents' Position: Respondents say that Complainant describes its {
} (Citing CIB at 25)

Respondents note that description deviates from Complainant's interrogatory contentions throughout this Investigation, in which Complainant described its alleged trade secret {

PUBLIC VERSION

Respondents contend that { } were well known. Respondents say that the 2002 Zhang publication, RX-301, describes the alkylation of phenol to make PTOB and {

{ (Citing RX-301 at SINOZJG_0021657 (emphasis added); RDX-014C) Respondents conclude that the 2002 Zhang publication concluded that {

} (Citing *id.*; RX-421C, Qs. 226-227)

Respondents assert that the 2002 Ma publication reached similar conclusions regarding { } {

Respondents argue that { } chosen by Complainant simply reflect the well-known principles discussed above and therefore do not represent legitimate trade secrets. (Citing RX-421C, Qs. 210-235; RDX-015C)

Respondents say that Complainant and Dr. Hamed do not dispute that Zhang and Ma teach {

PUBLIC VERSION

}

Staff's Position: Staff argues that the evidence fails to show that {

} is a trade secret. (Citing CX-581C; CX-1570C, Qs. 31-32) Staff

says that { } were generally known in the

industry. Staff explains that the evidence shows that {

} were generally known in { } (Citing RX-421C, Qs. 210-235; RX-508;

RX-301; RX-275) Staff concludes that the asserted {

} should not qualify as an individual trade secret.

Analysis and Conclusions: Complainant has defined this trade secret as {

} Respondents do not dispute this evidence.

The only substantive dispute between the parties is whether or not {

} is well known in the industry. In

section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that {

} is not generally known or readily ascertainable based upon Dr. Hamed's

³³ Respondents say that if Complainant attempts to argue that { } are trade secrets, that would create an insurmountable obstacle for Complainant, because Sino Legend does not use them and never has.

PUBLIC VERSION

testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that {

} is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have offered sufficient evidence to rebut this prima facie showing.

Respondents have identified a number of printed references that disclose {
} A 2002 publication
entitled "Improvements in Alkylation Process of P-Tert-Octylphenol Synthesis" by Zhang
addresses the alkylation of phenol to make PTOP and {
} It provides, in pertinent
part:

{

}

(RX-301 at SINOZJG 0021657 (emphasis added)) The publication continues that:

{

}

PUBLIC VERSION

{ }

Similarly, a 2002 publication entitled “Production of Octylphenol Using Polymer Oil” addresses {

} (RX-275 at SINOZJG 0021900) The publication

discloses that:

{

}

(*Id.* (emphasis added)) The publication continues to explain that:

{

}

(*Id.* at SINOZJG 0021901) {

} Thus, it is clear that publications have acknowledged the benefit of {

}

Complainant’s arguments that these references do not show that {

} are generally known in the industry are unpersuasive. Complainant argues that the references address { } and are small scale operations that would not necessarily “scale-up” to production size amounts. Complainant’s arguments fail. As defined by Complainant, {

}

PUBLIC VERSION

{ } Complainant has not limited this particular process limitation to { } or the commercial production of { } As a result, Complainant's attempt to distinguish the references based on the fact that the references address { } on a small scale is not persuasive. Complainant's arguments are more properly directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Based upon all of the foregoing, I find that Respondents have rebutted Complainant's prima facie showing that { } is not generally known, and I find that this process limitation is not a trade secret.

Assuming, *arguendo*, that Respondents had not rebutted Complainant's *prima facie* showing, I would find that Complainant has failed to show that this process limitation has value. Complainant has, however, taken reasonable steps to protect the secrecy of the process step.

In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. Complainant fails to identify the value of this specific process limitation, however. Although Dr. Hamed testified generally that {

{ (CX-1570C, Q. 29), Dr. Hamed does not testify that specifically { } is beneficial. (*Id.*) Dr. Banach also does not provide any such testimony. As a result, because Complainant has failed to cite any evidence that this specific process limitation results in a superior product or more efficient process (that would be considered along with the overall economic value of the process as a whole), I find that Complainant has failed to show independent value for this process limitation.

PUBLIC VERSION

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes {

} and here I

incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

g. { }

Complainant's Position: Complainant says that it employs a unique {

} (Citing *id.*) Complainant continues that it spent considerable resources to {

} (Citing CX-1570C, Q. 35; CX-608C)

Complainant says that {

PUBLIC VERSION

}

Complainant says that R&H Literature and Bortnick do not disclose any of Complainant's trade secrets and does not make any of Complainant's trade secrets readily ascertainable in any manner. (Citing CX-1570C, Qs. 127, 130; RX-517; RX-518; RX-503C)

Complainant says that R&H Literature and Bortnick promote {

}

Complainant says that the Rohm Alkylation Webpage does not provide {

} (Citing CX-1570C, Q. 123)

Complainant continues that the information in the Rohm Alkylation Webpage is inapplicable to Complainant's process because it is targeted to different processes. (Citing *id.*) Complainant argues that in the enumerated uses of the alkylphenol, the Rohm Alkylation Webpage does not disclose {

}

Complainant argues that Patwardhan is not relevant to Complainant's trade secret processes because Patwardhan concerns {

}

{

}

Complainant says that the Chaudhuri reference discloses {

} (Citing

RX-507). Complainant continues that Chaudhuri does not provide a method for {

}

that is any way comparable to Complainant's process {

PUBLIC VERSION

} (Citing *id.*)

Complainant says that the Gardziella reference does not disclose Complainant's { }
trade secrets because it does not provide any {

PUBLIC VERSION

}

Complainant disagrees with Respondents' argument that Complainant failed to prove its { } is non-conventional. (Citing RIB at 47) Complainant says that Dr. Hamed's testimony establishes that { } asserted by Complainant qualify as trade secrets and are not readily ascertainable.³⁴ (Citing CX-1570C, Qs. 33-36) Complainant says that

³⁴ {

}

{

}

Respondents' Position: Respondents say that Complainant originally asserted as a trade secret the use of {

}

{

}

PUBLIC VERSION

285) Respondents continue that Complainant now omits any mention of { }

(Citing CIB at 25-26) Respondents contend that the reason for the shift is clear: Sino Legend does not use {

}

Respondents argue that Complainant has completely failed in its burden of proof for any aspect of this alleged trade secret. {

}

³⁵ {

}

PUBLIC VERSION

Respondents say that putting aside Complainant's failure of proof, the {
} that allegedly constitute Complainant's secret were known in the industry. {

PUBLIC VERSION

Respondents say that Complainant did not show how any { }
are trade secrets, and none are proprietary subject matter; rather, all are consistent with standard
industry practice.

Respondents disagree with Complainant's argument that although Rohm & Haas
discloses {

} it is somehow inapplicable to alkylphenolic tackifier resins. Respondents say that
Complainant ignores the testimony of Dr. Swager {

} would make the teachings of the Patwardhan (RX-508) and Chaudhuri

³⁶ {

}

PUBLIC VERSION

(RX-507) articles applicable to commercial-scale production. (Citing Tr. at 870:7-14, 868:20-869:12) Respondents say that Complainant did not attempt to rebut the disclosure of the materials from Lightnin, RX-274 and RX-336, despite the fact that Dr. Thomas discussed them in his witness statement. (Citing RX-422C, Qs. 282-288) Respondents add that Complainant argues that Gardziella does not describe {

} (Citing RX-555C at 48) Respondents say that Gardziella thus discloses as much as Complainant does about { } Respondents continue that Complainant also argues that the Gardziella text (RX-505) does not provide specific details about {

} but Dr. Thomas did not rely on Gardziella for these features.

Staff's Position: Staff asserts that {

} is a trade secret. {

} (Citing *id.*) Staff says that

PUBLIC VERSION

Complainant spent significant resources to {

}

Staff asserts that { } were not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff says that { } would be difficult to duplicate by others through independent development or reverse engineering. (Citing CX-1570C, Q. 100) Staff continues that Dr. Hamed testified that the final SP-1068 tackifier product is a complex mixture of materials that does not provide a key to unlocking any of the trade secret aspects. (Citing *id.*) Staff says that the Respondents failed to introduce enough competent evidence to support a finding that Sino

PUBLIC VERSION

Legend ZJG independently developed { } on its own. (Citing Tr. at 765:18-25)

{

} (Citing CX-1570C, Qs. 31-36) Staff reasons that { } directly improves the manufacturing efficiency of the SP-1068 tackifier product. (Citing *id.*)

Staff says that { } were closely controlled, confidential, and were not made publicly available, and thus { } were not disclosed and were never known outside of the Complainant's or its licensees' businesses.

(Citing CX-1569C, Qs. 18-24) Staff continues that {

} used in the SP-1068 process could not be discerned other than through access to Complainant's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff disagrees with Respondents' argument that { } that allegedly constitute SI's secret were known in the industry." (Citing RIB at 47) Staff says that Complainant employs {

} (Citing CX-1570C, Qs. 33-36) Staff continues that Respondents focus on each of the design aspects individually, but fail to look at the trade secret aspect for the combined features. Staff says that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret." (Citing *Syntex Ophthalmics, Inc. v. Novicky*, 745 F.2d 1423, 1434 (Fed. Cir. 1984); *see also* Restatement (Third) of Unfair Competition § 39 (1995), Comment f: Requirement of Secrecy: ("The fact that some or all of the components of

PUBLIC VERSION

the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements.”)) Staff says that Respondents do not provide any references that disclose the combination of { } Staff reasons, as a result, that { } is a trade secret.

Analysis and Conclusions: Complainant identifies { } as a trade secret—{ }

I find that this particular combination of features is a trade secret.

{ } (CX-606C) Respondents have not contested the accuracy of { } As a result, it is clear that { } at Complainant’s Shanghai subsidiary include { } for which Complainant claims trade secret

³⁷ {

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protection.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes { } and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that { } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that the four reactor features are not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Respondents have not offered sufficient evidence to rebut this prima facie showing.

Respondents have cited various references as disclosing { } None of the references, however, disclose all of the features of { } or even multiple features of { } the combination of which comprises the trade secret.

RX-508 and RX-507 disclose {

} Moreover, RX-508 discloses {

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} RX-287C discloses that {

} (RX-287C at SINOZJG_0022358) RX-287C continues, however, to provide that {

} (*Id.*) RX-274C and RX-336 disclose that {

} (RX-274C; RX-336) These references do not disclose, however,
anything regarding {

} (*See* RX-274C; RX-336)

Because these references do not disclose the specific combination of features of {

} from which benefit is derived (as explained below), I find that Respondents have failed to
rebut Complainant's prima facie showing that the combination of features discussed *supra* from
Complainant's Shanghai subsidiary's reactors is not generally known or readily ascertainable.

There is persuasive evidence that these features are valuable. Dr. Hamed testified that:

{

(CX-1570C, Q. 35) Similarly, Mr. McAllister testified that:

{

{

}

(CX-1569C, Q. 38) He continues to explain that:

{

}

In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that the { } are valuable.

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Based upon all of the foregoing, including the value of {

} the efforts undertaken by Complainant to develop {

} the efforts undertaken to protect the secrecy of { } Respondents'

failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I

find that the following {

} is a trade secret: {

}

3. { }

a. { }

Complainant's Position: {

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Complainant says that its Shanghai subsidiary used { .) } between 2004 and 2007. (Citing CX-1570C, Q. 38) {

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)

Complainant argues that Howe does not disclose { } as used in Complainant's commercial trade secret process. (Citing *id.*) Complainant says that Howe only describes generally the use of { } and is inapplicable to Complainant's commercial trade secret process. (Citing *id.*) Complainant continues that Howe discloses {

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}

Complainant asserts that U.S. Patent No. 2,330,217 (“the ‘217 patent”) does not disclose any of Complainant’s trade secrets or make any of Complainant’s trade secrets readily ascertainable. (Citing CX-1570C, Q. 134; RX-529) Complainant says that the ‘217 patent is directed to a method of manufacturing phenol-aldehyde resins for use in coating compositions such as varnishes, enamels, paints, inks, and the like. (Citing RX-529 at 1:1-1:6, Left) Complainant continues that the ‘217 patent does not describe methods of preparing tackifier resins nor does it discuss methods of preparing {

}

Complainant says that Respondents also cite RX-510 (the “Howe” or Kirk-Othmer”

{

Complainant concludes that “Howe does not disclose { } as used in SP-1068 process.” (Citing *id.*) Complainant says that the only other reference Respondents cite is RX-529, which is fully addressed above.

Complainant says that Respondents do not cite any other reference as disclosing { }

³⁸ {

}

{

³⁹{

}

}

Respondents' Position: {

}

Respondents argue that Complainant incorrectly contends that {

}

a trade secret.⁴¹ (Citing RX-555C at 48-49) Respondents say that the use of {

} can be readily ascertained through testing of resins such as SP-1068 and the use of {

} has

been known for decades. (Citing RX-421C, Qs. 253-264)

Respondents say that { } cannot possibly be a trade secret, because simple testing methods will reveal whether a resin such as SP-1068 was made using {

⁴⁰ {

}

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} (Citing

RX-421C, Qs. 244-247; RX-441C; Tr. at 182:2-183:4) Respondents say that Complainant has

⁴² Respondents say that Dr. Banach testified at his deposition as Complainant's designated corporate representative on the alleged process trade secrets and his testimony constitutes admissions made on behalf of Complainant.

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acknowledged that the use of { } in SP-1068 can be determined simply by testing the product.⁴³ Respondents argue that on this basis alone, Complainant's claim is without merit.

Respondents contend that Complainant's claim is also defective because the use of { } has been known for decades. (Citing RX-421C, Qs. 253-264) Respondents say that the Encyclopedia of Chemical Technology explains:

{ }

(Citing RX-510 at SINZJG_0022260) Respondents say that the same Encyclopedia also notes that: {

⁴³ {

}

Staff's Position: Staff contends that {

} qualifies as a trade secret. {

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}}

Staff says that { } was not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff continues that { } would be difficult to duplicate by others through independent development or to learn through reverse engineering. (Citing CX-1570C, Qs. 97, 100) Staff says that Dr. Hamed testified that the final SP-1068 tackifier product is a complex mixture of materials that does not provide a key to unlocking any of the trade secret aspects. (Citing *id.*) Staff says that Respondents failed to introduce sufficient evidence to support a finding that Sino Legend ZJG independently developed { } on its own, or determined it through reverse engineering. (Citing Tr. at 765:18-25)

Staff says that { } affects the quality of the final tackifier product. Staff reasons that { } is valuable because it allows

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Complainant to make a commercially viable product efficiently and consistently. (Citing CX-1570C, Qs. 37-38)

Staff says that { } were closely controlled, confidential, and were not made publicly available. (Citing CX-1569C, Qs. 18-24) Staff continues that { } therefore, was not disclosed and were never known outside of the Complainant's or its licensees' businesses. (Citing *id.*) Staff adds that { } in the SP-1068 process could not be discerned other than through access to Complainant's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff disagrees with Respondents' contention that "simple testing methods will reveal { } (Citing RIB at 50) Staff says that Respondents' expert Dr. Swager admitted that he had neither personally conducted any reverse engineering analysis nor had he relied on any third party analysis that reveals { } (Citing Tr. at 849:13-850:7) Staff reasons that Dr. Swager, at the most, was describing an unproven, undocumented "theoretical" methodology. (Citing Tr. at 862:24-863:5; 859:15-19; Restatement (Third) of Unfair Competition § 39, Comment f: Requirement of Secrecy ("The theoretical ability of others to ascertain the information through proper means does not necessarily preclude protection as a trade secret. Trade secret protection remains available unless the information is readily ascertainable by such means."))

{

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}

Staff disagrees with Respondents' argument that "the use of {
} has been known for decades," citing to the Kirk-Othmer
Encyclopedia (by "Howe"). (Citing *id.* at 52; RX-510) Staff argues that Howe does not disclose
the use of { } as used in Complainant's commercial trade secret process. (Citing *id.*)
Rather, According to Staff, Howe discloses that {

} Staff says that the evidence shows that the
asserted { } should qualify
as an individual trade secret.

Analysis and Conclusions: I find that {
} to make tackifiers is a trade secret. Complainant has introduced un rebutted evidence
that Complainant's Shanghai plant { } to make
tackifiers between 2004 and 2007. {

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} (CX-1010C at

3) Respondents have not disputed the accuracy of these documents. As a result, I find that the un rebutted evidence shows that Complainant { } at Complainant's Shanghai subsidiary.

The only real dispute between the parties is whether or not { } is generally known or is readily ascertainable. In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that { } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that { } is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Respondents have not offered sufficient evidence to rebut this prima facie showing.

Dr. Banach's testimony that { } does not support Respondents' argument that SP-1068 could be reverse engineered to determine whether { } is used, as Respondents contend. { }

Respondents' argument that {
shows that { } can be reverse engineered is unpersuasive. {

}. (JX-2 at SIGITC0000155508) This does not

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show, however, that one could reverse engineer SP-1068. {

} As a result, I find that { } does not show that SP-1068 could be reverse engineered to determine { }

The references cited by Respondents also fail to show that { } was well known in the industry. Respondents cite two references—the Encyclopedia of Chemical Technology (RX-510) and U.S. Patent No. 2,330,217 (RX-529). Although RX-510 discloses (as Respondents note) that {

} the following sentences state that:

{

}

(RX-510 at SINOZJG_0022260 (emphasis added)) Thus, RX-510 discloses that {

}. (*Id.*)

U.S. Patent No. 2,330,217 is directed to “phenol-aldehyde type of resins, and particularly to such resins which are of the oil-soluble type, whereby they may be used in coating compositions such as varnishes, enamels, paints, inks, and the like.” (RX-529 at 1:1-6 (left column)) As a result, the fact that it discloses using {

} does not demonstrate that using { }

⁴⁴ Notably, Respondents’ expert, Dr. Swager, admitted that he did not perform any testing to see if he could determine whether or not Complainant products were { } (Tr. at 822:2-7)

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to make tackifiers was well known. Additionally, RX-529 discloses that {

} Because the cited references do not disclose {

}, and the evidence on reverse engineering of resins

show that it was difficult to determine {

}, I find that Respondents have not rebutted Complainant's prima facie

showing that { } is not

generally known or readily ascertainable.

The unrebutted evidence also demonstrates that {

} is valuable because {

} Dr. Hamed testified that:

{

},

(CX-1570C, Q. 37) Respondents do not contest Dr. Hamed's testimony regarding the value of

{

}; rather, Respondents argue that Complainant failed to

assign a specific economic value to this trade secret. (RIB at 77-79) Respondents' argument

misses the point—Complainant has provided unrebutted testimony that { }

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improves the quality of the resulting tackifier product and avoids the expense of purified PTOP.

In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that { } improves the quality of the resulting tackifier product and { } and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that { } is valuable.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes { }, and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

Based upon all of the foregoing, including the value of { }, the efforts undertaken to protect the secrecy of this step, Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that { } is a trade secret.

b. { }

Complainant's Position: Complainant says that Complainant uses {

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Complainant says that its Shanghai subsidiary used { } at its Shanghai plant between 2004 and 2007. (Citing CX-1570C, Q. 40) {

Complainant argues that the use of { } in the manufacture of tackifier resins cannot be reverse engineered by testing the final resin product as Respondents contend. (Citing CX-1570C, Q. 98) {

Complainant asserts that U.S. Patent No. 8,030,418 (“the ‘418 patent”) does not disclose any of Complainant’s trade secrets or make any of Complainant’s trade secrets readily ascertainable because it does not provide a method for preparing an unmodified hydrocarbylphenol-aldehyde resin. (Citing CX-1570C, Q. 137; CX-1565C, Qs. 149-150; RX-003) Complainant says that the ‘418 patent concerns a modified hydrocarbylphenol-aldehyde resin prepared by reacting a hydrocarbylphenol-aldehyde resin with an amine and an epoxide. (Citing RX-003 at 2:19-2:29, 7:14-7:26) Complainant continues that the application that led to

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{

}

Complainant argues that the procedure described in the '418 patent is different from and, therefore, inapplicable {

}

Complainant says that U.S. Patent No. 7,772,345 (the "'345 patent'") does not disclose any of Complainant's trade secrets or make any of them readily ascertainable because it is not directed to {

}

Complainant says that the '345 patent concerns a hydrocarbylphenol-formaldehyde linear

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novolak resin modified with a vinyl monomer. (Citing RX-497 at 3:11-3:36; 4:31-4:58)

{

}

Complainant avers that the '345 patent makes no disclosure of the use of { } as used in its trade secret process. (Citing CX-1570C, Q. 136; RX-497) {

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}

Complainant says that U.S. Patent No. 7,425,602 (the “‘602 patent”) and does not disclose any of Complainant’s trade secrets or make any of Complainant’s trade secrets readily ascertainable. (Citing CX-1570C, Q. 135; CX-1565C, Qs. 140-144; RX-498) Complainant says that the ‘602 patent discloses novolak resin compositions prepared with phenolic monomer units comprising larger amounts of phenol (45-98 wt%) and smaller amounts of alkylphenols (1-40 wt%) and/or resorcinol (1-25 wt%). (Citing RX-498 at 1:40-1:53) {

}

Complainant says that the ‘602 patent provides procedures for the lab scale synthesis of three different resins, called Resin 1, Resin 2, and Resin 3. (Citing RX-498 at 4:48-5:38) Complainant continues that {

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}

Complainant says that Respondents also make claims about reverse engineering { } from the final resin product, insinuating that someone attempting to reverse engineer Complainant's process would know to look for { } because it is disclosed in Complainant's patents. Complainant argues that these allegations are belied by Respondents' own reverse engineering efforts. Complainant says that according to Respondents' own account, Respondents engaged in active reverse engineering efforts in collaboration with Sumitomo, and yet the most Sumitomo was allegedly able to determine was that {

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}

Respondents' Position: Respondents assert that Complainant cannot credibly claim that

{

} was a secret. (Citing RX-555C at 49) Respondents say that using

{

} is

public knowledge, {

} (Citing RX-421C, Qs. 265, 309-310; RDX-017C; RDX-018; RDX-

019C)

Respondents say that Complainant's and Respondents' witnesses agree that the use of

{

} can be ascertained through testing of the commercial resin product.

(Citing RX-421C, Qs. 266-268 {

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}

Respondents assert that Complainant's '345 patent also specifically mentioned {

45 {

}

}

⁴⁶ {

}

{

⁴⁸ {

}

49 {

50

}

}

Staff's Position: Staff asserts that the evidence fails to show that {

} qualifies as a trade secret. Staff says that {

} is generally known. (Citing CX-653C; RX-421C, Qs. 265-310)

{

} Staff adds that Dr. Banach testified on Complainant's behalf that {

} was generally known and publicly disclosed in the '418 Patent and application. (Citing Tr. at 140:15-142:8) Staff says that he also testified that { } is publicly disclosed in the '345 Patent (RX-497). (Citing Tr. at 142:13-144:11; *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 216 U.S.P.Q. 762, 765 (9th Cir. 1982) (Matters disclosed in patents will destroy any claims of trade secret))

Analysis and Conclusions: Complainant has defined this alleged trade secret as {

{

}

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} (CIB at 27) Thus, the question that must be addressed is whether or not { } is a trade secret. I find that it is not.

Complainant has introduced un rebutted evidence that Complainant's Shanghai plant { } to make tackifiers between 2004 and 2007. {

} Respondents have not disputed the accuracy of these documents. As a result, I find that the un rebutted evidence shows that Complainant used { } to make tackifiers between 2004 and 2007.

The only real disputes between the parties are whether or not { } is generally known or is readily ascertainable. Based on the record, I find that it is. In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that { } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that { } is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-

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TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Unlike Section III.B.2.a, here Respondents have offered sufficient evidence to rebut this prima facie showing.

First, Complainant's patents disclose { } U.S. Patent No. 8,030,418 ("the '418 Patent") was assigned to SI Group, Inc. and lists as inventors, *inter alia*, Timothy F. Banach. (RX-003) The '418 patent is directed to "a modified hydrocarbylphenol-aldehyde resin prepared by reacting a hydrocarbylphenol-aldehyde resin with a primary or secondary amine and further with an expoxide." (*Id.* at Abstract) The '418 patent discloses {

(RX-003 at 7:21-26) Thus, the '418 patent clearly discloses { } (*Id.*)

Similarly, U.S. Patent No. 7,425,602 ("the '602 patent") is directed to novolak resins prepared with one or more alkylphenols. (RX-498 at Abstract) The '602 patent discloses three example resins. (RX-498 at 4:25-5:38) Dr. Banach admitted that { } The only remaining question is whether or not { } were well known.

Admissions of Dr. Banach, an employee of Complainant, show that { } were also well known. Specifically, he said that:

{

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}

(Tr. at 141:10-142:8) Thus, { } were “well known.” Combined with the disclosure in the ‘418 and ‘602 patents, I find that {

} was generally known or readily ascertainable.

Complainant’s argument that the application from which the ‘418 patent issued did not publish until November 6, 2008, and therefore would not demonstrate that { } was known in 2006, is unpersuasive. *Sausage Casings* explained that “[m]atters disclosed in patents also will destroy and claims of trade secret.” *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 216 U.S.P.Q. 762, 765 (9th Cir. 1982)). The mere fact that the patent application did not publish until 2008 does not change the fact that the ‘418 patent has publicly disclosed {

}

Complainant also argues that the ‘418 patent {

}. These arguments miss the mark. None of these features are required by the alleged trade secret; {

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} Complainant’s arguments are more properly directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Complainant argues that the ‘602 patent relates to {

.} Again, these

arguments miss the mark. As noted *supra*, Dr. Banach admitted that {

} Arguments that the ‘602 patent do not teach (or teach away) {

}. The remaining arguments

are directed to features that are not required by the alleged trade secret—they are directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

U.S. Patent No. 7,772,345 (“the ‘345 patent”) is directed to “a hydrocarbylphenol-lonaldehyde linear novolak resin modified with a vinyl monomer.” (RX-497 at Abstract)

Unlike the ‘418 patent, the ‘345 patent does not disclose {

}. Rather, it discloses {

} (RX-497 at 4:59-5:3) As a result, Respondents’ arguments regarding the

‘345 and ‘602 patents fail.

Respondents’ alternative argument, that testing would reveal {

⁵¹ {

},

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,} is disregarded, because it is unsupported. Although Dr. Swager testified that one can “analyze a resin and determine whether { } Dr. Swager cites no support for this testimony other than testimony of Dr. Banach. (RX-421C, Qs. 266-268) Dr. Banach explained, however, that {

.} (Tr. at 186:7-187:6)

Respondents add that { } (RIB at 53) Because Respondents did not raise this argument in their pre-hearing brief (RPHB at 54-56), it was waived. (G.R. 8.2) Assuming, *arguendo*, that this argument were not waived, I would find that the ‘418 patent would suggest {

}

After considering all of the foregoing, I find that Respondents have rebutted Complainant’s prima facie showing that { } is not generally known, and therefore it is not a trade secret.

Assuming, *arguendo*, that Respondents had not rebutted Complainant’s prima facie showing, I would find that there is un rebutted evidence that {

} is valuable. Dr. Hamed testified that:

{

-.}

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(CX-1570C, Q. 39) Similarly, Dr. Banach testified that:

{

}.
{

(CX-1565C, Q. 23) Respondents do not contest Dr. Hamed's and Dr. Banach's testimony

regarding the value of { }

rather, Respondents argue that Complainant failed to assign a specific economic value to this

trade secret. (RIB at 77-79) Respondents' argument misses the point—Complainant has

provided un rebutted testimony that {

} In Section III.B. 2.a, *supra*, I find that

Complainant has proven that the collection of trade secrets has economic value based on the

licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the

same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} is useful in the production of tackifier resins and has

shown that its licensing revenue for the trade secrets as a whole has a significant present value, I

find that { } is valuable.

Assuming, *arguendo*, that the '418 and '602 patents (which are assigned to Complainant)

did not disclose {

}, I would find that Complainant took reasonable steps to protect the secrecy of this

process step. In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to

protect the secrecy of its process. That process includes {

} and here I incorporate and reaffirm my findings

and rationale regarding the steps Complainant has taken to protect its process.

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c. { }

Complainant's Position: Complainant says that it generally uses {
} (Citing CX-1570C, Q. 41) Complainant
continues that Complainant's Shanghai subsidiary used { } at its Shanghai plant
between 2004 and 2007. (Citing *id*, Q. 42) {

}

Complainant says that the '418 patent concerns a modified hydrocarbylphenol-aldehyde
resin prepared by reacting a hydrocarbylphenol-aldehyde resin with an amine and an epoxide.
(Citing RX-003 at 2:19-2:29, 7:14-7:26) Complainant continues that the procedure described in
the '418 patent is different from and, therefore, inapplicable to {

} Complainant says that the procedure in the '418 patent

{

}

Complainant asserts that Respondents improperly focus on a particular experiment in the '418 patent relating to {

}

Respondents' Position: Respondents say that Complainant originally expressed its

{ } as {

⁵² {

}

}

Respondents contend that Complainant's patents disclose using an {

} (Citing RX-421C, Qs. 316-323; RDX-

020C) Respondents say that Complainant's '418 patent describes various modified novolak resins and includes the following description of a process for making the starting novolak resin (before the modification, as explained above):

{

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}

Respondents disagree with Complainant's attempts to distinguish the '418 patent. Respondents say that Complainant argues that the '418 patent (RX-003) is not applicable because it describes {

}

Respondents say that Complainant also argues that the '418 patent is inapplicable, because {

}

Respondents say that Complainant also tries to marginalize the '418 patent because it was based on {

}

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Staff's Position: Staff contends that {

} qualifies as a trade secret.

(Citing CX-653C; CX-1570C, Qs. 41-42; CX-1565C, Qs. 21-23) {

}

Staff says that {

} was

not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff says that

although certain Complainant patents and patent applications disclose the {

} the Staff is of the view that they do not disclose the

asserted trade secret (10), and others such as trade secret (12), which require {

}

Staff continues that this is because the Complainant's patents do not explicitly disclose {

}

Staff argues that while it was publicly known {

} would be difficult to duplicate by others

through independent development or reverse engineering. (Citing CX-1570C, Q. 98) Staff says

that Respondents failed to proffer evidence that would support a finding that Sino Legend ZJG

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independently developed { } on its own, or determined it through reverse engineering. (Citing Tr. at 765:18-25)

Staff says that { } directly affects the quality of the final tackifier product. (Citing CX-1570C, Qs. 41-42) {

{ } Staff reasons, as a result, that { } is valuable in producing a commercially viable product.

Staff says that { } were closely controlled, confidential, and were not made publicly available. Staff reasons, as a result, that { } were not disclosed and were never known outside of the Complainant's or its licensees' businesses. (Citing CX-1569C, Qs. 18-24) Staff continues that { } could not be discerned other than through access to Complainant's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff disagrees with Respondents' argument that "SI's patents disclose {

·}

Analysis and Conclusions: Complainant has defined this alleged trade secret as {
} (CIB at 28) Thus, the
question that must be addressed is whether or not {
} is a trade secret. I find that it is.

Complainant has introduced un rebutted evidence that Complainant's Shanghai
subsidiary's plant used { } between
2004 and 2007. {

} Respondents have not disputed the accuracy of these documents or {

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} As a result, I find that the un rebutted evidence shows that Complainant used {
} between
2004 and 2007.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes {
} to make tackifier resins, and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

The only real disputes between the parties are whether or not {
} is generally known or is readily ascertainable. Based on the record, I find that it is not. In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that the {
} is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls {
} of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that {
} is not generally known or readily ascertainable.

See Certain Cast Steel Railway Wheels, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have failed to rebut this *prima facie* showing by introducing evidence that {
} is generally known or readily

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ascertainable. Respondents rely solely on the disclosure of the '418 patent to argue that {

} As a result, the '418 patent does not disclose {

.}

Also, the '418 patent addresses the relationship between {

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} Thus, Dr. Swager's testimony is limited to this conclusory statement given during cross-examination and cites no evidentiary support. (*See id.*)

In contrast, Complainant has introduced compelling evidence that supports the inference that the discussion in the '418 patent regarding {

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.}

Dr. Swager's conclusory testimony that {
} is insufficient to rebut Complainant's prima facie showing, especially in light
of this un rebutted testimony regarding {
} and Dr. Swager's admission regarding { } Based
upon all of the foregoing, I find that Respondents have failed to rebut Complainant's prima facie
showing that { } was
not generally known or readily ascertainable.

This finding is not inconsistent with my finding in Section III.B.2.c, *supra*. There, the
trade secret at issue merely required {

} As a result, here, I
find that Respondents have not rebutted Complainant's prima facie showing.

Although Dr. Hamed did not directly address the value of {

} he explained the value of { } generally:

{

}

(CX-1570C, Q. 39) Similarly, Dr. Banach testified that:

{

·}

(CX-1565C, Q. 23) {

} Dr. Banach continues that the improvement to Complainant’s process was the “result of substantial expenditure on research and development by Complainant. Each improvement also leveraged the years of practical experience at the company running the alkylation and condensation reactions.” (CX-1565C, Q. 97)

Respondents do not contest Dr. Hamed’s and Dr. Banach’s testimony; rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Respondents’ argument misses the point—Complainant has provided un rebutted testimony that {

} and {

} was the result of substantial expenditure on research and development. In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that { } is

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useful in the production of tackifier resins, {

} was the result of substantial expenditure on research and development, and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that { } is valuable.

Based upon all of the foregoing, including the value of { } the efforts undertaken by Complainant to develop that { }, the efforts undertaken to protect the secrecy of { }, and Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that { } is a trade secret.

d. { }

Complainant's Position: Complainant says that Complainant uses {

}

Complainant says that it used { } at its Shanghai plant between 2004 and 2007. (Citing CX-1570C, Q. 44) {

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} (Citing

Id.; CX-1565C, Q. 26; CX-653C at 4; CX-946C at 1)

Complainant says that the '602 patent does not disclose any of Complainant's trade secrets or make any of Complainant's trade secrets readily ascertainable. (Citing CX-1570C, Q. 135; CX-1565C, Qs. 140-144; RX-498) Rather, Complainant says that the '602 patent discloses novolak resin compositions prepared with phenolic monomer units comprising larger amounts of phenol (45-98 wt%) and smaller amounts of alkylphenols (1-40 wt%) and/or resorcinol (1-25 wt%). (Citing RX-498 at 1:40-1:53) Complainant reasons that the '602 patent is therefore inapplicable to {

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}

Complainant says that Respondents rely entirely on the '602 patent, a {
 } for their allegations that Complainant's use of { }
trade secret is generally known. (Citing RIB at 58-65) Complainant argues that Respondents
misleadingly state that the '602 patent "describes a condensation reaction between alkylphenols
and formaldehyde." (Citing *id.* at 58) Complainant says that the '602 patent actually describes
reactions of mixtures of phenol, resorcinol and alkylphenols {

}

Respondents' Position: Respondents say that Complainant contends {

} was a secret. (Citing RX-

555C at 50) Respondents disagree, saying that Complainant's use of {

} was published for all to see in 2005. Specifically, Respondents say that

Complainant's '602 patent specifically describes a condensation reaction between alkylphenols

and formaldehyde, {

⁵⁶ {

}

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}

Respondents argue that Complainant's public disclosure alone destroys any legitimate basis for Complainant's trade secret claim based on {

}

Respondents say that Complainant argues that its '602 patent describes making resins which contain resorcinol, but fails to mention that resorcinol is added only after alkylphenol and formaldehyde undergoes a condensation reaction {

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} Respondents

say that the title of the '602 patent is "Novolak Resins and Rubber Compositions Comprising the Same" (Citing RX-498), and Dr. Swager confirmed that {

Staff's Position: Staff asserts that the evidence fails to show that {

} is a trade secret. Staff says that the evidence shows that {

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} is generally known. (Citing CX-653C; CX-1570C, Qs. 43-44) Staff continues that the disclosure { } shows that { } was publicly disclosed and generally known. (Citing RX-421C, Qs. 331-352; RX-498; RX-302; RX-001C at 280:17-281:7) Staff adds that Dr. Banach also testified that { } was publicly disclosed in { } (Citing Tr. at 148:21 to 151:9)

Analysis and Conclusions: Complainant has defined this alleged trade secret {

.}

(CX-1570C, Q. 43) Based on these statements, it is clear that Complainant contends that the { } is the alleged trade secret. I find that it is not a trade secret.

Complainant has introduced un rebutted evidence that Complainant's Shanghai plant used { } to make tackifiers between 2004 and 2007. {

} Respondents have not disputed the accuracy of these documents or testimony. As a result, I find that the un rebutted evidence shows that Complainant used { } to make tackifiers between 2004 and 2007.

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The only real disputes between the parties are whether or not {
 } is generally known or is readily ascertainable. Based on the record, I find that it is. In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that {
 } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that {
 } is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Unlike Section III.B.2.a, here Respondents have offered sufficient evidence to rebut this *prima facie* showing.

The '602 patent discloses a condensation reaction between alkyphenols and formaldehyde that {

} Thus, the '602 patent clearly discloses using {

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.} (Id.) Dr. Banach, an employee of Complainant, admitted as much, testifying that:

{

.}

(Tr. at 150:17-25) Similarly, Dr. Hamed admitted that:

{

.}

(Tr. at 368:23-369:6)

Complainant's arguments that the '602 patent does not disclose this alleged trade secret are unpersuasive. Complainant first argues that the '602 patent is inapplicable to Complainant's process because {

} These

features are not required by the alleged trade secret; rather, the alleged trade secret merely requires { .} Complainant's argument is more properly directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Complainant also argues that the '602 patent does not disclose that {

.} As a result, Complainant's second argument is

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also unpersuasive.

Based upon all of the foregoing, I find that Respondents have rebutted Complainant's prima facie showing that { } is not generally known, and therefore is not a trade secret.

Assuming, *arguendo*, that Respondents had not rebutted Complainant's prima facie showing, there is un rebutted evidence that { } is valuable. Dr. Hamed testified that:

{

.)

(CX-1570C, Q. 43) Similarly, Dr. Banach testified that:

{

.)

(CX-1565C, Q. 28)

Respondents do not contest Dr. Hamed's and Dr. Banach's testimony regarding the value of {

} rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Respondents' argument

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misses the point—Complainant has provided unrebutted testimony that {

.} In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} is useful in the production of tackifier resins and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that {
} is valuable.

Assuming, *arguendo*, that the '602 patent (which is assigned to Complainant) did not disclose { ,} I would find that Complainant took reasonable steps to protect the secrecy of this process step. In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes { } and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

e. { }

Complainant's Position: Complainant says that it generally uses { } Complainant continues that Complainant's Shanghai subsidiary used { } between 2004 and 2007. (Citing *id.*, Qs. 46-47) {

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}

Complainant says that the '602 patent does not disclose any of Complainant's trade secrets or make any of Complainant's trade secrets readily ascertainable. (Citing CX-1570C, Q. 135; CX-1565C, Qs. 140-144; RX-498) Rather, Complainant says that the '602 patent discloses novolak resin compositions prepared with phenolic monomer units comprising larger amounts of phenol (45-98 wt%) and smaller amounts of alkylphenols (1-40 wt%) and/or resorcinol (1-25 wt%). (Citing RX-498 at 1:40-1:53) Complainant reasons that the '602 patent is therefore inapplicable to {

}

Respondents' Position: Respondents disagree with Complainant's assertion that {

} is a trade secret.

(Citing RX-555C at 51) {

}

57 {

}

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Respondents say that Complainant's patents also disclose this purported trade secret.

Respondents say that { } was public knowledge by virtue of Complainant's '379 patent application (which published in June 2005) and later led to Complainant's '602 patent. (Citing RX-302 at ¶¶ 0047, 0050; RX-498 at 5:5-35) {

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}

Respondents contend that { } cannot be a crucial feature of Complainant's process for making SP-1068 because Complainant no longer uses it {

}

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Staff's Position: Staff asserts that {
} qualifies as a trade secret. {

)

Staff argues that { } was not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff says that { } was not disclosed in the '418 and '345 patents for the same reasons that { } (10) also was not disclosed in the '418 patent. (Citing RX-003; RX-497) Staff continues that these patents do not explicitly disclose {

-}

Staff says that { } would be difficult to duplicate by others through independent development or reverse engineering. (Citing CX-1570C, Q. 100) Staff continues that Respondents failed to introduce enough competent evidence to support a finding that Sino Legend ZJG independently developed the same { } on its own, or determined it through reverse engineering. (Citing Tr. at 765:18-25)

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Staff argues that { } was based, after extensive testing, on the finding that {

.} (Citing *id.*) Staff reasons that { } is valuable in the efficient production of a commercially viable product.

Staff asserts that access to { } was closely controlled, they were confidential, and they were not made publicly available. (Citing CX-1569C, Qs. 18-24) Staff says that { } were not disclosed and were never known outside of the Complainant's or its licensees' businesses. (Citing *id.*) Staff adds that { } used in the SP-1068 process could not be discerned other than through access to Complainant's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff disagrees with Respondents statement that { } and that "SI's patents disclose this purported trade secret," pointing to Complainant's '379 application which led to Complainant's '602 patent. (Citing RIB at 61-62) Staff says that {

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}

Staff says that Respondents' assertion that { } is no longer used by Complainant does not mean { } even if Complainant is not currently using { } Staff reasons that { } was used during the time period of alleged misappropriation, and { } could be used again. Staff concludes that { } should qualify as a trade secret.

Analysis and Conclusions: Complainant has defined this alleged trade secret as { } (CIB at 28) Thus, the question that must be addressed is whether or not { } I find that it is.

Complainant has introduced un rebutted evidence that Complainant's Shanghai subsidiary's plant used { } between 2004 and 2007. { }

{ } Respondents have not disputed the accuracy of these documents or { }. As a result, I find that the un rebutted evidence shows that Complainant used { } between 2004 and 2007.

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The only real disputes between the parties are whether or not {
 } is generally known or is readily ascertainable. Based on the
record, I find that it is not. In section III.B.2.a, *supra*, I find that Complainant has made a prima
facie showing that {
 } is not generally known or readily
ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-
1068 (other than products made by Sino Legend) shows that Complainant's entire process is
novel and not generally known, corroborating evidence that shows that Complainant controls
{ } of the market share of tackifier resins, and the evidence that shows Complainant's only
competition (other than Respondents) provides inferior tackifier resins. The same evidence
satisfies Complainant's obligation to make a prima facie showing that {
 } is not generally known or readily ascertainable.

See Certain Cast Steel Railway Wheels, Inv. No. 337-TA-655, Initial Determination at 23-25
(Oct. 16, 2009).

Respondents have failed to rebut this *prima facie* showing by introducing evidence that
{
 } is generally known or readily
ascertainable. Respondents argue unpersuasively that {
 } is logical. Respondents' argument is not directed to the trade secret at
issue, which addresses {
 }.
Respondents acknowledge this shortcoming and assert that {

.} This argument is incorrect. The trade secret at issue does not
describe {
 }
Rather, it addresses {

} Dr. Swager cites no support for this statement.

In contrast, Complainant has introduced credible evidence that supports the inference that the discussion in the '602 patent regarding { } would not necessarily apply for {

}

Dr. Swager's conclusory testimony that { } is insufficient to rebut Complainant's prima facie showing, especially in light of this un rebutted testimony regarding { } and Dr. Swager's admission regarding { }

Based upon all of the foregoing, I find that Respondents have failed to rebut Complainant's prima facie showing that {

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}

Although Dr. Hamed did not directly address the value of {
} he explained the value of { } generally, as noted in Section
III.B.3.d, *supra*. Dr. Banach also provided testimony regarding the value of { } generally as
noted in Section III.B.3.d, *supra*. {

.} Dr. Banach continues that the
improvement to Complainant’s process was the “result of substantial expenditure on research
and development by Complainant. Each improvement also leveraged the years of practical
experience at the company running the alkylation and condensation reactions.” (CX-1565C, Q.
97)

Respondents do not contest Dr. Hamed’s and Dr. Banach’s testimony regarding the value
of the use of { } as it relates to the quality of the tackifier product and {
} rather, Respondents argue that Complainant failed to
assign a specific economic value to this trade secret. (RIB at 77-79) Respondents’ argument
misses the point—Complainant has provided unrebutted testimony that {

} and the use of { } was the result of
substantial expenditure on research and development. In Section III.B. 2.a, *supra*, I find that
Complainant has proven that the collection of trade secrets has economic value based on the

⁵⁸ {

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licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that the use of { } in the condensation reaction is useful in the production of tackifier resins, the use of { } was the result of substantial expenditure on research and development, and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that { } is valuable.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes the use of { } to make tackifier resins, and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

Based upon all of the foregoing, including the value of { } the efforts undertaken by Complainant to develop { } the efforts undertaken to protect the secrecy of { } and Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that { } is a trade secret.

f. { }

Complainant's Position: Complainant says that Complainant uses {

(Citing *id.*)

Complainant says that Complainant's Shanghai subsidiary used {

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} between 2004 and 2007. (Citing CX-1570C, Q. 49) {

}

Complainant says that U.S. Patent Publication No. 2007/0060718 (the “‘718 publication”) does not disclose any of Complainant’s trade secrets or make any of them readily ascertainable because it does not provide process details for the manufacture of an unmodified PTOB-based tackifier resin. (Citing CX-1570C, Q. 138; CX-1565C, Qs. 151-154; RX-496) Complainant avers that the related Chinese Patent Publication No. CN1863832A (the “‘832

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publication”) was published on Nov. 15, 2006 and the ‘718 publication was published on March 15, 2007. Complainant reasons, as a result, that the ‘832 publication or the ‘718 publication would not demonstrate that Complainant’s trade secrets were publicly known prior to Sino Legend’s misappropriation. (Citing CX-1570C, Q. 138)

Complainant says that the ‘718 publication makes no disclosure of {

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}

Complainant disagrees with Respondents' claim that Complainant's patent application discloses { } trade secret. Complainant says that the generalized disclosure in the "Background" section of the application is merely an invitation for further research {

.)

Complainant says that Respondents' research by Mr. Pu highlights the fact that { } trade secret is not readily ascertainable. Complainant contends that Mr. Pu's research actually points away from the trade secret by concluding that {

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.} (Citing CX-1566C, Q. 71) Complainant continues that further evidence is that other Pu research departs even more dramatically from the trade secret by using

{ .} (Citing *id.*)

Complainant says that Dr. Swager's claims of reverse engineering the asserted

{ } from the final resin are incorrect. (Citing CX-1570C, Q. 100)

Complainant continues that Dr. Swager admitted that he never tested a tackifier resin and only participated in tackifiers through his work in this matter. (Citing Tr. at 794:25-795:23)

Complainant argues that without already knowing the intimate details of the process there would be no way to know {

}

Respondents' Position: Respondents say that Complainant points to {

.} (Citing CIB at 29)

Respondents continue that Complainant's statement that Complainant's Shanghai subsidiary used { } in the 2004-2007 time period is false and misleading.

(Citing *id.*) {

}

Respondents contend that Complainant is attempting to rely on a blend of process parameters taken from different formulas to make different products at different times and places. As an example, Respondents say that {

}

Respondents disagree, saying that this alleged trade secret is simply an improper attempt to lay claim to information that Complainant acknowledges is in the public domain.

Respondents say that Complainant's own patent application, published in March 2007, stated in the "Background" section:

{

}

{

}

Respondents say that Dr. Swager explained that {
could be easily determined by examining the final product:

}

{

}

Staff's Position: Staff asserts that {
} is a trade secret. (Citing CX-653C;
CX-1570C, Qs. 48-49; CX-1565C, Qs. 24-25) {

}

Staff says that {
} was not
generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) {

}

Staff asserts that {
} would be
difficult to duplicate by others through independent development or reverse engineering. (Citing
CX-1570C, Q. 100) Staff says that Dr. Hamed testified that the final SP-1068 tackifier product
is a complex mixture of materials that does not provide a key to unlocking any of the trade secret
aspects. (Citing *id.*) Staff says that Respondents failed to introduce enough competent evidence

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to support a finding that Sino Legend ZJG independently developed the same {
} on its own, or determined it through reverse engineering. (Citing Tr. at 765:18-
25)

Staff contends that defining {
} directly affects the quality of the final tackifier
product. (Citing CX-1570C, Qs. 48-49) {

} Staff reasons, as a result, that { } therefore, is valuable in
producing a commercially viable product.

Staff says that access to { } was closely
controlled, they were confidential, and they were not made publicly available. (Citing CX-
1569C, Qs. 18-24) As a result, Staff reasons that {

} therefore, were not disclosed and were never known outside of the Complainant's or its
licensees' businesses. (Citing *id.*) Staff adds that the evidence shows that {

} used in the SP-1068 process could not be discerned other than through access
to Complainant's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff disagrees with Respondents argument that this trade secret is in the public domain,
for example, by pointing to the '718 application (RX-496). (Citing RIB at 64) Staff says that
Dr. Swager also believes { } could be easily determined
by examining the final product." *Id.* {

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} Staff says that Dr. Swager also conceded that he did no testing nor did he rely on any third party's reverse engineering to support his "theory." (Citing Tr. at 849:13-850:7)

Analysis and Conclusions: Complainant has defined this alleged trade secret as {

} Based on the record, I find that this { } is a trade secret.

Complainant has introduced un rebutted evidence that Complainant's Shanghai subsidiary's plant used { } between 2004 and 2007. {

} Respondents have not challenged this calculation or the documents on which it is based.

Complainant also has shown that it used {

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} Respondents do not contest {
Rather, Respondents rely on the fact that Dr. Hamed admitted during cross examination that
{
} to argue they are inapplicable. (Tr. at 372:2-
375:20)

Respondents' argument is entirely semantic and turns on whether or not {

} Respondents have not offered any evidence to rebut this testimony. As a result,
Respondents' semantic argument fails.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect
the secrecy of its process. That process includes {

} to make tackifier resins, and here I incorporate and reaffirm my findings
and rationale regarding the steps Complainant has taken to protect its process.

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that
{
} is not generally known or readily ascertainable based upon Dr.
Hamed's testimony that the lack of competing products for SP-1068 (other than products made

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by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that the use of {

} is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have not rebutted this *prima facie* showing.

U.S. Patent Application No. 2007/0060718 A1 ("the '718 application") discloses a { } that is nearly identical to { } Complainant asserts is a trade secret, but {

.} The '718 application was filed on March 31, 2006, is assigned to Schenectady International, Inc., and is directed to "novolac alkylphenol resins having a low level of free alkylphenol, a method for the production thereof, and the use thereof as tackifying resins and reinforcing resins for rubbers." (RX-496) The '718 application explains that "[t]he resins may be used advantageously in the production of tires." (RX-496 at Abstract) The '718 application discloses, in pertinent part: {

}

I find that the '718 application's disclosure of { } fails to rebut Complainant's prima facie showing that { } is not generally known, especially in light of this unrebutted testimony regarding { } and Dr. Swager's admission regarding { }. Based upon all of the foregoing, I find that Respondents have failed to rebut Complainant's prima facie showing that { } was not generally known or readily ascertainable.⁶⁰

Assuming, *arguendo*, that the '718 application did disclose {

⁶⁰ For the same reasons explained in Section III.B.3.c, *supra*, which I incorporate and reaffirm, this finding is not inconsistent with my findings in Section III.B.2.C, *supra*.

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,} Complainant's other attempts to distinguish the disclosure of the '718 application from its process are not persuasive. Complainant variously argues that the '718 application does not provide process details for the manufacture of an unmodified PTO based tackifier resin, is directed to a laboratory scale operation, {

.} These arguments miss the mark. None of these features are required by the alleged trade secret; rather, the alleged trade secret merely requires {

.} These arguments are more properly directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Similarly, assuming arguendo that '718 application did disclose {

} Complainant's argument that the '718 application did not publish until March 15, 2007, and therefore would not demonstrate that the { } was known prior to misappropriation is unpersuasive. *Sausage Casings* explained that "[m]atters disclosed in patents also will destroy and claims of trade secret." *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984) (citing *Henry Hope X-Ray Products, Inc. v. Marron Carrel, Inc.*, 216 U.S.P.Q. 762, 765 (9th Cir. 1982)).

Respondents' alternative argument that { } could be determined through reverse engineering is unpersuasive. Respondents only cited support for this argument is the conclusory testimony by Dr. Swager:

{

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}

(Tr. at 866:10-23) This conclusory testimony of Dr. Swager is further diminished by the fact that, despite arguing that testing would be inexpensive and easy, Dr. Swager did not provide any testimony regarding testing that was actually conducted to confirm these values could be reverse engineered. (*See id.*) As a result, I find Dr. Swager's testimony to be unpersuasive.

Dr. Hamed provided unrebutted testimony that { } is useful to { } (CX-1570C, Q.

49) Respondents do not contest Dr. Hamed's testimony regarding the value of the use of {

} as it relates to the quality of the tackifier product for particular customers; rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Respondents' argument misses the point—Complainant has provided unrebutted testimony that the use of { } the quality of the tackifier product for particular customers.

In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that { } is useful in the production of tackifier resins and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that { } is valuable.

Based upon all of the foregoing, including the value of using {

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} the efforts undertaken to protect the secrecy of { } and Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that { } is a trade secret.

g. { }

Complainant's Position: Complainant says that Complainant's { } is to { } (Citing CX-1570C, Q. 50) Complainant continues that Complainant's Shanghai subsidiary used this { } between 2004 and 2007. (Citing *id.*, Q. 51) { } (Citing *id.*; CX-1565C, Q. 31; CX-653C at 2-4)

Complainant says that the '345 patent does not disclose any of Complainant's trade secrets or make any of them readily ascertainable because it is not directed to the preparation of unmodified PTOF based tackifier resins and it does not describe commercial scale manufacture. (Citing CX-1570C, Q. 136; CX-1565C, Qs. 146-148) Complainant says that the '345 patent concerns a hydrocarbylphenol-formaldehyde linear novolak resin modified with a vinyl monomer and describes conditions for a reaction on a 100 pound scale. (Citing RX-497 at 3:11-3:36, 4:31-4:58, 7:51-7:67) { }

}

Respondents' Position: Respondents assert that Complainant's alleged trade secret regarding { } is not a legitimate trade secret because { } is based on the underlying known chemistry. (Citing RX-421C, Q. 377) Respondents say that determining the sequence of addition based on the underlying chemistry would be a matter of common sense to a chemist. (Citing *id.*, Qs. 383-389)

{

}

Staff's Position: Staff contends that the evidence fails to show that {

} is a trade secret. {

} Staff

continues that a patent assigned to Complainant shows that {

} was publicly disclosed and generally known in condensation

reactions. (Citing RX-421C, Qs. 377-389; RX-497; RX-530) Staff adds that for this asserted

trade secret, basic principles of chemistry applied to { } weigh against the

{ } as a protectable trade secret.

Analysis and Conclusions: I find that {

} is a trade secret. Dr. Hamed testified

that Complainant's Shanghai plant {

} Respondents do not dispute this evidence.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect

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the secrecy of its process. That process includes {

} and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that { } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that the sequence used for adding reagents in the condensation reaction is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have not rebutted this *prima facie* showing.

U.S. Patent No. 7,772,345 ("the '345 patent") is assigned to SI Group, Inc., issued on August 10, 2010, and lists Mr. Banach, among others, as an inventor. (RX-497) The '345 patent is directed to a "hydrocarbylphenol-formaldehyde linear novolak resin modified with a vinyl monomer." (*Id.* at Abstract) It states, in pertinent part, that:

{

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} This is not {
} rather, as noted above, Complainant's
process requires {
.} As a result, I find that the '345 patent does not disclose
the { } used by Complainant.

Respondents' alternative argument that { } is required by the underlying
chemical properties of the reagents is not persuasive. Respondents rely on the testimony of Dr.
Swager, who offers the conclusory testimony that:

{

}

(RX-421C, Q. 387) Dr. Swager cites no support for this testimony. (*See id.*) Respondents have
not provided any evidence other than Dr. Swager's conclusory testimony. In light of this lack of
supporting evidence, I find Dr. Swager's testimony unpersuasive. As a result, I find that
Respondents have failed to rebut Complainant's prima facie case that {

} is not generally known in the industry.

Complainant has provided un rebutted evidence that { } used by Complainant's
Shanghai subsidiary has value. Dr. Banach testified that {

} (Tr. at 161:3-8, 162:10-18) Respondents do not contest Dr. Banach's
testimony. In fact, Respondents rely on this testimony in their brief. (RIB at 65) Respondents
argue, however, that Complainant failed to assign a specific economic value to this process.

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(RIB at 77-79) Respondents' argument misses the point—Complainant has provided unrebutted testimony that { } In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that { } and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that the specified { } is valuable.

Based upon all of the foregoing, including the value of { } the efforts undertaken to protect the secrecy of { } and Respondents' failure to rebut Complainant's prima facie showing that the trade secret is not generally known, I find that the use { } is a trade secret.

h. { }

Complainant's Position: Complainant says that Complainant { }

}

Complainant says that Complainant's Shanghai subsidiary used {
} between 2004 and 2007. (Citing CX-1570C, Q. 53)

} (Citing *id.*; CX-1565C, Q. 29; CX-653C at 2-3)

Complainant says that United States Patent Application No. 2001/0004664 A1 (the "'664 publication") does not disclose any of Complainant's trade secrets or make any of them readily ascertainable because it does not concern manufacture of a tackifier resin and does not address any issues relevant to tackifier resin manufacture. (Citing CX-1570C, Q. 139; RX-531)

Complainant continues that the '664 publication discloses a process for producing a novolac-type resin with{

} (Citing CX-1570C, Q. 139; RX-531) Complainant explains that the raw materials disclosed in the condensation reaction described in the '664 publication are phenol, formaldehyde, and an organophosphonic acid as a catalyst. (Citing RX-531 at [0004])

{

}

Complainant argues that the '345 patent does not disclose {

} because it describes a wholly different process.

Complainant says that the '345 patent discloses that {

}

Respondents' Position: Respondents say that Complainant incorrectly asserts that: {

}

Respondents argue that Complainant cannot credibly claim that {

} is a trade secret. (Citing RX-555C

at 51-52) Respondents say that this process was already publicly known, including through

Complainant's own public disclosures. As an example, Respondents say that this process feature

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was disclosed in U.S. Patent Application No. 2001/0004664 (published June 21, 2001), entitled Process for Producing Phenol Resin, which recommends:

{

}

Respondents say that Complainant's '345 patent (the application for which published September 7, 2006) also specifies {

Staff's Position: Staff asserts that {

} is not a trade secret.

(Citing CX-653C; CX-1570C, Qs. 52-53) Staff says that {

} was generally known in {

}

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Analysis and Conclusions: In briefing, Complainant has defined this alleged trade secret as {

} (CIB at 29) Similarly, Dr. Hamed

testified that {

} (CX-1570C, Q. 52) Dr. Hamed

continues to provide an “embodiment” of this trade secret:

{

}

(CX-1570C, Q. 52) Similarly, Complainant gives {

}

(CIB at 30) Having defined the trade secret in this manner, the question that must be addressed is whether or not {

} is a trade secret. I find that it is not.

Complainant has shown that it {

} Respondents have not disputed the accuracy of these

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documents. As a result, I find that the unrebutted evidence shows that Complainant {

}

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes {

} and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.⁶²

The only real disputes between the parties are whether or not {

} is generally known or is readily ascertainable. Based on the record, I find that it is. In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that {

} is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that {

} is not

⁶² {

.}

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generally known or readily ascertainable. See *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Unlike Section III.B.2.a, here Respondents have offered sufficient evidence to rebut this *prima facie* showing.

U.S. Patent Application No. 2001/0004664 (“the ‘664 application”) published on June 21, 2001 and is directed to “a novolak-type phenol resin with less unreacted phenol.” (RX-531 at Abstract) The ‘664 application continues that the resin is produced in high yield by reaction of a phenol with an aldehyde {

} Based on these disclosures, I find that the ‘664 application discloses

{

}

Complainant’s arguments that the ‘664 application does not disclose {

} are not persuasive. Complainant argues that the ‘664 application is inapplicable to Complainant’s process because {

These features are not required by the alleged trade secret; rather, as discussed above,

Complainant has defined this trade secret merely as {

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(CIB at 29) There are no requirements that {

}

Complainant’s arguments are more properly directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret. As a result, I find that Respondents have rebutted Complainant’s prima facie showing that this trade secret is not generally known.

Respondents alternatively rely on the ‘345 patent and the ‘418 patent. However, the {
} disclosed in the ‘345 patent and the ‘418 patent {
} The cited portions of the ‘345 patent disclose {
} and the cited portions of the ‘418 patent disclose {
} Because both {
} I find that they do not disclose {
}

Based upon all of the foregoing, I find that Respondents have rebutted Complainant’s prima facie showing that {
} is not generally known, and
therefore {
} is not a trade secret.

Assuming, *arguendo*, that Respondents had not rebutted Complainant’s prima facie showing, there is unrebutted evidence that this alleged trade secret is valuable. Dr. Hamed testified that:

⁶³ {

}

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{

.}

(CX-1570C, Q. 52) Dr. Banach provided similar testimony. (CX-1565C, Q. 30)

Respondents do not contest Dr. Hamed's and Dr. Banach's testimony regarding the value of {

} rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Respondents' argument misses the point—Complainant has provided unrebutted testimony that the use of {

.} In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that {

} is useful in the production of tackifier resins and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find {

} reaction is valuable.

i. { }

Complainant's Position: Complainant says that Complainant {

⁶⁴ Respondents improperly suggest this was a new theory when in fact the Court deemed Dr. Chao's supplemental witness statement CX-1592C timely because Respondents improperly withheld Pu documents and testimony until after discovery and indeed until the eve of trial, producing them only upon being compelled by Court order. (Citing Tr. at 410:22-411:14)

}

Respondents' Position: Respondents say that Complainant describes the use of {

}

Respondents argue that Complainant's contention that {

} is a trade secret is

baseless. (Citing RX-555C at 52) {

}

Respondents argue that the softening point of Complainant's tackifier resin product (SP-1068) is publicly known and readily ascertainable. (Citing *id.*, Qs. 405-409, 413-415; RDX-028C) {

}

⁶⁵ {

}

{

}

Respondents say that Complainant's patent application that was published March 2007 specifies {

}

}

Respondents argue that Complainant cannot credibly contend that {

}

rather, {

} is publicly

known or easily derived from the product itself. {

}

Staff's Position: Staff asserts that Complainant's {

} is not a trade secret. {

} Staff reasons that this is an indication that use of { }
would have been readily discernible through reverse engineering. Staff continues that Dr.
Banach admitted that the public literature such as the '718 patent application discloses {
}.} (Citing RX-
496; Tr. at 159:5-160:10)

Analysis and Conclusions: Complainant has defined this alleged trade secret as {
} (CIB at 30)

Complainant continues to state that {

} (*Id.*) Similarly, Dr. Hamed testified that:

{

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}

(CX-1570C, Q. 55) Thus, Complainant (and Complainant's expert) has made clear that {

} that is the alleged trade secret, not {

.} Having defined the trade secret in this manner, the question that

must be addressed is whether or not {

} is a trade secret. I find that it is not.

{

.} Respondents have not disputed the

accuracy of these documents. As a result, I find that Complainant has used {

.}

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that

{ } is not generally known or readily ascertainable based upon Dr.

Hamed's testimony that the lack of competing products for SP-1068 (other than products made

by Sino Legend) shows that Complainant's entire process is novel and not generally known,

corroborating evidence that shows that Complainant controls { } of the market share of

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tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a *prima facie* showing that {

} is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have, however, rebutted this *prima facie* showing.

As noted in Section III.B.3.f, *supra*, the '718 application is directed to "novolac alkylphenol resins having a low level of free alkylphenol, a method for the production thereof, and the use thereof as tackifying resins and reinforcing resins for rubbers," and explains that "[t]he resins may be used advantageously in the production of tires." (RX-496 at Abstract) The '718 application discloses, in pertinent part, that {

} This disclosure is strikingly similar to the subject matter of the alleged trade secret—{

.} Based on these disclosures, I find that the '718 application discloses { .}

Complainant's arguments that the '718 application does not disclose use of { } are not persuasive. Complainant argues that the '718 application is inapplicable to Complainant's process because {

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.} These features are not required by the alleged trade secret; rather, as discussed above, the alleged trade secret merely requires {

.} Complainant's arguments are directed to features of the overall process flow trade secret and are not persuasive with respect to this particular trade secret.

Assuming, *arguendo*, that the trade secret was limited to {
} this { } was disclosed in product information for SP-1068 and could be determined through testing of SP-1068. Dr. Chao, one of Complainant's experts, admitted that:

{

.} As a result, I find that Respondents have rebutted Complainant's prima facie showing that this trade secret is not generally known.

Because Respondents have rebutted Complainant's prima facie showing that {
} is not generally known or readily ascertainable, I find that it is not a trade secret.

Assuming, *arguendo*, that Respondents had not rebutted Complainant's prima facie

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showing, there is unrebutted evidence that { } is valuable. Specifically, Dr. Hamed testified that “experience and research and development are required to determine { } (CX-1570C, Q. 109) Respondents do not contest Dr. Hamed’s testimony. Respondents argue, however, that Complainant failed to assign a specific economic value to this process. (RIB at 77-79) Respondents’ argument misses the point—Complainant has provided unrebutted testimony that the experience and research and development are required to determine { } In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that { } has value and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that { } is valuable.

Assuming, *arguendo*, that the ‘718 application (which is assigned to Complainant) did not disclose { } I would find that Complainant took reasonable steps to protect the secrecy of this process step. In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes { } and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

j. { }

Complainant’s Position: Complainant says that Complainant’s {

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}

Complainant asserts that the Huang reference does not disclose any aspects of Complainant's { } trade secrets. (Citing CX-1566C, Q. 86; RX-270) Complainant says that Huang does not disclose {

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)

Complainant says that Gardziella does not disclose Complainant's { } trade secrets
because {

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}

Respondents' Position: Respondents say that Complainant's alleged trade secrets relating to { } are based upon { }

}

Respondents contend that Complainant's { } could not have been a trade secret because it falls within the range of conventional {

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}

Respondents additionally argue that similar to Complainant's { }

Complainant's { } is a conventional industry standard. (Citing RX-422C,

Qs. 382-383) {

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}

Respondents conclude, as a result, that Complainant fails to meet its burden of proving this

{ } to be a trade secret.

{

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.}

Respondents say that while Dr. Chao's witness statement addresses {

} (Citing CX-1566C, Q. 63)

Complainant did not allege in its interrogatory response that {

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..}

Respondents say that Complainant appears to have abandoned certain aspects of its
alleged { } secrets, including {

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}⁶⁷ See

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984) (“Information that is public knowledge or that is generally known in an industry cannot be a trade secret.”).

Staff’s Position: Staff contends that information relating to {
} qualifies as a trade secret. {

}

⁶⁷ {

}

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Staff argues that { } were not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) {

} Staff says that { } would be difficult to duplicate by others through independent development or reverse engineering. (Citing CX-1570C, Q. 100) Staff continues that Respondents failed to introduce sufficient evidence to support a finding that Sino Legend ZJG independently developed { } on its own.

Staff asserts that { } directly affects the quality of the SP-1068 tackifier product. (Citing CX-1570C, Qs. 56-57)

Staff says that access to { } was closely controlled, { } were confidential, and they were not publicly available, and thus these { } were not disclosed and were never known outside of the Complainant's or its licensees' businesses. (Citing CX-1569C, Qs. 18-24) Staff continues that { } used in the SP-1068 process could not be discerned other than through access to Complainant or Complainant's Shanghai subsidiary's confidential files. (Citing CX-1566C, Qs. 67-74, 76-78, 81-87)

Staff disagrees with Respondents argument that { } were publicly known and/or conventional in the industry." (Citing RIB at 71) {

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} Staff says that Respondents only examine { } in isolation and fail to look at the combined features as a trade secret. (Citing *Syntex*, 745 F.2d at 1434 (“[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.”); Restatement (Third) of Unfair Competition § 39 (1995), Comment f: Requirement of Secrecy) Staff continues that Complainant has specified { } in their asserted trade secret: {

.} (Citing CX-1566, Q. 63) Staff adds that evidence shows that { } (Citing CX-1569C, Qs. 36-47) Staff concludes that { } should qualify as a trade secret.

Analysis and Conclusions: Complainant identifies { } as a trade secret—{

.}⁶⁸ (CIB at 30-31) Similarly, Dr. Hamed testified that {

⁶⁸ Staff’s brief says that a number of additional features { } are trade secrets. Although Complainant’s pre-hearing brief addressed a number of these features, in its post-hearing briefing, Complainant has limited the trade secret to include the { } features discussed above and will be bound by that definition.

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.} (CX-1570C, Qs. 56-57) Mr. McAllister

offered similar testimony, saying that:

{

}

(CX-1569C, Q. 46) Mr. McAllister continued that:

{

.

(*Id.*, Q. 47) Complainant argues that this combination of features {

} (CIB at 30) I find that {

} is a trade

secret.

{

} As a result, it is clear that { } at Complainant's

Shanghai subsidiary include {

} which Complainant claims trade secret

protection: {

.

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There is persuasive evidence that these features are valuable. Mr. McAllister provided un rebutted testimony that:

}

.}

(CX-1569C, Q. 38) Respondents do not contest Mr. McAllister’s testimony regarding the value of { } rather, Respondents argue that Complainant failed to assign a specific economic value to this trade secret. (RIB at 77-79) Respondents’ argument misses the point—Complainant has provided un rebutted testimony that {

.} In Section III.B. 2.a, *supra*, I find that Complainant has proven that the collection of trade secrets has economic value based on the licensing revenue stream. I incorporate and reaffirm that finding and rationale here. For the same reasons discussed in Section III.B.2.a, *supra*, because Complainant has shown that the use of { } is useful in the production of tackifier resins and has shown that its licensing revenue for the trade secrets as a whole has a significant present value, I find that this alleged trade secret is valuable.

In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process. That process includes the design of the reactors, and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

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The only real disputes between the parties are whether or not the particular combination of { } discussed above are generally known or readily ascertainable. Based on the record, I find that they are not. In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that { } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that the design for the condensation reactor is not generally known or readily ascertainable. Respondents have not rebutted this *prima facie* showing. See *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009).

Respondents have cited various references as disclosing one or more { } None of the references, however, disclose all of { } the combination of which comprises the trade secret. { }

} Because (even combined) the references cited by respondents do not disclose the specific combination of {

} used in Complainant's { } I find that Respondents have failed to rebut Complainant's *prima facie* showing.

Based upon all of the foregoing, including the value of { } the efforts undertaken to protect the secrecy of { }, and Respondents' failure to rebut Complainant's *prima facie* showing that the trade secret is not generally known, I find that the use the combination of {

} is a trade secret.

4. Overall Process Flow Trade Secret

Complainant's Position: Complainant says that Complainant's scheme to prepare tackifier resins in one embodiment is overall { } with multiple interrelated process and equipment parameters. (Citing CX-1570C, Q. 58) {

} Complainant contends that this overall process flow was practiced by Complainant's Shanghai subsidiary between 2004 and 2007. (Citing CX-1570C, Q. 59) Complainant says that CDX-001C provides a summary of Complainant's overall process flow based on process as practiced at Complainant's Shanghai subsidiary in the 2005 to 2007 timeframe. (Citing *id.*, Q. 60)

Complainant argues that Respondents mischaracterize the record by claiming that there are "20 alleged trade secrets." (Citing RIB at 75-76) Complainant says that the record evidence describes 17 different process aspects asserted as trade secrets and the eighteenth is the overall process flow. (Citing CX-1570C, Qs. 14, 15)

Complainant says that Respondents also seek to introduce confusion as to the overall process flow trade secret by describing it as "all of the combined features of SI's process." Complainant says that this trade secret is not all-inclusive of the entire process; nor is the trade secret some "unspecified subset" of the asserted trade secrets. Complainant says that it has made clear that this trade secret is the combination of the 17 asserted process aspects—nothing more, nothing less.

Complainant says that Dr. Swager was unable to defend Respondents' position on this trade secret on cross-examination. Complainant says that Dr. Swager acknowledged he did not

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find a single reference that he claimed discloses all 17 trade secrets. (Citing Tr. at 836:1-8)

Complainant continues that for this trade secret, Dr. Swager was forced to rely on the numerous references he cited for the individual trade secrets, but he admitted that he made no effort to combine the various references to design an operable process. (Citing Tr. at 836:21-25)

Complainant says that Dr. Swager agreed that these various references concern different products (citing Tr. at 837:7-12) precluding the combination of their teachings. Complainant adds that Dr. Swager had no prior art for the overall process other than the disparate collection from the individual trade secrets. Complainant continues that Dr. Swager conceded that even if each of the 17 trade secrets is individually known, the combination (i.e., the overall process flow) can still be a trade secret. (Citing Tr. at 856:12-23) Complainant says that Dr. Swager pointed to reverse engineering but had previously volunteered that “if you were to put something like this together, you would read more than six references” (Citing Tr. at 838:15-20), thereby contradicting his claim that this trade secret could be reverse engineered from the product alone.

Respondents’ Position: Respondents say that Complainant is relying upon the complete set of all of the alleged process steps separately alleged as trade secrets. (Citing CIB at 31; RX-555C at 52-54) Respondents argue that Complainant cannot now contend that some collection of *less than all* of the steps somehow constitutes a separate protectable trade secret.

Respondents say that Complainant also contends that the combination of all 20 alleged trade secrets constitute a separate trade secret. (Citing RX-555C at 52-53) Respondents say that as previously discussed, the individual alleged trade secrets are not trade secrets at all, for multiple reasons including that the subject matter was: (1) in the published scientific literature; (2) common sense based on known chemistry and engineering principles; (3) independently and previously derived by Sino Legend; and/or (4) easily known or derived from Complainant’s

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product and product literature. Respondents argue that Complainant cannot overcome these fatal defects by claiming that the combination of all 20 of its “non-trade secrets” is transformed into an omnibus trade secret. Respondents contend that because Complainant has abandoned certain of its originally alleged trade secrets (*e.g.*, {

}, it would appear that all of the combined features of Complainant’s process is not a viable omnibus trade secret.

Respondents say that Complainant has never contended that some unspecified subset of the 20 alleged trade secrets constitute additional separate trade secrets. Respondents continue that Complainant has never alleged that various permutations of its 20 alleged trade secrets—say, trade secrets 4, 13, 16 and 17 or 1-4, 8 and 17-19—are themselves additional trade secrets at issue in this Investigation. Respondents argue that such a position would be antithetical to Complainant’s express contention that each trade secret “generally works together with at least one or more of the other aspects in a cooperative or synergistic manner in the overall process.” (Citing RX-555 at 43) Respondents conclude, that based on Complainant’s own representation, the 20 alleged trade secrets cannot be treated as a menu from which to pick and choose in order to create new trade secrets comprised of a handful of the 20.

Respondents additionally argue that Dr. Swager considered and rejected the notion that Complainant possessed a trade secret based on the combination of all of its alleged trade secrets together. (Citing RX-421C, Qs. 420-425) Respondents say that Dr. Swager was specifically queried on this point on cross-examination and he explained his reasoning, based on his opinion that Complainant’s process can be derived through reverse engineering:

Q. Does that seem to support the position that SI Group can have an overall-process-flow trade secret even if each of the 17 individual asserted trade secrets were publically known or readily discernible, as you describe in your witness statement?

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A. It pertains if you cannot readily ascertain them by another method.

Q. Okay. Can you readily ascertain them from another method?

A. Yes.

Q. From reverse-engineering?

A. Reverse-engineering, yes.

(Citing Tr. at 858:3-20) Respondents continue that Dr. Swager went on to explain that such reverse engineering would not be time consuming, difficult or costly. (Citing Tr. at 859:15-861:19)

Respondents add that to the extent Complainant attempts to combine process features and conditions from different times and places and formulas for various products, resulting in a “hybrid” process that was never actually used by Complainant, this combination would not constitute a legitimate trade secret. (Citing RX-421C, Q. 423)

Respondents say that even if Complainant could have a trade secret consisting of the combination of all of its 20 individual trade secrets, Complainant would be faced with an insurmountable failure of proof in the issue of misappropriation. Respondents contend that Complainant has simply not analyzed this issue in view of the many public disclosures (including Complainant’s own patents) of the alleged trade secrets, Complainant’s admissions that various process features can be ascertained through testing and the fact that Sino Legend was aware of process features such as { }long before any alleged contact with anyone from Complainant. Respondents say that no Complainant expert has offered any point by point comparison of *all* of the 20 *specific* alleged trade secrets with the Sino Legend accused process and equipment parameters. Respondents reason that because Complainant has not taken these factors into account, its conclusory assertions of misappropriation of the “overall process” are wholly inadequate.

Staff’s Position: Staff assert that the overall process flow for SP-1068 qualifies as a trade secret. Staff says that this particular trade secret addresses the overall process flow in

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manufacturing SP-1068 tackifier resin and incorporates each of the seventeen individual categories of information that Complainant asserts as trade secrets, or any combination thereof. (Citing CX-1570C, Qs. 58-61; CX-1565C, Q. 42) Staff continues that the overall process flow of the SP-1068 process contains information of the type that can qualify as a trade secret, particularly since, in the Staff's view, certain of the individual alleged trade secrets qualify as distinct trade secrets.

Staff says that the evidence shows that the overall process flow trade secret to prepare tackifier resins is a { } with multiple interrelated processes. (Citing CX-1570C, Qs. 58-65) {

}

Staff argues that even though the "overall process flow" may contain individual components that are generally known, the evidence shows that, in combination, it is maintained as a protectable trade secret in part due to the extensive research and development that it took over the years to combine them. Staff says that "[A] trade secret can exist in a combination of

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characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.” (Citing *Syntex Ophthalmics, Inc. v. Novicky*, 745 F.2d 1423, 1434 (Fed. Cir. 1984) (quoting *Imperial Chemical Indus. Ltd. v. Nat’l Distillers & Chemical Corp.*, 342 F.2d 737, 742 (2d Cir. 1965); see also *Water Servs., Inc. v. Tesco Chems., Inc.*, 410 F.2d 163, 173 (5th Cir. 1969); see also Restatement (Third) of Unfair Competition § 39 (1995), Comment f: Requirement of Secrecy: (“The fact that some or all of the components of the trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements.”)) Staff continues that Dr. Hamed testified that the overall process flow trade secret was practiced by Complainant at Complainant’s Shanghai subsidiary between 2004 and 2007. (Citing CX-1570C, Q. 59) Staff says that Dr. Chao summarized each of the individually asserted trade secrets in Complainant’s SP-1068 process (CDX-001C) shown in the following diagram {

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Staff says that the overall process flow in the alkylation and condensation reactions is set forth in {

} Staff continues

that Dr. Banach testified that the process was first implemented in 1959 and that several modifications and improvements have occurred over the past half a decade as a result of substantial research and development expenditures to develop the overall process flow trade secret implemented at Complainant's Shanghai subsidiary to manufacture SP-1068 tackifier resin. (Citing CX-1565C, Qs. 88-99)

Staff says that Complainant's overall process flow was not generally known or readily discernible. (Citing CX-1570C, Qs. 116-142) Staff continues that no one patent or document discloses the overall process flow for manufacturing SP-1068. Staff adds that Respondents' expert Dr. Swager acknowledged that he was not relying on any single reference for the combination of the individual trade secrets in his testimony. (Citing Tr. at 835:10 to 836:8) Staff says that the evidence shows that the overall process flow would be difficult to duplicate by others through independent development or reverse engineering. (Citing CX-1570C, Q. 100) Staff continues that Dr. Swager attempted to highlight the capabilities of reverse engineering in order to invalidate Complainant's overall process flow trade secret; but, Dr. Swager admitted that he had not reverse engineered SP-1068 himself, nor had he seen any other documentation of reverse engineering by Sino Legend or by any third party. (Citing Tr. at 822:2-7, 827:14-828:3, 849:13-850:7) Rather, Staff says that Dr. Swager agreed during cross-examination that reverse engineering SP-1068 would be "theoretically possible." (Citing Tr. at 862:24-863:5) Staff

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argues that such a “theoretical ability,” however, does not undermine the overall process flow trade secret. (Citing Restatement (Third) of Unfair Competition § 39 (1995), Comment f: Requirement of Secrecy)

Staff says that the overall process flow directly affects the quality of the final tackifier products. (Citing CX-1570C, Qs. 58-61; CX-1565C, Q. 42) Staff continues that the sequence and flow used by Complainant represents a valuable manufacturing process that is scalable to any batch size and repeatable over time, and the overall process flow is important to producing a commercially viable, high-quality SP-1068 tackifier.

Staff argues that even if individual aspects of Complainant’s trade secret process were publically known, the combination has still been maintained as a secret by Complainant from which it derives a competitive and economic advantage by virtue of the combination not being generally known. (Citing CX-1570C, Q. 115) Staff adds that even if every single aspect of Complainant’s trade secret process is not asserted in this investigation, the overall process flow, as a combination of multiple aspects of Complainant’s process, is still a valuable secret, the combination of which is not generally known. (Citing *id.*)

Staff says that access to Complainant’s Shanghai subsidiary batch cards was closely controlled, they were confidential, and they were not made publicly available. (Citing CX-1569C, Qs. 18-24) Staff continues that the SP-1068 overall process flow could not be discerned other than through access to Complainant’s confidential files. (Citing CX-1566C (Chao Witness Stmt.), Qs. 67-74, 76-78, 81-87)

Staff says that Dr. Swager conceded that if the ALJ determines that one or more (or all) of the asserted trade secrets is valid, then Dr. Swager’s opinions presented in his witness statement would not be applicable, as he failed to present any alternative opinion on the overall

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process flow trade secret. (Citing Tr. at 863:13-865:1) Staff says that if even one of the 17 individual trade secrets is deemed a valid trade secret, Dr. Swager concedes that the overall process would then qualify as a trade secret. (Citing *id.*)

Staff argues that even though the “overall process flow” may contain individual components that are generally known, the evidence shows that, in combination, it is maintained as a protectable trade secret in part due to the extensive and confidential research and development that it took over the years to combine them. (Citing Restatement (Third) of Unfair Competition § 39 (1995), Comment f: Requirement of Secrecy) Staff says that Respondents cannot point to any single, or even combination of references, that would disclose the overall process flow for manufacturing SP-1068. Staff continues that Dr. Swager acknowledged that he was not relying on any single reference for the combination of the individual trade secrets in his testimony. (Citing Tr. at 835:10-836:8)

Staff disagrees with Respondents’ argument that “SI has never contended that some unspecified subset of the 20 alleged trade secrets constitute additional separate trade secrets.” (Citing RIB at 76) Staff says that the combination of the eighteen categories qualifies as a trade secret even if none of the individual categories is a trade secret. (Citing *Skinless Sausage Casings*, Inv. No. 337-TA-148/169, Initial Determination at *42 (July 31, 1984) (“Union Carbide has identified ten items which characterize its overall shirring machine configuration...Three of these items are also classified as trade secrets in their own right, and will be considered individually, *infra.*”); *Imperial Chemical Indus. Ltd. v. Nat’l Distillers & Chemical Corp.*, 342 F.2d 737, 740 (2d Cir. 1965) (the court stated that both the individual components/elements and combination can be trade secrets))

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Staff disagrees with Respondents' contention that "the SI process can be derived through reverse engineering." (Citing RIB at 76-77) Staff says that Dr. Swager admitted that he had not reverse engineered SP-1068 himself, nor had he seen any other documentation of reverse engineering by Sino Legend or by any third party. (Citing Tr. at 822:2-7, 827:14-828:3, 849:13-850:7) Staff continues that Dr. Swager merely testified that reverse engineering SP-1068 would be "theoretically possible." (Citing Tr. at 862:24 to 863:5 (Q: ...Do you agree that it would be theoretical to reverse engineer SP-1068? A: Theoretically possible, or are you saying theoretical? Q: Theoretically possible? A: Yes.)) Staff argues that such theoretical possibility, however, does not undermine the overall process flow trade secret. (Citing Restatement (Third) of Unfair Competition § 39 (1995), Comment f: Requirement of Secrecy ("The theoretical ability of others to ascertain the information through proper means does not necessarily preclude protection as a trade secret. Trade secret protection remains available unless the information is readily ascertainable by such means."))

Staff says Respondents argue that Complainant should not be allowed "to combine process features and conditions from different times and places and formulas for various products." (Citing RIB at 77) Staff says that the focus of the inquiry should be on the asserted trade secrets reflected in the SP-1068 manufacturing process at Complainant's Shanghai subsidiary and {

}

Analysis and Conclusions: Complainant has defined the “overall process flow trade secret” as the seven { } features (including {

} combined with the ten { } features (including {

}. Thus, the question is whether or not this combination of seventeen features is a trade secret. I find that it is.

In sections III.B.2 and 3, *supra*, I find that Complainant practiced each of the individual elements in {

} The mere fact that small modifications {

} were made { } does not

change the fact that Complainant has practiced the combination of all seventeen elements in making SP-1068.

Although {

} Complainant has not disclosed the overall combination of elements. In Section III.B.2.a, *supra*, I find that Complainant has taken reasonable steps to protect the secrecy of its process, and here I incorporate and reaffirm my findings and rationale regarding the steps Complainant has taken to protect its process.

In section III.B.2.a, *supra*, I find that Complainant has made a prima facie showing that

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{ } is not generally known or readily ascertainable based upon Dr. Hamed's testimony that the lack of competing products for SP-1068 (other than products made by Sino Legend) shows that Complainant's entire process is novel and not generally known, corroborating evidence that shows that Complainant controls { } of the market share of tackifier resins, and the evidence that shows Complainant's only competition (other than Respondents) provides inferior tackifier resins. The same evidence satisfies Complainant's obligation to make a prima facie showing that the overall process (the combination of seventeen elements) is not generally known or readily ascertainable. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 23-25 (Oct. 16, 2009). Respondents have not rebutted this *prima facie* showing.

The essence of Respondents' argument is that because the seventeen individual elements are generally known, the overall combination of the seventeen elements is generally known. Respondents' underlying premise is incorrect—as found above, ten of the seventeen elements are not generally known and are trade secrets. As a result, a process that includes these ten elements also is not generally known and is a trade secret.

Moreover, Respondent has failed to identify any references that disclose the combination of seventeen elements. Dr. Swager admitted on cross examination that:

Q. And you're not relying on any single reference for the combination of the individual trade secrets; right?

A. Not a single reference, no.

(Tr. at 836:5-8) Thus, it is clear that no individual reference discloses all 17 elements of the overall process flow.

In addition, Dr. Swager admitted that he did not attempt to combine the various references, upon which he relied for the individual trade secrets, into a cohesive process:

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Q. Now, you've made no effort to combine the various references that you're relying on for the individual trade secrets to come up with the overall process; right?

A. I'm not sure I would characterize it that way. I did not pose a process.

(Tr. at 836:9-14) Dr. Swager continued that:

Q. And so you acknowledge that some of the patents and references that you're relying on concern different products; right?

A. Yes, I cited them for general teachings, but they do relate to different products, yes.

Q. And you didn't account for the differences between those references in creating an overall process; right?

A. As I mentioned, I didn't create an overall process, right. So that's where I'm taking issue with this, is I didn't set out to create a process. I am evaluating the prior art as it relates to the process.

(Tr. at 837:7-20) Thus, even assuming *arguendo* that each of the individual elements were not a trade secret (because they were individual disclosed in various references), Dr. Swager did not provide any basis to combine these various references together to reach the overall process flow.

As a result, I find that Respondents have failed to rebut Complainant's *prima facie* showing that the overall process flow (the combination of seventeen elements) was not generally known.

There is no question that combination of seventeen elements is valuable. In Section III.B.2.a, *supra*, I find that Complainant controls { } of the market share in the United States for tackifier products and produces a superior tackifier product compared to Complainant's only competition (other than Respondents). Additionally, in Section III.B.2.a, *supra*, I find that licensing revenue for the trade secrets as a whole has a significant present value. Because Complainant produces a superior tackifier product using the combination of seventeen elements, and the combination of seven elements has licensing revenue with significant present value, I find that the combination of seventeen elements is valuable.

Based upon all of the foregoing, including the value of the overall process flow, the

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efforts undertaken to protect the secrecy of the process, and Respondents' failure to rebut Complainant's *prima facie* showing that the overall process flow is not generally known, I find that the combination of seventeen elements is a trade secret separate from the individual seventeen elements.

IV. MISAPPROPRIATION OF TRADE SECRETS

A. Applicable Law

The following unfair acts result in a violation of 19 U.S.C. § 1337(a)(1)(A):

Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

- (i) to destroy or substantially injure an industry in the United States;
- (ii) to prevent the establishment of such an industry; or
- (iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A). Trade secret misappropriation qualifies as an unfair act under this section. *See Sausage Casings*, Inv. No. 337-TA-148/169, Initial Determination (July 31, 1984).

As discussed, *supra*, the Commission has provided four criteria as guidelines for establishing misappropriation of a trade secret:

- (1) the existence of a trade secret which is not in the public domain;
- (2) that the complainant is the owner of the trade secret or possesses a proprietary interest therein;
- (3) that the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means; and
- (4) that the respondent has used or disclosed the trade secret causing injury to the complainant.

Id.

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As discussed *supra*, the Federal Circuit in *Tianrui* explained that a single federal standard should determine what constitutes a misappropriation of trade secrets sufficient to establish an “unfair method of competition” under Section 337. *Tianrui*, 661 F.3d 1322. The Federal Circuit rejected the application of state law to Section 337 cases. *Id.* at 1327-28. (“[W]here the question is whether particular conduct constitutes “unfair methods of competition” and “unfair acts” in importation, in violation of Section 337, the issue is one of federal law and should be decided under a uniform federal standard, rather than by reference to a particular state’s tort law.”)

The Federal Circuit in *Tianrui* acknowledged that previous Commission decisions and the Uniform Trade Secrets Act (“UTSA”) are sufficient to establish the elements of trade secret misappropriation. *Tianrui*, 661 F.3d 1328. The UTSA is consistent with the guidance provided by the Commission in *Sausage Casings* in that it also requires the trade secret holder to prove that its secret information was “wrongfully” acquired by another through improper means. *See* Uniform Trade Secrets Act.

In contrast to the UTSA, which guides domestic state law, Section 337 addresses unfair practices in import trade. To satisfy the injury component to a domestic industry, a complainant must show that the “threat or effect” of a respondent’s misappropriation is to destroy or substantially injure the domestic industry. *Id.* at 1335. Consistent with the meaning of “injury” in Section 337 trade secret cases, I find that the “injury” element as recited within the fourth factor of trade secret misappropriation as adopted by the Commission similarly encompasses either an actual injury or a threat of injury to the complainant. *See Certain Cast Steel Railway Wheels*, ITC Inv. No. 337-T A-655, Initial Determination, 2009 WL 4261206 at *31-32 (Oct. 16, 2009) (“*Railway Wheels*”) (linking the domestic industry in a trade secret case to injury as a result of unfair acts).

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B. Relationship Between the Parties

In this Investigation, Respondent Sino Legend ZJG is a Chinese manufacturing company with its principal place of business in Zhangjiagang. (CX-267; CX-268; RIB at 6) Sino Legend ZJG was formerly wholly owned by Sino Legend BVI, but is now wholly owned by Respondent Sino Legend Hong Kong (CX-269; CX-270; CX-025C (Sino Legend ownership chart) at 3) Respondents have represented that Sino Legend BVI ceased operations in July 2008.⁶⁹ (RIB at 6)

Respondent Sino Legend Holding Group Limited is a Hong Kong holding company. Mr. Yang is its director and sole shareholder. (CX-280) Respondents state that Sino Legend Holding Group Limited shipped to the United States tackifiers at issue in this Investigation. (*Id.*)

Respondent Sino Legend Hong Kong was established in 2007 (CX-271), with Sino Legend BVI as shareholder (CX-272), with Mr. Yang as its sole director, (CX-273), and with its principal place of business in Hong Kong. (CX-274, CX-275) Sino Legend Hong Kong acquired all shares in Sino Legend ZJG via a chain of share transfers. (CX-270; CX-278; CX-279)

Sino Legend Marshall Islands is the Marshall Islands instance of Sino Legend Holding Group Inc., and was established on October 30, 2008. (CX-685) Respondents state that Sino Legend Marshall Islands shipped to the United States a single shipment of tackifiers at issue in this Investigation. (RIB at 8)

Respondent Mr. Quanhai Yang was the chairman of Sino Legend BVI (CX-278), and is the chairman of Sino Legend Marshall Islands. (CX-258C at 3) In addition, he is the chairman of Sino Legend ZJG. (CX-268 at 2) He is also the legal representative of Lunsai. (CX-297)

⁶⁹ Although Sino Legend BVI ceased operations, they are still a party to this Investigation.

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Gold Dynasty is a Cayman Islands corporation with a registered office address in the Cayman Islands. (CX-258C at 3; CX-684) Elite is a Belize corporation established on July 14, 2008. (CX-686) Respondents state that neither Gold Dynasty nor Elite manufacture any tackifiers at issue in this Investigation, and has not shipped to or received within the United States any tackifiers at issue in this Investigation. (RIB at 8)

Ms. Zhang is the director and majority shareholder of Elite, which is the sole shareholder of Gold Dynasty. (CX-1353.1C at 194:15-19, 196:7-9; CX-258C at 3 (Sino Legend ownership chart with Zhang's annotations); CX-1353.1C at 193:5-195:5 (discussion of annotation))⁷⁰ { } and Mr. Yang is the director of Sino Legend Marshall Islands. Sino Legend Marshall Islands wholly owns Sino Legend Hong Kong, which wholly owns Sino Legend ZJG. (CX-025C) The relationships between these parties are depicted in the following Sino Legend investment chart:

⁷⁰ Ms. Zhang testified that she owns { } (CX-1353.1C at 195:22-196:3) Mr. Crumlish also owns shares in { } (CX-258C at 1-3) Yang does not own shares in { } but owns shares in { }. (CX-1353.1C at 194:1-195:5; CX-258C at 3)

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(CX-258C at 3)

Respondent Red Avenue Chemical Co. Ltd. (“Red Avenue BVI”) was established in the British Virgin Islands in 2003 (CX-283), with Ms. Zhang as a majority shareholder. It has a place of operations in Shanghai. (CX-287) Red Avenue BVI operates under the name “Red Avenue Group.” (CX-286) Respondent Red Avenue Group Limited (“Red Avenue Hong Kong”) was established in Hong Kong in 1999, under the name Hong Kong Red Avenue

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Chemical Company Limited. (CX-681) The company changed its name to Red Avenue Group Limited in 2008. (CX-682) Ms. Zhang is the sole shareholder and director. (CX-683 at 4)

Thus, Ms. Zhang not only owns and controls Sino Legend ZJG (indirectly through Elite), but also owns and controls Red Avenue BVI and Red Avenue Hong Kong, enabling the various entities to operate as one. Mr. Yang testified that Sino Legend and Red Avenue {

} (CX-1352.1C at 119:7-10

(emphasis added))

Respondent Red Avenue Chemical Corp. of America (“Red Avenue America”) is a New York corporation. (CX-290 at 2) Respondent Thomas R. Crumlish resides in Rochester, New York, and is registered as the “Chairman or Chief Executive Officer” of Red Avenue America. (*Id.*; CX-291 at 3)

Respondent Precision Measurement International LLC (“PMI”) is a Michigan company (CX-293), that imports chemicals for sale to US customers, including Goodyear. (CX-102C) Respondents state that PMI was the consignee of a shipment of tackifier at issue in this Investigation. (RIB at 7)

Respondent Shanghai Lunsai International Trading Company (“Lunsai”) is a company in Shanghai, China. (CX-297) Respondents state that Lunsai does not manufacture any tackifiers at issue in this Investigation, and has not shipped to or received within the United States any tackifiers at issue in this Investigation. (RIB at 7)

Based on the foregoing, I find that the evidence shows that the following Respondents, each of which is controlled by individual respondents Mr. Quanghai Yang and Ms. Ning Zhang, have created a convoluted set of corporate structures and relationships that involve a number of

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entities that manufacture, distribute, and import the accused products: Sino Legend ZJG, Sino Legend BVI, Sino Legend Hong Kong, Sino Legend Marshall Islands, Sino Legend Holding Group, Gold Dynasty, Elite, Red Avenue BVI, Red Avenue Hong Kong, and PMI. As a result, I find that each aforementioned Respondent acted in concert. Based on his limited role, Mr. Crumlish is not liable for misappropriation in his personal capacity.

C. Unfair Acts in the Violation of Section 337(a)(1)(A)

I addressed the first element of trade secret misappropriation regarding ownership of each trade secret *supra* in section III.1.a, and I addressed the second element of trade secret misappropriation regarding the existence of each trade secret at issue *supra* in sections III.2-4. I now turn to the third element of misappropriation which is “access,” and the fourth element of misappropriation - “use.”

1. Respondents’ Access to the Trade Secrets through Mr. Xu and Mr. Lai

Complainant’s Position: Regarding Mr. Xu’s access, Complainant asserts that, as the manager of manufacturing, Mr. Xu was among a core group of people at Complainant’s Shanghai subsidiary who had access to technical information. (Citing CX-1569C, Q. 55; CX-1563C, Q. 15) Complainant avers that he received incoming formula from Complainant’s US plant and was a member of a “Needs to Know” core team. (Citing CX-703C at 2-3; CX-1569C, Q. 55; CX-703C; CX-706C) Complainant contends that he had access to information such as historical formula and batch cards. (Citing CX-1569C, Q. 56; CX-703C; CX-706C)

Complainant argues that Mr. Xu had access to formula forms for { } and SP1068. (Citing CX-1565C, Q. 133; CX-756C) { }

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}

Complainant contends that Mr. Xu signed a SP1068 formula, dated February 1, 2005. (Citing CX-653 at 1; CX-1565C, Q. 21) Complainant asserts that this same formula was accessed on his laptop on November 4, 2006. (Citing CX-187C at 7:11) Complainant avers that a September 2005 email chain shows that Mr. Xu was kept informed about Complainant US's development and testing of {

}

Complainant continues that Mr. Xu had continued access to formulas as they evolved over time. (Citing CX-1565C, Q. 134; CX-1558C) Complainant asserts that Mr. Xu also had access to SP1068 related technology through Complainant's U.S. engineering and R&D team. (Citing CX-1569C, Q. 59) For example, Complainant avers that Mr. Xu attended a meeting to decide {

} (Citing CX-1374C) Complainant

submits that, later, in a January 2007 to Complainant's U.S. engineers, Mr. Xu expressed his gratitude for the "endless support[] from [Complainant, U.S.] at any time and by any means, on every aspect." (Citing CX-171C)

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Complainant says that in his early days at Complainant's Shanghai subsidiary, Mr. Xu requested and ultimately received broader access to Complainant US's technical information. (Citing CX-1569C, Q. 56) Complainant states that this included material balance information and standard operating procedure (SOP) documents. (Citing CX-711C; CX-698C) Complainant submits that he also received a one-week training at the RJ plant in February 2005, including on the equipment and operations for making SP1068 and other tackifiers. (Citing CX-150C; CX-1569C, Qs. 62-63) Complainant asserts that the training covered { } (Citing *id.* at 17; Tr. at 310-11)

Complainant contends that Mr. Xu also received training at Complainant's Bethune subsidiary in France. (Citing CX-1565C, Q. 76) Complainant asserts that he learned about process parameters and materials such as {

}

Complainant asserts that in December 2005, Mr. Xu became a member of the manufacturing integration team (MIT). (Citing CX-1565C, Q. 136; CX-151C) {

} (Citing *id.*)

Complainant says membership was a position of trust. (Citing Tr. at 311:24-312:4)

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Complainant submits that, in a December 2005 email chain, Tom McAllister congratulated Mr. Xu on becoming a member of the MIT and noted that Mr. Xu would be given access to all of the { }. (Citing CX-151C) Mr. Xu expressed gratitude for “this trust you give.” (Citing CX-151C) Complainant asserts that Mr. Xu thereby gained access to knowledge about the formulas, process flow, and raw materials used historically and at other Complainant plants. (Citing CX-1565C, Q. 135) {

}

Complainant submits that when he became a member of the MIT, Mr. Xu also became a member of the MIT distribution list, through which he gained access to information about the processes at other Complainant plants. (Citing CX-1565C, Q. 84; CX-1569C, Q. 61)

Complainant avers that, for example, on March 20, 2006, Mr. Xu responded to an email sent to the MIT distribution, which provided {

.} (Citing CX-152C and CX-1032C)

{

} Complainant

asserts that, in January 2007, Mr. Xu acknowledged the “endless support” from Complainant U.S. on “technical, engineering and operation” aspects. (Citing CX-171C) Complainant

maintains that Mr. Xu continued to gain more access over time. (Citing CX-1569C, Q. 57)

Complainant avers that Mr. Xu was granted full access to {

}

containing sensitive technical information in January 2006, {

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}

Complainant says that Mr. Xu was promoted to plant manager in June 2006, gaining more access to proprietary information. (Citing CX-1569C, Qs. 60-61) Complainant states that, as the plant manager, Mr. Xu had access to product formulas, raw material specifications, batch cards, SOPs, test protocols, equipment drawings, P&ID, etc. (Citing *id.*) Complainant argues that there was no significant technical information to which Mr. Xu did not have access. (Citing *id.*)

Complainant submits that Mr. Xu had access to Complainant's file room, which contained Complainant's confidential documents, for example, product formula and manufacturing batch cards for products made at RJ as well as Complainant's Shanghai subsidiary. (Citing Tr. at 247:2-4; CX-1563C, Qs. 21-26) {

}

Complainant continues that Mr. Xu was effectively the contact person with Complainant US in terms of technical issues. (Citing CX-598C; CX-600C; CX-1154C; CX-1155C; CX-1156C; CX-1569C, Q. 61) {

} Complainant avers that Complainant's historic use of

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{ } was known to high level Complainant's Shanghai subsidiary personnel. (Citing CX-753C at 3)

}

}

Complainant asserts that Mr. Xu was intimately familiar with { } because he was the manufacturing manager when { } was implemented at Complainant's Shanghai subsidiary. (Citing CX-1569C, Q. 34) Complainant submits that in a chain of emails, Mr. Xu discussed with Frank Rutkey a problem in { } at Complainant's Shanghai subsidiary. (Citing CX-758C)

Complainant contends that, in an email sent by Mr. Xu on March 27, 2007, Mr. Xu asked { } what {

}

Regarding Mr. Lai's access, Complainant says that Mr. Lai was the General Manager of Complainant Shanghai from the inception of Complainant's China operation through February 28, 2005. (Citing CX-1563C, Q. 17; CX-1566C, Q. 77) Complainant argues that, as general manager, Lai had full access to all confidential information at Complainant's Shanghai

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subsidiary. (Citing CX-1563C, Q. 18) Complainant submits that this information included alkylphenol and SP1068 formulations from the U.S. and China. (Citing *id.*; CX-1565C, Q. 131) Complainant contends that, as General Manager, Lai was also free to review all documents in Complainant's Shanghai subsidiary's file room, with no paper trail being created unless he physically removed documents or made photocopies. (Citing Tr. at 470:8-14; CIB § III.E.4)

Complainant asserts that Mr. Lai, as the general manager at Complainant's Shanghai subsidiary, was a conduit for all product formulas. (Citing CX-1569C, Q. 70) Complainant avers that RJ formulas were sent to Complainant's Shanghai subsidiary through Mr. Lai. (Citing CX-697C; CX-1565C, Q. 131; Tr. at 206:23-207:6) Complainant contends that Mr. Lai received formulas for making { } SP1068, and SP1068 related products when they were sent from the U.S. (Citing *id.*) Complainant submits that an RJ { } formula was sent to Mr. Lai on May 12, 2003. (Citing CX-770C) Complainant avers that an RJ SP1068 formula (JX-011C) was released to Mr. Lai on July 23, 2003. (Citing CX-771C) Complainant says that { } and SP1068 formulas were released to Mr. Lai on May 11, 2004. (Citing CX-772C) Complainant submits that an RJ formula for HRJ-10420 was released to Mr. Lai on May 21, 2003. (Citing CX-773C) Complainant avers that an RJ SP1068 formula was released to Mr. Lai on March 31, 2003. (Citing CX-774C)

Complainant asserts that Mr. Lai also received technical information in overseeing business operations of Complainant's Shanghai subsidiary. (Citing CX-1569C, Q. 70) Complainant says, for example, he received the bill of materials for SP1068. (Citing CX-701C) Complainant avers that Mr. Lai had information about raw material suppliers for SP1068 and Complainant's Shanghai subsidiary startup. (Citing CX-692C; CX-699C)

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Complainant continues that Mr. Lai knew Complainant used { }
for making SP1068 at RJ. (Citing CX-1565C, Q. 131; CX-753C) Complainant avers that Mr.
Lai participated in a June 2003 email chain where Complainant's past use of { } was
discussed. (Citing *id.*) {

}
Complainant asserts that Mr. Lai was copied on all emails in this email chain. (Citing
id.) Complainant submits that, in addition, it was Mr. Lai who asked {

} Complainant argues that Mr. Lai was soliciting
inputs so that he could make a decision regarding which of the three options to take. (Citing *id.*)

Complainant argues that the purpose of {
} was to produce a copycat product using Complainant's technology.

Complainant asserts that at least ten pages of the original handwritten batch record {
} identify the product of the { } as "1068 Resin."
(Citing CX-200C at 2-5, 11, 15, 16, 18, 19, 26-29, 33, 35, 39, 40, 42, 43) Complainant submits

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that Respondents later decided that such obvious evidence of copying “might not be appropriate” and therefore marked out “1068 Resin” on all pages where it appeared. (Citing Tr. at 772:16-24; CX-201C at 1-4, 12, 14, 20, 21, 23, 24) Complainant contends that Respondents recorded their intent to copy elsewhere as well, {

} (Citing CX-037C at 2)

Complainant avers that { } a company associated with the manufacture of copycat products. (Citing CX-1352.1C at 117:20-119:17) Complainant says that Mr. Crumlish explained to customers that {

} (Citing CX-249C at 7 (emphasis added by

Complainant)) Thus, Complainant argues that Respondents’ purpose in {

} was to replace Complainant’s product by imitating Complainant’s process.

Prior to September 2006, Complainant states that Respondents’ work on PTOB based tackifiers used completely different process parameters from those used by Complainant to manufacture SP1068. (Citing CX-1566C, Qs. 72-73) Complainant avers that this pre-September 2006 work was a failure. (Citing CX-1592C, Q. 53) Complainant maintains that in a September 23, 2006 email, Sino Legend engineer Yunfeng Fan reported that tackifiers produced according to Sino Legend’s pre-September 2006 process had too large molecular weight distributions and too high monomer content, both of which indicated that Sino Legend’s developmental efforts prior to September 2006 to independently develop a product comparable to Complainant’s SP1068 had failed. (Citing RX-368C at 2; Tr. at 713:19-715:3) Complainant asserts that this

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failure provided the motivation for Respondents to look to high level Complainant employees for assistance.

Complainant says that, on the same day that Respondents received their disappointing test results, Mr. Yang emailed the Sino Legend technical team to rearrange a meeting about {

} so that Complainant's former General Manager, Mr. Lai, could attend. (Citing CX-1219C at 2) Complainant avers that the original plan according to the email was {

(Citing CX-1219C at 2) Complainant contends, however, that Mr. Yang suggested {

(Citing *id.*) Complainant argues that {

(Citing *id.* (emphasis added by Complainant)) Complainant also argues that Mr. Yang's handwritten note that {

(Citing CX-1352.1C at 117:8-19) Complainant says that Respondents hired Mr. Lai to perform consulting services from September 2006 through September 2009. (Citing CX-1109C; CX-1566C, Q. 77)

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Complainant asserts that Respondents also collaborated with Mr. Xu to salvage their failed attempts to develop a PTOP based tackifier. Complainant avers that Respondents formally hired Mr. Xu through three different entities on April 20, 2007. (Citing CX-153C; CX-154C; Tr. at 322:22-323:12) Complainant contends that Respondents gave Mr. Xu “a big increase” in salary. (Citing Tr. 309:20-22) However, Complainant says Respondents’ relationship with Mr. Xu began much earlier.

Complainant asserts that the story of Mr. Xu’s collaboration with Respondents is told by the files accessed and/or recovered from the laptop Mr. Xu used during the time that he worked for Complainant. (Citing CX-1563C, Qs. 46-51; CX-1562C, Qs. 14-21; CX-845C; CPX-0001) Complainant says that Complainant’s computer forensics expert, Michael McGowan, prepared a summary of recent link files accessed by Mr. Xu on his Complainant laptop, including the file names of the opened documents, when they were opened, their location, and the documents’ dates and times (the “Recent Link Files Summary”). (Citing CX-352; CX-1562C, Qs. 20-21)

Complainant asserts that the Recent Link Files Summary indicates that Mr. Xu updated his resume frequently in late March and early April of 2006, but then suddenly stopped after April 12, 2006. (Citing CX-352 at 6, rows 252-259) Complainant says that Mr. Xu’s discontinuation of resume updating coincides with the month that Yang suddenly would not specifically deny having met Mr. Xu. Complainant says that Mr. Yang, who was personally involved in the hiring of Mr. Xu, was asked at his deposition about when he met Mr. Xu, including a series of questions involving specific months and years. (Citing CX-1352.1C at 77:23-78:22; CX-1358C at 50:23-51:21) Complainant says that Mr. Yang specifically denied meeting Mr. Xu as early as September 2005, February 2006, and March 2006; but Mr. Yang did not deny that he might have met Mr. Xu as early as April 2006. (Citing *id.*)

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Complainant states that, at the hearing, Mr. Yang claimed to remember having met Mr. Xu in December 2006 “because it was cold.” (Citing Tr. at 705:5-705:13) However, Complainant says Mr. Yang did not recall this detail at his deposition. (Citing Tr. at 766:14-24) Similarly, Complainant says that Mr. Yang testified in his witness statement that “Counsel for Complainant showed me a document that Xu had on his laptop in December 2006. So that document makes me believe I likely met him at some point in December 2006.” (Citing RX-416C, Q. 326) Complainant avers that at his deposition, however, this document failed to trigger Yang’s memory. (Citing CX-1352.1C at 90:17-91:12) Complainant submits that, other than the document from Complainant’s counsel, Yang was unable to point to any documentary evidence of when the meeting with Xu took place, despite the fact that at least Xu’s resume should have changed hands around that time. (Citing Tr. at 766:1-767:10)

Complainant says that the document that Complainant’s counsel showed to Yang at his deposition is a document with a file name translated {

} (Citing CX-188C; CX-353C) Complainant says that {

}

(Citing CX-353C at 2-4) Complainant states that { } was transmitted from Yunfeng Fan to Yang on December 29, 2006 and last accessed by Mr. Xu on his Complainant laptop on December 30, 2006. (Citing CX-1562C, Qs. 22-27; CX-352 at 5, row 215; CX-353C at 2)

Complainant avers that the { } is a prospective document. Complainant states that it provides a plan for { } (Citing CX-1352.1C

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his testimony, clearly showed the suggestion that he only met Mr. Xu in December 2006 to be wholly lacking credibility. (Citing Tr. at 707:11-712:12 (particularly 711:21-712:12))

Complainant argues that it is much more likely that Mr. Yang and Mr. Xu met earlier in 2006 and more gradually developed their relationship to the point where they were ultimately comfortable sharing highly sensitive information in the latter part of 2006. Complainant avers that other documents accessed on Mr. Xu's laptop suggest just such a sequence of events.

Complainant states that Mr. Xu accessed a SP1068 formula on his laptop on November 4, 2006, just four days before Respondents' records first demonstrate possession of Complainant's technology. (Citing CX-352 at page 6, row 222; CX-653C; CX-1566C, Q. 76) Complainant asserts that the lab scale experiments of November 8 and November 12, 2006 recorded in Yunfeng Fan's notebook reflect copying of Complainant's SP1068 formula, as shown in the following table.

⁷¹ Citing CX-1566C, Q. 74.

⁷² Citing CX-581C; CX-653C.

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Complainant argues that the copying is apparent in the exact match between the parameters called for by Complainant's formulas and the parameters used by Mr. Fan, which are more exact than necessary to make a comparable product. For example, Complainant highlights that Mr. Fan did not merely use { } rather he copied Complainant's { } to the third decimal point. Similarly, Complainant emphasizes that, not only did Fan use the same { } he used these reagents in precisely the same amounts as Complainant. Complainant argues that such an exact replication of Complainant's reagents and reagent { } is extremely unlikely to happen by chance. Moreover, Complainant asserts that it is especially

⁷³ {

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inexplicable considering how far these parameters are from those used by Respondents' before November 2006, prior to collaboration with Mr. Lai and Mr. Xu. Complainant contends that the sudden appearance in SL records of Complainant's process parameters four days after Mr. Xu accessed Complainant's SP1068 formula on his laptop and a little over a month after beginning work with Mr. Lai cannot be a coincidence. Complainant notes that, at trial, Mr. Yang claimed to be {

} (Citing Tr. at 716:6-17) Complainant asserts that the relationship between these events is that they document the transmission of Complainant's formulas, transforming Sino Legend's experimental parameters from those looking nothing like those of Complainant's, to parameters that were substantially identical. Complainant argues that Mr. Xu or Mr. Lai, or both, transmitted Complainant's formulas to Respondents between September and November 2006.

Complainant continues that the table further demonstrates that Respondents continued to use the same process parameters in their { } pilot study and again in their first commercial scale production of SL-1801 in December of 2007. Complainant notes that {

} Complainant asserts that this change is explained by Mr. Xu's investigation into the process parameters used by other Complainant plants in the intervening months. Complainant avers that in March of 2007, Mr. Xu sent an email to an engineer from {

} asking what { } they were using. Complainant says that the answer Mr. Xu received was { }. (Citing CX-604C; Tr. at 464:19-467:12; 617:3-618:24) Complainant maintains that { } (Citing CX-040C at 6; CX-1566C, Q. 26)

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Complainant argues that the sudden appearance of Complainant's SP1068 process parameters in Respondents' records four days after they were accessed by Mr. Xu on his laptop on November 4, 2006 is consistent with Yang's admission that {

} (Citing CX-1352.1C at 90:23-91:21)

Complainant contends that Mr. Xu was clearly involved in {

} and his role included supplying Complainant's SP1068 formula to

Respondents.

Complainant submits that Mr. Xu was intimately involved with the design and construction of the SL plant from a very early stage. (Citing CX-1566C, Q. 77) For example, Complainant says that even before Mr. Xu left Complainant on April 30, 2007, he sent a startup plan to SL. (Citing CX-940C) Complainant avers that, in his startup plan, Mr. Xu assigned himself the task of modifying SL piping and instrumentation diagrams (P&IDs). (Citing CX-940C at 2) Complainant asserts that Mr. Xu's involvement in making suggestions for and modifying Sino Legend's P&IDs likely began at the time that Mr. Xu became involved with Sino Legend's { .} (Citing RX-385C) Thus, Complainant argues that Mr. Xu would have been responsible for {

-.}

(Citing CX-1566C, Qs. 29-31, 71; Tr. at 585:22-586:2; CX-1352.1C at 181:15-182:22; JX-058C)

Complainant contends that in his role as the lead engineer dealing with the P&IDs, Mr. Xu would have had a key role in working with { } to select { } for Sino Legend's plant. (Citing CX-874C; CX-1566C, Qs. 36-38, 62-63; Tr. at 654:22-658:16) Complainant asserts that Mr. Yang's project summary slides suggest that {

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.} (Citing RX-407C at 12 (noting that

{

}

Complainant says that Respondents emphasize that Complainant previously asserted {
} as a trade secret, but that SL uses a different { } (Citing Tr. at 95:10-
13 (“If Jack Xu was copying or if SL was copying, you would see that { } in our { } we
submit.”)) Complainant asserts that this exception to Sino Legend’s copying proves the rule.
Complainant says that Complainant’s Shanghai subsidiary implemented a unique {
} only *after* Xu’s departure, which is why SL was not able to
misappropriate it. (Citing RX-422C, Q. 313)

Complainant notes that Respondents have not produced a single electronic
communication for the critical period, 2005 through April 2007, when Respondents claim to
have independently developed their process for manufacturing SL-1801/2. (Citing Tr. at 701:1-
702:8, 704:16-705:4; CDX-5C; CDX-6C; CDX-7C) Complainant posits that given that
Respondents produced over 400 electronic communications for the calendar year of 2004, the
only explanation for the large gap in Respondents’ production is that Respondents destroyed
their emails for this time period. Complainant states that Mr. Yang could not provide a better
explanation: “I believe there were email exchanges during that gap. However, we have produced
all the documents we could locate.” (Citing Tr. at 702:6-8, 704:25-705:4)

Complainant alleges that such destruction was likely motivated by the unfavorable nature
of Respondents’ emails during the critical time period. Complainant says that two hard copy
print-outs of emails survive from this time period and both are harmful to Respondents’ claims to
have independently developed SL-1801/2. Complainant states that the first hard copy email
shows that Respondents were using process parameters that were nothing like what they used in

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their commercial production of SL-1801 (or like Complainant's) and that they were not obtaining their intended product at the time. (Citing RX-251C; Tr. at 754:18-755:5)

Complainant avers that the second hard copy email shows that Respondents' rearranged a technical preparation meeting { } so that Lai could attend. (Citing CX-1219C at 2) Complainant argues that the emails that have been destroyed likely provide more details regarding Respondents' failure to develop their own process for making PTOB based tackifiers and their receipt of Complainant formulas for SP1068 from Mr. Xu and/or Mr. Lai.

Complainant asserts that when Mr. Xu left Complainant on April 30, 2007, he lied about the identity of his new employer and the nature of his employment to Complainant personnel. (Citing Tr. at 316:4-317:14) On May 8, 2007, Complainant says that Mr. Xu sent an email to Timothy Banach stating that he was going to work for a polyurethane company, which he assured Dr. Banach practiced "a totally different process from Complainant." (Citing Tr. at 316-4-317:3; CX-170C; CX-1565C, Q. 138) Complainant contends that, in fact, Mr. Xu was going to work for SL, which was at that time attempting to develop a competing PTOB based tackifier product. (Citing Tr. at 317:12-14) Complainant avers that Mr. Xu also told Mr. Oliver Lu, the General Manager of Complainant's Shanghai subsidiary, that he was going to work at a company in a different industry that would not compete with Complainant's Shanghai subsidiary in any way whatsoever. (Citing Tr. at 317:4-14; CX-1563C, Qs. 42-45) Complainant argues that Mr. Xu's pattern of lying about his new employment indicates his desire to hide his transmission of Complainant formulas and other confidential information to SL.

Complainant asserts that SL has attempted to cover up { } that was performed using Complainant formulas. Complainant says that the batch records for { } identify the product name as "1068 resin" on at least ten separate pages. (Citing CX-200C at 2-5, 11, 15,

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16, 18, 19, 26-29, 33, 35, 39, 40, 42, 43) Complainant argues that Respondents later decided that such obvious evidence of copying “might not be appropriate” and so whited out “1068 resin” from all ten pages on which it appeared. (Citing CX-201C at 1-4, 12, 14, 20, 21, 23, 24; Tr. at 771:10-772: 24; SDX-6C; CX-200C at 2 and 26; CX-201C at 1; CX-1592C, Q. 32)

Complainant argues that the fact that Respondents whited out “1068 resin” in batch records { } shows that Respondents felt the need to conceal the fact that the purpose { } was to copy Complainant’s SP1068 process. Complainant reasons that this suggests that the copying was done illicitly (and not, for example, based on publicly available information).

Complainant asserts that Respondents’ denials of culpability because both versions of the documents were produced rings hollow. (Citing Tr. at 771:14-772:5) Complainant states that Respondents have been engaged in litigation with Complainant over trade secret misappropriation since 2009 and are embroiled in a parallel litigation in China currently. Complainant argues that, although Respondents’ counsel in the ITC investigation may have promptly produced the original along with the tampered evidence in this one instance, Respondents’ demonstrated willingness to tamper with evidence speaks volumes regarding the mass of missing evidence from the critical 2005 to April 2007 time frame. Complainant contends that the tampered with batch records strongly suggest that other similarly compelling evidence of misappropriation previously existed in the emails that are mysteriously missing from 2005 through April 2007.

Complainant states that, prior to trial, Respondents’ claimed that { } (Citing RX-416C, Q. 153) Complainant asserts that this claim was obviously false

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and flatly contradicted by page 29 in Pu's notebook, {

} (Citing CX-1566C, Q. 71;

CX-1592C, Qs. 13-30) Complainant submits that, aware of the problems with this page,

Respondents took two measures: (1) they provided a mistranslation of this page, (citing CX-

1566C, Q. 71); and (2) they tore the page into pieces, (citing CX-1592C, Qs. 31-32, CX-1585C).

With respect to the mistranslation, Complainant states that Respondents provided a generally high Quality translation of Pu's notebook that nevertheless mistranslated page 29 such that {

} (Citing CX-1566C, Q. 71) Complainant

says that the translation stated {

} (Citing *id.*) Complainant argues that this

demonstrates Respondents' awareness of the falsity of Yang's testimony and Respondents'

active attempts to conceal the lie.

With respect to the page ripping, Complainant asserts that it prejudiced Complainant because Complainant's counsel was thereby deprived of an opportunity during Pu's deposition to inspect that page, ask about possible alteration with respect to a current translation dispute regarding that page, or ask about writing that may have existed on the other side. (Citing CX-1592C, Q. 32) Complainant alleges that the primary purpose of the page ripping was likely to destroy evidence that could be used in future or parallel litigations. Complainant maintains that it would never have found out about the page ripping if Mr. Pu's deposition had not been ordered, and Respondents were likely counting on that. Complainant alleges that the page ripping is yet another example of Respondents' continued efforts to destroy critical evidence and, as such, it strongly suggests that any document from 2005 through April 2007 that would have provided

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explicit evidence of misappropriation would have been destroyed by Respondents consistent with their practice of destroying evidence that they believe is harmful to them.

Respondents' Position: Respondents assert that, according to Complainant's own witnesses, Complainant maintains strict control over its formulas and has established a special procedure to log and record whether someone had requested and received Complainant formulas. Respondents submit, however, that none of Complainant's witnesses could point a single document showing that Mr. Xu or Mr. Lai ever received any pre-2000 Complainant formula for { } from Complainant's Rotterdam Junction facility.

Regarding Complainant's document control procedure, Respondents aver that both Mr. McAllister and Dr. Banach testified that Complainant has a special procedure for requesting and granting of access to Complainant formulas:

Q. And part of the document control process that you're aware of from Rotterdam Junction is that if somebody wanted to look at a formula, they had to request it and approval had to be granted for somebody to look at the formula; right?

A. Yes.

(Citing Tr. at 223:23-224:4 (McAllister); CX-1569C (McAllister), Q. 18, 21-23)

Q. Now, Complainant, according to your witness statement, keeps its formulas for making its products highly secret; right?

A. That's true.

Q. Some of these formulas are under lock and key; right?

A. They're controlled in a procedure.

Q. There's a special procedure, and somebody needs to ask for access, and there's a record as to who's requesting it and who's getting it. Right?

A. That's correct.

(Citing Tr. at 174:20-175:6 (Banach)) Respondents contend that, according to Complainant's own expert, Dr. Chao, this approval process includes {

}

Q. Now, you do discuss Complainant's protection of confidential

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information in your witness statement. Is it your understanding that
Complainant has {

A. Yes. }

(Citing Tr. at 449:6-449:10 (Chao)) Respondents submit that, according to Complainant's Mr.
McAllister, Complainant {

Respondents say Mr. McAllister testified:

Q. Well, sir, as a result of Complainant's security procedures at
Rotterdam Junction, the company {

}

(Citing Tr. at 224:14-225:1 (McAllister)) Respondents asserts that, despite these security
procedures and records, Complainant failed to come forward with any record that shows that
Jack Xu or C.Y. Lai ever requested, received, or laid eyes on any of its pre-2000 formulas (and
in particular, formulas { } Respondents contend that
Complainant also has not shown that any pre-2000 formulas were ever transferred to
Complainant China. Respondents aver that Complainant did not use its formulas {
} after 2000, and Complainant never used these formulas in its facilities
in China. (Citing CX-1565C (Banach WS), Q. 58; Tr. at 174:3-9 (Banach))

Respondents say that, upon cross-examination, Complainant's Dr. Banach, Mr.
McAllister, and Dr. Chao all conceded that they could not point to any evidence showing that
Mr. Xu or Mr. Lai actually saw Complainant's pre-2000 formulas:

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Q. And you don't have any records of C.Y. Lai or Jack Xu or anyone else at Sino Legend ever having laid eyes on { } correct?

A. I honestly don't know....

(Citing Tr. at 175:7-11 (Banach))

Q. So on Page 14 of your witness statement in response to Question 63, you are asked, "Do you believe that Jack Xu would have been familiar with the process parameters {

} Answer: "Yes."

And then you talk about training that he received. But, sir, you don't refer to any evidence that Jack Xu ever laid eyes onto a formula { } correct?

A. I don't know what he laid eyes on personally

Q. The same goes for C.Y. Lai: You don't have any evidence, any record that C.Y. Lai ever laid eyes onto the formulas { } correct?

A. I don't know.

(Citing Tr. at 176:6-19 and 21-25 (Banach)) Respondents submit that, Mr. McAllister also could not produce a single piece of paper showing such transfer or that Mr. Xu or Mr. Lai were provided the formulas { } despite his testimony that {

}

Q. But you haven't shown us any piece of paper indicating that either of those gentlemen were provided a formula { } correct?

A. I have not, correct.

(Citing Tr. at 224:21-225:1, 227:3-7 (McAllister)) Respondents aver that, Dr. Chao, likewise, could not point to any corroborated evidence of actual receipt of Complainant's { } formulas by Mr. Xu or anyone else at Sino Legend:

Q. Now, you have not seen any evidence that Mr. Xu or anyone else at Sino Legend ever laid eyes on any formula that's { } right?

A. We did not have direct evidence.

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(Citing Tr. 448:25-449:10 (Chao)) Respondents argue that Dr. Chao's admission is all the more damaging to Complainant's position, because he was challenged to point to such evidence at his January 2013 deposition and was unable to do so. In particular, Respondents say that Dr. Chao acknowledged his testimony at his deposition during which he repeatedly admitted that he has not seen any evidence of Jack Xu or anyone else at Sino Legend actually seeing Complainant's pre-2000 formulas:

Q.: Well, have you seen any evidence whatsoever that Jack Xu or anyone else at Sino Legend ever laid eyes on any of the pre-2000 formulas that are listed in Dr. Hamed's Paragraph 20?

A: Pre-2002, pre-2000?

Q.: Pre-2000 formulas that are listed in Dr. Hamed's –

A: We have no evidence of that, but mainly the evidence to show that Jack Xu is from the batch card in the computer, mainly is {
.
}

Q.: Okay. Just to be clear, you have no evidence that Jack Xu or anyone else at Sino Legend ever saw the batch cards {
.
} dated prior to the year 2000. Right?

A: That's basically what we know. That's correct. And, however, based on the current 2004 Shanghai plant, it very easy to think of the – {
.
}

Q.: I just wanted to be clear about this one single point. You are not aware of any evidence that Jack Xu or anyone else at Sino Legend ever saw the -- any Complainant batch card dated prior to the year 2000. Right?

A: It's hard to say for me as a witness and it's from circumstantial evidence, I don't know. But he's involved in all of these important team, as a leaders, and he may get a chance to get access to the U.S. report.

Q.: You haven't seen any evidence of that, though; right?

A: I have not really physically seen anything.

Q.: Sir, were you asked those Questions and did you give those answers during your deposition?

A: Yes.

(Citing Tr. at 450:16-452:8 (Chao)) Respondents argue that, despite having three months to further augment its proof, Complainant failed to present any evidence on this central point at trial.

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Respondents contend that the best Complainant could muster is an email string on which Mr. Lai was copied that { } (Citing CX-753C; CX-1569C (McAllister WS), Q. 71-74) Respondents assert that email provides no formulas or process parameters, and it does not indicate that { } was ever provided to anyone in China, let alone Mr. Lai. Respondents assert that no record of transfer of these formulas had been adduced in this investigation, despite Complainant's strict procedure for { }.

Similarly, Respondents argue that testimony that Mr. Xu "would have known" the people at Complainant who { } to his membership in Complainant's Manufacturing Integration Team (MIT) also falls short. (Citing Tr. at 205:8-18 (discussing Q. 52 of CX-1565C (Banach)); CX-1569C (McAllister WS), Q. 59) Respondents aver that, despite Complainant's assertion that the MIT { } Complainant did not produce a single meeting minute or email showing that its { } were actually shared with Mr. Xu by the MIT. (Citing CX-1569C (McAllister WS), Q. 59) Respondents contend that Complainant also could not point to any documents { } allegedly accessible by Mr. Xu that refer to Complainant's { }

In sum, Respondents assert that Complainant cannot point to a single document evidencing access by Mr. Xu or Mr. Lai to { } or any other pre-2000 formula, including those { } Respondents argue that Complainant has thus failed to satisfy its burden of proving that Mr. Xu or Mr. Lai learned of any of the specific pre-2000 formulas that { } Respondents contend that gap is fatal to any Complainant claim of

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misappropriation based on those formulas because Mr. Xu and Mr. Lai were not in a position to disclose formulas that they had never seen.

Staff's Position: Staff argues that Jack Xu had access to Complainant's trade secrets. Staff avers that, as Plant Manager at Complainant's Shanghai subsidiary from June 2006 through April 2007, Jack Xu served in a key role and was in charge of the manufacturing operations for the SP1068 tackifier product at Complainant's Shanghai subsidiary. (Citing CX-1563C (Lu Witness Stmt.), Qs. 10-16) Staff asserts that he had full access to Complainant's confidential technical trade secrets, received training from Complainant, collaborated with members of the elite Manufacturing Integration Team on "best practices," and he was aware of the importance of those secrets to Complainant's business. (Citing *id.*; Tr. at 306:16 to 307:20; 308:2 to 310:1; 311:1 to 315:7; 325:13 to 316:14) Staff submits that, in his capacity as Plant Manager, Mr. Xu had access to Complainant's file room, which contained Complainant's confidential manufacturing formulations, among other confidential technical documents. (Citing CX-611C (Complainant's Shanghai subsidiary lending records showing that several documents were lent out to Jack Xu.); CX-1563C, Qs. 21-29)

Staff states, for example, that in his capacity as Plant Manager, Mr. Xu had access to Complainant's formulas for { } (Citing CX-756C (June 9, 2004 email from Fenny Fan to Jack Xu transmitting, as attachments, Complainant's Shanghai subsidiary's first formulas for {

} Tr. at 245:25 to 246:23 (McAllister testimony that new formulas go to General Managers first, such as C.Y. Lai, and then automatically to the "core team" that included Jack Xu))

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Furthermore, Staff says that Mr. Xu was a member of Complainant's Manufacturing Integration Team (MIT) and, through the MIT, Jack Xu had access to Complainant's tackifier technology from Complainant's plants around the world, including from the U.S. and France. (Citing CX-151C (December 21, 2005 email in which Xu expresses his gratitude for "this trust you give" in making Mr. Xu a member of the MIT); CX-152C and CX-1032C (email chain from April 2006 between members of the MIT)) Staff avers that, on April 14, Mr. Xu received MIT distribution emails, including {

} (Citing CX-171C (January 2007 email from Xu to a number of Complainant's Shanghai subsidiary personnel and Complainant's U.S. engineers)) Staff says that, in this email, Mr. Xu expresses his gratitude for the "endless support[] from [Complainant, U.S.] at any time and by any means, on every aspect."

Staff says that Jack Xu, executed a Labor Contract, which contains nondisclosure provisions. (Citing CX-317C; CX-1569C, Q. 24) Staff says he also signed a Non-Disclosure Agreement and a Supplementary Agreement. (Citing CX-318C; CX-319C) Staff avers that Jack Xu further signed an agreement to abide by the Complainant China Employee Manual (i.e., the "Employee Handbook"). (Citing CX-320C)

Staff maintains that Mr. Xu understood that the batch cards and other Complainant/Complainant's Shanghai subsidiary manufacturing related documents were to be kept confidential and were subject to strict confidentiality requirements. (Citing CX-1569C (McAllister Witness Stmt.), Qs. 18-24; Tr. at 325:7 to 326:14) Staff asserts that, although Complainant required its employees to sign confidential nondisclosure and non-compete agreements when leaving the company, including those employees at Complainant's Shanghai

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subsidiary, Jack Xu refused to discuss signing an exit agreement. (Citing CX-1563C (Lu Witness Stmt.), Qs. 39-45) Staff submits that Mr. Xu refused to sign a post-employment confidentiality agreement shortly before he left to work for Respondents.

Staff argues that the evidence shows that C.Y. Lai was the General Manager of Complainant's Shanghai subsidiary from the inception of Complainant's China operation through February 28, 2005. (Citing CX-1563C (Lu Witness Stmt) at 24; CX-1566C (Chao Witness Stmt.) at 46) Staff asserts that, in his capacity as general manager, C.Y. Lai had full access to all confidential information in possession of Complainant's Shanghai subsidiary including the Complainant trade secrets. (Citing CX-1563C at 24) Staff submits that this information included alkylphenol and SP1068 manufacture formulations from the U.S. and from China. (Citing *id.*; CX-1565C (Banach Witness Stmt.) at 30)

Staff avers that, according to the Complainant's Shanghai subsidiary Intellectual Property Protocol, C.Y. Lai, as the general manager at Complainant's Shanghai subsidiary, was responsible for maintaining the confidentiality of the product formulas. (Citing CX-1569C (McAllister Witness Stmt.) at 18) Staff contends that the tackifier formulas used at Complainant's Rotterdam Junction facility were sent to Complainant's Shanghai subsidiary, and specifically to C.Y. Lai, in accordance with Complainant's Intellectual Property Protocol. (Citing CX-697C (document control policy document); CX-1565C at 30) Staff submits that C.Y. Lai received a number of these formulas for making {

} in connection with starting up the Shanghai plant. (Citing *id.*) For example, Staff says that the Rotterdam Junction formula { } was sent to C.Y. Lai on May 12, 2003. (Citing CX-770C (May 12, 2003 formulation request))

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Staff argues that the evidence shows that C.Y. Lai knew that Complainant used {
} in the manufacture of SP1068 and SP1068 related products at the RJ
plant. (Citing CX-1565C at 30; CX-753C (June 24, 2003 email from James Huang to C.Y. Lai))
Staff avers that C.Y. Lai participated in a June 2003 email chain wherein {
} was discussed. (Citing CX-753C (June 24, 2003 Email from James Huang to
C.Y. Lai))

Staff argues that the evidence shows that Respondents obtained access to the SP1068
trade secrets and wrongfully took them by unfair means by hiring two former, senior
Complainant's Shanghai subsidiary employees that it now employs or has employed. Staff notes
that Respondents say that they recruited Jack Xu while he was Complainant's Shanghai
subsidiary's Plant Manager. Staff avers that, as Plant Manager at Complainant's Shanghai
subsidiary, Mr. Xu had full access to the entire Complainant trade secret processes for making,
e.g., SP1068. (Citing SIB Section E.1; CX-1565C (Banach), Qs. 132-138) Staff says that during
discovery, Complainant learned that Respondents had earlier recruited and hired another senior
employee of Complainant's Shanghai subsidiary, Mr. C.Y. Lai, who as General Manager also
had full access to the entire trade secret processes for making, *e.g.*, SP1068. (Citing SIB Section
E.2; CX-1565C (Banach), Qs. 130-131)

Staff asserts that the evidence shows that Mr. Quanhai Yang and Sino Legend ZJG
wrongfully obtained Complainant's trade secrets by unfair means from Mr. Jack Xu who was
likely the primary link for the misappropriation of Complainant's trade secrets by the
Respondents. Staff contends that the evidence supports a motive for Sino Legend ZJG to entice
Mr. Jack Xu to conspire against Complainant. Staff avers that, after meeting together, Mr. Yang
incentivized Mr. Xu to bide his time for his last 5-6 months at Complainant, after Complainant

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entrusted him with promotion to Complainant's Shanghai subsidiary Plant Manager and responsibility as a member of the elite MIT, to then join a newly formed competitor in Sino Legend ZJG. (Citing Tr. at 311:24 to 312:4; 319:22 to 320:16) Staff says that Sino Legend ZJG had invested millions of dollars in a feasibility study and in a manufacturing plant from late 2005 to 2007 in order to replicate Complainant's industry leading SP1068 tackifier resin by December 2007. (Citing RX-416C (Yang Witness Stmt.), Qs. 18-23, 333-334; RX-407C (Sino Legend project summary); CX-1184C (feasibility study))

Staff asserts that the evidence shows that Sino Legend failed to independently develop a successful product based on Mr. Pu's early research, as reflected by {

}

As a result, Staff avers that Sino Legend resorted to recruiting Complainant's Shanghai subsidiary's Plant Manager, who had access to, and was knowledgeable about, the manufacturing process for SP1068. Thus, Staff reasons that it was through its hiring of Mr. Jack Xu that Sino Legend was able to meet its corporate deadline of December 2007 for commercially manufacturing SL-1801, its "knock-off" copy of SP1068.

Staff says that Mr. Yang used { } to recruit Jack Xu. (Citing RX-416 (Yang Witness Stmt.), Qs. 321-326) Staff states that Mr. Yang testified that he and Sang interviewed Xu once sometime in the winter of 2006. (Citing *id.*, Q. 326) Staff notes that Mr. Yang, however, testified that he could not pinpoint the alleged one date that he met with Mr. Xu. (Citing *id.*) Staff avers that a forensic analysis of Mr. Xu's Complainant laptop, however, uncovered an email from Sino Legend to Jack Xu on/around December 30, 2006, which contained at least some Sino Legend confidential information pertaining to { }

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making SL-1801. (Citing CX-1562C (McGowan Witness Stmt.), Qs. 15, 18-27) Thus, Staff contends that Mr. Yang must have met with Mr. Xu before then, and likely much earlier.

Staff says that Mr. Xu was initially an employee of { } which was hired by Sino Legend ZJG to design and manufacture its plant in Zhangjiagang. (Citing Tr. at 322:25 to 323:12; CX-154C (ZZPE contract)) Staff avers that Mr. Xu joined Respondents {

} with a substantial increase, potentially doubling his salary. (Citing Tr. at 324:10-16; 330:16 to 331:4)

Staff states that Mr. Xu testified that he first worked in Hangzhou on a polyurethane process instead of directly working with Sino Legend. Staff asserts, however, Respondents and Mr. Xu have no corroborating documents to prove this, and the evidence more likely than not reflects that Mr. Xu hid from Complainant his intentions of working for a direct competitor in violation of his contractual obligation to Complainant. Thus, Staff argues that Mr. Xu's hiring was part of Mr. Yang's plan to misappropriate Complainant's SP1068 trade secrets in order to steal business from Complainant and Complainant's Shanghai subsidiary. (Citing Tr. at 316:4 to 317:14; 319:22 to 321:6)

Staff avers that, although he may have worked for { } Mr. Xu negotiated with { } and indirectly with Mr. Quanhai Yang and { } to receive greater compensation by having { } pay him his salary and pension contributions, in addition to paying him a housing allowance in Shanghai. (Citing Tr. at 331:5 to 333:6) Staff says that, later, Mr. Xu joined Shanghai Red Avenue Investment Group Company Limited as a Vice President. (Citing Tr. at 324:10-16)

Staff states that, as an Complainant's Shanghai subsidiary employee, Xu had a duty to maintain confidentiality with regard to Complainant's confidential information, and he had

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signed a number of Complainant's Shanghai subsidiary/Complainant forms imposing nondisclosure and confidentiality requirements on him. (Citing CX-1563C, Qs. 30-37; RX-203; Tr. at 284:17-285:10) Staff asserts that, as a former employee, he had a duty not to use or disclose the trade secrets that he had accessed while employed at Complainant's Shanghai subsidiary. (Citing Restatement (Third) Unfair Competition § 42) Staff contends that, because aspects of Complainant's designated technical information qualify for protection as trade secrets, any former Complainant or Complainant's Shanghai subsidiary employee who used those formulas and manufacturing processes to create competing Red Avenue and/or Sino Legend products, or disclosed those files and documents to other Respondents, "is subject to liability for appropriation of the trade secret[.]" (Citing *id.*) In spite of his contractual and ethical obligations to Complainant and Complainant's Shanghai subsidiary, Staff argues that the weight of the evidence shows that Mr. Xu disclosed Complainant's trade secrets to Respondents at least while still working for Complainant's Shanghai subsidiary and his disclosures to Respondents more than likely continued after leaving Complainant's Shanghai subsidiary in late April 2007 while employed with one or more of the Respondents. Staff submits that the evidence that Mr. Xu had communications with Sino Legend while still employed by Complainant's Shanghai subsidiary, and the fact that he later joined Shanghai Red Avenue, weigh against Mr. Xu's self-serving testimony that he worked for { } on an unrelated process when he left Complainant's Shanghai subsidiary.

In the Staff's view, the evidence shows that at least Sino Legend ZJG used Complainant's trade secrets obtained from Jack Xu to make tackifier products that competed directly with, and/or will compete directly with, Complainant products in the U.S. market. Staff says that Dr. Chao states that "[t]he access of these employees [Jack Xu and C.Y. Lai] to

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Complainant's trade secrets and their employment with Sino Legend and/or affiliated entities further reinforces my conclusion that Sino Legend copied Complainant's technology." (Citing CX-1566C, Q. 77)

Staff argues that, although both Mr. Yang and Mr. Xu attempted to deny any misappropriation of Complainant's trade secrets, the evidence shows that Mr. Yang wrongfully acquired Complainant's trade secrets from Mr. Xu, who had full access to Complainant's technology, and that Mr. Yang more likely than not enticed Mr. Xu with economic incentives to share Complainant's trade secrets with his future employer Sino Legend ZJG. (Citing Tr. at 306:16 to 307:20; 308:2 to 310:1; 311:1 to 315:7; 325:13 to 316:14; *see* CX-1566C (Chao Witness Stmt.), Qs. 76-77) For example, Staff avers that a summary of the evidence shows that:

- Respondents were already communicating with Mr. Xu while he was still employed at Complainant's Shanghai subsidiary, on at least Sino Legend's important pilot study {
} Staff says that Mr. Xu had a Complainant laptop during the time that he worked for Complainant, and the laptop was analyzed by forensic experts to confirm Mr. Xu's communications with Sino Legend personnel. (Citing CX-187C (data recovered from Mr. Xu's laptop shows that on page 8, row 4, Mr. Xu accessed a file called "pilot study.doc", which matches the file name of a document drafted in preparation for Sino Legend's December 2006 pilot study.); CX-188C and CX-189C. (text from the "pilot study.doc" document that was found on Mr. Xu's laptop))
- Respondents obtained from Mr. Xu while he was still employed at Complainant's Shanghai subsidiary a copy of Complainant's FM-02-SOP-MFG-426 SP1068 formula for the manufacture of SP1068 that was present on his Complainant laptop on November 4, 2006, just four days before the first experiments in Yunfeng Fan's notebook that demonstrate possession of Complainant's trade secrets and other technology. (Citing CX-187C at 7; CX-653C (copy of this SP1068 formula))
- Respondents enlisted Mr. Xu to work for Respondents as soon as possible while Mr. Xu was still employed at Complainant's Shanghai subsidiary. For example, Staff avers that, while still employed at Complainant's Shanghai subsidiary, Jack Xu had already obtained a Sino Legend company email account from which he communicated with Respondents, and from which he attached/transferred confidential technical documents to emails and sent emails to Respondents Yang, etc. Staff says that these files included Complainant's batch files. (Citing CX-1566C (Chao Witness Stmt.), Q. 76 & exhibits cited therein)

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- Respondents enlisted Mr. Xu to become intimately involved in starting up the new Sino Legend plant while Mr. Xu was still employed at Complainant's Shanghai subsidiary. (Citing CX-642C (email from Xu to a general manager of Sino Legend, Jianhui Zhou, sending an attachment for review.) Staff says that this email was sent by Mr. Xu on April 26, 2007, four days before Mr. Xu's last day at Complainant, using his "jack.xu@sinolegend.com" account. Staff says that the attachment is "startup plan-SL1.xls." Staff states that the startup plan shows that Mr. Xu is a member of the management team of the new plant and that he is assigned the task of modifying Sino Legend piping and instrumentation diagrams (P&IDs), i.e., diagrams relating to Sino Legend's process flow.
- Respondents enlisted Mr. Xu to cover-up his intentions to work for a direct competitor in Sino Legend. Staff states that, when Mr. Xu left Complainant's Shanghai subsidiary, he denied that he was leaving to join a competitor. (Citing CX-1563C, Q. 42) Staff avers that he refused to accept any compensation from Complainant's Shanghai subsidiary in recognition of his non-compete obligations, stating that he had found a better job, and that he had no intention of going to a company that would compete with Complainant's Shanghai subsidiary in any way. (Citing *id.*) Staff avers that Mr. Xu told Oliver Lu, Complainant's Shanghai subsidiary's General Manager, that Mr. Xu would be going to "go to another arena." (Citing CX-1372C; CX-170C; CX-1563C (Lu Witness Stmt.), Q. 44) Staff says that Oliver Lu testified that in Jack Xu's exit interview, he "refused to talk about anything on [the noncompetition agreement,]" and that Mr. Xu represented that he was "going to a completely unrelated field." (Citing Tr. at 288:1-14)
- Respondents attempted to hide Mr. Xu's involvement with Sino Legend by hiring him through { } Staff avers that, after leaving employment with Complainant at the end of April 2007, Mr. Xu ultimately signed contracts with entities affiliated with Sino Legend and worked at Sino Legend's Zhangjiagang plant. (Citing CX-938C: April 18, 2007 email from Albert Shih to Xu transmitting drafts of employment agreements with { } respectively, and a secondment agreement with { } CX-153C: { } dated April 20, 2007, and { } effective May 8, 2007)
- Respondents wrongfully obtained Complainant confidential information from Mr. Xu on other products than just SP1068. Staff asserts that, while with Sino Legend, Mr. Xu shared his knowledge regarding Complainant's technology with Sino Legend personnel. (Citing CX-645C: August 4, 2010 email providing meeting minutes for a meeting that Mr. Xu attended with Ning Zhang, Quanhai Yang, Shi Fei, and other Sino Legend and Red Avenue employees. Staff says that the meeting minutes record that "Mr. Xu and Dr. Raj discussed the formula and production process for Schenectady International's 7530 product") In view of this evidence, Staff argues that Mr. Yang's testimony that Sino Legend has and enforces confidentiality provisions in employment agreements to prevent Sino Legend employees from sharing confidential information from their previous employers is not persuasive. (Citing Tr. at 769:2 to 770:3)

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Thus, in the Staff's view, the evidence shows that Respondents and Mr. Xu conspired to misappropriate and use Complainant's trade secrets.

Staff contends that the evidence shows that Mr. Quanhai Yang and Sino Legend ZJG wrongfully obtained Complainant's trade secrets by unfair means from Mr. C.Y. Lai. Staff asserts that, although Respondents failed to provide much discovery relating to the parties communications during the consulting arrangement that Respondents had with Mr. C.Y. Lai, the evidence reflects the same motivation by Sino Legend to meet their corporate deadline of December 2007 for commercially manufacturing a "knock-off" copy of SP1068, as described above with Mr. Jack Xu. Staff states that Sino Legend earlier recruited Complainant's Shanghai subsidiary's General Manager, Mr. C.Y. Lai who had broad knowledge of Complainant's confidential information including the manufacturing process for SP1068 at Complainant's Shanghai subsidiary. (Citing RX-416C (Yang Witness Stmt.), Qs. 18-23, 333-334; RX-407C (Sino Legend project summary); CX-1184C (feasibility study)) In Staff's view, the evidence shows that C.Y. Lai was the General Manager of Complainant's Shanghai subsidiary from the inception of Complainant's China operation through February 28, 2005. (Citing CX-1563C (Lu Witness Stmt), Qs. 17-18; CX-1566C (Chao Witness Stmt.), Q. 77; CX-1565C (Banach Witness Stmt.), Q. 131)

Staff avers that, as a Complainant's Shanghai subsidiary employee, Mr. C.Y. Lai had a duty to maintain confidentiality with regard to Complainant's confidential information, and he had signed a number of Complainant's Shanghai subsidiary/Complainant's forms imposing nondisclosure and confidentiality requirements on him in the future. (Citing CX-1563C, Qs. 30-37; RX-203; Tr. at 284:17-285:10) Staff says that Mr. C.Y. Lai was required to sign confidentiality and invention assignment agreements. (Citing CX-1569C (McAllister Witness

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Stmt.), Q. 19) Staff states that Exhibit CX-552C includes the employment contract for C. Y. Lai and its attachments. (Citing *id.*) Staff asserts that it shows that both agreement and invention assignment agreements were part of the employment agreement that C.Y. Lai signed when he accepted the job from Complainant. (Citing *id.*) Staff argues that, as a former employee, he had a duty not to use or disclose the trade secrets that he had accessed while employed at Complainant's Shanghai subsidiary. (Citing Restatement (Third) Unfair Competition § 42)

Beginning in September 2006, Staff says that Mr. C.Y. Lai began consulting for Red Avenue Chemical Co. Ltd., which is an entity that works in close connection with Sino Legend. Staff says Exhibit CX-1109C is C.Y. Lai's Consulting Agreement with Shanghai Red Avenue Chemical Co. Ltd., effective September 1, 2006 to August 31, 2009. Staff asserts that the evidence shows that C.Y. Lai { .}

Staff says that Exhibit CX-1219C is an email chain from September of 2006. Staff states that the first email is from Dongshen Liu on September 21, 2006 to Quanghai Yang, Xiangdong Sang, and Ning Zhang, copying Sino Legend technical personnel such as Yunfeng Fan and Qijun Pu. In this email, Staff says that Mr. Liu states that "a technical preparation meeting will be conducted in the factory next Monday, September 25, to work out the specific procedures for the [pilot] test." Staff states that Mr. Quanghai Yang replies on September 22, 2006, stating that: "As we will be meeting in RA on the 26th (as suggested by CY) and accompanying CY to visit TYC on the 27th, and Teacher Pu is also required to be present, my suggestion is that we meet on the 28th; otherwise it will be too taxing if we have to go to TYC on the 25th, come back on the 26th, and then go again on the 27th." Staff observes that handwriting on this email from Quanghai Yang states: "Note: CY is the former General Manager of Schenectady." Staff contends that Mr.

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Yang considered Mr. C.Y. Lai's knowledge from Complainant beneficial to early manufacturing of SL-1801.

In the Staff's view, these examples are strong circumstantial evidence that Respondent Sino Legend ZJG wrongfully took and then used Complainant's trade secrets, particularly through Jack Xu and C.Y. Lai. Staff avers that both Mr. Xu and Mr. Lai had access to Complainant's trade secrets, and Sino Legend had direct access to Mr. Xu and Mr. Lai.

In its reply brief, Staff says that Respondents contend that "SI cannot show access by Mr. Xu or Mr. Lai to [SI Group's] pre-2000 formulas." (Citing RIB at 79) Staff asserts that Respondents, however, admit that Xu had access to the exemplary SP-1068 batch cards for {
} while at Complainant. (Citing RIB at 26-27
("Respondents do not dispute that Jack Xu and C.Y. Lai saw {

}

Staff contends that there is evidence that Mr. Xu and Mr. Lai had broad access to Complainant's existing and past formulations for SP-1068 as well as for other Complainant products as a requirement of their high levels within Complainant's Shanghai subsidiary, as Plant Manager and General Manager, respectively. (Citing SIB at 57-58) Furthermore, Staff is of the view that circumstantial evidence points to both Xu and Lai having access to and obtaining additional confidential knowledge of the information contained in the earlier Complainant batch cards, documents and communications. Staff argues that this broad information would reflect {

} and general variations involved in

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the SP-1068 process over the years. (Citing CX-1570C (Hamed Witness Stmt.), Qs. 73-80; CX-1566C (Chao Witness Stmt.), Qs. 76-77)

Staff asserts that the evidence shows that based on this broad access to Complainant's current and past SP-1068 technology, the circumstantial evidence shows that both Xu and Lai presented Sino Legend with alternative modifications to Complainant's current manufacturing process for SP-1068. (Citing *id.*; SIB at 57-59, 63-67) Staff contends that because Sino Legend intended early on to misappropriate Complainant's trade secrets through the hiring of C.Y. Lai and then Jack Xu, the evidence supports a conclusion that Sino Legend attempted to distance its "copycat" product from the exact SP-1068 formula in order to later argue for independent development. Staff submits that the causal nexus has already been established (and cannot be broken) as shown by Dr. Chao's direct comparison between the SP-1068 trade secrets and Sino Legend's initial process described in Mr. Fan's November 2006 lab notebook entries. Thus, Staff argues that it is clear that Sino Legend's later modifications and alleged "improvements" are directly derived from Complainant's original SP-1068 trade secrets. (Citing *Mangren*, 87 F.3d at 944 (Misappropriation of trade secrets includes potentially independent modifications or derivations when still based on the original trade secrets.)) Staff argues that the evidence, therefore, shows that Respondents misappropriated valuable information that it used to gain a head start in modifying and/or even improving upon the SP-1068 process.

Staff continues that Respondents conveniently fail to address the overwhelming direct and circumstantial evidence and testimony that shows that Respondents obtained access to the SP-1068 trade secrets and wrongfully took them by unfair means by hiring two former, senior Complainant's Shanghai subsidiary employees that it now employs or has employed. (Citing SIB at 63-73)

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In summary, Staff argues that the evidence shows the following:

{

}

(3) Sino Legend contacted Mr. Xu while he was employed by Complainant. (Citing CX-1562C (McGowan Witness Stmt.), Qs. 15, 18-27);

(4) Mr. Yang created strong financial incentives for Mr. Xu to leave Complainant. (Citing Tr. at 311:24 to 312:4; 319:22 to 320:16; 324:10-16; 330:16 to 333:6);

(5) Mr. Xu breached his duty of confidentiality to Complainant by disclosing Complainant's trade secrets to Respondents during his employment with Complainant, and likely afterwards as well. (Citing CX-1562C (McGowan Witness Stmt.), Qs. 15, 18-27; SIB at 63-67);

{

}

Thus, in the Staff's view, the evidence shows that Respondents, with Mr. Lai and Mr. Xu's assistance, misappropriated and used Complainant's trade secrets.

Analysis and Conclusions: The third factor of trade secret misappropriation requires that the complainant disclosed the trade secret to respondent while in a confidential relationship or that the respondent wrongfully took the trade secret by unfair means. As discussed in detail below, I find that Complainant has shown by a preponderance of evidence that Mr. Xu and Mr. Lai, two high-level employees at Complainant's Shanghai subsidiary had unquestioned access to Complainant's trade secrets in the normal course of their employment. Despite signing confidentiality and noncompetition agreements with Complainant's Shanghai subsidiary, Mr.

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C.Y. Lai and Mr. Jack Xu eventually left to work for Respondents, where Respondents wrongfully took Complainant's SP1068 trade secrets by unfair means.

a. Complainant Confidentially Disclosed Alleged SP-1068 Trade Secrets to Mr. Xu and Mr. Lai

Mr. Lu, the General Manager of Complainant's Shanghai subsidiary, testified that Mr. C.Y. Lai served as the first General Manager of Complainant's Shanghai subsidiary until he left around February 2005. (CX-1563C, Q. 17) Mr. Lu testified that Mr. Lai was the General Manager of Complainant's Shanghai subsidiary before him. (Tr. at 280:4-11) A letter from Complainant to Mr. Lai, dated August 24, 2004, confirms that Mr. Lai's employment agreement commenced on July 1, 1999. (CX-551C) An email from Complainant, dated July 28, 2000, attaches Complainant's "most recent job announcements," and indicates that Mr. Lai joined Complainant as General Manager in Shanghai, China. (CX-550C) Also, Mr. McAllister, manager of global manufacturing at Complainant, testified that Mr. Lai's employment with Complainant commenced on July 1, 1999. (CX-1569C, Q. 69)

Mr. Lu testified that all of Complainant's Shanghai subsidiary employees who were given access to confidential information were required to sign confidentiality agreements. (CX-1563C, Q.30) Mr. McAllister testified that Complainant's employees are required to sign confidentiality and invention assignment agreements. (CX-1569C, Q. 19) Mr. Lai signed a confidentiality agreement on July 21, 1999 as part of his employment contract with Complainant's Shanghai subsidiary. (CX-552C at 16)

Mr. Lu also testified that, as General Manager, Mr. Lai had access to the full formula for SP1068. (CX-1563C, Q.16) Mr. Lu also stated that, as General Manager, Mr. Lai had access to all confidential information in Complainant's Shanghai subsidiary's possession. (CX-1563C, Q. 18) Mr. McAllister also testified that, as General Manager of Complainant's Shanghai

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subsidiary, Mr. Lai “was the keeper of the product formulas.” Complainant’s Intellectual Property Protocol confirms this role. (CX-703C at 3) {

}

In addition, Mr. Banach, the Director of Rubber Technology at Complainant, testified that Mr. Lai had full access to Complainant’s sensitive technical documents. (CX-1565C, Q. 131) A Complainant “control policy” document shows that RJ formulas were sent to Complainant’s Shanghai subsidiary through Mr. Lai at the time the Shanghai plant was starting up in 2003 through 2004. (CX-697C; *see also* CX-1565C, Q. 131) A Complainant formulation request, dated May 12, 2003, requests that Mr. Lai release the formula {

} (CX-770C; *see also* CX-1565C, Q. 131) Another Complainant formulation request, dated July 23, 2003, requests that Mr. Lai release the formula for SP1068 to Mr. Huang. (CX-771C; *see also* CX-1565C, Q. 131) A Complainant letter of transmittal, dated May 11, 2004, demonstrates that the “official copies of formulas for { } and SP1068” were sent to Mr. Lai. (CX-772C)

A letter from Complainant to Mr. Lai, dated August 24, 2004, confirms that Mr. Lai’s employment agreement ended on February 28, 2005. (CX-551C) Also, Mr. McAllister testified that Mr. Lai’s employment with Complainant ended on February 28, 2005. (CX-1569C, Q. 69) Mr. Lai signed a “Consulting Services Contract” with Shanghai Red Avenue Chemical Co. Ltd., which was effective September 1, 2006 to August 31, 2009. (CX-256C)

At trial, Mr. Xu testified that he was hired at Complainant’s Shanghai subsidiary by Mr. Lai. (Tr. 304:21-23) He testified that he was promoted to Plant Manager effective June 5, 2006.

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(Tr. 305:7-11) A staff announcement from Complainant documents the promotion of Mr. Xu to the “newly established position Plant Manager effective June 5, 2006.” (CX-148C at 1) The announcement also confirms that Mr. Xu joined Complainant’s Shanghai subsidiary in April 2004. (*Id.*) The announcement further indicates that he “will directly report” to the General Manager of Complainant’s Shanghai subsidiary. (*Id.* at 2)

The evidence shows that Mr. Xu executed a “Labor Contract” with Complainant’s Shanghai subsidiary, starting on April 15, 2004, which contains an “Obligation of Confidentiality.” (CX-317C at 5, Article 9) The provision states, *inter alia*:

{

}

(*Id.* (emphasis added)) Mr. Xu also signed a Non-Disclosure Agreement on March 23, 2004, which expressly indicates that Complainant’s formula are confidential information exclusively owned by Complainant, and that the disclosure of such information without authorization could cause material injury to Complainant and harm the competitive position of Complainant. (CX-318C)

Mr. Xu also signed a Supplementary Agreement on April 12, 2004, “for the purpose of supplementing and perfecting the original non-disclosure agreement between both parties.” (CX-319C) This agreement states, *inter alia*, that {

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Mr. Xu additionally signed an agreement to abide by the Complainant China Employee Manual (i.e. the “Employee Handbook”). (CX-320C) The handbook outlined Complainant’s company policy of conflicts of interests. (*Id.* at 70) It states, *inter alia*, that {

}

During trial, Mr. Xu confirmed that he had access to batch cards for SP1068 and that they “probably” included information as to material quantities, process parameters, quality-control requirements, and testing specifications for the production of SP1068. (Tr. at 306:16-22) Mr. Xu testified that he participated in the training of employees who worked in Complainant’s New York, Rotterdam Junction facility. (Tr. at 309:20-310:1) He also testified that he signed a “borrow log” for Complainant’s Shanghai subsidiary, which reflected his borrowing of technical information from sources at Complainant’s Shanghai subsidiary. (Tr. at 309:3-19)

Mr. Xu continued to state that he became a member of Complainant’s manufacturing integration team (“MIT”), and that the position represents “some kind of trust.” (Tr. 311:19-4) He recalled that the members of MIT were mainly the plant managers at different sites and the

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engineers at Complainant's headquarters. (Tr. 312:5-10) He also testified that it is "possible" that he had access to { } (Tr. 313:7-13) An email from Ken Carroll to Anne Stroble, dated January 26, 2006, requests that Anne grant Mr. Xu "full readership permissions in the { } (CX-710C) Moreover, in a December 21, 2005 email referring to his invitation to join the MIT team, Mr. Xu stated, "It is more than the honor to gain the trust. I am so excited and cherish it so much. This glory will shine above my head, remind me all time of responsibilities, loyalty and contribution to Schenectady. Thanks again for this trust you give, I really appreciate it."

A batch card containing specific process parameters for Complainant's formulas for { } and SP1068, sent via a June 9, 2004 email from Mr. Fam to Mr. Xu, demonstrates that Mr. Xu had access to Complainant's early versions of formulas for { } and SP1068. (CX-756C; *see also* CX-1565C: Banach testimony that CX-756C contained early versions of Complainant's Shanghai subsidiary formula forms for { } and SP1068) Also, Mr. Xu's signature appears on a batch card for SP1068. The release and update date of the batch card was February 1, 2005, and Mr. Xu signed the batch card on April 5, 2005. Also, Mr. Banach testified that the { } and SP1068 formulas "do not differ substantially in the key process parameters from those in effect during the summer and fall of 2006." (CX-1565C, Q. 133) He also testified that as production manager, Mr. Xu had full access to Complainant formulas, process flow diagrams, information relating to reactors and equipment, and raw material specifications and sourcing. (*Id.*)

Mr. Xu's access to Complainant's formulas is further confirmed by a document entitled, "Intellectual Property Protocol Complainant's Shanghai subsidiary." (CX-703C) The protocol indicates that "Incoming Formula" first go to the general manger. (*Id.* at 3) The document also

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lists Mr. Xu as a member of a “core team.” (*Id.*) Mr. McAllister confirmed that new formulas first go to the general manager, which would be Mr. Lai or Mr. Lu, and then the formulas “automatically” go to the core team, which consists of higher-level management. (Tr. at 19-20; 245:25-246:23) He also testified that formulas from Complainant’s Rotterdam Junction plant would be contained in a file room in Complainant’s Shanghai plant, and that Mr. Xu and Mr. Lai had access to the Shanghai file room and could view those formulas. (Tr. 246:24-10)

Mr. Banach testified that the formulas at Complainant’s Shanghai plant are {
} (CX-1565C, Q. 32) Mr. Banach also testified that Mr. Xu had continued access to the formulas to the extent that they evolved over time. (*Id.*, Q. 134) An email chain, dated June 6, 2005, to Mr. Xu shows variations in the formula of SP1068 over time. (CX-1558C) He also testified that, as part of the MIT group, Mr. Xu had access to information about the formulas, process flow, and raw materials used by other Complainant plants. (CX-1565C, Q. 135) He further testified that {

} (*Id.*, Q. 137)

Mr. Lu, testified that Jack Xu joined Complainant’s Shanghai subsidiary in April 2004, was promoted to Plant Manager, and then left at the end of April 2007. (CX-1563C, Q. 11; *see also* CX-148C; CX-1281C) Mr. Lu also testified that as Plant Manager, Mr. Xu was responsible for supervising the manufacturing of products made at Complainant’s Shanghai subsidiary, including SP1068. (CX-1563C, Q. 13) Mr. Lu added that as Plant Manager, Mr. Xu had access to the full formula for SP1068 even though the formula is confidential, by virtue of his senior position. (CX-1563C, Q. 15) Mr. Lu stated that Mr. Xu had full access to Complainant’s

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Shanghai subsidiary's file room, where confidential documents, including product formulas and manufacturing batch cards, are stored. (CX-1563C, Qs. 21-25)

An email from Mr. Banach indicates that Mr. Xu left Complainant's Shanghai subsidiary on April 30, 2007. (CX-170C at 1) In a reply to Mr. Banach's email, Mr. Xu stated that he was leaving to work for a polyurethane company, and he stated that they use a "totally different process" from Complainant. (*Id.*) Mr. Xu signed both an "Employment Contract" with Shanghai Red Avenue Investment Group Co. Ltd. and a "Labor Services Contract" with Red Avenue Group Limited on April 17, 2012. (CX-095C; CX-096C) Mr. Xu signed a "Labor Contract" agreement with Sino Legend Holding Group, Inc. (CX-153C) Mr. Lu testified that during employees' departure interviews, Complainant's Shanghai subsidiary asks employees to sign a document, which he called a "departure agreement," reaffirming the non-compete obligations they agreed to in their employment agreements. (CX-1563C, Q. 35) He also stated that Complainant's Shanghai subsidiary pays a non-compete compensation at that time. (*Id.*) He emphasized that Mr. Xu refused to accept non-compete compensation and refused to sign the departure agreement. (*Id.*)

Based upon all of the foregoing, I find that credible evidence shows Mr. Xu and Mr. Lai had access to Complainant's trade secrets while in a confidential relationship with Complainant, and that they left to work for Respondents. As discussed in detail below, Respondents then wrongfully took Complainant's SP1068 trade secrets by unfair means through Mr. Xu and Mr. Lai.

b. Respondents Wrongfully Took Trade Secrets by Unfair Means

I find that Respondents wrongfully took Complainant's alleged trade secrets by unfair means when Mr. Lai and Mr. Xu left Complainant's Shanghai subsidiary to work for

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Respondents and disclosed Complainant's alleged trade secrets to Respondents. At trial, Mr. Xu admitted that he left Complainant's Shanghai subsidiary to work for a competing company; but that he did not tell Complainant. (Tr. 319:22-320:4) Although Mr. Xu went to work for Sino Legend, he told Complainant that he went to work for a company called ZZPE. (Tr. 320:11-16) Mr. Xu testified that he felt that it was necessary to tell Complainant that he was moving to a differently named company than Sino Legend when he left Complainant's Shanghai subsidiary because he was "reluctant" to tell Complainant that he was going to work for a competitor. (Tr. 320:24-321:6) Mr. Xu admitted that he was given a big salary increase, was paid a housing allowance, a pension insurance, and medical insurance to work for Respondents. (Tr. 330:16-331:4; 332:20-25) It is evident that Respondents attempted to hide Mr. Xu's involvement with Sino Legend by hiring him through { } After leaving employment with Complainant at the end of April 2007, Mr. Xu signed contracts with { } (CX-938C; CX-153C)

Mr. Xu was provided with a Sino Legend email account, and was in communication with Sino Legend while he was still employed at Complainant, as shown by an email that was retrieved from his Complainant's Shanghai subsidiary laptop. (CX-167) The email, dated April 28, 2007, shows that Mr. Yang, chairman of Sino Legend, using his Sino Legend email address, emailed Jack Xu at his Sino Legend email address, with the subject "Meeting in Zhangjiajiaang." (*Id.*; see also CX-1563C, Q. 46) Also, Mr. McGowan, director of a digital forensics lab, testified that based on his analysis of Mr. Xu's Complainant's Shanghai subsidiary laptop, a user "xujack" first accessed the Sino Legend webmail site on April 17, 2007 and then again on April 30, 2007. (CX-1562C, Q. 28) He also testified that Internet history on Mr. Xu's laptop revealed that the jack.xu@sinolegend.com account was accessed several times between April 17 and

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April 30, 2007. (*Id.*, Q. 29; *see also* CX-355C) He also testified that his firm recovered a folder view of Mr. Xu's Sino Legend inbox. (*Id.* at 30; *see also* CX-356C)

Respondents produced an email from Mr. Yang to Mr. Xu with the subject line {
} (CX-353) The message forwards an earlier message dated December
29, 2006 that also has the subject line { } (*Id.*) It attaches a {
} (*Id.*)

Mr. McGowan testified that he found evidence of the pilot test document in his analysis of Mr. Xu's laptop. (CX-1562C, Q. 23) Mr. McGowan stated that the document was created on Mr. Xu's laptop on December 30, 2006 at 8:32 am, and was located in a folder named "C:\New Folder." He further stated that the document was opened by "xujack" on December 30, 2006 at 8:32 am. Numerous pages of the original handwritten test record for Respondents' { } identify the product { } as "1068 Resin," which is the same name as Complainant's SP-1068 trade secret process. (CX-200C) These facts strongly indicate that Mr. Xu was involved in the preparations for the pilot study. Also, Respondents {

}

Credible evidence shows that Sino Legend ZJG acquired {
} from Mr. Xu in late 2006 and acquired { } from Mr. Xu after he joined Sino Legend ZJG. Shortly before Mr. Xu's departure from Complainant's Shanghai subsidiary, on March 27, 2007, Mr. Xu specifically asked {
} for the {
} which he received. (CX-604C; Tr. at 314:18-315:9) Mr. Xu

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stated, { } In reply, { } stated,
inter alia, { } (*Id.*) Thus, Mr. Xu knew that the
Complainant's Shanghai subsidiary plant used { } and he also
knew that { }, which he
learned shortly before joining Sino Legend ZJG.

Incredibly, in the face of the foregoing evidence, when questioned at the hearing, Mr. Yang insisted that he had only met Mr. Xu in December, 2006, and had sent him the pilot test document so that he would have faith in Sino Legend that they were building a bona fide plant and had done sufficient R&D to enter a medium scale test phase. (Tr. at 705:5-13, 706:7-10, 706:18-707:10) When questioned more closely about the nature of the pilot test document that was sent to Mr. Xu in December 2006, Mr. Yang defended his position:

Q. And so is it your view that -- are you testifying here today that Sino Legend sent its highly confidential technical details of an experiment and a pilot run that it was running for its SL-1801 process to someone that you had just met and was recruiting at the time, who was working at the time for a competitor? Is that your testimony here today, that that was the reason that you think that that was sent to Jack Xu?

A. I don't regard that document as a highly confidential technical document because it just contains some information about the company, and it's merely a very simple pilot-run document, just a plan for pilot run or medium-scale test run.

{

},

Q. So it's your testimony that your R&D testing, ongoing R&D testing that you had at the time was not confidential information?

A. I didn't mean that. I just said that document only contained some information about the company and a simple plan for the medium-scale test run, so that's not much to be confidential on or about.

(Tr. at 707:11-708:16)

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Following a discussion of translation issues and re-reading the questions to Mr. Yang by the court reporter, I questioned him more closely about whether or not the information in the pilot test document was confidential, and he equivocated, saying that most of the document was public; but some of it was confidential. (Tr. at 710:10-711:12, 711:14-712:12) I conclude from this exchange that Mr. Yang insists that he gave some confidential information related to a pilot test to a person he had just met and who worked for a competitor. His testimony and demeanor can best be described as a transparent effort to create the false impression that the information given to Mr. Xu was not confidential while simultaneously attempting to protect the confidential information given to Mr. Xu.

Mr. Yang obviously lacked candor, and as a result he is impeached as a witness. It is beyond reasonable belief that a responsible person would provide a stranger with such confidential information, and I conclude that Mr. Xu was not a stranger. Rather, as the surrounding facts and circumstances strongly suggest, Mr. Xu was known to Mr. Yang and was in his confidence. It is clear to me that Mr. Yang gave confidential information to Mr. Xu, as part of the scheme to access confidential information of the Complainant so that Sino Legend could finally produce a competing tackifier resin.

In a September 23, 2006 email, Mr. Fan, a Sino Legend engineer, reported that {

.} (RX-368C at 2) Mr. Yang testified that {

.} (Tr. 714:3-19) He also testified that his report

was based on work performed by Mr. Pu. (Tr. 714:20-24) This evidence demonstrates that Respondents' effort to independently develop a product comparable to Complainant's SP-1068, prior to September 2006, had failed.

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Also, an email dated September 22, 2006, from Mr. Yang to the Sino Legend technical team containing the subject {

} that suggests CY (i.e. Mr. Lai) will be in attendance, and contains a specific handwritten note that “CY is the former General Manager of Schenectady.” (CX-1219C; CX-1352.1C at 117:8-10) This specific unique handwritten note suggests the importance of Mr. Lai’s knowledge of Complainant’s technology to Respondents’ pilot study. Respondents hired Mr. Lai to perform consulting services from September 1, 2006 to August 31, 2009. (CX-1109C)

Mr. Xu accessed a SP1068 formula on his laptop on November 4, 2006, just before Respondents’ records first demonstrate possession of Complainant’s technology. (CX-352 at 6, row 222; CX-1566C, Qs. 73-74) Complainant’s expert, Dr. Chao, testified that the following chart summarizes his understanding of Sino Legend’s process conditions from *before* November 2006, compared to those of Complainant’s Shanghai subsidiary.

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(CX-1566C, Q. 73) To form his conclusions, Dr. Chao analyzed various pieces of evidence including: (1) Mr. Pu's notebook (CX-030C), (2) a Sino Legend "Feasibility Study Report" (CX-1184C), (3) a Sino Legend process flow diagram (JX-058C). (CIB at 83) As discussed in section III.B.2.a, repeating some of the calculations conducted by Dr. Chao (Tr. at 497:22-500:25) confirms the accuracy of his testimony.

Dr. Chao also provided a comparison of Complainant's SP-1068 process with Sino Legend's tackifier technology *in and after* November 2006:

(*Id.*, Q. 74) To form his conclusions for this chart, Dr. Chao analyzed, *inter alia*: (1) Mr. Fan's notebook (RX-267C at SINOZJG_0005199 to SINOZJG_0005201), (2) Mr. Shi's batch cards (CX-035C; CX-630C), (3) Mr. Shi's notebook, (4) { } (CX-37C), Sino Legend batch cards (CX-157C; CX-080); and Sino Legend piping and instrumentations drawings ("P&IDs") (CX-910C; CX-787C; CX-791C; CX-911C; Tr. 307:4-10). (CIB at 83) Based on the unrebutted evidence, I find that Respondents began using the

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exact or strikingly similar parameters to Complainant's SP1068 process starting in November, 2006.

I find Respondents' argument specious that no specific document shows that Mr. Xu or Mr. Lai received any pre-2000 Complainant formula { } from Complainant's Rotterdam Junction facility. The evidence shows that both Mr. Xu and Mr. Lai had unquestioned access to Complainant's trade secrets, given their high level positions at Complainant's Shanghai subsidiary as Plant Manager and General Manager, respectively. Respondents do not dispute that Mr. Xu and Mr. Lai saw the formula for SP-1068. (RIB at 26; CX-653C) Moreover, Respondents argument rings hollow in light of the fact that they failed to produce a single email for the critical period, 2005 through April 2007, when Respondents claim to have independently developed their process for manufacturing SL-1801/2, even though there were email exchanges during that gap. (Tr. 700:10-701:4; 702:1-8) The date that Respondents started producing emails, April 17, 2007, coincided with the date Mr. Xu gave his resignation to Complainant's Shanghai subsidiary. (Tr. 701:20-25) Respondents have failed to address the overwhelming evidence that clearly indicates Respondents obtained access to the SP-1068 trade secrets and wrongfully took them by unfair means.

I also find that Respondents' pattern of misconduct in the discovery phase of this investigation severely tainted their credibility. First, Respondents produced a version of the test record for { } in which "1068" was whited-out. (CX-201C) During trial, Mr. Yang testified that although he made some investigation into the matter after he was notified about it during his deposition, he did not provide the results of his investigation { } (Tr. 12:24-13:18; 14:25-15:13) Mr. Yang also testified, "Probably what happened was that someone was continue using [sic] this document, and that

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person saw the marking of AP-1068. That person thought it might not be appropriate, so it was marked out.” (Tr. at 771:10-21) This incident can only be charitably characterized as a botched attempt to falsify evidence and impeaches Respondents’ credibility on this issue.

Second, Respondents made Mr. Pu’s work the centerpiece for their independent development story, so the timing and substance of Mr. Pu’s research and development work was a core dispute in this investigation. (Tr. 10:14-19; Order No. 37; CX-1566C, Q. 71) Respondents refused to provide Mr. Pu’s deposition for several months after the due dates for expert reports, even though they relied heavily on his alleged developmental work for their independent development defense. (See Order No. 37) On March 9, 2013, Complainant asked Respondents to bring Mr. Pu’s original notebook to the deposition for inspection. Faced with this request, on March 11, Respondents produced an additional page of Mr. Pu’s notebook that Complainant would have seen during the deposition of the Mr. Pu’s original lab notebook. (Tr. 10:25-11:6) A piece of paper that listed C1212, which was material to Respondents’ independent development defense, was torn from the page from Mr. Pu’s notebook. (CX-1585C; Tr. 11:7-12) On March 13 and 14, during Mr. Pu’s deposition, Complainant inspected Mr. Pu’s original lab notebook and asked Mr. Pu questions about the piece of paper that was torn out. Mr. Pu testified during his deposition that he could not remember how the document was torn out. (Tr. 11:13-18) {

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} There are also appeared to be numerous white-outs throughout Mr. Pu's lab notebook. I found that it was undated, uncorroborated, and disorganized. There were ad hoc pages taped on top of other pages. (Tr. 608:12-20) As a result, I excluded Mr. Pu's notebook as unreliable evidence for the purpose of showing independent development, and I admitted the notebook for the limited purpose of showing a lack of credibility on the part of Sino Legend. (Tr. 11:8-12:19)

Respondents have failed to explain how they proceeded from their pre-November 2006 parameters to the post-November 2006 parameters that strikingly resemble Complainant's parameters. As discussed *supra*, the evidence clearly indicates that Mr. Lai began working for Respondents in September 2006. (CX-256C) Mr. Xu accessed Complainant's SP1068 formula on his laptop shortly before Respondents appeared to gain access to the same process parameters. (CX-352 at 6, row 222) Mr. Xu testified that he was hired at Complainant's Shanghai subsidiary by Mr. Lai. (Tr. 304:21-23) The { } appears in Mr. Fan's notebook without evidence of prior experimentation. (Tr. 458:2-459:11) Based on these key facts and all of the foregoing, I find that strong circumstantial evidence compels the conclusion that Respondent Sino Legend ZJG wrongfully took Complainant's trade secrets by unfair means through Mr. Xu and Mr. Lai. Copying is especially evident in the particular match in { } in Mr. Fan's notebook, which is (amazingly) exact to the thousandth decimal point. (Tr. 458:2-24) It defies logic to conclude that such an exact replication occurred by chance. (CX-1566C, Q.12)

As a result, the third factor of trade secret misappropriation is clearly met.

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2. Respondents' Use of Trade Secrets

a. General Arguments

Complainant's Position: In its reply brief, Complainant argues that Respondents say that Complainant's experts did not provide a proper side-by-side comparison of formula 1 with any batch of Respondents' products. (Citing RIB at 85) Complainant counters that this is not true. Complainant asserts that Dr. Chao provided a chart in his witness statement that shows that the basis of his comparison was formula 1 as practiced at Complainant's Shanghai subsidiary in the 2005-2006 timeframe. (Citing CX-1566C, Q. 74) Complainant avers that this chart compares the Complainant's Shanghai subsidiary process with Sino Legend's {

.} With respect to Sino Legend's importation

batches, Complainant says that Dr. Chao testified that he did a side by side comparison, which is reflected in CDX-1C. (Citing Tr. at 425:23-426:4; 493:3-497:7) As an example, Complainant submits that Dr. Chao testified he considered the softening points used as a control parameter in each of the SL importation batches and that his comparison of this parameter with Complainant's process is reflected in the answers to Questions 59 and 60 of his witness statement and in the side-by-side comparison, CDX-1C. (Citing Tr. at 495:17-497:7) Complainant asserts that it is Respondents' expert, Dr. Thomas, who failed to perform a proper side-by-side comparison. Complainant contends that Dr. Thomas failed to consider Sino Legend's developmental work entirely in an attempt to only look at Sino Legend's process as far removed from the initial misappropriation as possible. (Citing CIB at III.G.2.g)

Complainant claims that Respondents repeatedly feign confusion whenever reference is made to any SP-1068 related product that is sold under a name other than "SP-1068". For example, in the context of domestic industry, Complainant says that Respondents complain that

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Complainant “does not define what HRJ-2765 is.” (Citing RIB at 132) Complainant avers that when Dr. Hamed and Dr. Banach have defined HRJ-2765 by explaining the formulas that are used to make it, Respondents criticize them for citing formulas for “products that are not even SP-1068.” (Citing RIB at 86; *see also id.* at 109, n.39) Complainant argues that this “feigned confusion” and emphasis on product codes rather than process parameters is merely “sleight of hand.”

Complainant states that the primary difference among the processes for making the various SP-1068 related products {

.}

(Citing CX-1565C, Qs. 7-8, 80-82) Complainant says that Dr. Hamed testified that these various related products “mechanistically ... would work the same.” (Citing Tr. at 400:9-402:9)

Complainant asserts that it produced and relied upon formulas for these related products. (Citing *e.g.*, CX-1565C, Qs. 66-67; CX-1570C, Q. 90) Complainant argues that if there were any substantive argument that the SP-1068 related products were not made using Complainant’s trade secrets, Respondents would have made it.

Regarding the alleged differences between the products, Complainant says that Respondents present arguments about the molecular weight of the parties’ respective products. (Citing RIB at 118) Complainant states that its allegations relate to misappropriation of its *process*, not its products. Complainant asserts that both parties have produced process flow diagrams and batch cards with process instructions, which Dr. Chao has testified demonstrate the misappropriation of Complainant’s process parameters. (Citing CX-1566C, Q. 67) Rather than confront Dr. Chao’s analysis head-on, Complainant says Dr. Thomas provides this ancillary analysis of the molecular weights of the parties’ products in an apparent attempt to distract from the evidence directly relating to the process.

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Complainant continues that, even assuming that Dr. Thomas' product analysis is relevant, Dr. Thomas fails to explain its significance. Complainant avers that Sino Legend's documents from 2007 analyze SP-1068 and SL-1801 and conclude that they are equivalent across at least seventeen different product attributes. (Citing CIB at III.G.4 at 109) Rather than confront Sino Legend's product comparison from close to the time of the misappropriation, Complainant argues that Dr. Thomas looks to analyses performed in October 2009 by Complainant and December 2011 by Sino Legend, after Complainant had already filed complaints against Sino Legend in China for secret misappropriation. (Citing RX-32C; RX-266C) Complainant says that Dr. Thomas alleges that the analyses show that the parties' products have different molecular weights { }, but he does not explain whether this is a big or small difference, nor does he explain how (if at all) this difference relates to the process used to make the products. Complainant also asserts that Dr. Thomas compares Sino Legend's { } product with Complainant's { } product but fails to make the more appropriate comparison with Complainant's { } products.

Respondents' Position: Respondents argue that Complainant has failed to demonstrate that Sino Legend's accused processes practice Complainant's alleged trade secrets. Respondents assert that the respective parties' processes are different in significant ways and the Court should find no violation.

Respondents assert that neither the witness statement of Dr. Chao, nor Complainant's other technical expert, Dr. Hamed, provide a proper side-by-side comparison of { } with any batch of Respondents' products. Respondents say that Dr. Hamed performed no comparison whatsoever between Sino Legend's processes and Complainant's { } or any

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of the other Complainant formulas discussed in his expert report and witness statement. (Citing *generally* CX-1570C (Hamed WS))

Respondents submit that Dr. Chao purports to do a side-by-side comparison at page 39 of his witness statement. (Citing CX-1566C (Chao WS), Q. 39) Respondents say that he recognized that this page provided the only side-by-side comparison of Complainant's { } and Sino Legend's process.

Q. Well, is there any other portion of your witness statement that contains a side-by-side comparison of the { } process for making SP1068 and the process for making the accused Sino Legend products?

A. No.

(Citing Tr. 420:7-12)

Respondents aver that he looked only at Sino Legend's early laboratory work in 2006 and Sino Legend's first commercial batch from 2007, which was never imported, and focused on only a few of the parameters that Complainant claims as its trade secrets. (Citing Tr. at 420:1-421:8, 425:10-426:10, 433:14-21) Respondents say that he did not make any comparison with respect to the imported products at issue, including Sino Legend's SL-1801LFP and SL-1802LFP products. (Citing Tr. 425:18-22 ("Q. Sir, you didn't do a side-by-side comparison of the actual commercial production that led to the importation of products at issued in this case with Formula 1; correct? A. Yes.")) Respondents assert that, although Dr. Chao's witness statement incorporates the second page of CDX-001C, a reaction scheme (CX-1566C (Chao WS), Q. 15), it does nothing more than provide a summary of *Sino Legend's* processes, oftentimes misleadingly. (emphasis added by Respondents) For example, Respondents contend that Complainant glosses over the various temperatures in the condensation reaction, { }, and numerous differences in reactor parameters.

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Respondents submit that no reasoned comparison with any Complainant formula is made. (Citing CDX-001C) Respondents say that the first page of CDX-001C sets purports to set forth Complainant's alleged trade secret, but it was prepared by Dr. Hamed. (Citing CDX-001C; CX-1570C (Hamed WS), Q. 60) Respondents say that Dr. Chao, on the other hand, prepared the second page. (Citing *id.*) Respondents assert that the demonstrative therefore fails to provide a proper comparison or analysis between the processes.

Respondents aver that the remainder of Dr. Chao's witness statement simply states, as a matter of fact, what Sino Legend has done with respect to each of the various parameters. Respondents argue that the identification of a Sino Legend process parameter in response to the question (posing the ultimate conclusion of law) of whether Respondents' manufacturing processes "use, substantially use or are substantially derived from" Complainant is not a proper substitute for a legitimate side-by-side comparison and analysis. Respondents assert that, because Dr. Chao's witness statement provides nothing more than vague and conclusory opinions, it should be entitled to little weight, if any. (Citing *Lamelson v. United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1995) (giving "no weight to the series of conclusory statements" offered expert witness on infringement))

Respondents contend that Complainant relies upon work instructions from multiple Complainant locations, multiple time periods, and processes that are not even used to specifically make SP1068. Complainant avers that Complainant cites to { } between Dr. Banach and Dr. Hamed spanning decades, three continents, and products that are not even SP1068. (Citing CX-1565C (Banach WS) Qs. 68-79; CX-1570C (Hamed WS), Qs. 66, 85, 86, 89, and 90; Tr. at 375:11-20 (Hamed)) Respondents argue that this appears to be a deliberate attempt to muddy the waters as to what Complainant is asserting to be its trade secret and what

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Complainant formula is being used as the basis of comparison in Dr. Chao's "copying" analysis (because he does not clearly say). Respondents assert that Complainant appears to rely on these work instructions in an effort to create some sort of composite process created by a patch-work of formulas from different times, different places, and sometimes different products.

Respondents submit that this apparent attempt to mix and match is improper. Respondents reason that, not only would it allow Complainant to lay claim to a hypothetical process that it itself has never performed or possessed prior to this Investigation, it runs contrary to Complainant's own assertion that the various reactions parameters of its SP1068 process are inter-related.

Respondents state that, as Dr. Hamed himself has recognized, the process parameters, including { } are interrelated. (Citing CX-1570C (Hamed WS), Q. 58 {

} RX-422C (Thomas WS), Qs. 122, 125; RX-555C ("it should be understood that each trade secret...generally works together with at least one or more of the other aspects in a cooperative or synergistic manner in the overall process..."))

Respondents offer that Complainant has itself recognized the particular importance of the relationship between { } (Citing RX-555C at 14) Respondents aver that Complainant has stated that {

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} (Citing RX-555C at 15 (emphasis added by Respondents)). Respondents argue that Complainant should not be allowed to ignore these very principles by arguing that the Sino Legend's process uses, substantially uses, or is substantially derived from Complainant's alleged trade secrets just because Complainant can dig up a historic formula from its decades-old repository that just so happens to contain a parameter that Sino Legend now uses.

Respondents argue that, even more fundamental to the dispute, Dr. Chao's cursory and truncated analysis fails to take into account the significant differences between Complainant and Sino Legend's processes. Respondents assert that a proper comparison entails consideration of each of the processes in their entirety, and not just cherry-picked parameters, but the latter is precisely what Dr. Chao has done.

Respondents contend that a comparison of the full process reveals that Sino Legend's process is significantly different than that of Complainant. {

} Respondents argue that one point alone demonstrates that the processes differ significantly. Respondents concede there are some similarities between the processes as well, but Respondents assert that is expected given what was already known in the public and basic principles of chemistry going back to the 1800s, none of which was even acknowledged by Dr. Chao. Respondents maintain that differences in Sino Legend's final product further shows there are significant differences in the processes.

{

}

Respondents argue that Sino Legend therefore has two distinct processes for making the products at issue, which result in different products.

{

}

Respondents argue that, even without delving deeper, the Sino Legend processes are different from any practiced by Complainant. {

}

Respondents argue that Dr. Chao's opinion that Sino Legend's process is "basically identical" to, and an "exact copy" of, Complainant's alleged trade secrets must be rejected. (Citing Tr. at 418:7-9 (Chao); CX-1566C (Chao WS), Qs. 11-12) Respondents say that he

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plainly acknowledged that no side-by-side comparison of the commercial batches that led to importation is found in his witness statement with respect to { } (Citing Tr. at 425:18-226:10 (Chao)) Instead, Respondents state that Dr. Chao testified that his focus was on the Sino Legend's work in 2007, and earlier. (Citing Tr. at 424:15-19 (Chao)) Respondents aver that for this earlier work, he also admitted that only a few of the alleged Complainant trade secret parameters were compared. (Citing Tr. at 421:3-8 (Chao) ("Q. Sir, in the comparison that you have made on pages 39 and 40 of your witness statement, you are focusing on just a few of the process parameters from Formula 1 that comprise the alleged trade secrets in this case; right? A. That's correct.")) Respondents offer that, even with respect to the parameters he did compare, there are differences. Respondents argue that, as discussed below, there are numerous differences in Sino Legend's overall process that Dr. Chao simply ignores.

In their reply brief, Respondents argue that Complainant's selective portrayal of Sino Legend's development work is insufficient to support Complainant's claims. (Citing CIB at 78-85) Respondents assert that Complainant omits key facts and takes positions that "defy reason." Respondents say that "from the start, Complainant trumpets that Sino Legend's goal was to make a 'copy' of SI's SP-1068 resin, as if this were a patent case." (Citing CIB at 78) Respondents assert that Complainant has no patents claiming SP-1068 or a process for making it. (Citing Tr. at 121:24-122:2 (Banach)) Respondents continue that Complainant never filed any patent applications attempting to claim the decades-old technology. Thus, Respondents argue that anyone is free to duplicate the resin, without violating Complainant's rights. Respondents aver that Complainant knows this because Complainant acknowledges that its biggest competitor, { } was able to make a "knock off" of Complainant's SP-1068. (Citing JX-005C; Tr. at 523:19-524:20 (Hart)) As a result, Respondents submit that both the SP-1068 and processes for

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making it are in the public domain. Respondents claim that Complainant's selective story of Sino Legend's development work makes no mention of the vast public scientific literature and pertinent disclosures in Complainant's own patents. Respondents maintain that Complainant barely acknowledges the work Sino Legend did long prior to any contact with anyone from Complainant.

In particular, Respondents offer that nowhere in Complainant's timeline of events is there mention of Sino Legend's correspondence with catalyst maker Rohm & Haas in February 2006, corroborating that Sino Legend was already in possession of many of the process features that Complainant still asserts as trade secrets {

} (Citing RIB at 125-

26) Respondents contend that Complainant does not (and cannot now) take the position that this early work was influenced by anyone from Complainant. First, Respondents aver that there is no evidence of any such contact prior to September 2006. Second, Respondents assert that any suggestion of substantive contact prior to that time would be directly contrary to Complainant's assertions that Sino Legend's development work was well off the mark until the experiments in the November 2006 timeframe. (CIB at 78 ("This pre-Sept. 2006 work was a failure"))

Respondents state that, {

} Complainant flounders there as well. (Citing CIB

at 79-83) In particular, Respondents claim that Complainant compares only a few of the Sino Legend process parameters rather than the entire process, and even there, the comparison does not support Complainant's story.

Respondents continue that Complainant points to "white out" over a notation to "1068 resin" on a Sino Legend document. (Citing CIB at 87) Respondents contend that Complainant

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also ignores that another version of the document without whiteout and revealing the notations to “1068 resin” was produced to Complainant during fact discovery, contrary to Complainant’s allegations of concealment.

Respondents assert that Complainant also seeks to make up for the shortcoming in its own evidence by attacking Dr. Thomas’s testimony. (Citing CIB at 89-93) Respondents argue that Dr. Thomas properly focused on the objective differences between Sino Legend’s processes and Complainant’s alleged trade secrets. Respondents state that, unlike Dr. Chao, who merely provided conclusory statements that Sino Legend copied Complainant’s process, Dr. Thomas provided a detailed technical analysis of the differences based on his expertise in chemical engineering, polymer science, and material science engineering. (Citing *compare* RX-422C (Thomas WS), Qs. 23-400 *with* CX-1566C (Chao WS), Qs. 23-64)

Respondents assert that Complainant contends that Sino Legend’s processes “use, substantial use, or are substantially derived” from Complainant’s alleged trade secrets. (CIB at 90-108) Respondents contend that Complainant fails to provide any explanation regarding the differences between the various parameters, of which there are many. (Citing RX-422C (Thomas WS), Qs. 31-400) Respondents aver that, for the most part, Complainant fails to even provide any point of comparison with any Complainant process. Respondents argue that this glaring omission is particularly problematic given Dr. Chao’s opinion that Sino Legend’s processes were an “exact copy” of, or “basically identical” to, Complainant’s alleged trade secrets. (Citing Tr. at 418:7-9 (Chao); CX-1566C (Chao WS), Qs. 11-12)

Respondents continue that Complainant has never done a comparison of Sino Legend “LFP” { } process or products. Respondents say that failure amounts to a tacit admission that the processes differ in ways that are significant. Respondents argue that,

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because of the substantial differences in the processes, Complainant's attorneys now expressly rely (for the first time) on parameters found in other Complainant formulas in a blatant attempt to claim misappropriation by relying on substantially different processes. To that end, Respondents claim that Complainant mixes and matches individual parameters of different formulas from different decades and continents, going so far as to grasp for formulas that have long been abandoned by Complainant and that Mr. Xu or Mr. Lai never saw.

In addition, Respondents assert that, given the underlying chemistry, and Complainant's own patent publications it was incumbent upon Complainant to address alternatives to copying. Respondent contends that, not only does Complainant ignore these alternative explanations in its brief, it also ignores process differences that cut against its claims.

Staff's Position: Staff argues that the evidence demonstrates that Sino Legend ZJG more likely than not used Complainant's trade secrets to formulate, manufacture, market and sell Sino Legend ZJG's tackifier products. Staff avers that the accused products are SL-1801 and SL-1802 tackifiers including the newer LFP variations using { }.

Staff submits that even without explicit evidence of documentary copying from a comparison of Complainant and Sino Legend ZJG technical documents, the weight of the circumstantial evidence shows that the accused Sino Legend products initially copied Complainant's asserted trade secrets and that later versions of Sino Legend products were at least derived from the misappropriated Complainant proprietary information. Staff argues that "use" can occur, e.g., when goods that embody a trade secret are relied on to assist or accelerate research or development. (Citing Restatement (Third) of Unfair Competition § 40, Comment c)

Staff says that Complainant's expert, Dr. Chao, testified that based on the extent of the similarities between initial pilot tests, medium batch production, and commercial production of

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Sino Legend ZJG's SL-1801 and SL-1802 products and manufacturing processes and Complainant's products and processes, it is his opinion that "Respondents' use of a basically identical processes [*sic*] to make { } tackifier resins appears to be a result of copying as opposed to any other possible explanation." (Citing CX-1566C (Chao Witness Stmt.), Q.12)

Staff states that Dr. Chao also testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's trade secrets. (Citing CX-1566C (Chao Witness Stmt.), Qs. 23-24, 74) Staff says that Dr. Chao opined that Sino Legend's "use" of Complainant's SP1068 trade secrets started with exact copying of Complainant's process parameters in November 2006, as reflected in the Fan lab notebook, and evolved over time to include minor, subsequent modifications (and alleged improvements) to Complainant's overall process flow trade secret. (Citing Tr. at 458:2-461:16)

Staff says Complainant avers that such modifications and evolution of Sino Legend's manufacturing process is reflected in the SL-1801 and SL-1802 tackifier resins that were commercially manufactured starting in December 2007 and subsequently imported into the U.S. in 2010-2012. Staff says that Dr. Chao testified that, {

{ (Citing Tr. at 461:13-16 and 462:10-17) Staff states that {

.} Staff notes that {

.} (Citing

RX-416C (Yang Witness Stmt.), Qs. 11, 339-340; Tr. at 647:22 to 648:19; 749:24-750:7)

Staff argues that the ten SP1068 trade secrets that qualify as trade secrets and have been misappropriated are:

{

}

In the Staff's view, these ten trade secrets embody important aspects of the SP1068 process technology identified by Complainant as SP1068 trade secrets. Regarding each of these trade secrets, the Staff addresses the evidence that shows that each trade secret was misappropriated by Respondents. Staff offers that Dr. Chao testified that the similarities between the Complainant and Sino Legend formulas and manufacturing processes in view of Jack Xu and C.Y. Lai's access to Complainant's trade secrets support the conclusion that Respondents misappropriated Complainant's trade secrets. (Citing CX-1566C (Chao Witness Stmt.), Qs. 77-78)

Staff asserts that misappropriation evidence should be analyzed in view of the court-ordered exclusion of Mr. Qijun Pu's lab notebook and Mr. Quanhai Yang's subsequent admission that Respondents' independent development defense cannot succeed. Staff highlights that Respondents' affirmative defense of independent development depended heavily on Mr. Qijun Pu's lab notebook, which was excluded as unreliable. (Citing Tr. at 12:6-19, 608:1 to

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609:7) Staff avers that Mr. Pu had conducted research in the 1980s and 1990s for the Beijing Rubber Research Institute, developing a commercial PTOF tackifier branded “TKO” and a PTBP tackifier “TKB.” (Citing RPHB at 112) Staff says that Respondents allege that Mr. Pu then conducted extensive development work for Sino Legend in 2005-2006 that ultimately lead to the manufacture of Sino Legend’s PTOF tackifiers. (Citing *id.* at 113) Staff contends that Mr. Pu’s development work is not supported by any documents admitted into evidence. Thus, along with an overall lack of full documentation and even testimony to support its affirmative defense, Staff argues that Respondents’ independent development defense must fail, as Mr. Quanghai Yang essentially agreed to during cross-examination. (Citing Tr. at 765:18-25)

Staff says that Dr. Chao highlights two summary tables contrasting Sino Legend’s technology *before* November 2006 based on Mr. Pu’s work with its formulations, and *on and after* November 2006, at which time Sino Legend had access to Jack Xu, to show that Sino Legend dramatically changed course to adopt Complainant trade secrets. (Citing CX-1566C (Chao Witness Stmt.), Qs. 73-74 (emphasis added by Staff)). For example, Staff says that the first column compares Complainant’s { } to that of Sino Legend, and each of the other columns also relates to a category of information that the Staff supports as a trade secret:

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In its reply brief, Staff says that Respondents contend that “the respective parties’ processes are different in significant ways and the Court should find no [trade secret] violation,” asserting that Complainant failed to draw a valid comparison between Complainant’s alleged trade secrets and the accused products. (Citing RIB at 85)

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Staff asserts that the legal standard for trade secret misappropriation is defined by federal common law such as the UTSA and the Restatement (Third) of Unfair Competition. Staff avers that courts analyze the facts looking at the similarities, and Respondents concede that the inquiry for the ultimate conclusion of law is whether Respondents' manufacturing processes use, substantially use, or are substantially derived from Complainant's trade secrets. (Citing RIB at 86) Thus, Staff argues that any focus on differences by Respondents and Dr. Thomas simply overlooks the primary analysis for "use," where one "need not use the trade secret in its original form." (Citing Restatement (Third) of Unfair Competition § 40, Comment c) Staff quotes, "[A]n actor is liable for using the trade secret with independently created improvements or modifications if the result is substantially derived from the trade secret." (Citing *id.*; *see also Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, 2011 WL 6255116, Comm'n Determination at *46 (Oct. 2011) (Quoting *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) ("[T]he user of another's trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other's secret."))

Staff asserts that Respondents highlight two primary differences with Sino Legend's process. First, Staff says that Respondents point out that Complainant does not use {
.} (Citing RIB at 89) Staff argues, however, that the evidence shows that Sino Legend simply uses {
} (Citing CX-1566C, Qs. 51-52) Second, Staff contends that Respondents point out that Complainant has never used {
} (Citing RIB at 89) In Staff's view, however, the evidence shows that Complainant had previously {
} of which Mr. Xu and

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Mr. Lai would have been aware and could share with Respondents, and the knowledge of that confidential information gave Sino Legend a head start in developing its own modifications to SL-1801/1802. (Citing SIB at 86-88)

Staff asserts that Dr. Chao properly compared the SP-1068 process with Sino Legend's evolving processes, as first described in Mr. Fan's lab notebook in November 2006. (Citing CX-1566C (Chao Witness Stmt.), Qs. 15, 73-74 (and comparison tables); CDX-001C) Staff contends that, in a visually concise manner, Dr. Chao's tables in his witness statement and Dr. Chao and Dr. Hamed's demonstrative at CDX-001C present a thorough comparison of the asserted SP-1068 trade secrets to each Sino Legend process for manufacturing SL-1801/1802 over the course of time. Staff says that the Key in CDX-001C reflects that a comprehensive comparison is made for each of (A) the lab scale experiments from Yunfeng Fan's notebook in { } (B) Sino Legend's pilot study in 12/2006; (C) Sino Legend's first commercial scale production of SL-1801 in { } (D) Sino Legend's { } SL-1801 importation batches in 2010-2012; and (E) Sino Legend's { } SL-1801 and SL-1802 importation batches in 2012. (Citing *id.*) In Staff's view, there is more than a preponderance of the evidence to show that Sino Legend has used, substantially used, and/or substantially derived its processes from Complainant's SP-1068 trade secrets.

Analysis and Conclusions: The first three criteria of trade secret misappropriation were addressed, *supra*. I turn to the fourth factor, that the respondent has used or disclosed the trade secret causing injury to the complainant, and I find that Complainant has shown by a preponderance of evidence that Respondents have used each of Complainant's alleged trade secrets. I specifically address each trade secret, in turn, below. The issue of injury to Complainant's domestic industry is treated in section V, regarding the Domestic Industry, *infra*.

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Respondents' arguments that Dr. Chao did not provide a proper comparison of SP1068 with Respondents processes, and that his analysis was conclusory, are incorrect. Dr. Chao properly compared the SP-1068 process with Sino Legend's evolving processes, as first described in Mr. Fan's lab notebook in November 2006. (CX-1566C, Qs. 15, 73-74 (and comparison tables); CDX-001C) Dr. Chao's tables in his witness statement and Dr. Chao and Dr. Hamed's demonstrative at CDX-001C present a thorough, yet concise, comparison of the asserted SP-1068 trade secrets to each Sino Legend process for manufacturing SL-1801/1802 over the course of time. I concur that the Key in CDX-001C reflects that a comprehensive comparison is made for each of: (1) the lab scale experiments from Yunfeng Fan's notebook in { } (2) Sino Legend's pilot study in { } (3) Sino Legend's first commercial scale production of SL-1801 in { } (4) Sino Legend's { } SL-1801 importation batches in 2010-2012; and (5) Sino Legend's { } SL-1801 and SL-1802 importation batches in 2012. (CDX-001C) In addition, Dr. Chao testified credibly that he did perform a side-by-side comparison of formula 1 with batches of Respondents' products, although they were not explicitly included in his tables. (Tr. 425:23-426:4) Also, during trial, Dr. Chao provided credible live testimony as to how he arrived at some of his calculations (Tr. at 497:22-500:25), and his witness statement provides unrebutted detailed support for the basis of each of his opinions. (See, e.g. CX-1566C, Q. 24, Q. 26, Q. 28, Q. 31, Q. 33, Q. 35, Q. 37, Q. 40, Q. 42)

I also find Respondents' argument flawed that Complainant has never shown that Sino Legend's "LFP" { } process is the same as the SP1068 process. Mr. Yang, one of the founders of Sino Legend ZGJ and the Vice Chairman of Red Avenue, testified that {

.} (RX-416C, Q. 11) {

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.} (RX-416C, Qs. 339-340) Mr. Yang also admitted that {

.} (Tr. at 647:22-648:19;

749:24-750:7) Dr. Chao confirmed that {

.} (Tr. at 461:13-16 and 462:10-17)

Although Respondents contend that a comparison of their process with Complainant's reveals differences, I find that any focus on differences by Respondents and Dr. Thomas overlooks the primary analysis for "use." *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, 2011 WL 6255116, Comm'n Determination at *46 (Oct. 2011) (Quoting *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) ("[T]he user of another's trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other's secret.")) I find, too, that any minor modifications made by Respondents that were enabled by using Complainant's confidential trade secrets also qualify as "unfair acts" under 19 U.S.C. § 1337(a)(1)(A).

Even without explicit evidence of documentary copying, the weight of the circumstantial evidence shows that the Sino Legend initially copied Complainant's asserted trade secrets, and that later versions of Sino Legend products were at least derived from misappropriated proprietary information from Complainant. As discussed *supra*, Dr. Chao provided two summary tables contrasting Sino Legend's technology before November 2006 based on Mr. Pu's work with its formulations, and on and after November 2006, at which time Sino Legend had access to Jack Xu, to show that Sino Legend dramatically changed course to adopt Complainant

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trade secrets. (CX-1566C, Qs. 73-74) Dr. Chao testified that the similarities between Complainant's and Sino Legend's formulas and manufacturing processes in view of Jack Xu and C.Y. Lai's access to Complainant's trade secrets support the conclusion that Respondents misappropriated Complainant's trade secrets. (*Id.*, Qs. 77-78) The strong circumstantial evidence compels the conclusion that Sino Legend's access to Complainant's trade secrets gave it a substantial head start on any minor modifications/derivations.

I find it is disingenuous for Respondents to argue that Complainant has not asserted what formula is being used as the basis of comparisons in Dr. Chao's "copying" analysis, and that Complainant relies on a "patch-work" of formulas from different times, places, and products. Complainant has clearly specified that the rubber resins and processes for manufacturing the same at issue in this Investigation are SL-1801, SL-1802, SL-1805, and SL-7015. (Amended Complaint (December 18, 2012) at ¶¶ 114, 119; *see also* Order No. 37) Complainant has also clearly asserted that its own rubber resins at issue include SP-1068, HRJ-2765, SP-1045, and R-7578. (*Id.* at ¶ 119) Complainant has explained that it practices certain variations of the SP-1068 process at its Rotterdam Junction and Shanghai plants. (CIB at 31; CX-1565C, Qs. 43-46, 48-79; CX-1570C, Qs. 62-74, 85-94)

Complainant has also provided a concise table explaining the variations which are represented by alkylation and condensation formulas, and the corresponding evidence. (CIB at 31; CX-1565C, Qs. 10, 66-67; CX-762C) Complainant has also explained that the primary difference among the processes for making the various SP1068 related products is {
} (CX-1565C, Qs. 7-8, 80-82) Dr. Hamed testified that these various related products "mechanistically ... would work the same." (Tr. at 400:9-402:9)

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Finally, with respect to Respondents' argument that the Complainant's SP1068 process is in the public domain, I addressed the existence of each trade secret at issue in section III, *supra*.

**3. Technical Proofs of Misappropriation of Each { }
Alleged Trade Secret**

a. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (Citing CX-1566C, Qs. 23-24) Complainant avers that Sino Legend has used and continues to use Complainant's { } trade secret in the alkylation reaction to produce { } for the manufacture of its tackifiers. (Citing *id.*)

Complainant asserts that { }
{ } (Citing *id.*; CX-032C at 1, 13) Complainant avers that { }
{ } (Citing CX-1566C, Q. 24; CX-032C at 12, 24; CX-1359.1C at 24:24-25:3, 25:10-31:15, 31:20-32:4; CX-630C at 3, 5, 6, 11, 26, 28, 34 and 39; and CX-037C at 3, 10)

Complainant says that { }
{ } (Citing CX-1566C, Q. 24; CX-157C at 1, 5)

Complainant avers that { }
{ } (Citing CX-1566C, Q. 24; CX-224C at 1, 6)

Complainant states that { }

Complainant says that Dr. Thomas admitted that {

} (Citing Tr. 639:20-640:4, 640:16-643:1) Complainant avers that {

} (Citing CX-1566C, Q. 24) Complainant says that in the 1990s and early 2000s, Complainant's RJ Plant made {

.} (Citing *id.*) Thus, Complainant argues that Sino

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Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { .}

Complainant asserts that, contrary to Respondents' assertions, { } should not be taken into account in the calculation of { } (Citing CX-1570C, Qs. 79-

80) Complainant states that { } results in a less accurate measure and

one inconsistent with the realities of manufacturing {

} (Citing *id.*)

{

} (Citing CX-922C at 3-6)

Complainant asserts that {

} (Citing *id.* (emphasis added by Complainant))

Complainant states that {

} (Citing CX-906) In

the first, Complainant says that {

.} (Citing *id.* (emphasis

added by Complainant)) Complainant avers that {

} (Citing *id.* (emphasis added by Complainant)) Complainant states that {

}

(Citing JX-059C at 1) Complainant says that {

}

Complainant argues that it is clear that {

} (Citing CX-1592C, Qs. 42-51) Complainant

asserts that {

} (Citing *id.*) Complainant submits that {

} (Citing *id.*, Qs. 50-51)

{

}

Complainant says that Dr. Thomas did not consider whether Sino Legend accounted for

{ } in its work prior to Dec. 2006. (Citing Tr. at 605:12-20) Complainant avers that Yunfeng

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Fan's notebook details experiments he made in November through December 2006. (Citing CX-032C at 1) {

..}

Complainant argues that since accounting for { } results in a miscalculation, Respondents' assertions that { } must be taken into account are effectively a method of playing games with the numbers. Complainant asserts that when { } is correctly calculated, it is clear that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. Complainant submits that Respondents arguments that

{

} First, Complainant argues that a difference { } is a distinction without a difference. {

} Second, Complainant asserts that it has used different { } in different places and different times, which Jack Xu would have known. (Citing CIB Section III.F.1)

In its reply brief, regarding the { } Complainant asserts that {

} (Citing RIB at 90) Complainant contends that Respondents cite to Questions 223-24 of Yang's witness statement, which have been excluded. Complainant says that Respondents also cite to Thomas' testimony at Questions 59 and 63. Complainant avers that Dr. Thomas

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admitted at trial that he had no independent support for Sino Legend's alleged target outside of the hearsay testimony of Mr. Yang and Mr. Fan. (Citing Tr. at 603:7-604:12)

In contrast, Complainant asserts that Dr. Chao examined both the Pu and Fan notebooks and determined that { } (Citing CX-1592C,

Q. 51) Complainant avers that Fan does not show his calculation methods for his November 2006 experiments, but by examining Pu's notebook, Dr. Chao was able to determine that {

} (Citing CX-1592C,

Qs. 42-50) Complainant says that Dr. Chao testified that he {

} (Citing CX-1592C,

Q. 50) Complainant continues that Dr. Chao went on to point out that {

} (Citing *id.*; JX-059C; CX-922C; CX-906)

Therefore, Complainant contends that Dr. Chao applied Mr. Pu's method of calculating and determined that { }

(Citing CX-1592C, Q. 50) Complainant maintains that Respondents do not allege that their target ever changed for { } and the evidence is clear that they maintained this target from Fan's lab scale tests through the recent { } importation batches. (Citing *id.*, Qs. 23-24; *see also* CDX-1C)

Regarding the { } Complainant contends that Respondents' continued insistence on { } is a

transparent attempt to mask Respondents' misappropriation by playing games with numbers.

(Citing RIB at 90) Complainant asserts that Dr. Thomas admitted at trial that he took two Sino

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Legend batch cards {

} (Citing Tr. at 610:12-614:14

(particularly 613:6-13) {

} RX-239C; RX-240C)

Complainant argues that Respondents' approach is to compare apples to oranges.

{

}

Complainant says that Respondents suggest that it was Dr. Chao who cherry-picked his calculation method because he admitted that he performed calculations { } but did not include those calculations in his expert report. (Citing RIB at 92) Complainant highlights that, in making this argument, Respondents' brief again quotes and relies on Dr. Chao's non-admitted deposition testimony, improperly using it for substance rather than for impeachment. Complainant maintains that Dr. Chao performed calculations {

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} in order to fully weigh Dr. Thomas' opinion { } should be taken into account.

Complainant offers that Dr. Chao ultimately rejected Dr. Thomas' opinion because {

} Complainant avers that

Dr. Thomas further admitted that {

} (Citing Tr. at 605:12-20) Thus, Complainant contends that

Chao presented a reasoned defense of his calculation method, whereas Dr. Thomas did not.

Complainant avers that, in an attempt to paper over Dr. Thomas' failure to justify his calculation method, Respondents present two new (and equally flawed) rationales in their post hearing brief. {

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.}

Regarding the difference of the LFP product, Complainant says that {
.
} (Citing RIB at 93) Complainant argues that this is a
distinction without a difference. Complainant asserts that Dr. Hamed has explained that {

} (Citing CX-1565C,
Qs. 126-127) Complainant notes that, at trial, Dr. Thomas agreed. (Citing Tr. at 628:16-629:13;
CX-743C)

Complainant says that, taking another tack, Respondents make the obvious observation
that Complainant treats {
} as different raw materials. (Citing RIB at 91)
Complainant argues, however, that Respondents fail to explain why this difference is important
in the context of {
} Complainant avers that pre-litigation emails
demonstrate that Complainant does not consider the difference significant. Complainant states
that, in a June 12, 2003 email, Complainant U.S. engineer Gary Blodgett observed that {

} (CX-753C (emphasis added by Complainant); *see*
also CX-1570C, Q. 71)

Finally, Complainant says that Respondents point out that Dr. Chao {

} (Citing RIB at 93) Complainant asserts that Respondents ignore that Dr. Thomas

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admitted at trial that {

} (Citing

Tr. at 653:20-654:21) Thus, Complainant maintains that the {

} (Citing CX-1565C, Q. 63)

Respondents' Position: Respondents aver that Complainant's { } uses {

} (Citing RX-422C (Thomas WS), Q. 61; RX-555C at 44)

Respondents asserts that {

}

(Citing RX-422C (Thomas WS), Q. 59, 63; RX-416C (Yang WS), Q. 223-24)

Respondents say that Complainant argues that {

} because it does not matter. (Citing CX-1565C (Banach WS),

Q. 128; CX-1570C (Hamed WS), Qs. 79-80) {

Respondents assert that Complainant's efforts to now run away from { } adjustments are also undermined by its own actions in this litigation. First, Respondents submit that, as Dr. Chao recognized, Complainant at one point asserted that { } was one of its trade secrets, only to later withdraw that claim when it found out that

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Sino Legend was not practicing this trade secret. (Citing Tr. at 426:21-24 (Chao); compare RX-555C at 17 with RX-555C at 43-55) {

} (Citing RX-156C at 66:16-70:21) Respondents assert that, {

} (Citing RX-422C (Thomas

WS), Qs. 53-54 (citing RX-233C)) Respondents offer that {

} (Citing *id.* (citing RX-

235C)) Respondents argue that {

} is yet another key distinction

between the processes.

{

} Fourth, Respondents state that Dr. Chao admitted that he had

{ } for Sino Legend's batches, but then chose not

to include it in his expert report. (Citing Tr. at 427:15-428:1 (Chao) {

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Respondents assert that, while these { } are not found in his witness statement, the fact that they were calculated at all { } runs contrary to any argument that { } is irrelevant.

Respondents submit that Dr. Chao failed to account for { } Respondents argue that his “comparisons” are therefore flawed. Respondents assert that Dr. Chao acknowledged at trial that nowhere in his witness statement did he compare { } Sino Legend’s { } process with any formula of Complainant. (Citing Tr. at 429:22-25 (Chao) {

} Respondents allege that if he done a proper comparison, he would have found that the differences between { } are even more stark than the difference between { }.

Respondents claim that, based on the numbers found in Dr. Chao’s own witness statement, Sino Legend { } to make the LFP products that were imported. (Citing CX-1566C (Chao WS), Q. 24) Respondents aver that these {

} Respondents argue that this difference in { } is not the only distinction. Respondents say that Complainant has never used { } (Citing RX-422C (Thomas WS), Qs. 168, 188, 191-193) Respondents assert that, while

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Complainant used { } it was undisputed at trial
that Complainant abandoned its use {

}

Respondents argue that not only are the raw materials different from anything that
Complainant has every used, so too are the quantities of the various components. {

}

In their reply brief, Respondents argue that Sino Legend's {
.} Based on the numbers found in Dr. Chao's own witness
statement, Respondents aver that Sino Legend used { } to make the
imported "LFP" products. (Citing CX-1566C (Chao WS), Q. 24) Respondents say that {
.} (Citing
RX-555C at 44) Respondents argue that neither Complainant nor its expert Dr. Chao attempt to
refute this significant difference.

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Respondents assert that Dr. Chao acknowledged at trial that nowhere in his witness statement did he compare the { } used in Sino Legend's { } with any formula of Complainant. (Citing Tr. at 429:22-25 (Chao) {

} Respondents submit that, in an effort to fill this gap, Complainant resorts to unsupported, attorney argument. Respondents argue that this is improper. (Citing *See 3M v. United States ITC*, 1996 U.S. App. LEXIS 14585, at *5-6 (Fed. Cir. June 17, 1996))

{

} Respondents state that Complainant's Dr. Banach admitted that he had no evidence that Mr. Xu or anyone else at Sino Legend ever accessed this formula. (Citing Tr. at 174:14-175:16) Respondents continue that both Dr. Chao and Mr. McAllister testified that they had no evidence that Mr. Xu or anyone else at Sino Legend ever accessed any pre-2000 Complainant formula. (Citing Tr. at 224:21-225:1, 227:3-7 (McAllister); Tr. at 448:25-449:10 (Chao)) Respondents reasons that any comparison with { } is therefore improper.

Respondents argue that, even if a comparison were made, Complainant's { } involves other process parameters that Complainant completely ignores. Respondents aver that,

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unlike any accused Sino Legend process, that formula uses {

} Respondents

contend that these parameters are significantly different from Complainant's { } and from any formula that Sino Legend has ever used. Respondents assert that the evidence is also undisputed that Complainant abandoned its { } (Citing RX-422C (Thomas WS), Qs. 88, 91-93, 168 (citing JX-034C; RX-246C)) Respondents argue that this information could not possibly be a trade secret. (Citing *Fox Sports Net North, LLC v. Minn. Twins P'ship*, 319 F.3d 329, 336 (8th Cir. 2003) (stating that "obsolete information cannot form the basis for a trade secret claim because the information has no economic value"))

Respondents argue that Complainant's reliance on a {

} to make a comparison that Dr. Chao never made is defective. Respondents

contend that, not only does Complainant ignore the fact that it has no evidence that Mr. Xu, or anyone else at Sino Legend, ever accessed the formula, it also ignores the other parameters found in the formula. Respondents say that Complainant relies on the testimony of Dr. Thomas who acknowledged that {

} (Citing CIB at 91)

Respondents argue that the comparison Complainant asked Dr. Thomas to make was fatally flawed from the start for the reasons discussed above.

Respondents also contend that Sino Legend's {

} Respondents state that, {

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} Respondents argue that Sino Legend therefore has not used Complainant's {
.}

Respondents say that Complainant now argues { } does not matter. (Citing CIB at 92-93) Respondents assert, however, that Complainant ignores the fact that {
.} (Citing RIB at 90-92) Respondents contend that Complainant also ignores the fact that: {

; } and (4) Dr. Chao admitted that {
.} but then chose not to include it in his expert report. (Citing RIB at 91-92)

Staff's Position: Staff asserts that Dr. Chao testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 23-24, 74) Staff submits that { } was used by Sino Legend ZJG {

.} Staff says avers that these { } were then used in commercial scale production and importation samples. (Citing *id.*)

Staff argues that the use of an identical { } by Mr. Fan is his earliest lab notebook entry in November 2006 demonstrates that Sino Legend misappropriated and used the { } from Complainant's Shanghai subsidiary. Staff states that the

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quantities in Mr. Fan's notebook reflect Complainant's {

,} without evidence of prior experimentation. (Citing Tr. 458:2 to 459:11) Staff states that there is no testimony from Mr. Pu and/or Mr. Fan to explain why they and Sino Legend chose { .} Staff says that Jack Xu continued to deny sharing trade secrets with Sino Legend, although he plainly had a financial incentive to do so. (Citing Tr. at 326:11 to 327:8; 330:16 to 333:6 (Xu received almost double the pay from Sino Legend, along with generous housing and retirement benefits; now Xu is Vice President of one of the Red Avenue entities.)) Staff also says that Mr. Quanghai Yang continued to deny misappropriation of Complainant's trade secrets, although there is no credible evidence of independent development by Sino Legend. (Citing, *e.g.*, Tr. at 700:15 to 702:8: there was no substantive production of emails relating to Jack Xu prior to April 17, 2007 (as well as inadequate production relating to C.Y. Lai))

In its reply brief, Staff argues that, realizing that the exact same { } was used by Sino Legend ZJG during its early lab scale experiments, as shown in Mr. Fan's lab notebook in November 2006, Respondents contend that { .} (Citing RIB at 90) Staff asserts, however, that the evidence reflects that Complainant does not take into consideration { ,} and thus { } does not have a material impact on Complainant's trade secret process for manufacturing SP1068. (Citing CX-1570C (Hamed Witness Stmt.), Qs. 74-80) Staff avers that the evidence also shows that Complainant has used different { } in different plants and at different times. (Citing *id.*) Staff avers that Complainant has used { } in its process by making minor process modifications. (Citing CX-1565C (Banach Witness Stmt.), Qs. 101-123)

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Staff asserts that even Dr. Thomas admitted that Sino Legend's target { } is the same { } as Complainant's { }

{ } Furthermore, Staff contends that even assuming that it would be appropriate to compare Complainant's { } with Sino Legend's { } Dr. Thomas calculated that the difference between these two values is only { } (Citing Tr. at 640:12-641:15; 642:23 to 643:1; SDX-001C (modifying RDX-038C, based on Dr. Thomas' testimony))

Moreover, Staff argues that, even when { } is taken into consideration Sino Legend's { } is substantially similar to Complainant's { }. (Citing Tr. 641:16 to 643:1) As a third data point comparison, Staff states that Dr. Thomas re-calculated Complainant's { } (Citing Tr. at 641:16 to 642:22; RX-422C (Thomas Witness Stmt.), Q. 80) Staff asserts that, in comparing Complainant's { } with Sino Legend's alleged { } Dr. Thomas further testified that the difference between these two values is only { } and therefore substantially similar, { } (Citing Tr. at 642:3-22; SDX-001C (below))

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Staff says that Respondents also contend that Sino Legend's { } does not use Complainant's { } (Citing RIB at 92) Staff asserts, however, that Dr. Thomas agreed that SL-1801 and SL-1802 LFP are related and that the LFP version is based on SL-1801. (Citing Tr. at 645:12-24 (Q.: Okay, but SL-1801 and SL-1801 LFP version are related; correct? A: They're related, and 1801 is before 1801 LFP.); (Q.: And the LFP version is based on SL-1801; right? A: Well, [Sino Legend] changed the [SL-1801] composition to get the LFP version.)) Staff quotes, "[I]f trade secret law were not flexible enough to encompass modified or even new products that are substantially derived from the trade secret of another, the protections that law provides would be hollow indeed." (Citing *Mangren*, 87 F.3d at 944) Staff submits that Dr. Thomas also agreed that when comparing Complainant's { } to Sino Legend's { } the { } differ by only { } and are thus substantially similar { } (Citing Tr. at 653:20 to 654:21;

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SDX-003C (modifying RDX-040C)) Staff is thus of the view that Complainant has satisfied its burden of proving misappropriation of this trade secret.

Analysis and Conclusions: In Section III.B.2.a, I found that Complainant's { } is a valid trade secret. Here, I find that Respondents' process for manufacturing { } tackifier resins uses and substantially uses (or is at least derived from) Complainant's trade secret.

Dr. Chao testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's { } (CX-1566C, Qs. 23-24, 74) Dr. Chao based his unrebutted opinion on data shown in the November 8, 2006 experiment from Mr. Fan's lab notebook, { } (CX-032C at SINOZJG_0005184, 88; CDX-002C at No. 10; CDX-003C at No. 10) {

} The { } appears in Mr. Fan's notebook without evidence of prior experimentation. (Tr. 458:2-459:11) Mr. Fan did not provide any testimony to explain why he and Sino Legend chose the identical { } .}

Moreover, Sino Legend ZJG used { } for its pilot study of December 2006. (CX-1566C, Q. 24) { } (CX-032C, CX-035C, CX-630C, and CX-037C) Also,

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In Sino Legend ZJG's first commercial scale { } batch from { } Sino

Legend ZJG used { } (CX-1566C, Q. 24) {

.} (CX-157C) Dr.

Chao testified that { } used in the

manufacture of the SL-1801 product used { } (CX-

1566C, Q. 24; CX-224C at 1, 6) Dr. Chao also testified that {

.} (CX-1566C, Q.24; CX-1129C at 1, 3)

Respondents' argument fails when it says that, {

.} In section

III.B.2.a, *supra*, I found that { } does not have a material impact on Complainant's

trade secret process for manufacturing SP1068, and I reaffirm that finding here. Complainant

simply used { } (CX-1570C, Qs. 74-80)

Complainant has used { } in its process by making minor process

modifications. (CX-1565C, Qs. 101-123; CX-752C; CX-523C) I found in section III.B.2.a that,

despite { }, Complainant still used the same { }

(CX-1570C, Q. 83; CX-989C; CX-800C)

Furthermore, Dr. Thomas admitted at the hearing that Sino Legend ZJG's target

{ } is { } (same as Complainant) { }

(Tr. 639:20-640:4) Moreover, even when { } is taken into consideration, Dr. Thomas

also admitted that Sino Legend ZJG's { } (Tr. 639:20-25) is

substantially similar to Complainant's { } (Tr. 641:16-643:1; RX-422C, Q. 80;

SDX-001C)

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I find incredible Respondents' argument that Complainant treats {

}

Respondents' argument, that {

} is also ineffective. I found *supra* that {

} (Tr. at 461:13-16 and

462:10-17) {

} (RX-416C, Qs. 11, 339-340; Tr. at 647:22 to 648:19;

749:24-750:7) Even Dr. Thomas agreed that {

} (Tr. at 645:12-24)

As I discussed in section IV.C.2.a, the proper test for determining misappropriation is "use." *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, 2011 WL 6255116, Comm'n Determination at *46 (Oct. 2011). As I also found in section IV.B.2.a, a finding of misappropriation is not negated by slight modifications, or derivations, which are based on the misappropriated trade secrets. *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) ("[T]he user of another's trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other's secret.")) The strong circumstantial evidence compels the conclusion that Sino Legend's access to Complainant's trade secrets gave it a substantial head start on any minor modifications and derivations.

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Finally, as discussed in Section IV.E.1 *infra*, Respondents did not introduce sufficient evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in Section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's {

} trade secret of { } in Sino Legend ZJG's early lab experiments. I also find that Respondents' processes for manufacturing tackifier resins substantially used, or at least were derived from, Complainant's { } trade secret when using a { } in Sino Legend ZJG's pilot study, and in the manufacture of SL-1801 and SL-1802. I also find that Respondents' processes for manufacturing tackifier resins were derived from Complainant's { } trade secret when using { } in the SL-1801 and SL-1802 LFP products.

b. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (Citing CX-1566C, Qs. 25-26)

Complainant asserts that { } is Complainant's trade secret, irrespective of the concentration used. (Citing CX-1570C, Q. 19) Complainant alleges that Sino Legend has used and continues to use { } in accordance with Complainant's { } trade secret. (Citing CX-1566C, Qs. 25-26)

Complainant avers that, in addition to using { } in accordance with Complainant's trade secret, Sino Legend has used and continues to use Complainant's

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{ } (Citing *id.*) Complainant says that this {
} was used in Sino Legend's December 2006 pilot study, and Sino Legend's
commercial scale production of SL-1801/2 tackifier. (Citing *id.*, Q. 26)

Complainant states that Sino Legend used {
} in its pilot study of December 2006. (Citing CX-1566C, Q. 26;
CX-040C at 6, 103; CX-060C at 2, 4; CX-1359.1C at 84:4-10; Tr. at 616:17-617:2)

Complainant maintains that this is the exact same { } used at
Complainant's Shanghai plant between 2004 and 2007. Complainant submits that since this
time, Sino Legend has used {

} (Citing
CX-1566C, Q. 26; CX-1565C, Q. 69; CX-1352.1C at 194; Tr. at 618:1-24)

For example, Complainant says that Sino Legend used {
} (Citing CX-
1566C, Q. 26; CX-040C at 6, 103; CX-866C at 7, 15) Complainant avers that {

} (Citing CX-1566C, Q. 26; CX-224C at 3, 8;
CX-1129C at 2, 4; CX-866C at 7, 15; CX-229C at 2, 4; CX-866C at 7, 15; CX-667C at 2, 4; CX-
866C at 7, 15; CX-1121C at 2, 4; CX-866C at 7, 15)

In its reply brief, regarding { } Complainant asserts that
Respondents do not deny that Sino Legend uses { } or even that

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Sino Legend used { } but Respondents claim that Sino Legend never used {

} (Citing RIB at 94) Complainant argues that this is disingenuous. Complainant avers that, after hiring Lai in September of 2006, the first documented { } performed by Respondents used {

.} (Citing CX-1566C, Q. 24) Similarly, Complainant avers that the first documented { } ever used by Respondents was { } (Citing *id.*, Q. 26) Complainant contends that these { } were taken from Complainant's { } (Citing *id.*, Q. 74) Complainant claims that Respondents thereafter made a small process tweak, using {

.} (Citing CIB at III.G.2.d at 84)

Complainant contends that Respondents' argument that { } goes hand in hand with { } (citing RIB at 87, 94), is plainly contradicted by the facts. Complainant avers that, as Dr. Hamed testified at trial, Complainant has used {

} (Citing Tr. at 398:21-400:8; CX-762C at 17) Complainant asserts that Respondents asked Complainant's witnesses about the relationship at trial and all agreed that the two parameters are interrelated but not interdependent. For example, Complainant says that Dr. Banach answered: "Many things in the process are interrelated. They are interrelated. They're not dependent on each other. So if you change one, you don't have to change the other. You could make other tweaks in the system down the road." (Citing Tr. at 126:13-126:21) Complainant aver that, when Dr. Hamed was asked, he answered: "within a given range you can have variability and

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still make a good product if you know what you're doing.” (Citing Tr. at 349:11-351:24) Thus, Complainant argues that Respondents' suggestion that tweaking {

} somehow negates Sino Legend's misappropriation of Complainant's {
} is without merit.

Complainant asserts that Respondents' criticism of Dr. Hamed for not knowing the product code of { } (RIB at 95), fails to recognize he was focused on process parameters in Complainant's formulas, not the sales codes for the products made by them. Complainant does not allege that Sino Legend misappropriated Complainant's product codes. In any event, Complainant submits that the product code for { } as identified by Dr. Banach who provided a fulsome description of the process parameters called for by this formula. (Citing CX-1565C, Q. 74-78)

Respondents' Position: Respondents contend that Sino Legend also uses { } Respondents aver that Complainant's { } (Citing RX-555C at 45; RX-422C (Thomas WS), Q. 126; CX-581C) Respondents say that, by contrast, Sino Legend uses { } (Citing RX-422C (Thomas WS), Q. 127-132 (citing RX-238C; RX-252C))

Respondents note that Dr. Chao argues that “Sino Legend used { } (Citing CX-1566C (Chao WS), Q. 26) Respondents assert that, as Complainant has itself recognized, { } (Citing RX-555C at 14) Respondents contend that Complainant has also asserted that these two parameters are the “primary drivers” that determine { } and in turn, whether a resin having the desired properties will be made. (Citing RX-555C at 15)

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Respondents argue that, even assuming {

} (Citing RX-422C (Thomas WS), Qs. 75-80, 134-

35) Respondents maintain that, for all its imported batches, Sino Legend used {

} as even Dr. Chao acknowledged at trial. (Citing Tr. at 430:1-8 (Chao)) Thus,

Respondents argue that Sino Legend has never practiced Complainant's {

} and certainly not for

any commercial production.

At trial, Respondents argue that Complainant attempted to shift course by arguing that {

} and that its formulas

provided nothing more than "an initial starting point to get the final result." (Citing Tr. at 179:5-

23 (Banach); Tr. at 351:5-11 (Hamed)) Respondents note that Dr. Banach conceded that the

formulas were not merely just suggestions:

Q. Well, these aren't merely suggestions. These are the company's formulas.

A. These are the set points for that process at that time.

(Citing Tr. at 179:24-180:2 (emphasis added by Respondents)) Thus, Respondents argue that

any suggestion by Complainant that {

} from one Complainant formula

used by Complainant at one point in time could be mixed and matched with {

} used by Complainant in another formula used at a different point in time is simply

incorrect.

Respondents assert that, in an apparent attempt to claim {

} Dr. Hamed relies upon {

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.} (Citing CX-1570C (Hamed WS), Q. 86; Tr. at 384:22-385:3 (Hamed)) Respondents argue that Dr. Hamed neglects the underlying formula. Respondents say that he admitted at trial that he did not even know what material was made using this { }. (Citing Tr. at 385:19-386:1 (Hamed) (“Q. And do you know what material was made using { } A. I do not.”))

Respondents submit that the parameters found in { } are different from Complainant’s { }. Specifically, Respondents assert that { } uses { } which is different from the { } (Citing CX-1565C (Banach WS), Qs. 74-75 (citing CX-605C); Tr. at 178:18-179:4 (Banach)) Respondents say that Dr. Banach also recognized that the corresponding { } was different that that associated with Complainant { } (Citing Tr. CX-1565C (Banach WS), Qs. 77-78.))

Respondents add that Dr. Hamed also relies upon { } from { } facility which indicates the use of { } (Citing CX-1570C (Hamed WS), Q. 85 (citing JX-035C)) Other than { }, Respondents assert that nowhere does Dr. Hamed’s witness statement indicate his consideration of the other process parameters involved in this, and the other formulas. (Citing Tr. at 382:15-385:3 (Hamed)) Respondents say that at trial, he admitted that he did not. (Citing *id.*) Respondents aver that, had he considered these, he would have found that { } was { } and the { } was { } far from that specified in { }. (Citing CX-1565C (Banach WS), Qs. 68-69 (citing JX-035C))

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Respondents continue that, in his witness statement, Dr. Hamed also relies upon other Complainant formulas having { } used by Complainant in various formulas. (Citing CX-1570C (Hamed WS), Q. 85; CX-1565C (Banach), Q. 16) Respondents aver that, other than { } nowhere does Dr. Hamed's witness statement indicate his consideration of the other process parameters involved in this, and the other formulas. (Citing Tr. at 382:15-385:3) Respondents assert that the formula that requires { } and Dr. Banach also relies upon it in his witness statement. (Citing CX-1565C (Banach), Qs. 35-36) Respondents contend that {

{ } (Citing Tr. at 126:1-4 (Banach)) Respondents state that this formula has { } (Citing Tr. at 128:3-10 (Banach)) Respondents say that, given that Complainant has acknowledged that Sino Legend has not copied { }, Dr. Hamed and Dr. Banach's continued reliance on it is particularly surprising. (Citing RX-555C at 45 n.10)

Respondents state that, again, at trial, he admitted that he did not. (Citing *id.*) Respondents assert that for the same reasons why Complainant should not be allowed to splice reaction parameters from { } with other reaction formulas to create a process it has never in fact used, Complainant should not be allowed to rely on these formulas to support its claim of misappropriation.

In their reply brief, Respondents assert that, as Complainant acknowledges, Sino Legend adopted { } in June 2007 and then used it thereafter for every commercial batch of accused resins. (Citing CIB at 94-95 (citing CX-040C at 6)) Respondents contend that Complainant knows full well that its { } process for making SP-1068 in China is { } (Citing *id.*) Respondents says that, in an

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attempt to overcome the obvious significant differences between the Complainant and Sino

Legend { }, Complainant counters that Sino Legend copied the { } from Complainant's { } based upon information provided by Mr. Xu. (Citing *id.* at 84) Respondents aver that Complainant's argues that from the earliest days Sino Legend copied essentially a "hybrid" of { }

{ } (Citing *id.*) Respondents argue that Complainant's argument makes no sense. Respondents assert that Complainant has vehemently contended that its process parameters are interrelated, especially { }, which Complainant describes as "closely interconnected." (Citing RX-555C at 44-45)

Respondents submit that, according to Complainant, its { } process for making SP-1068 in China specifies { } coupled with { }

{ } (Citing Tr. at 127:16-128:2 (Banach))

In contrast, Respondents aver that Complainant's { } for which Complainant now relies for { } specifies { } (Citing CX-1565C (Banach WS), Qs. 68-69, 74-75 (citing JX-035C and CX-605C); *see also* Tr. at 178:18-179:4 (Banach)) In addition, Respondents argue that the { }

{ }, are all different from those in { } process in China. (Citing RIB at 19) Respondents say that Complainant offers no reason whatsoever why Sino Legend, supposedly having Complainant's { } in hand courtesy of Mr. Xu, would then immediately abandon that formula in favor of a process consisting of splicing together { } with aspects of a very different { } Respondents argue that there simply is no justification for Complainant's argument to this effect.

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Respondents state that, for all its commercial batches, Sino Legend used {

,} as even Dr. Chao acknowledged at trial. (Citing Tr. at 430:1-8 (Chao))

Respondents aver that Sino Legend's { } is therefore obviously different from

Complainant's { } which specifies { } (Citing

RX-555C at 45; RX-422C (Thomas WS), Q. 126; CX-581C)

Respondents contends that, as with the { } Complainant seeks to close the gap between its { } process and Sino Legend's process by resorting to isolated portions of other Complainant formulas. In particular, Respondents say that Complainant argues that Sino Legend's {

} (Citing CIB at 94) Respondents contend that the other process parameters found in these formulas are different from Complainant's { } and any process used by Sino Legend.

Respondents aver that { } used a { } and { } (Citing CX-1565C (Banach WS), Qs. 74-75 (citing CX-605C); *see also* Tr. at 178:18-179:4 (Banach)) Respondents assert that, in fact, the first page of the formula itself is clearly stamped "OBSOLETE." (Citing CX-605C, at SIGITC0000174297)

{

.}

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Moreover, Respondents contend that Complainant has no evidence that Mr. Xu, or anyone else at Sino Legend, ever accessed these formulas. Respondents assert that Complainant resorts to improper mixing and matching of process parameters in a doubly defective approach.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 25-26, 74)

Staff asserts that the Fan notebook fails to provide any evidence that Sino Legend ever used { } as a result of having applied publicly known information, independent development, or reverse engineering. (Citing RX-267; CX-1566C (Chao Witness Stmt.), Qs. 25-26, 74; Tr. at 765:18-25)

Staff argues that the evidence shows that Sino Legend first used { } (Citing CX-1566C

(Chao Witness Stmt.), Q. 26) Staff says that Mr. Fei Shi set forth {

.} (Citing CX-060C at 2 {

} Staff avers that a later writing by Mr. Shi in his notebook dated "June 16, 2007 to August 20, 2007" confirms that {

.} (Citing CX-040C (Shi Notebook) at pages 6 and 20;

CX-1359.1C at 84:4-10) Staff observes that subsequently, Sino Legend used {

}

(Citing CX-1566C, Qs. 26, 74)

Staff asserts that before Mr. Xu's departure from Complainant's Shanghai subsidiary, Mr. Xu specifically asked for and received { } from

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{ .} (Citing CX-604C; Tr. at 314:18-315:9 (Xu Cross)) Staff avers that soon after Xu started his employment at Sino Legend (around April 30, 2007), Sino Legend modified { } (Citing RX-416C (Yang Witness Stmt.), Qs. 331, 333; CX-040C and CX-866C; Tr. at 465:2-467:12)

Staff states that in an email of March 27, 2007, just before his resignation from Complainant, Xu asked { } (Citing CX-1154C; CX-604C) Staff says that { } responded that: { } Therefore, Staff avers that Mr. Xu knew that the Complainant's Shanghai subsidiary plant used { .} (Citing *id.*) Staff avers that he also knew that { } used { } which he learned shortly before joining Sino Legend in April 2007. (Citing *id.*)

Staff argues that the evidence shows that Sino Legend never used { } before December 2006, but that Sino Legend acquired { } from Xu in late 2006 and acquired { } from Xu after he joined Sino Legend. (Citing *id.*) Staff asserts that because Sino Legend uses { } in the same manner as Complainant and because Sino Legend did not independently develop { } in the Staff's view Complainant has carried its burden of proving misappropriation of this trade secret.

In its reply brief, Staff says that Respondents contend that "Sino Legend also uses a { } (Citing RIB at 93 { } In Staff's view, Respondents admit to Sino Legend's use of Complainant's { .} (Citing *id.*) Staff

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contends that they argue instead over an immaterial difference {

.} Staff avers that the Fan notebook (RX-

267) fails to provide any evidence that Sino Legend ever used {

} based on publicly known information, independent

development, or reverse engineering. (Citing CX-1566C (Chao Witness Stmt.), Qs. 25-26, 74;

Tr. at 765:18-25) Staff is of the view that Complainant has carried its burden of proving

misappropriation of this trade secret.

Analysis and Conclusions: In Section III.B.2.b, I found that Complainant's {

} is a valid trade secret. Here, I find that

Respondents' process for manufacturing {

} tackifier resins uses Complainant's

trade secret.

Dr. Chao testified that Respondents' processes for manufacturing {

tackifier resins use, substantially use, or are substantially derived from Complainant's {

.} (CX-1566C, Q. 25) Dr. Chao based

his un rebutted opinions on the Sino Legend ZJG's {

} which shows

that Sino Legend ZJG used {

} (*Id.*)

(CX-060C) A Sino Legend ZJG record for {

}

confirms that Sino Legend ZJG used {

} (CX-060C) Sino Legend

ZJG records also show that Sino Legend ZJG used {

} (CX-040C) Dr. Chao provided

the un rebutted opinion that {

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} used in the manufacture of SL-1802 and SL-1802. (CX-1566C, Q. 26; CX-224C; CX-1129C)

As discussed in section III.B.2.b, {

} (JX-035C

at SIGITC0000051833) A later writing by Mr. Shi in his notebook dated “June 16, 2007 to August 20, 2007” confirms that {

} (CX-040C at 6, 20; CX-1359.1C at 84:4-10) Dr. Chao testified that {

} (CX-1566C, Q. 26; CX-224C at 3, 8; CX-1129C at 2, 4)

Respondents’ argument, that Sino Legend uses a different {

} is unpersuasive. No { } is required by Complainant’s trade secret; it just requires that { } Also, the evidence shows that Sino Legend, in fact, used { } (CX-060C)

Respondents’ argument, that it never practiced {

} is contrary to established facts. I found that Sino Legend ZJG used of Complainant’s { } in section IV.C.2.b.i, and I found that Sino Legend ZJG used {

.}

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Regarding Respondents' use of { } After Mr. Xu joined Sino Legend ZJG, Sino Legend ZJG modified { } (RX-416C, Q. 333; CX-040C; Tr. at 465:2-467:12). Credible evidence shows that Sino Legend ZJG acquired { } from Mr. Xu in late 2006 and acquired { } from Mr. Xu after he joined Sino Legend ZJG. Shortly before Mr. Xu's departure from Complainant's Shanghai subsidiary, on March 27, 2007, Mr. Xu specifically asked { } which he received. (CX-604C; Tr. at 314:18-315:9) { } (Id.) Thus, Mr. Xu knew that the Complainant's Shanghai subsidiary plant used { } and he also knew that { } which he learned shortly before joining Sino Legend ZJG.

Finally, as discussed in Section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in Section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's { } trade secret in Sino Legend ZGJ's { } manufacture of SL-1801 and SL-1802.

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c. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret for { } (Citing CX-1566C, Qs. 27-28) Complainant avers that { } and in Sino Legend's commercial production of SL-1801/2. (Citing *id.*)

Complainant contends that Sino Legend's early lab scale experiments { } (Citing *id.*) Complainant says that, for example, the first experiment, dated November 8, 2006, uses { } (Citing *id.*; CX-032C at 1, 13; RX-341C at 37:14 – 38:3) Complainant also says that Sino Legend used { } (Citing CX-1566C at 13; CX-032C at 11, 23; CX-035C at 23, 47; CX-037C at 2, 3, 9, 10) Complainant avers that Sino Legend used { } SL-1801 and SL-1802, including the production of products that were imported into the U.S. (Citing CX-1566C, Q. 28; CX-616C at 1, 2, 7, 8; CX-854C at 1, 3; CX-224C at 1, 6)

Respondents' Position: Respondents argue that Sino Legend's { } are different from those used by Complainant. Respondents aver that Sino Legend uses { } (Citing RX-422C (Thomas WS), Q. 97; RX-416C (Yang WS), Q. 191) By contrast, before 2007, Respondents contend that Complainant was using

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{ .} (Citing RX-422C (Thomas WS), Q. 104; CX-1570C (Hamed WS), Qs. 86-87)

Respondents submit that Complainant also {
} Respondents aver that {
} was once one of Complainant's alleged trade secrets in this case; but Complainant dropped it. (Citing RX-555C at 16) Respondents assert that Sino Legend does not employ { } (Citing RX-422C (Thomas WS), Qs. 111-116 (citing RX-157C; RX-156C at 59:16-19; RX-249C; RX-250C)) Respondents argue that the fact that Sino Legend does not use { } that Complainant once claimed as a trade secret indicates that this difference is significant. Respondents say that Dr. Chao ignores these differences.

In their reply brief, Respondents argue that Complainant's brief misleadingly suggests that Sino Legend first started using { } in November 2006. (Citing CIB. at 95) In fact Sino Legend's use of { } dates as early as February 2006, long before Mr. Xu had any contact with Sino Legend. (Citing RIB at 125)

Staff's Position: In Staff's view, { } does not qualify as a valid trade secret.

Analysis and Conclusions: In Section III.B.2.c, I found that Complainant's { } is not a valid trade secret. Assuming *arguendo*, that { } was found to be a valid trade secret, I would find that Respondents' process for manufacturing { } tackifiers uses Complainant's trade secret.

Dr. Chao testified that Sino Legend ZIG uses { } (CX-1566C, Q. 27) His testimony is confirmed by Mr. Fan's

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testimony that he performed experiments using {

} (RX-0341C at 37:14-38:3) Dr. Chao also testified that Sino Legend ZJG uses

{ } in the

production of SL-1801 and SL-1802. (CX-1566C, Q. 28; CX-616C at 1, 2, 7, 8; CX-854C at 1, 3; CX-224C at 1,6)

Respondents admit that they use { }. (RX-422C, Qs. 97-98) I find

Respondents' argument that Complainant {

} irrelevant. Complainant's additional restrictions do not change

the fact that Respondents use { }. Finally, as discussed in Section IV.E.1 *infra*,

Respondents did not introduce any credible evidence to support a conclusion that it

independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in Section IV.C.1 *supra*, establishes by a preponderance of evidence

that Respondents' processes for manufacturing tackifier resins used Complainant's {

} trade secret in Sino Legend ZJG's early lab experiments and in the

production of SL-1801 and SL-1802.

d. { }

Complainant's Position: Complainant argues that Respondents' processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from

Complainant's { } trade secret. (Citing CX-1566C, Qs. 29-31)

Complainant avers that Sino Legend has adopted { } essentially

identical to that used by Complainant at its Rotterdam Junction and Shanghai facilities. (Citing *id.*; CX-492C at 51)

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Complainant says that, at the trial, Dr. Thomas admitted that he has not identified any differences between Sino Legend's { } and Complainant's { }. (Citing Tr. 585:22-586:2) Complainant submits that, like Complainant's { } Sino Legend's { } (Citing CX-1566C, Q. 31; CX-910C; CX-1115C; CX-871C; CX-872C; CX-909C; CX-787C; CX-791C; CX-792C; CX-072C at 3; CX-909C; CX-911C)

Complainant contends that Sino Legend used { } used in the production of SL-1801 and SL-1802 products that were imported into the U.S. (Citing CX-229C at 1, 3; CX-1121C at 1, 3)

In its reply brief, regarding the use { }, Complainant asserts that Respondents have been unable to identify any difference at all other than to note the trivial difference that on at least one occasion {

.} (Citing RIB at 97) Complainant says that it does not allege that { } is a trade secret or even an important process consideration. Complainant avers that its experts described Complainant's and Sino Legend's { } in great detail and Dr. Chao concluded that { } are "essentially identical." (Citing CX-1566C, Qs. 29-31; CX-1570C, Qs. 23-28) In response, Complainant submits that Respondents' chemical engineering and equipment expert, Dr. Thomas, did not identify a single difference. (Citing Tr. at 585:22-586:2) Complainant argues that Respondents' { } argument does not cure this deficiency.

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Respondents' Position: Respondents say that Dr. Chao claims that Sino Legend's {
{“ } is “essentially identical to that used by Complainant {
 } (Citing CX-1566C at (Chao), Q. 29) Respondents contend
that he never explains why. Respondents aver that, although Dr. Chao purports to describe Sino
Legend's process, he never provides a side-by-side comparison between Complainant's process
and equipment and Sino Legend's process and equipment.

Respondents assert that Dr. Chao again ignores differences between the two processes.
Respondents say that Complainant {
 } (CX-1565C (Banach WS), Q. 85 (emphasis
added by Respondents) In contrast, Respondents maintain that Sino Legend {
 }
{
 }

In their reply brief, Respondents say that Complainant points to an October 2005 Sino
Legend feasibility study to argue that Sino Legend originally thought to {
 } (Citing CIB at 115) Respondents argue that, even if Complainant's
interpretation of that study were correct (and it is not), Complainant ignores all of Sino Legend's
subsequent studies, including the testing of SP-1068 {
 } making it more logical for Sino Legend to do the same and, accordingly, {
 .} Respondents contend that, as Dr. Swager pointed out, in a process using {
 } is the logical choice. (Citing
Tr. at 873:23-874:14 (Swager)) In any event, Respondents submit that Complainant's
acknowledgment that Sino Legend { } back in 2005 cuts against

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Complainant's claims. Respondents argue that Complainant cannot contend that {
} was a concept foreign to Sino Legend.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 29-31, 74) Staff asserts that the evidence shows that Sino Legend {

} in its Zhangjiagang plant. (Citing RX-0416 (Yang Witness Stmt), Q. 278)

Staff argues that Respondents' { } is essentially identical to Complainant's { } (Citing CX-1566C (Chao Witness Statement), Q. 31) Staff states, however, that not until { } appeared in the { } of Sino Legend's Zhangjiagang Plant was there any evidence that Sino Legend knew about such a process, or that it had made any attempt to develop one. (Citing RX-416C, Qs. 272-284)

Staff avers that the evidence shows that Sino Legend did not learn of { } from its own work, from other sources, or from independent development. (Citing Tr. at 765:18-25) Staff says that Sino Legend asserts that it learned about { } (Citing RX-416C (Yang Witness Stmt.), Qs. 106-107) Staff notes, however, Mr. Yang's statement was not corroborated by his notes or even through the testimony of other Sino Legend personnel { } Staff argues that, because Sino Legend's process uses { } and because Sino Legend did not introduce sufficient evidence to support a conclusion

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that it independently developed { } Staff is of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

In its reply brief, Staff argues that Respondents contend that “Dr. Chao again ignores differences between the two processes.” (Citing RIB at 97 {

} In the Staff’s view, Respondents concede to Sino Legend’s use of { } in the same manner as Complainant. (Citing *id.*) Instead, Staff contends that Respondents argue over an immaterial alleged difference {

} Staff avers that the evidence shows however that Respondents’ { } is essentially identical to Complainant’s process. (Citing CX-1566C (Chao Witness Stmt.), Q. 31; RX-0416 (Yang Witness Stmt), Q. 278) The Staff is thus of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

Analysis and Conclusions: In Section III.B.2.d, I found that Complainant’s { } is a valid trade secret. Here, I find that Respondents’ process for manufacturing { } tackifier resins uses Complainant’s trade secret.

Dr. Chao testified that Respondents’ process for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant’s { } trade secret. (CX-1566C, Q. 29) In its First Supplemental Response to Complainant’s Requests for Admission, Sino Legend ZJG admitted that {

} (CX-492C at 51) Also, Mr. Yang, one of the founders of Sino Legend ZJG and Vice Chairman of Red Avenue Group, testified that Sino Legend {

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testified that {

} (RX-416C, Q. 278) Mr. Yang

.} (RX-416C, Q. 275)

(RX-385C at SINOZJG_0011116) Mr. Yang testified the {

} as shown below. (RX-416C, Q. 274)

(RX-385C) Mr. Yang testified that the {

}

(RX-385C at SINOZJG_0011112) Mr. Yang testified that {

.} (RX-416C, Q. 276)

(RX-385C at SINOZJG_0011112) Mr. Yang testified that {
.} (RX-385C at SINOZJG_0011114) {.

}

{

.} Dr. Chao testified that Sino Legend ZJG uses { } in the commercial production of SL-1801 and SL-1802. (CX-1566C, Q. 31; CX-229C at 1, 3; CX-1121C at 1, 3)

I find Respondents argument frivolous when they complain that Dr. Chao fails to provide a side-by-side comparison. Dr. Chao provided an unrefuted detailed description of Sino Legend ZJG's { }, which matched the admission of Mr. Yang. Moreover, Dr. Thomas admitted that he has not identified any differences between Sino Legend ZJG's { } and Complainant's { } (Tr. 585:22-586:2) I also find that Respondents' attempt to point out { } is not material. Complainant does not allege that { } is a trade secret.

As discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation. Furthermore, an attachment to an email from Mr. Xu, which is dated April 26, 2007, Mr. Xu's initials are listed as "XJ" for Xu, Jie, as the person who is

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responsible for numerous items related to Sino Legend ZJG's start-up plan in 2007. (CX-940C) These items include modifications of P&IDs. (*Id.* at 2) In addition to the facts presented *supra* in Section IV.C.1.a, these facts provide even more circumstantial evidence that Respondents wrongfully misappropriated Complainant's { } trade secret.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins use Complainant's { } trade secret in the production of SL-1801 and SL-1802.

e. { }

Complainant's Position: Complainant argues that Respondents' processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret, as seen in Sino Legend's { } used to manufacture the tackifiers were imported into the U.S. (Citing CX-1566C, Qs. 32-33)

Complainant asserts that, { } (Citing CX-037C at 2-3) Complainant contends that, { } (Citing CX-866C at 6-7; CX-157C at 2-3)

Complainant avers that, { }

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.} (Citing CX-1566C, Q. 33; CX-224C at 1-3; CX-1129C at 2, 4; CX-229C at 2, 4; CX-667C at 2, 4; CX-1121C at 2, 4)

Regarding { ,} Complainant says that { ,} Complainant asserts, however, that Dr. Chao explained at trial that {

,} at least until Sino Legend stole Complainant's confidential information. (Citing Tr. at 474:7-22)

Respondents' Position: Respondents say that Dr. Chao claims that Sino Legend uses { ,} but again, he ignores a number of differences. (Citing CX-1566C (Chao WS), Q. 32)

Respondents state that, according to Complainant, { } was one aspect of this alleged trade secret. (Citing *compare* RX-555C at 34 *with id.* at 47) Respondents say Dr. Chao does not discuss this in his witness statement. Respondents argue that, again, there are differences. Respondents assert that unlike Complainant, Sino Legend's process {

.} (Citing RX-422C (Thomas WS), Qs. 152-153) Respondents argue that, in contrast, in Complainant's process, { .} (Citing *id.*, Qs. 154-155 (citing RX-255C; RX-238C))

Respondents assert that { .} (Citing CX-1570C (Hamed), Q. 29) Respondents

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state that, in contrast, Sino Legend's process {

.} (Citing RX-422C (Thomas WS), Qs. 170-72 (citing RX-244C; JX-

038C; JX-037C)) Respondents say that Dr. Chao again overlooks these differences.

Respondents assert that, even as compared to Complainant's { } there are

differences. Respondents contend that Complainant's {

} (Citing RX-

422C (Thomas WS), Qs. 170-172)

Staff's Position: In Staff's view, {

} does not qualify as a valid trade secret.

Analysis and Conclusions: In Section III.B.2.e, I found that {

} is not a trade secret. Assuming

arguendo, that {

} was found to be a valid trade secret, I would find that Respondents'

process for manufacturing { } tackifiers uses and is substantially derived from

by Complainant for { .}

Dr. Chao testified that Respondents' processes for manufacturing { }

tackifier resins use, substantially use, or are substantially derived from {

} trade secret. Dr. Chao's testimony is confirmed by {

} Sino Legend ZJG's December 2006 pilot study {

.} (CX-037C at 3) Dr. Chao provided un rebutted

testimony that Sino Legend ZJG's batch records from its first commercial scale { }, from

{ .} confirm that Sino Legend ZJG {

.} (CX-1566C, Q. 33; CX-866C at 6-7;

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CX-157C at 2-3) Dr. Chao also testified that {

.}

(CX-1566C, Q. 33; CX-224C at 1, 3; CX-1129C at 2, 4)

Once again, Respondents' attempt to emphasize insignificant differences. The fact that Sino Legend ZJG's process {

} does not mean Sino Legend ZJG does not use Complainant's {

.}

Respondents' argument that some of Sino Legend ZJG's processes {

} is also misplaced. Dr. Chao testified that, Sino

Legend ZJG's "low free PTO" or "LFP" products called SL-1801LFP and SL-1802LFP {

.} (Tr. at 461:13-16 and 462:10-17)

Sino Legend and Red Avenue {

.} (RX-416C, Qs. 11, 339-340; Tr. at 647:22 to 648:19; 749:24-750:7)

As I found in section IV.C.2.a, a finding of misappropriation is not negated by independent modifications, or derivations, which are based on the misappropriated trade secrets. *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) ("[T]he user of another's trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other's secret.") The strong circumstantial evidence compels the conclusion that Sino Legend's access to Complainant's trade secrets gave it a substantial head start on any minor

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modifications/derivations.

Finally, as discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's {
} trade secret in the first commercial {
} and the manufacture of SL-1801 and SL-1802. I also find that Respondents' processes for manufacturing tackifier resins are substantially derived from Complainant's {
} trade secret in the manufacture of the SL-1801 LFP and SL-1802 LFP products.

f. {
}

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's {
} trade secret. (Citing CX-1566C, Qs. 34-35) Complainant avers that such uses include Sino Legend's {
} used to manufacture the SL-1801 and SL-1802 products that were imported into the U.S. (Citing *id.*)

Complainant states that, {
}. (Citing *id.*; CX-037C at 2-3; CX-060C at 2, 4)
Complainant says that {
}

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(Citing CX-1566C, Q. 35; CX-037C at 2-3; CX-060C at 2, 4) {

}. (Citing CX-866C

at 6-7; CX-157C at 2-3) Complainant submits that {

}. (Citing CX-866C at

6-7; CX-157C at 2-3)

Complainant says that {

}. (Citing CX-1566C, Q. 35;

CX-224C at 1-3) Complainant states that {

}. (Citing CX-

1566C, Q. 35; CX-224C at 1-3) Complainant continues that {

}. (Citing CX-1566C, Q. 35; CX-1129C at 2, 4) Complainant maintains that {

}. (Citing CX-

1566C, Q. 35; CX-229C at 2, 4) Complainant submits that {

}. (Citing CX-1566C, Q. 35;

CX-667C at 2, 4) Complainant adds that {

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}. (Citing CX-1566C, Q. 35; CX-1121C

at 2, 4)

Respondents' Position: Respondents argue that Complainant {

}. Respondents state that, in contrast, Sino Legend's {

.} (Citing RX-422C (Thomas WS), Qs. 148-151 (citing JX-055C; RX-237C; RX-238C; RX-239C; RX-243C; RX-244C; RX-245C; RX-384C))

Respondents assert that there is some overlap between Complainant's and Respondents' { ,} which Sino Legend's expert, Dr. Thomas acknowledged at trial. (Citing Tr. at 632:6-13) Respondents contend that this does not mean that any copying {

Respondents argue that { } was known in the prior art, and considered conventional for { } such as that used to make SP1068 and SL-1801.

Respondents aver that Sino Legend { } as early as February 2006. (Citing RX-251C; RX-416C (Yang WS), Q. 192) Respondents argue that the fact that any differences exist at all weighs against a finding of copying. (Citing RX-442C (Thomas WS), Qs. 73, 241)

Furthermore, Respondents state that Dr. Chao acknowledged that his comparison of Complainant's alleged { } trade secret looked at only Sino Legend's December 2006 laboratory test and the first commercial batch in December 2007. (Citing Tr. at 433:5-434:2) Respondents say that he therefore ignored the differences in reaction temperature for Sino Legend's commercial batches in 2007 forward.

Respondents assert that the differences are even more significant for the Sino Legend LFP products made based by Sino Legend's { } process. Respondents maintain that in

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this process, Sino Legend {

} (Citing RX-422C (Thomas WS), Q. 151)

Staff's Position: In Staff's view, { } does not qualify as a valid trade secret.

Analysis and Conclusions: In Section III.B.2.f, I found that { } is not a trade secret. Assuming *arguendo*, that { } was found to be a trade secret, I would find that Respondents' process for manufacturing { } tackifiers uses and is substantially derived from Complainant's trade secret.

Dr. Chao testified that Respondents' process for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's { } (CX-1566C, Q. 34) An { } batch record from Sino Legend ZJG's first commercial scale reaction from December 30, 2007 show that {

}. (CX-157C at 2-3) The batch cards also shows that {

.} (*Id.*) Dr. Chao also testified that {

.} (CX-1566C, Q. 34; CX-224C at 1-3) He also testified that {

.} (CX-1566C, Q. 35; CX-224C.)

He also testified that {

(CX-1566C, Q. 35; CX-1129C at 2, 4)

Respondents acknowledge that there is overlap between Sino Legend ZJG's {
 }, which Dr. Thomas conceded at trial is "similar." (Tr. at
 632:6-13) Respondents' argument that any difference at all weighs against a finding of copying,
 is incorrect. If Respondents knew about Complainant's parameters, and had a "head-start" in the
 process to arrive at their modification, copying still has occurred.

As I discussed in section IV.C.2.a, the proper test for determining misappropriation is
 "use." *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, 2011 WL 6255116, Comm'n
 Determination at *46 (Oct. 2011). As I also found in section IV.B.2.a, a finding of
 misappropriation is not negated by slight modifications, or derivations, which are based on the
 misappropriated trade secrets. *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937,
 944 (7th Cir. 1996) ("[T]he user of another's trade secret is liable even if he uses it with
 modifications or improvements upon it effected by his own efforts, so long as the substance of
 the process used by the actor is derived from the other's secret.")) Here, the minor {
 }
 difference, combined with access, as found in section IV.C.1 *supra*, is strong circumstantial
 evidence that Sino Legend's access to Complainant's trade secrets gave it a substantial head start
 on any minor modifications.

Finally, as discussed in Section IV.E.1 *infra*, Respondents did not introduce any credible
 evidence to support a conclusion that it independently developed the use of the alleged trade
 secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's
 trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence

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.} (Citing Tr. at 654:24-657:2) Complainant

asserts that {

.} (Citing CX-1566C, Q. 37; CX-077C at 3; JX-044C; CX-1352.1C

at 154:21 – 156:6) Complainant contends that {

.} (Citing CX-1151 at 1; CX-1566C, Q. 37; CX-1569C, Qs. 40-44;

CX-1015C; CX-1029C) Furthermore, Complainant submits that {

} Correspondingly, Complainant notes that {

.}

(Citing JX-043C at 1; CX-077C at 3)

Complainant avers that, {

} Thus, Complainant argues that {

}

(Citing CX-1566C, Q. 37)

In its reply brief, regarding {

,} Complainant argues that

Respondents mischaracterize Staff's cross of Dr. Thomas on {

} as "an attempt

... to quibble ." (RIB at 100) Complainant says that Staff confronted Dr. Thomas with a

demonstrative prepared by Respondents' counsel comparing {

.} (Citing Tr. at 654:22-657:2) Complainant

avers that Dr. Thomas admitted that {

} were "substantially similar" and that {

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} (Citing *id.*) Thus, Complainant contends that Staff was not quibbling with Dr. Thomas, but rather obtaining admissions that { } were substantially similar.

Complainant asserts that Respondents allege that Complainant's witness, Mr. McAllister testified that { } is "critical."

(Citing RIB at 104) Complainant avers that Mr. McAllister's testimony was that {

} was "important." (Citing Tr. at 244:10-14) Complainant states that the next day, Dr. Chao was asked by Respondents' counsel about Mr. McAllister's testimony and he explained that {

} is not at the heart of Complainant's trade secret, rather the key point is that { }

(Citing Tr. at 437:5-438:9) Complainant argues that, as Dr. Chao noted, it is not a substantial deviation from Complainant's practice {

} (Citing *id.*) Complainant avers that {

} confirm that {

(Citing CX-950C at 76; RDX-084C)

Respondents' Position: Respondents argue that Sino Legend's { } are also very different from Complainant's { }. (Citing RX-422C (Thomas WS), Q. 240) Accordingly, Respondents claim that Sino Legend is not practicing any of Complainant's alleged { } trade secrets.

At the outset, Respondents say that Dr. Chao ignores many of the {

.} Instead, Respondents say that he focuses on a few cherry-picked {

.}

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(Citing CX-1566C (Chao WS), Qs. 34-35; Tr. at 435:11-14 (“Q. Now you didn’t compare all of the { }, just a few of them; right? A. Yes.”)) Respondents contend that, presumably, these { }, shown below next to Sino Legend’s { } presented Dr. Chao’s best argument. (Citing Tr. at 436:8-445:15 (Chao); CX-1566C (Chao WS), Qs. 34-35)

Respondents argue that Complainant does not dispute that differences do exist. (Citing Tr. at 436:8-437:8, 446:4-447:16 (Chao)) Respondents assert that, while an attempt was made at trial to quibble with Sino Legend’s expert, Dr. Thomas, about the magnitude of the differences, that misses the point. (Citing Tr. at 640:5-643:1, 648:24-650:17, 654:2-21, 655:12-656:16, 657:21-658:17 (Thomas)) Respondents argue that each of these { } show differences between the Complainant and Sino Legend { } Respondents submit that the fact that any differences exist at all undermines Complainant’s suggestion of improper copying. (Citing RX-422C (Thomas WS), Q.241) Respondents aver that, {

} work in concert {

} necessary to produce a product having the desired properties in an efficient manner. (Citing *id.*) Respondents assert that {

.} (Citing *id.*)

Respondents say that according to Dr. Thomas’s unrebutted testimony, copying in the context of { } suggests that all { } have been duplicated. (Citing *id.*) Respondents argue that when numerous differences exist, those

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differences undermine a conclusion of copying because significant { } would be required to ensure that all the different { } work together to achieve the desired results. (Citing *id.*)

Respondents contend that had Sino Legend copied Complainant's { } Sino Legend's expert, Dr. Thomas, testified that he would have expected blind copying for both { } (Citing *id.*, Q. 242) Respondents argue that the fact that numerous differences exist suggests that different { } were involved. (Citing *id.*)

Respondents say that to the extent similarities exist, Dr. Chao fails to explain why those similarities are not attributable to { }

(Citing *id.*, Q. 243) Respondents say that Dr. Chao testified that he had no frame of reference to determine whether or not the various { } he cites were conventional or not:

- Q. Well, isn't it true that, similar to what we said in regard to { } you don't have a frame of reference to know whether these are conventional or unconventional { } based on industry practice?
- A. I don't know the other people's { } so therefore I cannot answer the question.

(Citing Tr. at 447:21-448:4 (Chao); *see also id.* at 440:1-19 (Chao)) Respondents argue that given that he is not a chemical engineer, and only selectively chose which { } he compared, his opinion that { } lacks all credibility. (CX-1566C (Chao WS), Q. 36)

Respondents argue that, as shown in the comparison table below (which Complainant did not challenge at trial), and discussed in further detail with respect to certain parameters, Sino

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Legend's {

}

(Citing RX-422C (Thomas WS), Qs. 246-247 (featuring RDX-068C-072C))

Respondents assert that a full comparison between Sino Legend's {
 }—a comparison not performed by Dr. Chao—reveals that { } are
very different and defeat Complainant's claim of copying.

Respondents contend that {
 } (Citing RX-422C (Thomas WS), Qs. 249-252 (citing RX-271C)) Respondents
aver that {

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} Thus, Respondents assert that, while Complainant appears to have {
} Sino Legend
has taken a different approach.

Respondents say that {

} (Citing RX-555C at 48)

Respondents argue that { } points away from improper copying.

Respondents aver that Dr. Chao ignores these differences.

Respondents say that, as set forth in the table above, {

} Respondents argue

that, according to Dr. Thomas's unrebutted testimony, this difference in { } is

enormous. (Citing *id.*, Q. 263) Respondents maintain that {

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}. (Citing *id.*)

Respondents argue that {

} Again, Respondents assert that Dr. Chao

ignores these differences.

Respondents argue that Sino Legend's {

Respondents say that Dr. Chao ignores other differences {

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Respondents assert that, as Dr. Thomas explained, {

}

Respondents argue that {

) At trial, Respondents assert that Complainant did not even attempt to argue otherwise.

Respondents also argue that {

}

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Respondent says that Complainant's Dr. Hamed suggests that {

} Thus, Respondents argue that Sino Legend is not practicing any alleged Complainant trade secret relating to {

Respondents claim that {

.} (Citing *id.*) Respondents assert that in Complainant's process, {

.} (Citing *id.*, Q. 313 (citing RX-033C at 64:6-8; 94:20-95:5)) Respondents submit that, in contrast, Sino Legend does not {

} Instead, Respondents say that Sino Legend {

} (Citing RX-416C (Yang WS), Qs. 313-318)

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Respondents argue that Complainant does not use the { } that Sino Legend uses. Respondents claim that {

} Respondents note that Complainant alleged in this Investigation and in Chinese proceedings that Sino Legend misappropriated { .}

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 36-38) Staff asserts that the evidence shows that Respondent Sino Legend ZJG uses { } with key features basically identical, or at the least substantially similar, to those { } used by Complainant. (Citing *id.*, Q. 36)

With regard to Complainant's use of { ,} Staff submits that the evidence shows that Sino Legend's { } has a substantially similar { } that it uses in the process for manufacturing SL-1801/SL-1802 tackifiers. (Citing CX-1566C, Qs. 36-37; JX-043C { } Tr. 436:8 to 437:11 (Chao Cross)) Staff states that Dr. Chao testified that { }

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are all “very close.” (Citing Tr. at 437:1-11 and 439:11-25) Staff avers that with regard to the { } the evidence shows that Sino Legend’s { } is substantially similar. (Citing Tr. at 446:17-23, 447:11-20)

Staff maintains that, even Respondents’ expert Dr. Thomas agreed that aspects of Sino Legend’s { } are substantially similar to Complainant’s { } (Citing Tr. at 654:22 to 656:16 and 657:3 to 658:16) For example, Staff says that Dr. Thomas testified that when comparing Complainant and Sino Legend’s { } (Citing *id.*; SDX-04C)

Staff continues that the evidence shows that { } by Sino Legend are substantially similar to those of Complainant’s { } (Citing CX-1566C (Chao Witness Stmt.), Qs. 36-37) For example, Staff avers that { } which is precisely the same { } specified in Sino Legend’s { } (Citing *id.*) Similarly, Staff avers that { } at Complainant’s Shanghai subsidiary is { } which is precisely the same as another one of { } specified for the { } in Sino Legend’s { } (Citing *id.*)

Moreover, Staff asserts that, because Sino Legend’s { } has the same { } as Complainant’s { } and because Sino Legend failed to introduce sufficient evidence to support a conclusion that it independently developed { } Staff is of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

In its reply brief, Staff says that Respondents contend that { }

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} (Citing RIB at 99) Staff avers, however, that Respondents' expert Dr. Thomas agreed that Sino Legend uses { } substantially similar to those { } used by Complainant. (Citing Tr. at 654:22 to 656:16 and 657:3 to 658:16) For example, Staff submits that Dr. Thomas testified that when comparing Complainant's and Sino Legend's { } the differences are only { }

} and thus substantially similar. (Citing *id.*; SDX-004C (modifying RDX-091C)) Staff argues that Respondents' attempt to classify these values as being different ignore the legal standard in determining "use" of Complainant's trade secrets. Staff quotes that such use "need not use the trade secret in its original form." (Citing Restatement (Third) of Unfair Competition § 40, Comment c.) Staff continues, "[A]n actor is liable for using the trade secret with independently created improvements or modifications if the result is substantially derived from the trade secret." Thus, the Staff is of the view that Complainant has satisfied its burden of proving misappropriation of this trade secret.

Analysis and Conclusions: In Section III.B.2.g, I found that the following combination of features used in { } is a trade secret: { }

.} Here, I find that Respondents' process for manufacturing { } tackifier resins substantially uses or is at least derived from Complainant's trade secret.

Dr. Chao testified that Respondents' processes for manufacturing { }

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tackifier resins use, substantially use, or are substantially derived from Complainant's {
} trade secret. The evidence shows that Sino Legend ZJG's {
} (JX-043C; CX-874C)

Credible evidence shows that certain aspects of Sino Legend ZJG's {
} (CX-1345C)

{
} Dr. Chao testified at the hearing that { } features of
Complainant and Sino Legend ZJG, as reflected in {
} are "very, very close." (Tr. at 436:3-437:11)

A diagram of Sino Legend ZJG's {
} between Complainant and Sino
Legend ZJG reflected in the { } are also "very, very close." { }

Staff provided a demonstrative at trial highlighting the similarities (and insignificant

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differences) between the key features {
} as shown below.

(SDX-004C)

Even Dr. Thomas admitted that {
} in Sino Legend ZJG's { } are "substantially similar" to those of
Complainant's { .} (Tr. at 654:24-657:2) Dr. Thomas testified that when comparing
Complainant's and Sino Legend ZJG's {

.} (Tr. at 446:17-23, 447:11-20) I find
unpersuasive Respondents' characterization of Staff's cross of Dr. Thomas {

} as "an attempt ... to quibble." Staff skillfully obtained admissions from Dr. Thomas on
cross using a demonstrative prepared by Respondents' counsel. (Tr. at 654:22-657:2) I also find
unpersuasive Respondents' argument that the particular { } that Complainant uses {

} is "critical." Mr. McAllister's testimony explained that {
} is not the key point, but rather the significant point is that {
} (Tr. at 437:5-438:9)

Again, I find Respondents' efforts to highlight trivial differences unpersuasive. As I
found in section IV.B.2.a, a finding of misappropriation is not negated by slight modifications, or

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derivations, which are based on the misappropriated trade secrets. *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) (“[T]he user of another’s trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other’s secret.”)) The number of similarities between the various features is strong circumstantial evidence that compels the conclusion that Sino Legend ZJG’s access to Complainant’s trade secrets gave it a substantial head start on any minor modifications/derivations.

Finally, as discussed in Section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai’s and Mr. Xu’s access to Complainant’s trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents’ processes for manufacturing tackifier resins substantially use Complainant’s { } trade secret in Sino Legend ZJG’s { } Alternatively, I find that Respondents’ processes for manufacturing tackifier resins are at least derived from Complainant’s { } trade secret.

4. Technical Proofs of Misappropriation of Each { } Alleged Trade Secret

a. { }

Complainant’s Position: Complainant argues that Sino Legend’s processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant’s { } trade secret. (Citing CX-1566C, Qs. 39-40)

Complainant avers that Sino Legend has used and continues to use { } (Citing *id.*) Complainant contends that

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{

} (Citing *id.*; CX-032C at 4, 5) Complainant asserts that {

.} (Citing CX-060C at 2, 4, CX-037C

at 3; CX-186C at 3) Complainant claims that {

} (Citing CX-157C at 3, 7; CX-

080C at 1-2; CX-867C at 4, 6)

Complainant says that Dr. Thomas does not dispute that Sino Legend uses {

.} (Citing Tr. at 582:4-6) Complainant

submits that {

} (Citing CX-1566C, Q. 40; CX-

223C at 2-3; CX-232C at 1-2; CX-227C at 2-3; CX-228C at 2-3; CX-214C at 2-3; CX-220C at 2-3; CX-1352.1C at 198:3-208:5, 208:16-24, 209:6-210:10)

In its reply brief, {

} (citing RIB at 107); but this is not a distinguishing feature.

Complainant asserts that the use of {

} is Complainant's trade secret and Respondents do not deny that Sino Legend practices this trade secret. (Citing Tr. at 582:4-6)

Complainant submits that, even assuming { } is

significant, Respondents' arguments miss the mark for at least three reasons. First, Complainant asserts that, as Respondents recognize, {

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} Second, Complainant avers that

{

} Third, Complainant maintains that

{

} Complainant asserts that {

} Complainant contends that, if Dr. Thomas had
made a proper comparison of { ,} he would not have found a substantial
difference.

Similarly, Complainant submits that Respondents' attempt to attach special significance
to {

} fails. (Citing RIB at 108) {

}

Respondents' Position: Respondents argue that because Sino Legend's { } process is different from Complainant's, {

.} (Citing *id.*, Q. 177) Respondents assert that because {

} Sino Legend's

use of { } is therefore different as compared to Complainant's.

Specifically, Respondents state that {

}. (Citing *id.*, Qs. 178-180 (citing

RX-156C at 107-111; RX-163C))

Respondents assert that, {

} Respondents say that the testimony of Sino Legend's expert, Dr. Thomas, regarding these differences was un rebutted at trial.

Respondents argue that Complainant's {

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} Again, Respondents state that Dr.

Chao ignores these differences.

Respondents contend that there are also clear differences in the {

}
Respondents argue that {

.} (Citing *id.*)

{ } Respondents aver that {

}

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Respondents assert that the difference between { } is significant.

At one point, Respondents say that Complainant asserted that { } in one embodiment of [its] trade secret { } (Citing RX-555C at 27) Respondents maintain that { }.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing { } tackifier resins use, substantially use, or are substantially derived from Complainant's trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 39-40, 74) Staff asserts that the evidence shows that Sino Legend {

} (Citing *id.*) Staff submits that Respondents' use of { } is identical to Complainant's process. (Citing *id.*)

Staff contends that the evidence does not show that Sino Legend learned of using { } from its early work, from other sources, or from independent development. (Citing Tr. at 765:18-25) Staff says that Sino Legend asserts that { } (Citing RX-416C (Yang Witness Stmt.), Qs. 94-95)

Staff asserts, however, that the weight of the evidence shows that the use of { } was unique to Complainant, and that Complainant {

.} (Citing CX-1566C (Chao Witness Stmt.), Qs. 39-40, 72) Staff submits that Sino Legend's process uses { } and the evidence is insufficient to support a

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conclusion that it independently developed { } or learned of it through testing, instead of through C.Y. Lai or Jack Xu. Staff is of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

In its reply brief, Staff says that Respondents attempt to emphasize differences where {

} (Citing RIB at 107) Staff submits that Respondents also contend that {

} (Citing RIB at 108) In the Staff's view, Respondents concede Sino Legend's use of Complainant's {

.} Staff asserts that no { } is required by Complainant's trade secret. Staff submits that Respondents argue that an immaterial alleged difference between { } demonstrates

no misappropriation. Staff argues that the evidence shows that Sino Legend's process uses { } and the evidence is insufficient to conclude that it independently developed {

} or learned of it through testing, instead of through C.Y. Lai or Jack Xu. (Citing Tr. at 765:18-25) The Staff is thus of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

Analysis and Conclusions: In Section III.B.3.a, I found that Complainant's { } is a valid trade secret. Complainant defines { } (CIB at 26) Here, I find that Respondents' process for manufacturing { } tackifier resins uses Complainant's valid trade secret.

Dr. Chao testified that Sino Legend ZJG has used and continues to use {

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.} (CX-1566C, Q.

39) Dr. Chao provided un rebutted testimony that Sino Legend ZJG used {

} recorded from Mr. Fan's notebook. (*Id.*; CX-032C at

4, 5) Dr. Chao also testified that records for Sino Legend ZJG's December 2006 pilot study

show that { .}

(CX-1566C, Q. 40; CX-060C at 2, 4, CX-037C at 3, and CX-186C at 3) Furthermore, Dr. Chao

testified that Sino Legend ZJG used { } in the first commercial scale {

} batch { } (CX-1566C, Q. 40; CX-157C at 3, 7; CX-080C at 1-2;

CX-867C at 4, 6) He also testified that Sino Legend ZJG used { } in the { }

batch used to manufacture the SL-1801 and SL-1802 products. (CX-1566C, Q. 40; CX-223 at 2-

3; CX-232C at 1-2) Dr. Chao further testified that {

.} (CX-1566C, Q. 72; CX-1184C)

(CX-1184C at SINOZJG_0019740)

Dr. Thomas testified that he does not dispute that Sino Legend ZJG uses {

} in the manufacture of its tackifier resins. (Tr. at 582:4-6) I find Respondents'

argument incredible that {

} As discussed *supra* in section III.B.3.a, the evidence regarding {

} raises serious doubts that reverse

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engineering could be used. Furthermore, Mr. Yang's statements are not corroborated by his notes or any other evidence from Sino Legend personnel {
-}

Once again, Respondents ineffectively attempt to emphasize differences that are not material to this decision. I found in section III.B.3.a that Complainant's {
} trade secret is { } but, no particular { } is required by the trade secret. Once again, I find that Respondents have not sufficiently explained why any alleged differences, {
} matters in the process. The fact remains that Respondents use { .}

Finally, as discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's {
} trade secret in Sino Legend ZJG's {
} manufacture of SL-1801 and SL-1802.

b. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. Complainant asserts that Sino Legend has used and continues to use {

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.} (Citing CX-1566C, Q. 41; RX-341C at 24:21–25:5; CX-1352.1C at 37:20-25, 139:5-140:2) Complainant asserts that Sino Legend’s batch cards {
.} (Citing CX-080C at 1, 7)

Complainant avers that Sino Legend’s uses {
} (Citing CX-1566C, Qs. 41-42; CX-032C at 2, 14; CX-032C at 10, 22; CX-080C at 1, 7; CX-1359.1C at 132:1-133:22, 134:5-8, 134:12-22)

Complainant says that Dr. Thomas does not dispute that Sino Legend uses {
} in its tackifier manufacture. (Citing Tr. at 583:19-584:10) Complainant claims that {

.} (Citing CX-1566C, Q. 42; CX-223C at 2-3; CX-232C at 1-2; CX-227C at 2-3; CX-228C at 2-3; CX-214C at 2-3; CX-220C at 2-3)

Respondents’ Position: Respondents contend that Complainant publicly disclosed the use of {

Respondents argue that Sino Legend therefore is not using any Complainant trade secret relating to these parameters.

Staff’s Position: In Staff’s view, { } does not qualify as a valid trade secret.

Analysis and Conclusions: In Section III.B.3.b, I found that Complainant’s {

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} is not valid trade

secret. Assuming *arguendo*, that {

} was found to be a valid trade secret, I would find that Respondents' process for manufacturing { } tackifiers uses Complainant's trade secret.

Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's {

} trade secret. (CX-1566C, Q. 41) Dr. Chao provided un rebutted testimony that Sino Legend ZJG has used and continues to use {

} (CX-1566C, Q. 42) Mr. Fan and Mr. Yang confirmed that { } (RX-341C at 24:21-25:5; CX-1352.1C at 37:20-25) Sino Legend ZJG's earliest recorded use of {

.} (CX-032C at 2) The use of {

} (CX-080C at 1) Dr.

Chao also testified that Sino Legend ZJG used {

.} (CX-1566C, Q. 42; CX-223C at 2-3; CX-232C at 1-2)

Dr. Thomas did not dispute that Sino Legend ZJG uses { } in its tackifier manufacture. (Tr. at 583:19-584:10) Respondents only contend that Complainant publicly disclosed { }

As discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence

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that Respondents' processes for manufacturing tackifier resins used Complainant's {
}

c. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. Complainant avers that Sino Legend has used and continues to use Complainant's { } (Citing CX-1566C, Q. 43)

For example, Complainant maintains that {

} (Citing CX-032C at 2-9) Complainant asserts that in each case, {

} (Citing CX-1566C, Q. 44) Complainant contends that {

.} (Citing CX-1566C, Q. 44;

CX-032C at 10, 12) Complainant submits that {

.} (Citing

CX-1566C, Q. 44; CX-080C at 1, 7)

Complainant claims that {

.} (Citing CX-1566C, Q. 44;

CX-223C at 2-3) Complainant avers that {

.} (Citing CX-

1566C, Q. 44; CX-232C at 1-2) Complainant contends that {

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} (Citing CX-1566C, Q.44; CX-227C at 2-3; CX-228C at 2-3) Complainant submits that {

} (Citing CX-1566C, Q. 44; CX-214C at 2-3) Complainant asserts that {

.} (Citing CX-1566C, Q. 44; CX-220C at 2-3)

Respondents' Position: Respondents assert that Complainant publicly disclosed {

.}

Respondents argue that Sino Legend therefore is not using any Complainant trade secret relating to these parameters.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 43-44) Staff asserts that the evidence shows that Respondent Sino Legend ZJG used {

} (Citing *id.*) Staff

contends that the evidence thus shows that it is more likely than not that Sino Legend ZJG copied, and is using, information it obtained from Complainant/Complainant's Shanghai subsidiary to manufacture competing tackifier resins. Staff reasons that, even if it were plausible that Sino Legend would or could conduct extensive experiments and coincidentally and independently derive the very same { } from independent experimental data, there is

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resins use, substantially use, or are substantially derived from Complainant's { }
trade secret. (CX-1566C, Q. 43) Dr. Chao provided un rebutted testimony that Mr. Fan's
notebook records {

.} (CX-1566C, Q. 44; CX-032C) He testified that, {

}

(CX-1566C, Q. 44; CX-032C at 3) Dr. Chao further testified that, Mr. Fan recorded in is
notebook that in Sino Legend ZJG's December 2006 pilot study, Sino Legend ZJG used {

} (CX-1566C, Q. 44; CX-032C at 10, 12) Also, a batch card for

the first commercial scale condensation reaction batch used to manufacture SL-1801, Sino

Legend ZJG used { .} (CX-080C at 1, 7) Dr. Chao also testified Sino Legend

ZJG used {

} (CX-1566C, Q. 44; CX-223C at 2-3; CX-232C at 1-2)

Respondents do not contest that Sino Legend ZJG uses {

} As discussed in section IV.E.1 *infra*, Respondents did not

introduce any credible evidence to support a conclusion that it independently developed the use
of the alleged trade secrets at issue in this Investigation.

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The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's {
} trade secret in Sino Legend ZJG's early lab experiments and in the production of SL-1801, and that Respondents' processes for manufacturing tackifier resins substantially used Complainant's { } trade secret in the first commercial scale condensation reaction batch and in the manufacture of SL-1802.

d. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. Complainant asserts that Sino Legend has used and continues to use Complainant's { } trade secret by using { } (Citing CX-1566C, Qs. 45-46; CX-032C at 5, 17; CX-1352.1C at 38:1-6; RX-341C at 58:25-59:16; CX-032C at 10, 12; RX-341C at 86:17-25; CX-080C at 1, 5; CX-1359.1C at 85:1-7)

Complainant says that Dr. Thomas does not dispute that Sino Legend uses {
} (Citing Tr. at 584:11-16) Complainant avers that {

.} (Citing CX-1566C, Q. 46;

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CX-223C at 1, 7; CX-232C at 1, 3; CX-227C at 2, 4; CX-228C at 2, 4; CX-214C at 2, 4; CX-220C at 2, 4)

In its reply brief, { }, Complainant asserts that Respondents do not contest that Sino Legend { } (Citing RIB at 109)

Respondents' Position: Respondents assert that Complainant publicly disclosed { }

Respondents argue that Sino Legend therefore is not using any Complainant trade secret relating to these parameters.

Staff's Position: In Staff's view, { } does not qualify as a valid trade secret.

Analysis and Conclusions: In section III.B.3.e, I found that Complainant's { } is not a valid trade secret. Assuming *arguendo*, that { } was found to be a valid trade secret, I would find that Respondents' process for manufacturing the accused tackifiers { } In section III.B.3.e, I found that Complainant defined this alleged trade secret as { }

Dr. Chao testified that Respondents' process for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (CX-1566C, Q. 45) Dr. Chao provided un rebutted testimony that Mr. Fan recorded in his notebook in an experiment dated { }

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.} (CX-1566C, Q. 46; CX-032C at 5, 17) Dr. Chao also testified that, also as recorded in Mr. Fan's notebook, Sino Legend ZJG used { } in its December 2006 pilot study. (CX-1566C, Q. 46; CX-032C at 10) A batch card for its first commercial scale { } batch for the manufacture of SL-1801 on { } also shows that Sino Legend ZJG also used { } (CX-080C at 1, 5) Dr. Chao also testified that Sino Legend ZJG used { } in the production of SL-1801 and SL-1802. (CX-1566C, Q. 46; CX-223C at 1, 7; CX-232C at 1, 3)

Dr. Thomas does not dispute that Sino Legend ZJG uses { } in the manufacture of tackifier resins. (Tr. 584:11-16) Respondents do not contest that Sino Legend uses { } As discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's { } trade secret in Sino Legend ZJG's early lab experiments, in the pilot study, in the first commercial scale { } batch, and in the production of SL-1801 and SL-1802.

e. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. Complainant asserts that Sino Legend has

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used and continues to use {

.} (Citing CX-1566C, Qs. 47-48; CX-032C at 5-9, 10, 12; CX-080C at 1, 5)

Complainant says that Dr. Thomas does not dispute { } Sino Legend uses in the manufacture of its tackifier resins. (Citing Tr. at 584:17-19) Complainant avers that {

.} (Citing CX-1566C, Q. 48; CX-223C at 1, 7; CX-232C at 1, 3; CX-227C at 2, 4; CX-228C at 2, 4; CX-214C at 2, 4; CX-220C at 2, 4)

In its reply brief, regarding { } Complainant asserts that Respondents do not contest that Sino Legend practices Complainant's trade secrets relating to { } (Citing RIB at 109)

Respondents' Position: Respondents assert that Complainant publicly disclosed {

.}

Respondents argue that Sino Legend therefore is not using any Complainant trade secret relating to these parameters.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from this Complainant trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 47-48, 74) Staff asserts that the evidence shows that Respondent Sino Legend ZJG uses Complainant's

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{

.} (Citing *id.*) Staff says that Complainant avers that

{ } was used in Sino Legend's December 2006 pilot study, its first commercial scale batch of SL-1801, and in its manufacturing of the SL-1801 and SL-1802 products that were imported into the U.S. (Citing *id.*) Staff argues that the evidence thus shows that it is more likely than not that Sino Legend ZJG copied, and is using, information it obtained from either Complainant or its Shanghai subsidiary to manufacture competing tackifier resins {

} Staff reasons that, even if it were plausible that Sino Legend would or could conduct extensive experiments and coincidentally and independently derive the very same { } from independent experimental data, there is insufficient evidence of such experimentation by Quanhai Yang and Fan of Sino Legend ZJG. (Citing Tr. at 765:18-25)

In its reply brief, Staff says Respondents contend that Complainant publicly disclosed { }, and Respondents do not appear to contest { } that Sino Legend uses. (Citing RIB at 109) Staff said that it previously addressed that { } was not disclosed in publicly available information. Furthermore, Staff argues that the evidence shows that Respondent Sino Legend used Complainant's {

} in early lab scale experiments, in Sino Legend's December 2006 pilot study, its first commercial scale batch of SL-1801, and in its manufacturing of the SL-1801 and SL-1802 products that were imported into the U.S. (Citing CX-1566C, Qs. 47-48, 74) Staff contends that the evidence further shows that Sino Legend did not conduct extensive experiments that coincidentally and independently derived the very same

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{ .} (Citing Tr. at 765:18-25) Staff is thus of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

Analysis and Conclusions: In Section III.B.3.f, I found that Complainant's { } is a valid trade secret. Here, I find that Respondents' process for manufacturing the accused tackifiers uses and substantially uses Complainant's trade secret.

Dr. Chao testified that Respondents' process for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (CX-1566C, Q. 47) Dr. Chao provided unrebutted testimony that Mr. Fan recorded in his notebook { .} (CX-032C at 5-9, 10, 12) Dr. Chao provided a sample calculation {

}

Dr. Chao also testified that, also as recorded in Mr. Fan's notebook, Sino Legend ZJG used { } in its December 2006 pilot study. (CX-032C at 10) A batch card for its first commercial scale { } batch for the manufacture of SL-1801 on { } also shows that Sino Legend ZJG used { } (CX-080C at 1, 5) Dr. Chao also testified that Sino Legend ZJG used { } in the production of the SL-1801 product. (CX-1566C, Q. 46; CX-232C at

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1, 3) Dr. Chao also testified that Sino Legend ZJG used {
} (CX-1566C, Q. 46; CX-227C at 2, 4)

Dr. Thomas does not dispute that Sino Legend ZJG uses { } in the manufacture of tackifier resins. (Tr. 584:17-19) Respondents do not contest that Sino Legend uses { } As discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's { } trade secret in the pilot study, and that Respondents' processes for manufacturing tackifier resins substantially used Complainant's { } trade secret in the first commercial scale { } batch and in the production of SL-1801 and SL-1802.

f. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret.

Complainant avers that Sino Legend has used and continues to use Complainant's {

.} (Citing CX-1566C, Q. 49)

Complainant contends that {

.}

Complainant avers that in {

}

Complainant maintains that {

} Complainant asserts that {

} (Citing CX-1566C, Q. 50; CX-232C at 1-3)

Complainant claims that {

} (Citing CX-1566C, Q. 50; CX-

227C at 2-4; CX-228C at 2-4) Complainant avers that {

.}

(Citing CX-1566C, Q. 50; CX-214C at 2-4) Complainant contends that {

.} (Citing CX-1566C, Q. 50; CX-220C at 2-4)

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Complainant asserts that Respondents {

} Complainant says that Dr. Thomas admitted that {

.} (Citing Tr. at 633:19-25) Complainant contends that

{

} further illustrates that Sino Legend uses Complainant's technology.

(Citing CX-1566C, Q. 52)

Complainant argues that Respondents' attempts to distinguish {

} Complainant

claims that {

} Complainant submits that batch

cards show that Sino Legend uses {

} (Citing CX-653C; CX-

223C; CX-232C; CX-227C; CX-228C; CX-214C; CX-220C)

Complainant avers that Sino Legend's {

} (Citing CX-1570C, Qs. 88-89)

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Complainant contends that Sino Legend's {

}

In its reply brief, Complainant says that Respondents contend that Complainant has also failed to establish that Sino Legend uses Complainant's {

.} (Citing RIB at 109) Complainant notes that they cite only to Dr. Hamed's witness statement. (Citing *id.*) Complainant avers that Dr. Chao did a side-by-side comparison and concluded that Sino Legend practices Complainant's { } trade secret. (Citing CX-1566C, Qs. 49, 74; CIB § III.D.1 at 21)

Complainant argues that Respondents attempt to differentiate {

.} Moreover, Complainant asserts that, {

} is

not the departure from Complainant precedent that Respondents claim. (Citing CX-1565C, Qs. 66-67)

Complainant says that Respondents contend that because Sino Legend uses {

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} (RIB at 110) Complainant contends that Respondents' argument is contradicted by Sino Legend's own documents, which show that {

}

Complainant submits that Dr. Chao has also identified {

.}

Respondents' Position: Respondents argue that Complainant has failed to establish that Sino Legend uses Complainant's { .} (Citing CX-1570C (Hamed), Q. 49; CX-653C) Respondents note that Dr. Hamed cites to five different { } to support its { } (Citing CX-1570C (Hamed WS), Qs. 48, 89-90) {

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} Respondents say that Dr. Hamed would even include these {
} is surprising given that {

}

Respondents emphasize that one key distinction is Sino Legend's use of {

} Respondents argue that
this difference is significant. Respondents aver that {

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(Citing RX-422C (Thomas WS), Qs. 197-198; Tr. at 666:11-667:11 (Thomas))

Respondents assert that Complainant has never used {

} Respondents argue that

} is obviously a significant distinction.

} Respondents says that Sino Legend uses a {

}
At trial, Respondents state that {

.} (Citing Tr. at 648:24-653:2

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(Thomas)) Respondents assert that {

} Respondents contend that the fact that any differences exist at all between { } used by Sino Legend and that which Complainant claims as its trade secret argues against copying because significant design consideration would be involved to ensure that all the different parameters work in concert to achieve the desired result. (Citing RX-422C (Thomas WS), Q. 241)

Respondents state that Dr. Chao admitted that his witness statement provides no comparison between Complainant's alleged trade secret and Sino Legend's commercial batches post-2007, {

.} (Citing Tr. at 424:10-425:9 (Chao))

Respondents aver that he therefore provides no opinion on whether { } used by Sino Legend use Complainant's alleged trade secrets. Respondents assert that they do not.

Respondents argue that these { } are obviously different from Complainant's {

.}

In their reply brief, Respondents argue that in Complainant's { } process for making SP-1068 that Sino Legend supposedly copied, { }

(CIB at 82; CX-581C; CX-1566C (Chao WS), Q. 40) Respondents contend that {

} (CIB at 83 {

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} RX-422C (Thomas WS), Qs. 230-234) Respondents continue that Complainant does not take into account that Sino Legend continued to use {

} (Citing Tr. at 664:14-21

(Thomas)) Respondents argue that Complainant's selective focus on a few process parameters runs counter to Complainant's contentions that Sino Legend obtained Complainant's { } from Mr. Xu and simply copied it.

Respondents submit that, citing only to Dr. Chao, Complainant asserts that Sino Legend processes "use, substantially use, or are substantially derived from Complainant's {

} (Citing CIB at 102) Respondents contend that Dr. Chao and

Complainant simply summarize { } that Sino Legend has used without providing a proper comparison to Complainant's process. (CIB at 102-03; CX-1566C (Chao WS), Q. 50)

In addition, Respondents say that Complainant states that Sino Legend's {

} (CIB at 104) Respondents assert that Complainant does not say {

} (Citing *id.*) Respondents aver that, while Complainant cites to Dr. Chao's witness statement at question 50, no { } is mentioned there. (Citing CX-1566C (Chao WS), Q. 50)

Respondents argue that, assuming the point of comparison is {

,} all the cited Sino Legend { } are different.

Respondents submit that not a single { } used by Sino Legend cited in Complainant's brief is { } (CIB at 102-03) In fact, Respondents contend that most of Sino Legend's commercial batches from 2010 forward, including batches made using Sino Legend's {

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substantially different from Complainant's { ,} used { ,} which is .} (CIB at 103)

Respondents contend that Complainant also fails to consider {

}

Respondents assert that Complainant also ignores the significant differences between Sino Legend's use of { } and Complainant's use of {

.}

Respondents assert that, {

} Thus,

Respondents argue that, unlike Complainant's process, Sino Legend's {

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} Respondents assert that, as Dr. Thomas explained, {

}

Respondents claim that Dr. Chao no made comparison between Complainant's alleged trade secrets and { } used in Sino Legend's { } process used to make SL-1801-LFP and SL-1802-LFP. (Citing Tr. at 424:10-425:9 (Chao)) Respondents argue that Complainant is faced with a complete failure of proof on this point.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from this Complainant trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 50-52, 74) Staff asserts that the evidence shows that Respondent Sino Legend ZJG uses a substantially similar {

} in early lab scale experiments, { } in its December 2006 pilot study, and { } in its first commercial scale batch of SL-1801. (Citing *id.*) Staff avers that { } was also used in its manufacture of the SL-1801 and SL-1802 products that Sino Legend and others imported into the U.S. (Citing *id.*) Staff contends that the evidence thus shows that it is more likely than not that Sino Legend ZJG copied, and is using, information it obtained from Complainant or its Shanghai subsidiary to manufacture competing tackifier resins. (Citing *id.*) Staff argues that, even if it were plausible that Sino Legend would or could conduct extensive experiments and coincidentally and independently derive nearly the same { } from independent

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experimental data, the evidence in the record is insufficient to prove such experimentation by Quanghai Yang and Fan of Sino Legend ZJG. (Citing Tr. at 765:18-25)

Furthermore, Staff submits that Respondents' expert Dr. Thomas testified on cross-examination that Sino Legend's { } is substantially similar to Complainant's { } (Citing Tr. at 648:20 to 653:2) Staff asserts that, when comparing Complainant and Sino Legend's { } Dr. Thomas calculated that the difference is only { } (Citing Tr. at 652:18 to 653:2 (Q.: And that shows a similarity of { } percent? A. Right.); SDX-002C)

Thus, the Staff is of the view that { } used by Sino Legend is nearly identical and substantially similar to { } in the SP1068 trade secret.

In its reply brief, Staff says that Respondents contend that because Sino Legend uses {

{ } that "[t]he two processes are therefore not even comparable." (RIB at 110)

Staff asserts that Respondents attempt to create a material difference when in fact the evidence shows that Respondents disclose in their own documents that {

{ } which is identical to what Complainant uses. (Citing CX-1566C (Chao Witness Stmt.), Q. 51, citing CX-788C {

}

Furthermore, Staff submits that Respondents' expert Dr. Thomas testified on cross-examination that Sino Legend's { } is substantially similar to Complainant's { } (Citing Tr. at 648:20 to 653:2) Staff

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avers that, when comparing Complainant and Sino Legend's {

} Dr. Thomas calculated that the difference is only { } (Citing Tr. at 652:18 to 653:2 (Q.: And that shows a similarity of { } percent? A. Right.); see SDX-002C)

Thus, the Staff is of the view that { } used by Sino Legend is nearly identical and substantially similar to { } the SP-1068 trade secret.

Analysis and Conclusions: In section III.B.3.f, I found that Complainant's { } is a valid trade secret. Here, I find that Respondents' process for manufacturing the accused tackifiers uses Complainant's trade secret. As discussed in section III.B.3.f, I found that Complainant defined this trade secret as { } (CIB at 29; CX-1570C, Q. 48)

Alternatively, assuming *arguendo*, that Complainant's { } trade secret is limited to { } (as disclosed in CX-653C discussed *supra* in section III.B.3.f), I would find that Respondents' process for manufacturing { } tackifiers substantially uses that trade secret.

Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (CX-1566C, Q. 49) Mr. Fan's notebook records { } (CX-032C) { } in Sino Legend's early lab scale experiments from { } show the use of { } (CX-032C at 1-9) Regarding one of his experiments, Mr. Fan testified that the experiment was dated {

} (RX-341C at 56:16-59:14))

Dr. Chao testified that {

} Dr. Chao stated that the {

} from Mr. Fan's notebook are as follows:

(CX-1566C, Q. 50; CX-032C at 3, 5)

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Furthermore, Dr. Chao also testified that, as recorded in Mr. Fan's notebook, Sino Legend ZJG used { .}

(CX-1566C, Q. 50; CX-032C at 10, 12) {

} (CX-080C at 1-4) Dr. Thomas

testified that {

} (CX-1566C, Q. 50; CX-223C at 2, 4-6) Dr. Thomas testified that Sino

Legend ZJG used { .}

(CX-1566C, Q. 50; CX-232C at 1-3)

Even if Complainant's trade secret is found to be limited to { } rather than {

,} Dr. Thomas found that the difference between Sino Legend ZJG's {

} and Complainant's { } is only { }

(Tr. 648:20-650:6) I find Respondents' argument unpersuasive that Sino Legend ZJG's process

is different, because Sino Legend ZJG uses { } rather than

{ .} (RIB at 110) I agree with Staff that Respondents continue their

pattern of attempting to create a material difference where none actually exists. A Preliminary

Design for Sino Legend ZJG's plant shows {

.} (CX-788C at

SINOZJG_0006281) Dr. Chao also testified that {

} is not a significant distinguishing feature. (CX-1566C, Q. 50)

Finally, as discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

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The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's trade secret of { } in Sino Legend ZJG's early lab experiments, pilot study, first commercial scale { } batch, and in the manufacture of SL-1801 and SL-1802. I also find that, if Complainant's { }, Complainant has proved by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins substantially use Complainant's { } trade secret.

g. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (Citing CX-1566C, Q. 53) Complainant avers that such uses include the {

.) (Citing *id.*)

Complainant avers that {

.) (Citing *id.*, Q. 54; CX-

0060C at 2, 4; CX-080C at 2-5; CX-867C at 6-7) Complainant asserts that {

}

(Citing CX-1566C, Q. 54; CX-223C at 3-7; CX-232C at 2-3; CX-227C at 3-4; CX-228C at 3-4; CX-214C at 3-4; CX-220C at 3-4)

In its reply brief, Complainant argues that Respondents' attempt to differentiate Sino Legend's {

} (RIB at 112-113) Complainant asserts that {

.} (Citing RIB at 112; CX-1566C, Q. 51)

Complainant submits that, {

} Therefore, Complainant argues that Sino Legend practices Complainant's {

} (Citing CX-1566C, Q. 56)

Complainant asserts that {

} (Citing CX-1570C at 52)

Respondents' Position: Respondents assert that Sino Legend's {

} also differs from the process used by Complainant.

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(Citing RX-422C (Thomas WS), Q. 208) Respondents contend that, {

.} (Citing *id.*, Qs. 209-216 (citing RX-260C; RX-051C); Tr. at 664:18-666:4 (Thomas))

{

}

Staff's Position: In Staff's view, { } does not qualify as a valid trade secret.

Analysis and Conclusions: In section III.B.3.g, I found that {

} used by Complainant, specifically {

} is a trade secret. Here, I find that

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Respondents' process for manufacturing { } tackifiers uses Complainant's trade secret.

Dr. Chao testified that Respondents' process for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's {

} trade secret. (CX-1566C, Q. 53) Although Complainant avers that Sino Legend ZJG { } as discussed *supra* in

section III.B.3.g, Complainant's trade secret is limited to {

} Sino Legend ZJG's December 2006 pilot study discloses { } (CX-1566C, Q. 54; CX-

060C at 2, 4) A batch card for its first commercial scale { } batch for the manufacture of SL-1801 on { } also shows that Sino Legend ZJG {

.} (CX-867C at 6-7) Dr. Chao testified that in the production of SL-1801 and SL-1802, Sino Legend ZJG {

} (CX-1566C, Q.54; CX-223C at 3-7; CX-232C at 2-3)

I find Respondents' attempt to differentiate Sino Legend ZJG's {

} unpersuasive. {

.} (CX-060C at 2, 4; CX-867C at 6-7; CX-223C at 3-7; CX-232C at 2-3) Finally, as discussed in section IV.E.1 *infra*,

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Respondents did not introduce any credible evidence to support a conclusion that it independently developed the use of the alleged trade secrets at issue in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins used Complainant's {
} trade secret in Sino Legend ZJG's pilot study, first commercial scale batch, and in the manufacture of SL-1801 and SL-1802.

h. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (Citing CX-1566C, Q. 55) Complainant asserts that such uses include Sino Legend's { } SL-1801/2 products that were imported into the U.S. (Citing *id.*)

Complainant contends that {

} (Citing *id.*, Q. 56; CX-035C at 6, 12; CX-060C at 2, 4) Complainant avers that {

.) (Citing CX-1566C at 32; CX-080C at 3-4)

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Complainant submits that {

(Citing CX-1566C, Q. 56; CX-223C at 3-7; CX-232C at 2-3; CX-227C at 3-4; CX-228C at 3-4; CX-214C at 3-4; CX-220C at 3-4)

Complainant contends that { } does not significantly distinguish its process from Complainant's process. (Citing CX-867C at 6-7; CX-1566C, Qs. 57-58) Complainant argues that the fact that Sino Legend generally uses { } is evidence that Sino Legend practices Complainant's technology. (Citing *id.*)

Respondents' Position: Respondents argue that {

.} (Citing *id.*) {

In his witness statement, Respondents say that Dr. Chao focuses on only a “portion” of Sino Legend’s process and argues, for example, with respect to Sino Legend’s December 2007 batch, that Sino Legend {

} (Citing CX-1566C (Chao WS), Q. 56) Respondents assert that this ignores {

.} Respondents contend that Dr. Chao’s portrayal of Sino Legend’s process therefore misleadingly observes the underlying differences.

Staff’s Position: In Staff’s view, {

} does not qualify as a valid trade secret.

Analysis and Conclusions: In section III.B.3.h, I found that {

} is not a trade secret. Assuming *arguendo*, that {

} was

found to be a valid trade secret, I would find that Respondents’ process for manufacturing {

} tackifiers uses Complainant’s trade secret. Alternatively, assuming *arguendo*, {

} (as discussed in section III.B.3.h), during at

least a portion of the formaldehyde addition was found to be a trade secret, I would still find that

Respondents’ process for manufacturing { } tackifiers uses that trade secret.

Dr. Chao testified that Respondents’ processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant’s {

} trade secret. (CX-1566C, Q. 55) A record from Sino Legend

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ZJG's December 2006 pilot study shows that Sino Legend {
} (CX-060C at 2, 4) {
} Sino Legend ZJG's first commercial scale { } batch on
{ } also shows that Sino Legend ZJG {
} (CX-080C at 3-4).

Moreover, a { } batch record from the manufacture of Sino Legend ZJG's SL-1801
product shows that Sino Legend ZJG { } (CX-
223C at 5) A { } batch record from the manufacture of Sino Legend ZJG's SL-1802
product shows that Sino Legend ZJG { } (CX-232C at 2-
3)

I find Respondents' argument unpersuasive that they { } Dr.
Chao testified that { } does not significantly distinguish Sino
Legend's process from Complainant's process. (CX-1566C, Qs. 57, 58) Respondents' own
documents plainly show that Sino Legend ZJG {
-}

Respondents' arguments focusing on immaterial differences remain unconvincing. Finally, as
discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to support
a conclusion that it independently developed the use of the alleged trade secrets at issue in this
Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's
trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence
that Respondents' processes for manufacturing tackifier resins used Complainant's trade secret
of {

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} in Sino Legend ZJG's pilot study, in the first commercial scale batch, and in the production of SL-1801 and SL-1802. I also find that, if Complainant's { } trade secret is { } Complainant has still proved by a preponderance of evidence that Respondents' processes for manufacturing tackifier resins uses Complainant's { } trade secret in the manufacture of the production of SL-1801 and SL-1802.

i. { }

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret, including in Sino Legend's { } commercial production. (Citing CX-1566C, Q. 59)

Complainant avers that Sino Legend used { } (Citing *id.*, Q. 60; CX-035C at 7, 12, 13; CX-060C at 2, 4; CX-037C at 3; CX-186C at 3) Complainant asserts that Sino Legend used {

} (Citing CX-1566C, Q.60; CX-080C at 5)

Complainant submits that {

} (Citing CX-1566C, Q. 60; CX-223C at 7) Complainant claims that {

} (Citing

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CX-1566C, Q. 60; CX-232C at 3) Complainant avers that {

.} (Citing CX-

1566C, Q. 60; CX-227C at 4; CX-228C at 4) Complainant also avers that {

} (Citing CX-1566C, Q. 60;

CX-214C at 4) Complainant states that {

.} (Citing CX-1566C, Q. 60; CX-220C at 4)

Respondents' Position: Respondents assert that {

} is publicly known and readily ascertainable. Respondents argue that Sino

Legend therefore is not using any Complainant trade secret relating to {

}

Staff's Position: In Staff's view, {

} does

not qualify as a valid trade secret.

Analysis and Conclusions: In section III.B.3.i, I found that Complainant's {

} is not a valid trade secret. Assuming *arguendo*, that {

,} I would find that

Respondents' process for manufacturing {

} tackifiers uses Complainant's trade

secret.

Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's { } trade secret. (CX-1566C, Q. 59) Dr. Chao testified that Sino Legend ZJG used and continues to

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use Complainant's {
} (*Id.*) Dr. Chao's testimony is confirmed by records for Sino Legend
ZJG's December 2006 pilot study use {
} (CX-037C at 3; CX-186C at 3) { } batch records for Sino Legend ZJG's
first commercial scale { } batch on { } also confirm that Sino Legend
ZJG used { } (CX-080C at 5) In the production of SL-
1801 and SL-1802, { } (CX-1566C, Q. 60; CX-
223C at 7; CX-232C at 3)

Respondents do not contest that Sino Legend ZJG uses { } .
As discussed in section IV.E.1 *infra*, Respondents did not introduce any credible evidence to
support a conclusion that it independently developed the use of the alleged trade secrets at issue
in this Investigation.

The foregoing evidence combined with Mr. Lai's and Mr. Xu's access to Complainant's
trade secrets as discussed in section IV.C.1 *supra*, establishes by a preponderance of evidence
that Respondents' processes for manufacturing tackifier resins used Complainant's {
} trade secret in Sino Legend ZJG's pilot study, first
commercial scale { } batch, and in the production of SL-1801 and SL-1802.

j. { }

Complainant's Position: Complainant argues that Sino Legend's processes for
manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from
Complainant's { } trade secret. (Citing CX-1566C, Q. 62)

Complainant asserts that Sino Legend's has used and continues to use {

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} that are essentially identical to that used by Complainant at its Shanghai facilities. (Citing *id.*)

Complainant avers that {

}

Complainant contends that other features of Sino Legend's {

}

Complainant avers that Sino Legend's {

} Accordingly, Complainant claims that {

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.} (Citing CX-

1566C, Q. 63)

Consistent with the evidence, Complainant says that Dr. Thomas admitted that {

.}

(Citing Tr. at 657:3-658:16; CX-1566C, Q. 63; CX-950C at 74-76; JX-049C at 2-4)

Complainant states that Sino Legend's {

.} (Citing CX-1566C, Q. 63)

Complainant asserts that {

.} (Citing JX-49C at 2; CX-950C at 71)

In its reply brief, Complainant says that Respondents {

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.} (Citing *id.* at 116)

Complainant asserts that on Staff's cross, Dr. Thomas admitted that {

} are substantially similar as between Complainant and Sino Legend, and that {

.}

Respondents' Position: Respondents argue that { } that Sino Legend uses is also different from Complainant's { }. Accordingly, Respondents assert that Sino Legend is not practicing any of Complainant's alleged { } trade secrets. Respondents provide the table below comparing {

.} (Citing RX-422C (Thomas WS), Qs. 330-332 (RDX-082C-RDX-085C))

Respondents say that Dr. Chao acknowledged that he considered only some of these, such as {

.} (Citing Tr. at 445:18-447:10) Respondents aver that {

} are not the same, as Dr. Chao admitted at trial. (Citing *id.*) Respondents contend that other differences with respect to other { } that Dr. Chao "ignored" are discussed below.

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Respondents say that as Professor Thomas testified, {
} are different. (Citing RX-422C
(Thomas WS), Qs. 335-336) Notably, Respondents state that Sino Legend uses {

.} (Citing *id.*) Respondents argue that {

.} (Citing RX-422C, Q. 340) Respondents
contend that { }
(Citing *id.*) Thus, Respondents aver that, according to Sino Legend's expert, Professor Thomas,
{ }
(Citing *id.*)

Respondents also assert that Sino Legend's {

.}

Respondents submit that Complainant {

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.} (Citing RX-422C

(Thomas WS), Qs. 352-353 (citing JX-049C))

Respondents argue that {

} are also different, as summarized below (citing RX-422C (Thomas WS),

Q. 371; (RDX-086C)):

Respondents contend that, {

In their reply brief, Respondents argue that Complainant’s allegations that Mr. Xu helped Sino Legend to “copy” Complainant’s { } is not borne out by the facts. (Citing CIB at 84-85) Respondents aver that if Mr. Xu really had a hand in { } and used Complainant’s { } to do so, a comparison of the { } for Complainant’s and Sino Legend’s { } should match, or almost

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identically so. Respondents offer that, instead, virtually every { } is different, and in many cases very different, which Complainant ignores. Respondents argue that, while Complainant trumpets that some of differences are not significant, under Complainant's theory of copying, there should not be any differences at all. Thus, Respondents contend that Complainant is left with the untenable position that Sino Legend set out to copy { }, but then { } that had different { } in nearly every respect. (Citing RIB at 127)

Respondents assert that Complainant relies on the testimony of Dr. Thomas that several of Complainant's cherry-picked { } were "substantially similar" to argue that Sino Legend's { } are "basically identical" to Complainant's. (Citing CIB at 98-99, 107-108) Respondents contend that a finding of copying is not appropriate because some differences exist. (RIB at 98) Respondents maintain that Complainant does not acknowledge the many differences in the other { } that undermine Complainant's claim.

Respondents continue that, to the extent similarities exist, Complainant fails to explain why those similarities are not attributable to {

.,} (Citing CX-422C (Thomas WS), Q. 243) Respondents aver that Dr. Chao testified that he had no frame of reference to determine whether or not the various {

} he cites were conventional or not. (Citing Tr. at 447:21-448:4 (Chao); *see also id.* at 440:1-19 (Chao)) Respondents submit that, given the fact that Complainant only selectively chose which { } to compare, and that it altogether ignores the numerous differences identified by Dr. Thomas in his witness statement (citing RX-422C, Qs. 240-386), Complainant has failed to show that Sino Legend's { } are "basically identical" to Complainant's.

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Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from this Complainant trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 62-64) Staff says that Complainant asserts that the evidence shows that Respondent Sino Legend ZJG uses {
 } that is nearly identical or substantially similar in key ways to Complainant's reactor. (Citing *id.*)

With regard to Complainant's use of {
 } Staff submits that the evidence shows that Sino Legend's {
 } (Citing *id.*)

Staff says that Dr. Thomas for Respondents acknowledged that in comparing Complainant and Sino Legend's {
 }, certain features are the same {
 } and other features are "substantially similar," such as {
 } (Citing Tr. at 637:5-14; 657:3 to 658:16) Staff contends that Sino Legend did not introduce sufficient evidence in its case-in-chief to support a conclusion that it independently developed the {
 } (Citing Tr. at 765:18-25)

Staff asserts that Mr. Yang alone contends that {
 } (Citing RX-416C (Yang Witness Stmt.), Qs. 288-289) Staff argues that the weight of the evidence shows however that the similarities {
 } is the result of Respondents' access to Complainant's

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Shanghai subsidiary's { } from C.Y. Lai and/or Jack Xu, { }
{ }

In its reply brief, Staff says that Respondents contend that { } that Sino Legend uses is also different from Complainant's { } such that "Sino Legend is not practicing any of Complainant's alleged { } trade secrets." (Citing RIB at 113) Staff asserts that Respondents' expert Dr. Thomas agreed that Sino Legend uses { } with { } substantially similar to those { } used by Complainant. (Citing Tr. at 657:3 to 658:17) Staff notes, for example, that Complainant uses { },} while the evidence shows that Sino Legend's { } has a substantially similar { },} reflecting only a { } difference. (Citing CX-1566C, Qs. 62-64; JX-049C { } Staff highlights that Sino Legend's { } has the same { } as Complainant's { } (Citing *id.*) Staff submits that Dr. Thomas for Respondents acknowledged that in comparing Complainant's and Sino Legend's { } certain { } are the same such as { } and other { } "substantially similar," such as { } .} (Citing Tr. at 637:5-14; 657:3 to 658:16; *see* RDX-092C)

Staff argues that Respondents' attempt to classify these { } as different are to no avail when the legal standard is to determine "use" of Complainant's trade secrets. Staff emphasizes that such use "need not use the trade secret in its original form." (Citing Restatement (Third) of Unfair Competition § 40, Comment c) Furthermore, Staff argues that Sino Legend did not introduce sufficient evidence in its case-in-chief to support a conclusion that it independently

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developed the { } (Citing Tr. at 765:18-25) Thus, the Staff is of the view that Complainant has carried its burden of proving misappropriation of this trade secret.

Analysis and Conclusions: In section III.B.3.j *supra*, I found that Complainant's { } is a valid trade secret. Here, I find that Respondents' process for manufacturing the accused tackifiers substantially uses Complainant's trade secret. As discussed in section III.B.3.j, I found that Complainant identified { } as a trade secret { }

Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's { }

{ } (CX-1566C, Q. 62) His testimony is confirmed by Sino Legend ZJG's { }

{ } (CX-869C at 6) { }

{ } (CX-057C at 3) Dr. Chao provided the un rebutted testimony that a { }

{ } (CX-1566C, Q. 63; JX-049C) Dr. Chao testified that these { } are basically identical to those used by Complainant. (CX-1566C, Q. 63) The same Sino Legend ZJG { } shows using

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k. **Technical Proof of Misappropriation of the Overall Process Flow Alleged Trade Secret**

Complainant's Position: Complainant argues that Sino Legend's processes for manufacturing SL-1801/2 tackifier resins use, substantially use, or are substantially derived from Complainant's "overall process flow" trade secret. (Citing CX-1566C, Q. 65) Complainant asserts that the evidence shows that Sino Legend ZJG has used and continues to use Complainant's overall process flow by using each and every one of Complainant's asserted trade secrets. (Citing CX-1566C, Q. 66)

In its reply brief, Complainant asserts that Respondents make two equally invalid objections to Dr. Chao's overall process flow analysis. (Citing RIB at 117) Complainant says that first, Respondents contend that Dr. Chao only looked to batches from 2007 and before. (Citing *id.*) Complainant contends that this is not true. Complainant asserts that Dr. Chao testified that he compared all Sino Legend importation batches side-by-side and that CDX-1C represents a summary of this comparison. (Citing CIB § III.D.1; *see also* CDX-1C at 2 (Key D)) Second, Complainant says that Respondents claim that "Complainant has provided no indication that the overall process has ever been used in an actual process to make any product, much less SP-1068." (Citing RIB at 117) Complainant avers that Dr. Hamed testified that "[t]he first page of CDX-001C represents my understanding of the key process parameters of the SP-1068 process as practiced at Complainant's Shanghai plant in the 2005 to 2006 timeframe." (Citing CX-1570C, Q. 61) Complainant argues that Respondents have not contested that Complainant's Shanghai subsidiary manufactured SP-1068 in 2005-06 or explained how CDX-1C is not representative of the actual process used at Complainant's Shanghai subsidiary during that time.

Respondents' Position: Respondents assert that Complainant cannot establish that Sino Legend is practicing Complainant's overall process. Respondents contend that, at the outset,

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Respondents say that Dr. Chao fails to account for these differences. Respondents argue that he altogether ignores them and provides no opinions on this point.

Respondents say that, as Professor Thomas explained at trial in unrebutted testimony,

{

}

Respondents claim that, according to Complainant's own expert Dr. Hamed, the

{

} (Citing CX-1570C (Hamed WS), Q. 8) (emphasis added

by Respondents)

Respondents aver that molecular weights and distributions can be determined by Gel Permeation Chromatography (GPC). (Citing RX-422C (Thomas WS), Q. 389) Respondents say that GPC is a method that uses a packed column of solvent swollen porous cross-linked polymer beads to separate analytes according to their molecular size. (Citing *id.*) Respondents also aver that higher molecular weight materials exit the GPC column earlier in time. (Citing *id.*)

{

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.} (Citing *id.*)

Respondents argue that, {

.} (Citing RX-422C (Thomas WS), Q. 394) Additionally,

Respondents assert that {

.} (Citing RX-422C (Thomas WS), Q. 394;

CX-1570C (Hamed WS), Q. 8; Tr. at 672:11-16 (Thomas) (emphasis added by Respondents))

Respondents maintain that {

.} (Citing RX-422C at (Thomas WS) Q. 397 (RDX-089C (citing

RX-0266C))

(Citing RX-266C)

Respondents submit that {

}

As for SL-1801LFP, {

.} (Citing CX-1570C (Hamed WS), Q. 8; Tr. at 669:3-673:5 (Thomas))

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In their reply brief, Respondents say that, {

.} (Citing RX-422C (Thomas WS), Qs. 387-400; Tr. at 668:21-673:5 (Thomas))

Respondents contend that none of Complainant's experts attempted to refute Dr. Thomas's testimony, much less draw any comparisons of their own of the various products. Respondents argue that Complainant therefore tacitly admits that the products exhibit substantial differences.

Respondents contend that Complainant resorts to attorney argument to make up for what its experts failed to do. For example, Respondents say that Complainant points to a presentation indicating that Sino Legend's products are "equivalent" to Complainant's SP-1068. (Citing CIB at 109) Respondents assert that the conclusions in that document were not based on GPC testing. Respondents submit that Complainant misrepresents what the document actually said, which is that the Sino Legend's products are only "equivalent in *quality*" to other foreign products. (Citing CX-936 at 30 (emphasis added by Respondents))

{

} (Citing CIB at 110) Respondents assert that

Complainant is attempting to make a scientific claim based only on attorney argument.

Respondents argue that {

} only confirms that the

products are distinct.

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Respondents continue that Complainant states that {

}

Respondents contend that, in an effort to {

} Complainant also tried to argue that {

} (Citing *id.*)

Respondents assert that Complainant also claims that the {

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.} (Citing *id.*) Further, Respondents assert that there is no evidence that Mr. Xu or Mr. Lai ever accessed these pre-2000 formulas. (Citing RIB at 79-84) Thus, Respondents argue that Complainant's attempt to mix and match with attorney argument should be rejected.

Staff's Position: Staff says that Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from this Complainant trade secret. (Citing CX-1566C (Chao Witness Stmt.), Qs. 65-66, 74) Staff asserts that the evidence shows that Respondent Sino Legend ZJG's overall process flow is nearly identical to the secret process used by Complainant to manufacture tackifier resins. (Citing *id.*)

Regarding the overall process flow trade secret, Staff argues that the similarities between the Complainant and Sino Legend formulas and manufacturing processes supports a finding of misappropriation by Respondents. Staff states that Dr. Chao testified that the same or similar overall process flow incorporating each of the seventeen asserted trade secrets (ten of which the Staff supports) was used by Sino Legend ZJG, for example, during its early lab testing. (Citing CX-1566C (Chao Witness Stmt.), Qs. 65-66, 74) Staff submits that this is shown through entries in Fan's lab notebook, documents relating to the initial pilot study, and documents relating to commercial scale production. (Citing *id.*) Staff states that Dr. Chao summarized the evidence of copying. (Citing CDX-001)

Staff says that Dr. Chao also testified that aspects of Complainant's overall process flow were copied by Sino Legend ZJG. (Citing CX-1566C, Qs. 65-66) Staff argues that Sino Legend basically duplicated Complainant's overall process flow trade secret by {
,} discussed *supra*, used by Sino Legend ZJG in and after November 2006 as evidenced in

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Dr. Fan's lab notebook, and using them in Sino Legend's Pilot Study, and in commercial production batches. (Citing CX-1566C, Qs. 65-74) Staff contends that the evidence shows that Sino Legend ZJG improperly acquired and used the asserted overall process flow trade secret from Complainant, either through its hiring of Former Plant Manager Mr. Xu and/or Former General Manager C.Y. Lai, and/or through unauthorized access to Complainant's Shanghai subsidiary documents. (Citing *id.*) Staff asserts that, when the number of similarities is viewed as a whole and considered in light of Mr. Xu's access to Complainant's trade secrets, Staff submits that the evidence weighs heavily for a finding of trade secret misappropriation.

Staff says Respondents' Dr. Thomas testified about the extensive "similarity" and/or "substantial similarity" between SP1068 and SL-1801 for each of Complainant's alleged trade secrets (as well as for the overall process flow trade secret). { } Staff states that Dr. Thomas acknowledged "similarity" and/or "substantial similarity" for Sino Legend's use of {

.} (Citing Tr. at 630:18-638:11) { } Staff submits that Dr. Thomas also testified on the "similarity" and/or "substantial similarity" for Sino Legend's use of {

} (Citing *id.*)

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Staff maintains that Dr. Thomas further testified that the “substantial similarity” is supported by the calculated differences between Complainant’s {

.} For the first trade secret relating to {

,} Staff asserts that Dr. Thomas acknowledged that {

}

(Citing Tr. at 500:12-21 and 640:1-4) Then even assuming that it would be appropriate to compare {

} Staff argues that Dr. Thomas admitted that

the difference between these two values is only { } and therefore substantially similar in his opinion. (Citing Tr. at 640:12-641:15; SDX-001C) Additionally, Staff contends that, as a third data point comparison, Dr. Thomas {

.} (Citing Tr. at 641:20-642:2; RX-422C (Thomas Witness

Stmnt.), Q. 80) Staff also asserts that, in comparing Complainant’s { } with Sino Legend’s alleged { } Dr. Thomas further testified that the difference between these two values is only { } and therefore substantially similar, with { } similarity. (Citing Tr. at 642:3-22; SDX-001C)

In its reply brief, Staff asserts that Respondents repeatedly focus on alleged “differences” in the processes. (Citing RIB at 117) For example, Staff contends that Respondents again contend that “Complainant has failed to properly perform a side-by-side comparison of Sino Legend’s overall process with its alleged trade secrets.” (Citing *id.*) Again, the Staff is of the view that Dr. Chao performed an adequate and detailed side-by-side comparison of SP-1068 trade secrets with SL-1801/1802, using the comparison tables in his witness statement and demonstrative CDX-001C, to show misappropriation and use.

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Analysis and Conclusions: In section III.B.3.k *supra*, I found that Complainant's overall process flow is a valid trade secret. Here, I find that Respondents' process for manufacturing the accused tackifiers use, substantially use, and are substantially derived from Complainant's trade secret.

Dr. Chao testified that Respondents' processes for manufacturing the accused tackifier resins use, substantially use, or are substantially derived from Complainant's overall process flow trade secret. (CX-1566C, Q. 65) I found *supra* in sections IV.C.3.a-g and IV.C.4.a-k that Sino Legend ZJG uses each of Complainant's alleged trade secrets used in both the alkylation reaction and condensation reactions. Also, Dr. Chao provided a chart, which is unrebutted, that summarizes his understanding of Sino Legend ZJG's process conditions in and after November 2006, compared with those of Complainant's Shanghai facility, as shown below:

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(CX-1566C, Q.74) I find that a preponderance of the evidence before me, combined with Mr. Lai's and Mr. Xu's access to Complainant's trade secrets as discussed in section IV.C.1 *supra*, establishes that Sino Legend ZJG duplicated Complainant's overall trade secret by incorporating Complainant's process parameters into entries in Mr. Fan's notebook, using them in documents relating to the initial pilot study, incorporating them into documents relating to commercial scale production, and then using them in the manufacture of SL-1801 and SL-1802. Therefore, I find that Respondents' processes for manufacturing tackifier resins use, substantially use, and are substantially derived from Complainant's "overall process flow" trade secret.

D. Violation

Based upon all of the foregoing, I find that Respondents have committed unfair acts in the importation of articles by misappropriating and then importing Complainant's trade secrets into the United States. 19 U.S.C. § 1337(a)(1)(A). Complainant has shown by a preponderance of evidence the existence of a trade secret which is not in the public domain, that it is the owner of the trade secret or possesses a proprietary interest therein, that Respondents wrongfully took the trade secret by unfair means; and that Respondents have used or disclosed the trade secret causing injury to Complainant, for each the following trade secrets: {

} Complainant has also shown that

⁷⁹ Regarding the overall process flow, I have also found, *supra*, that if the following were found to be trade secrets, they would also be found to have been used, substantially used or substantially derived from Complainant's trade secrets: {

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Respondents import the SL-1801, SL-1801LFP, SL-1802, and SL-1802LFP accused products, as discussed *infra* in section V.C.

Based on the relationship between the parties, discussed *supra* in section IV.B, I find that the evidence shows that individual Respondents Mr. Quanhai Yang and Ms. Ning Zhang and the following Respondents, each of which is controlled by either individual Respondent Yang or Zhang, have created a convoluted set of corporate structures and relationships that involve a number of entities that manufacture, distribute and import the accused products: Sino Legend ZJG, Sino Legend BVI, Sino Legend Hong Kong, Sino Legend Marshall Islands, Sino Legend Holding Group, Gold Dynasty, Elite, Red Avenue BVI, Red Avenue Hong Kong, and PMI. As a result, I find that each aforementioned Respondent acted in concert, to commit unfair acts in the importation of the accused products, which were produced using trade secrets misappropriated from Complainant in violation of 19 U.S.C. § 1337(a)(1)(A). Based on his limited role as described *supra* in section IV.B, Mr. Crumlish is not liable for misappropriation in his personal capacity.

In section V.C, *infra*, I address injury to Complainant's domestic industry, as recited in the fourth criterion.

E. Affirmative Defenses

1. Independent Development

Respondents' Position: Respondents assert that Sino Legend (and Red Avenue) conducted substantial independent work in the course of developing the processes used to make the products at issue in this Investigation. Respondents argue that much of that work occurred

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prior to any alleged contact with anyone at Complainant. Respondents aver that {

.} Respondents state that some of the development was recorded in a notebook by member of the development team, Professor Pu. Respondents also state that at trial the Court ruled that Mr. Pu's notebook did not meet the requirements for admissibility. As a result, Respondents say that they were not able to tell the full history of the development efforts, especially on those matters that touched on the Mr. Pu work. Nevertheless, completely apart from Mr. Pu's notebook, Respondents claim that there is corroborated evidence proving that aspects that Complainant asserts as trade secrets were in possession of Sino Legend before any alleged contact with any Complainant employee or former employee.

Respondents aver that {

.} (Citing RX-416C, Q. 86) Respondents say that, {

} (Citing RX-416C (Yang WS), Qs. 86-104, Qs. 106-107) Respondents maintain that, as part of those efforts, { } (Citing *id.*, Q. 96) Respondents contend that, {

.} Respondents aver that

{

.} (Citing RX-532; RX-416C (Yang WS) at 86-97) Respondents assert that {

. (Citing RX-329C

{

Respondents argue that, {

Respondents assert that, {

.} (Citing RX-329C at 849RESP_00006986-87; RX-416C (Yang WS), Qs. 97-104; 236) Respondents submit that {

(Citing *id.* at 849RESP_00006988-90; RX-375C) Respondents assert {

.} (Citing RX-416C (Yang WS), Qs. 97-104; RX-329C; RX-375C {

} Respondents offer that {

} (Citing RX-329C {

}

Respondents contend that, further demonstrating Sino Legend's early development activities, prior to any contact with Complainant, Sino Legend's Mr. Yang corresponded with

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{ .} (Citing RX-251C; RX-416C
(Yang WS), Qs. 179-185, Qs. 192-193) Respondents argue that {

.} (Citing RX-251C;
RX-416C (Yang WS), Qs. 179-185, Qs. 192-193) In particular, Respondents assert that {

.} (Citing *id.*) Respondents continue that, {

}

Respondents state that, {

} (Citing

RX-251C) Respondents aver that {

} (Citing *id.*) Respondents say {

} to use. (Citing *id.*; *see also*, RX-416C (Yang), Qs. 184-

185)

Respondents maintain that, in parallel with its experimental work and starting before October 2005, Sino Legend began working with two separate companies specializing in designing and building chemical processing facilities. (Citing *see generally*, RX-416C, Qs. 250-334) Respondents state that Sino Legend worked with Zhengzhou Zhongyuan Polyurethane Engineering Technology Company ("ZZPE") and also Henan Design Institute. (Citing *id.*) Respondents aver that both aided in preparing submissions to for governmental approval of Sino Legend's plant, such as the October 2005 feasibility study. (Citing *id.*, Qs. 252-253; RX-327C)

Respondents offer that Sino Legend hired ZZPE for its experience. Respondents say that ZZPE specializes in designing turnkey chemical factories for its clients. (Citing RX-416C, Q. 251) Respondents claim that {

} (Citing *id.*, Q.

88)

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Respondents contend that, prior to any alleged contact with a Complainant, Sino Legend

{

.} (Citing RX-327C at 19

(SINOZJG_0022727)) Respondents aver that, as Mr. Yang testified, {

.} (Citing RX-416C, Qs. 264-68) Respondents offer that {

} (Citing RX-385C at SINOZJG_0011114 (translation

at ComplainantNOZJG_0023088); RX-416C, Qs. 257, 269-71, 278) Further, Respondents argue

that {

} (Citing RX-416C, Qs. 313-318)

In April 2007, Respondents maintain that Sino Legend signed contracts to purchase commercial size reactors. (Citing RX-416C, Q. 292) Respondents state that, {

.} (Citing RX-416C, Qs. 260-

262) Respondents say that, in {

} (Citing RX-416C, Q. 285) Respondents submit that Sino Legend anticipated in

the study that {

.}

(Citing *id.*) Respondents assert that, {

.}

(Citing *id.*, Q. 286) Respondents claim that, ultimately, Sino Legend {

}

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Complainant's Position: Complainant quotes, "It is a well-recognized principal that, where a defendant in a trade secret case claims independent development, the burden shifts to the defendant to show that this was in fact the case." (Citing *Integrated Cash Mgmt. Servs., Inc. v. Digital Transactions, Inc.*, 732 F. Supp. 370, 377-78 (S.D.N.Y. 1989) (citing *Rapco Foam, Inc. v. Sci. Applications, Inc.*, 479 F. Supp. 1027, 1030-31 (S.D.N.Y. 1979)); see also *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463, 490 (N.D.N.Y. 2003))

Complainant also recites, "[D]isclosure of the secret to the defendant, followed by manufacture of a closely similar device by the defendant, shifts to the defendant the burden of going forward with evidence to prove, if it can, that it arrived at the process by independent invention." (Citing *Droeger v. Welsh Sporting Goods Corp.*, 541 F.2d 790, 793 (9th Cir. 1976)) Complainant continues, "There is substantial authority for the proposition that the defendant in such a case ought to offer more than the verbal testimony of interested witnesses." (Citing *id.*)

Complainant contends that "[t]he fact that information can be ultimately discerned by others—whether through independent investigation, accidental discovery, or reverse engineering—does not make it unprotectable." (Citing *AvidAir Helicopter Supply*, 663 F.3d at 973; see also *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 918 (Ind. 1993) ("Even if information potentially could have been duplicated by other proper means, it is no defense to claim that one's product could have been developed independently of plaintiff's, if in fact it was developed by using plaintiff's proprietary designs."))

Complainant asserts that the facts do not support Respondents' affirmative defense of independent development. Complainant contends that the only testimony Respondents offered that Sino Legend arrived at the process of making PTOB-based tackifier resins through independent development was from Yang, who repeatedly misled Complainant and the Court

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throughout the investigation, whose witness statement was *uncorroborated by any other fact or expert witness*, and whose testimony was unsupported by the documents. Complainant avers that

{

}

(Citing Tr. at 765:18-25)

Complainant asserts that Sino Legend's alleged development work, including Sino Legend's 2005 Feasibility Study and other R&D work, bears no resemblance to Sino Legend's November 8, 2006 experiments, {

.} (Citing CDX-2C (timeline of Sino Legend's misappropriation))

Complainant argues that {

}

Complainant says that it uses {

} (Citing CIB § III.B.1.a, CX-1565C, Qs. 10-15) Complainant avers that {

} (Citing CIB § III.G.2.d) Complainant

argues that this is evidence of copying, and that there is no evidence that Respondents previously independently developed { .} In fact, Complainant notes that {

} shows they were very much in the

wilderness. Complainant continues that as Chao testified, {

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} indicating Sino Legend's efforts to commercialize a process for making a product comparable to SP1068 were a failure. (Citing Tr. at 472:4-473:19)

Complainant asserts that its concept of using {
} is Complainant's trade secret, and its {
} are specific embodiments. (Citing §§ III.B.1.b and III.B.4.d) Complainant argues that Respondents present no evidence that Sino Legend {

.} (Citing CIB § III.G.2.d)

Complainant contends that Sino Legend {

} (Citing CX-604C (emphasis added by Complainant)) Complainant maintains that this is all evidence of copying, and that Respondents did not independently develop.

Complainant says that Mr. Yang claims to show proof of independently developing {
} (citing RX-416C, Q. 183). Complainant says, however, that Dr. Chao testified on cross that {
}.} (Citing Tr. at 432:12-19, 472:4-18 (citing RX-251C)) Moreover, Complainant avers that {

.} (Citing Tr. at 473:20-474:6 (discussing RX-251C) (emphasis added by Complainant))

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Complainant asserts that its {

,} is Complainant's trade secret. (Citing CIB §

III.B.1.d) Complainant argues that there is no evidence that Sino Legend ever had knowledge of such a process prior to December 2006.

Complainant says that {

.} Complainant notes, however, that

this is only Mr. Yang's own uncorroborated testimony, because the other two did not testify.

(Citing *compare* CX-1592C, Qs. 58-63 {

} Complainant also reasons

that the {

.} (Citing RX-532 at 27)

Complainant contends that {

} (Citing CX-1592C, Qs. 62-67) Complainant asserts that {

}

Complainant says that {

.} (Citing

RX-416C, Qs. 266-268) Complainant notes, however, {

.} Complainant asserts that, in fact, {

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(Citing CX-1184C at 1 (emphasis added by Complainant)) Thus, Complainant maintains that {

.}

Complainant states that Mr. Yang also testified that {

.} (Citing RX-416C, Qs. 178-179, Q.

191) Complainant contends that {

.}

Complainant says that Mr. Yang alleges that {

.} Complainant asserts that Mr. Yang's

testimony that he had only just met Mr. Xu in December 2006 is not credible, and that they had likely been working together for some time.

Complainant asserts that the only objective evidence of record is that {

.} (emphasis added by Complainant)

Complainant says that Mr. Yang alleges Sino Legend independently developed {

} that Complainant asserts is a trade secret. (Citing RX-

416C, Qs. 285-289) Complainant notes that such claims are uncorroborated by any other witness

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and inconsistent with the evidence. Complainant states that he makes the bald assertion {

.} (Citing *id.*) Complainant avers that {

} which is notably *after* the

September – October communications and meeting with Mr. Lai, and *after* the December

communications with Mr. Xu. (emphasis added by Complainant) Complainant argues that {

} are remarkably similar to those of Complainant's, which only shows copying.

Complainant says that Mr. Yang alleges {

.} (Citing RX-416C, Qs. 304-306)

Complainant asserts that Mr. Yang offers no corroboration by way of documents or testimony of

any other witness that Sino Legend {

.} Moreover, Complainant avers

that {

} (Citing

RX-270 at 215) Therefore, Complainant argues that {

} Consequently, Complainant states that

{

} (Citing *id.* at 212 (item 4)) Complainant contends,

however, that {

.} (Citing CIB § III.C.2.v) In comparison, Complainant claims that Sino Legend's used a

{

.} (Citing RX-272C at 1)

Thus, Complainant argues that Mr. Yang's testimony is inconsistent with the evidence.

Complainant continues that Mr. Yang claims Sino Legend independently developed the

{

} (Citing RX-416C, Qs. 86-87) Complainant states, however,

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that his suggestion {

} is uncorroborated by any other witness and is also contradicted by the evidence.

(Citing CX-1592C, Qs. 58-64, Q. 67 (Chao analysis of Sumitomo)) Complainant avers that

{ } nor do Respondents offer any

expert testimony that it does. Rather, Complainant asserts that {

.} (Citing

RX-0532 at 27) Furthermore, Complainant submits that {

.}

Complainant says that Mr. Yang suggested that Sino Legend {

.} (Citing RX-416C, Qs. 100-104) Complainant states, however, that {

} Complainant

asserts that Mr. Yang failed to mention CX-1584C, which directly contradicts his testimony.

Complainant says that Dr. Chao, on the other hand, {

}

{

.

(Citing CX-1592C, Q. 62, Qs. 64-67)

Complainant argues that Sino Legend used and continues to use its trade secret of

{

.} (Citing CX-1566C, Qs.

41-42) Complainant says that Mr. Yang makes the unsupported allegation that {

} (Citing RX-0416, Q. 163) Complainant avers however, that

here again there are no documents or witness statements to corroborate his testimony that he ever

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had possession of it during Sino Legend's development, much less used it. Complainant asserts that Mr. Yang's testimony is full of contradiction. Complainant submits that { } did not even issue until September 16, 2008 (citing RX-498), long after Mr. Fan copied Complainant on November 12, 2006 as recorded in his notebook. Complainant contends that, although there was a prior printed publication (citing RX-302), Mr. Yang specifically testified he relied on { } itself (which did not issue until 2008), not the prior publication. Complainant maintains that his story about learning from { } in early 2006 is thus not only entirely uncorroborated, but impossible. Complainant notes that it seems someone later sought to alter the substance of his original Chinese language testimony to point to the prior publication. Complainant avers that it is clear from Q. 159 that he was testifying in Chinese specifically about { } but someone changed the English language version to refer to the prior publication (also changed the references from column and line to paragraph numbers). Complainant argues that this further casts serious doubt about Yang's testimony of what he actually possessed and relied on in 2005-06.

Moreover, Complainant asserts that Sino Legend's { } Complainant claims that there is no evidence that Mr. Yang even possessed { } or related publication, much less allegedly used anything from it, before this access to Complainant information to support an independent development claim.

In contrast, Complainant says that Dr. Chao performed a detailed analysis of documents and testimony from multiple sources and demonstrated that Yang's testimony { }

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.} (Citing CX-1566C, Q. 77; CX-1592C, Qs. 13-30)

Complainant says that Respondents do not appear to claim independent development of

{ .}

Complainant contends that Mr. Yang makes essentially the same unsupported arguments regarding {

} Complainant argues that such arguments are rebutted by the same points above regarding { .} (Citing CIB § III.H.9)

Complainant asserts that Respondents do not appear to claim independent development of Respondents' {

.. .}

(Citing CX-1565C, Q. 27 and CX-1566C, Q. 46)

Complainant argues that there is no evidence of development {

.} (Citing CX-1566C, Q. 50) Complainant contends that the most likely source of the { } is Complainant's CX-653C formula.

Complainant maintains that Respondents offer no evidence to support a claim of independent development with respect to {

.} With respect to the LFP product, Complainant says that Mr. Yang testifies that {

.} (Citing RX-416C, Q. 378, Q. 387, Qs. 394-395) Complainant observes that, notably,

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{
} (Citing

RX-244C at SINOZJG_0022604) Complainant argues that without any explanation why {
} is material and “important,” it seems the most
likely explanation is that it is merely a immaterial attempt to appear as if Sino Legend designed
around Complainant’s { }

Complainant submits that Respondents offer no evidence that Sino Legend used {
} before being exposed to Complainant’s confidential
information. Complainant avers that {

} (Citing CX-1566C, Q. 56)

Complainant argues that, again, Respondents offer no evidence that Sino Legend used {
} before being exposed to Complainant’s confidential
information. Complainant claims that Sino Legend only started to use {

} (Citing CX-
1566C, Q. 60)

Complainant asserts that Mr. Yang’s only evidence of alleged prior development of {
} which Complainant claims is a trade
secret, is that Sino Legend previously { } (Citing RX-
416, Qs. 285-286 (emphasis added by Complainant)) Complainant contends that his attempt to
point to { } provides no plausible explanation why, after being exposed to
Complainant confidential information, Sino Legend later chose {

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.} (Citing CX-950C at 15 (emphasis added by Complainant)) Complainant continues that nor does any document or witness corroborate his wholly unsupported testimony that {

} (Citing RX-416, Qs. 285-286) For example, Complainant says that the

{

.}

(Citing CX-950C at 15) Complainant avers that Mr. Sang, {

.} (Citing CX-1358C at 41 (emphasis added by

Complainant)) Complainant argues that it stretches imagination that Sino Legend would independently arrive at the same { } as Complainant, in spite of the fact that it does not match any of Sino Legend's design documents prior to 2007.

Complainant asserts that Respondents and Mr. Yang do not point to any independent development precedent for Sino Legend's overall process flow. In its reply brief, Complainant argues that Respondents begin their development section by citing *inter alia* Mr. Pu's excluded notebook to argue that they "conducted substantial independent work ... developing the processes used to make the products at issue." (Citing RIB at 123) Complainant argues that, as the Court found, Respondents improperly withheld key document and deposition discovery into Mr. Pu's alleged work. (Citing Order No. 37 at 17-22) Complainant asserts that they only belatedly produced it pursuant to Court order on the eve of trial, during which the Court ruled the evidence of Mr. Pu's work was unreliable. Complainant submits that, in any event, Dr. Chao showed in painstaking detail how Mr. Pu's deposition and documents proved that Sino Legend's independent development and reverse engineering work, prior to being exposed to

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Complainant's confidential information in September-December 2006, was a complete failure.

(Citing CX-1592C)

With respect to the allegation that { }

Complainant avers that the documents prove otherwise, as Dr. Chao explained. As Dr. Chao explained, {

.} (Citing CX-1592C, Qs. 61-62, Q. 67; CIB at 137)

Complainant says that Respondents now argue that {

.} (Citing RIB at 124) Complainant contends that those arguments were not raised in Respondents' pre-hearing brief and so should be disregarded. Complainant adds that, {

,} those parameters do not disclose Complainant's trade secrets, which are more specific.

Complainant says that Respondents also argue that {

,} but they offer no evidence (other than Yang's uncorroborated testimony) that {

} Complainant avers that the document only *speculates* {

} (Citing CIB at 117-18) Complainant argues that this undermines Mr. Yang's uncorroborated testimony that Sino Legend knew or even thought it was "likely" that Complainant { } On the other hand, Complainant asserts that it *corroborates* the testimony of Dr. Banach, who explained, {

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.} (Citing Tr. at 183:19-184:3; *see*

also id. at 183:5-14; CX-1592C, Qs. 65-67 (Chao)) Tellingly, Complainant avers that

Respondents offer no documentary evidence or other witness testimony that, {

,} Sino Legend itself, at the time, actually drew any conclusion that

Complainant { .}

Complainant contends that Respondents now argue that {

.} (Citing RIB at 124) Complainant asserts that such

argument was not raised in Respondents' pre-hearing brief. Also, Complainant argues that the

quote and evidence cited by Respondents belies their argument that one could determine, from

publicly available information and reverse engineering (but without knowing what to look for),

{

.} (Citing RX-375C (emphasis added by Complainant))

Complainant submits that this corroborates Dr. Banach's testimony that one could not make that

determination without first knowing Complainant's process and thus what to look for. (Citing

Tr. at 186:7-187:17) Complainant offers that it also shows that { } could not be reverse

engineered.

With respect to Sino Legend's { } Complainant says that

Respondents cite to RX-0251C as suggesting Sino Legend knew various information, but in fact

the document shows {

.} (Citing Tr. at 472:4-474:6)

Complainant says that Respondents argue that RX-251C shows Sino Legend knew from {

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.} Complainant avers:

{

.}

(Citing SIB at (citing CX-1570C, Q. 21) (emphasis added)) Complainant submits that Respondents' assertion that { } (citing RIB at 125), was not in their pre-hearing brief. Complainant continues that the passage Respondents cite {

.} Complainant notes that that same passage

refers to Sino Legend then { .}

Complainant says that Respondents argue that Sino Legend's use of { } is proven by the phrase in RX-251C, {

....}

(Citing RIB at 125) Complainant argues that {

.} Complainant emphasizes

that the most contemporaneous documentary evidence of record in fact shows {

}

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(Citing CX-1184C (Sino Legend’s Feasibility Study Report) at 1) Complainant avers that Sino Legend’s { } is corroborated by Dr. Chao’s analysis of other Sino Legend documents, which showed that at all times prior to receiving Complainant’s confidential information, { } (Citing CX-1592C, Qs. 3-4, Qs. 66-67)

Complainant submits that Respondents’ contentions that CX-1592C discloses { }, were not raised in their pre-hearing brief and should be disregarded. Complainant continues that those new arguments are sleight of hand. For example, Complainant argues that { }

Regarding { }, Complainant says that Respondents cite the reference to { } Complainant asserts, however, that Dr. Chao explained at trial that the reference to { }

{ } (Citing Tr. at 474:7-22)

Complainant argues that Respondents’ claim about hiring “ZZPE for its experience” is hardly worth dignifying, as ZZPE is yet another entity in Respondents’ convoluted corporate web. (Citing Tr. at 320:11-16, 324:10-16, 325:1-4, 322:5-8, 322:18-21; *also compare* CX-055C at 9 { } with CX-258C at 3 { } CX-1358.1C at 27:20-21, 27:23-28:3 (same), and CX-1358.1C at 67:1-12 (Sang on Sino Legend

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ZJG board)) Complainant says that Sino Legend has already debunked {
} (Citing CIB at 115)

Complainant says that it has already pointed out the lack of corroboration for Mr. Yang's
unsupported allegation that it { } (Citing CIB at 116, 120-21)

Moreover, Complainant avers that Mr. Yang's claim that {

} (Citing RX-327C at 849RESP

0009726-27) Complainant asserts that Sino Legend's first use of {

} was after Sino Legend had already received Complainant's
confidential information from Mr. Xu and Mr. Lai.

Staff's Position: Staff argues that a complainant who alleges trade secret
misappropriation has the burden to prove "misappropriation," but once misappropriation is
established by a preponderance of the evidence, the burden shifts to the defendant (or
respondent) to prove lawful acquisition and/or independent development. (Citing *Pioneer Hi-
Bred Intern. v. Holden Foundation Seeds Inc.*, 35 F.3d 1226, 1240 (8th Cir. 1994))

Staff asserts that, once it is established that a trade secret exists and that its secrecy has
been adequately protected, it must be determined how respondent gained access to the
information. Staff also asserts that it is not unlawful to discover a secret process by reverse
engineering on the finished product, or a secret process may fairly be used if it is gained by
independent research. (Citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974))
Staff quotes, however, "one may not avoid these labors by taking the process from the discoverer

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without his permission at a time when he is taking reasonable precautions to maintain its secrecy.” (Citing *E.I. DuPont de Nemours & Co. v. Christopher*, 166 U.S.P.Q. 421, 424 (5th Cir. 1970)) Furthermore, Staff maintains that it is not enough to assert that a secret process could have been developed independently, without access to the confidential source of information. (Citing *Sperry Rand Corp. v. Rothlein*, 143 U.S.P.Q. 173, 182 (D. Conn. 1964)) Staff contends that it is also not an adequate defense to assert that a complainant did not take adequate security measures if the security lapse was not the cause of the misappropriation. (Citing *Syntex Ophthalmics, Inc. v. Novickly*, 214 U.S.P.Q. 272, 277 (N.D. Ill. 1982))

Staff notes that the defense of independent development is also addressed in his arguments above describing the evidence that supports the existence of ten of the eighteen asserted trade secrets. (Citing SIB Section III.B)

Staff says that Dr. Chao testified that he considered whether Sino Legend could have independently developed its process for manufacturing SL-1801, SL-1802, SL-1801LFP, and /or SL-1802LFP, but that he rejected that possibility: “Based on the striking similarity in Sino Legend’s and Complainant’s processes and conditions for the manufacture of tackifier resins, and the lack of precedent for Sino Legend’s manufacturing processes that I have reviewed, I believe Sino Legend’s sudden use of Complainant’s technology in November of 2006 could only be the result of copying Complainant’s processes.” (Citing CX-1566C, Q. 67)

Staff states that Respondent Quanhai Yang, Chairman of the Board at Sino Legend ZJG, acknowledged during cross-examination that Respondents’ independent development defense is inadequate and thus cannot succeed.

Q. So, Mr. Yang, you must admit at this point that the independent-development defense cannot be confirmed with documents and testimony.

A. My understanding is so.

Q. And so your independent-development defense cannot succeed in this

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investigation.

A. Probably [not] in this investigation.

(Citing Tr. at 765:18-25) Staff contends that Mr. Yang understood that Mr. Pu's development work as expressed in his lab notebook had been excluded from evidence and that Respondents had decided not to call Mr. Yunfeng Fan as a witness. (Citing Tr. at 763:6 to 765:25; *see* SDX-005C) Staff asserts that Mr. Yang also conceded to another gap in the timeline from the end of Mr. Pu's lab notebook to the beginning of Mr. Fan's lab notebook, where there was little to no evidence of independent development. (Citing *id.*) Finally, Staff argues that Mr. Yang conceded that he himself did no experimentation or independent development. (Citing *id.*)

In contrast, Staff avers that the evidence shows that Sino Legend used {
,} which is the same { } reflected in Complainant's Shanghai subsidiary formulas on Mr. Xu's laptop as of November 4, 2006, just four days prior. (Citing CX-187C (recovered data from Complainant laptop belonging to Jack Xu) at 7; CX-756C (exemplary Complainant batch card in Jack Xu's possession)) As another example, Staff states that Respondents apparently whited out the "1068 resin" on some copies of the hand written batch record for the pilot study on { .} (Citing CX-035C (Fei Shi's hand-written batch record for Sino Legend's pilot study) at 1-2; *see also* duplicate CX-200C; CX-201C (Fei Shi's hand-written batch record for Sino Legend's pilot study with "1068 resin" whited out) at 1; *see also* SDX-0006C) Staff argues that the fact that Respondents whited out "1068 resin" in batch records of their pilot study indicates that Respondents felt the need to conceal the fact that the purpose of the pilot study was to copy Complainant's SP1068 process, which suggests that the copying was not based on publicly available information or independent development. (Citing Tr. at 770:8 to 773:17; SDX-0006C)

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Staff asserts that, overall, the documentary evidence demonstrates that Sino Legend's process is not based on its own early work in 2005. Thus, Staff argues that the evidence shows that Sino Legend's use of { }, as well as the other SP1068 trade secrets, stems from misappropriation of Complainant trade secrets, not from independent development.

In its reply brief, Staff avers that, during his cross-examination, Mr. Yang conceded to evidentiary gaps during Respondents' alleged independent development timeframe. (Citing Tr. at 762:18 to 765:25; SDX-005C) Staff asserts that Mr. Yang acknowledged that Mr. Pu's development work as expressed in his lab notebook had been excluded from evidence and that Respondents had decided not to call Mr. Yunfeng Fan as a witness. (Citing *id.*) Staff contends that Mr. Yang also conceded to another gap in the timeline from the end of Mr. Pu's lab notebook to the beginning of Mr. Fan's lab notebook, where there was little to no evidence of independent development. (Citing *id.*) Finally, Staff submits that Mr. Yang conceded that he himself did no experimentation or independent development. (Citing *id.*)

In contrast, Staff argues that the evidence shows that Sino Legend used { }, which is the same { } reflected in Complainant's Shanghai subsidiary formulas on Mr. Xu's laptop as of November 4, 2006, just four days prior. (Citing CX-187C (recovered data from Complainant laptop belonging to Jack Xu) at 7; CX-756C (exemplary Complainant batch card in Jack Xu's possession))

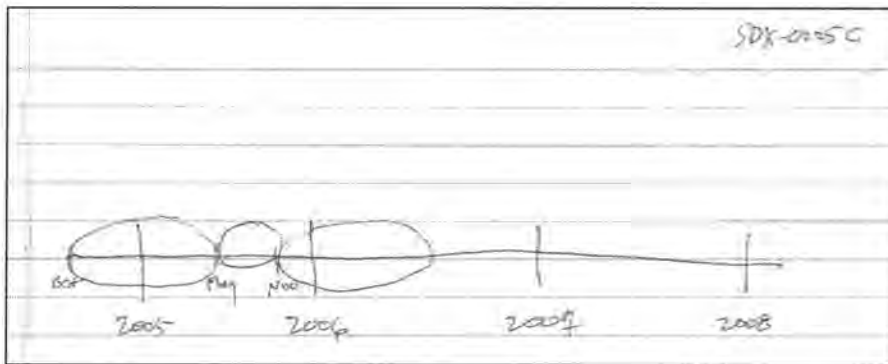
Staff submits that the evidence demonstrates that Sino Legend's process is not based on its own work. Thus, Staff argues that the weight of the evidence shows that Sino Legend's use of { } as well as the other SP-1068 trade secrets, stems from misappropriation of Complainant's trade secrets, not from independent development.

Analysis and Conclusions: I find that Respondents failed to meet their burden of proof

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to support an affirmative defense of independent development. It is legitimate to discover a secret process by reverse engineering on the finished product, or a secret process may fairly be used if it is gained by independent research. *Sausage Casings*, 337-TA-148, Initial Determination, 1984 WL 273789 at *95 (July 31, 1984). However, “one may not avoid these labors by taking the process from the discoverer without his permission at a time when he is taking reasonable precautions to maintain its secrecy.” *Id.* When respondent asserts that his use of the secret process is the product of independent development, respondent bears a *heavy burden of persuasion* to show that independent development. *Id.* (emphasis added).

At trial, Mr. Yang, the chairman of Sino Legend ZJG, conceded to multiple evidentiary gaps during Respondents’ alleged independent development timeframe, as shown in the demonstrative below. (Tr. at 762:18 to 765:25)



(SDX-005C) As shown by first large circle in the demonstrative, Mr. Yang acknowledged that Mr. Pu’s development work as expressed in his lab notebook, which covers the time frame from October 2005 to May 2006, had been excluded from evidence.⁸⁰ Mr. Yang also conceded to another gap in the timeline that covers the time period of Mr. Fan’s lab notebook, which begins in November 2006 as shown by the second large circle, where there was no credible evidence of independent development because Mr. Fan did not provide any testimony during the hearing. *Id.*

⁸⁰ The exclusion of Mr. Pu’s lab notebook because of unreliability is discussed in section IV.C.1.b, *supra*.

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Mr. Yang also testified that a gap exists between May 2005 and November 2006, as shown by the small middle circle due to Respondents' lack of production of a single email (even though email exchanges existed during that gap). (*Id.*; Tr. 700:10-701:4; 702:1-8) Finally, Mr. Yang conceded that he himself did no experimentation or independent development. *Id.* Because of Respondents lack of full documentation or other evidence to support its affirmative defense, Respondents' independent development defense fails, as Mr. Quanghai Yang conceded during cross-examination. (Tr. at 765:18-25)

Moreover, as discussed in section IV.C.2.a, *supra*, the proper test for determining misappropriation is "use," and a finding of misappropriation is not negated by independent modifications or derivations, which are based on misappropriated trade secrets. *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, 2011 WL 6255116, Comm'n Determination at *46 (Oct. 2011) (Quoting *Mangren Research & Dev. Corp. v. Nat'l Chem. Co.*, 87 F.3d 937, 944 (7th Cir. 1996) ("[T]he user of another's trade secret is liable even if he uses it with modifications or improvements upon it effected by his own efforts, so long as the substance of the process used by the actor is derived from the other's secret."))

Respondents' argument, that Sino Legend ZJG learned of information contained in the alleged trade secrets from { }, is incredible. (RX-416C, Qs. 106-107) As discussed *supra* in section III.B.3.a, the evidence regarding { } shows that no definite results were obtained, and raises serious doubts that reverse engineering could be used. Furthermore, Mr. Yang's statement is not corroborated by his notes or any other evidence from Sino Legend ZJG personnel who allegedly also { }. Overall, the evidence demonstrates that Sino Legend ZJG's misappropriation of Complainant's trade secrets gave it a substantial head start on any modifications and/or redevelopment of SL-

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1801. Respondents were only able to develop their minor modifications/derivations by using Complainant's trade secrets as a starting point.

All of the evidence discussed, *supra*, indicates that Respondents process is not based on its own work, and I find that Respondents' independent development defense fails.

2. Unclean Hands

Respondents' Position: Respondents state that, prior to trial, they took the position that Complainant's claims are foreclosed under the doctrine of unclean hands, because Complainant has itself engaged in acts of unfair competition—namely, improperly obtaining and using Sino Legend confidential process information to modify Complainant's process for making SP1068 in China. (Citing RPHB at 124-29) In particular, Respondents say that Sino Legend contended that Complainant had exploited and abused legal proceedings in Chinese actions to obtain through a third party technical organization known as the “SSTC”—under highly suspicious circumstances—detailed non-public information about Sino Legend's process for making tackifier resins. Respondents aver that the “Shanghai Science & Technology Consulting Service Centre” (“SSTC”) was engaged by the Chinese government to evaluate the technical underpinnings of the dispute now at issue in this Investigation. Respondents argue that, while the SSTC was supposedly intended to be a neutral evaluator of the technology, Respondents had evidence that Complainant put enormous pressure on SSTC—not only to influence the outcome of SSTC's report, but also to persuade SSTC to divulge to Complainant confidential Sino Legend process information. (Citing RPHB at 124-29)

Respondents say that Sino Legend contended that Complainant then took this information and apparently used it to make changes to Complainant's SP1068 process in China. (Citing *id.*) Respondents state that, having abused Sino Legend's confidential information, Sino Legend

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contended that Complainant is in no position to cast blame on Sino Legend, even assuming Complainant's allegations had merit. (Citing *id.*)

Respondents note that the evidence going to the parallel legal proceedings in China, including the related SSTC reports and documents underlying Respondents' "unclean hands" defense were ruled inadmissible. (Citing Tr. at 40:15-22, 268:9-270:18, 414:23-415:6) Consequently, Respondents say that were unable to set forth documents and adduce testimony forming the basis of their "unclean hands" defense.

Complainant's Position: Complainant argues that Respondents' unclean hands affirmative defense fails because there is no evidence in the record to support the defense. Complainant asserts that Respondents' unclean hands affirmative defense relied on Complainant's alleged use of the SSTC reports to obtain and use "Sino Legend confidential process information to modify Complainant's process for making SP1068 in China." (Citing RPHB at 124) Complainant says that during the hearing, Respondents' counsel acknowledged that excluding the SSTC reports "removes our unclean-hands defense." (Citing Tr. at 270:13-16) Complainant continues that the Court excluded the SSTC reports and all related testimony in their entireties. (Citing Tr. at 270:17-18) Accordingly, without any supporting evidence or testimony, Complainant argues that Respondents' unclean hands defense must fail.

In addition, Complainant submits that Respondents' unclean hands defense is without merit. Complainant states that it did not improperly obtain any of Respondents' allegedly confidential information. Moreover, Complainant asserts that it has never used any information that it obtained in connection with the SSTC investigation or any other Sino Legend technology. Complainant contends that Respondents could not have suffered any prejudice because

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Complainant has not engaged in any misconduct. Thus, Complainant argues that Respondents' unclean hands affirmative defense is meritless.

In its reply brief, Complainant asserts that Respondents admit to having no record evidence for this defense. (Citing RIB at 128)

Staff's Positions: Staff is of the view that the evidence fails to support a finding of unclean hands. To succeed in an unclean hands claim, Staff asserts that a plaintiff is required to show that the defendant has "engaged in particularly egregious conduct which would change the equities significantly in plaintiff's favor." (Citing *Serdarevic v. Adv. Med. Optics, Inc.*, 532 F.3d 1352, 1361 (Fed. Cir. 2008) (Quoting *Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992) (en banc))) Staff quotes, "But it is not enough merely to show misconduct." (Citing *id.*) Rather, Staff asserts that the party asserting unclean hands must show prejudice resulting therefrom. (Citing *id.*)

Staff contends that the evidence shows that Complainant has not improperly obtained and/or used any of Respondents' allegedly confidential information from the Shanghai Science & Technology Consulting Service Centre ("SSTC"). Staff submits that many aspects of Respondents' process steps were already known and used by Complainant independently. First, Staff asserts that Complainant has known about and used { } Staff offers that {

.} (Citing CX-604 (March 27, 2007 Email) at 1) Staff highlights that this information was provided to Xu while he was still working at Complainant and months before Sino Legend had even started commercial production. (Citing *id.*) Thus, Staff argues that Complainant did not come to know about { } from Respondents.

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Second, Staff asserts that Complainant knew about and used { } well before 2009, when Respondents' allege that the information was disclosed to Complainant. Staff avers that, on March 20, 2006, Mr. Xu responded to an email sent to the PRD MIT distribution, which provided {

} (Citing CX-152C; CX-1032C (March 20, 2006 email)) Thus, Staff argues that the evidence shows that Complainant has known that {

} (Citing CX-754C { } Staff offers that the reason that { } does not have a material impact on the manufacturing process is that {

.} (Citing CX-1570C (Hamed Witness Statement), Qs. 79-80, 83) Staff submits that, in March 2010, knowing that {

Complainant's Shanghai subsidiary {

} (Citing *id.*) Thus, Staff argues that the evidence demonstrates that Complainant's Shanghai subsidiary's { } was not based on Respondents' information.

For at least the foregoing reasons, Staff asserts that the evidence shows that Complainant has not improperly obtained or used any of Respondents' confidential information. Accordingly, Staff is of the view that the evidence fails to support Respondents' unclean hands defense.

In its reply brief, Staff is of the view that the evidence fails to support a finding of unclean hands.

Analysis and Conclusions: I find Respondents' affirmative defense of unclean hands to be ludicrous. Unclean hands is a doctrine in equity governed by the maxim that "he who comes into equity must come with clean hands." *In the Matter of Certain Microprocessors*,

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Components Thereof, and Products Containing Same, Inv. No. 337-TA-781, Initial Determination, 2012 WL 6883205 at *162 (Dec. 14, 2012). I have discretion to refuse relief to a litigant who himself has committed misconduct. *Id.* To succeed in an unclean hands claim, a party is required to show that the opposition has “engaged in particularly egregious conduct which would change the equities significantly.” *Serdarevic v. Adv. Med. Optics, Inc.*, 532 F.3d 1352, 1361 (Fed. Cir. 2008).

First, Respondents have been shown to come into this investigation with unclean hands and have obfuscated discovery throughout this investigation. As discussed *supra* in section IV.C.1.b, Respondents produced a version of the test record for the pilot study in which “1068” was whited-out. (CX-201C) {

} Mr. Yang also testified, “Probably what happened was that someone was continue using [sic] this document, and that person saw the marking of AP-1068. That person thought it might not be appropriate, so it was marked out.” (Tr. at 771:10-21)

Respondents refused to provide Mr. Pu’s deposition for several months after the due dates for expert reports, even though they relied heavily on his alleged developmental work for their independent development defense. *See* Order No. 37. A piece of paper that listed { } which was material to Respondents’ independent development defense, was torn from the page from Mr. Pu’s notebook. (CX-1585C; Tr. 11:7-12) There are also appeared to be numerous white-outs throughout Mr. Pu’s lab notebook. I found that it was undated, uncorroborated, and disorganized. There were ad hoc pages taped on top of other pages. (Tr. 608:12-20) As a result, I excluded Mr. Pu’s notebook as unreliable evidence for the purpose of showing independent

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development, and I admitted the notebook for the limited purpose of showing a lack of credibility on the part of Sino Legend. (Tr. 11:8-12:19) Respondents' own egregious behavior epitomizes coming with "unclean hands" while seeking equity. Their credibility suffers greatly as a result.

Additionally, credible evidence shows that Respondents have taken steps to hide the relationships between the parties and the origin of products, as discussed in section VI.A, *infra*. (CX-250C at SIGITC0000176503; CX-644C at SIGITC0000176685; Tr. at 743:23-744:2)

Second, Respondents have failed to provide any evidence to support their very general allegations. Respondents' unclean hands defense relies on Complainant's alleged use of the SSTC reports, which were excluded. (Tr. at 270:17-18)

Complainant also knew about and used { } well before 2009, when Respondents' allege that the information was disclosed to Complainant. On March 20, 2006, Mr. Xu responded to an email sent to the MIT distribution, which { }
(CX-1032C) Thus, the evidence demonstrates that Complainant's {

} was not based on Respondents' information.

Based upon the foregoing, I find that the evidence shows that Complainant has not improperly obtained or used any of Respondents' confidential information, and Respondents' unclean hands defense fails.

V. DOMESTIC INDUSTRY

A. Applicable Law

19 U.S.C. § 1337(a)(1)(A) provides that:

Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D),

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and (E) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—

- (i) to destroy or substantially injure an industry in the United States;*
- (ii) to prevent the establishment of such an industry; or*
- (iii) to restrain or monopolize trade and commerce in the United States.*

19 U.S.C. § 1337(a)(1)(A).

There is no express requirement that the domestic injury relate to the intellectual property involved in an investigation brought under 19 U.S.C. § 1337(a)(1)(A). (*Id.*) That section requires that a complainant prove that a domestic industry exists that is subject to injury as a result of unfair acts, *i.e.* “the target of the unfair acts and practices.” See *Certain Cast Steel Railway Wheels*, ITC Inv. No. 337-T A-655, Initial Determination, 2009 WL 4261206 at *31-32 (Oct. 16, 2009) (“*Railway Wheels*”); *Certain Nut Jewelry and Parts Thereof*, Inv. No. 337-TA-229, Comm’n Op. at 16-17 (Nov. 1986). Thus, there is no “technical prong” requirement to be met in a trade secret case brought pursuant to 19 U.S.C. § 1337(a)(1)(A).

In addition to proving the existence of a domestic industry, a complainant must satisfy the injury component, which requires proof that the “threat or effect” of a respondent’s misappropriation is “to destroy or substantially injure” a domestic industry. 19 U.S.C. § 1337(a)(1)(A); *TianRui Group Co. v. Int’l Trade Comm’n*, 661 F.3d 1322, 1335 (Fed. Cir. 2011); 77 Fed. Reg. 38083 (2012). The Commission has considered a “broad range of indicia” to determine whether unfair acts have the effect of substantially injuring the domestic industry.

These factors include:

- (1) the respondent’s volume of imports and penetration into the market;
- (2) the complainant’s lost sales;
- (3) underselling by the respondent;
- (4) the complainant’s declining production, profitability and sales; and
- (5) the harm to complainant’s goodwill and reputation.

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See Railway Wheels at *32 (Oct. 16, 2009) (quoting *Certain Electric Power Tools, Battery Cartridges and Battery Chargers*, Inv. No. 337-TA-284, Unreviewed Initial Determination at 246 (1991) (“*Electric Power Tools*”)).

When a complainant alleges actual injury, (*i.e.* effect) there must be a causal nexus between the unfair acts of the respondents and the injury. (*Bally/Midway Mfg. Co. v. Int’l Trade Comm’n*, 714 F.2d 1117, 1125 (Fed. Cir. 1983) (“*Bally*”))

In evaluating whether or not a “threat of substantial injury”⁸¹ exists Commission consideration includes the following factors:

- (1) substantial foreign manufacturing capacity;
- (2) ability of imported product to undersell the domestic product;
- (3) explicit intention to enter into the U.S. market;
- (4) the inability of the domestic industry to compete with the foreign products because of vastly lower foreign costs of production and lower prices; and
- (5) the significant negative impact this would have on the domestic industry.

In addition, the threatened injury must be “substantive and clearly foreseen,” and the complainant must show a causal connection between the respondent’s unfair act and the alleged future injury. *Certain Methods for Extruding Plastic Tubing*, Inv. No. 337-TA-110, 0082 WL 941574, Commission Opinion at *9 (Sept. 1982); *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, 2010 WL 5642165, Comm’n Op. at *33 (Dec. 2010); and *Electric Power Tools*, at 247-248.

B. Existence of Domestic Industry

Complainant’s Position: Complainant argues that there is a domestic industry consisting of SI’s rubber resin tackifiers and SP-1045 curing resin produced and sold in the U.S. Complainant alleges it has made substantial investments in the U.S., including: domestic plant

⁸¹ The Commission has used the term “tendency to injure substantially.”

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and equipment; domestic labor and capital; domestic manufacturing; domestic engineering, research and development; and other domestic distribution and sales in the United States of tackifiers made by using SI's asserted trade secrets. (Citing CX-1571C, Qs. 32-37)

Complainant avers that it has a major rubber resin manufacturing plant in Rotterdam Junction, New York, ("Rotterdam Junction") which manufactures rubber resin tackifiers that are sold under various product names, including SP-1068, HRJ-10420, HRJ-2765 and Berolic, and the SP-1045 curing resin. (Citing CX-1568C, Qs. 3-5; CX-843C at 1; and CX-331C at 2. Complainant says that HRJ-10420, HRJ-2765 and Berolic are tackifying resins based on the same basic manufacturing process as the SP-1068 process. (Citing CX-1565C, Qs. 7, 8, 80, and 81; and CX-1568C, Q. 31) Complainant states that it sells "these slightly different tackifier resins to suit the specific rubber composition that a customer is using." (Citing Tr. at 400:12-401:25) Complainant argues that, contrary to Respondents' attempt to limit the products at issue to SP-1068, the products SP-1068, HRJ-10420, HRJ-2765 and Berolic are all made using SI's asserted trade secrets and are all properly part of the domestic industry in this investigation. (Citing CX-1565C, Qs. 7, 8, 80, and 81; and CX-1570C, Q. 90)

Complainant avers that it has invested over { } into the Rotterdam Junction facility from 1968 through 2011. Complainant states that, based on 2011 production numbers, the tackifiers identified in the Complaint and the SP-1045 curing resin account for approximately { } of all products made at Rotterdam Junction. Complainant continues, applying a { } multiplier, it has invested about { } into Rotterdam Junction that is directly attributed to the tackifiers identified in the Complaint and the SP-1045 curing resin. (Citing CX-332C; and CX-331C)

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Complainant contends that Respondents are incorrect when they “attempt to understate SI’s tackifier business by comparing it to all of SI’s U.S. business,” because it improperly discounts the domestic industry. (Citing RPHB at 134-135) Complainant argues that Respondents’ argument misunderstands that SI’s U.S. business includes adhesives and other irrelevant products manufactured at SI’s Texas and Tennessee facilities. (Citing CX-333C) Complainant continues, “[t]ackifiers may be about { } of SI’s total business if these Texas and Tennessee facilities are included, RX-0066C at 65:15-19, but SI is not relying on any activities at these facilities to establish domestic industry.” (Citing CX-331C and CX-332C)

Complainant argues that it has and continues to devote substantial monetary and personnel resources to the domestic industry. Complainant asserts that from approximately 2007 through the present, SI has continued to invest an average of approximately { } million per year into Rotterdam Junction. (Citing CX-332C at 2) Complainant states, applying the { } multiplier, it has invested approximately { } per year into Rotterdam Junction that can be attributed directly to the tackifiers identified in the Complaint and the SP-1045 curing resin. Complainant adds that it has continuously employed more than { } of the approximately { } total United States employees at Rotterdam Junction, from 2009 through the first quarter of 2012, and by applying the { } multiplier, approximately { } of the { } employees at Rotterdam Junction can be allocated to manufacture of the tackifier resins at issue. (CX-331C; CX-332C; and CX-333C)

Complainant says that the three largest United States tire manufacturers are { }, which together account for almost { } of North America tire sales. (Citing CX-1567C, Qs. 71-72) Complainant avers that { } all use rubber resin tackifiers in the manufacture of their tires, and at least through the end of 2012,

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Complainant has been the primary supplier of rubber resin tackifiers to {
 } in North America. (Citing CX-1568C, Qs. 21-22) Complainant continues that the
tackifiers it supplies to {
 } in North America are
manufactured at Rotterdam Junction. *Id.* Complainant adds that, at least through the end of
2012, it has supplied about { } of rubber resin tackifiers to {
 } in North America. *Id.*

Complainant asserts that it has made substantial sales of its tackifier resins in North
America. Complainant says that in each of 2009, 2010, 2011, and 2012, it has sold more than {
 } pounds of {
 } tackifier resin to {
 } in North America at a cost of over {
 } each year. (Citing CX-843C at 1; CX-1568C, Q. 31) Complainant adds, in each of 2010,
2011, and 2012, it has sold more than {
 } pounds of SP-1068 tackifier resin in North
America at a cost of over {
 } each year. (Citing CX-843C at 1)

Complainant states that, in addition to Rotterdam Junction, it has a research center in
Niskayuna, NY, a suburb of Schenectady, (“Niskayuna”) in which it “has invested {
 } into
domestic research and development.” (Citing CX-332C) Complainant adds that a “substantial
amount” of its R&D investment specifically related to tackifiers such as SP-1068, HRJ-10420,
and HRJ-2765.

Complainant reasons that the manufacturing and sales figures of its SP-1068, HRJ-10420,
HRJ-2765 and Berolic tackifiers illustrate that the domestic industry is substantial. Complainant
says that by calculating the present value of the cash flow of these sales, its expert Dr. Putnam
opines that the market value of its SP-1068, HRJ-10420, HRJ-2765 and Berolic tackifiers add
about {
 } to the value of Complainant. (Citing CX-1567C, Qs. 16-17; CX-337C; and
CX-339C)

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In its reply brief Complainant argues that Respondents make the specious claim that an “ever-changing” domestic industry “obscures” the analysis. (Citing RIB at 131) Complainant says that Respondents’ argument is incredible because in attacking the trade secrets they complain that Complainant relied on formulas “for products other than SP-1068;” but when attempting to limit the domestic industry “they falsely assert” that Complainant did not assert “trade secret processes for products other than SP-1068.” (Citing RIB at 24 and at 131)

Complainant concludes that it has established a domestic industry relating to SP-1068, HRJ-10420, HRJ-2765, Berolic, and SP-1045.

Respondents’ Position: Respondents begin that Complainant has been inconsistent and overinclusive in purporting to define a domestic industry in various tackifiers, leaving the parties and the ALJ without sound evidence of a relevant domestic industry. Respondents conclude, however, that Complainant did not demonstrate a domestic industry with respect to SP-1045.

Respondents assert that Complainant has created confusion as to which products should and should not be counted as part of the domestic industry. Respondents accuse Complainant of presenting an “ever-changing nature of [a] definition of its claimed domestic industry” which makes it “impossible to measure or assess the magnitude of that industry.” Respondents continue that it also obscures whether any alleged injury is to a relevant domestic industry or to some other, irrelevant aspect of Complainant’s business. With respect to SP-1045, Respondents state that it is not a tackifier, and Complainant has not attempted to show a domestic industry at all. (Citing CX-1567C, Q. 26; Tr. at 553:10-24)

Respondents argue that Complainant’s “failure to present evidence of any alleged trade secret processes for products other than SP-1068 should preclude SI from aggregating those products into its claimed domestic industry.” Respondents contend this is not merely a dispute

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over whether a “technical prong” domestic industry analysis is necessary. Respondents assert identification of a domestic industry is not arbitrary but must contain some objective anchor in the use of the alleged trade secrets.

Respondents state, while Complainant’s operative complaint mentions HRJ-2765, it does not allege that any Respondent imported a product made using a trade secret process for making HRJ-2765, nor does the complaint (or any evidence cited in SI’s motion) define what HRJ-2765 actually is. (Citing amended complaint at ¶¶ 97, 119, 182, 185) Respondents say that Mr. Hart, testifying as Complainant’s corporate designee, affirmed that SI’s SP-1068, Berolic, HRJ-10420, and HRJ-2765 are all different. (Citing RX-066.1C at 43:8-15) Respondents allege that Complainant’s attribution of { } of its domestic investments to “Relevant Tackifiers” is grossly inflated. Respondents quote Mr. Hart’s testimony to say that tackifiers are { } of Complainant’s business. (Citing RX-066.1C at 65:15-19) Respondents add, within the category of tackifiers, SP-1068 only accounts for approximately { } of SI’s domestic tackifier production. (Citing *Id.* at 63:11-64:12; and RX-0067C at 3-4) Respondents argue that, based on these figures, even { } of the Rotterdam Junction investments would be too much to allocate to SP-1068.

In their reply brief Respondents allege that Complainant claims a domestic industry in a product that is not included in its proofs, and for which its brief does not identify any trade secrets. Respondents also allege that Complainant misrepresented the cause of its lost sales, which was revealed only through impromptu re-cross-examination of Complainant’s senior account manager Frank Hart, when “he confessed that it was { } domestic tackifier business.”

(Citing Tr. at 545:7-22) Respondents contend that “[t]his absence of any sales lost to

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Respondents discredits SI's effort to blame Respondents for SI's claimed loss of pricing power and confirms that SI's reliance on alleged underbidding has no legal force."

Respondents say Complainant attempts to apportion some of its domestic operations to a subset of its products, which includes SP-1045. (Citing CIB at 122-26) Respondents counter that the SP-1045 curing resin is not included in Dr. Putnam's domestic industry analysis. (Citing Tr. at 553:10-24) Respondents add that SP-1045 is not the subject of any asserted trade secrets in this investigation. (Citing CIB at 124; and CX-330C, ¶ 1 (domestic industry narrative on "tackifiers made by the Complainant's trade secrets")) Respondents argue that Complainant's asserted tackifier evidence does not support its claim that there is a relevant domestic industry in SP-1045 curing resin in addition to the "Relevant Tackifiers." (Citing CIB at 126)

Respondents add that Complainant now maintains the same allocation of its domestic activities—{ }—to "the tackifiers identified in the Complaint and the SP-1045 curing resin" as it previously did to just "the tackifiers identified in the Complaint" in its pre-hearing brief. (Citing CIB at 124 and CPHB at 355) Respondents reason that this implies that the allocation to SP-1045 is zero, and conclude that for all these reasons, SP-1045 is not a proper component of SI's alleged domestic industry.

Staff's Position: Staff contends that where "the unfair acts or methods of competition alleged under § 337 are based on the misappropriation of trade secrets, the domestic industry is defined as consisting of that portion of complainant's domestic operations devoted to utilization of the confidential and proprietary technology at issue which is the target of the unfair acts or practices." (Citing *Sausage Casings*, Initial Determination at *136) Staff says in considering domestic industry, more recent decisions have determined that a violation can occur even when the complainant does not use the misappropriated trade secrets in the United States, as long as a

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domestic industry exists. (Citing *TianRui*, 661 F.3d at 1335) Staff notes, therefore, there is no “technical prong” to the domestic industry analysis for a trade secret misappropriation investigation, although the Complainant must show that a domestic industry exists and that the unfair practices of Respondent threaten to destroy or substantially injure the domestic industry. *Id.*

In the Staff’s view, the evidence shows that Complainant satisfies the economic prong for a domestic industry under Section 337(a)(1)(A). Staff says Complainant has established that the proper scope for the domestic industry is the reasonably narrow market for its rubber resin tackifiers produced and sold in the U.S. Staff states that Complainant produces tackifier resins at Rotterdam Junction and sells them under various product names, including SP-1068, HRJ-10420, HRJ-2765, and Berolic. (Citing CX-1571C, Qs.26-42)

Staff asserts that the evidence shows a substantial investment in Complainant’s domestic activities. Staff says in terms of plant and equipment, Complainant uses Rotterdam Junction to manufacture virtually all of its tackifier resins, along with other rubber resins, for sale in the U.S. *Id.* Staff states that Complainant has invested { } of dollars into its Rotterdam Junction facility. (Citing *Id.*; and CX-330C) Staff continues that from 1968 through 2011, Complainant invested over { } in the Rotterdam Junction facility that is directly attributed to tackifier resins. *Id.* Staff adds that Complainant continues to invest approximately { } annually into the Rotterdam Junction facility related to the tackifier resins at issue. *Id.* In terms of labor and employment, Staff asserts that Complainant employs { } people dedicated to its tackifier products. *Id.* Staff asserts that Complainant has been the supplier of { } tackifier made by an SP-1068 related process to { } in the U.S. *Id.* In terms of volume and trend of production, Staff continues Complainant has sold more than { } pounds of

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{ } tackifier to { }, at a cost of over { } each year. *Id.* Staff submits that these investments are sufficient to establish that a domestic industry exists in the United States. *See* 19 U.S.C. § 1337(a)(1)(A).

In their reply brief Staff says Respondents assert that Complainant has inflated its apportionment of relevant tackifier resins by including not only SP-1068 but also Berolic, HRJ-10420, SP-1045 and HRJ-2765. (Citing RIB at 131-132) Staff says that Respondents included in the denominator Complainant's larger investments in its unrelated Texas and Tennessee facilities that do not manufacture the products at issue. (Citing CIB at 125; and CX-331C; CX-332C; and CX-333C) Staff points out that, instead of Respondents' over-broad calculation, Complainant focused solely on Rotterdam Junction, which manufactures virtually all of Complainant's U.S. tackifier resin supply, including the tackifier resins at issue sold under various product names, such as SP-1068, HRJ-10420, JRJ-2765, and Berolic. (Citing CX-1571C, Qs. 26-42) Staff believes that the evidence shows that approximately { } of all manufactured products at Rotterdam Junction are the products at issue. (Citing CIB at 125; and CX-331C)

Staff alleges that Respondents do not dispute the clear evidence showing a substantial investment in domestic activities related to plant and equipment, as well as in labor and employment. The Staff submits, therefore, that there is ample evidence to demonstrate that a domestic industry exists in the United States. *See* 19 U.S.C. § 1337(a)(1)(A).

Analysis and Conclusions: It is well settled that the scope of a section 337 investigation is determined by the Notice of Investigation issued and published by the Commission. (*See e.g. Telephonic Digital Added Main Line Systems*, Inv. No. 337-TA-400, Order 8 (December 2, 1997); *Certain NOR & NAND Flash Memory Devices & Products Containing Same*, Inv. No. 337-TA-560, Order No. 14 (July 6, 2006); *Certain Inkjet Ink Cartridges with Printheads and*

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Components Thereof, Inv. No. 337-TA-723, Order No. 12 (October 5, 2010); and 19 C.F.R. § 210.10(b)) In this case, the Notice of Investigation ordered that an investigation be instituted to determine:

[W]hether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain rubber resins and processes for manufacturing same by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States.

The investigation was instituted upon publication of the Notice of Investigation in the *Federal Register* on June 26, 2012. See 77 Fed. Reg. 38083-84 (2012). 19 CFR § 210.10(b).

Based upon the scope defined in the Notice of Investigation, I find that the relevant domestic industry at issue is one that includes “rubber resins,” and is not limited to “tackifier resins.” I also find that Complainant has met its burden to prove by a preponderance of evidence that a domestic industry exists⁸² in the United States. See 19 U.S.C. § 1337(a)(1)(A).

Respondents argue incorrectly that apportionment of domestic operations to domestic industry in a trade secret case must be to “that portion of complainant’s domestic operations devoted to utilization of the confidential and proprietary technology at issue which is the target of the unfair acts or practices.” (Citing *Sausage Casings*, at *136) The Federal Circuit found to the contrary in *TianRui*, 661 F.3d 1322. In that case, the facts of which closely parallel those of the instant investigation, the Court affirmed the Commission’s finding of the existence of a domestic industry. The court noted:

TianRui contended that Amsted did not satisfy the domestic industry requirement of section 337 based on the fact that Amsted no longer practiced the ABC process in the United States. Because none of Amsted's domestic operations used the ABC process, TianRui argued that there was

⁸² The relevant date for this determination is the date of filing the complaint, which was May 21, 2012.

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no “domestic industry” that could be injured by the misappropriation of trade secrets relating to that process.

The administrative law judge rejected that argument, holding that it was not essential that the domestic industry use the proprietary process, as long as the misappropriation of that process caused injury to the complainant's domestic industry. Applying that standard, the administrative law judge concluded that Amsted's domestic industry would be substantially injured by the importation of TianRui wheels.⁸³

TianRui at 1325, 1326.

The Federal Circuit in TianRui elaborated, saying that Section 337 contains different requirements for statutory intellectual property (such as patents, copyrights, and registered trademarks) than for other, nonstatutory unfair practices in importation (such as trade secret misappropriation). Describing the showing needed for statutory intellectual property, the Court said, “[t]he provisions that apply to statutory intellectual property require that an industry relating to the protected articles exists or is in the process of being established. 19 U.S.C. § 1337(a)(2). Such an industry will be deemed to exist if there is significant domestic investment or employment relating to the protected articles. Id. § 1337(a)(3).” (*TianRui* at 1335)

The Court contrasted the general provision relating to unfair practices, which it said is “not satisfied by evidence showing only that a domestic industry exists; it requires that the unfair practices threaten to ‘destroy or substantially injure’ a domestic industry. Id. § 1337(a)(1)(A).” The Court specifically found that “there is no express requirement in the general provision that the domestic industry relate to the intellectual property involved in the investigation.” With this guidance in mind, I turn to the evidence adduced regarding the existence of a domestic industry in the instant investigation. (*TianRui* at 1335)

It is the unrebutted testimony of Complainant’s expert, Jonathan D. Putnam, PhD, that Complainant maintains a market share of tackifier resins in excess of { } for the period of 2007

⁸³ The Commission decided not to review the Administrative Law Judge’s decision.

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through 2011. This testimony is corroborated by exhibit CX-336C, prepared by Dr. Putnam, which breaks down the demand for the rubber resin tackifiers in the United States and the percentage of those demands supplied by Complainant. In 2007, Complainant provided { } metric tons (MT) of tackifier resins, which was { } of total demand. By 2011, complainant's production dropped to { }, and a market share of { } (CX-1567C, Qs. 80-81; CX-336C)

On cross-examination at the hearing, Mr. Frank Hart, a senior account manager for Complainant since 1999, testified regarding a pie chart (JX-28C, at 3) and said that it reflected Complainant had { } of the market share of the rubber resin market. He testified that { } of that same market⁸⁴. He clarified that the market about which he was testifying was the rubber resin market as opposed to the rubber resin *tackifier* market. Mr. Hart also testified that another chart in JX-28C reflected that Complainant had a { } share of the tackifier market in 2007, and Durez had a { } share of the same market that year. (Tr. at 520:11-521:22; CX-1568C, Qs. 1-3)

On redirect examination, Mr. Hart said that the pie chart in JX-28C reflected tackifiers, reinforcing resins, curing resins and bonding resins. He also testified credibly that exhibits CX-1578, CX-1579 and CX-1591 all reflected imports of Sino Legend's SL-7015 product into the United States⁸⁵. Mr. Hart said that SL-7015 is a curing resin that competes with Complainant's SP-1045 product, which Complainant sells to a customer named { } (Tr. at 532:20-533:25) I note that JX-28C, contains a chart that indicates Complainant provided { } of the

⁸⁴ The pie chart at page 3 of JX-28C, reflects data for the year 2007.

⁸⁵ Each invoice in CX-1578, CX-1579 and CX-1591 reflects importation of 10,180 Kg, of curing resin which is approximately 10 MT (*i.e.* an aggregate of 30 MT). (I note that one metric ton equals approximately 2,204 pounds or approximately 1,000 Kg.)

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curing resin in the U.S. market in 2007, and slightly less than { } in 2010 and 2011. (JX-28C, at 3)

In his direct testimony, Mr. Hart testified credibly that Complainant's SP-1068, Berolic, HRJ-10420, and HRJ-2765 are tackifier resins at issue in this case and that they are all manufactured in the United States at Rotterdam Junction. (CX-1568C, Qs. 19-22)

Mr. Hart elaborated that Complainant sold approximately { } of tackifier resins in 2007 and about { } in 2011. He testified that CX-843C reflects quantities sold, gross sales, material margin and variable margin for U.S. tackifier products. Mr. Hart said, more specifically, that material margin reflects selling price less material cost. Mr. Hart's unrebutted testimony is that in 2009, the gross sale price of all tackifier resins in the United States was approximately { } He said that the gross sale price in 2012⁸⁶ averaged at { } for all tackifiers. (CX-1568C, Qs. 27-29, 30, 32, 35, 36)

The evidence shows that, in addition to Rotterdam Junction, Complainant has a research center in Niskayuna, NY, a suburb of Schenectady, ("Niskayuna") in which it has invested { } of dollars in domestic research and development a substantial amount of which is specifically related to tackifiers such as SP-1068, HRJ-10420, and HRJ-2765. (CX-332C) I concur that that the manufacturing and sales figures of Complainant's SP-1068, HRJ-10420, HRJ-2765 and Berolic tackifiers provides evidence that that the domestic industry is substantial. This is supported by the testimony of Dr. Putnam, who opined that the market value of Complainant's SP-1068, HRJ-10420, HRJ-2765 and Berolic tackifiers add about { } to the value of Complainant. (CX-1567C, Qs. 16-17; CX-337C; and CX-339C)

⁸⁶ Mr. Hart testified that the 2012 data reflects sales through October 24, 2012.

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Complainant has invested { } of dollars into its Rotterdam Junction facility. (CX-330C) From 1968 through 2011, Complainant invested more than { } in the Rotterdam Junction facility that is directly attributed to tackifier resins. *Id.* The un rebutted evidence shows that Complainant continues to invest approximately { } annually into the Rotterdam Junction facility related to the tackifier resins at issue. *Id.* Complainant expends { } of labor costs on its tackifier products. *Id.* Complainant has sold more than { } pounds of { } tackifier to { } at a cost of over { } each year. *Id.*

I find that the un rebutted evidence of record clearly and firmly establishes the existence of a rubber resin domestic industry in the United States. *See* 19 U.S.C. § 1337(a)(1)(A).

C. Injury, Threat of Injury, or Tendency to Substantially Injure

Complainant's Position: Complainant contends that Respondents' unfair competition in import trade has caused and will cause injury to Complainant. Complainant asserts it has already suffered substantial actual injury to its domestic industry, because it was forced to respond to Respondents' offers to sell its SL-1801 product by substantially reducing its domestic pricing, sales, and profits of the tackifier resins sold to its {

} Complainant says in addition to Respondents' imports that have resulted in lost sales to Complainant, the price erosion caused by {

} has already resulted in an actual injury to Complainant of at least { } out of Dr. Putnam's projected { } injury over the years { } (Citing Tr. at 537:8-24; and CX-343C)

Complainant alleges it is losing more than { } dollars per year in annual revenue for a total of at least { } corresponding to a margin loss of { } for { } tackifier sales to { } under its amended contract, resulting from Sino Legend's negotiation

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pressure. (Citing Tr. at 536:6-22; 537:8-24) Complainant asserts it was forced to reduce its price for { } tackifier by { } to maintain a large portion of its U.S. business with { } in response to Sino Legend's negotiation pressure. (Citing CX-1588C at 5; Tr. at 540:17-541:20; and CX-1568C, Qs. 55-61) Complainant asserts that it is also bearing the additional cost of providing { } in response to Sino Legend's entry and impact on the negotiations. (Citing CX-1588C at 3; and Tr. at 541:24-542:24)

Complainant alleges that { } allowed { } to apply this pricing pressure on Complainant during the negotiations of the amended contract. (Citing CX-1567C, Qs. 148, 167-177; CX-1132C; CX-1133C; and CX-1568C Qs 45-56) Complainant says it understood during the 2012 negotiations that {

{ } (Citing Tr. at 547:24-548:4; and CX-1568C, Q. 56) Complainant continues, {

{ } (Citing CX-1567C, Qs. 167-177; and CX-1133C) Complainant asserts that { } used this { } to force Complainant to reduce its prices to the agreed upon price of { } which was a decrease of { } (Citing Tr. at 540:23-541:24)

Complainant contends that, despite Respondents' claims about Sumitomo Durez ("Durez"), Complainant's injury resulting from the price drop and other concessions made to { } under the amended contract are properly attributable to Sino Legend's entry and effect on the U.S. tackifier market. (Citing Tr. at 547:14-548:8, 557:24-558:4) Complainant avers that unlike Durez's inferior product and service, Complainant understood that { } found Sino Legend's product to be of equal quality to Complainant's product. (Citing Tr. at 547:22-548:8;

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CX-1568C, Qs. 64-66; JX-005C at 5; and CX-1567C, Qs. 147-148) Complainant says Durez is not believed to use any of Complainant's asserted trade secrets. (Citing CX-1568C at 12)

Complainant asserts there is simply no comparison between the serious threat presented by Sino Legend's misappropriated product and Durez's lower quality product that customers use as a second source for security of supply. (Citing Tr. at 528:4-18) Complainant adds that the {

} was afraid to turn the business over

to Sino Legend as a result of the present investigation { }

(Citing Tr. 545:25-546:4; and CX-1588C at 5) Complainant concludes there is a causal nexus

between Sino Legend's negotiation pressure and at least { } in injury to Complainant in

{ } tackifier sales under the amended contract with { .}

Complainant argues that Respondents' complaints that the five shipments of SL-1801 and/or SL-1802 already imported are *de minimis* misses the mark because these shipments made possible the substantial price, revenue, and margin reductions that SI has suffered at { }

(Citing CX-103C; CX-104C; CX-105C; CX-106C; CX-107C; CX-108C; CX-109C; CX-110C; CX-111C; CX-112C; CX-113C; CX-114C; CX-116C; CX-117C; CX-119C; JX-023C; and JX-

0) Complainant asserts that {

} (Citing CX-103C;

CX-104C; CX-105C; CX-106C; CX-107C; CX-108C; CX-109C; and CX-1567C, Q. 148)

Complainant argues that Dr. Kaplan's unsupported contention that {

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.} (Citing Tr. at 540:17-541:20, 564:25-565:21, 912:18-913:4; and CX-1588C at 5)

Complainant continues, { } it supplied { } of { } U.S. tackifier demand, { } (Citing Tr. at 547:15-548:8; and CX-336C) Complainant avers that it supplies more than { } of overall U.S. tackifier demand. (Citing JX-028C) Complainant reasons that {

} were lost sales and the remaining importations to date “have most likely” come at the expense of Complainant. Complainant concludes, therefore, all five importations are properly considered lost sales, regardless of the volume of these shipments. (Citing *Bally/Midway Mfg. Co. v. U.S. Int’l Trade Comm’n*, 714 F.2d 1117, 1124 (Fed. Cir. 1983); and *Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Initial Determination at 83-87 (Oct. 16, 2009))

Complainant alleges, similarly, Sino Legend’s recent importations of SL-7015 curing resin { } are lost sales of its SP-1045 curing resin. (Citing Tr. at 532:20-536:6; CX-1578; CX-1579; CX-1591; CX-1601C; CX-1602C; and CX-1603C)

Complainant states the lost sales “appear to be” the result of Sino Legend undercutting Complainant’s price {

} (Citing Tr. at 534:22-535:16, 695:24-699:12) Complainant alleges its injury caused by these four importations is “at least” {

.} (Citing Tr. at 695:24-699:12)

Complainant concludes there is substantial actual injury to its domestic industry, because it has already lost { } in revenue corresponding to { } in margins in its U.S.

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tackifier sales as a result of pricing pressure and competition from Respondents and “at least { } in lost revenue from lost sales of SI’s SP-1045 curing resin.”

Complainant asserts, too, that there is a tendency to substantially injure SI’s domestic industry because Respondents have substantial foreign manufacturing capacity, the ability to import product to undersell Complainant’s product, an explicit intention to enter into the U.S. market, and lower foreign costs of production and lower prices, all of which will substantially injure Complainant’s domestic tackifier industry.

Complainant contends that each of these factors supports a tendency to substantially injure its domestic industry in an estimated amount that “may reach or exceed { } (Citing CX-1567C, Qs. 139-148, 183; and CX-343C) Complainant says this estimate conservatively focuses only on price erosion in the U.S. as has already occurred at { } and may occur with other of Complainant’s customers. Complainant adds it does not account for reduction in its market share in the U.S. (Citing CX-1567C, Qs. 25, 150) Complainant avers that the margin it receives in China is about { } less than in the U.S., and the difference in margins is attributable to competition from Sino Legend as opposed to other possible explanations. (Citing CX-843C; CX-1568C, Qs. 55-60; and CX-343C) Complainant says contrary to Respondents’ claims, it is not “speculation” that Complainant’s price in the U.S. market will decline { } when Sino Legend’s negotiation pressure already forced Complainant to drop its tackifier prices exactly half this amount under its amended contract with { } (Citing CX-1588C at 5; and Tr. at 540:17-541:20)

Complainant alleges it is not disputed that Respondents have substantial additional capacity to manufacture the accused SL-1801 and SL-1802 products. (Citing CX-457C at 88-89; and CX-099C) Complainant states, at its existing plant alone, {

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,} which is nearly as much as
SI's total annual sales of its SP-1068, HRJ-10420, HRJ-2765 and Berolic tackifiers in the United
States. (Citing CX-843C at 2) Complainant continues that {
} (Citing CX-1567C, Q. 182; and
CX-1360.1C at 95:23-97:20) Complainant adds {
} (Citing CX-1353.1C at 54:19-
55:11) Complainant argues Respondents' substantial manufacturing capacity supports a finding
of a tendency to substantially injure Complainant's domestic industry.

Complainant contends that Respondents have substantial ability to undersell
Complainant's products in the United States to cause substantial price erosion and diminished
profits in connection with Complainant's tackifiers sold to its other major customers.

Complainant says in {

.} (Citing Tr. at 540:23-541:24; CX-1567C, Qs. 167-177; and CX-1133C) Complainant
states in addition to {

.} (Citing CX-1567C, Qs. 156-158; and JX-025C) Complainant adds that {

} (Citing CX-1567C, Qs. 156-158; and JX-025C)

Complainant asserts that, as happened with { } it will suffer even more substantial
injury if these customers apply pricing pressure and elect to renew agreements with Complainant
only at lower prices. (Citing CX-1567C, Qs. 150, 180-181) Complainant says assuming a

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similar price drop of { } because of Sino Legend's negotiation pressure, Complainant could lose up to { } dollars per year in annual revenue from this customer, further realizing Dr. Putnam's projected { } injury over the years { } (Citing JX-028C at 2; Tr. at 537:8-24; and CX-343C) Complainant argues that Respondents' efforts to compete in the sale of tackifier resins at Complainant's other major customers in the U.S. is further evidence of a tendency to substantially injure its domestic industry.

Complainant contends that there is no doubt that Sino Legend has the explicit intention to enter into the U.S. market and sell its tackifier resins. Complainant notes that Sino Legend issued a press release re-affirming its commitment to enter the U.S. market. (Citing CX-1035C) Complainant avers that Sino Legend also told the ITC in this investigation that its tackifiers "are well along the path to expanding in earnest in the U.S." (Citing CX-1304 at 2)

Complainant asserts that Respondents' foreign costs of production are lower than Complainant's costs of production, because of *inter alia* lower labor and operations costs. Complainant says its costs in the United States are higher than Sino Legend's costs in Zhangjiagang. (Citing CX-1356.1C at 86:3-87:24) Complainant avers that costs at its Shanghai plant are also higher than Sino Legend's costs in Zhangjiagang. (Citing CX-1567C, Qs. 33-34; and CX-083C) Complainant contends that { } (Citing CX-1567C, Qs. 178-179; CX-083C; and CX-1356.1C at 86:3-87:24) Complainant argues that this factor also supports a tendency to substantially injure SI's domestic industry.

Complainant summarizes its argument, saying in view of the above, Respondents have substantial capacity to manufacture their tackifiers, the ability to import their tackifiers to

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undersell SI's tackifiers, an explicit intention to enter into the U.S. market to sell their tackifiers, and lower foreign costs of production. Complainant concludes that all of these factors show that Respondents' unfair acts have the effect of substantial injury and a tendency to substantially injure SI's domestic industry.⁸⁷

In its reply brief Complainant argues that Respondents improperly collapse the injury analysis into an issue of lost sales in an attempt to minimize the damage dealt by Respondents to Complainant's domestic industry. (Citing RIB at 130) Complainant contends that lower margins (among other factors) may also show injury. (Citing *Railway Wheels* at 81; and *Certain Electric Power Tools, Battery Cartridges and Battery Chargers*, Inv. No. 337-TA-284, Pub. 2389, at 247 (June 2, 1989)) Complainant adds that Kaplan admitted the relevance of Complainant's lower profits to injury at trial. (Citing Tr. at 897:18-898:13)

Complainant says considering its profits, Respondents' imports and {
 } have directly caused Complainant a margin loss of { } for
{ } tackifier sales to { } resulting in the inescapable conclusion of actual injury.
(Citing Tr. at 536:6-22; 537:8-24; and CX-1588C)⁸⁸

Complainant argues that by narrowing the analysis to only lost sales, Respondents also misconstrue Dr. Putnam's analysis, which does not rely on lost sales. (Citing RIB 135)

⁸⁷ Complainant notes, Respondents' LFP product does not change the injury analysis. Complainant says {

} (Citing CX-1570C, Q. 72; CX-

646C at 1; JX-024C; CX-113C; CX-667C; and CX-1121C)

⁸⁸ Complainant says Respondents seek to avoid the impact of the { } by claiming Complainant should not be able to rely on it at all. (Citing RIB at 134 n.44) Complainant argues that the Court should reject this request to reverse the Court's earlier express ruling that the document "can be used for the purpose of showing impact on the market and on Complainant." (Citing Tr. at 539:2-5) Complainant alleges that Respondents waived this argument when they failed to object to the admission of the { } into evidence. (Citing Tr. at 548:12-549:1) Complainant adds that Respondents' disclosure argument is also meritless because the { } (Citing Tr. at 539:3) and Respondents never requested production of the original

{ }.

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Complainant says Dr. Putnam's price erosion opinions concern the losses caused by a reduction in price that happened with { } and do not purport to include lost market share because pricing data is more reliable. (Citing CX-1567C, Qs. 25, 140; CX-343C; and Tr. at 562:23-25) Complainant adds that Kaplan failed to appreciate Dr. Putnam's opinion steps in the injury over a { }, beginning with { } in 2013. (Citing Tr. at 901:4-902:15)

Complainant contends that Respondents' effort to deflect attention from Sino Legend's effect on the U.S. tackifier market by pointing to Durez ignores the facts. Complainant asserts that Respondents overstate Durez's presence by improperly relying on a market share chart that includes reinforcing and bonding resins to imply that Complainant's market share is { } (Citing Tr. at 530:12-531:4; and RIB at 135) Complainant counters that it holds more than { } of the U.S. tackifier market. (Citing CX-336C; CX-1567C, Q. 56; and CX-1568C, Q. 28) Complainant argues that this evidence contradicts Respondents' contention that Durez "has been progressively cutting into SI's domestic tackifier sales." (Citing RIB at 134)

Complainant asserts that the totality of the evidence demonstrates that Respondents (and no one else) caused Complainant's dramatic { } price drop and margin loss of { } for its { } tackifier sales to { }. Complainant avers that Mr. Hart made clear that { } used { } against Complainant during the negotiation of the amended contract and considered Sino Legend's tackifiers to "be of equal quality." (Citing Tr. at 537:3-24, 547:14-548:8; and CX-1568C, Qs. 55-61) Complainant's cite Mr. Hart's testimony to establish that Complainant's customers do not view Durez as a { } (Citing Tr. at 531:6-532:2; 547:14-548:8; and CX-1568C, Qs. 64-66) Complainant concludes that it is of no moment that { } because of the present

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investigation { } (Citing Tr. 545:25-546:4; and CX-1588C, Q. 5)

Complainant asserts that the unrebutted evidence demonstrates that Respondents have substantial additional manufacturing capacity. (Citing CX-457C at 88-89; and CX-099C)

Complainant says Respondents do not dispute that they have the ability to undersell

Complainant's tackifiers { } well below

Complainant's price of { } at the time. (Citing CX-1132C; CX-1133C; and CX-837C)

Complainant adds that Respondents' argument that underselling in the context of *threatened* injury must be tied to *actual* lost sales is nonsensical. (Citing RIB at 129, 136) Complainant argues that a tendency to substantially injure only requires showing the "ability of the imported product to undersell the domestic product." (Citing *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, Pub. 4210, at 17 (Jan. 14, 2008))

Complainant states that the evidence shows that Sino Legend has the explicit intention to enter into the U.S. market and sell its tackifiers. (Citing CX-1035C; CX-1304 at 2; and CX-138C) Complainant contends that "Kaplan's unsupported assertion" based on his

"understanding" that { } is pure conclusory

opinion that should be given no weight. (Citing RIB at 130; and Tr. at 913:18-24) Complainant

asserts that this "apparent procedural technicality" {

} does not deter Sino Legend's intention to

enter the U.S. market. Complainant argues that, contrary to Respondents' claim, the legal

standard only requires a foreign cost advantage, not a showing of "vastly" lower production

costs. (Citing *Digital Multimeters*, at 17; and *Certain Air Impact Wrenches*, Inv. No. 337-TA-

311, Pub. 2419 (June 18, 1991), at 139 (May 6, 1991)) Complainant concludes that it has met its

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burden, and Respondents fail to offer any evidence rebutting Complainant's showing that its costs in the U.S. are higher than Sino Legend's costs in China.

Respondents' Position: Respondents say that before the hearing, Complainant and Dr. Putnam, contended that Sino Legend was responsible for making the U.S. tackifier market "contestable" and causing SI's sales volumes to drop. (Citing CX-1567C, Qs. 141-151) Respondents quote the testimony of Frank Hart, to assert that he "learned from { } in the negotiations that SI Group's offered prices were above the competition"—which he considered to mean Sino Legend. (Citing CX-1568C, Qs. 56, 58) Respondents say Mr. Hart further testified that "[w]e lost some of our { } business with { } in the United States" and that "[w]e believe much of SI Group's lost business to { } was lost to Sino Legend." (*Id.*, Qs. 59, 60) Respondents state that Mr. Hart dismissed SI's main tackifier competitor Durez, claiming that "[t]he only other alternative could have been offers from Durez and { } and asserting that Durez produced a lower-quality tackifier that could not really compete. (*Id.*, Qs. 58, 64-66) Respondents continue that Dr. Putnam, in turn, relied on the word of Mr. Hart and other SI employees for his opinions on injury to SI's business. (Citing CX-1567C, Q. 149, 147)

Respondents complain that two business days before the hearing began, Complainant produced { } which was offered as proof of price reductions and lost sales. (Citing Tr. at 537:3-542:22)⁸⁹ Respondents contend that the overall

⁸⁹ Respondents urge in a footnote that, Complainant should not be permitted to rely on any aspects of this late produced evidence. Respondents assert that the amended contract had been in negotiation for { }. (Citing CX-1568C, Q.51; and Tr. at 537:21-24) Respondents note that Complainant introduced this amended agreement into the case, on the eve of trial. Respondents aver that the Court initially excluded the document; but reconsidered at Complainant's prompting during Mr. Hart's redirect examination. Respondents argue that particularly given that Complainant has staked so much of its case on alleged failures to timely supplement discovery, Complainant should not profit from waiting to produce this information at the eleventh hour.

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substance of the contract is devastating to Complainant's effort to blame Sino Legend for its declining tackifier business. Respondents assert that this contract commits {

} (Citing Tr. at 543:3-544:6; and CX-1588C at

1-2) Respondents say that Mr. Hart emphasized that SI lost the business of a {

} and when asked where those sales went, he testified, {

} (Citing Tr. at 543:3-17; and

545:16-20)

Respondents contend that Mr. Hart's testimony confirms that it is { }, not Sino Legend, that has been progressively cutting into Complainant's domestic tackifier sales in recent years. Respondents allege this is not just the case with { } but also with Complainant's other top three customers, { } according to a document cited in Mr. Hart's witness statement that he testified was "accurate and correct." (Citing CX-1568C, Q. 26; and JX-028C) Respondents aver that Sino Legend did not register on Complainant's 2011 chart of market share for any rubber resins, much less for tackifiers. (Citing JX-028C at 4; and Tr. at 519:21-522:2)

Respondents say that the record unequivocally establishes that Respondents have not cost Complainant any lost sales in the United States, which is significant for two reasons. Respondents assert that it shows that Dr. Putnam was wrong to conclude that {

} (Citing CX-1567C, Q. 149; and Tr. at 562:4-564:16) Respondents state that lost sales are one of the three "mechanisms" by which Dr. Putnam opined that Complainant could be injured; but there is no evidence that lost sales have occurred, and there is now evidence that they

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cannot occur in the reasonably foreseeable future. (Citing CX-1588C) Respondents add that the fact that Complainant has not lost sales to Respondents also robs Dr. Putnam's price erosion opinions of any legal force. Respondents continue Dr. Putnam did not claim that Respondents' { } of imports of the Accused Products amounted to substantial injury, and confirmed instead that he was relying on "subsequent offers" and "potential offers" as the actual cause of alleged price erosion. (Citing Tr. at 554:19-555:2, 565:19; and CX-1567C, Qs. 148, 180) Respondents argue that such offers and potential offers — even if they are assumed to be at lower prices than Complainant's — cannot support a finding of injury because they are not sales and have not caused any lost sales. Respondents say that Section 337(a)(1)(A) defines injury as being caused by "importation" or "sale" of the accused articles, not merely talking with or potentially talking with customers about possible importation or sale. (Citing 19 U.S.C. § 1337(a)(1)(A)) Respondents contend "Underselling" has been recognized as a cause of actual or threatened injury where it has diverted actual sales to the respondents (Citing *Molded-In Sandwich Panel Inserts*, 1982 ITC GCM LEXIS 1, at *19-*22); but no party has identified any authority suggesting that mere negotiations are a valid source of injury.

Respondents say the final mechanism by which Dr. Putnam claimed Complainant could be injured, a reduction in royalties received, is also not cognizable because it is based exclusively on { } Respondents assert that Complainant's royalty income results from { } (Citing CX-1567C, Q. 142; and CX-534C) Respondents allege there is no evidence that Complainant { } and according to Mr. Hart, "[v]irtually all of the rubber resin tackifiers that SI Group supplies to { } in North America are manufactured at SI Group's Rotterdam Junction facility in New York." (Citing CX-1568C, Q.

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22) Respondents conclude, Complainant's royalties are affected, if at all, only by Respondents' foreign, non-imported sales, not on any importation, sale for importation, or sale after importation; thus, the alleged reduction in royalties is not a domestic injury.

Respondents aver that the five imports of accused products, valued at about {
 } of Complainant's domestic sales of its claimed domestic industry products in the same period. (Citing RX-423C, Q. 39) Respondents say this is a miniscule volume of imports and represents negligible penetration. Respondents allege that Complainant's witness testified that a small volume of sales, such as less than { } (Citing CX-1568C, Q. 41)

Respondents contend that the legal standard on lower production costs is whether respondents have "vastly lower foreign costs of production." (Citing *Methods of Extruding Plastic Tubing*, ITC Inv. No. 337-TA-110, 1982 ITC LEXIS 144, Comm'n Op., at *24) Respondents say that Complainant lacks evidence of "vastly" different production costs and has not tried to compare foreign and domestic costs. Respondents say, instead Complainant relies on an irrelevant comparison between its facility in China and Sino Legend's facility. (Citing CPHB at 366-67) Respondents say that Complainant's arguments do not establish that Sino Legend has vastly lower costs than SI in the United States, and such a cost differential cannot be assumed based on generalizations about U.S. and Chinese labor costs, particularly once other costs such as shipping, tariffs, and import handling fees are included. (Citing RX-0423C, Q. 72) Respondents aver that Complainant did not present any data on labor costs or other aspects of domestic and foreign costs, as the complainant did in *Methods of Extruding Plastic Tubing*. (Citing 1982 ITC LEXIS 144, at *26-*28)

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Respondents state that Complainant's "speculative claims of threatened injury" are not "substantive and clearly foreseen," as the law requires; but instead are based on allegations, conjecture or mere possibility. Respondents argue that Complainant's expert (1) ignored known and relevant supply and demand factors that drive certain tackifier sales, including car sales, replacement tire demand, and the price of material inputs into tackifier production; (2) projected future prices with unrealistically large price disparities between the United States, Asia (excluding China), China, and the rest of the world by 2017, which would stimulate market entry that would prevent those large price increases from actually occurring; and (3) based his projection that Complainant could raise prices by {

,} creating a trend distorted by beginning at the start of the largest economic collapse since the Great Depression. (Citing RX-423C, Qs. 56-60)

Respondents say that Complainant also relies on the tenuous supposition that its {
} in China would be replicated in the United States if Sino Legend's products were imported. (Citing CPHB at 367-68) Respondents contend this claim depends on the belief that Sino Legend is the only reason {
} in China is different from in the U.S. (*id.*), disregarding a universe of other potential factors: raw material costs, energy costs, competition from non-respondent entities such as Sumitomo and Kolon, quality of sales force, quality of management, different demand conditions, less affluent customers, etc. Respondents argue that Complainant's selection of such a weak proxy for the U.S. market suggests that other comparisons—such as Complainant's experience in China before and after Sino Legend entered that market in 2008—would have turned out unfavorably for Complainant.

Respondents contend that Complainant is wrong to claim that Respondents somehow caused {
} to shift business from {
} (Citing CIB at 128) Respondents say the

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much more reasonable explanation—and the only explanation supported by any credible evidence—is that { } and is the true source of the “injury” of which it complains. Respondents say, for example, between 2007 and 2011, { } domestic tackifier purchases. (Citing JX-028C at 4) Respondents aver that the situation was dire enough that Peter Schrecker, Complainant’s strategic director for the rubber market, attributed its { } as well. (*Id.*; Tr. at 522:18-19) Respondents assert that Complainant’s fears of losing part of { } (Citing Tr. at 522:20-523:8, 545:7-22)

Respondents contend that the situation thus stands with Complainant and { } competing vigorously for market share, while Respondents remain a non-factor in the U.S. market for PTO- and POP-based tackifiers. (Citing RIB at 133-37) Respondents say that Complainant and Dr. Putnam concede that “imports to date have been small” and “it may be the case that Sino Legend’s recent U.S. importation volumes are not substantial[.]” (Citing CX-1567C, Qs. 145, 180) Respondents reason that there is no reason to credit Complainant’s contention that Sino Legend, rather than { } or other market factors, caused Complainant’s price with { } to decrease.

Respondents next state that, unable to argue that offers are cognizable, Complainant instead tries to cloak its arguments in the language of actual sales where it had previously relied expressly on offers. Respondents say “in substance” Dr. Putnam’s argument remains that “offers and potential offers” forced Complainant to lower its prices, while Sino Legend’s actual sales are just a “gateway” to offers. (Citing CX-1567C, Q. 148; Tr. At 555:13-556:3; and (CIB at 127)

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Respondents argue, even in a “threatened injury” analysis “the ITC is not tasked with addressing offers for sale, much less the hypothetical possibility of future offers for sale.” (Citing 19 U.S.C. § 1337(a)(1)(A); and *Certain Elec. Chromatogram Analyzers*, Inv. No. 337-TA-251, Comm’n Action & Order, 1987 ITC LEXIS 199 at *115-116 (July 9, 1987))

Respondents continue, the failure to address the issue of offers for sale also undermines the Staff’s conclusion of injury. Respondents aver in previous briefing, the Staff embraced a distinction between “underselling”—meaning a completed sale at a lower price—and “underbidding”—i.e., offers for sale. (Citing Staff Opp. to SI Mot. for Summ. Determ. at 6-7 (citing *Certain Molded-In Sandwich Panel Inserts* for the proposition that mere negotiations, absent actual lost sales, do not support a finding of injury)) Respondents argue that distinction is still dispositive. Respondents contend, because the evidence overwhelmingly demonstrates that it was { } not Respondents, who took SI’s lost sales and will continue to do so in the coming years, there is no actual or threatened injury within the meaning of § 337(a)(1)(A).

Respondents recite that there must be a causal nexus between the alleged unfair acts of the respondents and the claimed injury suffered by the complainant. (Citing *Certain Air Impact Wrenches*, Inv. No. 337-TA-311, Initial Determination, 1991 ITC LEXIS 525 at *209 (May 6, 1991)) Respondents contend the nexus rule is not limited to “[w]hen the complainant alleges actual injury;” (Citing CIB at 123) but applies to “future” injury as well. (Citing *Air Impact Wrenches*, 1991 ITC LEXIS 525 at *209) Respondents reason that any product that is not found to be the result of misappropriation could not cause a relevant injury. Respondents say, for example, Complainant’s claimed injury due to SL-7015 fails the nexus test because, *inter alia*, it has no relationship to any of the alleged trade secrets at issue. (Citing SIB at 89 (noting that the evidence is insufficient to determine whether SP-1045 is made with “valid and protected trade

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secrets”). Respondents add there is no colorable claim of misappropriation because Respondents do not make SL-7015. (Citing Tr. at 688:3-8, 688:18-24, 776:17-777:2)

Staff’s Position: Staff notes that, in addition to showing the existence of a domestic industry that is the target of Respondents’ alleged unfair acts, Complainant must also satisfy the injury component, which requires showing either actual injury or a threat of injury to an industry in the United States. (Citing 19 U.S.C. § 1337(a)(1)(A); and *TianRui*, 661 F.3d at 1335) In the Staff’s view, the evidence shows that there is actual injury to Complainant’s domestic industry, as well as a substantial threat of such future injury.

In its reply brief, Staff notes that the Commission does not adhere to any rigid formula in determining the scope of the domestic industry as it is not precisely defined in the statute. Instead, the Commission will examine each case in light of “the realities of the marketplace.” (Citing *TianRui*, 661 F.3d at 1336) Staff recites the five indicators, set forth in section V.A *supra*, which are included in the “broad range of indicia” the Commission has considered to determine whether unfair acts have the effect of substantially injuring the domestic industry. (Citing *Certain Cast Steel Railway Wheels*, Initial Determination at 80 (quoting *Electric Power Tools*, Unreviewed Initial Determination at 246)

Staff contends, in its reply brief, that the evidence shows that Complainant has suffered substantial actual injury to its domestic industry because Respondents’ negotiation pressure forced Complainant to substantially reduce its domestic pricing of the tackifier resins sold to its

{ }⁹⁰

Staff says that Respondents underbid Complainant’s { } tackifier with Respondents’ own SL-1801/{ } tackifier to { } in an effort to undersell Complainant. (Citing Tr. at

⁹⁰ The Staff notes that it did not support a finding of actual injury in its pre-hearing brief. (Citing SIB at 84-85)

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537:8-24; CX-343C; CX-1588C at p. 5 (Noting that I admitted the { } with Complainant in { } for the limited purpose of showing impact on the market and on Complainant - Tr. at 539:2-6); and CX-1567C, Qs.149-182) Staff states {

.} *Id.* Staff asserts that {

.} *Id.* Staff is of the view that {

.} (Citing CX-1588C at p. 5; and Tr. at 540:13 to 541:20)

Staff adds that Mr. Hart testified that the renewed contract with { } included an unusual { } that results in an estimated loss of more than { } dollars annually to Complainant. (Citing CX-1588C at ¶ 6.3; and Tr. at 541:24-542:24)

Staff believes that the evidence suggests that, under the recently signed contract with { } Complainant will lose over { } dollars per year in annual revenue for a total of at least { } corresponding to a margin loss of { } for { } tackifier sales to { } under its amended contract, resulting from Sino Legend's negotiation pressure. (Citing Tr. at 536:6-22; 537:8-24)

Staff says Respondents contend that there has been no actual injury to Complainant. (Citing RIB at 133-138) Staff believes the evidence shows otherwise. Staff says that Respondents allege that { } is not evidence of actual injury because there are no actual sales (or importation) that result in lost sales, as required by Section

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337(a)(1)(A). (Citing RIB at 136) Staff says indeed, {

.} (Citing CX-103C; CX-104C; CX-105C; CX-106C; CX-107C; CX-108C; and CX-1567C, Q.148) Staff avers that Mr. Hart testified that Complainant knew about these importations at the time of its negotiations with { .} (Citing Tr. at 547:24 to 548:8; and CX-1568C, Q. 67) Staff continues, { } pressured Complainant to accept the amended contract with a price reduction from {

} (Citing Tr. at 547:22 to 548:9; CX-1568C, Qs. 64-66; JX-005C at 5; CX-1567C, Qs.147-182; and CX-1588C at p. 5) Staff says the value of the { } results in a loss of over { } dollars per year in annual revenue to Complainant, under the amended contract with { } (Citing Tr. at 536:6-22; 537:8-24) Staff concludes that the evidence demonstrates that { } does not account for the direct impact that Sino Legend's importations had on Complainant's pricing negotiations with { .}

Staff says that Respondents also contend that Complainant's amended contract with { } is evidence that Sino Legend imports "cannot occur in the reasonably foreseeable future" because {

} (Citing RIB p. 134-135) Staff counters that Respondents fail to consider the lost profits Complainant already incurred { .} Staff contends whether Sino Legend actually makes any sales to { } is

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irrelevant because Sino Legend's importations have *already* injured Complainant by reducing the value of its contract with { } (Citing Tr. at 540:13 to 541:20; CX-1588C; and CIB at 129)

The Staff is thus of the view that Complainant has demonstrated that { } resulted in a substantial and actual decline in profits for Complainant. Therefore, Staff reasons that the evidence shows that { } is sufficient to reach actual, substantial injury. 19 U.S.C. § 1337(a)(1)(A)(i); CX-1588C. Additionally, that example demonstrates threatened injury to SI Group's domestic industry in tackifier resins.

Staff, thus, turns to the issue of whether or not the evidence demonstrates a tendency to substantially injure Complainant's domestic industry, and recites the five indicators, set forth in section V.A *supra*, which are included in the "broad range of indicia" the Commission has considered to decide that issue.

Staff states that, pertinent to this investigation, Complainant's related SP-1068 products, such as { }

(Citing CX-1567C, Qs.149-182; and Tr. at 532:3-11) Staff says that, having { } approval, Complainant manufactures in the United States { } tackifiers made according to the SP-1068 process technology, including the SP-1068 trade secrets, and those tackifiers have been, are being, and are intended to be sold to { } for use in the United States. *Id.* Staff continues, likewise Sino Legend ZJG manufactures tackifiers by, through or with, the SP-1068 related/derived trade secrets. *Id.* Staff asserts that { }

}

(*Id.*, Qs. 150, 156-160; JX-025C) Staff contends that in the U.S market, the evidence shows that Sino Legend ZJG's tackifiers will compete directly and be interchangeable with Complainant's tackifier resins. *Id.* Staff avers that Respondents' imports are designed for the U.S. tackifier resin industry, as Sino Legend declared in a public statement, issued as a press release and posted on its website on May 2012, declaring that Sino Legend will "move forward with plans to enter the U.S. and European markets this year, undeterred by competitive sabre rattling. (*Id.*; and CX-1035C) Staff notes that Sino Legend also told the ITC in this investigation that its tackifiers "are well along the path to expanding in earnest in the U.S." (Citing CX-1304 at 2)

Staff argues that the evidence supports a threat of injury to SI Group's domestic industry. (Citing CX-1567C, Qs.149-182) Staff asserts that the evidence shows that Respondents have taken concrete steps to become an approved vendor to the { } have publicly announced their intentions to enter the U.S. market as soon as possible, { ,} have the ability to undersell Complainant, have substantial manufacturing capacity in at least Sino Legend ZJG's facility, and have an advantage in pricing with lower labor and material costs. *Id.* Staff says the evidence also shows that based on its misappropriation of Complainant's trade secrets, Respondents manufactured, sold, imported, and intend to continue to import versions of SL-1801 and SL-1802 tackifiers. *Id.* Staff avers that these tackifiers were manufactured using { } to create a PTOP intermediate, similar to Complainant's SP-1068. *Id.* Staff adds that Sino Legend imported "low free PTOP" or "LFP" versions of SL-1801 and SL-1802 tackifiers that are manufactured using a

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{ ,} where these LFP versions are substantially derived from Complainant's trade secrets. (*Id.*; and CX-1566C, Q.23)

Staff concludes, in view of the above, the evidence shows that Respondents have substantial capacity to manufacture their SL-1801 and SL-1802 tackifiers, the ability to import their SL-1801 and SL-1802 tackifiers to undersell Complainant's tackifiers, and an explicit intention to enter into the U.S. market to sell their SL-1801 and SL-1802 tackifiers. (Citing CX-1567C, Qs.149-182) The Staff submits that the evidence more likely than not demonstrates that Respondents' unfair acts have a tendency to substantially injure or threaten substantial injury to Complainant's domestic industry.

In their reply brief Staff says that Respondents contend there is no threatened injury to Complainant; but this allegation is contradicted by the evidence. Staff says Respondents allege that Complainant's evidence of "offers for sale" do not show "vastly lower foreign costs of production." (RIB at 137) Staff says Respondents assert that Complainant relies on an irrelevant comparison between its facility in China and Sino Legend ZJG's facility. (Citing RIB at 137) Staff avers that Complainant has referenced margin differences between Sino Legend ZJG, SI China, and SI U.S. (Citing CIB at 130-132; CX-083C; and CX-843C) Staff says for example, {

.} (Citing CX-083C) Staff adds Complainant's Shanghai subsidiary has a margin of about { } less than SI Group in the U.S. (Citing CIB at 130; and CX-843C) Staff concludes when the evidence is viewed as a whole, Sino Legend ZJG does in fact have a lower manufacturing cost than both Complainant's Shanghai subsidiary and Complainant in the U.S. (Citing CX-083C; and CX-843C)

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Staff notes that Respondents also contend that Complainant's claims of threatened injury are not "substantive and clearly foreseen," but are based on "allegations, conjecture or mere possibility." (Citing RIB at 137) Staff recites that Respondents assert that Complainant (1) ignored known and relevant supply and demand factors that drive certain tackifier sales; (2) projected future prices with unrealistically large price disparities between United States, Asia, China, and the rest of the world by 2017; and (3) based their distorted projection on an assumption that SI could raise prices by { } (Citing RIB at 137-138) Staff contends, regardless of these criticisms, the evidence shows that Respondents have substantial capacity to manufacture their SL-1801 and SL-1802 tackifiers, the ability to import their SL-1801 and SL01802 tackifiers to undersell SI Group's tackifiers, and an explicit intention to enter into the U.S. market to sell their SL-1801 and SL-1802 tackifiers. (Citing CX-1567C, Qs. 149-182) Staff concludes that the evidence shows that Respondents' unfair acts thus have a tendency to substantially injure or threaten substantial injury to Complainant's domestic industry.

Analysis and Conclusions: First, I find that there is neither argument nor evidence provided by Complainant that Respondents' importation of the SL-7015 (curing resin) product results in any injury or threat of injury to the domestic industry arising out of "unfair acts" by Respondents. The testimony by Respondents' witness, Quanghai Yang, that while Respondents have imported the SL-7015 product, they have never manufactured it, has gone un rebutted. In fact, {

} (Tr. 688:3-24,

691:22-692:4, 693:14-25, 776:15-777:2) Based upon a record devoid of evidence regarding misappropriation of trade secrets related to curing resins, and more specifically the product

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identified as SL-7015, I find that there has been no violation of 19 U.S.C. § 1337(a)(1)(A) in the importation of the SL-7015 product⁹¹.

I turn to the issues related to tackifier resins, and I find that Complainant has met its burden to prove by a preponderance of evidence that the unfair acts by Respondents has had the effect to substantially injure the rubber resin industry in the United States.⁹²

In *TianRui* the Complainant submitted evidence that imported cast steel railway wheels could directly compete with wheels produced by a trade secret owner. The Commission concluded that such competition was sufficiently related to the investigation to constitute an injury to an “industry” within the meaning of section 337(a)(1)(A). On review, the Federal Circuit upheld the Commission’s ruling, holding that “the Commission’s conclusion in that regard is based on a proper construction of the statute and that its factual analysis of the effect of *TianRui*’s imports on the domestic industry is supported by substantial evidence.” *TianRui*, 661 F.3d 1322, 1337.

The arguments regarding injury in this case are similar to those made in *TianRui*. As in *TianRui*, Complainant argues damages in the form of lost sales and negative impacts upon its contract negotiations with existing customers resulting from Respondents’ offers to sell to Complainant’s customers. Respondents counter that Complainant’s lost sales are at best de-minimis and that their “offers” to sell to Complainant’s customers cannot be the basis for a finding of injury.

⁹¹ { } is not a party to this investigation. While Complainant can bring a separate section 337 action alleging unfair acts through importation of curing resin produced through misappropriation of trade secret(s) – they have not done so at this point.

⁹² In sections III and IV, *supra*, I found that Respondents committed unfair acts in violation of 19 U.S.C. § 1337(a)(1)(A) by importing into the United States, tackifier resins produced through the misappropriation of existing trade secrets owned by Complainant.

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Complainant's expert, Dr. Putnam, testified that the Respondents {

.}

Dr. Putnam testified that the volume of the tackifier resin imported was substantial and was enough to produce approximately 50,000 tires, which are likely to be used or sold in the United States. (CX-1567C, Qs. 35, 36) Dr. Putnam's testimony is supported by CX-103C, CX-104C, and CX-105C, all of which document a shipment of SL-1801 tackifier resin in the amounts of { .} Also documented is a separate shipment, { } of SL-1801. (CX-106C; CX-107C) Dr. Putnam testified that Complainant had maintained a market share in excess of { } during the period { ,} and he opined that even modest market penetration by a rival, particularly a rival using misappropriated trade secrets, would reduce prices. (CX-1567C, Qs. 79-81; and CX-336C)

Respondents admit that they imported tackifier resins as alleged. Their defense is grounded in the premise that the five importations during the period of 2010 through 2012 were "miniscule," and that penetration into the market was "negligible." They conclude the importations did not result in actual or threatened injury to the domestic industry. Respondents' expert, Dr. Seth Kaplan, testified that the imports of Sino Legend tackifiers amounted to less than { } of Complainant's domestic sales of its claimed domestic industry products in the same period. He makes the conclusory observation that "there is no indication that the negligible quantities of imports have caused substantial injury by causing reductions in Complainant's sales, production, profits or employment levels." In support, Dr. Kaplan refers only to a demonstrative prepared by him. (RX-423C, Q. 39; RDX-31C) Respondents mischaracterize the testimony of Mr. Hart when they allege that he said that "a small volume of sales, such as less

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than { } (Citing CX-1568C, Q. 41) In fact, his testimony compared the Chinese and U.S. markets, saying:

We have considered differences in market structure and believe they cannot account for the { } Input prices are determined in the global market so there should not be a substantial sustained difference between regions. The main difference is the competition from Sino Legend because of their substantial market share in China. Other competitors in China, such as Kolon Industries and other local Chinese producers, have very small market share { } .}

(CX-1568C, Q. 41) The actual testimony of Mr. Hart had nothing to do with the issue of whether or not the shipments at issue herein were *de minimis* or had a *negligible* affect on Complainant’s hitherto uncontested U.S. market in tackifier resins.

In *Certain Trolley Wheel Assemblies*, the Commission found that the importation of a single trolley wheel assembly met the requirement for “importation or sale.”⁹³ *Certain Trolley Wheel Assemblies*, Comm’n Op. at 7-8. The Commission made that finding despite the fact that the trolley wheel assembly was not sold and was imported with the designation “without commercial value.” I find that the importation of tackifier resin in quantities sufficient to be used in the manufacture of 50,000 tires meets the requirement for importation, and the sale of those resins by Sino Legend to Red Avenue or to any other person or entity meets the “sale” definition of 19 U.S.C. § 1337(a)(1)(A). I turn to the issue of whether or not the “threat or effect,” of the importations at issue here, is “to destroy or substantially injure” the domestic industry.

⁹³ In 1984, the relevant statute for patent cases read as the current section 337(a)(1)(A) reads today for unfair practices not related to patents, “Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either ...” (*See Trolley Wheels* at 8)

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Consideration of whether or not the importations in this case had the effect of substantial injury to the domestic industry necessarily includes the five indicia used by the Commission in *Electric Power Tools* and restated in *Railway Wheels*. It is also important to view those indicia in light of the nature and characteristics of the relevant domestic industry.

In section V.B, *supra*, I noted that Complainant's witnesses (Dr. Putnam and Mr. Hart) presented credible testimony that in 2007, Complainant had { } of the rubber resin market share. The unrebutted evidence also establishes that during the period from { } Complainant maintained more than { } of the included tackifier resin market.⁹⁴ (CX-1567C, Qs. 80-81; CX-336C; CX-1568C, Qs. 1-3; JX-28C; and Tr. at 520:11-521:22) Mr. Hart also testified credibly that Complainant's SP-1068, Berolic, HRJ-10420, and HRJ-2765 are tackifier resins at issue in this case, all of which are manufactured in the United States at Rotterdam Junction. (CX-1568C, Qs. 19-22)

The facts established by the evidence are that Respondents' importation and sale to { } of the SL-1801 and SL-1802 { } were sufficient to manufacture 50,000 tires, which is a substantial volume. It is undisputed that in { } Complainant supplied { } U.S. tackifier demand, { } (Tr. at 547:15-548:8; and CX-336C) Complainant has also established that it supplies more than { } of overall U.S. tackifier demand. (JX-28C) Complainant has established by a preponderance of evidence that { } represented lost sales and, thus, actual injury to Complainant.

Even more significantly, the importation of Respondents' tackifier resins { }

⁹⁴ This is a portion of the rubber resin domestic industry, which includes tackifiers, reinforcing resins, curing resins and bonding resins. (Tr. at 530:16-531:5; and JX-28C)

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.} The unrebutted testimony of Dr. Putnam and Mr. Hart was that prior to the importation by Respondents, the only competing entity was Durez, which offered tackifier resin product that was inferior in quality to Complainant's. (CX-1567C, Qs. 147-148; CX-1568C, Qs. 64-66; Tr. at 547:22-548:8; and JX-005C at 5) Mr. Hart also testified credibly that {

} (Citing Tr. at 528:4-18)

Respondents contend that the only explanation supported by any credible evidence is that { } and is the true source of the "injury" of which it complains; but they misstate the content of JX-28C when they use it to support their argument. JX-28C does not demonstrate that, between {

.} JX-28C does not provide any insight into the factors that brought about the changes reflected in its various charts and graphs, and Respondents do not offer any evidence to explain those changes. I note that one of Sino Legend's imports occurred in 2010, which was one year prior to the change noted in JX-28C.

Respondents also mischaracterize Dr. Putnam's testimony when they alleged that he conceded that "it may be the case that Sino Legend's recent U.S. importation volumes are not substantial[.]" Dr. Putnam's testimony was:

While it may be the case that Sino Legend's recent U.S. importation volumes are not substantial, these recent importation volumes are not indicative of their market impact, nor even of their future importation volumes. (CX-1567C, Q. 180)

Even assuming that Dr. Putnam's testimony conceded that the importation volumes are not substantial, the real thrust of his testimony is that market penetration was disproportionate to volumes that are not substantial.

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The undisputed evidence reflects that {
,} allowed { } to apply pricing pressure on Complainant during the negotiations of an amended contract. (CX-1567C, Qs. 148, 167-179; CX-1132C; CX-1133C; and CX-1568C Qs 45-61) Mr. Hart testified that during the 2012 negotiations {
} (Tr. at 547:24-548:4; and CX-1568C, Q. 56)

Dr. Putnam averred that {
}

(CX-1567C, Qs. 167-177; and CX-1133C) Mr. Hart testified that { } used {
} to force Complainant to reduce its prices to the agreed upon price of {
,} which was a decrease of { } (Tr. at 540:23-541:24)

Mr. Hart's un rebutted testimony is that Complainant is suffering a margin loss of {
} for { } tackifier sales to { } under its amended contract, resulting from Sino Legend's negotiation pressure. (Tr. at 536:6-22; 537:8-24) Mr. Hart testified that Complainant was forced to reduce its price for { } tackifier by { } to maintain a large portion of its U.S. business with { } in response to Sino Legend's negotiation pressure. (CX-1588C at 5; Tr. at 540:17-541:20; and CX-1568C, Qs. 55-61) Mr. Hart also testified that Complainant is bearing the additional cost of providing {
} in response to Sino Legend's entry and impact on the negotiations. (Citing CX-1588C at 3; and Tr. at 541:24-542:24)

Respondents complain that CX-1588C was initially excluded at the hearing and then "reconsidered at Complainant's prompting during Mr. Hart's redirect examination." During the prehearing conference, Respondents objected to CX-1588C among other exhibits, and I found that it was not relevant or material based upon the showing made at that time, and would not be

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admitted. I did not exclude it for any issue related to the lateness of its production. During Mr. Hart's testimony, CX-1588C became both relevant and material to the injury issue, because it documented the agreement between { } and Complainant that included the price reductions to which Mr. Hart testified. CX-1588C was admitted. (Tr. 43:24-44:1, 547:11-549:14)

Respondents quote the testimony of Mr. Hart that the { } (Tr. at 545:16-22) They ignore the remainder of Mr. Hart's testimony that explains that the { } (Tr. 545:23-546:4, 547:9-548:8; and CX-1588C at 5)

Similar to the TianRui case, the evidence here demonstrates that Complainant's domestic industry has experienced actual injury in the form of lost sales to Respondents. There has been underselling by Respondents, and Complainant's profitability has declined significantly as a result. Given the nature of the tackifier portion of the rubber resin industry and Complainant's market share consistently above { } that portion of the rubber resin industry was uncontested until Respondents' actions caused the injury noted, *supra*. Complainant had to make concessions in the amended agreement negotiations that significantly reduced its profitability – costing Complainant { } dollars in lost margin. Complainant was also forced to accept unfavorable { } .}

⁹⁵ I note too, that at Tr. 543:3-544-6, Mr. Hart testified that the { } and CX-1588C, at table 5.1 corroborates his testimony. Amended paragraph 4.1 states that {

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Based upon the foregoing, I find that Respondents have penetrated the market for rubber resins to a degree that is disproportionate to the actual volume of tackifier resin they have imported. Their unfair acts have caused the Complainant lost sales, and their underselling has further injured the domestic industry by causing Complainant to lose its competitive edge in contract negotiations with its { .} That lost competitive edge caused Complainant to suffer { } dollars in lost margin as a result of unfavorable bargaining position, plus the loss attributable to an unfavorable { .}

Complainant's injury resulting from the price drop and other concessions made to { } under the amended contract are properly attributable to Sino Legend's entry and effect on the U.S. tackifier market. (Citing Tr. at 547:14-548:8, 557:24-558:4) Thus, there is a definite causal nexus between the unfair acts of Respondents and the actual injury to Complainant's domestic industry.

I find that Respondents' offer to sell its tackifier resins to { .} coupled with the importation and resultant qualification of Respondents' tackifier resins for sale to { } has resulted in actual damages to Complainant's domestic industry. Based upon all of the foregoing, I find that Respondents have committed unfair practices in the importation and sale of misappropriated articles that result in actual injury to a domestic industry in violation of 19 U.S.C. § 1337(a)(1)(A).

Finally I focus on the issue of whether or not Respondents' unfair acts present a threat to injure or destroy Complainant's domestic industry, and I find that Complainant has met its burden to prove by a preponderance of evidence that the unfair acts by Respondents does, in fact, present such a threat.

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Complainant asserts that there is a tendency to substantially injure its domestic industry because Respondents have substantial foreign manufacturing capacity, the ability to import product to undersell Complainant's product, an explicit intention to enter into the U.S. market, and lower foreign costs of production and lower prices, all of which will substantially injure Complainant's domestic industry. The dispute focuses primarily upon the issues of lower foreign costs of production, lower prices, and whether or not Respondents' actions threaten to substantially injure Complainant's domestic industry. Respondents do not contest that they have substantial foreign manufacturing capacity, an ability to undersell Complainant, and the explicit intention to enter into the U.S. market.

It is not disputed that Respondents have substantial additional capacity to manufacture the accused SL-1801 and SL-1802 products in China. The evidence supports a finding that at its existing plant, Sino Legend has capacity to manufacture an additional { } of tackifiers per year, which is nearly as much as SI's total annual sales of its SP-1068, HRJ-10420, HRJ-2765 and Berolic tackifiers in the United States. (CX-843C at 2; CX-457C at 88-89; and CX-099C) Respondents' witness Ms. Lizhi Li, President of PMI, admitted during her deposition that PMI expects {

.} (Citing CX-1567C, Q. 182; and CX-1360.1C at 95:23-97:20) Respondents also have additional manufacturing capacity at Red Avenue's new Shanghai plant. (CX-1353.1C at 54:19-55:11) I find that the un rebutted evidence demonstrates that Respondents have substantial additional manufacturing capacity.

I have already found that Sino Legend was able to undersell Complainant { ,} which injured Complainant through lost sales and lost negotiating power that ultimately resulted in a { } dollar margin loss to

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Complainant, and unfavorable { .} Dr. Putnam's
unrebutted testimony is that {
.} (CX-1567C, Qs. 156-158; and JX-25C) {

.} (Citing CX-1567C, Qs. 156-158; and JX-025C)

Complainant argues reasonably that, { .} it will suffer even more
substantial injury if the foregoing customers apply pricing pressure and elect to renew
agreements with Complainant only at lower prices. (See CX-1567C, Qs. 150, 180-181) The
evidence supports a finding that, assuming a similar price drop of {
} because of Sino Legend's negotiation pressure, Complainant is likely to lose as
much as { } dollars per year in annual revenue from that customer for the years {
.} (JX-28C at 2; Tr. at 537:8-24; and CX-343C) Respondents do not dispute that they have
the ability to undersell Complainant's tackifiers, and I find that the preponderance of evidence
supports a finding that Respondents have this ability.

Sino Legend does not dispute that it has the explicit intention to enter into the U.S.
market and sell its tackifier resins. Quite the contrary, Sino Legend issued a press release re-
affirming its commitment to enter the U.S. market declaring that Sino Legend will "move
forward with plans to enter the U.S. and European markets this year, undeterred by competitive
sabre rattling." (CX-1035C) Sino Legend also told the Commission in this investigation that its
tackifiers "are well along the path to expanding in earnest in the U.S." (CX-1304 at 2) Based
upon the foregoing, I find that Sino Legend has the explicit intention to enter into the U.S.
market to sell the tackifier resins at issue here.

Complainant asserts that Respondents' foreign costs of production are lower than

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Complainant's costs of production, because of *inter alia* lower labor and operations costs.

Complainant says its costs in the United States are higher than Sino Legend's costs in Zhangjiagang. (Citing CX-1356.1C at 86:3-87:24) Complainant avers that costs at its Shanghai plant are also higher than Sino Legend's costs in Zhangjiagang. (Citing CX-1567C, Qs. 33-34; and CX-083C) Complainant contends that Sino Legend's lower manufacturing costs are one reason that Sino Legend can undercut Complainant's prices and still make a profit. (Citing CX-1567C, Qs. 178-179; CX-083C; and CX-1356.1C at 86:3-87:24) Complainant argues that this factor also supports a tendency to substantially injure SI's domestic industry.

Complainant and Respondents dispute whether the legal standard only requires a foreign cost advantage, or a showing of "vastly" lower production costs. While some cases cited by Complainant do not use the word "vastly," (*e.g. Digital Multimeters*, at 17; and *Certain Air Impact Wrenches*, Inv. No. 337-TA-311, Pub. 2419 (June 18, 1991), at 138, 139 (May 6, 1991); and *Electric Power Tools*, ID at 248, 249) other cases use the word "vastly"; but they do so in reference to the facts proved by the evidence rather than listing "vastly lower production costs" as a requirement. (*See e.g. Plastic Tubing* at *24, 26, 27) After a careful review of the cited cases, I find that the "broad range of indicia" used by the Commission to determine whether unfair acts have the effect of substantially injuring the domestic industry does not require a finding of "vastly lowered production costs." In my view, the Commission's approach to this question eschews a rigid list of "required elements."

In this case, Complainant has failed to provide any evidence of comparable costs of production between Sino Legend in China and Complainant in the United States. The only "evidence" provided on this issue by Complainant amounts to several general statements that the costs of labor are lower – without any specific evidence regarding costs. (*See CX-1567C*, Qs.

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178, 179; CX-083C; CX-1356.1C at 86:3-87:24) The record also lacks evidence regarding any other actual comparisons of “production costs” that might support the required finding.⁹⁶ The evidence does, however, support a finding that Complainant’s products cannot compete with Sino Legend’s products based upon Respondents’ lower prices, which Respondents admit derive in part from lower costs of production. (*Id.*) The evidence also supports a finding that Respondents’ lower costs of production arise, at least in part, from costs they were able to avoid as a result of their misappropriation of Complainant’s trade secrets instead of actually developing the process necessary to product a product equal to SP-1068 (*i.e.* SL-1802 and SL-1802).⁹⁷

Based upon all of the foregoing, I find that Respondents’ unfair acts have the effect of substantial injury and a tendency to substantially injure SI’s domestic industry.⁹⁸

I find, too, that the threat to injury or destroy the domestic industry is substantive and clearly foreseen as a result of Respondents’ unfair acts. The evidence cited, *supra*, establishes that the recently signed amendment to contract between Complainant and { }, represents a loss to Complainant of more than { } dollars per year in annual revenue for a total of at least { } corresponding to a margin loss of { } for { } tackifier sales to { }, which results from Sino Legend’s negotiation pressure.

{

}

(CX-1567C, Qs.149-182; and Tr. at 532:3-11) Respondents have made clear that they intend to

⁹⁶ While CX-843C does contain data regarding gross sales and margins, from which one might derive costs, the figures are only for Complainant’s costs and provide no insight into how those costs compare to Respondents’ costs of production.

⁹⁷ See the discussion of affirmative defense of independent development in section, IV.E.1, *supra*.

⁹⁸ Complainant notes, Respondents’ LFP product does not change the injury analysis. {

} (Citing CX-1570C, Q. 72; CX-

646C at 1; JX-024C; CX-113C; CX-667C; and CX-1121C)

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use their SL-1801 and SL-1802 products to compete in the United States tackifier market for { .} (*Id.*, Qs. 150, 156-160; JX-025C)

Respondents' tackifier resins will compete directly and be interchangeable with Complainant's tackifier resins. *Id.*

The evidence shows that Respondents have substantial capacity to manufacture their SL-1801 and SL-1802 tackifiers, the ability to import their SL-1801 and SL01802 tackifiers to undersell SI Group's tackifiers, and an explicit intention to enter into the U.S. market to sell their SL-1801 and SL-1802 tackifiers. (CX-1567C, Qs. 149-182)

Based upon all of the foregoing, I find that Respondents' unfair acts have a tendency to substantially injure or destroy Complainant's domestic industry.

VI. REMEDY & BONDING

A. General Exclusion Order

Complainant's Position: Complainant says that in a recent investigation, *Certain Handbags, Luggage, Accessories and Packaging Thereof*, Inv. No. 337-TA-754, 2012 WL 864789 (Mar. 5, 2012), the Staff argued that the difficulty of identifying the source of infringing products "is exacerbated by the fact that companies involved in selling the infringing goods frequently change their name and corporate form." (Citing *id.* at *11) Complainant continues that the ALJ agreed "that the 'difficult to identify' component of section 337(d)(2)(B) [was] satisfied. Indeed, identifying the source of the infringing products is next to impossible, as even the respondents that participated in this Investigation could not identify the manufacturers and distributors of the infringing merchandise they sold." (Citing *id.*) Complainant avers that this contributed to the ALJ recommending the grant of a General Exclusion Order. (Citing *id.*)

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Complainant says that Respondents' "shifting sands of corporate names, and corporations themselves, appearing and disappearing" have been noted in this investigation. (Citing Order No. 21 at 10-11 in the instant investigation) Complainant continues that, as in *Certain Handbags*, the complex and convoluted structure, with many entities involved in manufacturing, distribution and importation of the accused products, all controlled directly or indirectly by respondents Yang and Zhang, weighs in favor of a general exclusion order, as (1) it is necessary to prevent circumvention of an order limited to products of named entities, and (2) it is difficult to identify the source of infringing products. (Citing 19 U.S.C. § 1337(d)(2))

Complainant says that its complaint alleged that the Chinese Red Avenue Respondents currently distribute products for a variety of companies without revealing that Sino Legend and Red Avenue are in fact affiliated through common ownership. (Citing Amended Complaint at ¶ 100) Complainant says that it explained that the use of seemingly unconnected company names creates the possibility that a chemical company may be distributing products through Red Avenue without realizing a Red Avenue affiliate may be making a competing product and selling it through the same sales channel. Complainant says that Complainant uncovered evidence of Respondents hiding their relationships among themselves, particularly between their manufacturing and distribution arms.

{

.} Complainant continues that in her deposition, Zhang resorted to ridiculing a colleague also atop their pyramid of companies, who also turned out to be her own husband, in a strained attempt to distance herself from the ramifications of the document. (Citing CX-1353C at 190-195:9; CX-1353C at 213:5-216:9; CX-258C at 1, 3)

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Complainant says that {

.} (Citing CX-250C at 1)

{

.} (Citing CX-1353C at 184:11-18) {

.} (Citing CX-1592C, Qs. 58-67) Complainant argues that

Respondents' use of their complex web of companies to deceive customers, suppliers and competitors also weighs in favor of finding that (1) a general exclusion order is necessary to prevent circumvention of an exclusion order limited to products of named entities, and (2) it is difficult to identify the source of infringing products.

{

.} Complainant says that Yang's explanation was inconsistent with the text of the email chain, uncorroborated, and not at all credible. (Citing Tr. at 742:19-745:13)

Complainant says {

.}

Complainant argues that this document further highlights both (1) the need to prevent circumvention of an exclusion order limited to products of named persons and (2) the difficulty to identify the source of infringing goods. (Citing *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, 2012 WL 5874344, *12 (Nov. 19, 2012) (considering that Respondents changed product boxing and that companies selling infringing cases frequently change their names in order to avoid detection))

Complainant asserts that throughout this investigation, Respondents have engaged in a pattern of evasion, withholding and misdirection in an attempt to avoid the full scope of a proper investigation. Complainant says that such discovery abuse was far reaching, and only a portion

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of it is described herein. Complainant contends that at the very outset of the case, Respondents violated Commission and ALJ ground rules to avoid discovery. Complainant says that instead of providing full discovery, Respondents filed a motion for protective order the same day discovery responses were due, July 23, and then unilaterally withheld for almost two months any substantive discovery relating in any way to its products, process or equipment. Complainant says that in Order No. 7 on Sept. 6, the Court denied Respondents' motion and found their delay tactics had violated Ground Rule 3.8, noting that the "Ground Rules explicitly state that 'no motion stops discovery except a timely motion to quash a subpoena.'" (Citing Order No. 7 at 4)

{

.} (Citing CX-646C) {

.} Complainant avers that {

} Respondents withheld CX-646C until ten days after the close

of fact discovery.

Complainant says that Order No. 7 directed Respondents to provide discovery within 5 days. (Citing Order No. 7 at 4) Complainant continues that Respondents engaged in a campaign to circumvent the Commission's authority over the { } of SL-1801 and SL-1802. Complainant says that in September Respondents identified 1801 and 1801LFP as resins, but only said they imported 1801 when in fact they had imported LFP as well in June and

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July.⁹⁹ (Citing CX-386C at 5-10) Complainant continues that later they said LFP was shipped to Japan, again omitting it had already been imported to the U.S. (Citing CX-418C at 14)

Complainant says that throughout the rest of discovery, Respondents continued to hide the ball, pointing Complainant to large volumes of documents that had no answers, and the obfuscation continued into depositions. (Citing *Id.* at 20-23)¹⁰⁰ Complainant says that Respondents then produced records showing { } but such production was too late to use until Yang’s deposition on Nov. 8-9, 2012. Complainant avers that Complainant began to ask Yang, but Respondents’ counsel interrupted to suggest deferring such questions because he would promptly provide a chart that “maps all the batches to the products shipped {

} (Citing CX-1352C at 21) Complainant says that its counsel acquiesced. (Citing *id.*) Complainant says that it was not until 4:30 p.m. on the second day that Respondents’ counsel provided a chart (citing CX-209C) and documents to enable Complainant to just begin to get answers about which importations, if any, correlated to which batch records. (Citing CX-1352C at 163-64; *id.* at 224-236)¹⁰¹

Complainant says that it was not until November 20, 2012, that Respondents supplemented their responses to confirm Respondents had exported their { } products to the U.S. (Citing CX-457C at 40) Complainant argues that through misdirection and other

{ } (Citing CX-1303C at 2)

¹⁰⁰ Complainant says that the corporate witness on logistics, (Citing CX-1356C at 11), claimed to be unable to help, (Citing *id.* at 127-130). Complainant continues that the corporate witness on importation, (Citing CX-97C at 3-4), said the same. (Citing CX-1357C at 11-12, 120-123)

¹⁰¹ Complainant says that the chart from the Yang deposition is shown in CX-209C, and a chart indicating the corresponding trial exhibits is shown at Complainant’s prehearing brief at 393-94 (Citing CX-222C, CX-234C, CX-224C, CX-223C, CX-231C, CX-233C, CX-232C, CX-226C, CX-234C, CX-229C, CX-230C, CX-228C, CX-227C, CX-218C, CX-234C, CX-221C, CX-1121C, CX-234C, CX-220C, CX-215C, JX-21C, CX-234C, CX-217C, and CX-214C)

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discovery abuse, including withholding of relevant and responsive documents, Respondents prevented Complainant from learning, effectively throughout all of discovery, that certain importations at issue were made from { .} Complainant says that Respondents intent to avoid the Commission's authority on LFP then became clear when they then sought to preclude Complainant from identifying LFP in its interrogatory responses.

Complainant says that I rejected Respondents' attempt, noting they had "*used every artifice in their arsenal to obfuscate and to delay revealing the truth about the products they have imported into the United States*, and now seek to prevent SI Group from using that information to update trade secrets they believe to be misappropriated." (Citing Order No. 36 at 18 (emphasis added)) Complainant says that Respondents' attempt to avoid the Commission's authority for LFP further warrants a general exclusion order.

Complainant avers that it calculates that over 40% of Respondents' entire production in this case was produced after the close of fact discovery. Complainant says that charts showing this were provided in Complainant's March 15 Response to Respondents' Motion 849-036, at 9. Complainant continues that based on that tabulation, Complainant calculates that 41% was produced in the month after the close of fact discovery. Complainant adds that Respondents attempted to cover up their misappropriation by withholding all email during the critical period when Sino Legend was suddenly able to replicate Complainant's process. (Citing Tr. at 701:1-702:8, 704:16-705:4; CDX-5C (histogram showing zero electronic production from 2005 through April 17, 2007 when Xu gave notice at Complainant); CDX-6C; CDX-7C)

Complainant says that the order pointed out:

Respondents [were] patently dilatory by refusing to provide Mr. Pu's deposition until [the Court] compelled them to do so. Respondents' obfuscation of the discovery process by withholding Mr. Pu's deposition until several months after the due dates for expert reports made it impossible for Mr. Pu's deposition testimony to be included in Dr. Chao's expert report. ... Respondents' misconduct during the discovery process

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in this Investigation has severely prejudiced S1 Group.

(Citing Order No. 44 at 5.)

Complainant says that Respondents' tampering with key documents, including the Pu notebook and Sino Legend batch records, was discussed at trial. (Citing Tr. at 10:14-13:18; 770:24-773:17) Complainant argues that isolated incidents might be explained, but the patterns exhibited by Respondents should be taken into consideration with respect to remedy.

Complainant says that the discovery abuses summarized above further illustrate the widespread pattern of Respondents' attempt to thwart the ITC's authority, and to conceal the nature of the products that Respondents actually imported. Complainant argues that Respondents pattern of conduct further highlights both (1) the need for a general exclusion order to prevent circumvention of a limited exclusion order limited to products of named persons; and (2) the difficulty to identify the source of infringing goods.

Complainant says that Complainant's flagship curing resin is designated as SP-1045 in the United States and as R7530 in France. Complainant continues that since the beginning of this case, Complainant has consistently accused Sino Legend's SL-7015 product of misappropriating Complainant's curing resin. (Citing Complaint at ¶¶ 13, 61-62, 88, 114; and Amended Complaint at ¶¶ 13, 61-62, 88, 119) Complainant says that it also provided domestic industry information in its Complaint and in discovery. (Citing CX-307C, CX-331C)

Complainant says that it also provided substantial document production including both technical information on how Complainant makes this curing resin, and how Xu had access to such information. As an example, Complainant says that it produced discovery showing how Xu was privy to Complainant's US engineers' plans to use certain parameters from {

} corresponding R7530 process in Complainant's Shanghai subsidiary.

(Citing CX-975C) Complainant says that Respondents' production shows how Xu in turn used

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that knowledge to help Sino Legend to make an SP-1045 knock-off. Complainant continues that as of August 2010, Sino Legend was “work[ing] hard to come up with a product that is exactly the same as SP1045.” (Citing CX-645C at 1) Complainant avers that this included “Mr. Xu and Dr. Raj discuss[ing] the formula and production process for Schenectady International’s 7530 product” (Citing *id.*) Complainant says that Respondents’ efforts apparently succeeded, but they refused to provide discovery.

Complainant says that it had served discovery requests directed to any importation of Sino Legend’s phenolic resin products, including Sino Legend’s SL-7015 product. Complainant avers that Sino Legend ZJG objected that Complainant had not stated a ground for violation with respect to SL-7015. (Citing CX-452C, CX-194C at 6) Complainant says that Respondents also specifically denied importing SL-7015. (Citing CX-492C at 8-9) Complainant continues that it should be noted that SL-7015 was also later covered by the Court’s Order No. 15, which compelled answers to *inter alia* Complainant interrogatories 36&37 and 30&31, as well as requests for production 15&153. (Citing Order No. 15 at 1-2; Complainant’s Motion 849-009 and exhibits; Mot. Ex. B at 9 (defining “Identified Sino Legend Products” to include SL-7015)) Complainant says that those requests sought *inter alia* all Respondents’ bases for alleging no misappropriation (Citing Mot. Ex. D at 3) and each “Respondents respective roles in the Sino Legend products.” (Citing Order No. 15 at 8) Complainant says that the order specifically compelled Sino Legend, the entity who was later expressly listed on the SL-7015 bills of lading (Citing CX-1601C, CX-1602C, and CX-1603C), to answer interrogatory 31. (Citing Order No. 15 at 9) Complainant continues that that interrogatory “is directed to all respondents and concerns the importation of the accused products.” (Citing *id.*; *see also* Mot. Ex. M at 3)

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Complainant says that as recently as January-February 2013, Respondents sought to circumvent Complainant's discovery requests, the Court's Order No. 15, and scope of the Commission's authority. Complainant says that as it explained in its Feb. 25 pre-trial brief, it learned through monitoring of periodically updated importation databases that Respondents had imported two substantial quantities of SL-7015 the previous month. (Citing CPHB at 399; CX-1578; CX-1579) Complainant argues that Respondents had the duty to supplement their discovery responses to report this development and the duty "extends at least until the close of the record upon completion of the hearing, especially where the withholding party has been aware of the information." (Citing *Certain Recombinantly Produced Human Growth Hormones*, Inv. No. 337-TA-358, 1995 WL 1049871, *18 -19 (March 1995)) Complainant continues that failure to abide that duty is sanctionable and can warrant termination of the investigation. (Citing *id.* at *25; *Certain 3G Wideband Code Division Multiple Access (WCDMA) Handsets and Components Thereof*, Order No. 21, Inv. No. 337-TA-601, 2008 WL 4460462, *5 (July 1, 2008))

Complainant asserts that not only did Respondents fail to disclose they had imported SL-7015 just the previous month, but as Staff pointed out, "Respondents made a contrary assertion about SL-7015 in their pre-hearing brief: '[SL-7015 is] outside the scope of this investigation and potential remedies at issue, in part because none of these products have been imported.'" (Citing SPHB at 91)

Complainant says that despite their discovery failures and misrepresentation, Respondents moved to *preclude* SL-7015 from the scope of the investigation by a motion *in limine*, just as Respondents had withheld discovery about importing their LFP products and then

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sought to preclude Complainant from updating its interrogatories when it finally learned of those importations.

Complainant says that I denied Respondents' motion *in limine*, noting that SL-7015 was identified in the Complaint and in Complainant's interrogatories, yet Respondents "unilaterally refused to provide discovery regarding SL-7015." (Citing Tr. at 31:21-32:4) Complainant says that I explained: "Respondents' decision not to provide discovery regarding it prevented SI Group addressing SL-7015 substantively in contention interrogatory responses." (Citing *id.* at 32:1-7) Complainant continues that at the time of the Court's ruling, Respondents had imported a third shipment of another 10 metric tons on March 12, 2013. (Citing Tr. at 271:2-273:17) Complainant adds that it only learned of it because the importation was reported on an importation database later that day. (Citing *id.*) Complainant says that despite being expressly admonished in person the first thing in the morning of April 1 about Respondents' "general willingness to abuse discovery throughout this proceeding" (citing *id.* at 14:8-23), and being expressly told that SL-7015 is in the case (citing *id.* at 31:21-32:7), by the end of the day neither Yang nor any other Respondent informed either the Court or Complainant about the third importation that had just occurred on March 12. (Citing *id.*) Complainant avers that it was only through coincidence that the database was updated that day and Complainant was able to bring the importation to light early the next day. (Citing *id.*)

Complainant says that Yang admitted he knew from the outset of the case that Complainant was accusing SL-7015. (Citing *id.* at 686:22-688:11) Complainant continues that he also admitted to withholding discovery *inter alia* because "at that time SL-7015 was not imported to United States yet." (Citing *id.*) Complainant says that at first he said he made the decision to withhold and did not even remember if he told counsel, (citing *id.* 688:25-689:8) but

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then contradicted himself regarding the latest importation, stating: “Well, that’s up to the counsel to do so. That’s not my responsibility.” (Citing *id.* at 694:12-13) Complainant continues that despite being present when the Court ruled on SL-7015, neither he nor counsel informed Complainant or the Court about the third importation. (Citing *id.* at 693:9-25)

Complainant says that Yang sought to belatedly introduce a new defense by saying Sino Legend does not make SL-7015, a position that Respondents never took in discovery and is too late to take now. Complainant continues that the evidence shows Xu accessed Complainant’s secret process and disclosed it to Sino Legend to develop a product to compete with SP-1045. Complainant argues that it would be just as unfair for Respondents to compete by having it made within or outside their complex web because they stole the process and imported to benefit all Respondents.

Complainant concludes that an exclusion order is fully warranted by the evidence of record, alone or combined with Respondents’ intentional withholding of relevant evidence regarding SL-7015 and other discovery abuse. Complainant says that Respondents also violated the Court’s Order No. 15, which compelled answers to interrogatories seeking Respondents’ bases for alleging no misappropriation and each “Respondents respective roles in the Sino Legend products,” including Sino Legend who was listed on the SL-7015 bills of lading. Complainant argues that this violation, combined with Respondents’ documented pattern of discovery abuse in this case, warrants a finding of willfulness or bad faith and a “[ruling] by initial determination that a determination in the investigation be rendered against the party....” (Citing Comm’n R. § 210.33(b)(5); *Certain Asian-Style Kamaboko Fish Cakes*, Inv. No. 337-TA-378, 1996 WL 1056341, *16-*17 (Sept. 1996) (sanction of findings resulting in summary

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determination on domestic industry); *Certain Agricultural Tractors*, Inv. No. 337-TA-380, 1996 WL 965328, *4 (Aug. 15, 1996) (adverse inferences))

Complainant says that based on the record as a whole, with or without a § 210.33 sanction, Complainant submits it is entitled to an exclusion order covering the accused products, including particularly SL-7015.

Complainant says that Respondents' failure to comply with their discovery obligations to avoid ITC jurisdiction is further evidence of the likelihood that Respondents will seek to circumvent the ITC's jurisdiction in the absence of a general exclusion order. Complainant continues that their failure to comply with their duty to supplement also highlights that it will be difficult to identify the source of infringing goods.

Complainant argues that imports during the five years in which Sino Legend has been manufacturing commercially but not importing substantial volumes to the U.S. have allowed Respondents to achieve acceptance { } Respondents say that this is a huge commercial benefit Respondents have already gained through their illicit conduct and the five years should not be deducted from the duration of an exclusion order.

Complainant says that Xu's obligation to refrain from disclosing the trade secrets at issue in this Investigation arise under Xu's NDA with Complainant, in which Xu committed to permanently refrain from disclosing Complainant confidential information, "whether or not I continue to render services to Schenectady International." (Citing CX-318C at 2) Complainant says that Xu's non-disclosure obligations will only expire, with respect to specific items of information, when "such information becomes public for reasons not attributable to [Xu]," which has not occurred. (Citing CX-318C at 2)

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Complainant says that Respondents' argument that {

.}

Complainant says that Respondents selectively cite Thomas McAllister's trial testimony, cutting off the citation in the middle of a sentence. (Citing Tr. at 230:2-5) Complainant says that Respondents' partial citation omits Mr. McAllister's reference to Xu's contract {

} (Citing Tr. at 230:6-7) Complainant says

that Respondents ignore the distinctions Mr. McAllister drew between {

.}

Complainant says that Respondents' emphasis on {

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Complainant says that Xu was free to compete with Complainant's Shanghai subsidiary after three years, but was not permitted to use or disclose confidential information in such competition, as Oliver Lu explained. (Citing Tr. at 294:7-11) Complainant continues that this is not, as Respondents claim, "tantamount to a non-competition restriction of perpetual duration," because the NDA with Complainant only covers {

(Citing CX-318C at 2) Complainant says that Xu's disclosure of Complainant's trade secrets to

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,} as evidenced by failed efforts of others (including Sino Legend) described by Dr. Chao.

Complainant says that Respondents cite Dr. Swager's view, which was first elicited at trial *after* Complainant's cross (and thus not subject to cross by Complainant) and should have been presented if at all in Respondents' pre-hearing brief (not for the first time in their post-hearing brief), that it would take { } to reverse engineer or independently develop Complainant's trade secrets. (Citing RIB at 139) Complainant says that Dr. Swager is an academic with no tackifier experience. (Citing Tr. at 794:25-795:23) Complainant continues that he formed a few consulting companies but nothing involving rubber resin products. (Citing *id.*) Complainant adds that he has no experience from which to estimate how long it would take to develop a commercial rubber resin process. (Citing *id.*) Complainant argues that this explains why he in fact offered no opinion in his witness statement on how long it would take to reverse engineer or independently develop, despite the detailed testimony of Banach and Chao on those topics.

Complainant contends that Dr. Swager's belated and impromptu trial testimony that it would take {

} (Citing Tr. at 858:8-862:2), is conclusory and has no basis in commercial reality.

Complainant says that it timely offered the testimony of Dr. Banach, a fact witness with a wealth of commercial experience and insight into the SP-1068 process, as Respondents acknowledge. (Citing RIB at 2) Complainant continues that his fulsome testimony about the time and difficulty to develop various aspects of the SP-1068 process was well supported.

Complainant says that there is no evidence Swager even considered that testimony. Complaint says that in contrast to Swager's impromptu statements, Dr. Chao's expert testimony was well

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considered and supported. Not only did he consider the publicly available literature when collaborating with Dr. Hamed on expert reports, (Citing Tr. at 416:24-417:2), but he also expressly addressed the efforts of others including Sino Legend and Sumitomo to reverse engineer and independently develop the SP-1068 process, which he observed were failures. (Citing CX-1566C, Qs. 37, 53, 64-73, 78; CX-1592C)

Complainant argues that Dr. Swager offered only impromptu speculation for the first time at trial, based on his *academic* literature review and experience, that it would take just { } to reverse engineer Complainant's process. Complainant posits that if it were so easy to do, then more competitors would be selling products, and Complainant would no longer enjoy such a competitive advantage over {

.} (Citing CX-1566C, Q. 78; CX-1568C, Qs. 41, 58, 62-68) Complainant says that Respondents' argument that "it was inevitable that SI would face competition years ago," (citing RIB at 5, 139), is not only self-serving speculation, but is belied by the fact that Respondents were the only competitors able to capture substantial market share (e.g., in China), and only after resort to illicit means.

Complainant says that Respondents argue that the relevant question is how long it would take to develop the product for someone who already has the available public information and can perform tests. (Citing RIB at 146) Complainant avers that Dr. Chao was conservative in answering this question by considering the references cited by Swager along with the evidence of record regarding competitors { } who are certainly capable to perform those tests. Dr. Chao stated:

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(Citing CX-1566C, Q. 78) Complainant says that not only did Dr. Chao offer his fully considered testimony from the outset, but he is also much more qualified than Swager to offer such testimony, as he has many years of industry experience, including with tackifiers. (Citing *id.*, Qs. 4-7) Complainant says that his testimony, and that of Dr. Banach, should be credited over that of Swager. Complainant adds that it should not be forgotten that { } was a more than competent competitor, with access to the public literature and Complainant's product, and in fact *tried* to reverse engineer Complainant's process, but could not even determine what neutralizer Complainant used, much less other components, amounts, or process steps. (Citing *id.*, Q. 223)

Complainant argues that Respondents' allegation that { } are stale and obsolete technology should be ignored. Complainant says that the cited testimony (Tr. at 152:16-153:17) indicates that Complainant still uses { } in China. Complainant explains that it continues to enjoy economic benefit domestically from its license fees for that technology. Complainant continues that it {

.} (Citing Tr. at 220:25-222:3) Complainant says that nothing suggests the { } technology is obsolete. Complainant continues that the technology for { } were, and are, both valuable by virtue of not being known to Sino Legend, and Complainant's other competitors, respectively.

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Complainant says that neither the UTSA nor the Restatement require current use for trade secret protection. (Citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 727, 727 n.6 (7th Cir. 2003)) Complainant argues that a policy requiring continuous or current use would discourage improvement because an innovator would fear that moving on to an improvement would automatically forfeit the improved-on technology, allowing competitors to freely misappropriate and use that technology. Complainant says that Respondents should not be allowed to use Complainant's alternative embodiments because they are still valuable by virtue of giving Complainant a competitive advantage. Complainant says that the cases cited by Respondents are all irrelevant because they relate to outdated business information (financial data, business contacts, etc.). Complainant argues that the cases do not apply to technology which is still valuable even if not currently used by the trade secret owner.

Complainant avers that it presented extensive evidence supporting a general exclusion order in its pre- and post-trial briefs, but Respondents' post-hearing brief only offers general denials and an irrelevant straw man argument about downstream products. Complainant says that Respondents seek to minimize their documented attempts to circumvent the Commission's authority by referring to the evidence as merely "pejorative accusations about discovery," and referring to Zhang's attempt to mislead and thereby conceal harmful information as "lighthearted mocking," while failing to address the findings that they have "used every artifice in their arsenal to obfuscate and to delay revealing the truth about the products they have imported into the United States," (Citing Order No. 36 at 18), and have "displayed a general willingness to abuse discovery throughout this proceeding," (Citing Tr. at 14:8-12). Complainant says that these and the other points set forth by Complainant are effectively un rebutted and clearly warrant a general exclusion order.

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Complainant argues that Respondents cannot be heard to complain that Complainant's experts did not offer an opinion on SP-7015 or that Complainant lacks sufficient evidence "that Respondents used any SI trade secrets to make SL-7015," because it was Respondents' design to withhold evidence regarding SL-7015 as part of their pattern to "obfuscate and to delay revealing the truth about the products they have imported into the United States." (Citing Order No. 36 at 18) Complainant says that if Respondents should not be rewarded for their discovery abuse and violation of orders. Complainant avers that the only other argument Respondents offer about SL-7015, that { }, should be ignored because it does not foreclose a 337 violation and in any event was not presented until trial despite Complainant's discovery requests and orders. Complainant says that I should not consider new arguments in Respondents' reply, as this issue was briefed in Complainant's pre-hearing brief at 397-402, and Respondents should have presented any arguments in its initial post-hearing brief.

Complainant submits that if a general exclusion order does not issue, any limited exclusion order issued in this investigation should be broad enough to cover related entities, including the individual Respondents. Complainant says that Respondents have acknowledged in opposing the Motion to Amend, a limited exclusion and cease and desist order that this Court would grant may extend to cover the named entities as well as other similarly situated entities, including parents, grandparents, great-grandparents, subsidiaries, other related business entities, their successors, etc. As an example, Complainant says that Respondents acknowledged the following:

[T]he Commission's orders have excluded: ... [Infringing products] that are manufactured abroad by or on behalf of or imported by or on behalf of, Respondent **or any affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or its successors, assigns, or other related business entities.**

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(Citing Respondents' Opposition to Motion 849-011, Oct. 26, 2012, at 4-5 (emphasis by Respondents) (quoting *In re Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. No. 337-TA- 752, at 2 (May 18, 2012) (emphasis added); also citing *Certain Starter Motors and Alternators*, Inv. No. 337-TA-755, at 2 (Mar. 30, 2012))) Complainant continue that Respondents further elaborated:

Here, SI seeks to add **grandparent** (e.g., Gold Dynasty) and **great-grandparent** (e.g., Elite) companies, as well as successor companies (e.g., Red Avenue HK) of one or more of the already named Respondents. But, as in *Starter Motors*, these entities need not be joined to provide SI with the relief it seeks.

(Citing Respondents' Opposition to Motion 849-011, at 5 (emphasis added)) Complainant says that Respondents are correct that a limited exclusion order can and should cover any Respondent or any affiliated companies, parents, grandparents, great-grandparents, subsidiaries, licensees, contractors, or other related business entities, or its successors, assigns, or other related business entities.

Complainant says that it is important for any limited exclusion order to also include the individual Respondents, particularly Yang and Zhang, because the individuals are the only Respondents who cannot be dissolved and reformed as new entities. (Citing Order No. 21 at 10-11 (referring to "shifting sands of [Respondents'] corporate names, and corporations themselves"))

Respondents' Position: Respondents assert that a general exclusion order is only appropriate if (a) it is necessary to prevent circumvention of a limited exclusion order or (b) there is a pattern of violation of Section 337 and it is difficult to identify the source of infringing products. (Citing 19 U.S.C. § 1337(d)(2); 19 C.F.R. § 210.50(c)) Respondents aver that none of these factors are present here. Respondents say that the accused products are shipped in large quantities (often several tons) with bills of lading indicating the suppliers and recipients, thus

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their identities and sources are easily recognized. Respondents continue that Complainant has admittedly been able to identify Respondents' imports and their sources "through monitoring of periodically updated importation databases." (Citing CPHB at 399; *see also* Complaint ¶ 126 (citing Chinese export records and U.S. import records for Sino Legend's tackifiers, obtained by Complainant before this investigation)) Respondents add that the substantial investment of time and money that went into Sino Legend's factory (Citing RX-416C) show that tackifier manufacturing is not the type of transitory business that has traditionally been necessary for a general exclusion order. Respondents say that its corporate structure is also no basis for a general exclusion order. (Citing Tr. at 761:4-8 (Yang) (rejecting characterization as "complex and convoluted")) Respondents continue that five imports over the course of three years cannot be considered a "pattern of violation."

Respondents assert that Complainant's claim of "circumvention" is "absurd." (RIB at 148) Respondents say that despite devoting 21 pages of its pre-hearing brief to the subject of a general exclusion order, Complainant did not prove that Respondents would have any ability, much less any intention, to circumvent a limited exclusion order. Respondents argue that Complainant's arguments consist mostly of pejorative accusations about discovery. Respondents say that Complainant finds "deceit" everywhere, even in Ms. Zhang's lighthearted mocking of her husband's attempts to make himself useful at Red Avenue. (Citing CPHB at 383-86)

{

.} (Citing Tr. at 744:8-745:13; CX-644C at SIGITC0000176685) Respondents say that Complainant's remaining arguments are similarly devoid of merit.

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Respondents say that Complainant did not argue in its prehearing brief that a general exclusion order should extend to downstream products (such as tires). (Citing CIB at 371 (arguing only for exclusion of “SL-1801 and SL-1802 products (including both DIB and LFP versions)”)) Respondents continue that Complainant has also not addressed the general exclusion order requirements with respect to any downstream products. (Citing *Certain CPS Devices and Products Containing Same*, Inv. No. 337-TA-602, Comm’n Op. (Jan. 27, 2009) (finding that the complainants had not made a showing of circumvention or other general exclusion order requirements against non-respondents who imported downstream products)) Respondents add that to the extent Complainant was ever seeking an exclusion order on downstream products, it has waived that position.

Respondents argue that under the clear and unambiguous terms of Mr. Xu’s labor contract, he was under no obligation to maintain the confidentiality of any protected information he may have learned from Complainant after { .} Respondents say that the process for making SP-1068 can be reverse engineered in { ,} and various aspects of it have been disclosed through { ,} as discussed above. Respondents conclude that it was inevitable that Complainant would face competition soon after { ,} if not earlier, including from individuals familiar with Complainant’s Shanghai subsidiary’s 2007 technology. Respondents add that for that reason, any exclusion remedy going forward from 2013 would amount to an unwarranted windfall in favor of Complainant. Respondents say that given the nature of the alleged trade secrets (discussed above), it is inconceivable that the process for making SP-1068 could not be duplicated, without any help from Complainant. Respondents add that Complainant’s 2007 process for making SP-1068 is now stale and obsolete because Complainant has since made changes to its process and is no longer using any process or formula

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alleged to have been misappropriated, so its information does not qualify for a trade secret remedy years later.

Respondents say that on { }, Mr. Xu entered into a labor contract with Complainant that, by its clear and unambiguous terms, provided {

.} (Citing Tr. at 229:12-24)

Respondents continue that Complainant both wrote and approved this contract. (Citing Tr. at 230:2-5) Respondents add that {

.}¹⁰² Respondents aver that {

} Respondents

conclude that Complainant's express contract with Mr. Xu allowed him to work for a competitor, free of any confidentiality restrictions, starting in { } Respondents say that having written Mr. Xu's employment contract in that manner, Complainant had to expect that it could face legitimate competition in the future (certainly after { } that involved individuals such as Mr. Xu.

Respondents say that where Complainant intended the confidentiality provision to have { }, it has made that clear in other subsequent employment contracts. As an example, Respondents say that the employment contract of {

.} (Citing RX-203C,

¹⁰² Respondents say that a { } employee manual that Mr. Xu acknowledged receiving also includes a { } (Citing CX-320C; CX-321C) Respondents argue that it does not impose any separate duty of confidentiality.

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Art. 9) Respondents continue that in contrast to Xu's contract, Lu's { } contract contains {
-}

(Citing *id.*) Respondents say that Mr. Lu affirmed that, {

} (Citing Tr. at 285:5-10) Respondents continue that the contrast between the provisions in
Xu's { } labor contract and Lu's { } labor contract demonstrates that {
-}

Respondents aver that Mr. Lu and Dr. Chao corroborated this fact at trial. (Citing Tr. at 285:11-
14; CX-1566C, Q. 20 {

} Respondents say that this cannot
serve retroactively to re-write Xu's labor contract to {
-}

Respondents argue that the { } implies that Complainant itself realized
that any information to which Mr. Xu had access was not so "secret" as to require more than
{ } Respondents say that Complainant seems to be taking the position
that every aspect of Complainant's processes, no matter how trivial or conventional in the art,
constitutes a trade secret that could never be divulged by a departing employee. Respondents
argue that this conflicts with the express provisions of Complainant's contract with Xu, and
would also make it virtually impossible for any departing employee ever to work for a
competitor. Respondents say that this would be tantamount to a non-competition restriction of
perpetual duration, which is contrary to Complainant's labor contracts and Chinese law.¹⁰³

¹⁰³ Respondents aver that at the time of the contract, a non-compete provision in a Chinese labor contract was not allowed to extend beyond a three-year term. (Citing Regulation of Shanghai Municipality on Labor Contract, Art.

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Respondents say that U.S. law recognizes a similar concern. (Citing *Int'l Bus. Mach. v. Seagate Tech.*, 941 F. Supp. 98, 100 (D. Minn. 1992) (“A claim of trade secret misappropriation should not act as an ex post facto covenant not to compete.”))

Respondents argue that Complainant is not entitled to a remedy that would restrict competition beyond { } because {

} Respondents add that even if Complainant were to argue that there was some “commercial advantage” or “head start” that had to be eliminated, such time has long since passed. (Citing *Minn. Mining & Mfg. Co. v. Pribyl*, 259 F.3d 587, 609 (7th Cir. 2001)

(upholding denial of permanent injunction in trade secret misappropriation case because, “by the time the district court was faced with determining whether to enjoin Accu-Tech’s use of 3M’s trade secret, the court believed that Accu-Tech would have discovered 3M’s trade secret”))

Respondents say that Complainant cannot establish any cognizable harm caused by any alleged trade secret misappropriation that would justify a Section 337 remedy going forward.

Respondents argue that to grant Complainant the remedy it seeks also would assume that a competitor of Complainant would not have been able to manufacture a resin similar to SP-1068 without misappropriating Complainant’s alleged trade secrets. Respondents say that this conclusion is contrary to the evidence. Respondents continue that the general method for making novolak resins, such as SP-1068, had been known for decades. Respondents add that many of the parameters that Complainant now argues are critical to its process were publicly disclosed { },} dictated by the underlying chemistry, or readily ascertainable using standard procedures. Respondents say that Complainant itself has characterized SP-1068 as { }.} Respondents explain that

16 (Nov. 15, 2001)) Respondents continue that in 2008, the maximum term of a Chinese non-compete provision was shortened to two years. (Citing Labor Contract Law of the People’s Republic of China, Art. 24)

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{

} Respondents argue that given the vast range of conditions that have been found suitable to make resins such as SP-1068 and the public availability of much of this information, the notion that Sino Legend, or any other competitor of Complainant, would not have been able to make the products at issue without misappropriating Complainant's alleged trade secrets is contrary to the evidence. Respondents add that Complainant's Mr. Hart acknowledged that {

.} ¹⁰⁴ (Citing Tr. at 524:12-20)

Respondents argue that Complainant is also not entitled to any remedy because it seeks trade secret protection for process parameters and reaction conditions that are stale and obsolete. As an example, Respondents say that {

} (Citing Tr. at

153:15-17) Respondents say that obsolete information that provides no competitive advantage is not commercially valuable and cannot constitute a trade secret. (Citing *Fox Sports Net North, LLC v. Minn. Twins P'ship*, 319 F.3d 329, 336 (8th Cir. 2003) (stating that "obsolete information cannot form the basis for a trade secret claim because the information has no economic value"); *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 661 F. Supp. 2d 548, 555 (E.D. Va. 2009) (finding that

¹⁰⁴ Respondents say that despite Mr. Hart's protestation that {

.} (Citing Tr. at 544:7-22)

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a document was not worthy of trade secret protection because “the products it references have not been on the market for over half a decade, and the market for these products is constantly changing”); *Applied Indus. Materials Corp. v. Brantjes*, 891 F. Supp. 432, 438 (N.D. Ill. 1994) (refusing to extend trade secret protection to information that was “so outdated that it lack[ed] current economic value”))

Respondents argue that Complainant has not demonstrated that any of its outdated processes continue to provide it with any competitive advantage. Respondents say that

{

.} (Citing Tr.

at 522:3-523:18, 543:3-17, 545:7-22; JX-028C at 4) Respondents reason that because Complainant is relying on obsolete information for its trade secret claims, no remedy is warranted.

Respondents argue that if an exclusion order is issued, its scope and duration would have to be tailored to whatever violation is actually found. Respondents say that Complainant seeks an exclusion order “that would prevent the importation into the United States of all SL-1801 and SL-1802 products {

} (Citing CPHB at 371) Respondents continue that to the extent Sino Legend’s SL-1801LFP and SL-1802LFP products {

} are not found to violate Section 337, those products should be outside the scope of any exclusion order. Respondents assert that to ensure that any remedial order is not overextended to non-violating products, such order should include a certification provision permitting Respondents to certify that future imports are beyond the scope of the order.

Respondents say that the duration of any remedy should not be longer than “a reasonable research and development period” to develop the particular process parameter(s) on which any

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finding of violation is based. (Citing *Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, Comm'n Determination and Order, 1979 ITC LEXIS 99 at *110-11 (Nov. 1979)) Respondents continue that Complainant presented no cogent evidence of how long it would take to independently develop each claimed trade secret.

Respondents assert that Some of Complainant's alleged trade secrets would require no more than { .} (Citing Tr. at 865:14-867:15) Respondents say that { .} (Citing Tr. at 860:10-14) Respondents continue that someone with an understanding of basic organic chemistry can ascertain the product's { ,} as Dr. Swager demonstrated on cross-examination. (Citing Tr. at 799:25-803:13) Respondents add that independently determining the process by which SP-1068 was made would require no more than { .} (Citing Tr. at 865:14-866:9) Respondents continue that the amount of time Complainant has been manufacturing SP-1068 is clearly not an appropriate metric; the relevant question is not how long did it take for Complainant to develop the product but rather how long it would take to develop the product for someone who already has public information about Complainant's product and can perform tests on Complainant's product. (Citing *Copper Rod*, 1979 ITC LEXIS 99 at *111 (basing remedy length on the amount of time it would take "to reproduce" a trade secret "by lawful means"))

Respondents say that it was incumbent upon Complainant to provide some basis for establishing an appropriate length for the exclusion order it seeks. Respondents say that Complainant has not done so; rather, Complainant's pre-hearing brief called for an exclusion order lasting { ,} based on the time it would allegedly take to develop a competing

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process according to the conclusory opinions of Complainant's witnesses Banach and Chao. (Citing *Lamelson v. United States*, 752 F.2d 1538, 1551 (Fed. Cir. 1995) (giving no weight to series of conclusory statements offered by expert)) Respondents say that relying on testimony purportedly based on Complainant's own development time, Complainant and the Staff answered the wrong question.

Respondents argue that the correct question is how long it would take to develop a competing process with the benefit of the publicly available information about SP-1068.

Respondents say that this includes {

;} and the availability of the SP-1068 resin itself

for reverse engineering. (Citing RIB Section III.B) Respondents aver that unrebutted evidence at the hearing established that – equipped with all this information – independently reproducing the SP-1068 process would take no more than {

.} (Citing Tr. at 860:10-14, 865:14-866:9)

Respondents argue that Sino Legend could have independently developed Complainant's alleged trade secrets using only public information. (Citing *Minn. Mining*, 259 F.3d, at 609)

Respondents say that Mr. Xu's contract with Complainant {

.} (Citing CX-317C at Art. 9;

Tr. at 229:12-24) Respondents continue that {

.}

Respondents say that with the benefit of that knowledge, the time to develop competing product would have decreased even further.

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Respondents argue that Complainant failed to show how alleged misappropriation in 2007 could entitle it to a prospective remedy now because six years have passed without the Respondents substantially participating in the U.S. market. Respondents say that {

.} Respondents continue that one of those years has also been consumed by this Investigation, which has deterred U.S. customers from purchasing the Accused Products. (Citing CX-1360.1C at 96:3-7; Tr. at 912:13-24) Respondents reason that in view of this timeline, the alleged misappropriation, even if proven, is at most a matter for monetary damages (which Complainant seeks in the concurrent Chinese litigation), not a basis to shelter Complainant from competition it would have faced anyway. (Citing *See 3M v. Pribyl*, 259 F.3d 587, 609 (7th Cir. 2001))

Respondents argue that Complainant relies on nothing but the conclusory testimony of Drs. Chao and Banach. Respondents say that Dr. Chao makes no effort to justify his opinion based on anything other than his “many years of industry experience” and Frank Hart’s discredited testimony that Complainant’s competitors make inferior products. (Citing CX-1566C, Q. 78) Respondents say that Dr. Banach answers the wrong question by pointing to the amount of time it purportedly took Complainant to {

.} (Citing CX-1565C, Qs. 97-100) Respondents continue that the correct question is how long it would take to develop the process in question through legal means, including reverse engineering and reviewing publicly available information. (Citing *Apparatus for the Continuous Prod. of Copper Rod*, 1979 ITC LEXIS 99 at *110-11 (Nov. 1979) (basing remedy length on amount of time it would take “to reproduce” trade secret “by lawful means”))

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Respondents argue that the time to develop the alleged trade secrets would be {
} (Citing Tr. at 865:14-866:9) Respondents say that Complainant's assertion that it
would take { } for someone to independently develop the process for making SP-
1068 is wrong in view of the overwhelming evidence pointing to {
} (Citing Tr. at 875:13-876:13) Respondents continue that it would
not take anywhere near { } to ascertain the alleged secret process steps by doing the
following:

{

.}

Respondents argue that none of these steps are particularly time-consuming or costly.
(Citing Tr. at 859:15-21, 866:15-18, 868:16-19) Respondents add that {
} (Citing Tr. at 868:6-15) Respondents say that while some analytical test
equipment can be expensive, typically the tests can be performed by an outside service, for as

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little as { } (Citing Tr. at 860:10-14) Respondents say that even if independent development would have taken { }—any alleged “headstart” Sino Legend obtained through Complainant’s information { }.

Respondents argue that Complainant also fails to overcome its own witnesses’ testimony about {

.} Respondents argue that the time to legally develop such claimed trade secrets would be { }.

Respondents contend that in view of the evidence that the SP-1068 process could be { } Complainant is not entitled to an exclusion order at all. Respondents say that the pendency of this investigation has already resulted in a *de facto* exclusion order { }.

(Citing CX-1360.1C at 96:3-7; Tr. at 912:13-24) Respondents continue that the “clock” for injunctive relief in a trade secret case typically starts earlier than the beginning of the litigation. (Citing *Syntex Ophthalmics, Inc. v. Novicky*, 745 F.2d 1423, 1437 (Fed. Cir. 1984) (measuring injunction from date defendant resigned from plaintiff’s employ and could have commenced independent development); *3M*, 259 F.3d at 609 (denying injunction against because development time expired before court’s ruling on remedy)) Respondents reason that any length of time would be measured from the beginning of SL-1801/2 development in October 2005, or at the latest September 2006 (the earliest alleged misappropriation). (Citing RX-416C, Q. 18)

Respondents argue that any exclusion order would also have to be bounded by the scope of whatever misappropriation finding it is based on, and should not extend to other products or processes. (Citing 19 U.S.C. § 1337(d)(1)) Respondents say that in the absence of { } there is no basis to exclude SL-7015. Respondents continue

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that a standard certification provision would assist in determination of whether future products fell within or outside the scope of any exclusion order.

Respondents say that Complainant's arguments for a general exclusion order ("GEO") fail the statutory test. (Citing 19 U.S.C. § 1337(d)(2)) Respondents continue that Complainant's allegation that it is "very difficult to identify the source of the products being imported by the various entities" (Citing CIB at 135) is belied by Complainant's own exhibits. (Citing CX-327C; CX-1578; CX-1579; CX-1591 (shipping documents identifying Respondent(s)))

Respondents assert that Complainant's and Staff's characterization of Respondents' corporate structure as "complex and convoluted" is inaccurate and irrelevant. Respondents say that Mr. Yang noted at the hearing, "the main line is very clear." (Citing Tr. at 761:4-8) Respondents continue that an allegation that respondents frequently change names or corporate structure is insufficient to warrant a GEO. (Citing *Certain Ground Fault Circuit Interrupters & Prods. Containing Same*; Inv. No. 337-TA-615, Comm'n Op., 2010 ITC LEXIS 681 at *38 (March 26, 2009)) Respondents say that Complainant's argument accusing Respondents of "hiding" their relationships misperceives a simple branding effort and does not imply that source identification is difficult. (Citing CX-250C at 1 (discussing product names to help "Sino Legend's products being launched in the market with a new image")) Respondents say that Complainant's false-labeling argument was refuted at the hearing. Respondents continue that Complainant's discovery arguments mischaracterize the history of this investigation and the disputes at issue in Order No. 15, and do not suggest a tendency or ability to circumvent, or any difficulty identifying the source of infringing goods. (Citing *id.*)

Staff's Position: Staff says that the evidence supports a general exclusion order. Staff notes, however, that it is uncertain how U.S. Customs and Border Protection will be able to

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implement and enforce such an order. Staff says that the Commission's statutory authority to issue a general exclusion order is set forth in 19 U.S.C. § 1337(d)(2), which states in relevant part:

- (d) Exclusion of articles from entry . . .
 - (2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that -
 - (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
 - (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

Staff continues that a general exclusion order applies to respondents as well as to persons who were not respondents in the investigation, and even to persons who could not have been respondents, such as persons who did not import until after the investigation is concluded.

(Citing *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm'n Op. at 24 (November 19, 2012) ("*Protective Cases*")) Staff adds that it instructs U.S. Customs and Border Protection to exclude from entry all articles that are covered by the intellectual property at issue, without regard to source. Staff says that the Commission has stated that "[b]ecause of its considerable impact on international trade, potentially extending beyond the parties and articles involved in the investigation, more than just the interests of the parties is involved." Staff continues that the Commission exercises caution in issuing general exclusion orders and requires that certain conditions be met before one is issued." (Citing *Certain Agricultural Tractors*, 337-TA-486, Comm. Op. on Remedy, Bonding, and Public Interest at 21 (July 14, 2003) ("*Tractors*"))

Staff says that a general exclusion order may issue in cases where the exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products

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of named respondents. (Citing 19 U.S.C. § 1337(d)(2)(A); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 23 at 4-5; (March 25, 2009); *Certain Sildenafil or Any Pharmaceutical Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Comm'n Op. at 7 (July 26, 2004)) Staff continues that an evidentiary record that reveals that respondents have, or are capable of, changing names, facilities, or corporate structure to avoid detection would, as another example, be relevant to an inquiry under Section 337(d)(2)(A). (Citing *Protective Cases* at 25-26)

Staff says that a general exclusion order also may issue if there is a widespread pattern of violation of Section 337, and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2)(B). (Citing *Certain Cigarettes and Packaging Thereof*, 337-TA-643, Order No. 23 at p. 8 (March 18, 2009) (finding that the fact that the complainant has “engaged in twenty-three lawsuits since 2002, not including this investigation, against 85 defendants” supported a GEO))

Staff argues that Respondents are likely to circumvent an LEO by employing a complex and convoluted set of corporate structures and relationships that involve a number of entities that manufacture, distribute and import the accused products, each of which seems to be controlled directly or indirectly by individual respondents Quanghai Yang and Ning (Denny) Zhang. (Citing SIB at Section I.B.2) Staff says that after noting that Respondents did not appear to oppose adding Sino Marshall Islands as a Respondent in this investigation, I found:

In my view, the shifting sands of corporate names, and corporations themselves, appearing and disappearing, makes it particularly important to include parent, grandparent, and great-grandparent entities as parties respondent in order to ensure that elusive offspring of those entities are covered by this investigation and by any exclusion order or cease and desist order that may issue.

(Citing Order No. 21 at 10-11)

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Staff asserts that Respondents' conduct, including shortcomings in discovery, further highlights the need for a general exclusion order to prevent circumvention of a limited exclusion order limited to products of named persons. Staff says that as recently as January 2013, Respondents appear to have sought to circumvent the scope of the Commission's authority by failing to provide notice of new importations of another relevant accused product, SL-7015. (Citing CPHB at 397-402) Staff continues that the duty to supplement discovery "extends at least until the close of the record upon completion of the hearing, especially where the withholding party has been aware of the information." (Citing *Certain Human Growth Hormones*, 337-TA-358, 1995 WL 1049871 at 16) Staff says that failure to abide that duty is sanctionable and can warrant termination of the investigation. (Citing *id.*) Staff adds that Respondents even asserted in their pre-hearing brief: "these [SL-7015 and SL-1805] products are outside the scope of this investigation and potential remedies at issue, in part because none of these products have been imported. . . ." (Citing RPHB at 22) Staff says that the evidence also shows potential mislabeling on their products, that also weighs in favor of finding that a general exclusion order is necessary. (Citing CX-644C; Tr. at 742:10 to 744:2; 19 U.S.C. § 1337(d)(2))

Staff says that it is uncertain how, or the extent to which, U.S. Customs & Border Protection will be able to enforce the terms of a general exclusion order as to tackifier resins made using Complainant trade secrets. Staff recommends, however, that a general exclusion order include a standard certification provision.

Staff continues that a limited exclusion order against all named Respondents should issue if a violation is found but the requirements of a general exclusion order are not met.

Staff says that Federal case law and Commission decisions are consistent concerning relief for trade secret misappropriation and generally agree that such relief "should be limited to

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the amount of time it would have taken [the defendant] to reproduce [the plaintiff's] trade secret by lawful means.” (Citing *Copper Rod I* at 67; *Sausage Casings* at 19) Staff continues that in *Copper Rod*, the Commission entered a cease and desist order for five and seven years respectively for two misappropriated trade secrets based on a theoretical “reasonable research and development period.” (Citing *Copper Rod*, at 67) Staff says that the Commission ruling in *Sausage Casings* applied the *Copper Rod* standard to Respondent’s integrated production line that included both trade secret and non-trade secret machinery and methods. Staff continues that the opinion notes that “trade secret aspects are not independent of the non-trade secret aspects of the technology involved” thus found there to be one “independent development time” for the entire process. (Citing *Sausage Casings*, at 19) Staff says that the final limited exclusion order lasted for a period of ten years, based on evidence provided by both complainant and respondent regarding the duration for independent development of the process. (Citing *id.*) Staff continues that in *Railway Wheels*, the Commission also entered a limited exclusion order for a period of ten years. (Citing Inv. No. 337-TA-655, Comm’n Determination at *2)

Staff contends that trade secret misappropriation cases decided by Federal courts follow the same principles as Commission cases by imposing injunction periods commensurate with the estimated time required to legally develop the trade secret. Staff notes that in *K-2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471, 474 (9th Cir. 1974), the court ruled that it was “satisfied that the appropriate duration for the injunction [was] the period of time it would have taken Head, either by reverse engineering or by independent development, to develop its ski legitimately without use of the K- 2 trade secrets.” (Citing *id.* at 474) Staff says that most courts adhere to the standard that injunctive relief should last as long as it would have taken the competitor to

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develop the trade secret by any legal means including research and development, reverse-engineering, or independent discovery.

Staff says that the evidence supports an exclusion order for tackifier resins manufactured and distributed by Respondents for a period of { .} Staff says that the research and development period for the SP-1068 process used at Complainant's Shanghai subsidiary would take at least { } to recreate from scratch. (Citing CX-1565C, Q. 100 (Banach states that {

Staff says that Dr. Chao testifies similarly: {

} (Citing CX-1566C, Q. 78)

Staff says that Respondents' argument that it would only take Respondents { } to independently develop the alleged trade secrets { } is not correct. Staff says that the evidence fails to support a showing that SP-1068 can be reverse engineered to unlock Complainant's valid trade secrets in such a short time frame. Staff says that Respondents should not be "rewarded" for their misappropriation of Complainant's trade secrets. Staff adds that even if it were possible to reverse engineer SP-1068 to discern the asserted trade secrets, Respondents would not be entitled to this argument if it is clear that they unlawfully misappropriated the information. (Citing *ILG Indus., Inc. v. Scott*, 273 N.E.2d 393, 397-98 (Ill. 1971) (finding that because the defendants proceeded unlawfully, the court would accept plaintiff's testimony that it would take only 18 months to reverse engineer the trade secret))

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Staff says that a general exclusion order is further warranted because of Respondents' continuing efforts to shield relevant information from this investigation. Staff continues that Respondents still fail to acknowledge the additional importations of their SL-7015 product. (Citing RIB at 17 ("To date [April 12, 2013], only five shipments of the Accused Products have been imported.")) Staff says that they make this statement even after Complainant introduced evidence during the hearing that three substantial shipments of SL-7015 were recently imported by Respondents. (Citing CX-1578; CX-1579; Tr. at 271:2-273:17) Staff says that shipments have continued even after the hearing. Staff says that such clear efforts by Respondents to withhold relevant information regarding importations are a strong indication that they will continue these efforts in order to circumvent any exclusion order.

Analysis and Conclusions: I have found that, in this case, there is a violation of Section 337 in the importation of SL-1801, SL-1801 LFP, SL-1802, and SL-1802 LFP, but not for SL-7015 (*see* Sections IV.D, V.C, *supra*). If the Commission finds a violation of Section 337 in the importation of resins, specifically including one or more of the following: SL-1801, SL-1801 LFP, SL-1802, SL-1802 LFP, or SL-7015, I recommend that the Commission issue a general exclusion order directed to the resins that are made using trade secrets misappropriated from Complainant.

Pursuant to 19 U.S.C. § 1337(d), the Commission may issue either a limited or a general exclusion order. A limited exclusion order instructs the U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the patent at issue and that originate from a named respondent in the investigation. A general exclusion order instructs the CBP to exclude from entry all articles that are covered by the patent at issue, without regard to source.

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A general exclusion order is permitted in certain limited situations. Specifically, the statute provides:

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

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2); *see also Certain Hydraulic Excavators*, Inv. No. 337-TA-582, Commission Opinion (Feb. 3, 2009) (describing the standard for general exclusion orders). The Federal Circuit has noted that a complainant must meet “the heightened requirements of 1337(d)(2)(A) or (B)” before the Commission will issue a general exclusion order. *Kyocera*, 545 F.3d at 1358.¹⁰⁵

Circumvention - 19 U.S.C. § 1337(d)(2)(A)

This prong of the statute requires a showing that “a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons[.]” I find that Complainant has met the heightened requirement of Section 337(d)(2)(A) to support a finding that a general exclusion order is necessary to prevent circumvention of a limited exclusion order.

In Section IV.B, I find that the Respondents created a convoluted set of corporate structures and relationships that involve a number of entities that manufacture, distribute and import the accused products. In addition to the creation of this convoluted structure,

¹⁰⁵ This Recommended Determination does not address the “*Spray Pumps* factors,” and instead focuses on the language of the statute. *Certain Ground Fault Circuit Interrupters & Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 26, 2009).

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Complainant has introduced credible evidence that Respondents have taken steps to hide their activities from Complainant—for example, I find in Section IV.C.1.b, *supra*, that Respondents attempted to hide Mr. Xu’s involvement with Sino Legend by hiring him through ZZPE and Shunsai Trading. Complainant also has introduced credible evidence that Respondents have taken steps to hide the relationships between the parties origin of products. {

.}

(CX-250C at SIGITC0000176503)

Respondents’ argument that {

-.} The email states that {

} (CX-

250C at SIGITC0000176503) The email continues that {

-.} (*Id.* (emphasis added)) Thus, the email makes clear that {

-.}

{

.}

Based upon all of the foregoing, I find that Complainant has provided sufficient evidence to establish that the named Respondents would be likely to circumvent a limited exclusion order. Therefore, I recommend that the Commission issue a general exclusion order in this investigation pursuant to 19 U.S.C. § 1337(d)(2)(A).

Pattern of Violation - 19 U.S.C. § 1337(d)(2)(B)

This prong requires a showing that “there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” The pattern of violation must be separate from the accused infringement alleged in this investigation. *See Certain Self-Cleaning Litter Boxes & Components Thereof*, Inv. No. 337-TA-625, Commission Opinion at 56 (Apr. 28, 2009) (explaining that a “pattern of violation of this section” must include acts of importation unrelated to one of the named respondents); reversed on other grounds (*Lucky Litter LLC v. ITC*, 403 Fed. Appx. 490 (Fed. Cir. 2010)).

I find that Complainant has failed to demonstrate that it is entitled to a general exclusion order under Section 337(d)(2)(B). The Commission has found that complainants failed to show a “pattern of violation” when the complainants “failed to identify a single act of importation that is unrelated to one of the Respondents.” *Id.* In another investigation, the Commission found that infringement by four respondents did not establish the “pattern of violation” that warranted a

¹⁰⁶ In Section IV.C.1.b, I find that Mr. Yang is impeached as a witness.

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general exclusion order. *Certain Ground Fault Circuit Interrupters & Products Containing Same*, Inv. No. 337-TA-615, Comm'n Op. at 26 (Mar. 26, 2009); reversed in part on other grounds (*General Protecht Group, Inc.*, 619 F.3d 1303 (Fed. Cir. 2010)).

Here, Complainant has failed to introduce evidence of importation that is unrelated to one of the respondents. Based on the foregoing, I do not recommend a general exclusion order pursuant to 19 U.S.C. § 1337(d)(2)(B).

Length of Exclusion Order

The Commission has based the duration of exclusion orders in trade secrets investigations on a “reasonable research and development period,” or an “independent development time” for the trade secrets at issue. *See Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, Comm'n Op. at 67 (Nov. 1979); *Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Product*, Inv. No. 337-TA-148/169, Comm'n Decision Not to Review Initial Determination Finding Violation (“Sausage Casings”) at 19 (Dec. 1984).

I recommend that the exclusion order run for 10 years from the target date. Dr. Chao provided credible testimony that {
.
} (CX-1566C, Q. 78) In Section V.B, *supra*, I find that Dr. Putnam offered unrebutted testimony that Complainant maintains a market share of tackifier resins in excess of { } for the period of 2007 through 2011, and I find that Dr. Putnam’s testimony is corroborated by documentary evidence. In Section V.C, *supra*, I find that Dr. Putnam and Mr. Hart provided unrebutted testimony that prior to the importation by Respondents, the only competing entity was { } which offered tackifier resin product that was inferior in quality to Complainant’s. I find that Complainant would not have its position in the market if Complainant’s process for producing superior tackifier products could be

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developed { }, as Dr. Swager contends. (Tr. at 865:14-866:9) Additionally, I note that Dr. Swager's argument relies on his opinions that the trade secrets were generally known or readily ascertainable. I rejected these arguments for { } of the alleged trade secrets in Sections III.B.2-4, *supra*. I incorporate and reaffirm those findings and rationale here.

Respondents' arguments that Mr. Xu's confidentiality obligations { } are incorrect, as explained in Section III.B.2.a, *supra*. I incorporate and reaffirm those findings and rationale here.

Respondents' arguments that the exclusion order should be retroactively applied—i.e., treating the exclusion order as if it were already in force in 2006—are baseless. In Section V.C, *supra*, I find that Respondents have imported accused products as recently as 2012 and those importations were { }, in direct competition with Complainant's products. Because Respondents were imported products between 2006 and the present, I find that there is no basis to give them credit for the period between 2006 and the present.

Based upon all of the foregoing, if the Commission finds a violation of Section 337 in the importation of resins, I recommend that the Commission issue a ten year (starting on the target date) general exclusion order directed to resins that are made using trade secrets misappropriated from Complainant.

B. Limited Exclusion Order

Parties' Positions: The parties addressed general and limited exclusion orders together, as identified in Section VI.A.

Analysis and Conclusions: In Section VI.A, I recommend a general exclusion order be issued. If the Commission does not issue a general exclusion order, I recommend that the

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Commission issue a limited exclusion order that applies to Mr. Quanhai Yang, Ms. Ning Zhang, Sino Legend ZJG, Sino Legend BVI, Sino Legend Hong Kong, Sino Legend Marshall Islands, Sino Legend Holding Group, Gold Dynasty, Elite, Red Avenue BVI, Red Avenue Hong Kong, and PMI as well as all of their affiliated companies, parents, subsidiaries, other related business entities, and their successors or assigns and cover the resins that are made using trade secrets misappropriated from Complainant.

In Section IV.F, *supra*, I find that these respondents, including Mr. Quanhai Yang and Ms. Ning Zhang acted in concert to misappropriate Complainant's trade secrets and violate 19 U.S.C. § 1337(a)(1)(A). As a result, I recommend that any limited exclusion order apply to individual respondents Mr. Quanhai Yang and Ms. Ning Zhang. As noted in Section IV.B, *supra*, Complainant has failed to introduce evidence that shows that individual respondent Mr. Thomas Crumlish, acting in his *individual* capacity (as opposed to his official capacity as an officer in one or more of the respondent corporations), acted in concert to misappropriate Complainant's trade secrets and violate 19 U.S.C. § 1337(a)(1)(A).

I recommend that any exclusion order include a certification provision. The Commission has explained that “[c]ertification provisions are generally included in exclusion orders where Customs is unable to easily determine by inspection whether an imported product violates a particular exclusion order.” *Certain Semiconductor Chips With Minimized Chip Package Size & Products Containing Same*, Inv. No. 337-TA-605, Commission Opinion (July 29, 2009) (including a certification provision in an exclusion order because of the difficulty of determining whether imported products contain the infringing chipsets); *see also Certain Ground Fault Circuit Interrupters & Products Containing Same*, Inv. No. 337-TA-615, Commission Opinion (Mar. 26, 2009) (noting that a certification provision “gives U.S. Customs & Border Protection

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the authority to accept a certification from the parties that goods being imported are not covered by the exclusion order.”). Here, because Customs would not be able to easily determine by inspection whether or not an imported product violates the exclusion order, I find that a certification provision is appropriate.

C. Bonding

Complainant’s Position: Complainant says that the amount of the bond must be sufficient to protect the complainant from any injury during the Presidential review. (Citing 19 U.S.C. § 1337(j)(3)) Complainant continues that {

.} Complainant says that {

.} (Citing CX-0104C; CX-

0837C at 2, 5) Complainant says that { }, the

bond amount should be set at 122 percent of entered value.

Complainant asserts that if the Commission determines that a reliable price comparison is not possible, there is no established royalty applicable to the accused products that would allow the Commission to set a bond based on a reasonable royalty. Complainant says that it has not licensed its trade secrets to anyone other than its foreign affiliates. (Citing CX-1567C, Qs. 122, 125; CX-1132C at 2; CX-1133C at 1) Complainant continues that it is not possible to determine the royalty Complainant could reasonably seek from Respondents if it decided to license Respondents’ imported products. Complainant says that a bond based on a reasonable royalty is not possible.

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Complainant argues that I should recommend a bond of 122% of entered value {
} or alternatively a bond of 100% because a reasonable royalty
unavailable.

Respondents' Position: Respondents assert that any bond should be limited to an
amount "sufficient to protect the complainant from any injury" during the Presidential review
period, which ends in December 2013. (Citing 19 U.S.C. § 1337(j)(3); Order No. 20
(maintaining target date of Oct. 25, 2013)) Respondents say that {

} (Citing CX-
1588C at 1-2, 5 {

}; Tr. at 543:3-545:22) Respondents continue that
{

.} (Citing Tr. at
912:13-21; CX-1357.1C at 76:5-12, 81:3-9; CX-0336C at 1) Respondents reason that because
Complainant is already protected from any injury that could occur during the Presidential review
period, there is no basis for a bond.

Respondents say that if a bond were to be applied, however, Complainant has
miscalculated it. Respondents say that the 133% bond Complainant advocated in its pre-hearing
brief would be far higher than necessary to, in Complainant's words, "eliminate this differential
between the price of the domestic product and the price of the imported, misappropriated
product." (Citing CIB at 414) Respondents say that the bond would eliminate more than the
entire price of the goods in question. Respondents continue that because Respondents' sales
were for qualifying purposes, and any alleged Respondent commercial offers for sale were never
consummated, a reliable price comparison is not possible. Respondents say that the bond should

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be set at a reasonable royalty. (Citing *Certain Digital Televisions and Certain Products Containing Same and Methods of Using Same*, Inv. No. 337-TA-617, Comm'n Op. at 18-19 (Apr. 23, 2009))

Respondents assert that a reasonable royalty for bonding purposes would be 2.5%.

Respondents say that {

} (Citing *id.*) Respondents add that Complainant's expert Dr.

Putnam testified that {

.} (Citing CX-1567C, Q. 122 {

}); CPHB (citing

Complainant's license agreements as basis for bond)) Respondents reason that because

{

,} any bond should be set at no more than 2.5% of the

entered value of the articles.

Respondents say that Staff selects { } 3.0%, {

;} but Respondents respectfully submit that 2.5%, {

,} is the more relevant metric. (Citing CX-

0341C)

Staff's Position: Staff asserts that if the Commission determines to enter an exclusion order and/or cease and desist order in this investigation, then affected articles shall still be entitled to entry and sale under bond during the 60-day Presidential review period. Staff says that the amount of such bond must "be sufficient to protect the complainant from any injury." (Citing 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3)) Staff says that the

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Commission typically sets the Presidential review period bond based on the price differential between the imported or infringing product, or based on a reasonable royalty. (Citing *Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24, (December 15, 2995) (setting bond based on price differentials); *Certain Plastic Encapsulated Integrated Circuits*, Inv. No. 337-TA-315, Comm'n Op. on Issues Under Review and on Remedy, the Public Interest, and Bonding, at 45, USITC Pub. 2574 (Nov. 1992) (setting the bond based on a reasonable royalty)) Staff continues that where the available pricing or royalty information is inadequate, the bond may be set at 100% of the entered value of the accused product. (Citing *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Products Containing Same*, Inv. No. 337-TA-372, Comm'n Op. on Remedy, the Public Interest and Bonding at 15, USITC Pub. 2964 (May 1996))

Staff says that a bond should be set at a reasonable royalty of 3% of the entered value of the Sino Legend ZJG resins. (Citing CX-1567C, Qs. 121-125 {

}; CX-0341C (Exh. 7 to Putnam Expert Report)) Staff continues that if Sino Legend ZJG and any other Respondents were licensed to the SP-1068 trade secrets, Complainant would expect to be paid a royalty of 3% based on the sales of licensed tackifier resins.

Analysis and Conclusions: I have found that, in this case, there is a violation of Section 337 in the importation of SL-1801, SL-1801 LFP, SL-1802, and SL-1802 LFP, but not for SL-7015 (see Section V.C, *supra*). If the Commission finds a violation of Section 337 in the importation of resins, I recommend that the Commission impose a bond of {

.}

The administrative law judge and the Commission must determine the amount of bond to

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be required of a respondent, pursuant to section 337(j)(3), during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to order a remedy. The purpose of the bond is to protect the complainant from any injury.

19 CFR §§ 210.42(a)(1)(ii), 210.50(a)(3). The complainant has the burden of supporting any bond amount it proposes. *Certain Rubber Antidegradants, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-533, Comm'n Op., 2006 ITC LEXIS 591 (Jul. 21, 2006).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product 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, Comm'n Op. a 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995).

Here, Complainant has provided unrebutted evidence that {

.} Dr. Putnam testified that {

.} (CX-1567C, Q. 174) Dr.

Putnam's testimony is corroborated by CX-1133C, a spreadsheet showing prices of Complainant's products. (CX-1133C at 2, 5) {

}

{

}

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Respondents' argument that this price differential is inapplicable because its prices were not for commercial manufacturing but for qualifying purposes is not persuasive. Respondents have cited no evidence that their price would be higher (thereby reducing the cost differential) for commercial transactions. {

} (CX-1133C) Based upon all of the foregoing, if the Commission finds a violation of Section 337 in the importation of SL-1801, SL-1801 LFP, SL-1802, SL-1802 LFP, and SL-7015, I recommend that the Commission issue a bond of {
.

VII. MATTERS NOT DISCUSSED

This Initial Determination's failure to discuss any matter raised by the parties, or any portion of the record, does not indicate that it has not been considered. Rather, any such matter(s) or portion(s) of the record has/have been determined to be irrelevant, immaterial or meritless. Arguments made on brief which were otherwise unsupported by record evidence or legal precedent have been accorded no weight.

VIII. CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction, *in rem* jurisdiction, and *in personam* jurisdiction.
2. There has been an importation into the United States of the accused SL-1801, SL-1801 LFP, SL-1802, SL-1802 LFP, and SL-7015 resins, which are the subject of the alleged unfair trade allegations.
3. I find that the following are trade secrets: {

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} the overall process flow.

4. I find that the following are not trade secrets: {

}

5. I find that the trade secrets addressing {

} the overall process flow were misappropriated by individual Respondents Mr.

Quanhai Yang and Ms. Ning Zhang and the following Respondents, each of which is controlled by individual Respondents Mr. Quanhai Yang and Ms. Ning Zhang: Sino Legend ZJG, Sino Legend BVI, Sino Legend Hong Kong, Sino Legend Marshall Islands, Sino Legend Holding Group, Gold Dynasty, Elite, Red Avenue BVI, Red Avenue Hong Kong, and PMI.

6. I find that the domestic industry exists and was injured as a result of the importation of SL-1801, SL-1801 LFP, SL-1802, and SL-1802 LFP resins that are made using the misappropriated trade secrets.

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IX. ORDER

Based on the foregoing, and the record as a whole, it is my Final Initial Determination that there is a violation of 19 U.S.C. § 1337(A)(1)(a) in the importation into the United States, sale for importation, and the sale within the United States after importation of SL-1801, SL-1801 LFP, SL-1802, SL-1802 LFP.

I hereby **CERTIFY** to the Commission my Final Initial and Recommended Determinations together with the record consisting of the exhibits admitted into evidence. The pleadings of the parties filed with the Secretary, and the transcript of the pre-hearing conference and the hearing, as well as other exhibits, are not certified, since they are already in the Commission's possession in accordance with Commission rules.

It is further **ORDERED** that:

In accordance with Commission Rule 210.39, all material heretofore marked *in camera* because of business, financial and marketing data found by the administrative law judge to be cognizable as confidential business information under Commission Rule 201.6(a), is to be given *in camera* treatment continuing after the date this investigation is terminated.


The initial determination portion of the Final Initial and Recommended Determination, issued pursuant to Commission Rule 210.42(a)(1)(i), shall become the determination of the Commission sixty (60) days after the service thereof, unless the Commission, within that period, shall have ordered its review of certain issues therein, or by order, has changed the effective date of the initial determination portion. If the Commission determines that there is a violation of 19 U.S.C. § 1337(a)(1), the recommended determination portion, issued pursuant to Commission Rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission Rule 210.50(a).

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On or before June 28, 2013, the parties shall submit to the Office of Administrative Law Judges *a joint statement* regarding whether or not they seek to have any portion of this document deleted from the public version. The parties' submission shall be made by hard copy and must include a copy of this Initial Determination with red brackets indicating any portion asserted to contain confidential business information to be deleted from the public version. The parties' submission shall include an index identifying the pages of this document where proposed redactions are located. The parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.

Issued: 6/17/2013
DATE



Robert K. Rogers, Jr.
Administrative Law Judge

**CERTAIN RUBBER RESINS AND PROCESSES FOR
MANUFACTURING SAME**

337-TA-849

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **INITIAL DETERMINATION** has been served by hand upon the Commission Investigative Attorney, John Shin, Esq., and the following parties as indicated, on **AUG 16 2013**



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

On Behalf of Complainant SI Group, Inc.:

Lawrence T. Kass, Esq.
MILBANK, TWEED, HADLEY & MCCLOY, LLP
One Chase Manhattan Plaza
New York, NY 10005

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

For Respondents Sino Legend (Zhangjiagang) Chemical Co., Ltd.; Sino Legend Holding Group, Inc.; Sino Legend Holding Group Limited and Hong Kong Sino Legend Group, Ltd. (collectively "Sino Legend"); Red Avenue Chemical Corp. of America and Red Avenue Chemical Co. Ltd.; Red Avenue Group (collectively "Red Avenue"); Precision Measurement International LLC; Shanghai Lunsai International Trading Company; Thomas R. Crumlish, Jr.; Ning Zhang; Quanghai Yang:

Michael R. Franzinger, Esq.
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

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

PUBLIC MAILING LIST

Lori Hofer, Library Services
LEXIS-NEXIS
9473 Springboro Pike
Miamisburg, OH 45342

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

Kenneth Clair
Thomson West
1100 Thirteen Street, NW, Suite 200
Washington, DC 20005

- Via Hand Delivery
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- Other: _____