

How Trade Secrets Feud Put EV Battery Maker's US Manufacturing Plans at Risk

"Default is the only appropriate remedy here," ITC Administrative Law Judge Cameron Elliot concluded after reviewing SK Innovation's spoliation of evidence in a trade secrets action.

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A Korean company's spoliation of trade secret evidence could throw a wrench into its plans to open a 2 million-square-foot electric vehicle battery plant in Georgia.

The International Trade Commission last week made public Administrative Law Judge Cameron Elliot's 135-page initial determination documenting SK Innovation Co. Ltd.'s spoliation of evidence and explaining his entry of default in favor of competitor LG Chem Ltd.

"Default is the only appropriate remedy here," Elliot wrote. "LG Chem's ability to pursue its case and my ability to oversee a fair and timely investigation on the merits have been significantly prejudiced. The evidence overwhelmingly shows this prejudice was the result of acts committed with bad faith, with the intent to create this exact impairment."

It's a big win for a Latham & Watkins team led by partner Bert Reiser in a closely watched case with potentially broad impact on

the electric battery manufacturing market.

"The U.S. automotive industry is on the cusp of a major transition to electric vehicles as part of a broader effort to combat climate change—a transition that is wholly dependent on a sufficient supply of EV batteries," SK Innovation (SKI) states in a petition to the full ITC requesting review of Elliot's order.

LG is trying to "stop or slow competition in the U.S. domestic market that it is facing from SK's superior battery technology," and auto makers who build cars in the U.S. are "deeply concerned about their ability to meet their EV production targets without adequate supplies of high performance EV batteries."

LG Chem and SKI are Korean-based competitors, with LG the more established player in EV batteries and SKI gaining market share rapidly. SKI won a contract to produce battery cells for Volkswagen in 2018 and broke ground on its Commerce, Georgia, facility last year that is slated to employ 2,000 workers. LG is building a plant in a



Latham & Watkins partner Bert Reiser

Lordstown, Ohio. Either one would likely depend on materials imported from outside the United States.

LG alleges that SKI has fueled its growth with more than 80 former LG employees, many of whom brought trade secrets with them. According to LG, some of its now former employees have gone so far as to identify the trade secrets they intended to misappropriate on their CVs. A Deloitte consultant even cautioned SKI in 2018 that its recruiting from "the L company" had become so well known that search firms weren't

responding to its requests any more, per Elliot's order.

LG grew fed up last year and, on April 8, warned that it would take "all possible legal action" if SKI didn't stop. Three weeks later LG sued in the ITC, seeking to block SKI from importing battery products, components and materials into the United States.

In September, SKI produced a spreadsheet that was located in the electronic recycling bin of an LG-turned-SKI employee. It listed some 1,000 "extracted" documents based on keywords such as "competitor," "LG," LG Chem and "L Company" in their titles. The documents "can be misleading due to their titles if accessed externally," the spreadsheet indicated. Metadata showed it had been created April 12, four days after LG Chem had sent its cease-and-desist letter.

SKI argued that it had understood LG Chem to be threatening litigation under Korean law, which does not involve an obligation to preserve documents. Nevertheless, Elliot ordered SKI to produce "all relevant and discoverable information" and explain why evidence had been destroyed.

Further forensic testing found that on April 15, a SKI employee sent an email stating, "Be sure to delete this email after confirming and handling it. The files below could be misunderstood and require a response. If you do not really need a document, please delete it, and, if you do need it, please be sure to delete the company name from the title and content."

The files identified in the email had titles such as "LG Chem Battery Business 2018 First Half Year Results Report," "Lateral Open Recruitment Weekend Schedule Inquiry (L Company)," and "Competitor [redacted] information."

Another post-suit email instructed: "Delete every material related to the rival company from every single individual's PC, mail storage archives and team rooms. ASAP. ... PCs may even be subject to seizure and examination. Delete this email after completing this directive."

Eventually, SKI turned up 74 more spreadsheets listing documents that had been ordered deleted. LG Chem demanded further searches based on that data, but SKI said doing so wasn't possible by the Oct. 20 deadline Elliot had imposed.

All of this led to devastating findings of fact. "The evidence recounted above shows SKI deliberately sought to gain LG Chem proprietary information through the interviews and subsequent employment of LG Chem personnel, and then, after receiving that information, distributed it amongst its teams with the instruction to use the information for their own work," Elliot concluded.

Though SKI disputes that finding, "the problem is that SKI has prevented development of a complete factual record through its intentional and culpable destruction of documents," Elliot wrote.

The judge allowed that "in retrospect," the demands imposed by his discovery order "may appear

strict and exceedingly burdensome." But, he said, "it cannot be overemphasized that at the time of the order, SKI had not yet revealed—not to me, to LG Chem, or to the Staff—that 74 other spreadsheets beyond the [original] had issued across its organization, even though SKI personnel had known that fact for months."

Latham's team for LG Chem included Reiser and partners David Callahan, Gabriel Gross and Jeffrey Homrig, along with counsel Joseph Lee and Sarah Gragert.

SKI is represented by Covington & Burling. Its petition for full ITC review, signed by partner Sturgis Sobin, says SKI "regrets the loss of documents" and acknowledges it might be fair for Elliot to draw some adverse inferences. But default is too severe a remedy, particularly because some of the conduct Elliot documented took place before LG Chem's suit was filed, SKI argues.

Once the litigation was filed, SKI took reasonable steps to meet its duty to preserve evidence, Sobin writes. "Although in hindsight, SK's preservation efforts did not close every single gap—and accordingly did not prevent the deletion of some potentially relevant documents—the efforts were reasonable under the circumstances and do not amount to bad faith," he writes.

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