

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

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In the Matter of)	
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CERTAIN LENS-FITTED FILM PACKAGES)	Inv. No. 337-TA-406
)	Enforcement Proceedings (II)
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ORDER

The Commission’s original investigation in this matter was terminated on June 2, 1999, with a finding of violation of section 337 by 26 respondents by reason of importation or sales after importation of certain lens-fitted film packages (“LFFPs”) (*i.e.*, disposable cameras) that were found to infringe one or more claims of 15 patents held by complainant Fuji Photo Film Co. (“Fuji”). 64 *Fed. Reg.* 30541 (June 8, 1999). The Commission issued a general exclusion order, prohibiting the importation of LFFPs that infringe any of the claims at issue, and issued cease and desist orders to twenty domestic respondents. *Id.* The Commission’s orders were upheld on appeal. *Jazz Photo Corp.* [“Jazz”] *v. Int’l Trade Comm’n*, 264 F.3d 1094 (Fed. Cir. 2001), *cert. denied*, 536 U.S. 950 (2002).

On September 24, 2002, the Commission initiated enforcement proceedings under Commission rule 210.75(b) against Jazz, Mr. Benun (Jazz’s founder, former president and, during the relevant time period, principal consultant and later COO), and Mr. Cossentino (Jazz’s then-president and CEO). The Commission referred the proceedings to the presiding Administrative Law Judge (“ALJ”) to determine whether enforcement respondents had violated the general exclusion order or cease and desist orders issued by the Commission on June 2, 1999, and to recommend appropriate enforcement measures if necessary. 67 *Fed. Reg.* 61152 (Sept. 27, 2002).

On April 6, 2004, the ALJ issued his Enforcement Initial Determination (“EID”) in which he found a violation of the general exclusion order and cease and desist order by enforcement respondents. Of the 26,857,730 LFFPs imported and sold during the relevant period, he found that 25,216,980 infringed one or more claims of the asserted patents, and further that infringing sales were made on 547 days. Ultimately, he recommended penalties totaling \$13,675,000 against Jazz and Mr. Benun, jointly and severally, and \$154,000 against Mr. Cossentino, for violation of the cease and desist order.

The Commission found that the record supported the EID's violation findings and determined not to review the EID. 69 Fed. Reg. 46179 (Aug. 2, 2004). Following separate briefing on whether to adopt the specific enforcement measures recommended in the EID, the Commission largely adopted the recommendations. The Commission imposed a civil penalty in the amount of \$13,675,000 against Jazz and Mr. Benun, jointly and severally, based on a daily penalty rate of \$25,000 and 547 violation days, and in the amount of \$119,750 against Mr. Cossentino, based on a daily penalty rate of \$250 and 479 violation days. 70 Fed. Reg. 3385 (Jan. 24, 2005).

Fuji, Jazz, Mr. Benun, and Mr. Cossentino appealed. Jazz and Mr. Cossentino reached a settlement with the Commission and withdrew their appeals. The Court decided the appeals of Fuji and Mr. Benun on January 11, 2007. *Fuji Photo Film Co., Ltd. v. Int'l Trade Comm'n*, 474 F.3d 1281 (Fed. Cir. 2007). The Court found that Fuji lacked standing to bring its appeal. *Id.* at 1289-91. The Court affirmed the Commission's determination against Mr. Benun's major challenges, including his claim that the Commission did not have the power to impose individual liability, but found error in the number of LFFPs that the Commission determined were infringing, 25,216,980. *Id.* at 1291-98. The Court found that 998,250 of these were non-infringing. The Court remanded for the limited purpose of considering an appropriate adjustment to the penalty against Mr. Benun in light of this correction. *Id.* at 1298.

The Court issued its mandate on March 5, 2007, returning jurisdiction to the Commission. The Commission now seeks input from the parties on the action it should take on remand.

Accordingly, it is hereby ORDERED that:

1. Within fourteen (14) days of service of this Order, the parties shall submit comments on (a) the amount of and basis for any adjustment to the \$13.675 million penalty that they claim is appropriate in light of the Court's finding that 998,250 of the 25,216,980 LFFPs found infringing by the Commission were, in fact, permissibly repaired and non-infringing, and (b) whether referral to the Administrative Law Judge is warranted. Reply comments may be submitted within seven (7) days of service of original comments.
2. The Secretary shall serve copies of this Order upon each party to the *Enforcement II* proceeding.

By order of the Commission.

/s/
Marilyn R. Abbott
Secretary to the Commission

Issued: April 9, 2007