UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VICOR CORPORATION, Plaintiff, v. FII USA, INC. (a/k/a Foxconn Industrial Internet USA, Inc.), INGRASYS TECHNOLOGY, INC., and INGRASYS TECHNOLOGY USA, INC., Defendants.	)	Civil No. 24-10060-LTS

ORDER ON VICOR'S MOTION FOR PRELIMINARY INJUNCTION (DOC. NO. 4)

June 24, 2024

SOROKIN, J.

Plaintiff Vicor Corporation ("Vicor") and Defendants FII USA, Inc., Ingrasys Technology, Inc., and Ingrasys Technology USA, Inc. (collectively, "Defendants"), have engaged in a years-long commercial relationship. Doc. No. 1 ¶ 9.[1] At some point in that relationship, Vicor alleges that Defendants began importing products into the United States that Vicor claims infringe upon its intellectual property. Id. ¶ 22. Subsequently, Vicor filed this suit against Defendants, seeking declaratory and injunctive relief. Id. ¶¶ 26-39. In addition to its Complaint, Vicor filed the instant Motion for Preliminary Injunction. Doc. No. 4. For the following reasons, Vicor's Motion is ALLOWED IN PART as explained below.

[1] Citations to "Doc. No. __" reference documents appearing on the Court's electronic docketing system. Pincites are to the page numbers in the ECF header or numbered paragraphs within the document, where applicable.

I. BACKGROUND

A. The Parties

Vicor develops power converters for use in network servers.[2] Doc. No. 1 ¶ 13. Defendants are related entities that manufacture electronic products, including network servers, under the corporate umbrella of Hon Tai Technology Group.[3] Id. ¶¶ 5, 14. Defendants have been customers of Vicor since at least 2020, each having purchased power converters from Vicor. Id. ¶¶ 14, 15.

B. Procedural History

At some point, Defendants began purchasing competing power converters from other suppliers—purchases which Vicor alleges infringe various patents it holds when those products are imported into the United States. Id. ¶ 22. The parties do not dispute the quality of the power converters manufactured and delivered by Vicor, nor the payments made by Defendants. Rather, their dispute centers, in part, on whether Vicor granted Defendants a license for Vicor's intellectual property, and, if so, the scope of that license. Id. ¶¶ 16, 22. The parties also appear to dispute whether Defendants used or infringed upon any of Vicor's intellectual property. Id. ¶ 22.

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[2] In deciding the pending Motion for Preliminary Injunction, the Court accepts well-pleaded allegations in the Complaint and uncontroverted affidavits, and may also rely on otherwise inadmissible evidence, including hearsay. See Asseo v. Pan Am. Grain Co., 805 F.2d 23, 26 (1st Cir. 1986) (explaining that courts may consider inadmissible evidence, including hearsay, when ruling on a motion for preliminary injunction, with the "dispositive question" being "whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding"); Diaz v. Drew, 253 F. Supp. 3d 369, 372 (D. Mass. 2017). The Court draws whatever inferences it might favor and decides the likely ramifications. Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 933 (1st Cir. 1988).

[3] Vicor is a Delaware corporation with its principal place of business in Massachusetts. Doc. No. 1 ¶ 1. FII USA, Inc., is a Wisconsin corporation with its principal place of business also in Wisconsin. Id. ¶ 2. Ingrasys Technology, Inc., is a Taiwanese corporation with its principal place of business in Taiwan. Id. ¶ 3. Ingrasys Technology USA, Inc., is a California corporation with its principal place of business in California. Id. ¶ 4.

The lawsuit pending in this Court presents a much narrower issue: whether the terms of the contract(s) between the parties include a provision requiring arbitration in China as stated in the purchase orders ("POs") issued by the Defendants to Vicor. See, e.g., Doc. No. 40-16.

On July 12, 2023, Vicor filed a complaint with the United States International Trade Commission ("ITC"), seeking an exclusion order preventing Defendants from importing patent-infringing power converters in the United States. Doc. No. 1 ¶ 22; see also Doc. No. 5-2. On the same date, Vicor filed a complaint for patent infringement against Defendants and other entities in the United States District Court for the Eastern District of Texas. See Doc. No. 5-2 ¶ 130; see also Compl. Patent Infringement, Vicor Corp. v. Delta Elecs., Inc., No. 23-cv-00323 (E.D. Tex. July 12, 2023), ECF No. 1. On August 18, 2023, Defendants filed an unopposed motion to stay the Eastern District of Texas action pending the ITC determination, which was subsequently granted. See Unopposed Mot. to Stay Action Pending ITC Determination, Vicor Corp. v. Delta Elecs., Inc., No. 23-cv-00323 (E.D. Tex. Aug. 18, 2023), ECF No. 25.

On December 20, 2023, Defendants initiated arbitration proceedings before the China International Economic and Trade Arbitration Commission ("CIETAC"). Doc. No. 5 at 12; Doc. No. 20 at 8. Defendants allege that they have authority to do so because of an arbitration provision in the terms and conditions attached to their POs that they sent to Vicor when purchasing power converters. Doc. No. 20 at 8; Doc. No. 1 ¶ 23. Defendants also assert that the terms and conditions included in their POs provide them with an intellectual property license from Vicor. Doc. No. 20 at 6; Doc. No. 1 ¶ 16. This license forms a defense in the ITC proceedings, as well as a position Defendants will assert in the arbitration.

On December 28, 2023, Defendants filed a motion to terminate the ITC proceedings as to each of them. Doc. No. 1 ¶ 23. In their motion, Defendants alleged that the terms and conditions

in their POs submitted to Vicor grant them a license to Vicor's patents. Id. Additionally, Defendants alleged that the arbitration provision of their POs requires any disputes—and questions of arbitrability—to be resolved by arbitration before CIETAC. Id.

On January 8, 2024, Vicor filed its Complaint in this Court, seeking injunctive relief and declaratory judgments. Id. ¶¶ 26-39. Specifically, Vicor sought an injunction staying the arbitration proceedings filed against it before CIETAC by prohibiting Defendants from further prosecuting those arbitrations. Id. Furthermore, Vicor sought declarations that it was not bound by either the license or arbitration clauses in the terms and conditions in Defendants' POs. Id.

On January 9, 2024, Vicor filed its instant Motion for Preliminary Injunction, seeking the same relief as stated in its Complaint. Doc. No. 4. On January 12, 2024, Vicor also filed an Emergency Motion for an Ex Parte Temporary Restraining Order ("TRO"), seeking to enjoin Defendants from pursuing the CIETAC arbitrations until the resolution of its Motion for Preliminary Injunction. Doc. No. 8 at 4.

On January 19, 2024, after expedited briefing and a hearing on the Motion for TRO, the Court granted Vicor's TRO, thereby enjoining Defendants from pursuing the CIETAC arbitrations against Vicor pending resolution of Vicor's Motion for Preliminary Injunction. Doc. No. 27 at 4.[4] In its order, the Court found, based on the evidence then before it, that Defendants' POs did not establish a binding agreement to arbitrate between the parties. Id. at 2. As a result, the Court concluded that (i) the parties did not agree to arbitrate before CIETAC; and (ii) the parties either (a) agreed to arbitrate in Massachusetts pursuant to a provision in Vicor's Sales Order Acknowledgements ("SOAs"), or (b) various provisions of the Uniform Commercial Code

[4] The Court's January 19, 2024, Order is also available on Westlaw. See Vicor Corp. v. FII USA, Inc., Civ. No. 24-10060-LTS, 2024 WL 532612 (D. Mass. Jan. 19, 2024).

("UCC") constituted the agreement between the parties, resulting in no applicable arbitration provision. Id.

On January 22, 2024, Defendants filed an Emergency Motion to Stay Under 28 U.S.C. § 1659 and to Vacate the Temporary Restraining Order. Doc. No. 28.

On January 23, 2024, the ITC denied Defendants' Motion to Terminate on the grounds that Defendants had waived their claims to compel arbitration by both waiting too long before asserting them at the ITC and engaging in conduct inconsistent with the right of arbitration. See Doc. No. 33-1 at 3-6.

On February 16, 2024, after briefing and a hearing, this Court allowed in part and denied in part Defendants' Motion to Stay.[5] Doc. No. 36.[6] This Court denied the Motion to Stay to the extent it sought an order vacating the TRO already entered and/or an order staying the action insofar as a resolution of the Motion for Preliminary Injunction would mirror the relief provided in the TRO. Id. at 8. Specifically, although this Court found that the instant dispute fell within the statutory language of 28 U.S.C. § 1659, it also found that the statute did not prevent the Court from issuing injunctive relief aimed at preserving its jurisdiction, preventing potentially inconsistent judgments, and protecting a party from participation in an arbitration to which, according to the evidence then before the Court, it had not agreed. Id. at 7. This Court otherwise allowed the Motion, thereby staying the action insofar as any relief or discovery beyond the foregoing was sought. Id.

[5] At the hearing on the Motion to Stay, Vicor agreed to narrow the scope of the injunctive relief it seeks in its Motion for Preliminary Injunction. Doc. No. 35. That is, Vicor agreed to seek only an order halting Defendants from pursuing arbitration in front of CIETAC until the completion of the ITC proceedings. Id.

[6] The Court's February 16, 2024, Order is also available on Westlaw. See Vicor Corp. v. FII USA, Inc., Civ. No. 24-10060-LTS, 2024 WL 1675681 (D. Mass. Feb. 16, 2024).

Thereafter, the Court allowed additional discovery and briefing on Vicor's Motion for Preliminary Injunction. See Doc. Nos. 37, 38. On March 7, 2024, Defendants filed their Opposition to Vicor's Motion. Doc. No. 40.[7] On March 28, 2024, Vicor filed its Reply. Doc. No. 44. On May 14, 2024, the Court heard arguments on the Motion at a hearing, during which the parties submitted extensive slide decks. Doc. No. 56. The Motion is now fully briefed.

C. Scope of the Record

At the non-evidentiary hearing on the Motion for Preliminary Injunction held on May 14, 2024, Defendants objected orally to the Court's consideration of any new arguments advanced by Vicor in its Reply and orally moved to strike the fact evidence submitted by Vicor for the first time along with its Reply. Doc. No. 56. These requests are DENIED.

First, in contrast to some United States District Courts, this Court has not adopted a rule prohibiting the submission of new arguments or facts in a reply. See Hilsinger Co. v. Kleen Concepts, LLC, Civ. No. 14-14714-FDS, 2017 WL 3841468, at *7 (D. Mass. Sept. 1, 2017). Compare D. Mass. LR 7.1, with D. Me. LR 7(c) (requiring parties to "strictly confine[]" their replies to issues raised in the opposition), and D.N.H. LR 7.1(e)(1) (providing essentially the same as Maine local rule).

Second, no harm or unfairness will result here from the Court's consideration of Vicor's Reply. For starters, at the hearing, Defendants identified no prejudice flowing from the arguments or evidence advanced in Vicor's Reply. See Doc. No. 56. Moreover, Defendants, in fact, suffered no unfair prejudice from the new arguments or facts advanced by Vicor in its Reply. Vicor filed its Motion for Preliminary Injunction on January 9, 2024—the day after filing

[7] Defendants filed their Opposition under seal as Doc. No. 40 with an unredacted, but otherwise identical, version appearing as Doc. No. 40-11. For clarity, the Court refers to the unredacted version, Doc. No. 40-11, in its analysis below.

its Complaint. Doc. No. 4. Shortly thereafter, Vicor filed a Motion for TRO, which the Court resolved after expedited briefing and a hearing. Doc. Nos. 8, 20, 25, 26, 27.

On February 23, 2024, the parties filed a joint status report which stated their separate positions as to the schedule governing further proceedings regarding the pending Motion for Preliminary Injunction. Doc. No. 37. The Court adopted the schedule advanced by Defendants, Doc. No. 38, which provided for further discovery by Defendants, an opposition to be filed by Defendants after the completion of further discovery, a period for Vicor to take discovery from any witness submitting a declaration in support of the opposition, and a reply from Vicor. Doc. No. 37 at 1-2. Neither party proposed an evidentiary hearing. Id.

The parties complied with the schedule adopted by the Court. This schedule necessarily contemplated that Defendants would have the opportunity to submit evidence not previously before the Court along with their opposition. Defendants did so, advancing, inter alia, an argument that Vicor "accepted" in various emails the "offers" contained in various POs. See Doc. No. 40-11 at 13-19. Defendants supported this legal argument by submitting emails along with deposition testimony. See generally Doc. Nos. 40-1 to -17. Defendants submitted no affidavits from any witness. Obviously, understandably, and reasonably, Vicor responded to this submission with further arguments and evidence of its own. See generally Doc. Nos. 44, 45, 45-1 to -93. For present purposes, the Court accepts Defendants' characterization that some of the arguments and evidence submitted by Vicor are "new."

Between the filing of Vicor's Reply on March 28, 2024, and the hearing on May 14, 2024, Defendants had a full and fair opportunity to file a motion to strike, to seek leave to file a surreply (with or without additional supporting evidence), to request an evidentiary hearing to rebut or to dispute the new evidence, and/or to request to reopen discovery. The Court notes that

the original period for discovery had been only fourteen days; thus, if further discovery was warranted, it could have been accomplished easily. Defendants took none of those actions, nor any other action.

However, at the hearing on May 14, 2024, Defendants responded orally and in writing—in the form of their written, fifty-page, PowerPoint slide deck. See Doc. No. 56. At the conclusion of the hearing, the Court advised the parties that it was accepting and considering the slide decks used by both parties. Id. At no time did Defendants request an opportunity to submit new evidence.

Third, not all of the arguments are "new." Vicor advanced at least the "Note 6" argument, as described below, at the hearing on the Motion for TRO on January 19, 2024, in response to the arguments advanced by Defendants in their opposition brief as to the terms of their POs. See Doc. No. 26.

In light of the foregoing, Defendants' request to strike or disregard any or all of the "new" arguments and evidence is DENIED. The Court further notes that this resolution comports with Rule 1 of the Federal Rules of Civil Procedure, which directs that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

D. The Purchase Orders

Defendants' central argument in opposition to Vicor's Motion is that Vicor agreed to the terms of Defendants' POs and, thus, to arbitrate before CIETAC any disputes arising out of Defendants' POs. Doc. No. 40-11 at 13-19. Accordingly, the Court analyzes the relevant POs and related documents on the record before it. Although the parties have exchanged hundreds of POs during their course of dealing, they focus their arguments largely around four POs and

associated documents. See generally Doc. Nos. 5, 40, 44. The Court follows suit and discusses the four in chronological order.

1. PO 054

On May 20, 2021, Ingrasys Technology USA, Inc. ("Ingrasys US"), sent Vicor PO 4500319054 ("PO 054"), requesting 5,300 units of a certain part with a delivery date of June 10, 2021.[8] Doc. No. 40-16. PO 054 also contains a number of terms and conditions, including three relevant to the instant dispute. First, it contains "Note 6," which states:[9]

> This PO and any particular DN[10] 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. Final quantity and/or delivery date shall be subject to the provisions on the most current DN or other delivery requests. Seller agrees to deliver products according to such particular DN or delivery request. Unit Price shall be the most current one as agreed by both parties before payment. Notwithstanding otherwise provided under this PO, in case Seller supplies Products to Buyer via VMI Hub ("Hub") as agreed by both parties, any particular DN or delivery request issued by Buyer shall only serve as Buyer's forecast and its request for safety stock according to which Seller shall stock the products in Hub. However, such DN or delivery request shall not constitute Buyer's purchase obligation. The actual quantity of Products purchased by Buyer is subject to the quantity of Products specified in the confirmed pull document, including but not limited to Goods Receiving Notice ("GRN"). Buyer's confirmed pull documents, including but not limited to GRN, and this PO constitute a complete agreement and Seller shall perform all obligations under this PO and the pull documents.

Id. at 2.

[8] The actual part description in the PO is a long series of alphanumeric characters. See Doc. No. 40-16 at 2. Because the parties do not contest the identity of the relevant part, the Court omits the part's full name and description for clarity and does the same for the other three POs below.

[9] Throughout this Order, the Court reproduces the parties' terms and conditions exactly as they have been provided to the Court, unless otherwise indicated.

[10] Defendants' POs define "DN" as "Delivery Notice." See, e.g., Doc. No. 40-16 at 2. For the purposes of this decision, the Court uses the term "DN" to mean "DN," "delivery notice," or "delivery request."

PO 054 also contains an "Intellectual Property Right" provision ("IP Clause"), which states:

> Seller agrees to grant Buyer 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.

Id. at 3.

Finally, PO 054 contains a "Governing Law and Jurisdiction" provision ("Arbitration Clause"), which states:

> The formation, effectiveness, interpretation and performance of this PO shall be governed by the laws of the People's Republic of China. Any and all disputes arising out of this PO shall be amicably resolved by both Parties. Both parties agree to submit the disputes which cannot be amicably settled to China International Economic and Trade Arbitration Commission for arbitration in accordance with its effective arbitration rules when submitting. If the arbitration fails to proceed or there is any dispute about the validity of the arbitral awards due to jurisdiction, Statutes of Limitations or other reasons, both Parties agree to submit the disputes to the court in Buyer's place of business as the first instance court. However, the formation, effectiveness, interpretation and performance of this PO shall be governed by the laws of Republic of China, and any disputes arising out of this PO shall be submitted to Taipei District Court, Taiwan for the first resolution, if Seller's registered place of business is in Taiwan.[11]

Id.

Following Ingrasys US's submission of PO 054 to Vicor, Vicor sent Panda Chen, an employee of Ingrasys US, an SOA, which mirrored the requested product and quantity, but had a different scheduled ship date of February 4, 2022. Doc. No. 45-47 at 3. The SOA states that the order would be both billed to and shipped to Ingrasys US. Id. The unit price and total are redacted. Id. The SOA also contained an "Important Notice," which states:

[11] No party has suggested or argued that this Court, in this action, should apply any law other than the law of Massachusetts or federal statutory law.

> THIS ORDER IS SUBJECT TO VICOR CORPORATION'S STANDARD TERMS AND CONDITIONS OF SALE, INCORPORATED BY REFERENCE INTO THIS DOCUMENT. THE FULL TEXT OF THESE TERMS AND CONDITIONS MAY BE FOUND ON THE COMPANY'S WEBSITE: http://www.vicorpower.com/termsconditions

Id.

Vicor's terms and conditions contain several provisions relevant to this dispute. The first is a "Scope" provision, which states, in relevant part:

> 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 or any of its subsidiaries, divisions, affiliates, or related entities based in the United States ("Vicor") to the commercial party listed on the order form or other documentation ("Purchase Order") provided to Vicor by that party ("Buyer"), except to the extent these Terms conflict with those of an existing, separate contract signed by Vicor and Buyer may take precedence over these Terms. Vicor's express acceptance of a Purchase Order under these Terms is evidenced by its delivery of a Sales Order Acknowledgment ("SOA"), and such acceptance of a Purchase Order is expressly conditioned on Buyer's assent to these Terms . . . . 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. No party has been authorized by Vicor to make any statements or representations 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 . . . . In the event of any conflict between these Terms and terms and conditions of purchase of the Buyer, these Terms shall prevail, except in those circumstances when Vicor has expressly consented to the specific application of the conflicting condition(s) of Buyer to the Sales Agreement, as specifically indicated in the SOA.

Doc. No. 5-6 at 2.

The second is a provision titled "Buyer's express acceptance of these terms," which states, in relevant part:

> Buyer's assent to these Terms shall be conclusively presumed from: (A) Buyer's receipt of Vicor's SOA without written objection received by Vicor within 10 days after such receipt; (B) Buyer's instruction to Vicor to begin manufacturing (and/or shipping) the Products and/or delivering the Services after receipt of Vicor's SOA;

> (C) Buyer's acceptance of or payment for all or any part of the Products or Services set forth in the SOA; or (D) taking any other action evidencing Buyer's acceptance of the benefits of the Sales Agreement between Vicor and Buyer . . . . These Terms, together with Buyer's Purchase Order (inclusive of all specifications, drawings, and data submitted to Vicor with such Purchase Order) and Vicor's SOA (inclusive of a SOW for Services, if any) shall constitute the complete and final Sales Agreement between Vicor and Buyer, superseding completely any prior oral or written communications.

Id. at 2-3.

The third is a provision entitled "Governing law," which states:

> Any and all matters in dispute between Vicor and Buyer, whether arising from or relating to a Sales Agreement or arising from alleged extra-contractual facts including, but not limited to, fraud, misrepresentation, negligence, or any other alleged tort or violation of contract, shall be governed by, construed, and enforced in accordance with the Uniform Commercial Code as enacted in the statutes of the Commonwealth of Massachusetts, without resort to the Commonwealth's conflict of laws provisions and regardless of the legal theory upon which such matter is asserted, and any applicable United States federal law.

Id. at 9.

The final relevant provision is entitled "Dispute resolution; Vicor's selection of forum," which states, in relevant part:

> Any dispute with Buyer in connection with a Sales Agreement may, at Vicor's sole discretion, be resolved through binding arbitration in the Commonwealth of Massachusetts, pursuant to the Commercial Arbitration Rules of the American Arbitration Association ("Arbitration"). The seat of arbitration shall be Boston, Massachusetts . . . . Buyer's only forum for dispute resolution is Arbitration. Vicor, in its sole discretion, may elect to have a judicial forum for dispute resolution. As such, Buyer irrevocably submits and agrees to the jurisdiction of the state courts of the Commonwealth of Massachusetts and the Federal courts within the Commonwealth of Massachusetts, in any action, suit, or proceeding related to, or in connection with, a Sales Agreement.

Id.

Because the foregoing provisions are included verbatim in the other three POs and related documents, the Court omits their reproduction below. The record contains no further communications between the parties regarding PO 054.

2. PO 176

On August 18, 2021, FII USA, Inc. ("FII"), sent Vicor PO 4600000176 ("PO 176"), requesting 7,400 units of a certain part with a delivery date of October 15, 2021.[12] Doc. No. 5-7 at 2. PO 176 contains the same three provisions described above: Note 6, the IP Clause, and the Arbitration Clause. Id. at 2-3.

Following FII's submission of PO 176 to Vicor, employees of the two companies exchanged a series of emails about PO 176 between September 26 and October 5, 2021, in which they primarily discussed delivery dates. See Doc. No. 20-5. The first email, sent on September 26, 2021, from Anita Wang of FII to Peter Goodwin of Vicor, asked: "Could you provide all open invoices on your side and update ETA? Please find attached new POs and confirm ETA asap."[13] Id. at 5. Thereafter, on September 27, 2021, Goodwin appears to forward something to Carolyn Lee of FII.[14] Id. at 4. On September 30, 2021, Lee emailed Goodwin to ask, in part: "Do you have an update on the docking status of PO#4600000176?"[15] Id. On October 1, 2021, Goodwin emailed Lee stating: "PO# 4600000176 . . . . . 2K ship date 5-13-22, 2K 5-20, 2K 5-27 and 1400 6-3." Id. at 3. On October 4, 2021, Lee emailed Goodwin and stated, in part: "According to your dates below, we should have received all of PO#4600000176. I was just a little confused because on our internal shortage report, our Asia team has a note that they are checking on it." Id. On October 5, 2021, Lee emailed Goodwin and asked: "Do you have an update on the status of the PO's below?"[16] Id. at 2. Finally, on that same date, Goodwin emailed

[12] The PO provided to the Court includes redacted unit prices and total price. See Doc. No. 5-7 at 2. However, neither party raises any argument in relation to these figures.
[13] Neither party has provided the Court with these attachments.
[14] Neither party has submitted evidence as to what the potential attachment may have been. Accordingly, the Court makes no factual finding as to what the attachment said.
[15] Neither party has defined the phrase "docking status."
[16] The evidence before the Court does not clearly indicate to which POs Lee is referring here.

Lee to state: "I will provide an update tomorrow for the following new orders," and then listed PO 176 among others. Id.

Also on October 5, 2021, Vicor sent Anita Wang an SOA which mirrored the requested products and quantity but had a different scheduled ship date of May 13, 2022. Doc. No. 5-8 at 3. The SOA states that the order would be billed to Ingrasys US, but shipped to FII. Id. The unit price and total are again redacted. Id. The SOA also contained the same "Important Notice," linking to the same provisions, described above under the section on PO 054. Id.

3. PO 265

On May 31, 2023, Ingrasys Technology, Inc. ("Ingrasys"), sent Vicor PO 4500273265 ("PO 265"), requesting 6,270 units of a certain part with a delivery date of August 9, 2023.[17] Doc. No. 5-13. PO 265 contains the same three provisions described above: Note 6, the IP Clause, and the Arbitration Clause. Id. at 2-3.

PO 265 was generated after Defendants informed Vicor that they wished to cancel a prior PO (PO 4500317991 or "PO 991"), for which Vicor had already sent an SOA. Doc. No. 45 ¶ 39. Vicor had previously informed Defendants that PO 991 was "non-cancellable and non-reschedulable," or "NCNR." Id. To accommodate Defendants, Vicor offered to reallocate a portion of PO 991 originally destined for Taiwan to a subsidiary of Defendants in Shenzhen, China, that was more in need of the parts than the original recipient. Id.; see also Doc. No. 45-71 at 2. Thereafter, Defendants requested that the portion of PO 991 described above be transferred to a new PO that ultimately became PO 265. Doc. No. 45 ¶ 50.

Following Ingrasys's submission of PO 265 to Vicor, employees of the two companies exchanged a series of emails about PO 265 between May 31 and June 14, 2023. Doc. No. 40-12.

[17] The unit price and total price are again redacted. See Doc. No. 5-13 at 2.

The first relevant email was sent on May 31, 2023, by Signe Shi of Ingrasys to Mandy Jungjohann of Vicor, attaching PO 265 for her reference and discussing transferring portions of various POs to different POs, including PO 265. Id. at 4. The second relevant email was sent on June 6, 2023, by Liz Liu (an employee of one of the Defendants, though which specific entity is unclear) to Jungjohann and Alice Salamanca of Vicor asking them to "confirm the latest delivery date for Taiwan orders" and listing PO 265. Id. at 3. On June 13, 2023, Salamanca emailed Liu, stating that "Qty 6,270 pcs scheduled for 9/29/23 ship" of PO 265. Id. Thereafter, Jungjohann emailed Liu to ask, in relation to PO 265:

> [I]t looks like these were asked for in June below and you just sent a PO over with the corrected warranty asking for delivery on August 9th, then request to cancel 1 minute later. Can you provide some clarity? This product and PO is NCNR. We can add back to the original NCNR Shenzhen PO or the new San Jose site PO. The overall quantity of this part on order is not cancellable and will ship to a Foxconn location on 9/29 or sooner.

Id. at 2.

On June 13, 2023, Vicor sent Signe Shi of Ingrasys an SOA which mirrored the requested products and quantity but had a different scheduled ship date of September 29, 2023. Doc. No. 5-14 at 3. The SOA states that the order would be billed to and shipped to Ingrasys. Id. The unit price and total are again redacted. Id. The SOA also contained the same "Important Notice," linking to the same provisions, described above under the section on PO 054. Id.

4. PO 185

On November 23, 2023, Ingrasys sent Vicor PO 4500277185 ("PO 185"), requesting 24,030 total units of three distinct parts with a single delivery date of March 28, 2024. Doc. No. 40-14. PO 185 contains the same three provisions described above: Note 6, the IP Clause, and the Arbitration Clause. Id. at 2-3.

Following Ingrasys's submission of PO 185 to Vicor, employees of the two companies exchanged a brief series of emails about PO 185 between November 28 and December 6, 2023. Doc. No. 40-15. The first relevant email was sent on November 28, 2023, by Salamanca to Owen Wang of FII, asking for him to "Please send me a copy of new PO# 4500277185." Id. at 2. On that same date, Wang emailed Salamanca, stating: "Please see the attached for new PO# 4500277185, thank you."[18] Id. On December 6, 2023, Salamanca emailed Wang, stating: "Thanks for the new order. Here's ship dates - 15,390 pcs MCM4609S59Z01C5T00 for 2/29/24 ship. Line 2 for 2,880 pcs MCD4609S60E59H0T20 for 12/29/23 ship. Line 3 for 5,760 pcs DCM3110S60E02A3TN0 for 1/19/24 ship." Id. at 2.

On December 6, 2023, Vicor sent Wang an SOA which mirrors the total quantity, but has three different ship dates of December 29, 2023, January 19, 2024, and February 29, 2024. Doc. No. 45-93 at 3. The SOA states that the order would be both billed to and shipped to Ingrasys. Id. The SOA also contained the same "Important Notice," linking to the same provisions, described above under the section on PO 054. Id.

II. LEGAL STANDARD

Preliminary injunctive relief is an "extraordinary and drastic remedy." Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011). To demonstrate that it is entitled to a preliminary injunction, Vicor, as the moving party, bears the burden to establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) that a balancing of the equities favors relief now; and (4) the public interest also favors relief now. Akebia Therapeutics, Inc. v. Azar, 976 F.3d 86, 92 (1st Cir. 2020).

[18] Neither party has provided the Court with this attachment.

Although the Court must consider all four factors, the first factor bears the most significance, id., and a court need not engage with the other factors when it finds the first to be lacking. See, e.g., Orkin v. Albert, 603 F. Supp. 3d 1, 2 (D. Mass. 2022). However, as to the first factor, "the district court is required only to make an estimation of likelihood of success and 'need not predict the eventual outcome on the merits with absolute assurance.'" Corp. Techs., Inc. v. Harnett, 731 F.3d 6, 10 (1st Cir. 2013) (quoting Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 16 (1st Cir. 1996)).

As to the second factor, Vicor must show that, absent a preliminary injunction, it will face irreparable harm, which, in this context, means "an injury that cannot adequately be compensated for either by a later-issued permanent injunction, after a full adjudication on the merits, or by a later-issued damages remedy." Rio Grande Cmty. Health Ctr., Inc. v. Rullan, 397 F.3d 56, 76 (1st Cir. 2005). As to the third and fourth factors, Vicor must show that "the balance of relevant hardships as between the parties" tilts in its favor and that the public interest lies in granting injunctive relief. Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 482 (1st Cir. 2009).

III. DISCUSSION

A. Likelihood of Success on the Merits

For Vicor to demonstrate a likelihood of success on the merits—which here means establishing that it is not bound by the terms of Defendants' POs and therefore need not arbitrate before CIETAC—Vicor must show that, at a minimum, the PO terms are not terms of the contract between the parties. This follows because the POs are the only documents on the record which specify arbitration before CIETAC in China. Compare Doc. Nos. 40-16, 5-7, 5-14, 40-14 (Defendants' POs specifying arbitration to be conducted in China), with Doc. Nos. 45-47, 5-8, 5-13, 45-93 (Vicor's corresponding SOAs specifying arbitration to be conducted in Boston.). If

Vicor can show that it did not agree to arbitrate before CIETAC, it cannot be compelled to do so. Coinbase, Inc. v. Suski, 144 S. Ct. 1186, 1191 (2024) (holding that "disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes").

As an initial matter, the Court finds that the POs are not, standing alone, an agreement or contract between the parties. Under Massachusetts law, a valid contract requires "an offer, acceptance, and an exchange of consideration or meeting of the minds." Vadnais v. NSK Steering Sys. Am., Inc., 675 F. Supp. 2d 205, 207 (D. Mass. 2009); accord Conte v. Bank of Am., N.A., 52 F. Supp. 3d 265, 268 (D. Mass. 2014). 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) (quoting I & R Mech., Inc. v. Hazleton Mfg., Co., 817 N.E.2d 799, 802 (Mass. App. Ct. 2004)); see also Restatement (Second) of Contracts § 24 (Am. L. Inst. 1981) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.").

Accordingly, the unilateral act of sending a PO to Vicor cannot alone create a binding agreement between the parties. As the foregoing authority makes clear, before a buyer's offer can bind a seller, the seller must accept the offer (in some form), and there must be an exchange of consideration between the parties. See Vadnais, 675 F. Supp. 2d at 207. Indeed, no buyer can obligate a seller to make a sale merely by sending the seller an offer—even if the offer contains all the material terms of a proposed contract. Some action by the seller is required. Here, at the time Vicor receives a PO, it has not yet indicated acceptance, nor have the parties exchanged

consideration. Consequently, Vicor's mere receipt of a PO from Defendants, without more, does not bind Vicor to arbitrate disputes over the PO before CIETAC in China.

At the hearing on the Motion for Preliminary Injunction, Defendants sensibly conceded the foregoing basic, uncontroversial provisions of law. See Doc. No. 56. Nonetheless, the Court starts with these considerations because they form the foundation of contract law analysis. From this foundation, the Court proceeds to consider whether there is "more" here.

Turning to the record beyond the POs, which has expanded since the Court considered the TRO, Defendants point to a series of email exchanges, described above, following three of the four disputed POs. See Doc. No. 40-11 at 8-11. These exchanges, Defendants contend, formed a contract under the terms of the POs prior to Vicor sending an SOA. Id. For the following reasons, the Court finds that Vicor has established it is likely to succeed in demonstrating that it did not accept the POs' terms.

First, based on the present record, the Court finds that the POs alone were not "offers" that Vicor could accept, thereby creating a binding contract. Each of the four disputed POs contains Note 6, which explicitly states that the PO alone does not obligate Defendants to buy anything, even should Vicor "accept" the PO. Note 6 states, in relevant part: "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." E.g., Doc. No. 40-16 at Note 6 (emphasis added). 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. That is what the sentence, written by Defendants, states in each PO. Elsewhere, the POs again expressly make this point when each states that the seller must comply with the various "provisions on Delivery Notice ('DN') or

other delivery requests from Buyer." E.g., Doc. No. 40-16 at Note 3. The POs also state that they are not delivery notices or delivery requests. They define an order of precedence in the case of a "conflict" among the documents such that the hierarchy becomes "(1) DN or other delivery requests; (2) PO; (3) Purchase Agreement." E.g., id. at Note 4.

Furthermore, Defendants point to no documents labeled expressly "DN."[19] Thus, the Court need not consider the terms of a contract formed (or if a contract was formed) by a sequence of communications begun with a PO and including an express DN.

In light of the foregoing language, written by Defendants, the Court finds and determines that the POs are not "offers" within the meaning of Massachusetts law, which, if "accepted," would become binding contracts. Cf. Restatement (Second) of Contract § 54, cmt. b ("A reservation of power to revoke after performance has begun means that as yet there is no promise and no offer."). Rather, each individual PO was merely an invitation to negotiate or to discuss a purchase-and-sale arrangement.[20]

Second, the Court finds that the email exchanges provided by the parties do not establish a contract based on the terms of the POs. The POs carve out a formal role for a DN: the DN is what, under the PO, transforms the PO's invitation to negotiate into a binding contract—assuming acceptance by the seller. Vicor has established that there is no such document, either express, implied, or de facto, associated with any of the four POs at issue. Moreover, in response

[19] Defendants' slide deck does point to one email, Doc. No. 40-3 at 3, which contains a long, alphanumeric string that includes the letters "DN." The Court declines to construe that document, on that basis, as a "DN" or "delivery notice," as no reasonable person reading the document would so conclude based on that string of letters, without more. Defendants have submitted no affidavits at all, nor any evidence from which the Court can discern a course of conduct or even notice that documents with such a string are delivery notices within the meaning of the POs.

[20] Because each PO contained the same Note 6 language, the foregoing analysis applies to each PO at issue here.

to each PO at issue, Vicor sent an SOA at some point. This document expressly rejects the terms of the PO within the meaning of Massachusetts law. See Doc. No. 27 at 2.

None of the email exchanges, reproduced above at Sections I.D.1-4, request delivery of specific goods at a specific time to a specific place—details which, the Court reasonably infers, would be included in a DN. Nor do any of the emails otherwise make an offer to buy goods. See Doc. Nos. 20-5, 40-3, 40-7.[21] Instead, the emails are just status requests, inquiring as to the present status of a particular PO or POs. To be sure, the emails allow for the possibility that the parties are making and responding to questions about a completed or contemplated contractual arrangement. They do not, however, shed light on the terms of such an arrangement. And, without more, the emails plainly do not establish Vicor's agreement to a contract defined by the terms of the POs.

Additionally, Vicor's emails and SOAs contain materially different terms than Defendants' POs in the form of proposed ship dates. These communications by Vicor, therefore, amount to counteroffers, not acceptances. "It 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). Generally, delivery terms are considered material terms of a contract. See James J. White et al., Uniform Commercial Code § 2:14 (6th ed., 2023) (listing "delivery terms" among the type of terms that cannot differ between an offer and an acceptance). More specifically to the instant dispute, the timing of shipments is of

[21] There is no email exchange at all as to PO 054, just a PO to which Vicor responds with an SOA. See Doc. Nos. 40-16, 45-47. From the lack of such an exchange as to PO 054, the Court draws the reasonable inference more broadly that the email exchanges between Defendants and Vicor do not constitute DNs.

particular importance to Defendants. See Doc. No. 20 at 6 (describing Defendants' operations as depending upon a "reliable stream of materials" and stating concerns when facing "interruptions, delays, and shortages" as a motivating factor for including IP Clause in their terms and conditions). While not every term need be "precisely specified" for a contract to be binding, the "parties must . . . have progressed beyond the state of 'imperfect negotiation.'" Malouf, 724 N.E.2d at 703 (quoting Lafayette Place Assocs. v. Boston Redev. Auth., 694 N.E.2d 820, 826 (Mass. 1998)).

Based on the record before it, the Court finds that the shipment or delivery dates are material terms. The goods purchased from Vicor are used by Defendants as components while manufacturing other goods for resale. See Doc. No. 1 ¶ 14; Doc. No. 20 at 6. Defendants' receipt of Vicor's goods too soon (i.e., before they are needed for the manufacturing process) requires purchase and storage costs Defendants wish to avoid. Cf. Doc. No. 20 at 6. Defendants' receipt of Vicor's goods too late (i.e., after the immediate need for them) interferes with the manufacturing schedule, causing significant disruptions as well as related costs. Cf. id. The importance of this just-in-time purchase/delivery practice is reflected in the terms of the POs. E.g., Doc. No. 40-16 at 3 (specifying, under "Purchase Order Change," Defendants' ability to alter order until shipment and, under "Delivery and Package," remedies in case of delayed shipment, including expedited shipments and per-day discounts until successful delivery). The record also demonstrates that shifts in orders from Defendants' customers can meaningfully alter quantities and timing. See, e.g., Doc. No. 45-66 at 2; Doc. No. 45-68 at 2; Doc. No. 40-11 at 8. The evidence, argument, terms of the POs, and terms of the SOAs all demonstrate that Vicor sold Defendants goods manufactured to order, and that the time of delivery was a critical

component of the purchase arrangements. Thus, the Court concludes that shipment or delivery dates are a material term of a contract between these parties for the purchase of these goods.

Defendants point to the ship dates provided by Vicor in its emails as indicating Vicor's acceptance of Defendants' POs. See Doc. No. 40-11 at 7-11, 13-19. However, as to the three POs for which the parties submitted email exchanges occurring after the PO and before the SOA (POs 176, 254, and 185), the dates discussed by Vicor differed materially from the dates proposed by Defendants.[22] Compare Doc. No. 5-7 at 2 (PO 054 requesting delivery date of "2021/10/15"), with Doc. No. 20-5 at 3 (Vicor email containing four ship dates with the earliest listed as "5-13-22"); and Doc. No. 5-8 at 3 (corresponding SOA with single ship date of "13-MAY-2022"). Compare Doc. No. 5-13 at 2 (PO 265 requesting delivery date of "2023/8/9"), with Doc. No. 40-3 at 3 (Vicor email containing scheduled ship date of September 29, 2023), and Doc. No. 5-14 at 3 (corresponding SOA with same ship date as email). Compare Doc. No. 40-14 at 2 (PO 185 requesting delivery date of "2024/3/28"), with Doc. No. 40-7 at 2 (Vicor email containing scheduled ship dates of February 29, 2024, December 29, 2023, and January 19, 2024), and Doc. No. 45-93 at 3 (corresponding SOA with same ship dates as email). In none of these instances does Vicor accede to the requested delivery date or propose close-in-time ship dates. Thus, the Vicor emails did not "accept" any "offer" from Defendants.

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 Defendants. See Restatement (Second) of Contracts, § 39 ("A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a

[22] As to PO 054, for which no associated email exchanges have been submitted to the Court, the PO has a delivery date of "2021/6/10," Doc. No. 40-16 at 1, and the corresponding SOA has a ship date of "04-FEB-2022." Doc. No. 45-47 at 3.

substituted bargain differing from that proposed by the original offer."); see also Whoop, Inc. v. Ascent Int'l Holdings, Ltd., Civ. No. 19-10210-LTS, 2019 WL 2075591, at *6 (D. Mass. May 10, 2019) (finding seller's quote which modified significant terms to be a counteroffer rejecting initial offer, rather than an acceptance). In none of the email exchanges provided to the Court do Defendants reply to Vicor's emails, containing alternative shipment dates, with clear acceptances of these alternate dates.

Moreover, because the dates proposed in the POs and the dates offered in the email exchanges and SOAs amount to serious differences in material terms, the Court is unable to reach the conclusion, implied by Defendants in their Opposition, see Doc. No. 40-11 at 17-19, that such dates would just be incorporated into the parties' agreement otherwise defined by the terms of the POs. See Whoop, Inc., 2019 WL 2075591, at *7 (citing i.Lan Sys. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328 (D. Mass. 2002) (finding that additional terms will only be incorporated into parties' agreement if not material)).

Furthermore, the parties' conduct, in the form of their course of dealing, demonstrates that Defendants were aware that Vicor did not authorize its Customer Relationship Associates ("CRAs") to negotiate contract terms with its buyers. This is a position Vicor has maintained throughout the instant dispute, and one to which Defendants have not provided contrary evidence. See Doc. No. 5-6 at 2; Doc. No. 40-5 at 9; Doc. No. 44 at 6; Doc. No. 45 ¶ 24.

There is no dispute that the parties had engaged in a similar course of dealing many times before the four POs at issue. See Doc. No. 45 ¶¶ 11-15; see also Mass. Gen. Laws ch. 106, § 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.").

The parties had also separately negotiated price outside of the email exchanges between Vicor's CRAs and whomever emailed on behalf of the Defendants. See Doc. No. 44 at 6; see also Doc. No. 45 ¶¶ 16-18. The negotiations over the quantity and timing of orders also involved discussions with the end user, at least on some occasions. See Doc. No. 45 ¶¶ 16-18. Prior to the POs at issue, Vicor had issued hundreds of SOAs to Defendants which incorporated by reference Vicor's terms expressly rejecting any conflicting PO terms. Doc. No. 45 ¶ 13. Vicor did the same for at least some of its price-quote negotiations with Defendants, which preceded the POs. Id. ¶ 16. This put Defendants 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 the CRAs could not alter. See Doc. No. 45 ¶ 24; see also Mass. Gen. Laws. ch. 106, § 1-303(d) ("A . . . course of dealing between the parties . . . of which the parties are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement and may supplement or qualify the terms of the agreement.").

In these circumstances, which are not contradicted by Defendants, the Court concludes that (a) Vicor's CRAs were not authorized to agree to the terms of the POs, (b) Vicor's CRAs were not "accepting" the POs (even assuming the POs were "offers," which they were not), and (c) Defendants could not and did not reasonably understand the email exchanges to constitute agreement to the terms set out in the POs.

Third, and relatedly, the Court finds that, before this dispute arose, the parties took actions demonstrating that they understood their behavior was not bound by the terms of the POs. The POs issued by Defendants entitle them to cancel an order at any time prior to the shipment of the goods. As the "Purchase Order Change" provision in each PO states:

> Both Parties agree that, Buyer may, from time to time before Seller's shipment of Products, cancels the shipment or changes: 1) the method of shipment or packing, 2) time and/or place of delivery, and/or 3) the quantity of Products specified under this PO, DN or other delivery request.

Doc. No. 40-16 at 3 (emphasis added).

On June 13, 2023, Defendants tried to cancel at least part of PO 265 when Liz Liu emailed Mandy Jungjohann and Alice Salamanca saying: "The customer has cancelled the demand needs to cancel the order for this." Doc. No. 40-3 at 2. At the time of this email, Vicor had not yet shipped the goods at issue. See Doc. No. 5-14 at 3. In response to the cancellation notice, Jungjohann of Vicor responded that this order was "NCNR"—meaning, as both parties agree, that it was non-cancellable and non-returnable. See Doc. No. 40-3 at 2. This stemmed from the fact that PO 265 was part of the earlier PO 991, for which Vicor had already sent an SOA. See Doc. No. 45 ¶ 39. Defendants did not respond to this communication from Vicor by pointing to the PO and its provision allowing for cancellation. See generally Doc. No. 40-3.

This sequence plainly means that the parties understood that the terms of the PO allowing cancellation did not govern. By contrast, the SOA did not permit cancellation in this circumstance: "Buyer is not entitled to delay or cancel all or any part of a shipment of Products under a Sales Agreement, unless Buyer has received Vicor's prior, express written consent in the form of an amendment to the SOA in question . . . ." Doc. No. 5-6 at 4. From this exchange, and the absence of further communication regarding PO 265, the Court concludes and finds that Defendants acceded to Vicor's position.

One final point bears mentioning. Defendants contend that the email exchanges constitute a "prompt promise to ship," resulting in a binding contract under the terms of the PO. See Doc. No. 40-11 at 13-14. This argument fails because the POs are not "offers" to buy goods, as explained above, thus, they cannot be accepted "either by a prompt promise to ship or by the

prompt or current shipment of conforming or non-conforming goods."[23] U.C.C. § 2-206 (Am. L. Inst. & Unif. L. Comm'n 1977). In any event, a prompt promise to ship on materially different terms is not a contract without acceptance of the materially different terms. See JOM, Inc. v. Adell Plastics, Inc., 193 F.3d 47, 54 (1st Cir. 1999) (finding that when a seller makes its acceptance "expressly conditional" on buyer's assent to any divergent terms in seller's invoice, the invoice is a counteroffer, and a contract is formed only when buyer expresses "affirmative acceptance" of counteroffer); Whoop, Inc., 2019 WL 2075591, at *7 (stating same); see also Hydraulics Int'l, Inc. v. Amalga Composites, Inc., Civ. No. 2:19-00535-PMW, 2020 WL 586867, at *4 (D. Utah Feb. 6, 2020) (finding parties' combined writings, in the form of a purchase order and sales order acknowledgement form with incorporated or attached terms and conditions, did not establish a contract under § 2-207(1) because buyer did not expressly assent to seller's different terms, although contract formed by conduct under § 2-207(3)); Diamond Fruit Growers, Inc. v. Krack Corp., 794 F.2d 1440, 1444 (9th Cir. 1986) (finding that if offeror does not assent to offeree's terms made expressly conditional in its reply but parties proceed with the transaction as if they have a contract, their performance creates a contract consisting of matching terms plus those supplied by the UCC).

For the foregoing reasons, Vicor has established a likelihood of success in proving that it did not agree to arbitrate any disputes with Defendants before CIETAC in China. The Court need not go further at this point.

[23] Although Defendants briefly allude to it, see Doc. No. 40-11 at 14, they do not meaningfully advance the argument that Vicor accepted Defendants' terms, contained in their POs, by prompt shipment. The fact that the alternative ship dates proposed by Vicor were often many months after those initially requested by Defendants negates any such an argument, in addition to the reasons advanced in the text.

B. Irreparable Harm

Defendants argue that Vicor cannot meets its burden here because it would suffer no irreparable harm from having to proceed in China—a country in which it regularly conducts business, maintains physical operations, and could still raise objections to arbitration. Doc. No. 40-11 at 22. However, this fails to address Vicor's primary contention that it would suffer irreparable harm from being forced to arbitrate in front of CIETAC—including whether it granted Defendants licensing rights to its intellectual property—despite never having agreed to do so. See Doc. No. 5 at 5, 15. As this Court previously found in its Order on Vicor's TRO, Vicor would "face[] irreparable harm from having to proceed to arbitrate overseas when the contract between the parties either provides for arbitration in the United States or not at all and, in any event, does not provide for arbitration before CIETAC." Doc. No. 27 at 3; see also UBS Secs., LLC v. Voegli, 405 F. App'x 550, 552 (2d Cir. 2011) ("Being forced to arbitrate a claim one did not agree to arbitrate constitutes an irreparable harm for which there is no adequate remedy at law." (citing Merrill Lynch Inv. Managers v. Optibase, Ltd., 337 F.3d 125, 129 (2d Cir. 2003))); see also Coinbase, Inc., 144 S. Ct. at 1191 ("Arbitration is a matter of contract and consent, and we have long held that disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes."). Now that the Court has found, on a more established record, that the POs do not constitute the agreement between the parties, this Court's earlier finding at the TRO stage has greater force. Vicor has satisfied its burden to show that being compelled to arbitrate before CIETAC without its consent would constitute irreparable harm.

C. Balance of the Equities

The Court finds that Vicor has met its burden as to this PI factor for largely the same reasons outlined in the immediately preceding section. Defendants argue that the equities tip in their favor because they are being forced into an ITC action where Vicor continues to "insist on wielding this Court's rulings in that proceeding." Doc. No. 40-11 at 22. Yet, as Vicor persuasively argues, the inverse would mean that Vicor would be forced to arbitrate—including arbitrating the licensing issue—in front of an arbitral body to which it did not agree. Doc. No. 5 at 5, 15. Additionally, granting Vicor's PI would not be determinative of the underlying, substantive claims. Moreover, it would also avoid conflicting judgments that the parties would have to reconcile, whether from the various U.S. courts presently adjudicating this dispute or from CIETAC. Finally, in this Order, the Court is simply ruling on the pending Motion. Whatever significance, if any, this decision has in the ITC proceeding is for the ITC to determine. Accordingly, this Court finds the equities tilt in Vicor's favor.

D. Public Interest

Finally, the Court finds that the public's interest is best served by enforcing only those contracts to which the parties have actually agreed. Because the Court has found here that the terms of the POs alone do not constitute an agreement between the parties, it would run counter to the public interest to allow Defendants to compel arbitration before CIETAC. Cf. Coinbase, Inc., 144 S. Ct. at 1192 (stating that because arbitration agreements are "simply contracts," arbitration is "strictly a matter of consent" (citing Lamps Plus, Inc. v. Varela, 587 U.S. 176, 184 (2019))). Moreover, the Court additionally finds that the public's interest is best served by preventing a U.S.-based company (Vicor) from being forced to arbitrate claims in China, where the claims arise from performance largely conducted in the U.S., two of three Defendants are

also U.S.-based companies, and (again) Vicor did not agree to such arbitration. See Doc. No. 1 ¶¶ 1-4. Accordingly, this factor also tilts in Vicor's favor.

E. Defendants' Non-PI Arguments

In their Opposition, Defendants also reiterate two claims that have already been rejected by this Court. First, they argue that Vicor has still failed to show that this Court's "interference" with foreign arbitral bodies is proper. Doc. No. 40-11 at 22-24. Yet, Defendants' argument here largely ignores the reasoning behind this Court's earlier Order on Vicor's TRO.

In that Order and on the record then before it, this Court stated that, because the POs were not the contract between the parties, this Court had primary jurisdiction over arbitration-related matters stemming from Vicor's terms and conditions or UCC gap-fillers. See Doc. No. 27 at 2-3. Alternatively, this Court stated that, in the absence of any written contract containing an agreement to arbitrate, it had the power to stay arbitration based on Massachusetts law because the instant case was before it on diversity grounds. Id. (citing Mass. Gen. Laws ch. 251, § 2(b) (2023)). With a more complete record now before it and pursuant to the foregoing PI analysis, the Court reiterates more strongly its earlier conclusions. Nothing contained in Defendants' Opposition undermines those conclusions.

There is a further point, made earlier, regarding this contention. At issue are transactions arising from the manufacture in Massachusetts of goods made by a company located in Massachusetts. The transactions arose from orders sent to Massachusetts by Defendants. Vicor has established, from the record evidence before the Court, that the fulfillment of these orders would occur in Massachusetts and involve direction from Massachusetts. Two of three Defendants ordering the goods are entities incorporated in the United States with principal places of business in the United States, while only one Defendant is from Taiwan, and none are from

the People's Republic of China. Doc. No. 1 ¶¶ 1-3. Finally, all the parties argued this case under Massachusetts law. In light of all of the foregoing circumstances, as well as for the reasons expressed in its prior Order on this point, the Court rejects the notion that it is improperly interfering with a foreign arbitration by enjoining the parties before it (but not the arbitrators) from pursing an arbitration to which Vicor did not agree.

Second, Defendants restate their earlier argument that 28 U.S.C. § 1659(a) requires this Court to stay its proceedings in deference to the ongoing ITC action. Doc. No. 40-11 at 24. This fails to address to the Court's reasoning in its earlier Order on Defendants' Motion to Stay and to Vacate the TRO. In that Order, the Court found that, although § 1659(a) applies to the present dispute and prevents the Court from reaching a final resolution on any of the issues pending before it, that statute does not prevent the Court form issuing preliminary injunctive relief to preserve its jurisdiction, prevent inconsistent judgments, and protect a party from being compelled to arbitrate despite never having agreed to do so. Doc. No. 36 at 6-7.

Defendants' arguments here do not persuade the Court to reverse course. The Court declined to issue a stay earlier because, in part, it likely would have meant Defendants would have sought to compel arbitration, thereby undermining the same ITC proceedings they presently argue must be protected. See Doc. No. 40-11 at 24. Now, as it did before, the Court declines to stay this matter to the extent of issuing the Preliminary Injunction, which is identical in scope to the TRO previously issued, but as it also did previously, the Court stays any further proceedings in this action pending final resolution of the ITC proceedings.

IV. CONCLUSION

For the foregoing reasons, Vicor's Motion for Preliminary Injunction, Doc. No. 4, is ALLOWED IN PART to the extent stated below and otherwise DENIED in light of the narrowing of the Motion as explained previously. Accordingly, the Court hereby enters the

following Preliminary Injunction. **The Court ENJOINS each Defendant as well as its agents, officers, and employees from further pursuing arbitration against Vicor before CIETAC pending the resolution of this case. Further proceedings in this case are STAYED pending final resolution of the ITC proceedings. Additionally, the Court ORDERS the parties to file a status report fourteen days after the final resolution of the ITC proceeding advising the Court of any remaining issues for its determination.**

SO ORDERED.

/s/ Leo T. Sorokin
United States District Judge