

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN HIGH-DENSITY FIBER OPTIC
EQUIPMENT AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1194

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART A FINAL
INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337; REQUEST
FOR 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 a final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”), finding a violation of section 337 of the Tariff Act of 1930. The Commission requests written submissions from the parties on the issues under review and submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone 202-205-2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.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 March 24, 2020, based on a complaint filed on behalf of Corning Optical Communications LLC (“Corning”) of Charlotte, North Carolina. 85 FR 16653 (Mar. 24, 2020). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain high-density fiber optic equipment and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 9,020,320 (“the ’320 patent”); 10,120,153 (“the ’153 patent”); 8,712,206 (“the ’206 patent”); 10,094,996 (“the ’996

patent”); and 10,444,456 (“the ’456 patent”). *Id.* The complaint further alleged that a domestic industry exists. *Id.* The Commission’s notice of investigation named the following as respondents: Total Cable Solutions, Inc. (“TCS”) of Springboro, Ohio; Legrand North America, LLC (“Legrand”) of West Hartford, Connecticut; AFL Telecommunications Holdings LLC (“AFL Holdings”) of Duncan, South Carolina; Huber+Suhner AG of Herisau, Switzerland; Huber + Suhner, Inc. of Charlotte, North Carolina; Shenzhen Anfkomp Telecom Co., Ltd. d/b/a Anfkomp Telecom (“Anfkomp”) of Shenzhen, China; Shanghai TARLUZ Telecom Tech. Co., Ltd. d/b/a TARLUZ (“TARLUZ”) of Shanghai, China; Wulei Technology Co., Ltd. d/b/a Bonelinks (“Wulei Bonelinks”) of Shenzhen, China; FS.com Inc. (“FS”) of New Castle, Delaware; Leviton Manufacturing Co., Inc. (“Leviton”) of Melville, New York; Panduit Corporation (“Panduit”) of Tinley, Illinois; The LAN Wirewerks Research Laboratories Inc. d/b/a Wirewerks (“Wirewerks”) of Quebec, Canada; and The Siemon Company (“Siemon”) of Watertown, Connecticut. *Id.* The notice of investigation also names the Office of Unfair Import Investigations (“OUII”) as a party. *Id.* at 16654.

Respondent Legrand was terminated from the investigation based on withdrawal of allegations in the complaint pursuant to Commission Rule 210.21(a), 19 CFR 210.21(a). *See* Order No. 5 (Apr. 16, 2020); *unreviewed by* Comm’n Notice (May 7, 2020). The complaint and notice of investigation were amended to substitute AFL Telecommunications LLC for respondent AFL Holdings. 85 FR 44923 (July 24, 2020). Thereafter, Respondent AFL Telecommunications LLC was terminated from the investigation based on a settlement agreement. *See* Order No. 27 (Oct. 20, 2020), *unreviewed by* Comm’n Notice (Nov. 2, 2020). Respondents Huber+Suhner AG, Huber + Suhner, Inc., Anfkomp, TARLUZ, and Wulei Bonelinks (collectively, “Defaulting Respondents”) were found in default pursuant to Commission Rule 210.16, 19 CFR 210.16. *See* Order Nos. 7 & 8 (June 9, 2020), *unreviewed by* Comm’n Notice (June 22, 2020); Order No. 13 (Aug. 21, 2020), *unreviewed by* Comm’n Notice (Sep. 15, 2020). Respondent TCS was terminated from the investigation based on consent. *See* Comm’n Notice (Sept. 28, 2020). Accordingly, Respondents Panduit, Leviton, Siemon, FS, and Wirewerks (collectively, “Active Respondents”) remain active in the investigation.

As a result of termination of all asserted claims of the ’996 patent and certain other asserted claims, *see* Order No. 11 (July 29, 2020), *unreviewed by* Comm’n Notice (Aug. 13, 2020); Order No. 18 (Sept. 14, 2020), *unreviewed by* Comm’n Notice (Oct. 14, 2020); and Order No. 19 (Oct. 2, 2020), *unreviewed by* Comm’n Notice (Oct. 27, 2020), claims 1 and 3 of the ’320 patent; claims 11, 12, 14-16, 19, 21, 27, and 28 of the ’456 patent; claims 9, 16, 23, and 26 of the ’153 patent; and claims 22 and 23 of the ’206 patent remain asserted in the investigation.

A prehearing conference and evidentiary hearing were held in this investigation from October 21-26, 2020.

On March 23, 2021, the ALJ issued his final ID, finding a violation of section 337 with respect to claims 1 and 3 of the ’320 patent; claims 11, 12, 14-16, 19, 21, 27, and 28 of the ’456 patent; claims 9, 16, 23, and 26 of the ’153 patent; and claims 22 and 23 of the ’206 patent. The ID also found the Active Respondents have not shown that any of the asserted patent claims are invalid. The ID further found that the economic prong of the domestic industry requirement has

been satisfied with respect to all the asserted patents under section 337(a)(3)(B) and (C).

On April 5, 2021, OUII and Respondent Leviton each filed a petition for review of the ID. That same day, Respondents FS, Panduit, Wirewerks, and Siemon (collectively, “Joint Respondents”) also filed a joint petition for review. On April 13, 2021, OUII, Leviton, the Joint Respondents, and Complainant Corning each filed a response to the petitions.

Having reviewed the record of the investigation, including the final ID, the parties’ submissions to the ALJ, the petitions for review, and the responses thereto, the Commission has determined to review the ID in part. Specifically, the Commission has determined to review: (1) the ID’s finding that the importation requirement of section 337 is met with respect to the accused products of Respondents Leviton, Panduit, and Siemon; (2) the ID’s interpretation of the “width of the front side of [the] fiber optic module” limitation in the asserted claims of the ’456 patent, and the associated infringement findings; (3) the ID’s construction of “a front opening” in the asserted claims of the ’206 patent, and the associated infringement findings; (4) the ID’s finding that Leviton directly infringes the asserted claims of the ’320 and ’456 patents; (5) the ID’s findings on indirect infringement of the asserted claims of the ’320, ’456, and/or ’153 patents by the accused products of Respondents Leviton, Panduit, FS, and Siemon; and (6) the ID’s finding that Corning has satisfied the economic prong of the domestic industry requirement under section 337(a)(3)(B) and (C). The Commission has determined not to review any other findings presented in the final ID.

In connection with its review, Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

1. To determine whether an imported article, which does not satisfy all elements of an asserted patent claim, is an “article that infringes” within the meaning of section 337 when the respondent-importer uses the imported article to directly infringe the asserted patent claim after importation:
 - a. Would it be appropriate for the Commission to consider whether there is a sufficient nexus between the imported article and the alleged unfair acts?
 - b. Would it be appropriate for the Commission to consider the following factors:
 - (i) whether the imported article is a material part of the claimed invention,
 - (ii) whether it is especially designed and/or configured for use in an infringing manner, (iii) whether it has substantial noninfringing uses, and (iv) the extent to which it is modified or combined with other articles after importation?

Please consider the applicable Court and Commission precedent, including *Suprema, Inc. v. International Trade Comm’n*, 796 F.3d 1338 (Fed. Cir. 2015), and please apply your analysis to the facts of this investigation with respect to Leviton’s alleged direct infringement of the asserted claims of the ’320 and ’456 patents.

2. With regard to Leviton, please address with citation to the record whether any of the U.S.-sourced parts and assembly steps in the United States for Leviton's enclosures relate to the claims asserted against Leviton.
3. Please provide citation to any record evidence of sales of the accused products by Leviton, Panduit, Siemon, or FS. In addition, please discuss the relevance, if any, of such sales in determining whether there is direct infringement of the '320, '456, and/or '153 patents by third-parties.
4. With citation to the record evidence please discuss whether there are any non-infringing uses of the accused products that provide at least 98 fiber optic connections per 1U space as required by claim 1 of the '320 patent or at least 144 fiber optic connections per 1U space required by claim 3 of the '320 patent. In addition, please discuss the relevance, if any, of such noninfringing uses in assessing the knowledge requirement for inducement by Leviton, Panduit, Siemon, and FS and in determining whether there is direct infringement of the '320, '456, and/or '153 patents by third-parties.
5. Does the record evidence show that Leviton, Panduit, Siemon, and FS copied Corning's EDGE products, including designing and developing their accused products to support the same high fiber density as Corning's EDGE products and with the goal of capturing EDGE's customers and the same segment of the market?
6. Please address whether the domestic industry investments constitute investments in the "exploitation" of the asserted patents under Section 337(a)(3)(C). *See Certain Integrated Circuit Chips and Products Containing the Same*, Inv. No. 337-TA-859, Comm'n Op., 2014 WL 12796437 (Aug. 22, 2014).
7. The Federal Circuit has stated that section 337 does not protect mere importers. *See, e.g., Schaper Mfg. Co. v. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983). Please explain whether Complainant's asserted domestic industry differs from that of a mere importer, including by discussing: (A) how the Commission and the Federal Circuit have considered such investments in prior investigations, and (B) how the facts of this investigation should be assessed in light of applicable precedent. Also address the extent to which the activities relied upon to show satisfaction of the economic prong (*e.g.*, field engineering and Pioneer-related expenses) need to take place in the United States either as a legal or a practical matter, such that those activities would not distinguish a domestic industry from a mere importer.
8. Please address whether and to what extent *Schaper Mfg. Co. v. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983), should continue to guide the Commission's analysis in light of changes to the law and Commission and Federal Circuit precedents since 1983 and the legislative history associated with the 1988 amendments to section 337 discussing the "inconsistent and unduly narrow" view of domestic industry reflected in certain pre-1988 Commission decisions and specifically citing as an example the Commission's decision in *Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles*, Inv. No.

337-TA-122. *See, e.g., Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing the Same*, Inv. No. 337-TA-1097, Commission Op. at 9, n.6 (June 29, 2018).

The parties are invited to brief only the discrete issues requested above. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondents 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, Comm'n Op. at 7-10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or a cease and desist order 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, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 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 and prescribed by the Secretary of the Treasury. 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. The parties' opening submissions should not exceed **80** pages, and their reply submissions should not exceed **50** pages. 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.

In their initial submissions, Complainant is also requested to identify the remedy sought and Complainant and OUII are requested to submit proposed remedial orders for the

Commission's consideration. Complainant is further requested to state the dates that the Asserted Patents expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on **Monday, June 7, 2021**. Reply submissions must be filed no later than the close of business on **Monday, June 14, 2021**. 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. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1194) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/documents/handbook_on_filing_procedures.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 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. 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 nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on May 24, 2021.

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 CFR Part 210.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: May 24, 2021