

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436**

In the Matter of

**CERTAIN DIMMABLE COMPACT
FLUORESCENT LAMPS AND
PRODUCTS CONTAINING SAME**

Investigation No. 337-TA-830

RECOMMENDED DETERMINATION ON REMEDY AND BOND

Administrative Law Judge Thomas B. Pender

(March 1, 2013)

PUBLIC VERSION

List of Abbreviations

CDX	Complainant's Demonstrative Exhibit
CIB	Complainant's Initial Post-Hearing Brief
CRB	Complainant's Reply Post-Hearing Brief
CPHB	Complainant's Pre-Hearing Brief
CX	Complainant's Exhibit
Depo.	Deposition
JX	Joint Exhibit
RDX	Respondent's Demonstrative Exhibit
TCP_IB	TCP's Initial Post-Hearing Brief
TCP_RB	TCP's Reply Post-Hearing Brief
ULA_IB	ULA's Initial Post-Hearing Brief
ULA_RB	ULA's Reply Post-Hearing Brief
RX	Respondent's Exhibit
Tr.	Hearing Transcript
DWS	Direct Witness Statement (Including Revised Direct Witness Statements)
RWS	Rebuttal Witness Statement

PUBLIC VERSION

The Commission's Rules provide that subsequent to an initial determination on the question of violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of Section 337, and (2) the amount of bond to be posted by respondents during Presidential review of Commission action. *See* 19 C.F.R. § 210.42(a)(1)(ii).

On February 27, 2013, an initial determination ("ID") issued in this Investigation, finding that no violation of section 337 of the Tariff Act, as amended, has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain dimmable compact fluorescent lamps and products containing same with respect to claim 9 of U.S. Patent No. 5,434,480 ("the '480 patent") or claims 1 and 12 of U.S. Patent No. 8,035,318 ("the '317 patent").

I. EXCLUSION ORDER

A limited exclusion order ("LEO") directed to respondents' infringing products is among the remedies that the Commission may impose following a determination that a violation of section 337 has occurred. *See* 19 U.S.C. § 1337(d). Here, Neptun seeks a limited exclusion order that prohibits respondent U Lighting America Inc. ("ULA") from importing products that infringe claim 9 of the '480 patent and respondents Technical Consumer Products, Inc.; Shanghai Qiangling Electronics Co. Ltd.; and Zhejiang Qiang Ling Electronic Co. Ltd (collectively, "TCP") from importing products that infringe claims 1 and 12 of the '318 patent. (CIB at 74.)

TCP argues that if a remedy does issue, any remedial orders should indicate that they do not include TCP's earlier line of dimmable CFLs (ProDim), which has not been accused of infringement, and cover only the TruDim line of dimmable products. (TCP_IB at 64 (citing

PUBLIC VERSION

Certain MEMS Devices and Products Containing Same, 337-TA-700, Comm’n Op. at 27 (Mar. 13, 2011).) TCP further argues that it should be permitted to certify entry of products not made according to the TruDim ballast designs. (*Id.*) TCP argues such a certification would be easy enough to police, since, as noted, the TruDim products use an integrated circuit easily visible on the printed circuit board; whereas, the non-accused ProDim products do not use an IC. (*Id.*)

Neptun argues that TCP’s infringement is related to CFLs that have a feedback that adjusts in relation to the level of the dimmer. (CRB at 58.) Neptun further argues TCP could try and import dimmable CFLs that do not have an IC, but would nonetheless infringe the ’318 patent. (*Id.*) Neptun contends whether or not the product has an IC may provide an indication as to whether the product may infringe, it is not a dispositive test and using it as such risks inconsistencies on what can and cannot be imported. (*Id.*)

The Commission has explained that “[c]ertification provisions are generally included in exclusion orders where Customs is unable to easily determine by inspection whether an imported product violates a particular exclusion order.” *Certain Semiconductor Chips With Minimized Chip Package Size & Products Containing Same*, Inv. No. 337-TA-605, Commission Opinion (July 29, 2009) (including a certification provision in an exclusion order because of the difficulty of determining whether imported products contain the infringing chip sets); *see also Certain Ground Fault Circuit Interrupters & Products Containing Same*, Inv. No. 337-TA-615, Commission Opinion (Mar. 26, 2009) (noting that a certification provision “gives U.S. Customs & Border Protection the authority to accept a certification from the parties that goods being imported are not covered by the exclusion order.”)

I decline to recommend the broad certification sought by TCP that it be permitted to certify entry of products not made according to the TruDim ballast design. In *Certain MEMS Devices*, the certification was directed to products that were made using ***non-accused processes***.

PUBLIC VERSION

Here, TCP seeks a certification that products were not made using the TruDim ballast design—the design that implements the accused process. The scope of the investigation is not limited to the TruDim ballast design. Accordingly, I find TCP's broad request improper. However, I agree with TCP that any remedial order should indicate that it does not include TCP's earlier line of dimmable CFLs (ProDim) which have not been accused of infringement.

It is recommended that, in the event the Commission finds a violation of section 337, an LEO should be issued that is directed to TCP and ULA's dimmable compact fluorescent lamps and products containing same that are found to infringe the asserted claims.

II. Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of Section 337. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm'n Op. at 26-28 (Aug. 27, 1997).

Neptun asserts both ULA and TCP maintain commercially significant inventory of infringing products. (CIB at 74.) However, Neptun offers no support for its bald assertion. Accordingly, I find Neptun has not established that ULA or TCP maintains a commercially significant inventory of imported infringing accused products in the United States. Thus, if the Commission determines a violation of Section 337 has occurred, I recommend that no cease and desist order issue in this Investigation.

III. BOND DURING PRESIDENTIAL REVIEW PERIOD

Section 337(j)(3) provides that if an exclusion order is issued respondents may, upon payment of a bond, continue to import products subject to exclusion until the expiration of the 60-day Presidential review period. 19 C.F.R. §1337(j)(3). I am charged with recommending whether a bond shall issue and if so, the amount of said bond. The purpose of the bond is to protect the complainant from any injury and thus any bond set should be in an amount sufficient to ensure such protection. 19 C.F.R. § 210.42(a)(1)(ii); 19 C.F.R. § 210.50(a)(3).

Neptun argues that the appropriate bond is 100% of the entered value of accused products. (CIB at 75.) Neptun argues that if allowed to continue to import infringing products, sales of those products will harm it by reducing Neptun's market share of its dimmable CFLs. (*Id.*) Neptun further argues that a 100% bond is appropriate to protect it from injury due to the continuing importation of infringing products. (*Id.*) However, Neptun offers no evidence supporting such a bond.

I am not required to recommend any bond amount if, as here, the complainant does not establish the need for a bond. *Certain Liquid Crystal Display Devices and Prods. Containing Same*, Inv. No. 337-TA-631, Initial Determination at 223-225 (Feb. 2009). I find Neptun has not established any need for a bond. Neptun's bald statement that it will be injured is insufficient to establish the need for a bond.

Even if Neptun had established a need for a bond, I find that Neptun has not satisfied its burden in establishing that a bond should be set at 100% of the entered value. When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (1995) (The

PUBLIC VERSION

Commission “typically has considered the differential in sales price between the patented product made by the domestic industry and the lower price of the infringing imported product, and has set a bond amount sufficient to eliminate that difference.”). However, Neptun failed to provide any price information regarding its products or TCP and ULA’s products, including price differential.

In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No.337-TA-337, Comm’n Op. at 41 (1995). However, Neptun has failed to provide any information regarding the royalty rates paid by any licensees of the asserted patents.

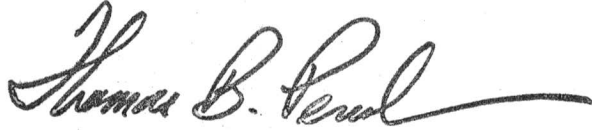
A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm’n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record). However, Neptun has failed to demonstrate that no effective alternative exists. Neptun offered no explanation for its failure to provide price and royalty information. Accordingly, I do not recommend any bond should the Commission find a violation.

Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties’ submissions must be made by hard copy by the aforementioned date. Any party seeking to have any portion of this document deleted from the public version must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information to be

PUBLIC VERSION

deleted from the public version. The parties' submissions concerning the public version of this document need not be filed with the Commission.

SO ORDERED.

A handwritten signature in black ink, reading "Thomas B. Pender". The signature is fluid and cursive, with a long horizontal stroke extending to the right.


Thomas B. Pender
Administrative Law Judge

**IN THE MATTER OF CERTAIN DIMMABLE COMPACT
FLUORESCENT LAMPS AND PRODUCTS CONTAINING SAME**

337-TA-830

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC Recommended Determination** has been served upon, the Office of Unfair Import Investigations and the following parties via first class mail and air mail where necessary on March 26, 2013.



Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112A
Washington, DC 20436

FOR COMPLAINANTS ANDRZEJ BOBEL & NEPTUN LIGHT, INC.:

Sudip Kundu, Esq.
THE FUISZ-KUNDU GROUP LLP
1455 Pennsylvania Avenue N.W.
Suite 400
Washington, DC 20004

() Via Hand Delivery
(x) Via Overnight Mail
() Via First Class Mail
() Other: _____

**FOR RESPONDENT TECHNICAL CONSUMER PRODUCTS, INC., TCP (Shanghai)
TIANCANBAO LIGHTING ELECTRICAL APPLIANCE CO. LTD., SHANGHAI
QIANGLING ELECTRONICS CO. LTD., & ZHENJIANG QIANG LING ELECTRONIC
CO. LTD**

Tom M. Schaumberg, Esq.
ADDUCI, MASTRIANI & SCHAUMBERG LLP
1133 Connecticut Avenue N.W., Twelfth Floor
Washington, DC 20036

() Via Hand Delivery
(x) Via Overnight Mail
() Via First Class Mail
() Other: _____

FOR RESPONDENT U LIGHTING AMERICA INC.

Lance G. Johnson, Esq.
ROYLANCE, ABRAMS BERDO & GOODMAN, LLP
1300 19th Street, N.W., Suite 600
Washington, DC 20036

() Via Hand Delivery
(x) Via Overnight Mail
() Via First Class Mail
() Other: _____

**IN THE MATTER OF CERTAIN DIMMABLE COMPACT
FLUORESCENT LAMPS AND PRODUCTS CONTAINING SAME
RESPONDENTS:**

337-TA-830

**GOLDEN U LIGHTING
MANUFACTURING (Shenzhen) Co., Ltd.**
3F, Block A3, Xinjianxing
Industrial Park, Fengxin Road, Lou
Village, Guangming
District Shenzhen Guangdong China 518107

() Via Hand Delivery
(x) Via Overnight Mail
() Via First Class Mail
() Other: _____

PUBLIC MAILING LIST

Angela Ruby
LEXIS - NEXIS
9443 Springboro Pike
Miamisburg, OH 45342

() Via Hand Delivery
() Via Overnight Mail
(x) Via First Class Mail
() Other: _____

Kenneth Clair
THOMSON WEST
1100 – 13th Street NW, Suite 200
Washington, DC 20005

() Via Hand Delivery
() Via Overnight Mail
(x) Via First Class Mail
() Other: _____