



INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1159]

Certain Lithium Ion Batteries, Battery Cells, Battery Modules, Battery Packs, Components Thereof, and Processes Therefor; Commission Decision to Review an Initial Determination in Its Entirety; Schedule for Filing 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 the presiding administrative law judge's ("ALJ's") initial determination ("ID") (Order No. 34) finding a violation of section 337 of the Tariff Act of 1930, as amended. The Commission requests briefing from the parties on certain issues under review, as set forth in this notice. The Commission also requests briefing from the parties, interested persons, and government agencies on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 708-2532. 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 <http://www.usitc.gov>. Hearing-impaired persons are advised that information on this

matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 4, 2019, based on a complaint filed on behalf of LG Chem, Ltd. of South Korea and LG Chem Michigan, Inc. of Holland, Michigan (collectively, "complainants" or "LG"). 84 FR 25858 (June 4, 2019). The complaint, as supplemented, alleges violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation and sale of certain lithium ion batteries, battery cells, battery modules, battery packs, components thereof, and processes therefor by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States, under subsection (a)(1)(A) of Section 337. The complaint, as supplemented, names SK Innovation Co., Ltd. of Seoul, South Korea and SK Battery America, Inc. of Atlanta, Georgia as the respondents (collectively, "respondents" or "SK"). The Office of Unfair Import Investigations ("OUII") was also named as a party in this investigation.

On November 5, 2019, LG moved for an order entering default judgment against the respondents due to contempt of Order No. 13, which granted in part complainants' motion to compel forensic examination of respondents' computer system due to spoliation of evidence. Respondents opposed the motion and OUII supported the motion.

On February 14, 2020, the ALJ issued the subject initial determination ("ID") (Order No. 34) finding that the respondents spoliated evidence, and that the appropriate remedy is to find the respondents in default. The ID noted that complainants do not seek a general exclusion order, and therefore no issues remain to be litigated, and terminated the investigation. ID at 131.

On March 3, 2020, SK filed a petition for Commission review of the ID. On March 11, 2020, LG and OUII filed oppositions thereto. On March 17, 2020, SK moved for leave to file a reply, which LG opposed on March 18, 2020, and OUII opposed on March 24, 2020.

Having reviewed the record of the investigation, including Order No. 13, the subject ID, the parties' submissions to the ALJ, and SK's submission and LG's and OUII's responses thereto, the Commission has determined to review the ID in its entirety. Accordingly, the Commission has determined to deny SK's motion for leave to file a reply as moot.

In connection with its review, the 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]

- (1) Please discuss what the destroyed evidence was, and whether there are plausible, concrete suggestions as to what the destroyed evidence might have been, in connection with misappropriation of trade secrets (*e.g.*, if SK had not obtained documents and confidences from former LG employees, that SK would not have been able to develop its battery technologies, its battery technologies would not have been as good, or it would have taken longer for SK to develop its battery technologies).

^[1] In reviewing the ID, and in seeking briefing on these issues, the Commission has not determined to excuse any party's noncompliance with Commission rules and the ALJ's procedural requirements, including requirements to present issues in a timely manner. *See, e.g.*, Order No. 2 (June 4, 2019) (ground rules). The Commission may, for example, decline to disturb certain findings in the ID upon finding that issue was not presented in a timely manner to the ALJ.

- (2) Please discuss what the destroyed evidence was, and whether there are plausible, concrete suggestions as to what the destroyed evidence might have been, in connection with the economic injury requirement of section 337 or the “threat” of economic injury, *see* 19 U.S.C. 1337(a)(1)(A) & (a)(1)(A)(i) (e.g., SK intended to or projected that it would be able to take market share from LG over the next several years by obtaining documents and confidences from former LG employees,).
- (3) It is unclear from the parties’ submissions which alleged trade secrets remain within the scope of the investigation at the time of the ID’s default finding. The parties are to provide a list of the alleged trade secrets remaining in the investigation at the time of the ID, with citations to the evidentiary record as to when and where in the record each trade secret was asserted by LG and not later withdrawn. SK is not to dispute whether any of the alleged trade secrets that remained within the scope of the investigation are actually trade secrets; SK’s existing briefing is adequate as to that issue. To the extent that the parties can provide a joint response to question (3), they should, and it should be presented in LG’s opening brief explaining that the other parties do not disagree. Such a list may be appended to the brief without counting against page limitations.

The existing record is adequate as to issues concerning inherent authority; sanctions under Commission rule 210.33 and Federal Rule of Civil Procedure 37; and under *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed Cir. 2011).

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue a cease and desist order that could result in the respondent 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 any remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or 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 as to the issues under review. The parties' opening submissions should not exceed 30 pages, and their reply submissions should not exceed 25 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. For the parties, the submissions on remedy, the public interest, and bonding, shall be separate from their submissions as to the issues under review, with page limits of 50 pages for opening submissions and 40 pages for response submissions. In their initial submissions, Complainants and OUII are requested to submit proposed remedial orders for the Commission's consideration. In connection with remedy, the public interest, and bonding, the parties may present whatever responsive briefing they wish, but the briefing must include the following:

Limited Exclusion Order

- (1) Whether the Commission should issue a limited exclusion order and how Customs should administer the exclusion order, including how Customs may identify which imported articles “embody the misappropriated trade secrets,” Compl. ¶ 158, especially in view of the fact that the complaint itself references future discovery as to such issues, *id.*, and the parties have not yet addressed such discovery in their submissions to the Commission.
- (2) The appropriate length for a limited exclusion order, if any.
- (3) Whether the statutory public interest factors of 19 U.S.C. § 1337(d)(1) should result in a Commission finding that some or all of the accused articles should not be excluded, or warrant tailoring of any limited exclusion order.

Cease and Desist Order

- (1) Against which respondent(s) a cease and desist order, if any, should issue.
- (2) The appropriate length for one or more cease and desist orders, if any.
- (3) Whether the statutory public interest factors of 19 U.S.C. § 1337(f)(1) should result in a Commission finding that a cease and desist order not issue, or warrant tailoring of any cease and desist order.

Bond

- (1) What the appropriate amount of bond, if any, should be during the Presidential Review period. *See* 19 U.S.C. § 1337(j)(3).

Initial written submissions and proposed remedial orders must be filed no later than close of business on Friday, May 1, 2020. Reply submissions must be filed no later than the close of business on Tuesday, May 12, 2019. 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 C.F.R. 210.4(f) are currently waived. 85 Fed. Reg. 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1159) 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 at (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. 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,^[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection on EDIS.

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.

Issued: April 17, 2020.

Lisa Barton,
Secretary to the Commission.

^[2] All contract personnel will sign appropriate nondisclosure agreements.

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