PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN INDUSTRIAL AUTOMATION SYSTEMS AND COMPONENTS THEREOF INCLUDING CONTROL SYSTEMS, CONTROLLERS, VISUALIZATION HARDWARE, MOTION CONTROL SYSTEMS, NETWORKING EQUIPMENT, SAFETY DEVICES, AND POWER SUPPLIES**	**Inv. No. 337-TA-1074**

ORDER NO. 30: DENYING RESPONDENT RADWELL INTERNATIONAL, INC.'S MOTION FOR SUMMARY DETERMINATION OF NO TORTIOUS INTERFERENCE

(June 21, 2018)

I. BACKGROUND

On October 16, 2017, the Commission instituted this investigation based on a complaint by Rockwell Automation, Inc. ("Rockwell") for alleged violations of section 337 "based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain industrial automation systems and components thereof including control systems, controllers, visualization hardware, motion and motor control systems, networking equipment, safety devices, and power supplies" under subsection (a)(1)(B) and (C) of section 337 by reason of infringement of various copyrights and trademarks, and under subsection (a)(1)(A) of section 337 "by reason of unfair methods of competition[] and unfair acts, the threat or effect of which is to destroy or substantially injure an industry in the United States." 83 F.R. 48113-48114 (Oct. 16, 2017). Among other respondents, the complaint names Radwell International, Inc. ("Radwell").

With respect to subsection (a)(1)(A), Rockwell alleges that Radwell engages in unfair competition by tortiously interfering with "the known contracts between Rockwell and its authorized foreign distributors," and by "the use of fraud and misrepresentation in the acquisition of the Rockwell products that they resell." Compl. at 3. Rockwell alleges that Radwell's alleged unfair trade practices "have caused substantial injury and threaten further injury to Rockwell's domestic industry, causing price erosion, loss of revenue and a host of other harms." *Id.*

Rockwell also alleges that some or all of the respondents have violated section 337(a)(1)(A) by "inducing hundreds—perhaps thousands—of breaches of the end user license agreement ('EULA') that all end users of Rockwell Copyright Products must enter into prior to downloading the necessary Rockwell copyrighted firmware." *Id.* Rockwell alleges that the EULA "only allows the download of the necessary firmware if the Rockwell product in question was purchased from an authorized distributor," and that the purchase price of the product includes permission to download and install the firmware. *Id.* Rockwell alleges that end users obtaining Rockwell products from respondents, "believing they have purchased the goods from an authorized distributor, agree to the EULA," thereby "obtaining the firmware for nothing . . . in breach of the EULA." *Id.* at 3-4. Rockwell alleges that "[t]his unfair trade practice has caused substantial injury and threatens further injury to Rockwell's domestic industry, causing price erosion, loss of revenue and a host of other harms." *Id.* at 4.

On May 23, 2018, Radwell filed a motion seeking summary determination of no tortious interference because Rockwell "has failed to make a showing sufficient to establish, with respect to imported articles, that Rockwell suffered pecuniary loss as a result of Radwell's alleged interference." Motion Docket No. 1074-020 (the "motion"). On June 4, 2018, Rockwell filed an

opposition. Also on that date, Commission Staff filed a response in opposition. On June 7, 2018, Radwell filed a brief in reply.

Radwell argues that in addition to failing to "establish" that Rockwell suffered pecuniary loss, Rockwell cannot satisfy the damages element of tortious interference "as a matter of law, because it profited from the sale of the products at issue." Motion at 1. Radwell maintains that Rockwell "has failed to establish that any Radwell customer accepted and subsequently breached the terms of Rockwell's EULA by downloading Rockwell firmware in connection with an imported Allen Bradley product purchased from Radwell." *Id.* at 1-2.[1]

In its opposition, Rockwell states that "Radwell's business model relies on purchasing gray market Rockwell products from unauthorized sources abroad through fraudulent and deceptive means for resale in the United States," Opp. at 4 (citing Mot. Ex. A "Garvey Expert Report"), and maintains that Rockwell has identified, with sufficient specificity to withstand Radwell's motion for summary determination, damage flowing from Radwell's alleged tortious interference. Rockwell argues that the profit it made on "gray market" sales does not bar its tortious interference claim, as a matter of law. Rockwell states further that there is evidence in the record of a contractual relationship between Rockwell and the end users of its products, as well as damage from the alleged breach of that relationship.

Staff says the record contains specific examples of Rockwell's alleged pecuniary loss tied to unauthorized sales of imported products. In particular, Staff points to certain Rockwell responses to contention interrogatories. Staff says Radwell has been placed on notice that Rockwell contends it lost money due to "Radwell's acquisition of a product overseas, the sale of

[1] "Allen Bradley" is a brand name for Rockwell products. Mot. Ex. 9 at 51.

that product to its customer in the United States, and a comparison of those prices to those offered by Rockwell to its [authorized distributors] both overseas and in the United States." Staff Response at 6. Staff says it should not be a "surprise" to Radwell "if Rockwell were to provide evidence of specific transactions in its pre-trial brief or the evidentiary hearing." *Id.*

In its reply brief, Radwell says specific evidence of pecuniary loss cannot "be presented for the first time at hearing." Reply at 1. Radwell says that Rockwell to date has presented only legal argument to support its damage theories and that "there is no evidence—none—that Rockwell's net profit margins on Allen Bradley products are actually lower in the United States than on those sold abroad." *Id.* at 3. Radwell says there is no evidence of record "substantiating the three specific examples in Rockwell's contentions," and that Rockwell should not be permitted to "ambush" Radwell at trial by presenting new evidence for the first time. *Id.* at 3-4. As to the EULA, Radwell says there is no evidence "to show that any customer to which Radwell sold the product ever actually downloaded and installed the firmware." *Id.* at 4.

II. DISCUSSION

A. Summary Determination

Commission Rule 210.18(b) states that the summary "determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b). The rule is patterned on Fed. R. Civ. P. 56. *See Certain Carbon and Alloy Steel Products ("Carbon and Alloy Steel"),* Inv. No. 337-TA-1002, Initial

Determination, 2017 WL 5167413 at *11, *not reviewed* by Commission Notice, 2017 WL 6434923 (Nov. 1, 2017).[2]

Under Rule 56, summary judgment is required where a party fails to make a showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The burden of the moving party may be discharged by pointing out to the court the lack of evidence supporting the non-moving party's case. *Id.* at 325. Where the non-moving party bears the burden of proof at trial, that party must produce more than a "scintilla of evidence . . . ; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986).

If an element of a cause of action deemed essential as a matter of law cannot be proved, summary judgment is appropriate regardless of disputes over other issues. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322-23. Deciding which facts are material requires "'analyzing the logic of the case.'" *Carbon and Alloy Steel,* 2017 WL 5167413 at *12 (quoting William W. Schwarzer, *et al.*, Federal Judicial Center, "The Analysis and Decision of Summary Judgment Motions," 139 F.R.D. 441, 477 (1992)). "By this process, courts can ascertain which issues may be dispositive of the case, rendering other factual disputes immaterial." *Id.*

---

[2] Radwell's suggestion that Rockwell must separately plead harm as a distinct element of damage for tortious interference, rather than relying on its evidence of substantial injury under section 337(a)(1)(A), is inconsistent with summary judgment practice. Under Rule 56, the court must decide whether there is a triable issue of fact based on the record as a whole. *See generally, e.g., Faust v. Pemco Aeroplex, Inc.,* 226 F. App'x 887, 889 (11th Cir. 2007) ("In the context of summary judgment, we must look at the record as a whole, reviewing all of the evidence in the record.") (quoting *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 151 (2000)).

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.