

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC**

In the Matter of

**CERTAIN LIGHT EMITTING DIODE
PRODUCTS, SYSTEMS, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-3385

**PUBLIC INTEREST COMMENTS OF
PROPOSED RESPONDENTS MLS AND LEDVANCE**

Proposed Respondents MLS Co., Ltd., LEDVANCE GmbH, and LEDVANCE LLC (LEDVANCE) respectfully submit that implementation of Complainants' requested remedy in the above-referenced matter would harm the public health and welfare of U.S. consumers by eviscerating a key component of current and future U.S. energy security. Accordingly, LEDVANCE asks the U.S. International Trade Commission (Commission) to decline Complainants' amended request for institution of a Section 337 investigation or, if institution is allowed, to delegate public interest issues to the Administrative Law Judge (ALJ).

Complainants Failed to Comply with Commission Rule 210.8(b)

Complainants failed to file a revised public interest statement with their Amended Complaint, as required by Commission Rule 210.8(b). Because Complainants in their Amended Complaint seek a different type of relief against a different set of proposed Respondents (subtracting three and adding one), there is no way their original public interest statement could “[p]rovide *specific* information regarding the public interest” that addresses “how the issuance of the requested relief” impacts the factors found in 19 U.S.C. § 1337(d)(1).¹ Even if the Commission were to overlook Complainants' non-compliance, which it should not, the representations in their original public interest statement have been rendered unreliable. By withdrawing their request for a general exclusion order in their original Complaint less than three weeks after filing it, Complainants tacitly have admitted the impropriety of their request. Complainants have an affirmative duty to provide details justifying why the *particular* exclusion they seek will not harm the public interest. They failed to do so. At a minimum, this failure should require Complainants to make a third attempt at filing in accordance with Commission rules.

LEDs Are Essential to US Energy Efficiency

The US Department of Energy (DOE) reports that “LED lighting has the greatest potential impact on energy savings in the United States. By 2027, use of LEDs could save about 348 TWh,” which “is the equivalent annual electrical output of 44 large electric power plants (1000 megawatts each), and a total

¹ 19 C.F.R. § 210.8(b) (emphasis added).

savings of more than \$30 billion at today's electricity prices.”² Non-governmental sources concur that LEDs play a pivotal role in energy conservation. Dr. Lucas Davis of the Haas School of Business at the University of California instructs “[w]hen you take out incandescent light bulbs and replace them with LEDs, the amount of electricity you consume goes down more than 80 percent,” and “[t]here’s nothing else like that.”³

LED Subsidies Reflect an Industry Insufficiently Competitive to Withstand the Requested LEO

Although DOE recognizes strides in the development/adoption of LEDs, it admits that “LED lighting has not yet come close to achieving its full potential,” and that “[s]ignificant work remains to be done to further improve performance, reduce costs, and efficiently enable new value propositions such as improved health, productivity, and safety.”⁴ A variety of governmental subsidies exists to artificially bolster market forces vis-à-vis LED lighting. For example, under the Advanced Energy Manufacturing Tax Credit program, proposed Respondent Cree, Inc. received \$30 million in subsidies to support production of LED bulbs, and Acuity Brands received nearly \$1 million for similar reasons under the same program.⁵ Indeed, Cree has admitted in U.S. Securities and Exchange Commission (SEC) filings that it depends on utility rebates and government funding for Cree’s R&D.⁶ Cree and Acuity Brands are not alone in receiving government aid designed to encourage the creation of a healthy LED market. For years, proposed Respondents GE, OSRAM, and Lumileds, along with Cree, have received DOE subsidies under the American Recovery and Reinvestment Act for LED-related product development and manufacturing.⁷

² *LED Lighting*, DOE (last visited June 2, 2019), <https://www.energy.gov/energysaver/save-electricity-and-fuel/lighting-choices-save-you-money/led-lighting>.

³ Nadja Popovich, *America’s Light Bulb Revolution*, NY TIMES (Mar. 8, 2019), <https://www.nytimes.com/interactive/2019/03/08/climate/light-bulb-efficiency.html>.

⁴ *LED R&D Challenges*, DOE (last visited June 2, 2019), <https://www.energy.gov/eere/ssl/led-rd-challenges>.

⁵ *Cree receives \$30 million for LED expansion*, BIZ TIMES (Dec. 16, 2013), <https://www.biztimes.com/2013/industries/manufacturing-logistics/cree-receives-30-million-for-led-expansion>; *Acuity Brands Selected to Receive Advanced Energy Tax Credit*, ACUITY BRANDS (Jan. 15, 2010), <https://acuitybrands.gcs-web.com/news-releases/news-release-details/acuity-brands-selected-receive-advanced-energy-tax-credit>.

⁶ Cree, ANNUAL REP. (Form 10-K) at 19 (June 24, 2018).

⁷ See DOE, *Solid-Stated Lighting Research and Development*, MULTI-YEAR PROGRAM PLAN at 75 (Apr. 2014), https://www1.eere.energy.gov/buildings/publications/pdfs/ssl/ssl_mypp2014_web.pdf; DOE *funds*

Complainant Lighting Sciences Group Corporation (LSG), too, has long acknowledged the prominence subsidies play in the U.S. LED market.⁸ The Amended Complaint likewise proclaims the importance of ongoing Energy Star subsidization, stating that “Energy Star certification also enables products to obtain subsidies from local utility companies,” which “drastically reduce the price of an Energy Star certified bulb” and has an “enormous effect on end-user price and demand.”⁹ In its SEC filings, LSG discusses a U.S. “industry trend” to adopt “subsidy programs concerning energy efficiency” that include “banning the sale after specified dates of certain forms of incandescent lighting, which is advancing the adoption of more energy efficient lighting solutions such as LEDs.”¹⁰ This trend, however, may soon reverse, as the Administration has proposed rolling back efficiency standards that have encouraged LED use under both Presidents Bush and Obama.¹¹ As policies incentivizing such adoption are being scaled back, it is more critical than ever to ensure there remains a full complement of LED suppliers in the US market.

Each of these subsidies are designed to spur LED development and sales that are not being achieved through organic economic forces. Because such subsidies have been available for years, it cannot be said that the existing US LED market is sufficiently competitive to withstand Complainants’ requested relief.

Complainants Have Not Shown Sufficient LED Capacity to Serve U.S. Consumers

Complainants argue in the public interest statement filed with their original Complaint that “Proposed Respondents represent only a portion of a competitive market for the manufacture and sale of

17 solid-state-lighting projects to the tune of \$37.8 Million, *LEDs Mag.* (Jan. 18, 2010), <https://www.ledsmagazine.com/leds-ssl-design/modularlightengines/article/16699829/doe-funds-17-solid-statelighting-projects-to-the-tune-of-378-million>.

⁸ LSI, ANNUAL REP. (Form-10K) at 14 (Dec. 31, 2014) (noting as a “risk” the reduction or elimination of LED-based government incentives and rebates).

⁹ Am. Compl. ¶ 161.

¹⁰ LSI, ANNUAL REP. (Form-10K) at 14 (Dec. 31, 2014).

¹¹ Gina-Marie Cheeseman, *Trump Administration Rolls Back Light Bulb Efficiency Standards*, PLANET WATCH (Mar. 28, 2019), <https://earthmaven.io/planetwatch/energy-economics/trump-administration-rolls-back-light-bulb-efficiency-standards-t2AYJMqYaUKYfRM5ye1RYw> (stating DOE plans to issue a rule later in 2019 that may roll back A-lamp standards); *Trump Administration Should Shelve Lightbulb Efficiency Rollback*, ALLIANCE TO SAVE ENERGY (May 3, 2019), <https://www.ase.org/news/alliance-trump-administration-should-shelve-lightbulb-efficiency-rollback> (concluding “DOE’s proposal would cause needless market uncertainty less than one year before the new standards are set to take effect”).

LED products,” and that “Complainants and others have the capacity to replace Proposed Respondents’ volume of production of Accused Products for the United States market without delay.”¹² This statement, however, is entirely unsupported. First, Complainants provide no quantification of the current or prospective needs of the US market or of Complainants’ capacity to supply those needs. Second, Complainants provide no quantification of the combined current or prospective volumes that the requested exclusion would represent. These data points are critical in determining whether post-LEO there will be adequate supplies of LEDs within a commercially reasonable period, so as not to deprive U.S. consumers of products essential to reducing domestic energy consumption.

The proposed Respondents include six of the ten largest LED lighting manufacturers in the world for 2019, and those six companies account for over \$22 billion in revenue—i.e. nearly 90% of publicly reported revenue for those top ten manufacturing leaders.¹³ Viewing Complainants’ requested LEO from the perspective of LED package suppliers provides equally disturbing results. The largest four LED package suppliers worldwide in 2017 are proposed Respondents, representing almost \$8 billion in revenue—i.e. roughly 46% of revenue for the top ten on that list.¹⁴

It therefore appears **unlikely** that the United States will have access to amounts of LED products necessary to satisfy its energy conservation objectives if Complainants’ requested LEO were to issue. The domestic need for such products is immense, and the market share proposed Respondents supply to US consumers is considerable.¹⁵ Moreover, it is axiomatic that removing a substantial number of competing products from the U.S. market will reduce competition and increase prices—yet another way in which Complainants’ suggested course of action harms public health and welfare.

¹² Complainants’ Public Interest Statement at 2.

¹³ *Top 10 Largest LED Lighting Manufacturers in the World 2019*, TECHNAVIO (May 28, 2019), <https://blog.technavio.com/blog/top-10-largest-led-lighting-manufacturers>.

¹⁴ Thomas Insights Rep.

¹⁵ See *Top LED Lighting Manufacturers and Suppliers in the USA and Internationally*, Thomas Insights (last visited June 2, 2019), <https://www.thomasnet.com/articles/top-suppliers/led-lighting-manufacturers-suppliers> (Thomas Insights Report).

The ITC Can and Should Deny Institution

Public interest must be “the overriding consideration[] in the administration” of Section 337, and here, it would not be served by instituting an investigation.¹⁶ The ITC need not do so. The U.S. Supreme Court has held that an agency has “absolute discretion” whether to pursue prosecution/enforcement within its purview.¹⁷ The ITC itself maintains that Section 337 does not contain “a directive to institute an investigation based on every complaint.”¹⁸ Rather, it must determine “whether an investigation should be instituted,” and Congress expects it “to give attention to other preliminary matters” during this review.¹⁹ The ITC has declined to institute investigations previously, which the Federal Circuit has affirmed.²⁰

In this matter, Complainants’ requested remedy threatens U.S. goals for energy efficiency and, in turn, energy security that both Republican and Democrat Administrations have deemed vital. To undo years of bipartisan energy policy that has yielded such positive results would undermine the public health and welfare of US consumers. In short, “[t]he public as a whole has an interest in conserv[ation] through the provision of energy efficient alternatives,” such as those produced by proposed Respondents’ LED products.²¹ Complainants’ requested remedy will frustrate this important public interest initiative. Accordingly, LEDVANCE respectfully requests that the Commission deny institution of Complainants’ requested Section 337 investigation or, alternatively, delegate public interest issues to the ALJ.

¹⁶ See S. Rep. No. 93-1298, at 197 (1974).

¹⁷ *Heckler v. Chaney*, 470 US 821, 831 (1985) (upholding FDA decision to decline enforcement action.)

¹⁸ *Amarin Pharma, Inc. v. ITC*, Case No. 18-1247, Appellee Br., at 40-42 (Mar. 19, 2018).

¹⁹ *Id.* at 41 (quoting S. Rep. No. 93-1298, at 7327 (1974)); see 19 C.F.R. § 210.10(a)(1).

²⁰ See, e.g., *Amarin*, 2019 WL 1925649 (Fed. Cir. May 1, 2019); *Syntex Agribus., Inc. v. ITC*, 659 F.2d 1038, 1044-45 (CCPA 1981).

²¹ *Certain Automatic Crankpin Grinders*, USITC Pub. 1022, Inv. No. 337-TA-60, Comm’n Op. at 20 (Dec. 1979) (declining to issue exclusion order because “the public interest considerations ... are stronger than complainants’ rights to enforce its patent monopoly through a remedy pursuant to section 337”).

Date: June 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that copies of **PUBLIC INTEREST COMMENTS OF PROPOSED RESPONDENTS MLS AND LEDVANCE** were served on June 4, 2019 as follows:

The Honorable Lisa R. Barton Secretary to the Commission U.S. International Trade Commission 500 E Street, SW, Room 112 Washington, DC 20436	By EDIS
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