

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN LIGHT-EMITTING DIODE
PRODUCTS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-947

**NOTICE OF COMMISSION DETERMINATION TO REVIEW IN PART THE FINAL
INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337; SCHEDULE
FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON
REMEDY, THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on July 29, 2016, finding a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337). The Commission requests certain briefing from the parties on the issues under review, as indicated in this notice. The Commission also requests briefing from the parties and the public on the issues of remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2392. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on February 18, 2015, based on a complaint filed by Cree, Inc. of Durham, North Carolina (“Cree”). 80 *Fed. Reg.* 8685-86 (Feb. 18, 2015). The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain light-emitting diode products and components thereof by reason of

infringement of certain claims of United States Patent Nos. 6,657,236 (“the ’236 patent”); 6,885,036 (“the ’036 patent”); 6,614,056 (“the ’056 patent”); 7,312,474 (“the ’474 patent”); 7,976,187 (“the ’187 patent”); 8,766,298 (“the ’298 patent”); 8,596,819 (“the ’819 patent”); and 8,628,214 (“the ’214 patent”). The complaint also alleged violations of section 337 based on the false and misleadingly advertised light-emitting diode products and components thereof in violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and/or the federal common law of unfair competition. The notice of investigation named Feit Electric Company, Inc. of Pico Rivera, California; Feit Electric Company, Inc. of Xiamen, China (collectively, “Feit”); Unity Opto Technology Co., Ltd. of New Taipei City, Taiwan; and Unity Microelectronics, Inc. of Plano, Texas (collectively, “Unity”) as respondents. The Office of Unfair Import Investigations (OUII) is also a party to the investigation. The Commission previously terminated the investigation with respect to the ’036 and ’056 patents. Order No. 36 (Oct. 13, 2015), Commission Notice (Nov. 3, 2015).

On July 29, 2016, the ALJ issued her final ID and her recommended determination on remedy and bond in this investigation. The ID found a violation of section 337 by Respondents in connection with claim 19 of the ’474 patent; claim 26 of the ’187 patent; claims 1, 3, and 5 of the ’298 patent; claims 1-4, 6-12, 22, 24-28, and 52-59 of the ’819 patent; and claims 7, 8, 16, 17, and 19 of the ’214 patent. The ID also found a violation of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), as amended, the federal common law of unfair competition, and section 337, by Respondents by reason of the false advertising of the ENERGY STAR® label on certain accused products. The ID further found that Respondents’ false advertising had the effect of substantially injuring the LED lighting industry in the United States under 19 U.S.C. § 1337(a)(1)(A)(i). The ID found no violation of section 337 with respect to any claim of the ’236 patent; claims 15, 16, 18, and 20 of the ’474 patent; and claims 4, 5, and 29 of the ’187 patent. Finally, the ID found that Cree established the existence of a domestic industry that practices the asserted patents under 19 U.S.C. § 1337(a)(2). The ID further found Unity and Feit jointly and severally liable for monetary and evidentiary sanctions as a result of their failure to comply with discovery orders. The ID imposed an additional monetary sanction on Unity and its counsel.

On August 1, 2016, Respondents filed a motion requesting that the Commission allow the parties to increase the page limits applicable to petitions for review and responses thereto under Commission Rule 210.43(b)(2) and (c) by fifty pages in order to address all relevant issues in the final ID. The Commission denied the motion on August 8, 2016.

The parties filed timely petitions for review of the final ID. Specifically, Respondents challenged the ID’s sanction rulings, false advertising determinations, and the finding that the economic prong of the domestic industry requirement has been met. Respondents also challenged certain claim construction, infringement and validity findings with respect to the asserted patents. The Commission’s Investigative Attorney requested that the Commission review two of the ID’s findings: (i) that certain asserted claims of the ’819 patent and the ’214 patent are not invalid for lack of enablement under 35 U.S.C. § 112; and (ii) that claim 19 of the ’474 patent is not obvious in view of Canadian Patent No. 2529996. Cree filed a petition for review challenging certain findings with respect to the ’236 patent, the ’474 patent, the ’187 patent, and false advertising. The parties filed timely responses on August 23, 2016. On August

31, 2016, the parties filed their respective public interest comments pursuant to Commission rule 210.50(a)(4). On September 20, 2016, Respondents filed a notice of new precedent relevant to their petition for review. Cree filed a response to the notice on September 26, 2016.

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review: (1) the imposition of sanctions against Feit, Unity, and Respondents' counsel; (2) the false advertisement of certain accused products labeled with the ENERGY STAR® label; (3) the validity of claim 19 of the '474 patent; (4) the finding of violation of section 337 by Respondents in connection with the asserted claims of the '819 and the '214 patents; and (5) the economic prong of the domestic industry requirement.

The Commission is reviewing the economic prong of the domestic industry requirement solely to correct two typographical errors on page 410 of the final ID. Specifically, the citation to "CPBr. at 732 (citing CX-1040C)" is replaced with "CPBr. at 732 (citing CX-1168C)" and the citation to "(SBr. at 234 (citing CX-1140C).)" is replaced with "(SPBr. at 234 (citing CX-0004C).)"

The parties are invited to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission requests responses to the following questions only. Each party's brief responding to the following questions and any response to the initial briefs should be no more than 80 pages. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

1. Respondents assert that the ALJ imposed sanctions on Unity at the evidentiary hearing. Please explain with particularity the basis for this argument including, if appropriate, identifying where in the record the ALJ allegedly impaired Unity's ability to introduce evidence and/or defend itself against Cree's allegations. In answering this question, please cite any documents from the Feit Xiamen October production that were used during cross-examination.
2. For both Feit and Unity, please provide the following with citation to the record:
 - (i) identify the Commission Rule(s) or other authority relied upon by the ALJ in imposing each of the sanctions (including the \$10,000 sanction imposed on Unity);
 - (ii) identify the specific conduct, acts, or omissions of each respondent that the ALJ found to be sanctionable; and
 - (iii) explain how such conduct, acts, or omissions satisfy (or fail to satisfy) the requirements of the Commission Rule(s) or other authority relied upon by the ALJ in imposing each of the sanctions.
3. With respect to Respondents' counsel, please identify the Commission Rule(s) (or other authority) that forms the legal basis for the \$10,000 sanction and explain how the \$10,000 amount was calculated. In your response, please address whether and when counsel was or should have been on notice that he or she might be subject to sanctions,

and whether counsel was given adequate opportunity to present evidence and argument on any issue of which they had notice.

4. Please discuss whether Respondents' counsel filed pleadings on behalf of Unity that contained "deliberate untruths and misstatements with regard to the Court Orders," and whether Respondents' counsel "direct[ed] their clients not to respond and/or to deliberately evade Court Orders." ID at 14. Please also discuss whether it is appropriate to sanction counsel in this investigation for "their role in preparing briefs" in which the ALJ finds that "they refused to produce information that their clients were ordered twice to produce." ID at 16-17. In your response, please address whether counsel's conduct was reasonable under the circumstances.
5. Respondents and OUII argue that asserted claims of the '819 patent and the '214 patent that recite the limitation "a wall plug efficiency of at least 60 lumens per watt" are not enabled. The ID cites (at 297) evidence that Cree achieved a LED luminaire with a wall plug efficiency of about 80 lm/W by May 2006. Please discuss any evidence (or the lack thereof) regarding whether a person of ordinary skill in the art would know or would not know (i) how to make and use the claimed lighting devices with a wall plug efficiency greater than 80 lm/W; (ii) how to use after-arising technologies with the teachings of the '819/'214 patents to achieve a lighting device with a wall plug efficiency greater than 80 lm/W; and (iii) the predictability or unpredictability of the art and the quantity of experimentation needed to make and use a lighting device with a wall plug efficiency greater than 80 lm/W. In addressing this question, please apply the facts here to the law governing enablement, including *In re Fisher*, 427 F.2d 833 (C.C.P.A. 1970); *MagSil Corp. v. Hitachi Global Storage Techs., Inc.*, 687 F.3d 1377 (Fed. Cir. 2012); and *Promega Corp. v. Life Techs. Corp.*, 773 F.3d 1338 (Fed. Cir. 2014).

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion). In particular, the Commission is interested in the following issues on remedy:

1. Cree relied on 22 "representative" products to show infringement of the '819 patent and the '214 patent. Please discuss the record evidence (or the lack thereof) regarding any other Feit and/or Unity products that are allegedly equivalents to and/or have the same design for purposes of infringement as the 22 "representative" products. In

addressing this question, please explain how the design characteristics for these “representative” products correlate to the products accused of infringing the ’819 patent and the ’214 patent and discuss the appropriate scope of any remedy should one be issued by the Commission at the conclusion of this investigation.

2. The Commission may issue an exclusion order based on Respondents’ alleged false advertising of accused products with the ENERGY STAR label. Please discuss the appropriate scope of any remedy based on Respondents’ alleged false advertising should one be issued by the Commission at the conclusion of this investigation.
3. Please identify with citations to the evidentiary record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If complainant also relies on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the evidentiary record such information as to each respondent against whom a cease and desist order is sought.
4. Please identify with citations to the record the presence of any domestic inventory or any domestic operations as to each respondent against whom a cease and desist order is sought, regardless of the commercial significance.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission’s action. *See* Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding with respect to the asserted patent. Complainant and OUII are also requested to submit proposed remedial orders for the Commission’s consideration. Complainant is further requested to state the date that the relevant patents expire and the HTSUS numbers under which the accused products are imported, and provide identification information for all known importers of the subject articles. A party’s

written submission on the issues of remedy, the public interest, and bonding do not count towards its 80-page limit. The written submissions and proposed remedial orders must be filed no later than close of business on Thursday, October 13, 2016. Reply submissions must be filed no later than the close of business on Thursday, October 20, 2016. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to Commission Rule 210.4(f), 19 C.F.R. 210.4(f). Submissions should refer to the investigation number (“Inv. No. 947”) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, and in Part 210 of the Commission’s Rules of Practice and Procedure, 19 C.F.R. Part 210.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: September 29, 2016