

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

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

**Inv. No. 337-TA-947**

**ORDER NO. 46: GRANTING COMPLAINANT'S AND STAFF'S REQUEST FOR  
SANCTIONS FOR FEIT RESPONDENTS' VIOLATION OF  
ORDER NOS. 24 AND 37**

(December 11, 2015)

This Order is a memorialization of Bench Orders I issued during the evidentiary hearing in this matter during the mornings of October 19 and October 20, 2015. This Order provides some of the history and abbreviated discussion that occurred for more than an hour and a half on those dates. The Bench Orders I issued on October 19 and October 20, 2015 resulted from the Respondents' Feit Electric Inc, USA, ("Feit USA"), Feit Electric Inc. (Xiamen) ("Feit Xiamen")(collectively "Feit Respondents") violations of Order Nos. 24 and 37. A separate order will follow that deals specifically with whether the Respondents Unity Opto Technology Co., Ltd.'s ("Unity Opto") and Unity Microelectronics, Inc.'s ("UMI") (collectively "Unity Respondents") played any role in or had any obligations with respect to the discovery problems that led to Order Nos. 24, 35, 37 and this Order. Other orders will be directed to any other outstanding issues that flow from this Order.

On July 13, 2015, Complainant, Cree, Inc. ("Complainant") filed a motion to compel all of the Respondents "to comply with their discovery obligations under the Commission Rules 210.15 and 210.33 and Ground Rule 4.1.1." Complainant requested specifically that

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Respondents produce technical documents for the accused products in response to Cree's Requests for Production Nos. 10, 12, and 14 and provide full and complete responses to Interrogatory Nos. 64-66. (Motion Docket No. 947-016.) These were documents with regard to testing of accused products the Complainant had sought from the outset of discovery.

On July 23, 2015 all Respondents opposed the motion claiming that they had "already conducted reasonable and thorough searches and have produced all responsive documents in their possession, custody or control." (Opp. at 1, 4-6.) In support of their opposition, Respondents submitted a declaration from the Assistant Vice President in the Lighting Division at Unity Opto declaring under perjury that "no datasheet was ever created for the products at issue here. (Huan-Ying Lu Decl. at ¶ 5.). Respondents also submitted the declaration from Counsel with regard to Feit Electric Company, Inc.'s search for Testing Documents. (Celine Liu Decl.)

I granted this motion in part on September 9, 2015. (Order No. 24.) I found with respect to Feit USA "Testing Documents," that Complainant was entitled to a declaration/<sup>1</sup> from one or more corporate representatives of the Feit Respondents with the requisite knowledge and authority, stating that all responsive "Testing Documents" within Feit's possession, custody, or control have been produced to Complainant." (*Id.*) In addition, I ordered the Feit Respondents to provide written and verified interrogatory responses where documents were lacking. (*Id.*) With regard to the Unity Respondents, I noted specifically that I could not compel the production of documents that their declarant claimed did not exist. (Order No. 24.)

On September 28, 2015, Complainant filed a motion seeking to enforce Order No. 24. (Motion Docket No. 947-031.) According to Complainant, the Feit Respondents failed to (i) provide unequivocal declarations; (ii) produce all "Testing Documents" as ordered; and (iii)

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<sup>1</sup> See, e.g., 28 U.S.C. § 1746.

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supplement the responses to Interrogatory Nos. 65 and 66 if documents were lacking. (Mot. at 2.) Before Complainant filed this motion, the parties apparently met and conferred at which time there was no agreement with regard to responses that Complainant claimed were deficient. (Commission Investigative Staff ( "Staff" ) Res. at 2, Docket No. 3051.)

Respondents responded to this motion on October 6, 2015. Because of remaining ambiguities in at least one of the Feit Respondents' declarations, the parties were given yet another opportunity to provide additional briefing by October 13, 2015. I ordered Respondents to provide any remaining documents, unequivocal declarations, and interrogatory responses, as appropriate, pursuant to Order No. 24. (Order No. 37.) I also warned Respondents that I was considering whether to issue an order to show cause for monetary or other sanctions after the hearing. (*Id.*)

On October 13, 2015, both Staff and Complainant responded that the supplemental declaration still showed that discovery remained incomplete. (*See* Complainant Suppl. Br. at 1-2; Staff Suppl. Br. at 2-3). Even after so many opportunities to correct deficient declarations and discovery responses, Respondents still argued that the declaration(s) should not affect the outcome of the motion to enforce Order No. 24. (Resp. Suppl. Br. at 2-3.) Again, I ordered that the Respondents produce any remaining documents, unequivocal declarations and interrogatory responses, as appropriate, by close of business October 16, 2015. I advised the parties I expected an update on October 19, 2015, at the start of the second morning of the evidentiary hearing. (Order No. 37.)

During the hearing the morning of October 19, 2015, Complainant's Counsel reported that between October 16 and October 17, 2015 in response to Order 37, Feit Xiamen produced more than 1000 pages of documents, many of which Complainant's Counsel showed were

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unarguably accused product testing reports that had been sought since the outset of discovery. (See Hearing Transcript (“Hr’g Tr.”) October 19, 2015, at 311-334.) At least half of the documents were produced after the October 16, 2015 deadline contained in Order No. 37 because of corrupted documents that the Respondents’ e-discovery vendor was unable to open. (*Id.*, at 337-338.) As a result of this production, Complainant’s Counsel produced evidence and argued that certain of Respondents’ witness declarations and witness statements, made under penalty of perjury, were materially contradicted by some of these newly produced test documents. (*Id.*, at 324-326.) Among the probative and startling documents were those that Complainant’s Counsel demonstrated were testing reports from Feit Xiamen showing that

[

]. These test results clearly were not a select

]. (*Id.*, at 318:3-330: 25, 324: 14-16.) These were documents had been located on the Feit Xiamen server that ostensibly were collected on the Feit USA server that the Respondents failed to produce despite two (2) Orders to do so and the Respondents’ initial discovery obligations.

After rereading certain of the Respondents’ declarations and discovery requests, it was evident that certain of the Respondents’ representatives or witnesses submitted declarations in which either the individuals submitting them did not have the requisite knowledge to make the affirmative statements they made, or they submitted false statements knowing the statements were false. Moreover, the newly produced documents called into question other material statements of fact made during discovery. In any case, Complainant’s Counsel established clearly the relevance of the documents and how they fit within the scope of the discovery ordered

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in Orders Nos. 24 and 37. (*Id.*)

Complainant moved for various sanctions. These included: (i) adverse inferences or ruling the matters established pursuant to Commission Rule 210.33(b)(1); and (2) or a ruling that Respondents may not introduce rebuttal evidence pursuant to Commission Rule 210.33(b)(3) on the allegations that: (a) Respondents falsely used the ENERGY STAR label on certain accused products; and (b) that the '819 and '214 patents are infringed (on all asserted claims); or (ii) an order holding open the record pending forensic inspection of the Feit servers and supplementation from Complainant's experts; and (iii) monetary sanctions for Respondents' willful actions. (*Id.*, at 333-337.) There was discussion whether the hearing could be postponed or extended to permit forensic examination of Feit servers, as well as to take additional witness testimony that may have been necessary. (*Id.*, at 335.)

Respondents' Counsel was given an opportunity to respond. (*Id.*, at 337-346.) I asked Respondents' Counsel specifically to provide an explanation for the Feit Respondents' actions and an explanation as to each of the Respondent's roles in producing or in failing to produce the discovery at issue. (*Id.*) Respondents' Counsel stated that he took accusations of willful discovery violations "very seriously." (*Id.*, at 337: 17-25.) Respondents' Counsel asked for more time to ascertain the nature of the late produced documents (including the number that were duplicative), and the role of the Unity Respondents in response to my questions. (*Id.*, at 337-347, 358-361.) He then sought to explain the scope of the discovery requests at issue from his clients' perspective and to argue that some or all of the documents produced were not responsive to Complainant's discovery because they were not specifically "LM79" testing documents that Respondents' claimed they thought Complainant's discovery requested. (*Id.*, at 343-348; *see also* 349.) Respondents' Counsel did not object on October 19, 2015 to

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Complainant's use of the newly produced documents for purposes of cross-examination. (*Id.*, at 346; *see also* 360-361.) Respondents' Counsel did not seek more time for a more concrete and thorough rebuttal that day.

Staff's recommendation based on his evaluation of the late produced discovery and his knowledge of the earlier discovery requests and productions was that I issue certain sanctions even though the scope of the problem of the late produced discovery was still unfolding. (*Id.*, at 348-350.)

Complainant's Counsel was permitted to make rebuttal argument on the record. (*Id.*, at 360-361.) Complainant refuted Respondents' arguments regarding the scope of the interrogatories and document requests at issue suggesting that the Respondents' had read the discovery requests far too restrictively despite continued requests that Complainant asserted were far broader in scope. Complainant's Counsel restated the negative impacts to Complainant of the late produced discovery. Staff supported Complainant's Counsel's position. (*Id.* at 349.)

After the parties had more time to look at the production and I had time to consider the legal implications of sanctions and the production as it existed at that time, there was additional discussion the morning of October 20, 2015.

In contrast to Complainant's claim that more than 1000 documents including specific testing documents had been withheld, during the morning of October 20, 2015, Respondents' Counsel explained that fewer than 500 documents had been newly produced that previous weekend. (Hr'g Tr., October 20, 2015, at 595.) He claimed that only 98 pages were directed to accused products, and of those 65 were "updates" of previously produced documents. Respondents' Counsel asserted that 23 pages were test results generated after discovery cutoff and that arguably, fewer than three (3) documents could be considered to be previously

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unproduced reports. (*Id.*) These assertions were rebutted both by Complainant and Staff.

There is no question that the late production of relevant, material testing documents during the evidentiary hearing prejudiced Complainant, and to some extent Staff. They did not have the benefit of these documents in conducting their discovery, in preparing their expert reports, and in preparing their pre-hearing submissions. Complainant was then expected to expend time and resources to integrate these belatedly produced documents, some of which were at least initially in corrupted form or untranslated, into its case in chief, after the pre hearing conference and just two days before the hearing.

In addition, I was concerned by the degree to which the documents I was shown the morning of October 19, 2015 appeared to discredit the testimony of certain of Respondents' hearing witnesses and declarants. At that point, Respondents' counsel had no clear explanation as to why the documents had been omitted from the earlier discovery requests, or how they were overlooked. Particularly problematic, however, were that the documents produced from Feit Xiamen contradicted an explicit declaration made in response to Order No. 24 that Feit Xiamen had no such documents. Indeed, there still remains a question whether other pertinent documents remain outstanding even at this late date. Finally, the content of the Feit Xiamen testing (as translated by Respondents) clearly reflected [

], thereby refuting certain positions, facts and arguments Feit Respondents' had made throughout discovery, including in certain witness statements.

As a result of the evidence produced October 19 and 20, 2015, it seemed quite clear that the Feit Respondents failed to timely comply with Order No. 24 and Order No. 37 and that they should be sanctioned pursuant to Commission Rule 210.33(b) and (c). In the absence of any cogent explanation that could explain the failure to produce such critical documents, the failure

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to produce those documents appeared to be both willful and intentional.

The sanctions I ordered on October 19 and October 20, 2015, and that I endorse now, are as follows:

First, I found it to be appropriate that the Complainant could use the newly produced documents for cross-examination without limitation or rebuttal.

Second, I found it appropriate that monetary sanctions be imposed on the Feit Respondents for their failure to cooperate in discovery, as necessary to cover the Complainant's fees and expenses in preparing its motions that led to Order Nos. 24 and 37 and the emergency briefing pursuant to Order 35. (Hr'g Tr., October 19, 2015 at 358; *see also*, Hr'g Tr., October 20, 2015 at 593.) Additionally, I considered it appropriate that the Feit Respondents cover Complainant's costs and fees for wading through the newly produced documents during the weekend of October 17 and 18, 2015 in preparation for the report on October 19, 2015.

Third, after consideration, I found it appropriate for purposes of this Investigation that whether the Feit Respondents falsely advertised certain accused products by marking them with the ENERGY STAR label should be taken as established adversely to the Feit Respondents pursuant to Commission Rule 210.33(b)(2). (Hr'g Tr., October 20, 2015 at 593-594.) I announced I would hear no further evidence on the subject of whether the Feit Respondents made false statements about the products at issue by marking them with the ENERGY STAR label, and would not accept any additional witness statements or testimony, other than otherwise was necessary to support this claim. (*Id.*) The evidence that was precluded included: a showing that the false statements actually deceived or had the tendency to deceive a substantial segment of their audience; the materiality of the deception to purchasing decisions; the entry of the false advertisements into interstate commerce; and injury or likely injury to Complainant's

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domestic industry. (*Id.*, at 593-596.)

Fourth, I found with respect to the '819 and '214 patents that Respondents could not introduce evidence or testimony to support non-infringement arguments based upon the color-rendering index, input power, or lumen output for the accused Feit LED products pursuant to Commission Rule 210.33(b)(3). Very clearly, the belated testing that Feit produced from Feit Xiamen showed that the accused products had [

]. (*Id.*, at 594.) Respondents were permitted to present evidence and testimony with respect to other limitations of the asserted patent claims at issue.

Fifth, I denied the Respondents' Counsel's motions that I reconsider the sanctions I ordered, that I grant the Feit Respondents leave to appeal the order to the Commission or that I stay the orders pending an appeal to the Commission. (*Id.*, at 596-597).

Finally, I ordered that the sanctions would include reasonable costs that Staff incurred in responding to Complainant's motion to enforce Order No. 24 and the emergency briefing request in Order No. 35, such as postage and copying costs for service on the parties. (*See* Commission Rule 210.33(c)(2) (authorizing reimbursement to the Commission for expenses, but not attorney's fees, incurred by a Commission investigative attorney).)

I specifically announced the Commission Rules upon which I relied for the sanctions levied against the Feit Respondents. (*See* Commission Rule 210.33(c)(1) (authorizing monetary sanction payable to other parties).) (Hr'g Tr., October 20, 2015 at 593-596).

I asked Complainant and Staff to file an accounting that would include affidavits and other, appropriate supporting documentation. As part of their briefing, I asked Complainant and Respondents to file a more thorough description of the documents that were produced than there

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was time to provide the mornings of October 19 and October 20, 2015. I asked Respondents for a clear explanation of the discovery terms they had used when they had requested searches of Feit Respondents' computers, and why so many documents had not been produced previously. I asked Respondents to explain the discrepancy between Respondents' description of the document production and Complainant's description. I extended the time for briefing until October 28, 2015. (*Id.*, at 594-595.)

Given the time constraints associated with the Investigation deadlines, I did not on October 19 or 20, 2015: permit Complainant to conduct a forensic inspection of the Feit Respondents' servers; reopen discovery; or grant Complainant's motion to hold the hearing record open for additional discovery. (*Id.*, at 594.)

Within seven (7) business days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not<sup>2</sup> it seeks to have any confidential portion of this document deleted from the public version. Any party seeking redactions to the public version must submit to this office two (2) copies of a proposed public version of this document pursuant to Ground Rule 1.11 with red brackets clearly indicating any portion asserted to contain confidential business information.

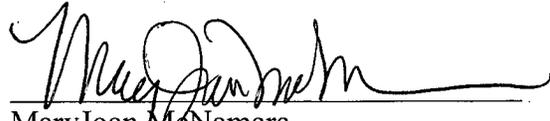
The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. In addition, an electronic courtesy copy is required pursuant to Ground Rule 1.3.2. The parties' submissions concerning the public version of this document need not be

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<sup>2</sup> This means that parties that do not seek to have any portion redacted are still required to submit a statement to this effect.

filed with the Commission Secretary.

**SO ORDERED.**

A handwritten signature in black ink, appearing to read 'MaryJoan McNamara', written over a horizontal line.

MaryJoan McNamara  
Administrative Law Judge

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

**337-TA-947**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Brian B. Koo, Esq., and upon the following parties as indicated, on May 9, 2016



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Secretary to the Commission  
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