2025-1616

United States Court of Appeals for the Federal Circuit

VICOR CORPORATION,

Appellant,

– v. –

INTERNATIONAL TRADE COMMISSION,

Appellee,

FII USA INC., INGRASYS TECHNOLOGY INC.,

Intervenors.

On Appeal from the United States International Trade Commission in No. 337-TA-1370

CORRECTED NON-CONFIDENTIAL BRIEF FOR APPELLANT

DINIS CHEIAN
SUSMAN GODFREY LLP
One Manhattan West
395 Ninth Avenue, 50th Floor
New York, New York 10001
(212) 336-8330
dcheian@susmangodfrey.com

OLEG ELKHUNOVICH
SUSMAN GODFREY LLP
1900 Avenue of the Stars, Suite 1400
Los Angeles, California 90067
(310) 789-3100
oelkhunovich@susmangodfrey.com

Counsel for Appellant

(For Continuation of Appearances See Inside Cover)

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CP COUNSEL PRESS (800) 4-APPEAL • (714680)

LOUIS S. MASTRIANI
BUCHANAN INGERSOLL & ROONEY PC
1700 K Street, NW, Suite 300
Washington, DC 20006
(202) 452-7900
louis.mastriani@bipc.com

DANIELLE NICHOLSON
STEVEN SEIGEL
GENEVIEVE VOSE WALLACE
SUSMAN GODFREY LLP
401 Union Street, Suite 3000
Seattle, WA 98101
(206) 516-3880
dnicholson@susmangodfrey.com
sseigel@susmangodfrey.com
gwallace@susmangodfrey.com

Counsel for Appellant

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CONFIDENTIAL MATERIAL OMITTED

The material omitted from pages 19, 20, 22, and 23 contains descriptions of confidential price terms from the parties' commercial transactions, namely: the quantity and the per-unit price.

The materials that are redacted in the Addendum are confidential versions of the Initial Determination, Final Determination, Cease and Desist Orders, and Limited Exclusion Order, which were filed with redactions pursuant to the Protective Order entered in the proceeding before the International Trade Commission. The redacted information constitutes the parties' Confidential Business Information (CBI) as defined under that Protective Order and includes, e.g., confidential licensing terms, confidential transaction details, confidential part and product numbers, and confidential source code and technical documentation relating to the products at issue in the case, including those of both Vicor and the Respondents.

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STATEMENT OF RELATED CASES

No other appeal in or from the same proceeding in the United States International Trade Commission ("ITC") is or was previously before this Court or any other appellate court. The following pending case is directly related to the issue on appeal, is stayed pending the completion of the ITC proceedings on appeal, and may be affected by the decision in this appeal: *Vicor Corp. v. FII USA Inc.*, *Ingrasys Tech. Inc., & Ingrasys Tech. USA Inc*., No. 1:24-cv-10060-LTS (D. Mass.).

JURISDICTIONAL STATEMENT

The ITC had jurisdiction pursuant to 19 U.S.C. § 1337. The ITC issued its Final Determination on February 13, 2025. Appx4. Vicor timely noticed its appeal on April 2, 2025. Appx7689. This Court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(6).

INTRODUCTION

Vicor Corporation ("Vicor") is a publicly traded, Massachusetts company that develops, designs, manufactures, and sells efficient, high-density power converters. Vicor's sophisticated products power some of the world's most advanced technologies, including artificial intelligence and hyperscale computing systems. Vicor learned that foreign competitors were making copycat versions of certain Vicor patented power converters and selling them to contract manufacturers, including the Intervenors in this appeal, to make computing systems that were then imported into the United States. Vicor filed a complaint with the U.S. International Trade Commission ("ITC" or "Commission") under Section 337 of the Tariff Act of 1930 and obtained a finding of infringement, a limited exclusion order banning infringing power converters from being imported into the United States, and cease and desist orders prohibiting certain conduct by the named Respondents.

The ITC's decision largely favored Vicor. But it erred on one critical issue: It found that the Intervenors in this appeal, both affiliates of the contract manufacturing giant Foxconn, obtained a license to Vicor's patents, and thus were not subject to the exclusion order. Foxconn's license defense is the sole issue on appeal.

To summarize Foxconn's license defense: long after the start of the ITC Investigation, the Foxconn Respondents—including Intervenors FII USA Inc. ("FII") and Ingrasys Technology, Inc. ("Ingrasys") (together, "Foxconn")—argued

that Foxconn could not infringe Vicor's patents because Foxconn had obtained, for free, a license to Vicor's valuable patent rights. To be clear, Foxconn did not argue that Foxconn and Vicor had negotiated at arm's length and executed a patent license agreement. Instead, Foxconn argued that it had secured a license by way of boilerplate terms and conditions that Foxconn incorporated into purchase orders for Vicor's power converters.

More specifically: Foxconn and Vicor had engaged in 700+ transactions over many years, in which Vicor sold power converters to Foxconn. At the beginning of every project, Vicor would send Foxconn a price quote which detailed the price for a Vicor component to be used in the project. When Foxconn wanted to purchase Vicor components, it would send Vicor a purchase order ("PO") containing boilerplate terms and conditions favorable to Foxconn (the "Foxconn Terms"). One of the Foxconn Terms purported to grant a royalty-free license to all intellectual property rights embodied in any goods Foxconn bought (the "free-license" clause). In response to every Foxconn PO, Vicor responded with a sales form (called a "Sales Order Acknowledgement," or "SOA") that expressly rejected the Foxconn Terms. Vicor's SOAs also stated that every sale was made subject to Foxconn's assent to *Vicor*'s terms and conditions (the "Vicor Terms"); that Vicor could accept a PO only by sending an SOA; and that Vicor granted no license to its intellectual property rights by selling its goods to a buyer like Foxconn.

Despite Vicor's consistent practice of responding to every PO with an SOA rejecting the Foxconn Terms, Foxconn argued that there were two transactions in which Vicor nevertheless "accepted" the Foxconn Terms contained in the PO—including the free-license clause—via email *before* sending a responsive SOA.

According to Foxconn, one "acceptance" (of FII PO No. 4600000176 or "PO 176") occurred when a Foxconn representative asked for an "ETA" and an "update" on shipment dates, and a Vicor sales representative responded with estimated shipment dates that differed from Foxconn's requested delivery date by over six months. The other "acceptance" (of Ingrasys PO No. 4500273265 or "PO 265") purportedly occurred after a Foxconn representative asked for the "latest delivery date," and a Vicor sales representative responded with a "scheduled" shipment date that diverged from the delivery date by over seven weeks. By these emails, Foxconn argued that Vicor bound itself to all of the Foxconn Terms, including the one that gave Foxconn a free license to Vicor's patents. As a result, Foxconn could not infringe Vicor's patents and thus could not violate Section 337 of the Tariff Act of 1930.[1]

Foxconn's license defense was so outlandish that, at the close of the 5-day evidentiary hearing, the Administrative Law Judge ("ALJ") stated:

[1] The Commission Office of Unfair Import Investigations ("OUII") Investigative Staff consistently agreed with Vicor that Foxconn never obtained a license to Vicor's Patents. Appx1314; Appx5354; Appx6024.

> The only thing I have to comment on is that *I am less impressed now, having heard the evidence, regarding the license by purchase order defense than I was even before the hearing*. I'm really -- I was struck by the fact that, after 700 purchase orders, suddenly the Foxconn group decides that it's going to assert a license, that seems a bit of a stretch.

Appx10976:10-16. Following the hearing, the ALJ rejected Foxconn's license defense in the Initial Determination ("ID"), holding that Vicor had not "accepted" the Foxconn Terms and had not granted Foxconn a license to Vicor's patents.

But, upon review of the ID, the Commission fell prey to Foxconn's erroneous theory of contract formation and reversed the ID. Applying an interpretation of the Uniform Commercial Code ("UCC") that no court has ever adopted, the Commission incorrectly concluded that Vicor *had* given away its patent rights to Foxconn.

The Commission reversibly erred for three reasons. *First*, its decision rests on a fundamental misunderstanding and misapplication of the law of contract formation in "battle of the forms" transactions like this one, where a buyer and a seller each send competing terms that conflict with one another. The applicable provision of the Massachusetts UCC (Mass. Gen. Laws Ann. ch. 106, § 2-207), and Massachusetts precedent interpreting it, allow sellers like Vicor to protect against a buyer's one-sided terms by sending their own responsive form and making the seller's "acceptance" of a buyer's purchase order "expressly conditional" on the buyer's assent to the seller's terms. That is exactly what Vicor did. And although no contract

was formed by the parties' writings, the parties proceeded to exchange the goods. Under UCC § 2-207(3), the resulting contract thus consists of those terms on which the parties' writings agree, while the conflicting terms (including Foxconn's free-license clause) are excluded.

Second, the Commission's theory that Vicor could "accept" FII's PO 176 and thus all the Foxconn Terms by email was legally and factually defective for at least five independent reasons:

1. the email relied on by the Commission was not a "definite and seasonable expression of acceptance" as required under UCC § 2-207 because it provided only *estimated* shipping dates and contained no language of acceptance;
2. the Commission failed to properly consider the parties' course of dealing, which confirmed that Vicor did not accept POs by email (only by an SOA);
3. the Commission failed to properly consider that the estimated shipping dates in the Vicor emails differed substantially from the Foxconn-specified delivery dates, confirming the emails could not have constituted an acceptance;
4. the Commission ignored that the Foxconn POs expressly disavow that they are binding offers that any seller can accept; and
5. the Commission erroneously concluded that Vicor's email was a "written confirmation[s]" under UCC § 2-207(1) because a "written confirmation"

exists only when there is prior agreement to confirm—and there indisputably was no prior agreement here.

Third, the Commission also erred in extending the free license to Ingrasys based on Ingrasys's PO 265 because the correspondence upon which Foxconn relied demonstrates no acceptance by Vicor occurred, and no license was granted, for the same reasons as stated above regarding PO 176.[2]

Rules of contract formation under the UCC are long settled. And under these long-settled rules, the undisputed facts here permit only one conclusion: Vicor never gave Foxconn a free license to Vicor patents. The Commission's ruling ignored these rules. And in so doing, it transformed the UCC into an economically devastating weapon—one in which a seller might inadvertently bind itself to commercially nonsensical one-sided terms merely because one of its sales representatives responded to a contract manufacturer's inquiry by email providing estimated shipping dates. The Commission's ruling on Foxconn's license defense is erroneous and must be reversed.

STATEMENT OF THE ISSUES

In every sales transaction, Foxconn and Vicor exchanged competing forms, each expressly conditional on the other party's assent to its terms.

[2] The Commission further erred by failing to identify what Vicor communication constituted the purported "acceptance" of PO 265.

1. Did the Commission err in holding that Vicor had given Foxconn a royalty-free license to Vicor's patents, where Mass. Gen. Laws Ann. ch. 106, § 2-207 requires that all conflicting terms in contracting parties' competing forms be excluded from the resulting contract?

2. Did the Commission err in holding that Vicor accepted Foxconn's royalty-free license term by email?

STATEMENT OF THE CASE

I. Vicor is an innovator in power-conversion technology, with valuable patents on its non-isolated bus converter module (NBM).

Vicor is an American innovator, designer, and manufacturer of power converters. From its founding in 1981, Vicor has relentlessly focused on improving power density and efficiency in power-conversion technology. Appx11563, Appx11564-67, Appx11618-19. Vicor is headquartered in Andover, Massachusetts, where its 320,000 square-foot, automated manufacturing facility and approximately 1,000 employees are also located. Appx11563.

Vicor is at the forefront of high-density power systems that fuel the cutting edge of recent innovations: artificial intelligence and cloud computing systems, artificial intelligence accelerators, tensor processing units, and data center servers, among other technical applications. Appx17, Appx11563, Appx11566-70, Appx11584. Vicor is publicly traded on NASDAQ, and, in addition to its headquarters in Massachusetts, has offices throughout the United States, including in California, Illinois, Texas, Rhode Island, and Oregon. Appx11563.

One of Vicor's significant contributions to power-conversion technology is its development of high-density, high-efficiency power converters called non-isolated bus converter modules, or "NBMs." Appx11568-60. Vicor's NBMs achieved a 10-fold increase in power density relative to Vicor's earlier generation products. Appx11571. Leading technology companies took notice of Vicor's

technological advances and began incorporating NBMs into their high-performance computing systems starting in 2017. Appx11584-86.

To meet these companies' demands, Vicor sells its power converters directly to certain contract manufacturers that procure parts (like Vicor's NBMs) and assemble them into a final computing system that is delivered to end-customers. As relevant here, Foxconn affiliates FII and Ingrasys—Respondents in the ITC Investigation and Intervenors on appeal—are among the contract manufacturers that purchased NBMs for incorporation into high-performance computing systems for leading American technology companies. Appx12183-84, Appx11610-11.

To support its end-customers, Vicor commenced and maintained a five-year commercial relationship with Foxconn that involved over 700 transactions in which Foxconn purchased NBMs from Vicor (approximately 400 of which preceded the transactions at issue on appeal). Appx12193. Foxconn then incorporated Vicor's NBMs into end-customers' computing systems. Appx12231, Appx11603, Appx12193.

Because Vicor's competitive edge comes from its innovation, Vicor protects its intellectual property with patents. Vicor has secured over 200 patents, some of which are embodied in Vicor's NBMs. Appx11567. In the ITC Investigation, Vicor asserted three such patents: U.S. Patent Nos. 9,516,761 (the "'761 Patent");

9,166,481 (the "'481 Patent"), and 10,199,950 (the "'950 Patent") (collectively, the "Asserted Patents"). Appx453.

Vicor's patents are valuable. As one example, one licensee to Vicor's patents has paid Vicor a royalty per unit of current or power that its licensed power converters provide, resulting in substantial payments under the license. Appx12001, Appx11604-05; Appx279; Appx11607. In fact, Vicor's total licensing royalty revenue went from $2.8 million in 2022, to $15.8 million in 2023, to $46.6 million in 2024.[3] And in the second quarter of 2025 alone, Vicor's revenue from licensing income and a patent litigation settlement exceeded $55 million.[4]

II. Vicor initiates the ITC Investigation, and Foxconn belatedly asserts a royalty-free right to Vicor's patents.

Vicor learned that one of Vicor's competitors, Delta Electronics, Inc. ("Delta"), was manufacturing infringing NBMs and selling them to contract manufacturers like Foxconn. Appx11623. To stop that infringement, Vicor filed an ITC complaint in July 2023, alleging that Delta, Foxconn, and other entities violated

[3] Vicor Corp, Form 10-K at 35 (Dec. 31, 2024), available at https://vicorcorporation.gcs-web.com/static-files/be0ef742-794b-4f37-a3eb-fca4db900625. Vicor's Form 10-K from December 2024 is not part of the record because it was not available at the time of the April 2024 hearing. But Vicor's "Form 10-K is readily verifiable and thus the proper subject of judicial notice." *Cyntec Co., Ltd. v. Chilisin Elecs. Corp.*, 84 F.4th 979, 989 n.6 (Fed. Cir. 2023).

[4] Vicor Corp, Form 10-Q at 4 (June 30, 2025), available at https://vicorcorporation.gcs-web.com/sec-filings/sec-filing/10-q/0000950170-25-101161 .

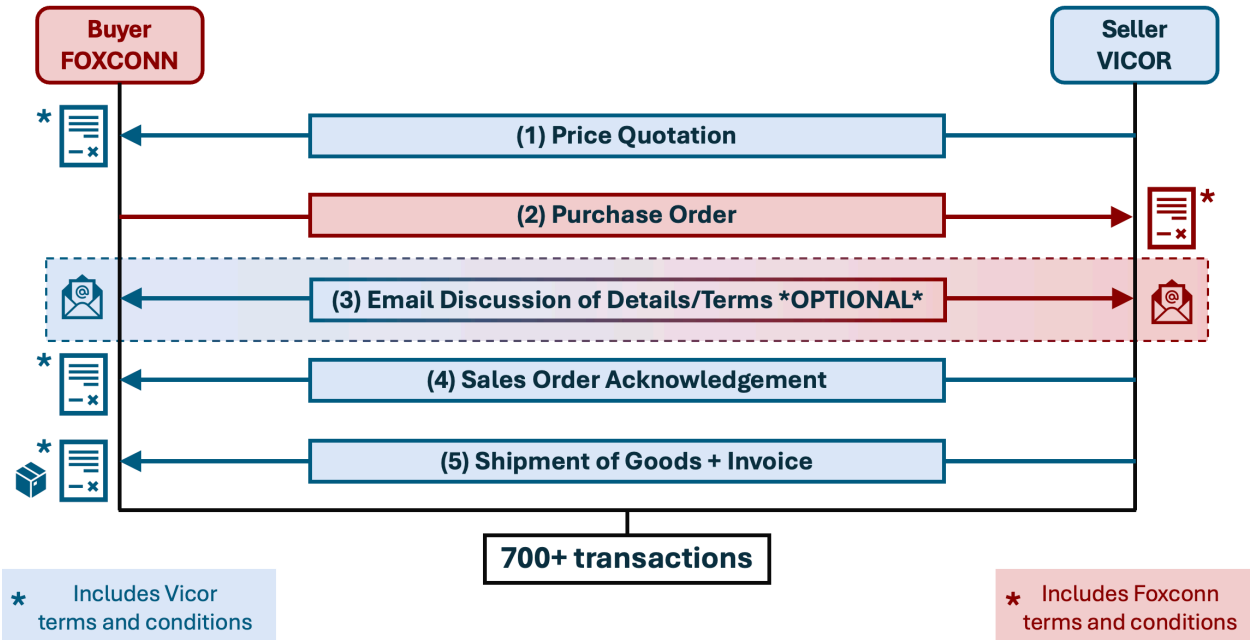
Section 337 of the Tariff Act of 1930 by importing NBMs that infringe Vicor's Asserted Patents. The Commission instituted the Investigation on August 14, 2023.

Foxconn did not raise its license defense until five months after Vicor filed its complaint. Foxconn did so through a Motion to Terminate the Investigation in favor of Chinese arbitration, relying on a provision in the Foxconn Terms. Appx750-51. As detailed in Section IV below, the ALJ rejected Foxconn's Motion to Terminate in favor of arbitration but allowed Foxconn to present its novel free-license defense on the merits. Appx1441; Appx5121.

To explain Foxconn's peculiar theory by which it purportedly obtained a free license to Vicor patents, Vicor in this Section (A) provides a summary of how Foxconn and Vicor engaged in transactions for Vicor goods; (B) details the two transactions on which Foxconn relied to assert a free license to Vicor patents; and (C) explains Foxconn's "email acceptance" theory.

A. The Vicor-Foxconn sales process.

Vicor and Foxconn engaged in 700+ sales transactions—and over 400 prior to the two at issue in this appeal. The basic process was invariably the same and is illustrated in the diagram below, followed by an explanation of each step.



Step 1: Price Quotation. At the beginning of any project (and whenever pricing of the goods change), Vicor sends buyers, including Foxconn, a price quotation for the Vicor parts the contract manufacturer wants to purchase. Appx12191-92. The price quotation includes as a "condition[] of quotation" a hyperlink to the Vicor Terms.[5] Appx12191. Three sections of the Vicor Terms are relevant here:

Section 1: Scope. This section makes clear that (i) the Vicor Terms are the only terms that apply to Vicor sales, (ii) Vicor's acceptance of any PO is *expressly conditioned* on a buyer's assent to the Vicor Terms; (iii) a binding

[5] Vicor Terms are incorporated into every form that Vicor sends to buyers like Foxconn, including (1) in datasheets advertising Vicor's products; (2) price quotations; (3) Sales Order Acknowledgements; and (4) invoices. Appx12191.

agreement can be formed only by Vicor's delivery of an SOA to the buyer; and (iv) no party is authorized to make representations inconsistent with the Vicor Terms:

> **[i]** These Terms and Conditions of Sale ("Terms") shall be the sole terms and conditions governing the sale of products and services ("Goods") by Vicor Corporation . . . ("Vicor") to the commercial party listed on the order form or other documentation ("Purchase Order") provided to Vicor by that party ("Buyer") . . . .
>
> **[ii]** Vicor's express acceptance of a Purchase Order under these Terms is evidenced by its delivery of a Sales Order Acknowledgement ("SOA"), and ***such acceptance of a Purchase Order is expressly conditioned on Buyer's assent*** to these Terms, as described in Section 2.
>
> **[iii]** ***Only upon delivery by Vicor of a SOA*** to Buyer shall these Terms and the associated Purchase Order together become a binding, bilateral contract between Vicor and Buyer, with enforceable rights and performance obligations (the "Sales Agreement"). A Sales Agreement will not exist, and Vicor will not be obligated to fulfill a Purchase Order, unless Vicor affirmatively acknowledges the respective responsibilities of Vicor and Buyer through delivery of a SOA to Buyer. **[iv]** ***No party has been authorized by Vicor to make any statement or representation*** as to the sale of Goods ***inconsistent with these Terms, and no such statements, if made, will be binding upon Vicor*** or be grounds for any claim.

Appx12106 (emphases and brackets added).

Section 7: Delivery. This section states that "Delivery dates set forth in the SOA are approximate" and that "Buyer acknowledges [that] Vicor is not bound by any such date(s) set forth in the SOA."

Section 25: Intellectual Property. This section makes explicit that Vicor does not license any intellectual property right simply by selling its products:

> Nothing in the Sales Agreement is to be construed as a grant or assignment of any license or other right to Buyer of any of Vicor's intellectual property rights, whether patent, trademark, trade secret, copyright or otherwise.

Appx12109, Appx12119-20.

Step 2: Purchase Order (PO). Once pricing is established, Foxconn (buyer) sends Vicor (seller) POs for a specific quantity of Vicor NBMs. Foxconn POs comprise a two-page form that incorporates specific "Notes" along with the unilateral set of Foxconn Terms. Appx12335-36. Three aspects of Foxconn's standard POs are worth noting here:

Note 1: expressly limits a seller's acceptance of the PO to Foxconn's terms: "Any different or additional provision provided by Seller in any acceptance, confirmation, or acknowledgement to this Purchase Order ('PO') is null and void unless accepted by authorized person of Buyer in writing." Appx12335.

Note 6: disavows any obligation by Foxconn to purchase goods unless Foxconn issues a subsequent "Delivery Notice": "This PO shall not constitute Buyer's purchase obligation without DN or other delivery requests. Final quantity and/or delivery date shall be subject to the provisions of the most

current DN or other delivery requests. Seller agrees to deliver Products according to such particular DN or delivery request." Appx12335.

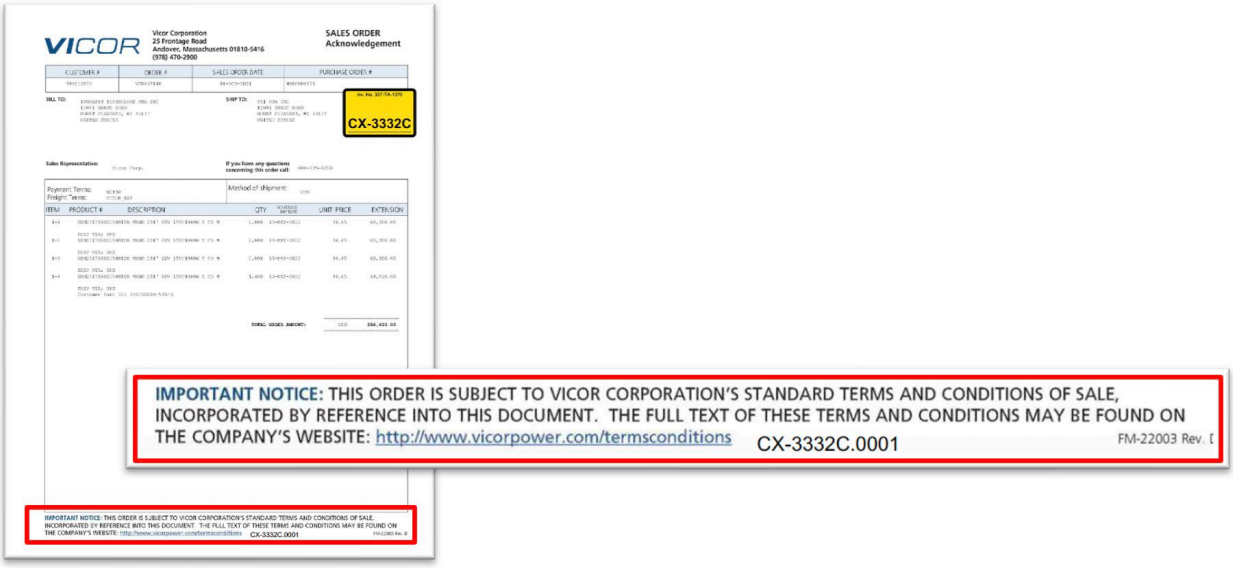
General Term No. 10. Intellectual Property Right: broadly asserts that any seller "agrees to grant Buyer [Foxconn] and its customer(s) a perpetual, irrevocable, non-transferable, and royalty-free license under all intellectual property rights included in the Products supplied to Buyer by Seller, so that Buyer and its customer(s) have the right to make, use, sell, offer to sell or import similar products or other products which contain the aforesaid intellectual property rights worldwide." Appx12336.

POs are received at Vicor by non-managerial employees who enter the orders into Vicor's computerized tracking system. Appx12192.

Step 3 (*Optional*): Emails. Foxconn and Vicor *sometimes* exchange emails about, *e.g.*, errors in POs, shipment schedules, payment or warranty terms, and other administrative issues. Appx12192.

Step 4: Sales Order Acknowledgement (SOA). Anticipated shipment dates—which are "approximate" according to the Vicor Terms, Appx12109 [CX-3328.0004]—are entered into a sales-order tracking system, which then automatically generates and emails an SOA to Foxconn. Appx12192. The SOA is a one-page form that identifies the product, quantity, price, shipment date, and total amounts due for the order. Appx12188, *see also* Appx12134, Appx12135,

Appx12136, Appx12137, Appx12138, Appx12139, Appx12140. In all-caps at the bottom of every SOA, Vicor includes an "IMPORTANT NOTICE" hyperlinking to the Vicor Terms and stating that the order is "SUBJECT TO VICOR CORPORATION'S STANDARD TERMS AND CONDITIONS OF SALE, INCORPORATED BY REFERENCE INTO THE DOCUMENT." *See, e.g.*, Appx12134, Appx12135, Appx12136, Appx12137, Appx12138, Appx12139, Appx12140.



Appx12134.

The hyperlinked Vicor Terms are the same as those described in Step 1 above. Every SOA sent to Foxconn was, in this way, made subject to the Vicor Terms. Appx12188-89.

Step 5: Shipment & Invoice. After sending the SOA, Vicor ships the goods and electronically submits an invoice. Appx12193. Vicor's invoices also reference and incorporate the Vicor Terms. Appx12191.

* * *

Foxconn and Vicor engaged in over 700 transactions. Appx12193. All followed this same practice. Appx12193. Vicor responded to each PO with an SOA and/or invoice, making clear that Vicor's acceptance of any PO is conditioned on Foxconn's assent to the Vicor Terms. *See, e.g.*, Appx12128, Appx12130, Appx12132, Appx12134, Appx12135, Appx12136, Appx12137, Appx12138, Appx12139, Appx12140.

B. Foxconn's two transactions for its free-license defense: PO 176 (FII) and PO 265 (Ingrasys).

Of the 700+ transactions, Foxconn's license defense relies on only two: FII PO No. 4600000176 ("PO 176") and Ingrasys PO No. 4500273265 ("PO 265"). Both transactions followed the same sales process described above: after Foxconn receives Vicor's price quotation with the Vicor Terms (Step 1), Foxconn sends a PO containing the Foxconn Terms (Step 2); Foxconn and Vicor sometimes exchange emails about problematic terms, such as delivery or payment terms or requested ship dates that clash with factory lead time (*optional* Step 3); Vicor sends Foxconn a responsive SOA subject to the Vicor Terms (Step 4); and Vicor ships the goods with an invoice subject to the Vicor Terms (Step 5).

Vicor sets forth the details of each transaction below starting with Foxconn sending Vicor a PO. An asterisk (*) identifies the specific email the Commission relied on to find that Vicor "accepted" PO 176. As to PO 265, although *Foxconn* presented a theory of acceptance for this transaction, identified with a double-asterisk (**) below, the Commission never specified in its decision how and by what email Vicor "accepted" PO 265.

PO 176 (Foxconn)

- September 26, 2021: Anita Wang (Foxconn) emails Peter Goodwin (Vicor) attaching PO 176. Appx12340-41.
    - The PO requests qty. units at price with a "delivery date" of October 15, 2021. Appx12335. In her cover email, Foxconn's Wang states: "Please find attached new POs and confirm ETA [***estimated*** time of arrival] asap." Appx12340.
- September 27, 2021: Goodwin (Vicor) responds with three emails to Foxconn:
    - Goodwin (Vicor) first emails Wang (Foxconn) asking Foxconn to revise PO 176's delivery term: "Please send a revised order for EXW – Factory." Appx11334. "EXW" means the buyer pays transportation costs and assumes the risk at the point of shipment from Vicor's facility. Appx11237.

- Later that day, Goodwin (Vicor) responds to his own email and asks Foxconn to also revise payment terms: "Also payment terms are NET 30 for the attached orders, please send revised PO's." Appx11334.
- Goodwin (Vicor) forwards Wang's September 26 email to a Foxconn procurement specialist, Carolyn Lee. Appx12339.

- September 30, 2021: Lee (Foxconn) responds to Goodwin's forwarded email:

> Hi Peter – Sorry for my late response, eventually the buying will come from the Wisconsin location but we are not quite set up for that yet. We recently underwent a systems change with our SAP system and as IT works through it with us, our Asia team will continue to send PO's.
>
> Hope that answers your question.
>
> Do you have an update on the docking status of PO [176]?

Appx11353.

- October 1, 2021:***** Goodwin (Vicor) responds to Lee (Foxconn), stating in full:

> PO [176] ..... qty. ship date 5-13-22, qty. 5-20, qty. 5-27 and qty. 6-3.

Appx11353.

The "ship date[s]" differ from PO 176's "Delivery Date" of October 15, 2021 by 210 days (6 months, 28 days) for the earliest shipment, to 231 days (7 months, 19 days) for the latest shipment.

> ***** This email is the email that the Commission held was Vicor's "acceptance" of PO 176. Appx112, Appx119.

- October 4, 2021: Lee (Foxconn) responds to Goodwin (Vicor), stating:

  > Can you tell me when the next delivery is coming and verify that it is coming direct here from MA? I thought you mentioned that last time we spoke.

  Appx11357.

- October 5, 2021:
  - Lee (Foxconn) sends another email to Goodwin (Vicor), stating: "Hi Peter – Do you have an update on the status of the PO's [in my prior email]?" Appx11357.
  - Goodwin (Vicor) responds to Lee (Foxconn) stating: "I will provide an update tomorrow…." *Id.*
- October 5, 2021: Lee (Foxconn) sends another email to Goodwin (Vicor), stating: "Hi Peter – Do you have an update on the status of the PO's?" Appx11367.
- October 5, 2021:
  - Goodwin (Vicor) responds to Lee (Foxconn), stating: "[PO] 176 ..... Ship date 5-13-22." Appx11367.
  - The next day, Vicor's computer system sends an email to Wang (Foxconn) attaching Vicor's SOA for PO 176, rejecting the Foxconn Terms and making Vicor's acceptance of PO 176 subject to the Vicor Terms. Appx11251.

PO 265 (Ingrasys)

- May 31, 2023: Foxconn[6] sends Vicor PO 265 by email, requesting qty. units with a delivery date of August 9, 2023. Appx12335, Appx11402. PO 265 was not an original PO. Instead, Foxconn issued PO 265 on May 31, 2023, after Foxconn attempted to cancel prior PO 991. Appx110. (Original PO 991 had been confirmed by SOA and therefore was not cancellable under the Vicor Terms, but Vicor agreed to modify it to accommodate its customer, Foxconn). Appx110 (citing *Vicor Corp. v. FII USA, Inc.*, No. CV 24-10060-LTS, 2024 WL 3548786, at *8 (D. Mass. June 24, 2024)).
- May 31, 2023: Mandy Jungjohann (Vicor) responds that Vicor was confirming the availability of certain parts but that Vicor "should be able to support partial[] [shipments] earlier than the August and September backlog dates." Appx11407.
- June 1, 2023: Liz Liu (Foxconn) emails Vicor asking for a delivery date. Appx11412.
- June 6, 2023:
    - Liz Liu (Foxconn) emails Vicor stating: "Please confirm the latest delivery date for Taiwan orders." Appx11419.

[6] Even though PO 265 is an "Ingrasys PO," the email communications relating to it are between Vicor and FII employees. Appx12335.

- Alice Salamanca (Vicor) emails Liz Liu (Foxconn) asking Foxconn to revise PO 265's "delivery terms" and "warranty period." Appx11425.

- June 13, 2023:
  - **Salamanca (Vicor) emails Foxconn stating that "Qty qty. [units] scheduled for 9/29/23 ship." Appx11499.

    ** Foxconn argued that this email constituted Vicor's acceptance of PO 265, Appx7579, even though the "scheduled" shipment date differed from Foxconn's "delivery date." ***The Commission***, however, never identified which Vicor communication, if any, constituted an "acceptance" of PO 265. *See* Appx119-124.
  - Salamanca (Vicor) emails Foxconn with a screenshot of PO 265, states "[t]hank you for revising the delivery terms," and asks "[p]lease revise the warranty period from 48 months to 24 months." Appx11506-07.

- June 14, 2023:
  - Foxconn sends a revised PO 265. Appx11506 (attachment 4500273265.pdf); Appx11514, Appx12199.
  - Foxconn asks to cancel PO 265. Appx11517.
  - Jungjohann (Vicor) responds to Foxconn explaining "[t]his product and PO is NCNR [non-cancellable non-returnable]," and that "[t]he overall quantity of this part on order is not cancellable and will ship . . . on 9/29 or sooner." Appx11525.

- Vicor sends Foxconn Vicor's SOA for PO 265, containing the Vicor Terms. Appx11265-66 (dated June 13, 2023 eastern standard time / GMT -5).

C. Foxconn's "email acceptance" theory.

Foxconn's "email acceptance" theory is that, in the two transactions described above, Foxconn's POs were offers, and Vicor "accepted" each offer in the two emails identified with asterisks (*, **). Appx7579-80. Foxconn also argues that these emails, rather than each SOA that Vicor sent thereafter, constituted Vicor's "definite and seasonable expression of acceptance or a written confirmation" under § 2-207(1). Appx7578. Foxconn appears to have focused on these two transactions because Vicor *first* corresponded by email with Foxconn, and only *later* sent an SOA incorporating the Vicor Terms. According to Foxconn, those later-sent SOAs are irrelevant, as Vicor had already bound itself to the Foxconn Terms. In the ITC proceedings, Vicor argued, and Foxconn did not dispute, that Massachusetts law governed the issue of contract formation. Appx7407, Appx7577-78.

III. Foxconn attempts an end-run around the ITC Investigation by initiating arbitration in China.

Foxconn first presented its "free license" defense in a Motion to Terminate in the ITC Investigation, where it argued that Vicor granted it a license and had agreed to arbitrate any dispute arising from the sale of its goods before the China International Economic and Trade Arbitration Commission (CIETAC), both by way

of the Foxconn Terms. Appx762. The ALJ denied Foxconn's Motion to Terminate, holding that Foxconn had forfeited any right to arbitration (assuming it had one), and deferred ruling on the merits of Foxconn's license defense until after the evidentiary hearing. Appx1441.

Foxconn also sought to outflank the ITC by initiating arbitration proceedings before CIETAC, asserting the same free-license theory. Foxconn filed these arbitrations on December 20, 2023, in parallel with its Motion to Terminate. To stop the CIETAC proceedings, Vicor sued Foxconn in the United States District Court for the District of Massachusetts, seeking to enjoin the CIETAC arbitrations with a ruling that Vicor never agreed to the Foxconn Terms, including the arbitration provision. The district court issued a temporary restraining order and then a preliminary injunction, ruling, based on three independent grounds, that Vicor had not "accepted" Foxconn's POs by email and thus had not formed binding contracts in which it agreed to the Foxconn Terms. *See Vicor*, 2024 WL 3548786, at *2-16.[7]

First, the district court held that PO 176 and PO 265 were not "offers" that Vicor could accept, because PO "Note 6 . . . explicitly states that the PO alone does

[7] The First Circuit vacated the district court's order on procedural grounds. It held that, under the broad stay provision for proceedings that parallel ITC investigations, 28 U.S.C. § 1659(a), the district court was required to stay Vicor's case pending the final resolution of the 1370 Investigation. *Vicor Corp. v. FII USA Inc.*, 132 F.4th 1, 9-10 (1st Cir. 2025). Although the First Circuit vacated the district court's order, it did not address or disagree with the district court's conclusion that Vicor never accepted Foxconn's POs nor agreed to the Foxconn Terms.

not obligate Defendants to buy anything, even should Vicor 'accept' the PO." *Id.* at *10. Thus, "the POs are not 'offers' within the meaning of Massachusetts law, which, if 'accepted,' would become binding contracts." *Id.* at *11.

Second, the district court rejected Foxconn's "email acceptance" theory. It explained that, under Massachusetts law, "the email exchanges provided by the parties do not establish a contract based on the terms of [Foxconn's] POs." *Id.* at *11. This is because Foxconn was "aware that Vicor did not authorize its [sales representatives] to negotiate contract terms with its buyers;" that "SOAs were Vicor's only method of acceptance of a PO;" and "that agreements were formed only upon Vicor's terms and conditions—terms which the [sales representatives] could not alter." *Id.* at *13. Thus, "Vicor's [staff] were not 'accepting' the POs (even assuming the POs were 'offers,' which they were not), and [Foxconn] could not and did not reasonably understand the email exchanges to constitute agreement to the terms set out in the POs." *Id.* Further, the court explained, the purported email "acceptances" could not have been acceptances because their estimated shipping dates differed materially from the "delivery dates" Foxconn specified in its POs. *Id.* at *12. As such, Vicor's emails were at most counteroffers—not acceptances—under Massachusetts law. *Id.* at *11.

Third, the district court also ruled that Vicor did not "accept" the Foxconn Terms when Vicor transmitted its SOAs because the SOAs "expressly reject[ed] the terms of the PO within the meaning of Massachusetts law." *Id.* at *11.

IV. The ALJ rejects Foxconn's free-license defense.

Like the Massachusetts district court, the ALJ also rejected Foxconn's theory that Vicor had "accepted" Foxconn's POs. Referring to the district court's order granting Vicor's motion for a preliminary injunction, the ALJ observed that the "order explains, with much greater clarity than Foxconn makes in its own scattershot case for a license, the multiple reasons why Vicor is likely to succeed on the merits of its claim for injunctive relief." Appx336-58. The ALJ found "especially pertinent" the Massachusetts district court's conclusion that "'Vicor's [staff members] were not 'accepting' the [purchase orders] . . . [and Foxconn] could not and did not reasonably understand the email exchanges to constitute agreement to the terms set out in' the purchase orders." Appx337 (brackets in original). The ALJ's bottom line was that "neither [PO] Foxconn relies on as evidence of a license was ever enforceable because there was no valid acceptance of an offer . . . Foxconn has no license to any asserted patent." Appx338-39.

V. The Commission reverses the ALJ on Foxconn's free-license defense.

In its Final Determination ("FD"), the Commission reversed the ALJ and concluded that, in the context of PO 176, Vicor's sales representative, Peter

Goodwin, "accepted" Foxconn's offer (PO 176) when he "provided shipment dates for the requested products via the email dated October 1, 2021." Appx119. As a result, according to the Commission, Vicor bound itself to all of the unilateral Foxconn Terms, including the free-license clause. *Id*. The Commission acknowledged that the Goodwin email provided shipment dates that were inconsistent with PO 176's requested delivery dates. Appx121. And it did not find any facts to question Vicor's uncontroverted evidence showing that in the 700+ transactions completed by the parties, "Vicor always sent an SOA" subject to the Vicor Terms. Appx120. But the Commission ruled that providing shipment dates by email was a reasonable way to accept Foxconn's PO. Appx119.

The Commission also held that Vicor granted Ingrasys a free license to Vicor patents in the PO 265 transaction, even though the Commission never identified or explained how Vicor "accepted" PO 265 or otherwise agreed to be bound by its terms. *See* Appx119-24.

This appeal followed.

SUMMARY OF ARGUMENT

1. Under settled Massachusetts law, where parties to a sales transaction exchange competing preprinted forms, each made expressly conditional on the other party's assent to its terms, § 2-207 provides that the resulting contract includes only

those terms on which the parties' writings agree, along with any off-the-rack "gap fillers" provided by other parts of the UCC.

The undisputed facts of this case demonstrate that, in every sales transaction, both parties exchanged preprinted forms, each made expressly conditional on the other party's assent to its terms. Vicor expressly rejected the Foxconn Terms by sending a responsive SOA that made Vicor's acceptance of any PO expressly conditional on Foxconn's assent to the Vicor Terms, including a clause disclaiming any transfer of Vicor's intellectual property rights to any buyer. But because the parties acted as if there were a contract—with Vicor shipping the goods and Foxconn paying for them—the terms of the resulting contract include only those terms on which the parties' writings agree, together with any Uniform Commercial Code "gap fillers" supplied by default. Foxconn's free-license term is excluded ("knocked out") of the contract.

2. For five independent reasons, the Commission reversibly erred when it ignored Massachusetts law and concluded that Vicor bound itself to Foxconn's unilateral free-license term because a Vicor sales representative, Peter Goodwin, provided estimated shipment dates by email *before* sending an SOA.

First, Peter Goodwin's October 1 email was not a "definite and seasonable expression of acceptance" under § 2-207(1) because nothing in the email, nor in its surrounding context, suggests that Vicor manifested assent to the Foxconn PO or to

any of its terms. Even Foxconn's lone witness on this issue at the evidentiary hearing repeatedly admitted that the October 1 Goodwin email *was not an acceptance*:

> "Looks like they are still trying to get some confirmation."
>
> "It doesn't look like it's final yet."
>
> "I think there's still some back and forth thing that's actually going to confirm, right? The ship dates and the receiving dates and all of those things."
>
> "Q. … It's apparent that there were still questions, right?
> A. Right."

Second, the Commission impermissibly ignored the parties' uncontroverted course of dealing, in which Vicor notified Foxconn on at least 400 prior occasions that Vicor would *only* accept a PO from Foxconn by delivering to Foxconn a Vicor SOA.

Third, Goodwin's October 1 email cannot be an acceptance (i.e., an objective manifestation of mutual assent) because the email's four different "ship date[s]" differ from the "delivery date" specified in the Foxconn PO by over six months, a material difference from what Foxconn proposed.

Fourth, Foxconn's POs were not "offers" that could be accepted, as their plain language states that Foxconn is not bound by the PO unless and until it issues a "DN" or "delivery request" that is separate and distinct from the PO itself, something the PO did not obligate it to do.

Fifth, the Commission erred in concluding that "confirmation" could constitute an "acceptance" under § 2-207(1), appearing to improperly conflate the two distinct concepts of a "definite and seasonable expression of acceptance" and a "written confirmation sent within a reasonable time" in § 2-207(1).

3. The Commission separately erred in concluding that Vicor "accepted" the Ingrasys PO 265. The Commission did not explain how and by what means Vicor "accepted" that PO. Regardless, no such acceptance occurred for the same reasons as with PO 176.

Vicor never agreed, directly or indirectly, to give Foxconn a free license to Vicor patents. The Commission's decision holding that Vicor licensed Foxconn must be reversed.

STANDARD OF REVIEW

This Court "review[s] the Commission's final determinations under the standards of the Administrative Procedure Act." *Guangdong Alison Hi-Tech Co. v. Int'l Trade Comm'n*, 936 F.3d 1353, 1358 (Fed. Cir. 2019). It "review[s] the Commission's factual findings for substantial evidence and its legal determinations de novo." *Id*.

The party asserting a license defense to patent infringement bears the burden of proving the existence of a license and its scope. *Intel Corp. v. Int'l Trade Comm'n*, 946 F.2d 821, 828 (Fed. Cir. 1991). Questions of contract formation and

interpretation are reviewed according to the law of the state, in this case, Massachusetts. Appx111, Appx116, Appx117, Appx120; *see Immunex Corp. v. Sandoz Inc.*, 964 F.3d 1049, 1060 (Fed. Cir. 2020); *Alfred E. Mann Found. for Sci. Rsch. v. Cochlear Corp.*, 604 F.3d 1354, 1359 (Fed. Cir. 2010).

Under Massachusetts law, where "the evidence consists only of writings, or is uncontradicted," as is the case here, "the question [of] whether a contract has been made . . . is for the court" and thus is reviewed de novo. *Bresky v. Rosenberg*, 152 N.E. 347, 351 (Mass. 1926); *see Schwanbeck v. Fed.-Mogul Corp.*, 592 N.E.2d 1289, 1293 (Mass. 1992) (whether a writing "was a firm offer is a question of law"); *Cook v. Baldwin*, 120 Mass. 317, 318 (1876) (where there is no factual dispute, "it is a question of law for the court whether [those facts] prove an acceptance"); *accord Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 97 (3d Cir. 1991) (reviewing *de novo* questions of contract formation under the UCC).

The "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *Vizio, Inc. v. Int'l Trade Comm'n*, 605 F.3d 1330, 1343 n.11 (Fed. Cir. 2010) (quoting *Sec. & Exch. Comm'n v. Chenery Corp.,* 318 U.S. 80, 87 (1943)). Each agency decision "must make the necessary findings and have an adequate evidentiary basis for its findings." *In re Nuvasive, Inc.*, 842 F.3d 1376, 1382 (Fed. Cir. 2016) (cleaned up). Vacatur of an agency's decision is required when an agency fails to articulate an adequate

evidentiary basis for its decision, or its reasoning cannot be reasonably discerned. *Id.* at 1382-85 (cleaned up); *see Palo Alto Networks, Inc. v. Centripetal Networks, LLC*, 122 F.4th 1378, 1385 (Fed. Cir. 2024).

ARGUMENT

I. Under Massachusetts law, UCC § 2-207 governs these "battle of the forms" transactions, and Foxconn's unilateral free-license clause is knocked out.

Before addressing the Commission's error in adopting Foxconn's "email acceptance" theory, it is helpful to review how contract formation occurs in circumstances like those here. Under Massachusetts' application of § 2-207,[8] where a buyer and seller exchange competing preprinted forms (each requiring the other party's assent to their own unilateral terms), no contract is formed by the exchange of writings. In such scenarios, despite the competing forms, parties often *act* like there is a contract—the seller ships the goods; and the buyer accepts and pays for them. In these scenarios, § 2-207(3) provides that a contract *is* formed, and its terms consist of those terms on which the parties' competing forms agree, along with any applicable UCC "gap fillers" (default terms).

In every sales transaction—including the two upon which Foxconn relies—Foxconn and Vicor exchanged competing forms (Foxconn's PO and Vicor's SOA),

[8] All citations to the UCC and any drafters' comments are to Massachusetts' codification of the UCC at Mass. Gen. Laws Ann. ch. 106.

each made expressly conditional on the other party's assent to their own unilateral terms. It is also undisputed that Foxconn and Vicor acted as if there were a contract: Vicor shipped the goods; Foxconn accepted and paid for them. As a result, the contract consists of the terms on which the parties' competing writings agree, while the unassented to terms—like Foxconn's free-license clause—are excluded.

A. UCC § 2-207 applies when a buyer and seller exchange divergent preprinted forms.

"This case presents a dispute arising from what has been styled a typical 'battle of the forms' sale, in which a buyer and a seller each attempt to consummate a commercial transaction through the exchange of self-serving preprinted forms that clash, and contradict each other, on both material and minor terms." *Commerce & Industry Ins. Co. v. Bayer Corp.*, 742 N.E.2d 567, 571 (Mass. 2001). In Massachusetts, where parties transact for the sale of goods using preprinted forms, § 2-207 "sets forth rules and principles concerning contract formation and the procedures for determining the terms of a contract." *Id.*; *see* 1 White, *et al*., Uniform Commercial Code § 2:26 (6th ed.) ("[UCC] Code drafters formulated § 2-207 to deal with th[e] problem" of "battle of the forms").

"[U]nder § 2-207, there are essentially three ways by which a contract may be formed," *Comm. & Indus.*, 742 N.E.2d at 571:

> *First*, if the parties exchange forms with divergent terms, yet the seller's [form] does not state that its acceptance is made 'expressly conditional'

> on the buyer's assent to any additional or different terms in the [seller's form], a contract is formed under subsection (1) of § 2-207.
>
> *Second*, if the seller does make its acceptance 'expressly conditional' on the buyer's assent to any additional or divergent terms in the seller's [form], the [form] is merely a counteroffer, and a contract is formed under subsection (1) of § 2-207 only when the buyer expresses its affirmative acceptance of the seller's counteroffer.
>
> *Third*, where for any reason the exchange of forms does not result in contract formation (e.g., the buyer 'expressly limits acceptance to the terms of [its offer]' under § 2-207(2)(a), or the buyer does not accept the seller's counteroffer under the second clause of § 2-207[1]), a contract nonetheless is formed under subsection (3) of § 2-207 if their subsequent conduct—for instance, the seller ships and the buyer accepts the goods—demonstrates that the parties believed that a binding agreement had been formed.

Id. (cleaned up & emphasis added); *see JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 53-54 & n.5 (1st Cir. 1999) (adopting identical interpretation of § 2-207); *accord* 14D Mass. Prac., Summary of Basic Law § 15:6 (5th ed.) (same rules).

B. Foxconn's free-license clause is knocked out of the parties' contract under § 2-207(3).

As Foxconn agrees, this case presents a "battle of the forms" analysis under "UCC § 2-207." Appx773-74. And under *Commerce & Industry*'s three routes of contract formation under § 2-207, the undisputed facts demonstrate that the "third" avenue of contract formation under § 2-207(3) applies here.

No contract was formed under *Commerce & Industry*'s "first" avenue of contract formation. Vicor's SOA "made [acceptance] 'expressly conditional' on the buyer's assent to any additional or different terms," just as the seller's form did in

Commerce & Industry.[9] Vicor's SOAs thus never functioned as an acceptance under § 2-207(1), because they required as a predicate to contract formation that Foxconn expressly assent to the Vicor Terms. No assent occurred and as such, no contract was formed under § 2-207(1). *Comm. & Indus*., 742 N.E.2d at 570-71.

Nor was any contract formed under the "second" avenue of contract formation. Vicor's SOA "ma[d]e its acceptance 'expressly conditional' on the buyer's assent to any additional or divergent terms in the [SOA]." *Id.* at 571–72; *see* Appx12106, Appx12134, Appx12136. As a result, each SOA was "merely a counteroffer, and a contract is formed [under subsection (1) of § 2–207] only when the buyer expresses its affirmative acceptance of the seller's counteroffer." 742 N.E.2d at 571–72. The record here, however, contains no indication that Foxconn "expresse[d] its affirmative acceptance of [Vicor's] counteroffer." *Id.*; *see PCS Nitrogen Fertilizer, L.P. v. Christy Refractories, L.L.C.*, 225 F.3d 974, 980 (8th Cir. 2000) (explaining that "specific and affirmative assent to the seller's counter-offer is necessary to create a contract").

Instead, in each transaction between the parties, a contract was formed by the "third" avenue of contract formation under *Commerce & Industry*. Although the

[9] *Compare* 742 N.E.2d at 571 ("The acceptance of any order entered by [buyer] is expressly conditioned on [buyer's] assent to any additional or conflicting terms contained herein."), *with* Appx12106 ("Vicor's express acceptance . . . of a Purchase Order is expressly conditioned on Buyer's assent to these Terms.").

parties' writings do not and cannot create a contract, the parties' conduct demonstrated the existence of a contract: after sending an SOA, Vicor shipped the goods, and Foxconn paid for them. *See* Appx12198, Appx12202, Appx12216, Appx12234. The parties' "conduct . . . demonstrate[d] that the parties believed that a binding agreement had been formed." 742 N.E.2d at 572; *accord Transwestern Pipeline Co. v. Monsanto Co.*, 46 Cal. App. 4th 502, 516 (1996) (applying § 2-207(3) to resolve dispute over conflicting limitation-of-liability clauses, where parties repeatedly bought and sold goods with conflicting preprinted forms over 12-year relationship).

"In such [a] case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [Chapter 106 of the Massachusetts UCC]." § 2-207(3). The "writings of the parties" do not "agree" on any aspect of IP licensing; they are diametrically opposed. *See infra*, at Section II. Foxconn's free-license clause is thus excluded from the contract, and none of UCC's "gap-fillers" provide for a transfer of intellectual property rights from one party to another. *See*, *e.g.*, *JOM, Inc.*, 193 F.3d at 56 (identifying standard UCC "gap fillers").

Section 2-207(3) "addresses the precise situation we have here: 'In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made . . . . The only question is what

terms are included in the contract, and subsection (3) furnishes the governing rule.'" *Transwestern*, 46 Cal. App. 4th at 515 (quoting § 2-207, cmt. 7).[10] And the result is precisely what the UCC drafters intended: "to put aside the formal and academic stereotypes of traditional doctrine of offer and acceptance and to analyze instead what really happens," and in so doing, avoid "the imposition of harsh terms upon a party merely as a result of his or her accepting a price quotation of a purchase order form." 2 Lawrence's Anderson on the Uniform Commercial Code § 2-207:5 (3d ed.).

II. The Commission erred in relying on Foxconn's "email acceptance" theory to find that Vicor had "accepted" PO 176 by Peter Goodwin's October 1 email.

The Commission reversibly erred when it adopted Foxconn's "email acceptance" theory and concluded that the October 1 Goodwin email "[p]roviding

[10] *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 445 (3d Cir. 2003) ("[i]n a commercial transaction involving the sale of goods, where the parties' performance demonstrates agreement, [courts] look past disputes over contract formation and move directly to ascertain its terms"); *Waukesha Foundry, Inc. v. Indus. Eng'g, Inc.*, 91 F.3d 1002, 1007 (7th Cir. 1996) (when "it is clear that the parties exchanged writings containing different terms" and "the course of conduct by both parties demonstrates the existence of a series of contracts for the sale of castings," "[t]here is no need to identify at precisely what point in time each contract of sale between [buyer] and [seller] came into being"); *accord* § 2-204(2) ("An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."); *see also*, *e.g.*, *McJunkin Corp. v. Mechanicals, Inc.*, 888 F.2d 481, 483–87 (6th Cir. 1989) (applying § 2-207(3) where the parties performed and the seller's acceptance form was made expressly conditional on the buyer's assent to its terms); *Diamond Fruit Growers, Inc. v. Krack Corp.*, 794 F.2d 1440, 1443–45 (9th Cir. 1986) (same).

shipment dates was a 'definite and reasonable [*sic*] expression of . . . written confirmation'" under § 2-207(1), thereby binding Vicor to all of the Foxconn Terms without reservation. Appx120 (ellipsis in original). Under the Commission's flawed analysis, Goodwin's email was an "acceptance" because a separate provision of the UCC, § 2-206, provides that an offer invites acceptance "in any manner and by any medium reasonable in the circumstance." § 2-206(1)(a). And because "[t]he POs did not specify acceptance via an SOA, and nothing in the email correspondence from Vicor's employees stated that the response was not final pending an SOA[,] [a]n email response to an email PO is facially reasonable and sufficient under Massachusetts law." Appx120. The Commission erred for five independent reasons, each detailed below.

A. Peter Goodwin's October 1 email did not include any objective manifestation of assent to PO 176.

Section 2-207 is intended to address a scenario in which a party provides a definitive acceptance of a contractual offer, but in doing so attempts to impose different or additional terms from those in the offer. As Comment 1 to § 2-207 explains, a "definite and seasonable expression of acceptance" refers to the prototypical "wire or letter *expressed and intended* as an acceptance," as happens with "the exchange of printed purchase order and acceptance (sometimes called 'acknowledgment') forms." Peter Goodwin's email providing four "ship date[s]" in response to FII's request for an "update on the docking status of [PO 176]" does not

fit this bill because it contains no objective expression of acceptance. Accordingly, the email did not purport to form a contract, and § 2-207's rules for determining the resulting contract terms simply do not apply.

The Seventh Circuit's decision in *Echo, Inc. v. Whitson Co., Inc.*, 121 F.3d 1099 (7th Cir. 1997), rejected an argument nearly identical to the erroneous "email acceptance" theory the Commission adopted here. And it explains why correspondence that merely clarifies certain terms in an order is not a "definite and seasonable expression of acceptance" where it does not use any language of acceptance—even when considering that § 2-206(a)(1) permits acceptance "in any manner and by any medium reasonable in the circumstance."

In *Echo*, a dispute arose between a buyer (PTC, distributor of power tools) and a seller (Echo, manufacturer of power tools) about whether seller-Echo "accepted" buyer-PTC's purchase order, which "requested Echo to deliver the equipment in installments over the period between December 1992 and July 1993." 121 F.3d at 1101. Seller-Echo sent buyer-PTC a letter that "mention[ed] three enclosed computer reports 'recapping your 1993 Spring Booking of Units and Accessories,'" and "state[d] that the computer reports should be helpful 'when reconciling your order' and that '[i]t is extremely important to verify that the information on these reports matches your records' because 'mistakes and omissions can sometimes occur' when entering the orders into the computer." *Id.* Buyer-PTC

argued that "Echo's . . . letter signaled Echo's acceptance of the [Purchase] Order." *Id.* at 1103. And it supported its argument by pointing to the same provision of § 2-206(1)(a) that the Commission relied on here. *Id.*

In rejecting buyer-PTC's argument, the Seventh Circuit explained that "the UCC retains the basic common law requirements of offer, acceptance, and consideration," and that "[e]ven though the 'modes of a valid acceptance may be varied, the requirement of an acceptance by the offeror still exists.'" *Id.* (citation omitted). Under that standard, the court held that seller-Echo's letter was not an acceptance because it "does not use the vocabulary of acceptance." *Id.* Although the computer reports "recap[ped]" the buyer-PTC's order and reflected the seller's entry of order details into its computer system, the letter "reveal[ed] a clarification purpose rather than any commitment to provide the goods PTC requested." *Id.*

So too here. The language of the October 1 Goodwin email, whether read alone or in the full context of the parties' transactions, confirms that it was not "*expressed and intended* as an acceptance" of PO 176. § 2-207, cmt. 1. The email "does not use [any] vocabulary of acceptance." *Echo*, 121 F.3d at 1103. And no record evidence suggests that anyone understood it to be an acceptance either.

FII's own email responses to the October 1 Goodwin email confirm that no one understood Goodwin's email to be an acceptance. Three days later, FII's Carolyn Lee asked: "Can you tell me when the next delivery is coming and verify

that it is coming direct here from MA." Appx11357. Then, on October 5, Lee *again* asked Goodwin: "Do you have an update on the status of the PO's?" *Id*.

Foxconn's witness on this issue also admitted at the evidentiary hearing that the Goodwin email *was not even a confirmation* of shipment dates because the details had not been finalized:

> Q. For instance, let's go to RX-1631C, which you relied on in your witness statement. This is the e-mail in which you say that Vicor accepted a purchase order from FII USA, correct?
>
> A. Well, I don't see a sentence here. ***Looks like they are still trying to get some confirmation.***

Appx10414:6-11 (emphasis added). When presented with Goodwin's October 1 email again, Foxconn's witness similarly testified:

> Q. Now, you testified in your witness statement that once Mr. Goodwin sent the response to RX-1631C giving tentative ship dates, "There was no doubt that Vicor was going to fulfill purchase order" -- the 176 purchase order, right?
>
> A. Well, I mean, I -- I don't know. I mean, is this the -- you know, I mean, there are some still -- ***it doesn't look like it's final yet***. I mean, ***I think there's still some back and forth thing that's actually going to confirm, right***? The ship dates and the receiving dates and all of those things. So I -- what are you trying to tell me here?

Appx10419:11-21 (emphasis added). Foxconn's witness also testified that he understood that a "PO is binding" only "whenever there's no more questions and . . . all the questions are resolved," and agreed that, as of October 5, 2021 (four

days after Goodwin sent his email): "Q. . . . [i]t's apparent that there were still questions, right? A. Right." Appx10420:25-10421:2.

Even under the UCC's more flexible standards for offer and acceptance, "the purported acceptance must still be certain enough to evince mutual assent." *Stanwood Boom Works, LLC v. BP Expl. & Prod., Inc.*, 476 F. App'x 572, 575 (5th Cir. 2012). And nothing in the October 1 email, "considered in the full context of the parties' negotiations, . . . evince[d] such assent." *Id.*; *see McCarty v. Verson Allsteel Press Co.*, 89 Ill. App. 3d 498, 510 (1980) (§ 2-207(1) "does not change the basic common law requirement that there must be an objective manifestation of mutual assent").

B. The Commission ignored the parties' course of dealing, which confirmed that Vicor could accept a PO only by sending an SOA.

"[A] course of dealings" between the parties may inform what can reasonably be construed as an acceptance. *Ismert & Assocs., Inc. v. New England Mut. Life Ins. Co.*, 801 F.2d 536, 541–42 (1st Cir. 1986); *see* § 1-303(b) ("A 'course of dealing' is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting the parties' expressions and other conduct.").

Here, the Commission erred in finding that Peter Goodwin's email was an acceptance of PO 176, given that the Vicor Terms that Foxconn received in the course of hundreds of prior transactions state that: (1) Vicor can accept a PO *only*

"through delivery of a SOA to buyer," and (2) no Vicor employee is "authorized by Vicor" to alter those terms. Appx12106. As the Massachusetts district court correctly held: "the parties' conduct, in the form of their course of dealing, demonstrates that [Foxconn] w[as] aware that Vicor did not authorize its [sales representatives] to negotiate contract terms with its buyers." *Vicor*, 2024 WL 3548786, at *13.

Courts routinely find that a prior course of dealing may be established with an exchange of forms that put one party on notice of the other party's terms. In *Rational Software Corp. v. Sterling Corp.*, the First Circuit applying Massachusetts law held that a carrier had put a shipper on notice of its limitation-of-liability terms through 200 prior transactions in which the carrier had supplied the shipper with a bill of lading containing the terms. 393 F.3d 276, 279–80 (1st Cir. 2005); *see also Ins. Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc.*, 201 F.3d 1111, 1115 (9th Cir. 2000) ("actual notice" of terms sent in 47 prior transactions is not required to establish a course of dealing). And in *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, the Seventh Circuit held that an arbitration clause contained in a seller's "confirmation form" sent repeatedly in nine prior transactions "g[a]ve notice to [the buyer] that an arbitration clause would likely be included in" the seller's form. 831 F.2d 709, 714 (7th Cir. 1987); *accord Mid-S. Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1123 (5th Cir. 1985) ("[T]he extensive course of dealing between the two parties clearly indicated to [buyer] that the [seller's] invoices would follow [the buyer's] purchase

orders and, [buyer] having received several of the invoices in prior transactions, the interest and collection costs terms came as no surprise to [buyer].").[11]

The Commission did not challenge Vicor's course-of-dealing evidence. Instead, it speculated that "[e]ven if Vicor always sent an SOA as alleged, there is no reason to conclude that the SOA, as opposed to the 'courtesy emails,' constituted confirmation in the parties' course of dealing." Appx120. There are three key flaws with this conclusion.

First, the course of dealing made clear that the emails would not constitute expressions of acceptance. The uncontroverted evidence showed that Foxconn had been notified of the Vicor Terms on hundreds of occasions prior to the emails at issue though (1) Vicor's data sheets and quotations sent "before [Foxconn] ever place[s] an order," (2) hundreds of SOAs, and (3) invoices sent after an order was fulfilled. Appx10966:18-24. For example, Foxconn received at least 400 SOAs with Vicor Terms prior to the transactions at issue, Appx12193, a point that neither Foxconn witness contested. And it is undisputed that the Vicor Terms that Foxconn repeatedly received state clearly that the sole means to accept a PO is through

[11] Conversely, a repeated exchange of competing forms over a 12-year relationship, with each side's form containing divergent terms, indicates that the parties "have not reached an agreement over the terms in dispute." *Transwestern*, 46 Cal. App. 4th at 516. The fact that the record contains no evidence that Vicor accepted or agreed to the Foxconn Terms confirms that Vicor did not "accept" those terms with a single email responding to a request for estimated shipment dates.

Vicor's "delivery of a SOA to buyer," and that no Vicor employee was authorized to alter those terms. Appx12106.

Second, "[t]here is no evidence in the record to support the [Commission's] assertion that" the parties had a shared understanding that Vicor accepted POs by email in contravention of their course of dealing. *Rambus Inc. v. Rea*, 731 F.3d 1248, 1257 (Fed. Cir. 2013). Nor could the Commission have reached such a conclusion, as no record evidence supports the theory that the parties shared a custom or "common basis of understanding" that Vicor accepted POs by email. § 1-303(b). When asked, "You, sir, don't have any basis to deny that sending a sales order acknowledgment is a standard part of Vicor's process for accepting a PO, right?," Foxconn's witness responded: "I cannot deny that." Appx10423:24-10424:2.

Third, the Commission's reference to a "confirmation" is inapt because under § 2-207(1), a "confirmation" is a written confirmation of a prior informal agreement, and there was no prior informal agreement. As explained in Section II.E below, the Commission erroneously conflated the distinct concepts of a "definite and seasonable expression of acceptance" and a "written confirmation" under § 2-207(1), thereby erroneously concluding that a mere "confirmation" email necessarily constitutes a legally binding "acceptance" under § 2-207(1).

In short, just as the ALJ and Massachusetts district court both correctly concluded, through hundreds of prior transactions, Foxconn had been put "on notice

of Vicor's position that its SOAs were Vicor's only method of acceptance of a PO, and that agreements were formed only upon Vicor's terms and conditions—terms which [Vicor sales representatives] could not alter." *Vicor*, 2024 WL 3548786, at *13; Appx337. On the other hand, *no* evidence suggests a common understanding that Vicor "accepted" POs by email. The Commission erred in holding otherwise.

C. The Goodwin email is not an acceptance because its four "ship date[s]" differed materially from PO 176's "delivery date."

The October 1 Goodwin email cannot operate as an acceptance because it estimated "ship date[s]" that exceeded PO 176's October 15, 2021 delivery date by 210 days at the earliest, and 231 days at the latest. Appx11358. As the ALJ and the Massachusetts district court both correctly concluded, even assuming that Foxconn POs could be an "offer" (they are not, *see infra* at II.C), Vicor's response contained materially different terms and thus is not an acceptance. Appx337; *Vicor*, 2024 WL 3548786, at *11-12.

In Massachusetts, "[i]t is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement." *Situation Mgmt. Sys., Inc. v. Malouf, Inc.*, 724 N.E.2d 699, 703 (Mass. 2000). As the First Circuit explained in *Lambert v. Kysar*, where a responsive writing "diverge[s] as to price, quality, quantity, *or delivery terms*," the responsive writing "amount[s]

to a *rejection* of the original offer." 983 F.2d 1110, 1115 (1st Cir. 1993) (quoting White, *et al*., Uniform Commercial Code, § 2:14 (6th ed.) (emphasis added)).

Instructive here is *Alliance Wall Corp. v. Ampat Midwest Corp.* There, the court held that a seller's multiple responses to a buyer's purchase order containing divergent shipment dates did not constitute an acceptance of the purchase order, and that the parties formed a contract only by their subsequent conduct (performance) under § 2-207(3). 477 N.E.2d 1206, 1210–11 (Ohio App. 1984). In *Alliance Wall*, the buyer's purchase order initially specified shipment "within five (5) weeks of" production, which the buyer modified by letter to be shipment "within seven (7) weeks of" the letter. *Id.* at 1208. In response, the seller sent an acknowledgement form specifying a "tentative shipping date" more than two weeks after the shipment date specified by the seller. *Id.* at 1210. The court concluded that the parties did not reach agreement through their competing writings because they differed as to the "dickered for" shipment date term. *Id.* at 1211. Even so, because "the goods were shipped and received, and the price was partially paid," the "conduct by both parties [was] sufficient to establish a contract" under § 2-207(3), in which "the terms of the contract consist of the terms upon which the parties agreed together with the 'gap-filler' provisions of the Uniform Commercial Code." *Id.*[12] So too here.

[12] *See also*, *e.g.*, *Gen. Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (no acceptance where responsive form differed as to "dickered for" terms, including "delivery date"); *Jalor Color Graphics, Inc. v. Knoll Pharm. Co.*,

The Commission "disagree[d] with the Final ID (and District Court) that the email responses were not acceptances because they provided shipment dates different than specified" by FII. Appx121. But its only reasoning was that "the Foxconn Respondents gave no indication that the May 2022 delivery dates were unacceptable for PO '176 patent [*sic*], nor did they indicate any intent to cancel the PO upon learning of the altered delivery dates." *Id*. In other words, the Commission relied on Foxconn communications post-dating the purported acceptance to conclude that the delivery date was not a material term. But acceptance requires an objective manifestation of "a ***present intention*** to be bound," *Malouf*, 430 Mass. at 878, which is ascertained "at the moment of [the purported contract's] formation." *Basis Tech. Corp. v. Amazon.com, Inc.*, 878 N.E.2d 952, 961 (Mass. App. 2008); *see Kelly v. Bensen*, 58 N.Y.S.3d 169, 172 (N.Y. App. 3d Div. 2017) (when determining mutual assent to "all material terms," "the court looks not to the parties' after-the-fact professed subjective intent, but rather at their objective intent as manifested by their expressed words and conduct at the time of the [alleged] agreement").

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26 F. App'x 38, 39 (2d Cir. 2001) ("Here, as the district court correctly found, the parties did not reach agreement on such essential terms as . . . the dates of delivery and production").

Foxconn's POs make clear that, at the time of the purported acceptance, the delivery date was material, and that Vicor did not accept the PO by sending estimated shipment dates that diverged from PO 176's delivery date by over six months:

- Note 1 specifies that the seller cannot alter the buyer's terms, stating:

> Any different or additional provision provided by Seller in any acceptance, confirmation, or acknowledgement to this Purchase Order ('PO') is null and void.

Appx12173; *see also* Appx12216 (testifying that Foxconn includes Note 1 so "Vicor cannot try to change [the PO's] terms without getting proper agreement in writing from" Foxconn).

- General Term No. 6 specifies:

> Seller shall deliver Products *in strict accordance with this PO, DN, and other delivery request provided by Buyer*. In case that any shipment will or may likely be delayed, Seller shall immediately notify Buyer of the reasons for and the effect of such delay. . . . *If Seller fails to deliver Products in a timely manner, in addition to the remedies under applicable laws, Buyer is entitled to penalty at 0.5% of the total Price of the delayed Products per day*, starting from Delivery Date as specified in this PO and ending on the Delivery Completion Date. . . .

Appx12174 (emphases added).

Foxconn's POs require strict adherence to the "Delivery Date," a requirement enforced by severe consequences, including daily financial penalties. *Id*. As a result, "the disparity between the POs and the dates offered in Vicor's emails indicate imperfect negotiations, with the latter dates best understood as counteroffers to the dates proposed by [Foxconn]." *Vicor*, 2024 WL 3548786, at *12.

The Commission also erroneously relied on *Borden Chemical, Inc. v. Jahn Foundry Corp.*, 834 N.E.2d 1227 (Mass. App. 2005) to suggest that agreement as to "product, price, and quantity" creates a binding agreement. But that is a misreading of *Borden*. In *Borden,* the parties exchanged forms: a purchase order from the buyer and an invoice from the seller (who contemporaneously shipped the goods). There was no dispute that the seller had accepted by providing invoices. The only question was whether a specific indemnity term in the invoices became part of the resulting contract. *Id.* at 1229-30.

Borden is inapposite. The dispute in this case is not whether specific terms in an acceptance form should be incorporated into the parties' agreement, but whether specific communications—Vicor's emails—were acceptances in the first place. Section 2-207 applies only when there is "a definite and seasonable expression of acceptance or a written confirmation." *Borden*'s *dicta* concerning the "essential components of the sale" at issue in that case, *id.* at 1231, does not explain this statutory language and thus has no bearing on whether the Vicor emails were acceptances. Further, in *Borden,* the parties' arrangement was that individual shipments would be ordered by telephone (under the terms of an annual purchase order) and then shipped by the seller with a corresponding invoice. *Id.* at 1229. Accordingly, there was no issue regarding the *timing* of the shipments, as in the present case.

D. Foxconn's POs were not "offers" Vicor could accept.

"An offer is the manifestation of willingness to enter into a bargain made in such a way as to justify the other person in understanding that his assent will conclude the agreement." *N. Beacon 155 Assocs., LLC v. Mesirow Fin. Interim Mgmt., LLC*, 135 F. Supp. 3d 1, 5 (D. Mass. 2015) (citation omitted). Foxconn's POs were not "offers" that Vicor could accept because they provided "that the PO alone does not obligate [Foxconn] to buy anything, even should Vicor 'accept' the PO." *Vicor*, 2024 WL 3548786, at *10.

The language of Foxconn's POs confirms that the PO itself cannot be "accepted" (such that the buyer would be bound by a promise to perform) without additional action by the buyer:

- Note 6 states that "This PO and any particular DN or delivery request issued by Buyer constitute an independent and complete agreement between both parties. This PO ***shall not constitute Buyer's purchase obligation without DN or other delivery requests***." Appx12173 (emphasis added). Note 6 also states that "Final quantity and/or delivery date shall be subject to the provisions of the most current DN or other delivery requests." Appx12173.
- Note 3 reinforces that no agreement may be formed without a "DN" or "delivery request" by requiring that the Seller "shall perform all

obligations under this PO ***and DN or other delivery requests***." Appx12173.

- Note 4 confirms that the PO itself is not a delivery request, because it specifies that the "order of precedence in case of conflict among the following documents shall be (1) ***DN or other delivery requests***, (2) ***PO***; (3) Purchase Agreement." Appx12173.

As the Massachusetts district court correctly held, there is "no doubt that Defendants (who are the "Buyer") must issue a 'DN or delivery request' before an agreement is formed pursuant to this plain language." *Vicor*, 2024 WL 3548786, at *10. As a result, "each individual PO was merely an invitation to negotiate or to discuss a purchase-and-sale arrangement." *Id.* at *11.

Foxconn's POs also were not offers because they provided no consideration. *See Neuhoff v. Marvin Lumber and Cedar Co.*, 370 F.3d 197, 201 (1st Cir. 2004) ("A contract must have consideration to be enforceable"); *Crellin Techs., Inc. v. Equipmentlease Corp.*, 18 F.3d 1, 7 (1st Cir. 1994) ("[t]he law requires mutuality of obligation as a prerequisite to a binding bilateral contract."); *Gill v. Richmond Co-op. Ass'n*, 309 Mass. 73, 80 (1941) ("Since the plaintiffs bound themselves to nothing, the defendant received no consideration . . . ."). Foxconn's POs contained no promises. They expressly disavowed any commitment to purchase goods without first sending another document—a "DN or other delivery request." Since the PO

"bound [Foxconn] to nothing," *Gill*, 309 Mass. at 80, Vicor received no consideration at the time of the supposed acceptances, and no contract was formed.

The Commission did not dispute that Foxconn's POs "require that Foxconn send a 'DN or other delivery request.'" Appx121. But it concluded, with no reasoning, that "Lee's September 27, 2021 email transmitting the PO [and] ask[ing] Vicor to 'confirm ETA asap'" constituted a "delivery request." *Id.* The Commission's reasoning withstands no scrutiny. The PO makes clear that a "DN" or "delivery request" will specify a date certain for delivery, which the seller must comply with: "Final . . . delivery date shall be subject to the provisions on the most current DN or other delivery requests." Appx12173. An email asking the seller to "confirm [*estimated* time of arrival]" for a pending PO is not a specification of a date certain; at most, it is an inquiry about feasible dates for Vicor, without obligating Foxconn to purchase the goods (per note 6).[13] Foxconn's POs thus were not "offers" that could be accepted.

E. The Commission erred by concluding that the October 1 Goodwin Email was a "written confirmation" under § 2-207(1).

The Commission independently erred in concluding that Goodwin's October 1 email was a "definite and reasonable [sic] expression of . . . *written confirmation*."

[13] The fact the PO requires "***strict accordance*** with this PO, DN, and other delivery request" confirms that Goodwin's response with substantially divergent "ship date[s]" was not an expression of acceptance to such "strict" terms.

Appx120 (quoting § 2-207(1)). Throughout its decision, the Commission concluded that the October 1 email bound Vicor to PO 176 because it served as a "written confirmation from the seller" and might have "constituted *confirmation* in the parties' course of dealing," Appx120, thereby rendering it a binding acceptance under § 2-207(1). This was clear error.

As Comment 1 explains, § 2-207(1) "is intended to deal with two typical situations." One is a "written confirmation" that is sent *after* a prior oral or informal agreement is reached. § 2-207, cmt. 1. The other is a "definite and seasonable expression of acceptance," which is a document "expressed and intended as an acceptance," like an "acceptance ([or] 'acknowledgment') form[]." *Id.* Goodwin's October 1 email cannot be a "written confirmation" under § 2-207, as there was no prior agreement to "confirm."

The Seventh Circuit in *Echo* repudiated the Commission's precise logic when it rejected the appellant's attempt to treat a "confirmation" as an "acceptance" under § 2-207(1). As noted above, in *Echo*, the buyer argued that the seller had "accepted" the buyer's purchase order when the seller sent a letter with computer records confirming the buyer's purchase order. To circumvent the letter's lack of any language of acceptance, the buyer argued "that even a 'confirmation' can operate as an acceptance" under § 2-207(1). *See* 121 F.3d at 1103 (arguing that "confirmation of a mere offer (like the recap letter here)" was sufficient). The Seventh Circuit

rejected this argument, explaining that "'confirmation' as used in the UCC refers to confirmation of *a prior agreement*." *Id.* As such, merely confirming a purchase order does not constitute either a "definite and seasonable expression of acceptance" or a "written confirmation" under § 2-207(1).

The Commission thus independently erred when it concluded that "[p]roviding shipment dates was a 'definite and reasonable [*sic*] expression of . . . ***written confirmation***'" under § 2-207(1).

III. The Commission's reasoning for finding that Vicor "accepted" Ingrasys's PO 265 cannot be discerned from the record.

The Commission erred in concluding, without any evidentiary basis or reasoned explanation, that Vicor "accepted" PO 265. The Commission mentions PO 265 in only four places in its "Analysis," Appx121, Appx122, and in none of them does the Commission pinpoint when, how, and by what means Vicor "accepted" the PO. Regardless, no such acceptance occurred for the same reasons explained in Sections II.A-E above in connection with PO 176:

(1) The June 13, 2023 Vicor email that Foxconn cites as "acceptance" of PO 265, Appx11499, did not include any objective manifestation of assent. *Vicor*, 2024 WL 3548786, at *12. Vicor merely identified a quantity for shipment and a ship date. Appx11499. Vicor then requested that Foxconn revise the terms of PO 265, which Foxconn did, resulting in transmission of a new PO 265. Appx11506-07 (attachment 4500273265.pdf); Appx11514. In response to the revised PO 265, Vicor

responded with its SOA, just as it had in the hundreds of prior transactions. Appx11265-66 (dated June 13, 2023 eastern standard time / GMT -5). The intermediary email providing a ship date and quantity thus could not be considered an objective manifestation of assent to the terms of PO 265, which was sent *after* the purported "acceptance email."

(2) The Commission ignored the parties' course of dealing, which confirmed that Vicor could accept PO 265 only by sending an SOA. There is no record evidence to suggest that the parties had a shared understanding that Vicor would accept PO 265 by email in contravention of that course of dealing.

(3) The ship date that Vicor included in its purported "acceptance" email differed from PO 265's "delivery date" by approximately seven weeks. *Compare* Appx11514, *with* Appx11499. Because Vicor's response contained materially different terms, it was not an acceptance. *See* Appx11514 (requiring strict adherence to its "Delivery Date").

(4) PO 265 was not an "offer" Vicor could accept for the same reasons noted above, as to PO 176.

(5) The June 13, 2023 Vicor email was not a "written confirmation" under § 2-207(1) because there was no prior agreement to "confirm."

CONCLUSION

The Court should reverse the Commission's decision finding that Vicor gave Foxconn a free license to Vicor patents embodied in the goods Foxconn purchased from Vicor.

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Respectfully submitted,

SUSMAN GODFREY L.L.P.

By: */s/ Oleg Elkhunovich*

Oleg Elkhunovich
SUSMAN GODFREY LLP
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150
oelkhunovich@susmangodfrey.com

Genevieve Vose Wallace
Steven M. Seigel
Danielle Nicholson
SUSMAN GODFREY LLP
401 Union Street, Suite 3000
Seattle, Washington 98101
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
gwallace@susmangodfrey.com
sseigel@susmangodfrey.com
dnicholson@susmangodfrey.com

Dinis Cheian
SUSMAN GODFREY LLP
One Manhattan West
New York, New York 10001
Telephone: (212) 336-8330
Facsimilie: (212) 336-8340

dcheian@susmangodfrey.com

Louis S. Mastriani
BUCHANAN INGERSOLL & ROONEY PC
1700 K Street, NW, Suite 300
Washington, DC 20006
Telephone: (202) 407-7292
louis.mastriani@bipc.com

Attorneys for Appellant Vicor Corporation