CLIENT ALERTS

Electric Vehicles in the ITC Spotlight

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To say the least, electric vehicles (EVs) are a hot topic. The Biden administration has made no secret of its commitment to drive toward electrification and away from the internal combustion engine. So, too, the OEMs. GM recently set a target date of 2035 for ending sales of gas-powered passenger vehicles worldwide. Ford announced a plan to do the same in Europe by 2030. Without question, it is "game on" for transitioning to EVs.

Key to the transition are automotive-grade battery components, the vast majority of which come from Asia. LG Chem and SK Innovation, both South Korea-based companies, are competitors in the development and production of EV battery components. LG, which has a manufacturing facility in Holland, Michigan, supplies carmakers such as GM and Tesla. SKI supplies Ford and Volkswagen, among others.

In recent years, LG and SKI have been adverse to each other in patent-infringement and trade-secret-misappropriation matters before the U.S. International Trade Commission. LG, the complainant in the trade secret dispute, claimed that SKI, the respondent, misappropriated LG's trade secrets by poaching more than 100 former LG employees, including 70 engineers. LG further claimed that SKI asked those former employees to disclose LG confidential information during their recruitment, and indeed, that certain of those employees downloaded more than 1,900 confidential documents from LG's database in the process, documents which SKI later destroyed.

SKI defaulted in the case when it refused to comply with an order requiring a forensic examination of its computer system. As a result, the ITC determined the appropriate remedy to be twofold: (1) a limited exclusion order preventing SKI from importing into the U.S. "certain lithium ion batteries, battery cells, battery modules, battery packs, and components thereof," and (2) cease and desist orders directed to SKI, preventing its use of LG's identified trade secrets. Importantly, and going to the

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Trade Secret & Non-Compete Specialty Team “limited” nature of the exclusion order, the ITC further determined, among other things, that SKI may continue to import components for the domestic production of lithium ion battery equipment for the purpose of supporting Ford’s EV F-150 program for 4 years, and Volkswagen’s MEB line for 2 years, so as to give Ford and Volkswagen ample time to transition those programs to domestic suppliers.

The Biden administration has a 60-day period within which to review the ITC’s determination. One question on the minds of many is whether the Ford, Volkswagen, and other exemptions to the ITC’s import exclusion order will be enough to assure the administration that the order will not stunt EV development, especially in light of concerns that demand for EV battery components far exceeds their supply. Only once in more than 30 years has a U.S. president overruled an ITC determination.

The ITC’s trade secret determination in the LG-SKI case is interesting for several reasons. One of which is how it might affect battery availability and domestic EV development overall, bearing in mind that LG and SKI have yet to settle their patent-infringement disputes before the ITC. Another is that the determination reflects the marked uptick in high-stakes automotive trade secret litigation, as the industry becomes increasingly high-tech. LG, for example, claims that it lost more than $1 billion in revenue due to SKI’s misappropriation.

As companies continue to race to bring new and improved technologies to market, it is imperative that they identify and take proper measures to protect their trade secrets along the way. Absent such protection, the misappropriation of trade secrets by iniquitous third parties could be too much for aggrieved companies to bear.

Don Orlandoni
313.225.5314
orlandoni@butzel.com