

August 30, 2016

VIA ELECTRONIC FILING

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

Re: *Certain Industrial Control System Software, Systems Using Same, and Components
Thereof*, Inv. No. 337-TA-____, Docket No. 3165

Dear Secretary Barton:

Proposed Respondent 3S-Smart Software Solutions, GmbH (“3S”) hereby responds to the August 29 letter submitted by Complainant Rockwell Automation, Inc. (“Rockwell”). Though Rockwell’s letter relies heavily on 3S’s alleged physical shipments, Rockwell failed to adequately plead in its Complaint the allegations of physical importation upon which it is now attempting to rely. Tellingly, Rockwell fails to address this shortcoming, or 3S’s request that Rockwell amend its Complaint, in its letter. If Rockwell is only seeking relief against the alleged physical importations, Rockwell should amend its Complaint to properly plead those allegations against 3S, thus narrowing the scope of the investigation—and any remedy that may issue—to the importation and sale for importation of physical articles. Moreover, Rockwell provides no response to 3S’s request to limit the Investigation to sale for importation or importation of physical articles. 3S reiterates that request and submits that it would conserve substantial public and private resources, while not allowing the ITC to be used to threaten business practices that do not constitute violation of Section 337.

Furthermore, contrary to Rockwell’s allegations, the issue of whether 3S’s actions can constitute a violation of Section 337 is dispositive. While Rockwell now attempts to point to 3S’s limited physical shipments, saying nothing about 3S’s main business of providing software digitally pursuant to a license, there are dispositive issues regarding those physical shipments as well as Rockwell’s digital provision of software. Specifically, whether the provision of software, delivered digitally and/or sent physically as a courtesy, pursuant to a license can constitute importation or sale for importation is a dispositive issue that has the potential to eliminate the need to conduct this Investigation or, at a minimum, dramatically alter the scope of the Investigation and any remedy that may issue.

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Regarding the standard essentiality of the asserted patents, Rockwell's argument that even if the OPC Foundation issued a binding determination of essentially, "Rockwell could simply withdraw from the OPC Foundation and continue to assert its patents against 3S" does not change the fact that Rockwell assented to the Foundation's IPR Policy promising to disclose essential patents. Withdrawal from the Foundation would not remove its obligation to fulfill that promise. Moreover, Rockwell's threat to withdraw from the OPC Foundation is, at best, just that—a threat. As a founding member of the Foundation, and as a major participant in a market that requires the interoperability guaranteed by compliance with the OPC Foundation's standards, withdrawing is not practical. Put simply, Rockwell's threat that it might withdraw at some point in the future is irrelevant to 3S's request that the Commission decline to institute the requested investigation until the OPC Foundation completes its review of the patents at issue or, in the alternative, direct the ALJ to issue an early determination under the Pilot Program regarding whether all asserted patents are standards-essential and are encumbered by mandatory licensing obligations pursuant to the OPC Foundation's IP Policy.

Sincerely,

A handwritten signature in blue ink, appearing to read "Paul M. Bartkowski". The signature is fluid and cursive, with a prominent initial "P" and "B".

Paul M. Bartkowski

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **LETTER TO THE HONORABLE LISA R. BARTON** was served to the parties, in the manner indicated below, this 30th day of August 2016:

The Honorable Lisa R. Barton

Secretary

U.S. INTERNATIONAL TRADE COMMISSION

500 E Street, SW, Room 112-A

Washington, DC 20436

VIA ELECTRONIC FILING

COUNSEL FOR COMPLAINANT ROCKWELL AUTOMATION, INC.:

Paul J. Tanck, Esq.

Gregory J. Carbo, Esq.

Neal J. McLaughlin, Esq.

CHADBOURNE & PARKE LLP

1301 Avenue of the Americas

New York, NY 10019

VIA ELECTRONIC MAIL

(ptanck@chadbourne.com)

(gcarbo@chadbourne.com)

(nmclaughlin@chadbourne.com)

David F. Nickel

James B. Altman

Matthew N. Duescher

FOSTER, MURPHY, ALTMAN & NICKEL, PC

1899 L Street, NW, Suite 1150

Washington, DC 20036

(dnickel@fostermurphy.com)

(jaltman@fostermurphy.com)

(mduescher@fostermurphy.com)

PROPOSED RESPONDENTS:

Advantech Corporation

380 Fairview Way

Milpitas, CA 95035

VIA FEDERAL EXPRESS

Advantech Co., Ltd.

No. 1, Alley 20, Lane 26

Rueiguang Road, Neihu District,

Taipei City, Taiwan

VIA FEDERAL EXPRESS

/s/ Patricia L. Cotton, Sr. Paralegal

ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.