PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN LITHIUM ION BATTERIES, BATTERY CELLS, BATTERY MODULES, BATTERY PACKS, COMPONENTS THEREOF, AND PROCESSES THEREFOR**	**Inv. No. 337-TA-1159**

COMMISSION OPINION

I. INTRODUCTION

In this investigation, complainants LG Chem, Ltd. of the Republic of Korea and LG Chem Michigan, Inc. of Holland, Michigan[1] accused SK Innovation Co., Ltd. of the Republic of Korea and SK Battery America, Inc. of Atlanta, Georgia (collectively, "respondents," "SK," or "SKI") of violating section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337, by, *inter alia*, selling and importing in the United States certain lithium ion batteries, battery cells, battery modules, battery packs, components thereof, and processes therefor, that were produced using trade secrets misappropriated from LG. 84 Fed. Reg. 25,828 (June 4, 2019) ("Notice of Investigation"). The administrative law judge's ("ALJ's") final initial determination on violation (Order No. 34) ("the ID" or "the sanctions ID") found SK in default as a result of its spoliation of evidence.

[1] On December 1, 2020, Complainants filed an unopposed motion to amend the complaint and NOI to reflect a reorganization of LG Chem, Ltd. in which (i) certain business functions were transferred to a newly created subsidiary named LG Energy Solution, Ltd., and (ii) LG Chem Michigan Inc. was renamed LG Energy Solution Michigan, Inc. (EDIS Doc. ID 726833). The Commission grants LG's motion, adding LG Energy Solution, Ltd. of Seoul, Republic of Korea as a complainant, and changing the name of "LG Chem Michigan, Inc." to "LG Energy Solution Michigan, Inc." The complainants are referred to herein, collectively, as "complainants," "LG," or "LGC."

On review of the ID, the Commission has determined to uphold the ID's finding that SK is in default, and to issue a limited exclusion order and cease and desist orders. The Commission finds SK's destruction of evidence in this case to be extraordinary. The destruction was ordered at a high level and was carried out by department heads throughout SK. The record of the investigation demonstrates not merely SK's eagerness to destroy documents, but also SK's callous disregard to ascertain the scope of the destruction after the commencement of Commission proceedings. As a result of SK's disregard, it is undisputed that evidence was irretrievably lost both before and after SK was served with the complaint and Notice of Investigation. That disregard is illustrated by the undisputed fact that even six months after SK received the complaint, and four months after the commencement of the investigation, 75 lists of documents targeted for destruction were produced for the first time by SK in discovery. On October 3, 2019, the ALJ issued an order (Order No. 13) compelling forensic discovery as to all deleted information. But SK's failure to timely ascertain the scope of its efforts to spoliate or to disclose that massive spoliation to the ALJ notwithstanding the ALJ's order compelling discovery and requiring a report identifying the destroyed documents—or both—resulted in SK's failure to comply with Order No. 13. In view of the record evidence of SK's spoliation, the Commission affirms the ALJ's default determination based upon section 337(h), Commission Rule 210.33, and Federal Rule of Civil Procedure 37.

Independently, the Commission also determines that SK's spoliation warrants default under the Commission's inherent authority to protect the integrity of its proceedings and its statutory duty to investigate alleged violations of section 337. SK's spoliation occurred after litigation was reasonably foreseeable and continued after SK received the complaint. The case-terminating sanctions are warranted based on SK's massive document destruction, which has

impeded the Commission from performing its statutory duty to investigate LG's complaint alleging that SK misappropriated LG's trade secrets and used those trade secrets in SK's products that are imported and sold in the United States harming LG's domestic industry. These sanctions ensure that SK's document destruction cannot be used to avoid a finding of a violation of section 337. The Commission finds that SK acted in bad faith, that LG has been prejudiced, and that no lesser alternative sanctions would provide adequate redress. Accordingly, default is also independently warranted as a matter of inherent authority.

Having found a violation of section 337, the Commission has determined that the appropriate remedy is a limited exclusion order and cease and desist orders, each with a duration of ten years, but with certain tailored provisions. Numerous third-parties—including automakers Ford Motor Co. ("Ford") and Volkswagen of America, Inc. ("VW"); suppliers for those automakers; contractors for SK; Members of Congress; representatives of various state and local governments; and trade and other associations—filed comments on remedy and the public interest. In view of the record of this investigation, including those comments, the Commission has determined to issue a limited exclusion order that will expire in ten years directed to certain lithium ion batteries, battery cells, battery modules, battery packs, and components thereof; as well as cease and desist orders directed to the respondents. Those same comments, however, demonstrate the need to tailor the scope of the remedial orders to avoid undue harm to U.S. automakers that have contracted to purchase SK batteries for their electric vehicle product lines that are to be manufactured and sold in the United States in the near future. This tailored remedy will permit SK solely to import components necessary for SK's battery production in its Georgia plant otherwise subject to the Commission's remedial orders for two years to support SK's domestic production for VW's MEB NAR production plant in Tennessee and for four years to

support SK's domestic battery production for Ford's F-150 EV production plant in Dearborn, Michigan. These periods provide a two-year opportunity for VW and a four-year opportunity for Ford to transition their businesses to domestic electric vehicle battery suppliers that have not misappropriated LG's trade secrets. Additionally, the tailored remedy permits the importation of replacement batteries for Kia Niro EV and Kia Soul EV automobiles that have been sold to U.S. consumers as of the date of the Commission's remedial orders and which were originally equipped with SK batteries.

II. BACKGROUND

The Commission instituted this investigation on June 4, 2019, based on a complaint filed on behalf of LG on April 29, 2019. 84 Fed. Reg. 25,828 (June 4, 2019). The complaint, as supplemented, alleges violations of section 337 by SK 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 Office of Unfair Import Investigations ("OUII") was also named as a party in this investigation.

On October 3, 2019, the ALJ issued Order No. 13, granting in part LG's motion to compel forensic examination of SK's computer system due to spoliation of evidence. On November 5, 2019, LG moved for an order entering default judgment against SK due to contempt of Order No. 13. SK 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 SK spoliated evidence, and that the appropriate remedy is to find SK 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 ("SK Pet."). On March 11, 2020, LG and OUII filed oppositions thereto ("LG Pet. Opp'n" and "IA Pet. Opp'n," respectively). On March 17, 2020, SK filed a motion for leave to file a reply in support of its petition. On March 24, 2020, LG and OUII filed oppositions thereto.

On April 17, 2020, the Commission determined to review the ID in its entirety. Notice, 85 Fed. Reg. 22,753 (Apr. 23, 2020) ("Notice of Review"). The Commission denied as moot SK's motion for leave to file a reply in support of its petition for Commission review. *Id.* The Notice of Review requested the parties to brief three issues under review. *Id.* The first two questions sought additional briefing on (1) whether the destroyed evidence contained information pertinent to SK's misappropriation of trade secrets; and (2) whether the destroyed evidence contained information pertinent to substantial injury or threat of substantial injury, a requirement of 19 U.S.C. § 1337(a)(1)(A)(i). *See id.* at 22,753. The third question sought clarification on the specific trade secrets within the scope of the investigation. *See id.*

The Notice of Review also sought briefing from the parties, interested government agencies, and any other interested parties on remedy, the public interest, and bonding. *See id.* at 22,753-54. The Notice of Review provided that such submissions from the parties be filed separately from the filings on the issues under review. *See id.* at 22,754.

On May 1, 2020, the parties filed their opening briefs on the issues under review,[2] and on remedy, the public interest and bonding.[3] SK also filed a short submission seeking a hearing before the Commission on remedy, the public interest, and bonding.[4] The Commission received public interest comments from Members of Congress: Sens. Sherrod Brown and Rob Portman of Ohio (filing jointly); Sen. Lamar Alexander of Tennessee; Rep. Debbie Dingell of Michigan; Rep. Chuck Fleischmann of Tennessee; Rep. Bill Huizenga of Michigan; Rep. Robert Latta of Ohio; Rep. Paul Mitchell of Michigan; Rep. Fred Upton of Michigan; and a contingent of seven Representatives from the State of Georgia filing jointly: Rick Allen, Sanford Bishop, Jr., Doug Collins, Drew Ferguson, Jody Hice, Hank Johnson, Jr., and Rob Woodall. Several state or local organizations in Georgia and Michigan also filed public interest comments. General Motors, the Ford Motor Co.,[5] and Volkswagen Group of America, Inc.[6] also filed comments. Ford and Volkswagen are customers of SK. The remaining comments were filed by suppliers to, or contractors for, either SK or Ford.

[2] Compl'ts Initial Resp. to the Notice of Comm'n Determination to Rev. a Final Initial Determination in Its Entirety (May 1, 2020) ("LG Br."); Resp'ts SK Innovation Co., Ltd. & SK Battery Am., Inc.'s Opening Submission in Resp. to Comm'n Decision to Rev. an Initial Determination in Its Entirety (May 1, 2020) ("SK Br."); Br. of the Office of Unfair Import Investigations on the Issues Under Review (May 1, 2020) ("OUII Br.").

[3] Compl'ts Submission on Remedy, Bonding, and Public Interest (May 1, 2020) ("LG Remedy Br."); Respt's SK Innovation Co., Ltd. & SK Battery Am., Inc's Brief on Remedy, Bonding, and the Public Interest (May 1, 2020) ("SK Remedy Br."); Br. of the Office of Unfair Import Investigations on Remedy, the Public Interest, and Bonding (May 1, 2020) ("OUII Remedy Br.").

[4] Resp'ts SK Innovation Co., Ltd. & SK Battery Am., Inc.'s Req. for a Hr'g Pursuant to Comm'n R. 210.50(a)(4)(v) (May 1, 2020) ("SK Hr'g Req.").

[5] Letter from Robin McGrath to Lisa R. Barton re Public Interest Comments of Ford Motor Co. in Inv. No. 337-TA-1159 (May 1, 2020) ("Ford Comments"). Ford's comments were not filed until May 4, 2020, but the Chairman granted Ford's motion for leave to file out of time.

[6] Volkswagen Grp. of Am., Inc.'s Statement on the Public Interest (May 1, 2020) ("VW Comments").

On May 12, 2020, the parties filed reply briefs on the issues under review,[7] and on remedy, the public interest and bonding.[8] LG also filed a separate short response to SK's request for a hearing on remedy, the public interest and bonding.[9] The Commission received public interest replies from Ford[10] and Volkswagen,[11] and a submission from Ohio Governor Mike DeWine (supporting LG).

On May 27 and 28, 2020, Senator Marsha Blackburn (Tenn.) and Representative Tim Ryan (Ohio), respectively, filed letters concerning the public interest, supporting SK and LG, respectively. During the pendency of Commission review, LG and SK have filed several motions, the disposition of which is discussed below.

III. DEFAULT

The Commission has determined to affirm the ALJ's factual findings, including detailed findings of SK's malfeasance and nonfeasance in destroying and failing to preserve its records. On review, the Commission clarifies and modifies the legal basis for default as set forth by the

---

[7] Compl'ts Reply to Resp'ts Opening Submission in Resp. to the Not. of Comm'n Decision to Rev. an Initial Determination in Its Entirety (May 12, 2020) ("LG Reply Br."); Resp'ts SK Innovation Co., Ltd. & SK Battery Am., Inc.'s Reply to Compl'ts & Staff's Opening Submissions in Resp. to Comm'n Decision to Review an Initial Determination in its Entirety (May 12, 2020) ("SK Reply Br."); Reply Br. of the Office of Unfair Import Investigations on the Issues Under Rev. (May 12, 2020) ("OUII Reply Br.").

[8] Compl'ts Reply Submission on Remedy, Bonding, and Public Interest (May 12, 2020) ("LG Remedy Reply Br."); Resp'ts SK Innovation Co., Ltd. & SK Battery Am., Inc.'s Reply to Compl'ts & Staff's Initial Submissions on Public Interest, Remedy, and Bonding ("SK Remedy Reply Br."); Reply Br. of the Office of Unfair Import Investigations on Remedy, the Public Interest, and Bonding (May 12, 2020) ("OUII Remedy Reply Br.").

[9] Compl'ts LG Chem, Ltd. & LG Chem. Mich. Inc.'s Opp'n to Resp'ts Req. for a Hr'g (May 12, 2020) (LG Hr'g Opp'n").

[10] Letter from Robin McGrath to Lisa R. Barton re Responsive Public Interest Comments of Ford Motor Co. in Inv. No. 337-TA-1159 (May 12, 2020) ("Ford Reply Comments").

[11] Volkswagen Grp. of Am., Inc.'s Responsive Statement on the Public Interest (May 12, 2020) ("VW Reply Comments").

ALJ. In particular, the Commission clarifies that 19 U.S.C. § 1337(h) and the Commission's inherent authority provide independent bases for a finding of default, each subject to specific requirements, and each warranting a finding of default in this investigation.

A. Summary of SK's Spoliation and Dilatory Conduct

As the ID properly explains, SK has a history of collecting documents about LG and SK's competition with LG, and then destroying those documents. ID at 18-25. For one example, among many, as recently as 2018, in connection with ongoing Korean proceedings, an SK battery supervisor, ordered his team to hide or destroy "[d]ocuments you took from the 'L' company' and '[p]lease don't save this email as well!!" ID at 19. What is most remarkable about SK's spoliation—explained in detail over scores of pages in the ID—is the combination of the scope of the spoliation with its frequency. It was not enough for SK to destroy or hide its records once, because SK then, unchastened, collected more LG proprietary information, only to destroy or hide those records as well. The Commission affirms the ID's findings that the corporate culture of collecting and thereafter destroying records was rampant, well-known, and condoned at SK.

For present purposes, the Commission focuses on **[[SK EMPLOYEE 1]]**, a Senior Manager in SK's "Information Protection Department." ID at 29. On April 8, 2019, **[[SK EMPLOYEE 1]]** sent an email to team leaders throughout SK, including in the battery business, advising them of "a regular inspection on document security across the company." *Id.* Ostensibly, the purge targeted three types of documents: documents that were no longer needed, such as resumes; "[p]ersonal information materials" such as employees' "photos and videos"; and "[d]ocuments that may potentially trigger unnecessary misunderstanding." ID at 30. In connection with this purge, **[[SK EMPLOYEE 1]]** ran keyword searches targeting documents

identifying "LG" in English, in Korean, and in Chinese; as well as "competitor" (in Korean) and "action plan" (in Korean). *Id.* To guide others, **[[SK EMPLOYEE 1]]** created numerous spreadsheets identifying specific documents he had targeted for deletion.

One of the spreadsheets **[[SK EMPLOYEE 1]]** sent to SK's battery team took on special importance in this investigation, because it was the first to be produced in response to LG's discovery requests in the investigation. That spreadsheet, called the "6125 spreadsheet" is Bates numbered SK00066125 (it is an Excel spreadsheet in native format).[12] It is excerpted in part at pages 5-6 of the ID and identifies 980 documents extracted by keyword search. The 6125 spreadsheet lists numerous documents concerning LG's EV battery products and processes. *See, e.g.*, ID at 106-07. **[[SK EMPLOYEE 1]]** created this document on April 12, 2019. *Id.* at 12.

In Commission proceedings, SK acknowledged that a substantial number of documents listed in the 6125 spreadsheet had been irretrievably lost. In particular, SK had not been able to locate 368 out of the 980 documents listed on the 6125 spreadsheet. *Id.* at 13. SK asserted that forensic recovery would be difficult and likely futile as to emails and attachments because SK's "retention timeframe for emails that are deleted from Outlook" is "zero days." *Id.* at 13. SK asserted that forensic recovery as to "any document deleted from SKI's SharePoint-based team rooms" would likely also be futile because of SK's "recycle bin timeframe of 30 days and the backup timeframe of approximately four weeks." *Id*. These team rooms are critical because the "team rooms" are "the official document storage location for each team" and "contain[] the vast majority of documents identified by **[[SK EMPLOYEE 1]]**'s security sweep." *Id.* at 49.

[12] SK apparently located the spreadsheet in the recycling folder of employee **[[SK EMPLOYEE 2]]**, and issued a litigation hold notice to him considerably later, on October 15, 2019. ID at 51.

Apparently, team leaders throughout SK received at least seventy-five such spreadsheets listing documents with the same or similar keyword hits, targeted by **[[SK EMPLOYEE 1]]** for deletion. The ID recounts in detail SK's spoliation efforts in the days following transmission of **[[SK EMPLOYEE 1]]**'s spreadsheets. *Id.* at 33-44. LG filed its complaint at the Commission on April 29, 2019, and SK received it no later than April 30, 2019. Even after receipt of the complaint, it appears that SK scrambled to destroy more records. *Id.* at 45-47. Although some destruction may have been interrupted by a litigation hold notice issued later in the day on April 30, 2019, *id.* at 47, the evidence shows no efforts by SK to preserve documents in the SharePoint team rooms or in employees' recycle bins, *id.* at 49. As the ALJ found, SK's preservation efforts—whatever they were—did not "involve **[[SK EMPLOYEE 1]]** going back to the employees or employee groups to whom he sent the seventy-five document security inspection spreadsheets to inform them that they should no longer delete documents as previously instructed." *Id.* at 49-50. Accordingly, records that SK had targeted for destruction prior to the complaint were irretrievably lost in the days and weeks after SK received the complaint. *Id.* at 49-50, 72-74. In response to the complaint, therefore, SK failed to put a stop to its records destruction that was already in progress. Its failure to do so is both inexplicable and inexcusable in view of the fact that SK's "Information Protection" staff, as well as managers throughout SK, knew about the weeks-old destruction plan.

SK's lack of diligence in putting a stop to its ongoing destruction of records was matched by its lack of acknowledging the full scope of that destruction in Commission proceedings. As late as September 2019, SK had produced one or two spreadsheets in response to LG's discovery requests in this investigation. *See id.* at 9 (referencing the 6125 spreadsheet and one other spreadsheet). On September 11, 2019, LG filed a letter with the ALJ concerning "alleged

discovery deficiencies on the part of" SK. *Id.* at 4. One deficiency was the 6125 spreadsheet. *Id.* The next day, September 12, 2019, SK responded to the ALJ that "[t]he issue does not require the ALJ's intervention, and certainly not at this time." *Id.* at 7. Remarkably, SK contended that the spreadsheet was merely "in connection with a routine security inspection of SKI documents." *Id.* at 8. Indeed, to the extent that such a spreadsheet was *routine*, it was routine only because of SK's pervasive culture of destroying its records concerning LG.

On September 13, 2019, the ALJ conducted a teleconference with the parties, granting permission to proceed to motions practice. *Id.* at 8-9. On September 23, 2019, LG filed a motion to compel all information that was deleted and for SK to provide an explanation. *Id.* at 9. The motion challenged SK's explanation of the spreadsheet. "[A]ccording to SKI's lawyers, the document deletion was part of 'a routine security inspection' by IT personnel "in an effort to improve storage space efficiency." *Id.* at 10 (quoting Compl'ts LG Chem. Ltd. and LG Chem Michigan Inc.'s Mot. to Compel Discovery and Req. for Shortened Time to Respond at 9 (Sept. 23, 2019) (EDIS Doc. ID 689017). In contrast, LG asserted that SK deleted the documents to hide SK's misconduct. ID at 9-10.

On October 1, 2019, SK responded to LG's motion, and reiterated its assertion that the spreadsheet was not problematic. *Id.* at 12-14 (citing Resp'ts Opp'n to Compl'ts LG Chem, Ltd. and LG Chem Michigan Inc.'s Mot. to Compel Discovery (Mot. No. 1159-007) at 1-2, 4-15 (EDIS Doc. ID 689925). In particular, SK asserted that the destruction was "routine" and was directed to unspecified "compliance requirements outlined in" the April 8, 2019 memorandum by **[[SK EMPLOYEE 1]]** reprinted on page 30 of the ID. *Id.* at 12 (quoting Resp'ts Opp'n, *supra*, at 1, 5). SK also asserted that after the complaint was filed at the Commission, SK engaged in "appropriate steps to preserve documents, including issuing litigation holds to

relevant custodians, taking a snapshot of the company's VDI server, and archiving email folders of relevant employees." *Id.* (quoting Resp'ts Opp'n, *supra*, at 6-7).

Prior to the issuance of Order No. 13, SK failed to disclose to the ALJ that the 6125 spreadsheet was merely the tip of the iceberg of document destruction. As discussed above, the scope of destruction was or should have been known throughout SK, as **[[SK EMPLOYEE 1]]** created at least seventy-five spreadsheets in the weeks before LG's complaint was filed at the Commission, and each was sent to team leaders throughout SK. The record demonstrates that SK's failure to timely admit to the ALJ SK's rampant spoliation (including documents that became unrecoverable in May 2019) led the ALJ to the reasonable belief that Order No. 13 would resolve the spoliation issues in this investigation.

Accordingly, on October 3, 2019, the ALJ issued Order No. 13, granting in part LG's motion for forensic recovery. In view of SK's nondisclosure of the many other spreadsheets that would only later be disclosed by SK, the Order made specific reference only to the 6125 spreadsheet. Importantly, the Order directed the forensic recovery of *all* spoliated documents within a certain timeframe. Order No. 13 provides in relevant part:

> 1. Respondents shall immediately engage their currently retained electronic discovery and forensics consultants, who shall search for and attempt to *recover all documents and associated electronic information relating to either LG Chem or the subject matter of this investigation that have been deleted by Respondents, including but not limited to the documents referenced in SK00066125* . . . .
>
> 2. Within four business days of this order, Respondents' consultants shall submit to LG Chem an interim status report . . . .
>
> 3. Within seven business days of this order, the forensic examination described in paragraph (1) above shall be completed, and Respondents' consultants shall submit to LG Chem a final report . . . .

> 4. Within ten business days of this order, Respondents shall produce to LG Chem all discoverable information responsive to LG Chem's discovery requests recovered as a result of the forensic examination described in paragraph (1) above, to the extent they have not already done so.

ID at 16 (quoting Order No. 13 at 4-5) (emphasis added).

The record shows that **[[SK EMPLOYEE 1]]** belatedly disclosed the scope of the spoliation on October 8, 2019. ID at 54. On that day, **[[SK EMPLOYEE 1]]** indicated to LG's and SK's forensic examiners that he prepared a number of similar such spreadsheets. *Id.* On October 9, 2019, SK counsel told LG counsel that SK would be producing fifty-eight more spreadsheets later that day. ID at 56. On October 10, 2019, SK moved for a one-day extension of time for its status report required by Order No. 13. *Id.* at 58. The motion mentioned additional spreadsheets in a footnote, but failed to advise the ALJ that it would take substantially more time, resources, and explanation to comply with any and all of the deadlines in Order No. 13. ID at 58. This was at the same time that SK struggled to comply with Order No. 13 even with respect only to the 6125 spreadsheet. *Id.* Nonetheless, SK prepared a final report in response to Order No. 13, targeted to the 6125 spreadsheet, and not, as Order No. 13 required, as to all spoliation. ID at 61-65. On October 21, 2019, SK disclosed 19 more spreadsheets to LG. ID at 66. In total SK produced 75 such spreadsheets. ID at 66.

On November 5, 2019, LG moved for default sanctions against SK for its spoliation. OUII responded on November 15, 2019, and SK responded on November 20, 2019. On November 27, 2019, LG replied, and on November 29, 2019, LG filed a corrected reply. On February 14, 2019, the ALJ granted the motion for default as Order No. 34.

B. Sanctions Under 19 U.S.C. § 1337(h) and Commission Rule 210.33

Section 337(h) provides that the "Commission may by rule prescribe sanctions for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure." 19 U.S.C. § 1337(h). Commission Rule 210.33(b), promulgated under section 337(h), provides the ALJ with the authority to impose a remedy "as is just," including to "[o]rder any other non-monetary sanction available under Rule 37(b) of the Federal Rules of Civil Procedure." 19 C.F.R. § 210.33(b)(6). Commission Rule 210.33(b) "is 'coextensive' with" Federal Rule of Civil Procedure 37. *Organik Kimya, San. ve Tic. A.S.* v. *Int'l Trade Comm'n*, 848 F.3d 994, 1003 (Fed. Cir. 2017) (quoting *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1418 (Fed. Cir. 1997)).

Federal Rule of Civil Procedure 37, in relevant part, provides for sanctions for not obeying a discovery order. Fed. R. Civ. P. 37(b)(2)(A). Specifically, Federal Rule 37(b)(2)(A) provides authority for district courts to issue "just" remedies for a violation of a discovery order, including a default judgment, stating in relevant part:

> (2) *Sanctions Sought in the District Where the Action Is Pending.*
>
> (A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:
>
> * * *
>
> (vi) rendering a default judgment against the disobedient party . . . .

Fed. R. Civ. P. 37(b)(2)(A) & (b)(2)(A)(vi).

The Supreme Court has explained that the purpose of Rule 37 sanctions is "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v.*

Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) ("*NHL*"). The district court's case-terminating sanction in the *NHL* case was not for spoliation, but merely for a party's failure to answer certain interrogatories in a timely manner or seek leave before the deadline for an extension of time. *Id.* at 640-41. Noting that the sanctioned party had "worked frantically to complete discovery within the deadlines set by the" district court, the Third Circuit reversed the district court's ruling. *In re Prof'l Hockey Antitrust Litig.*, 531 F.2d 1188, 1194 (3d Cir.), *rev'd sub nom. Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639 (1976).[13]

The Supreme Court reversed the Third Circuit: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *NHL*, 427 U.S. at 642. The Supreme Court explained:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, *the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent*. If the decision of the Court of Appeals remained undisturbed in this case, it might well be that *these* respondents would faithfully comply with all future discovery orders entered by the District Court in this case. *But other parties to other lawsuits*

[13] The court of appeals stated that it did not view the plaintiff's conduct as being "in flagrant bad faith, willful, or intentional." *Id.* at 1195. Citing the testimony of the plaintiff's counsel, the Third Circuit explained that there were "only fifty-six out of 1,150 interrogatories to be answered" and that depositions were in progress that "would provide the necessary information to answer the fifty-six interrogatories." *Id.*

> *would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.* Under the circumstances of this case, we hold that the District Judge did not abuse his discretion in finding bad faith on the part of these respondents, and concluding that the extreme sanction of dismissal was appropriate in this case by reason of respondents' "flagrant bad faith" and their counsel's "callous disregard" of their responsibilities.

Id. at 642-43 (emphasis added).

Accordingly, the purposes served by sanctions issued under Rule 37 can include penalizing and deterring when doing so is just. The Commission has thus rendered default judgments pursuant to Commission Rule 210.33 and Federal Rule 37(b)(2)(A)(vi) where the respondent disobeyed an ALJ's order compelling discovery and the facts demonstrated "egregious discovery abuse" as the respondents engaged in massive, willful spoliation of records in violation of their duty to preserve evidence. *See Certain Stainless Steel Prods., Certain Processes for Mfg. or Relating to Same, and Certain Prods. Containing Same*, Inv. No. 337-TA-933, USITC Pub. 4904, Comm'n Op. at 20 (June 9, 2016) ("*Stainless Steel*") (rendering default judgment pursuant to Commission Rule 210.33 and Rule 37 of the Federal Rules of Civil Procedure); *Certain Opaque Polymers*, Inv. No. 337-TA-883, USITC Pub. 4922, Comm'n Op. (Apr. 30, 2015) ("*Opaque Polymers*") (same), *aff'd sub nom., Organik Kimya San. ve Tic. AS v. Int'l Trade Comm'n,* 848 F.3d 994 (Fed. Cir. 2017).

The key prerequisite for exercising authority under Commission Rule 210.33(b) and Federal Rule 37(b) is violation of a discovery order. In the present investigation, there is no dispute about the existence of a discovery order: Order No. 13, issued on October 3, 2019, compelled forensic recovery of spoliated documents, and set specific deadlines for compliance, which SK indisputably failed to obey. SK does not dispute that its forensic examination efforts were limited to finding and producing the documents listed in the 6125 spreadsheet, and not, as

Order No. 13 required, as to all spoliation. ID at 121. Moreover, the ALJ appropriately exercised his discretion to impose a case-terminating sanction for the discovery abuse recounted in the ID's findings above. SK's failure to comply with Order No. 13 demonstrates flagrant bad faith and showed a callous disregard for its obligations as a party to this section 337 investigation to preserve evidence relevant to LG's claim of a section 337 violation. The ID found, and the Commission affirms, that SK's noncompliance with Order No. 13 is inexcusable and warrants the sanction of default. ID at 119-128.

The problem with SK's conduct is not merely that it did not immediately advise the ALJ on October 10, 2019 as to the scope of spoliation. Rather, the ALJ found, and the Commission agrees, that SK had offered "no plausible explanation why" it failed to apprise the ALJ of the full scope of spoliation and why, instead, SK left that task to "LG Chem and the present motion for default and sanctions." *Id.* at 128. More than *five months* had passed from the time SK received the complaint until SK disclosed the full scope of the document destruction that **[[SK EMPLOYEE 1]]** directed throughout the company in April 2019. Likewise, more than a month had passed from the time that SK represented (on September 12, 2019) that "[t]he issue does not require the ALJ's intervention, and certainly not at this time," *id.* at 7, to SK's disclosure of the full scope of spoliation. As the ALJ explained: "[I]t cannot be overemphasized that at the time of [Order No. 13], SKI had not yet revealed—not to me, to LG Chem, or to the Staff—that 74 other spreadsheets beyond the 6125 spreadsheet had issued across its organization, even though SKI personnel had known that fact for months." ID at 123. And: "the record shows that SKI knew of the additional spreadsheets since their creation, months before LG Chem's motion to compel; **[[SK EMPLOYEE 1]]** surely did not forget that he sent out 74 spreadsheets at the same time as the 6125 spreadsheet." *Id.* at 128. The Commission affirms these findings, which

demonstrate SK's flagrant bad faith in bringing the full scope of its spoliation to the attention of the other parties and to the ALJ in connection with the issuance of Order No. 13 or response to the issuance of that order. These findings also demonstrate that SK was responsible for its own noncompliance with Order No. 13.

Although default is warranted for SK's noncompliance in this case even without considering deterrence, the Commission finds that deterrence provides a strong and just additional basis for the default sanction here. The present case demonstrates SK's lack of diligence in investigating spoliation. To be clear, this is not a case of a rogue employee secretly destroying evidence; instead this is a case of an SK manager charged with "Information Protection" instructing scores of department heads to destroy their documents, with the company making little or no effort timely to disclose, much less mitigate, that destruction. Then, SK attempted to construe an unambiguous discovery order narrowly so as to cover only the spoliation that it had previously disclosed. The Commission cannot countenance a spoliator's lack of candor about the full scope of its spoliation. Nor can the Commission countenance a spoliator's attempt to control the scope of forensic recovery based on what it has chosen to disclose to the tribunal. Deterrence of such conduct in future investigations warrants the sanction of default here.

Commission Rule 210.33 does not state a requirement for case-terminating sanctions that lesser remedies be considered in every case. Nonetheless, such consideration of lesser remedies is prudent regardless of whether a legal requirement exists.[14] In the present investigation, the Commission has concluded that there is no lesser remedy, short of default, appropriate here.

---

[14] Consideration of lesser remedies does not necessarily require exhaustive analysis. *See, e.g.*, *Wexell v. Komar Indus., Inc.*, 18 F.3d 916, 920 & n.2 (Fed. Cir. 1994).

Lesser remedies will also be discussed more fully in connection with inherent authority, *infra*, and should be treated as incorporated by reference herein for purposes of this Rule 37 discussion.

In addition, SK's lack of diligence and candor flouted the procedural schedule for this investigation thereby impeding the Commission's statutory obligation to complete its investigation expeditiously. The ALJ set the cutoff date for fact discovery as November 8, 2019.[15] Order No. 6, App'x A (July 1, 2019). SK not only wasted the ALJ's time as to the proceedings surrounding Order No. 13 and the discovery he was led to believe was at issue (the 6125 spreadsheet), it also wasted time that could have been spent by LG moving forward with fact discovery. Indeed, a complete forensic examination within the period of fact discovery was rendered impossible because SK did not even produce 58 of the spreadsheets until October 9, 2019, and 19 more spreadsheets on October 21, 2019. The undue delay caused by SK's spoliation, tardy discovery responses, and lack of candor as to that spoliation was in callous disregard of the Commission's statutory obligation to complete this investigation expeditiously, and the procedural schedule established by the ALJ to implement this statutory requirement. *See* 19 U.S.C. § 1337(b). Thus, SK's intentional discovery misconduct further warrants the imposition of the sanction of default for this reason.

C. Sanctions Under a Tribunal's Inherent Authority

Inherent authority can provide another, separate, basis for the imposition of default in connection with the spoliation of evidence. The Commission finds that it has such inherent

[15] The parties later moved to extend the fact discovery cutoff to November 22, 2019. Joint Mot. to Amend Discovery Order (Nov. 12, 2019). The ALJ granted that motion on November 13, 2019. Order No. 21 at 1. The Commission views November 8, 2019, as the pertinent reference date for the undue delay caused by SK, but further finds that the delay caused by SK would still be undue with a fact discovery cutoff of November 22, 2019.

authority in connection with spoliation, and that such inherent authority provides an independent basis warranting default.

1. **The Commission Has the Inherent Authority to Redress Spoliation**

The Supreme Court has explained that it "has long been understood that 'certain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)) (modification omitted). For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose . . . submission to their lawful mandates." *Id.* (quotation omitted).

Inherent authority is not limited to Article III courts, but also extends to Article I courts. The Court of Federal Claims has found that its inherent authority is commensurate with that of the district courts as it concerns spoliation. *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 263-64 (2007) (citing, *inter alia*, *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136-37 (2004)); *see also In re Bailey*, 182 F.3d 860, 864 n.4 (Fed. Cir. 1999) (inherent authority of the Court of Appeals for Veterans Claims). More recently, the Supreme Court has favorably compared the authority of administrative law judges to the authority of judges of the Tax Court, another Article I court. *Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018); *cf. Butz v. Economou*, 438 U.S. 478, 512-13 (1978) (treating administrative law judges as "functionally comparable" to federal trial judges for purposes of immunity). Although the Commission is not a court, the Commission exercises quasi-judicial authority in connection with its section 337 investigations. *See, e.g.*, *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) (exercise of quasi-

legislative and quasi-judicial authority by the Federal Trade Commission).[16] The federal courts have recognized that the Commission has inherent authority, for example, not to countenance perjury or fraud in its investigations: "a fundamental source of authority exists for allowing the [International Trade] Commission to determine initially the issues in this litigation: the inherent power of any administrative agency to protect the integrity of its own proceedings." *Alberta Gas Chems., Ltd. v. Celanese Corp.,* 650 F.2d 9, 14 (2d Cir. 1981); *see also Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) (inherent authority of the Department of Commerce to reopen sunset review proceedings in view of fraud).

The Commission cannot protect the integrity of its proceedings when a party destroys or otherwise fails to preserve documents. Nor can the Commission "provid[e] an adequate remedy for domestic industries against unfair practices beginning abroad and culminating in importation," *Akzo N.V. v. U.S. Int'l Trade Comm'n*, 808 F.2d 1471, 1488 (Fed. Cir. 1986), when those accused of unfair acts destroy their records. Section 337 exists to proscribe "[u]nfair methods of competition and unfair acts in the importation of articles," 19 U.S.C. § 1337(a)(1)(A), and the spoliation of documents—especially spoliation in bad faith that causes prejudice—is an affront to section 337's statutory mission. Accordingly, the Commission holds that it possesses the inherent authority in section 337 investigations to redress spoliation through non-monetary sanctions, including default.

Having found that it possesses such authority, the Commission cannot and does not exercise that authority lightly. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980)

[16] Congress modeled the predecessor of section 337—section 316 of the Tariff Act of 1922, Pub. L. No. 67-318, § 316, 42 Stat. 858, 943-44 (1922)—on section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. *See, e.g., In re Frischer & Co.*, 16 U.S. Cust. App. 191, 212 (1928) ("Section 316 of the Tariff Act of 1922 . . . in many respects is an absolute and precise copy of the Federal Trade Commission act.").

(recognizing that inherent powers "must be exercised with restraint and discretion").[17] As the Federal Circuit sits in review of the Commission's determinations of violation of section 337, 19 U.S.C. § 1337(c), the Commission adopts the Federal Circuit's standards for the exercise of inherent authority as to spoliation, specifically expressed in *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed Cir. 2011).

A case-dispositive sanction such as dismissal or default is a "harsh sanction, to be imposed only in particularly egregious situations where a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings." *Micron*, 645 F.3d at 1328. To flout a tribunal's authority, *see Chambers*, 501 U.S. at 43, the person potentially subjected to sanctions would have to have known about that tribunal's jurisdiction over that person. In connection with spoliation, the law is consistent with that straightforward recognition. A "duty to preserve evidence begins when litigation is pending or reasonably foreseeable." *Micron*, 645 F.3d at 1320 (quotation omitted). The Federal Circuit has explained that this "is an objective standard, asking not whether the party in fact reasonably foresaw litigation, but whether a reasonable party in the same factual circumstances would have reasonably foreseen litigation." *Id.* The Federal Circuit has further explained:

> When litigation is "reasonably foreseeable" is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry. . . . This standard does not trigger the duty to preserve documents from the mere existence of a potential claim or the distant possibility of litigation. . . . However, it is not so

[17] The Commission notes that its determination of default here is subject to "direct democratic controls" in a way that district court decisions are not, *see Roadway Express*, 447 U.S. at 765, given the President's power to review the Commission's default determination and remedial orders before they become final, and to disapprove the orders if warranted for "policy reasons." 19 U.S.C. § 1337(j)(2). Nonetheless, the Commission applies the same standard for its own exercise of authority as do the courts.

> inflexible as to require that litigation be imminent, or probable without significant contingencies . . . .

Id. (quotation and citations omitted).

The Federal Circuit has held that "such sanctions should not be imposed unless there is clear and convincing evidence of both bad-faith spoliation and prejudice to the opposing party." *Id.* at 1328-29. The Federal Circuit further explained:

> Moreover, the presence of bad faith and prejudice, without more, do not justify the imposition of dispositive sanctions. In gauging the propriety of the sanction, the district court must take into account (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. . . . The sanction ultimately imposed must be commensurate with the analysis of these factors.
>
> The district court must select the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the victim.

Id. at 1329 (quotations, citations, and emphases omitted).

2. **SK's Duty to Preserve Evidence**

The ID found that SK's duty to preserve evidence began when SK received a cease and desist letter from LG on April 9, 2019. ID at 75-92. The Commission affirms those findings,[18] but finds that the date is immaterial to the outcome here: SK received the complaint by April 30, 2019, and it is undisputed that SK's duty to preserve evidence existed at least as of that date. Although **[[SK EMPLOYEE 1]]** prepared and distributed his spreadsheets identifying and directing the deletion of LG-related documents between those two dates (April 9 and April 30),

[18] Chair Kearns relies only on the duty to preserve evidence arising from SK's receipt of the complaint.

the Commission finds that SK abdicated its duty to preserve documents after receiving the complaint. That SK was able to set into motion an extraordinary amount of spoliation in the days and weeks prior to receiving the complaint does not permit SK to sit by idly after receiving the complaint, allowing extensive relevant records to become irretrievably lost, as explained below. Nor was SK entitled to withhold disclosing the extent of that destruction for a half year, despite discovery requests, and then only to produce them, belatedly, after the ALJ ordered forensic recovery in Order No. 13. The Commission has affirmed the ID's findings as to what documents were lost, including on pages 49-50, 72-75, and 102-105 of the ID.

3. **SK's Bad Faith**

The ID found that "clear and convincing evidence shows that SKI's destruction of documents following both April 9, 2019, and April 30, 2019 was done with a culpable state of mind and with the intent to hide evidence of trade secret misappropriation." ID at 105. The ID further explained "the most reasonable inference is that SKI intentionally allowed the documents in team room recycle bins to disappear after April 30, 2019 for the same reasons those documents were put in the recycle bins in the first place prior to April 30, 2019—to hinder LG Chem's trade secret misappropriation case." ID at 104. The Commission agrees with the ID that SK has offered no plausible explanation for how or why **[[SK EMPLOYEE 1]]**, the rest of his Information Protection Department, or any of *scores* of recipients of his April 2019 document destruction effort failed to promptly come forward to halt the ongoing spoliation after the complaint was received no later than April 30, 2019. As the ID appreciated, the "team rooms" "contain[] the vast majority of documents identified by **[[SK EMPLOYEE 1]]**'s security sweep." ID at 49. And **[[SK EMPLOYEE 1]]** never went "back to the employees or employee groups to whom he sent the seventy-five security inspection spreadsheets to inform them they

should no longer delete documents as previously instructed." ID at 49-50. Indeed, SK did not disclose to LG or to the ALJ seventy-four of the spreadsheets until October 2019. Instead, SK represented that the destruction was routine, had nothing to do with the misappropriation of trade secrets, and did not even warrant the ALJ's attention. ID at 7, 11-12. The ID appropriately rejected SK's assertions as "circular," *id.* at 96, and, in any event, false, *id.* at 99-105. Had it not been for the 6125 spreadsheet, SK's spoliation may never have been caught by LG or the ALJ. The Commission finds based on the record of the investigation that SK's conduct here demonstrates flagrant bad faith in destroying documents, excusing that destruction as routine, and otherwise trying to hide that destruction. That SK was not successful in its effort to hide the destruction does not substantially diminish SK's bad faith here. That is especially so given that SK was able to hide its destruction long enough for its information to be irretrievably lost.

4. **Prejudice to LG**

The Commission's notice of review sought further briefing on LG's prejudice from the spoliation:

> (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).
>
> (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).

Notice of Review, 85 Fed. Reg. at 22,753. The first question is directed to the trade secret misappropriation, and the second question is directed to the requirement of section 337(a)(1)(A) that the "threat or effect" of the importation and sale of SK products that use such misappropriated trade secrets is to cause substantial injury or threaten such injury to the domestic industry. 19 U.S.C. § 1337(a)(1)(A) & (a)(1)(A)(i).

a. Misappropriation

Under *Micron*, prejudice "to the opposing party requires a showing that the spoliation materially affects the substantial rights of the adverse party and is prejudicial to the presentation of his case." *Micron*, 645 F.3d at 1328 (quotation and modification omitted). To satisfy the burden to demonstrate prejudice, the party seeking sanctions "must only come forward with plausible, concrete suggestions as to what the destroyed evidence might have been." *Id.* (quotation, modification, and emphasis omitted). "If it is shown that the spoliator acted in bad faith, the spoliator bears the heavy burden to show a lack of prejudice to the other party . . . ." *Id.* (quotation omitted).

The application of *Micron* to the present investigation is straightforward. As LG explains:

> While the still-existing documents provide a glimpse into SKI's culpable behavior, the absence of the deleted documents deprives LG Chem and the Commission from considering the extent of the information that was misappropriated, with whom it was shared, how SKI used it to guide its product development, and how SKI used it with respect to particular EV battery models made for Ford, Volkswagen, or other OEMs. This information void materially lessens LG Chem's ability to prove its case and to rebut SKI's claim that it independently developed its technology or derived it from public sources.

LG Br. 16. OUII similarly observes:

> OUII submits that to the extent circumstantial evidence remains as to what the destroyed evidence was, that evidence suggests the destroyed evidence would have demonstrated at least the misappropriation of the 22 LG Chem trade secrets that remained at issue at the time the prehearing briefs were filed. When the above activity is placed in the particular context of the competition between SKI and LG Chem for the U.S. business with VW (as described in the Background section above), SKI's spoliation of evidence indicates that, without the misappropriation of LG Chem's trade secrets, SKI would not have been able to develop its current and planned next-generation EV battery products to meet the current EV battery requirements of its automobile manufacturer customers in the United States.

OUII Br. 11.

The ID, likewise, provides extensive discussion of the prejudice from materials in the 6125 spreadsheet. ID at 105-28. We have affirmed those findings herein. In addition, both OUII and LG provide thorough background about the files that were destroyed and what some of the filenames reveal. LG Br. 6-20; OUII Br. 7-11. OUII explains, for example, that the 6125 spreadsheet contains entries for "**[[REDACTED]]**_FW L Company **[[REDACTED]]**.msg" and "**[[REDACTED]]**_FW CEO, This is Competitor's **[[REDACTED]]**.msg." OUII Br. 8 (citing ID at 5). OUII also notes, for example, that another spreadsheet (SK00894814) that **[[SK EMPLOYEE 1]]** prepared for a **[[REDACTED]]** includes "LG Chem **[[REDACTED]]**.ppt"; **[[REDACTED]]** LGC.pdf"; "LG Chemical-**[[REDACTED]]**.xls"; "**[[REDACTED]]** (L Company).pptx."; "LG Chemical **[[REDACTED]]**.xlsx"; "L Company **[[REDACTED]]**.xlsx."; and "**[[REDACTED]]** L Company **[[REDACTED]]**." OUII Br. 8 (citing LG Chem Mot. for Default Judgment at 39, in turn citing the SK00894814 spreadsheet, appended thereto as Ex. 86); *see*

also ID at 39-40. OUII further explains that at the time of the prehearing briefs, LG was specifically asserting the following categories of trade secrets:

i. Overall Process Trade Secrets (trade secret nos. 2(a), 2(j), 2(m), and 146;

ii. Bill of Materials Trade Secrets (trade secret nos. 119 and 119(a)-(i);

iii. Pre-Dispersion Slurry Trade Secrets (trade secret nos. 8 and 8(a));

iv. Anode and Cathode Mixing and Recipe Trade Secrets (trade secret nos. 138, 139, 144, and 145);

v. Double Layer Coating Trade Secrets (trade secret nos. 31(a)-(e) and 33(a)-(f));

vi. Battery Pouch Sealing Trade Secrets (trade secret nos. 60(a) and (b));

vii. Jig Formation Trade Secrets (trade secret no. 66);

viii. Cathode Foil Trade Secrets (trade secret nos. 80 and 81(a)-(b));

ix. Electrolyte Trade Secrets (trade secret nos. 84(a)-(b) and 94-97);

x. State of Charge Estimation Trade Secrets (trade secret nos. 117 and 117(a)-(d)); and

xi. Dream Cost Trade Secrets (trade secret nos. 124, 124(a)-(k), and 147.

See OUII Br. 9. OUII's brief correlates what some of the destroyed evidence was in connection with categories (ii), (iii), (iv), (v), and (vii). *Id.* at 9-11. OUII's prehearing brief spends more than 30 pages connecting trade secret misappropriation to each of the eleven categories of trade secrets above, Comm'n Investigative Staff's Pre-Hearing Br. 28-60 (Feb. 13, 2020) (EDIS Doc. ID 702558)), and there is more than a plausible suggestion that the evidence destroyed related to that misappropriation, which SK sought to hide. OUII Br. 11. The Commission agrees with and adopts OUII's analysis.

LG, likewise, explains persuasively what the destroyed evidence likely included based on what survived SK's purge and the filenames of what has been irretrievably lost. For example,

LG explains that SK destroyed the application files of LG applicants to SK. LG Br. 9 (citing, *inter alia*, LG Mot. Compel 10). These files pertained to misappropriation by SK from LG's current and former employees. LG Br. 10-12. LG also points to several spreadsheets in its brief to the Commission—*see* Ex. 19 (SK00894815), Ex. 20 (SK00894814), Ex. 21 (SK00894808), Ex. 47 (SK00894818), Ex. 48 (SK00894826), Ex. 65 (SK00894838)— along with other record material, including LG Br. Ex. 50 (SK00524871-72); Ex. 51 (SK00527182); Ex. 52 (SK00524111); Ex. 53 (SK00525901); Ex. 54 (SK00522382); Ex. 55 (SK00524683-84) concerning SK's misappropriation. LG Br. 13-16. Consequently, plausible, concrete suggestions as to what SK destroyed are in plain view. Likewise, LG provides plausible, concrete suggestions as to LG's cost, sourcing and pricing, *id.* at 16-19, and SK's use and benefit from LG's trade secrets, *id.* at 19-20. LG's showing is far in excess of what the Federal Circuit's decision in *Micron* requires.

SK's opening brief argues that the ID failed to link the spoliation to any of the trade secrets LG still sought to enforce in the investigation, which were a subset of those originally asserted in the Complaint. SK calls this subset the "Surviving Alleged Trade Secrets" ("SATS"). SK contends as follows:

> SK provided extensive discovery in this investigation, producing over 1.6 million pages of documents and 40 witnesses who sat for a cumulative total of 62 days of deposition. This discovery enabled LGC (1) to discover every salient aspect of SK's battery designs, manufacturing methods, and components, (2) to understand the history, timeline, and processes by which SK arrived at those designs, methods, and components, and (3) to compare all of this against LGC's own ATS. As discussed below, the resulting record shows that SK did not copy or embody any of the SATS in its designs, manufacturing methods, or components. SK also did not use any of the SATS to enable, facilitate, improve, accelerate, or benefit SK's battery designs, manufacturing methods, or components.

SK Br. 6; *see also id.* at 6-18. SK also contends that anything destroyed would have been cumulative to what was produced. *Id.* at 18.

SK's argument that it provided extensive discovery as to what it did not destroy has no bearing on the content of the documents that it has destroyed. Likewise, SK provides no citations to support its conclusory assertion that the information destroyed is somehow cumulative with what was not destroyed. Under *Micron*, SK has a "heavy burden" to demonstrate lack of prejudice, and conclusory assertions are insufficient. As LG properly observes:

> [] SKI never attempts to show that the missing documents contained the same or even substantially equivalent information as produced materials. Even if there were some overlap, SKI cannot say that the thousands of destroyed or hidden documents lacked additional relevant information—such as information revealing other stolen trade secrets, more evidence of use, or evidence related to other elements of LG Chem's claims. It is simply implausible that each of the 15,000+ documents [on located **[[SK EMPLOYEE 1]]** spreadsheets] that SKI admittedly destroyed is purely cumulative of other evidence.

LG Reply Br. 12. LG also notes that SK witnesses refused to acknowledge that "L Company" in various documents meant LG (as opposed to, for example, L'Oreal). *Id.* OUII notes that even if one could know how each SK product were made, that still would not demonstrate if SK's product was independently developed, free of trade secret misappropriation. IA Reply Br. 6.

In short, SK has not carried its heavy burden to show a lack of prejudice here. A First Circuit case cited by *Micron* in support of the "heavy burden" corroborates the stringency of the test:

> The presumption [of prejudice], if it arises, should be a rebuttable one. It may be refuted by clear and convincing evidence demonstrating that the withheld material was in fact inconsequential. We are keenly aware of the stringency of this standard, yet we believe it to be an appropriate antidote for

> deliberate misconduct. A party who is guilty of, say, intentionally shredding documents in order to stymie the opposition, should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import. Without the imposition of a heavy burden such as the "clear and convincing" standard, spoliators would almost certainly benefit from having destroyed the documents, since the opposing party could probably muster little evidence concerning the value of papers it never saw. As between guilty and innocent parties, the difficulties created by the absence of evidence should fall squarely upon the former.

Anderson v. Cryovac, Inc., 862 F.2d 910, 925 (1st Cir. 1988).

In *Opaque Polymers* and *Stainless Steel*, the Commission rejected arguments analogous, if not identical, to SK's argument here: that at best the destroyed documents relate to SK's possession of LG's information, a "single element" of a trade secret misappropriation claim, and that the complainant should nonetheless prove, on the merits, that the information is a trade secret and that the spoliator used that information to develop its products. *Opaque Polymers*, Comm'n Op. 17; *Stainless Steel*, Comm'n Op. 22. In *Opaque Polymers*, for example, the Commission explained that the spoliation "made it impossible to know the exact volume and content of the destroyed data." *Opaque Polymers*, Comm'n Op. 17. The Commission likewise found the complainant provided plausible, concrete suggestions that the documents may have contained information concerning the complainant's trade secrets, the value of those trade secrets to the respondent, and the respondent's use of those trade secrets for its own products. *Id.* at 18. We have made the same findings in the present investigation, *supra*. The Federal Circuit affirmed the Commission's determinations, in a precedential opinion in *Opaque Polymers*, *Organik Kimya*, 848 F.3d at 1003-04 n.4, and summarily in *Stainless Steel*, *Viraj Profiles Ltd. v. Int'l Trade Comm'n*, 697 F. App'x 699 (Fed. Cir. 2017). The ALJ properly applied these precedents, rejecting SK's argument as "unrealistic" that the spoliated information demonstrates only that "SKI received information from LGC's files." ID at 109 (quotation omitted).

b. Injury to the Domestic Industry

In connection with trade secret misappropriation, section 337 requires the complainant to show, *inter alia*, that the "threat or effect" of the importation and sale of articles that use such misappropriated trade secrets is "to destroy or substantially injure an industry in the United States." 19 U.S.C. § 1337(a)(1)(A) & (a)(1)(A)(i). In its petition for Commission review, SK argued that evidence unconnected to spoliation adequately demonstrated no economic injury or threat. SK Pet. 22-38. SK also argued that LG had not made, and the ID had not found, a plausible, concrete suggestion as to how the destroyed evidence related to economic injury or threat to LG's domestic industry. SK Pet. 38-49.

i. SK Forfeited Its Motion for Summary Determination

SK's first argument (SK Pet. 22-38), which ignores what was spoliated, attempts to resuscitate SK's motion for summary determination as to lack of injury or threat. In particular, a month *after* LG's motion for default sanctions, SK moved for summary determination of no violation because of lack of injury or threat thereof.[19] SK's motion for summary determination relied heavily on the Commission's investigation in *Certain Optical Waveguide Fibers*, Inv. No. 337-TA-189 and the appeal therefrom, *Corning Glass Works v. U.S. International Trade Commission*, 799 F.2d 1559 (Fed. Cir. 1986). SK SD Mot. 4-5, 11-24.

The default ruling here mooted any ruling on the pending motion for summary determination. The ALJ thus did not reach SK's summary determination motion prior to issuing the default ID, and SK does not argue that failure to decide the motion for summary determination was error. Nor could SK plausibly present such an argument. In *Stainless Steel*,

[19] *See* Resp'ts Mem. in Support of Its Mot. for Summ. Determination of No Violation of Section 337 Based on the Absence of Existing or Threatened Substantial Injury Attributable to Unfair Imports (Dec. 17, 2019) (EDIS Doc. ID 697506) ("SK SD Mot.").

the ALJ issued, and the Commission affirmed, a default ruling even though the respondent had filed—before the motion for default—a motion for summary determination based upon a statute of limitations, a legal defense question. But the Commission refused to consider that defense, explaining that the respondent's "argument that a court must address the applicable statute of limitations before reaching the merits of the case misses the point"[20] of default. *Stainless Steel*, Comm'n Op. at 24. The Federal Circuit affirmed the Commission's determination without an opinion. *Viraj Profiles Ltd. v. Int'l Trade Comm'n*, 697 F. App'x 699 (Fed. Cir. 2017).

As discussed above, *Micron* requires the party alleging spoliation to provide plausible, concrete suggestions as to what was destroyed, and if it is shown that the spoliator acted in bad faith, "the spoliator bears the heavy burden to show a lack of prejudice to the other party" as a result of such destruction. *Micron*, 645 F.3d at 1328 (quotation omitted). As discussed below, the Commission finds that LG has established that it has been prejudiced in demonstrating substantial injury or threat thereof to its domestic industry by showing plausible, concrete suggestions that the spoliated evidence might have contained information relevant to economic injury.[21]

SK's attempt in its petition for Commission review of the ID to reargue the motion for summary determination is inapposite and fails to establish by a preponderance of the evidence, much less clearly and convincingly, that the spoliated evidence of injury or threat is

[20] *See also* Br. of Appellee ITC at 50, *Viraj Profiles Ltd. v. Int'l Trade Comm'n*, No. 16-2482 (Fed. Cir. Feb. 8, 2017) ("Viraj points to no 'first-come, first-served' rule for motions before any tribunal, much less the Commission."). Notably, unlike *Stainless Steel*, SK filed its motion for summary determination *after* LG's motion for default in the present investigation, not *before.*

[21] Accordingly, although the ALJ was under no obligation to consider SK's motion for summary determination, the Commission finds that in view of what was destroyed, summary determination would also have been inappropriate on the merits.

inconsequential. SK cannot sidestep *Micron* by arguing that the weight of the evidence that was not destroyed would support summary determination in its favor on economic injury. Moreover, summary determination could not be issued in its favor because SK's spoliation has rendered discovery of material facts pertaining to this issue impossible. *See* 19 C.F.R. § 210.18(b). In short, SK has failed to carry its heavy burden to show by clear and convincing evidence that the spoliated evidence of injury or threat was inconsequential.

ii. The Record Demonstrates Unrebutted Plausible, Concrete Suggestions that the Spoliated Evidence Related to the Injurious Threat or Effect of SK's Misappropriation

In order to demonstrate injury or threat thereof to an industry in the United States by reason of SK's importation and sale of articles using LG's misappropriated trade secrets, the Commission must find that "the respondents' practices have caused substantial injury to the domestic industry or that the presence of the accused imported products demonstrate relevant conditions or 'circumstances from which probable future injury can be inferred.'" *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, Comm'n Op., 2010 WL 5642165, at *33 (Dec. 2010) (quoting *Certain Electric Power Tools, Battery Cartridges & Battery Chargers,* Inv. No. 337-TA-284, USITC Pub. 2389, Unreviewed Initial Determination at 246, 248 (Feb. 20, 1990) ("*Power Tools*");[22] *Certain Foodservice*

[22] In *Power Tools*, the ALJ found that a complainant need not demonstrate actual lost sales to demonstrate economic injury. *Power Tools*, ID at 247. Complainant Makita's business in the United States in *Power Tools* was growing, but the ALJ nonetheless found injury based on evidence that Makita's sales had "levelled off" in the context of industry-wide sales increases and evidence concerning complainant's profitability. *Id.* at 247-48. The ALJ noted that injury could also be shown by, *inter alia*, evidence that respondents' accused products were "generally priced substantially lower than complainants' comparable products" and "the very substantial, and increasing volumes of sales of the accused products by the respondents." *Id.* The ALJ relied, *inter alia*, on respondents' price advantage and that same increase of sales by the respondents to demonstrate threat of injury. *Id.* at 249.

Equipment and Components Thereof, Inv. No. 337-TA-1166, Comm'n Op. Remanding the Investigation at 10 (Dec. 16, 2020).

The Commission identified a broad range of indicia to determine economic injury and threat in *Certain Rubber Resins and Processes for Manufacturing Same*, Comm'n Op., 2014 WL 7497801, at *30, *32 (Feb. 26, 2014) ("*Rubber Resins*"):

Economic injury	**Threat**
In determining whether unfair acts have substantially injured the domestic industry, the Commission considers a broad range of indicia, including: [1] the volume of imports and their degree of penetration, [2] complainant's lost sales, [3] underselling by respondents, [4] reductions in complainants' declining production, [5] profitability and sales, and [6] harm to complainant's good will or reputation. (formatting and numbering added)	In determining whether a threat to substantially injure exists, the Commission considers, *inter alia*, the following indicia: (1) substantial foreign manufacturing capacity; (2) ability of imported products to undersell the domestic product; (3) explicit intention to enter into the U.S. market; (4) the inability of the domestic industry to compete with the foreign products because of vastly lower foreign costs of production and lower prices; and (5) the significant negative impact this would have on the domestic industry. (quoting *Certain Methods for Extruding Plastic Tubing*, Inv. No. 337-TA-110, Comm'n Op., 0082 WL 941574 at *9 (Sept. 1982).

Other factors may also be indicative of economic injury and threat under the facts of each case.

LG argues that the destroyed documents would have shown that SK became a viable competitor only through use of LG's trade secrets, causing substantial injury and threat thereof to LG. LG Br. 21-22. LG's argument comports with LG's allegations in its complaint alleging economic harm or threat thereof. Compl. ¶¶ 138-151. Essentially, LG argues that SK became a viable competitor in the U.S. market by misappropriating LG's trade secrets and securing

lucrative domestic supply contracts with Ford and VW. LG Br. 21. Accordingly, LG argues that the record supports concrete, plausible suggestions that the spoliated evidence would have contained information pertaining to its injury claim that LG's "domestic industry was effectively forced to compete in the United States against its own technology and against its own pricing, without the comparative benefit of its hard-earned cost-saving measures, against a competitor who not long ago was not even in the mix. LG Chem must now do so on a permanent basis." *Id.* at 21-22.

LG offers specific concrete, plausible suggestions that the spoliated evidence concerned injury or the threat thereof to its domestic industry. For example, LG asserts that the evidence indicates that a "catch-up plan" is SK's attempt to improve SK's market share at LG's expense, and "job application materials," is a further effort to target and hire LG employees "to mine them for LG Chem's know-how." *Id*. at 22. LG also points to filenames marked for deletion that concern competition with LG for business with specific automakers. *Id.* at 23. LG also theorizes that the spoliated evidence would also show that SK's win over LG for contracts with Ford and VW are based on the misappropriation to the detriment of LG with these and other automakers. *Id.* at 24-27. To the extent SK argues that even in SK's absence LG would not have won the contracts to supply VW and Ford, LG explains the harm SK has nonetheless caused or threatened to cause: In particular, by entrenching itself with these automakers, SK strengthens its position for future contracts with other automakers. *Id.* at 28. Most succinctly, LG explains:

> [N]ot only will LG Chem now have to compete against its own technology, it will have to do so against the newfound legitimacy SKI gained in winning the VW and Ford contracts. And even if LG Chem were to win future contracts, it will have to lower its prices and obtain contracts on less favorable terms to compete against SKI. SKI's prices will be artificially low because it does not have R&D costs to recoup, and it unfairly knows LG Chem's pricing information.

Id. at 29 (citations omitted).

As to threat of injury, LG also observes that SK failed to produce documents as to SK's "future plans for its supply of EV batteries to domestic OEMs." *Id.* LG quotes (at p. 28 of its opening brief) OUII's submission to the ALJ in support of default:

> With respect to injury, it is reasonably clear that SKI is seeking to sell EV batteries that compete with LGC's products in the same basic channels and in direct competition with LGC in the U.S. But many of the details of SKI's future plans and product and pricing strategies are likely missing. SKI argues that there is no threat of injury because "it has no plans to import batteries into the United States for commercial sale." (citation omitted). However, it is impossible to know that any documentation that would have otherwise been available to LGC to disprove this argument has not been deleted, or otherwise not produced, by SKI.

OUII Supp. Br. in Connection with Dkt. No. 1159-013 & Order No. 28 at 15-16 (Dec. 6, 2019).

OUII argues that the destroyed documents would include those involving Ford and VW. OUII Br. at 13. OUII also points to SK's effort to "especially scrutinize SKBA"—SK's U.S. entity—in connection with document destruction involving LG-related files. *Id.* (quoting LG Chems's Mot. for Default Judgment at Ex. 2, SK00815537). As a result, OUII argues that it can be presumed that destroyed documents would relate to economic injury or threat as to LG's U.S. operations, specifically LG's Michigan plant. *Id.* OUII also reiterates that the absence of documents concerning SK's future plans is inexplicable but for spoliation. *Id.* at 13-14.

SK's opening brief argues that the specific examples of documents cited by the ALJ fail to show economic injury. SK Br. 22-27. LG responds that SK's attempt to show that specific cited documents standing alone fail to show economic injury loses sight of the plausible, concrete suggestions of additional evidence destroyed. LG Reply Br. 19. Accordingly, LG asserts that SK "cannot 'excuse [its] misconduct by claiming that the vanished documents were

of minimal import.'" *Id.* (quoting *Micron,* 645 F.3d at 1328). The Commission finds that SK's attempt to focus on a handful of specific documents loses sight of the massive amount of spoliation that occurred, and the plausible, concrete suggestions discussed above that have been presented by LG and OUII as to that massive spoliation.

The Commission finds that LG amply disposes of SK's arguments in LG's reply brief. In particular, LG explains that specific cited documents provide plausible, concrete suggestions for how destroyed documents would relate to injury to the domestic industry. LG Reply Br. 19-20 (citing Compl'ts LG Chem, Ltd. and LG Chem Michigan Inc.'s Supplemental Brief in Support of Mot. for Default Judgment, Contempt, and Sanctions Exs. 2, 122, 125, 130 (EDIS Doc. ID 696618)). LG also notes that several filenames of deleted documents were likely relevant to injury including, for example, documents titled: "180523 _Competitor Cost Comparison. 3. Xlsx" and "**[[REDACTED]]** L Company **[[REDACTED]]**." LG Reply Br. 22 (citing ID at 22). The Commission agrees with LG that LG's cited documents and filenames address matters relevant to injury or threat. LG also correctly notes that to the extent that SK destroyed documents related to Ford and VW, these documents are also highly probative of injury, given that the documents would have been destroyed because they also discussed LG. LG Reply Br. 22-23. Indeed, a number of such documents reference LG in their filenames. *Id.* at 23. Also, tellingly, SK deleted some discoverable documents that VW still possessed (and which VW produced in discovery), *id.* at 23-24, but there is no telling how many documents SK deleted that VW itself never possessed.

A principal SK argument is that LG was not injured—and that destroyed documents could not relate to injury or threat—because LG was never in the running for the Ford and VW contracts. SK Reply at 15-17. SK also asserts that LG is improperly injecting allegations of

misappropriation into the injury analysis. *Id.* at 17-22. SK contends that the threat of future injury is wholly speculative. *Id.* at 22. SK asserts as follows:

> Contrary to LGC's and Staff's unsubstantiated speculation about threat of injury, the record confirms that the domestic industry is growing at an unprecedented rate. Indeed, the U.S. battery market already suffers from a lack of domestic suppliers with available capacity, and this is not a "zero sum" situation in which alleged lost sales result in declining production, employment, or business opportunities for LGC.

Id. at 22-23. The Commission rejects SK's argument as inconsistent with the record. It is undisputed that LG sought to extend its relationship with Ford as to Ford's EV F-150 program, and that **[[REDACTED]]**. *See, e.g.*, Dep. Tr. of Ford Motor Co. (**[[FORD WITNESS]]**) at 70:9-72:7 (Nov. 8, 2019) ("**[[FORD]]** Dep. Tr."). Likewise, it is undisputed that LG competed for the VW business. *See, e.g.*, Dep. Tr. of Volkswagen Group of Am. (**[[VW WITNESS]]**) at 28:8-29:10 (Oct. 24, 2019) ("**[[VW]]** Dep. Tr."). It is also undisputed that LG already supplied Volkswagen AG outside the United States with batteries for the same VW MEB platform as at issue in this investigation. *See, e.g.,* LG Br. 27; **[[VW]]** Dep. Tr. at 27:20-28:6, 69:7-21. The documents and deleted filenames provide plausible, concrete suggestions that SK has and will be bidding against LG for contracts with the same small number of U.S. automaker customers. In short, destroyed documents could have related to SK's price competition with LG's products (*Rubber Resins* injury factor 3), and provides an adequate basis for prejudice to LG as to the existence of substantial injury to a domestic industry.

In addition to injury, we find prejudice to LG as to threat of economic injury. SK targeted for deletion documents referencing LG (in three languages), as well as "competitor" and "action plan." ID at 12. The competition LG faces in the future from SK is unknown to LG and unknowable as a result of the spoliation. Destroyed documents could have related to the ability

to continue to undersell LG (*Rubber Resins* threat factor 2), to SK's future plans to compete with LG (*Rubber Resins* threat factor 3), and to maintaining a competitive advantage over LG (*Rubber Resins* threat factor 4).

As with the misappropriation, SK has not carried its clear and convincing burden to demonstrate that such documents would be "inconsequential." *Anderson*, 862 F.2d at 925. Accordingly, the Commission finds that SK's spoliation has prejudiced LG as to its ability to establish threat or effect of substantial injury to LG's industry in the United States caused by the importation or sale of SK's products that use LG's misappropriated trade secrets.

5. **Lesser Sanctions**

The Commission has considered whether any lesser sanctions will "avoid substantial unfairness to" LG and, given that SK is seriously at fault, will serve to deter such conduct by others in the future. The Commission affirms and adopts the ID's finding that "[c]ontrary to SK's suggestion, default is the only appropriate remedy here." ID at 130. As the ID properly recognized, the "spoliated evidence has direct relevance, or at least 'might have been' relevance, to almost all aspects of LG Chem's trade secret claim." *Id.* As discussed, *supra*, such relevance covers trade secret misappropriation as well as injurious threat or effect of SK's importation and sales of products that use LG's misappropriated trade secrets on LG's industry in the United States, which comprise LG's trade secret misappropriation claim under 19 U.S.C. § 1337(a)(1)(A). Consequently, "an issue-related sanction effectively disposes of the merits anyway," and default is appropriate. *Shepherd v. Am. Broadcasting Co.*, 62 F.3d 1469, 1479 (D.C. Cir. 1995). The ID is correct that "LG Chem's ability to pursue its case and [the ALJ's] ability to oversee a fair and timely investigation on the merits have been significantly prejudiced." ID at 130. The Commission also finds that to award an adverse inference here

"would encourage, rather than discourage, a party to destroy or not produce critical evidence to avoid a finding of no violation." *Stainless Steel*, Comm'n Op. at 22; *Organik Kimya*, 848 F.3d at 1003-04 n.4 (quoting the ALJ's statement that "no lesser sanction will adequately deter the repetition of this kind of easily accomplished and highly prejudicial destruction of evidence"). The Commission has considered SK's arguments, and finds that no lesser sanction than default is appropriate under the circumstances of this investigation. Accordingly, the Commission finds SK in default, and thereby in violation of section 337.

IV. REMEDY, THE PUBLIC INTEREST, AND BONDING

The Commission finds a violation of section 337 based upon SK's default. Upon finding a violation of section 337, the statute provides that the Commission "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry." 19 U.S.C. § 1337(d)(1); *see Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359-60 (Fed. Cir. 2010). Under section 337(f)(1), the Commission has the discretion to issue a cease and desist order in "addition to, or in lieu of" an exclusion order, after consideration of the same public interest factors. 19 U.S.C. § 1337(f)(1). The Commission has "broad discretion in selecting the form, scope, and extent of the remedy." *Viscofan S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986).

LG seeks a limited exclusion order and cease and desist orders as to certain lithium ion batteries, battery cells, battery modules, battery packs, components thereof, and processes therefor. SK argues that in view of the statutory public interest considerations, there should be

no remedy for its trade secret misappropriation and spoliation-related misconduct. Numerous third-party submissions were filed, including by SK's customers Ford and Volkswagen.

A. <u>The Scope and Duration of Remedial Orders</u>

There are two issues that must be addressed related to the limited exclusion order and cease and desist orders sought by LG: what trade secrets should be covered, and what should be the duration of any orders.

1. The Trade Secrets at Issue

The parties dispute which trade secrets are subject to the Commission's default finding. The Notice of Review sought further briefing and clarification from the parties on this issue. Notice of Review, 85 Fed. Reg. at 22,573.

LG asserts that the trade secrets should be all of those "contained in Appendix A" in LG's "October 7, 2019 Final Trade Secret Disclosure." LG Br. 29. OUII and SK state that LG effectively withdrew a number of the trade secrets from within the scope of the investigation, and that any default should be limited to what was still live in the investigation at the time of the default. SK Br. 28-29; OUII Br. 14-15. OUII's brief, for example, explains that LG Chem served a Final Disclosure of Trade Secrets for discovery purposes on October 7, 2019, but that the disclosure "is over 100 pages in length" and SK asserted that it was "overly broad and imprecise." *Id.* On November 5, 2019, LG served its motion for default, and on "January 22, 2020, LG Chem informed SKI and OUII that it would be limiting its case for the pre-hearing brief and evidentiary hearing to" 22 specific trade secrets. *Id.* at 15. OUII further explains:

> The trade secrets that LG Chem was at the time of the ID still asserting in its prehearing brief and for purposes of the then-scheduled evidentiary hearing are as follows: 2, 8, 31, 33, 60, 66, 80, 81, 84, 94, 95, 96, 97, 117, 119, 124, 138, 139, 144, 145, 146, and 147 in Complainants' Final Trade Secret Disclosure (Oct. 7, 2019). In OUII's view, this subset of 22 trade secrets found in the

> pre-hearing briefs is concise and well-defined. . . . OUII is of the view that the remedial orders in this investigation should use this same subset of trade secrets for their scope.

Id. at 14.

Pursuant to the ALJ's Ground Rules, these 22 trade secrets identified in the pre-hearing brief would have constituted the scope of the LG trade secrets to be adjudicated on the merits. *See* Order No. 2, Ground Rule 9.2. LG contends that because the case was not heard on the merits, LG should be entitled to fall back upon the October 7, 2019 list. LG Br. 29-30. In support of its position, LG relies on the Commission's decision in *Stainless Steel.* In *Stainless Steel*, complainant Valbruna asserted 335 protected operating practices in its complaint, each of which constituted an alleged trade secret. *Stainless Steel*, Comm'n Op. at 27. Several months into the investigation, the ALJ "ordered Valbruna to identify" all "operating practices that it was asserting against respondents." *Id.* at 28. Valbruna identified 47 operating practices in response. *Id.* The Commission found that as a result of the default, the allegations of the complaint are presumed to be true, and that Valbruna was entitled to relief to the full extent set forth in the complaint. *Id.*

SK's reply addresses *Stainless Steel*. SK Reply Br. 25. SK observes, *inter alia*, that LG's "complaint does not identify specific" accused trade secrets. *Id.* Instead the complaint identifies categories of trade secrets but not any misappropriated trade secrets themselves. Compl. ¶¶ 51-69 & Ex. 6. SK's observation is correct, which proves fatal to LG's reliance on *Stainless Steel*. *Stainless Steel* does not resolve the question presented here: the Commission must determine which of LG's two *post-complaint* identifications of trade secrets is enforceable by sanctions, because LG's complaint failed to identify specific trade secrets misappropriated by

SK. Compl. ¶¶ 51-69 & Ex. 6. That is an open question within the Commission's remedial discretion.

This decision necessarily depends on the record of this investigation and administrability of any remedial orders. The Commission agrees with OUII that "there is an underlying interest in a remedy that is clearly defined in scope," and that in the present investigation, the way to achieve that interest is to limit relief to those trade secrets still at issue at the time of the pre-hearing briefs. OUII Br. 11. The Commission agrees with OUII and SK that LG's October 2019 submission—which is more than 100 pages in length—is likely to prove difficult to enforce. In short, the October 2019 submission does not recite with sufficient clarity and specificity the trade secrets misappropriated by SK that would be subject to enforcement by the Commission and U.S. Customs and Border Protection against SK's imported products. The Commission therefore finds that any remedial orders will encompass the 22 trade secrets selected by LG in its second post-complaint submission on January 22, 2020: trade secret numbers 2, 8, 31, 33, 60, 66, 80, 81, 84, 94, 95, 96, 97, 117, 119, 124, 138, 139, 144, 145, 146, and 147.

2. **The Duration of Any Remedial Orders**

The Federal Circuit has affirmed the Commission's practice that "the duration of relief in a case of misappropriation of trade secrets should be the period of time it would have taken respondent independently to develop the technology using lawful means." *Viscofan S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 550 (Fed. Cir. 1986). The Commission has the discretion to begin that countdown at the effective date of the exclusion order rather than from the date of

misappropriation,[23] the Commission ordinarily does so in trade secret misappropriation cases,[24] and the Commission does so here.

In the present case, LG argues that the appropriate duration of an exclusion order is ten years, LG Remedy Br. 11-15; OUII argues "at least five years" but not ten, OUII Remedy Br. 5; and SK argues one year, SK Remedy Br. 42.

LG's opening remedy submission provides more than ample demonstration as to the propriety of the ten-year head start provided by SK's misappropriation. LG Remedy Br. 11-15. LG explains: "To determine how long it would take SKI independently to develop and implement the step-change in battery manufacturing technology necessary to catch-up with LG Chem, without the head-start gained by having misappropriated LG Chem's technology and skilled workers, it is necessary to consider the amount of time it would require SKI to: (i) build a new R&D team that did not rely on the stolen LG Chem technology; (ii) reset its technology development process; (iii) reset its manufacturing process; (iv) undertake iterative testing and optimization; and (v) build Series A through C sample batteries. *Id.* at 13 (citing Ex. 1, Whitacre Decl. ¶ 69); *see also* Whitacre Decl. ¶ 91. Each of these steps is dependent on the success of the prior step, and thus cannot be completed in parallel to the other steps." LG Remedy Br. 13. LG illustrates the independent development period, which, according to LG would be 12.5 years or longer as follows:

---

[23] *Viscofan*, 787 F.2d at 551 (holding that the Commission—which found that the trade secret misappropriator "should not be credited with the time between the misappropriation and the entry of the Commission's remedial order"— has the "discretion in this case in making the effective date of its 10-year exclusion the date of its order").

[24] *See, e.g.*, *Opaque Polymers*, Limited Exclusion Order at 2 (Apr. 17, 2015); *Stainless Steel*, Limited Exclusion Order at 2 (May 25, 2016)

Figure 6. Estimate of the Time Needed for SKI to Independently Develop the LG Chem Trade Secrets

Development Stages	Time Needed
Build a new R&D team	18 months – 2 years
Reset the technology development process	At least 2 years
Reset the manufacturing process	At least 2 years
Iterative testing and optimization	At least 5 years
Build Series A through C sample batteries	2 – 3 years
Total Independent Development Time:	**12.5+ years**

Whitacre Decl. ¶ 91.

Moreover, LG provides evidence that SK is much smaller than LG,

[[REDACTED]]. *Id.* at 13-14. As

[[REDACTED

]] Whitacre Decl. ¶ 88. LG, in comparison, "employed nearly 2,000 people in its EV battery R&D in 2017." *Id.* LG's submission also notes the leaps in innovation SK made after SK's misappropriation began in 2017. *Id.* at 14. Even setting aside the "calendaring and slitting," "drying," "anode," and "supplier information" trade secrets, *see* LG Remedy Br. 4-5, 7, which are not among those in LG's January 22, 2020 submission, we agree with LG that:

> In sum, it is clear that SKI, without the stolen LG Chem Trade Secrets, would not have been able to develop the information in the stolen trade secrets in anything less than ten years. The very large volume of stolen trade secret documentation, and the expertise improperly acquired by SKI from the former LG Chem employees it hired away, would have been beyond the capacity of the much smaller and less experienced SKI R&D department to develop in less than a decade. SKI simply did not have the personnel or ability to simultaneously develop all the trade secret technology it misappropriated from LG Chem in less than ten years. This conclusion is true not just if the Commission considers the amount of time SKI's diminutive R&D department would have required to develop technology equivalent to what was stolen from LG Chem, but it is also true if the Commission considers the minimum time SKI would have required to catch up with LG Chem, the industry

> leader, if SKI had made the investments necessary to build its R&D capability as quickly as possible and practicable.

Whitacre Decl. ¶ 93.

SK relies on its expert's testimony that it would have taken at most one year of independent development time to discover each trade secret individually. SK Remedy Br. 42. SK also notes that over time, LG reduced its request from thirty years, to twenty, to ten. *Id.*

In reply, LG responds that if "SKI could independently develop LG Chem's trade secrets in a *single year*, SKI could easily have entered into a consent order and focused its efforts on legitimate business." LG Remedy Reply Br. 15. If that had happened, then SK would have completed such independent development during the course of the Commission investigation. *See id.*

SK's reply asserts that the "duration of ITC remedies in trade secret cases is not concerned with 'implementing' or 'catching up.' The remedy's duration is, instead, the time to *develop* the technologies, which in this case is not more than one year." SK Remedy Reply Br. 36; *see also* SK Remedy Br. 42. SK provides no legal or factual citations for its assertion, except for the Rebuttal Expert Report of its expert, Dr. Paul Kohl. *See* SK Remedy Br. at 42 (citing Ex. 56, Kohl Reb. Rpt., ¶¶ 576–78). Dr. Kohl opines that he attempted to evaluate the time advantage if SK used trade secret numbers 8, 10, 14, 15, 19, 20, 24, 26, 31, 35, 66, 67, 69, 73-75, 80-81, 83, 84, 86, 94-97, 138-141, and 144-146. Kohl Reb. Rept. ¶ 576. Dr. Kohl presents his own scheme of activity groupings that work in parallel to develop each enumerated trade secret individually, assuming that SK had the necessary vendors, equipment, and engineers to work in tandem. *Id.* ¶¶ 576-78.

As an initial matter, Dr. Kohl's estimate is incomplete; his estimate omits seven of the 22 trade secrets that are within the scope of the remedial orders here (*i.e.,* from LG's January 22,

2020 submission): misappropriated trade secrets 2, 33, 60, 117, 119, 124, and 147. More importantly, Dr. Kohl fails to appreciate the interrelationships between and among the misappropriated trade secrets and LG's technology that are integral to developing and advancing R&D to the point of production-ready samples of EV batteries. *See* LG Remedy Br. at 13-15. Dr. Kohl merely attempts to reverse-engineer LG's processes beginning with the knowledge of LG's trade secrets. Under Dr. Kohl's analysis, SK thus still benefits—substantially—from what it pilfered from LG, using the list of LG trade secrets as a roadmap. Moreover, neither SK nor Dr. Kohl have shown, or even attempted to show, that the trade secrets aspects of LG's technology are independent of the complete LG EV production technology involved. Dr. Kohl merely opines as to the time necessary to independently discover 15 of the involved trade secrets individually rather than presenting evidence to address the pertinent question of the actual development time that was required to develop the complete processes in which the misappropriated trade secrets were used, as LG explained. Furthermore, there is no indication that Dr. Kohl has validated his assumptions regarding SK's commitment of resources underlying his analysis, *i.e.,* that SK has the necessary vendors, equipment, and engineers to work in tandem to develop the subset of individual trade secrets in his theoretical scheme.

LG's argument addresses the issue of technology development that SK has sidestepped. LG argues that the theft of its trade secrets saved SK ten years of time—with a number of activities that SK was able to short circuit: "(i) build an R&D team that did not rely on the stolen LG Chem technology; (ii) reset [SK's] technology development process; (iii) reset [SK's] manufacturing process; (iv) undertake iterative testing and optimization; and (v) build Series A through C sample batteries." LG Remedy Reply Br. 16. The evidence presented by LG shows that these are all fairly part of the development process impacted by SK's theft of trade secrets

and should fairly count toward the duration of relief LG should be afforded for SK's misappropriation of its trade secrets. In view of the evidence presented by LG, it is untenable for SK to assert that these R&D steps involved in developing a commercial EV battery manufacturing process using LG's trade secrets should not count in this trade secret misappropriation case involving the spoliation of evidence. By way of example, in *Viscofan*, the Federal Circuit affirmed the Commission's decision to include the time required to develop the complete processes in which Union Carbide's misappropriated trade secrets were used rather than the time necessary to discover each trade secret independently. *Viscofan,* 787 F.2d at 550-51. The Federal Circuit approvingly quoted the Commission's rationale: "to issue a remedial order based on the time necessary to develop each such [trade secret] aspect would ignore the fact that Viscofan had the benefit of the entire machine, system, or set of standards, including non-trade-secret elements, which it had misappropriated, from which to work in developing its 'new technology.' The trade secret aspects are not independent of the non-trade-secret aspects of the technology involved." *Id.* (quoting *Certain Processes for the Manufacture of Skinless Sausage Casings & Resulting Product,* Inv. Nos. 337-TA-148 & 169, USITC Pub. 1624, Comm'n Op. at 19 (Dec. 1984) ("*Sausage Casings*")). *See also Organik Kimya*, 848 F.3d at 1001 (affirming the Commission's determination that "it would have taken Organik Kimya 25 years to develop a *commercial* opaque polymer comparable to Dow's without using Dow's trade secrets") (emphasis added).

In addition to pointing out the inadequacy of SK's showing, LG argues that adopting SK's proposed one-year duration for the remedial orders would be inequitable because it would disregard the time it would have taken SK to independently develop the trade secrets as a whole, the baseline knowledge required to develop the trade secrets, and the time it would have taken

SK to optimize and apply the trade secrets to the manufacturing process for specific battery models. LG Remedy Br. at 12-13. The Commission agrees. The Federal Circuit's statement in *Viscofan* quoting the Commission's opinion from the underlying *Sausage Casings* investigation is equally applicable here: "To now conclude that Viscofan could have developed alternative technology for the misappropriated trade secrets in a relatively short time would be to give it the benefit of having had the misappropriated trade secrets for a period of years as a basis from which to work. We believe that this would be a wholly inequitable result." *Viscofan*, 787 F.3d at 551 (quoting *Sausage Casings* at 20-21). In the present case involving spoliation, there is a special reason to be wary of SK's attempt to trivialize the technological advancements that it has enjoyed since 2017: the best evidence of independent development time—of how much SK benefited from LG's trade secrets—was at the core of what SK is presumed to have destroyed.

OUII "submits that the duration of any LEO should be for at least five years, but not ten years, from the issuance of the LEO." OUII Remedy Reply Br. 10. The Commission rejects OUII's conclusory assertions that "at least" five years—but not ten—is "what is necessary"; that LG's 10-year period improperly accounts for "foundational development work"; and that it is improper for LG to expect SK to take longer because of its smaller size. Rather, as discussed above, the record supports the Commission's finding that it would take ten years for SK to develop products without the 22 trade secrets. Accordingly, the Commission finds that the duration of any orders issued should cover a period of 10 years from their effective date.

The Commission finds that the ten-year duration of the remedial orders will not unduly prejudice SK. The Commission's orders will allow SK to "bypass the" remedial orders by demonstrating to the Commission that it has re-developed its products without the misappropriated trade secrets. *Organik Kimya*, 848 F.3d at 1004; *id.* at 1005 ("Given [the

factual] basis for the Commission's decision, and that Organik Kimya can end the exclusion order period at any time by seeking an advisory opinion or initiating a modification proceeding before the Commission and showing that Organik Kimya has produced opaque polymers independently, we do not find that the Commission abused its discretion or committed legal error in this case."). SK has alleged that it can independently develop its products without the misappropriation within one year. Although the Commission has determined that the record does not support SK's allegation, when SK completes independent development of its battery technologies, it can request Commission proceedings to end the exclusion period, thereby addressing any issue of undue prejudice.

B. <u>Limited Exclusion Order</u>

The Commission finds that a limited exclusion order is appropriate here to bar imports of SK's lithium ion batteries, battery cells, battery modules, battery packs, and components thereof that were produced using the trade secrets specified above that were misappropriated from LG.[25] However, after considering each of the public interest factors, the Commission has determined that certain tailored exemptions to the LEO are necessary to mitigate adverse effects on the statutory public interest considerations as discussed below.

1. **Public Interest Considerations**

By statute, the Commission must consider the effect of four statutory public interest factors in determining the appropriate remedy to address the unfair acts found. 19 U.S.C. § 1337(d), (f). These public interest considerations are the public health and welfare, competitive conditions in

[25] LG identifies the accused components as potentially including "electrolytes; Anode active material; Anode binder; Anode slurry and its constituent elements; Cathode active material; Cathode slurry and its constituent elements; CNT [carbon nanotube] paste; Cathode binder; Anode foil material; Cathode foil material; Electrode conductive additives; and Battery Management System." LG Remedy Br. 18 n.3.

the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. *Id.* The Commission sought public interest submissions from the parties, interested government agencies and other interested persons. *See* Notice of Review, 85 Fed. Reg. at 22,754.

The Commission accepted submissions from the parties and from the public. LG and OUII argue that the public interest does not preclude the issuance of a limited exclusion order, although the forms of their proposed orders differ, as will be discussed below. LG argues that SK is building a factory in the United States with the ill-gotten gains of its misappropriation and that the public interest considerations support the issuance of its requested remedial orders. SK argues that, due to public interest considerations, it should be completely free to continue doing business and that no remedial orders should issue. SK Remedy Br. 28, 50.

The Commission received numerous public interest submissions from the public. In addition to SK's customers Ford and VW, the Commission received submissions from firms in Ford's supply chain:

- Amanda Mfg. (EDIS Doc. ID 709280)
- Busche Performance Grp. (EDIS Doc. ID 709219)
- Cooper Std. Auto. (EDIS Doc. ID 709223)
- Detroit Mfg. Sys. (EDIS Doc. ID 709332)
- Hitachi Auto. Sys (EDIS Doc. ID 709294)
- Husco Auto. Techs. (EDIS Doc. ID 709285)
- Lydall Thermal (EDIS Doc. ID 709329)
- Metalsa Structural Products (EDIS Doc. ID 709398)
- New Mather Metals (EDIS Doc. ID 709369)
- NHK of Am. Suspension (EDIS Doc. ID 709370)
- NTN (EDIS Doc. ID 709222)
- Piston Grp. (EDIS Doc. ID 709290)
- SL Tennessee (EDIS Doc. ID 709313)
- Structural Plastics (EDIS Doc. ID 709412)
- Thai Summit Am. (EDIS Doc. ID 709283)
- THK Rhythm (EDIS Doc. ID 709388)

Several submissions came from suppliers to or contractors for SK's Georgia plant:

- Clayco (EDIS Doc. ID 708810)
- Enchem (EDIS Doc. ID 709128)
- Liochem (EDIS Doc. ID 709477)

Georgia organizations also filed submissions in support of SK:

- City of Commerce, Ga. (EDIS Doc. ID 709019)
- Georgia Power (EDIS Doc. ID 709360)
- Jackson County Bd. of Comm'rs (EDIS Doc. ID 709112)
- Jackson County Chamber of Commerce (EDIS Doc. ID 709109)

One Michigan organization, Mich. Econ. Dev. Corp. (EDIS Doc. ID 709330), filed a submission on behalf of LG (because LG has a design and engineering center in Troy, Michigan). General Motors (EDIS Doc. ID 709309) filed a submission noting its joint venture with LG in Lordstown, Ohio.

There were also a number of Congressional submissions. These included a joint letter by much of the House delegation from Georgia in support of SK: Reps. Rick Allen, Sandford Bishop, Jr.; Doug Collins; Drew Ferguson; Jody Hice; Hank Johnson, Jr.; and Rob Woodall (EDIS Doc. ID 709214). Also writing comments were: Rep. Debbie Dingell (Mich.) (EDIS Doc. ID 709111) (asserting impact on "automotive manufacturing and supply chain jobs and product development in" her district); Rep. Chuck Fleischmann (Tenn.) (EDIS Doc. ID 709558) (discussing VW's manufacturing facility in Tennessee); Rep. Robert Latta (Ohio) (asserting impact on "automotive manufacturing and supply chain jobs and product development in" Ohio); Rep. Paul Mitchell (Mich.) (asserting impact on "automotive manufacturing, product development, and supply chain jobs" in Michigan); and Sen. Lamar Alexander (Tenn.) (EDIS Doc. ID 709599) (noting that it could "take several years" for auto companies to "shift supply chains due in response to the remedies from this case").

The Ohio Senate delegation (Senators Sherrod Brown and Rob Portman) filed in support of LG, in view of LG's decision to break ground on a plant in Lordstown, Ohio—LG's second in the United States. Other letters in support of LG were submitted by Rep. Bill Huizenga (Mich.) (EDIS Doc. ID 709253) (noting LG Chem's design and engineering center in Troy, Michigan, and plant in Holland, Michigan); and Rep. Fred Upton (Mich.) (noting LG Chem's investments and workforce in Michigan).

Subsequently, Senator Marsha Blackburn (Tenn.) filed a letter in support of SK (EDIS Doc. ID 711109) (discussing a Volkswagen plant in Tennessee), and Representative Tim Ryan (Ohio) filed a letter in support of LG and its Ohio operations (EDIS Doc. ID 711280). Ohio Governor Mike DeWine likewise filed a letter in support of LG and its Ohio operations (EDIS Doc. ID 710399).

The Commission has carefully reviewed all of these public interest submissions. The arguments raised regarding the public interest consideration by the parties and the public are discussed below.

a. The Parties' and The Public's Comments

i. Ford's Comments

Ford explains that, as early as **[[REDACTED]]**, Ford considered SK to be a viable battery supplier for future programs. Ford Comments at 3. In **[[REDACTED]]**, Ford began evaluating battery suppliers in connection with the upcoming electric F-150 truck program ("the EV F-150"), *id.*, and **[[REDACTED]]**," *id.* at 4 & n.5. Ford states that it "**[[REDACTED]]**[26]

[26] *See* The United States-Mexico-Canada Agreement Implementation Act, Pub. L. 116-113, 134 Stat. 11 (2020) ("USMCA").

[[

REDACTED

]]"[27] *Id.* at 4. Ford notes that LG has a plant in Holland, Michigan that serves General Motors and VW, and an upcoming plant in Ohio that it asserts will exclusively serve General Motors. *Id.* at 4 n.7. According to Ford,

[[REDACTED]]. *Id.*

Ford asserts that in evaluating proposals from different battery suppliers,

[[

REDACTED

]] *Id.* at 5; *see also id.* at 7 (explaining that **[[REDACTED]]**). Ford projected,

[[

REDACTED

]]:

[27] Ford explains that "to satisfy the USMCA provision that requires automakers to use 75% of North American parts . . . (up from the 62.5% under [NAFTA]), **[[REDACTED]]**." *Id.* at 9. Ford also notes that LG supplies Ford "with EV batteries imported from Poland for use in [Ford's] Mustang Mach-E." *Id.* at 9 n. 10.

[[FIGURE REDACTED]]

Id. at 5-6.

Ford further explains that its F-150 program is in "its advance stages," that the "key design and technical specifications for the F-150 EV battery have been finalized," and that even "if there were another supplier that could meet Ford's specifications **[[REDACTED]]**, Ford is simply too far into the design process to switch EV battery cell suppliers." *Id.* at 7. Ford contends that its ability to launch a fully electric F-150 is a critical aspect of Ford's competitive strategy. *Id.* at 12.

Ford contends that **[[**

REDACTED

]] *Id.* at 9. Ford further contends that **[[** **REDACTED**

]] "would be far-reaching and would have a profound impact on Ford's electric vehicle programs, its employees, **[[** **REDACTED**

]], and its ability to compete in the burgeoning market for electric pickup trucks." *Id.* at 9-10. Ford has contended that **[[**

REDACTED

]] *Id.* at 11.

Ford has forecasted revenue of the fully electric F-150 at approximately **[[REDACTED]]**. *Id.* at 10. Ford also contends that termination would cause Ford to **[[REDACTED]]**. *Id.* at 10. Ford also asserts that there are indirectly, "potentially thousands more" supply base and dealer jobs at risk.[28] *Id.* at 10, 12-13.

Ford also submitted reply comments (EDIS Doc. ID 710181). Ford asserts that an "EV battery supplier must be selected approximately four years (and sometimes more) before vehicle launch." Ford Reply Comments at 8. Ford reasserts that LG cannot now supply the batteries that Ford needs, and that **[[REDACTED]]** *Id.* at 3. Ford takes issue with LG's assertion that LG could supply replacement batteries for Ford. This is both due to what Ford characterizes as LG's technical constraints, *id.* at 3-7, as well as Ford's **[[REDACTED]]**, *id.* at 7-8. As to LG's technology, Ford explained that it initially determined that "**[[REDACTED**

---

[28] A number of Ford suppliers filed comments (generally identical in form) explaining that if the EV F-150 program were cancelled or delayed for years, their sales would likely be impacted. Amanda Mfg. Comments (EDIS Doc. ID 709280); Busche Performance Grp. Comments (EDIS Doc. ID 709219); Cooper Std. Auto. Comments (EDIS Doc. ID 709223); Detroit Mfg. Sys. Comments (EDIS Doc. ID 709332); Hitachi Auto. Sys. Comments (EDIS Doc. ID 709294); Husco Auto. Techs. Comments (EDIS Doc. ID 709285); Lydall Thermal Comments (EDIS Doc. ID 709329); Metalsa Structural Products Comments (EDIS Doc. ID 709398); New Mather Metals Comments (EDIS Doc. ID 709369); NHK of Am. Suspension Comments (EDIS Doc. ID 709370); NTN Comments (EDIS Doc. ID 709222); Piston Grp. Comments (EDIS Doc. ID 709290); SL Tennessee Comments (EDIS Doc. ID 709313); Structural Plastics Comments (EDIS Doc. ID 709412); Thai Summit Am. Comments (EDIS Doc. ID 709283); THK Rhythm Comments (EDIS Doc. ID 709388).

]]." *Id.* at 4. Later in [[REDACTED]], Ford concluded that **[[REDACTED]]**. *Id.* at 5. Ford notes that LG has asserted that LG "will have sufficient capacity to replace SKI as a supplier for the Volkswagen MEB NAR program before the anticipated start of production in the United States," but that LG made no such representation about being able to fill Ford's needs. Ford Reply Comments at 5 n.9 (quoting LG PI Comments at 42).

In reply, Ford also contends that if it could not procure SK battery cells, that it would **[[REDACTED]]** causing harm to Ford, U.S. employment, the environment, energy efficiency, and consumers. *Id.* at 9, 13-23. Ford also asserts that, to the extent LG believes that Ford or SK should obtain a license from LG so that SK's batteries are licensed, that LG's licensing demands have not been "commercially reasonable." *Id.* at 9.

ii. VW's Comments

Volkswagen's comments (EDIS Doc. ID 709418) explain that it has a forthcoming electric-drive platform (the Modular Electric Drive Matrix, or "MEB"). Volkswagen further explains that its MEB vehicles are scheduled to start coming off the assembly line in Chattanooga, Tennessee in 2022. VW Comments at 3 & n.2. VW contends that it is investing $800 million in its Chattanooga site for EV production, which will create 1,000 new jobs.[29] *Id.* at 4. VW states that the only way it can meet the 2022 launch date is to continue to have access to SK's batteries. *Id.* at 4, 7. VW asserts that VW's contract with SK

[29] *See also* Sen. Blackburn Comments (EDIS Doc. ID 711109); Rep. Fleischmann Comments at 1-2 (EDIS Doc. ID 709558).

[[**REDACTED**]] *Id.* at 3-4; *see also* VW Reply Comments at 4. VW contends that [[**REDACTED**]] *Id.* at 7. Should the Commission issue remedial orders, VW asks that the Commission allow SK "to fulfill its existing contract" with VW, or, in the alternative, "to exempt from the scope of such orders any imported components needed for SKI to operate its Georgia facility." *Id.* at 8. VW's submission also addresses what it considers the "negative widespread effects on the U.S. energy-efficient automotive industry" and harms to U.S. employment, "energy conservation and environmental perseveration [*sic*]" and U.S. consumers that would result from an exclusion order barring SK's batteries *Id.* at 1, 4-6.

VW also filed reply comments (EDIS Doc. ID 710176). In its reply, VW states that LG has not committed to offering VW a domestically-sourced battery supply for the MEB program in North America before 2022, too late to enable VW's planned EV rollout that year from Chattanooga. VW Reply Comments at 1-2. As with its opening comments, VW seeks an exemption to allow SK to fulfill its contract with VW, or, in the alternative, an exemption allowing "any imported components needed for SK to operate its Georgia facility." *Id.* at 3.

iii. SK's Comments

SK argues that batteries are in short supply, and that its presence in the marketplace is necessary to fulfill demand. SK Remedy Br. 5-9. SK also asserts that neither Ford nor VW would be able to find an adequate substitute for the SK batteries that those manufacturers have already selected. *Id.* at 10-13, 15. SK contends that to the extent that other suppliers' batteries are more expensive than SK's, that automakers will pass that cost onto consumers. *Id.* at 25. The Commission finds that SK's comments, as they concern U.S. consumers, are substantially

cumulative to Ford's and VW's submissions though Ford and VW have more directly argued the impact of remedial orders on their ability to continue production of their EVs as planned.

SK further contends that to the extent its Georgia facility is closed, it would harm U.S. competitiveness in the "global EV production race."[30] *Id.* at 16. SK notes the alleged economic benefits of its factory under construction in Georgia, *id.* at 24-25.[31] SK asserts that its batteries offer "key innovations." *Id.* at 19-20.

SK also contends that any remedy should not include components of SK's products. *Id.* at 29-33, 37. SK asserts that any remedial order should be limited to batteries to be used in automotive end-use products. *Id.* at 40. SK also believes that it should be entitled to import batteries for replacement, repair and warranty for Kia Niro EV and Kia Soul EV automobiles that were originally imported with SK batteries. *Id.* at 41. SK's submission also attempts to reargue whether LG has suffered economic injury. *Id.* at 33-35.

iv. LG's Comments

As to Ford, LG asserts:

> Ford likewise already qualified LG Chem to supply EV batteries, and the two companies have an established supply relationship spanning more than a decade. And to the extent Ford contends that LG Chem's requested remedial relief may cause some delays to one of its product lines (the F-150 EV program), Ford has been aware since the April 29, 2019 filing of the complaint that its potentially

[30] *See also* Ford Comments at 15; Sen. Blackburn Comments at 1 (EDIS Doc. ID 711109); Rep. Fleischmann Comments at 2 (EDIS Doc. ID 709558); H.R. Georgia Delegation Comments at 1-2 (EDIS Doc. ID 709214).

[31] *See also* Sen. Blackburn Comments at 1 (EDIS Doc. ID 711109); H.R. Georgia Delegation Comments at 1-2 (EDIS Doc. ID 709214); City of Commerce, Ga. Comments at 1-2 (EDIS Doc. ID 709019); Clayco Comments at 1-2 (EDIS Doc. ID 708810) (construction firm hired by SK to construct SK's Georgia facility); Enchem Comments (EDIS Doc. ID 709128) (electrolyte supplier to SK); Georgia Power Comments (EDIS Doc. ID at 709360); Jackson County Bd. Of Comm'rs Comments at 1-2 (EDIS Doc. ID 709112); Jackson County Chamber of Commerce Comments at 1-2 (EDIS Doc. ID 709109); Liochem Comments (EDIS Doc. ID 709477); State of Ga. Dep't of Econ. Development Comments at 1-2 (EDIS Doc. ID 708705).

> supplied EV batteries were manufactured using LG Chem's misappropriated trade secrets. Even if Ford did not then begin to explore alternate EV battery suppliers, certainly after the November 13, 2019 filing of the public version of LG Chem's Motion for Default Judgment, Contempt, and Sanctions, Ford had to recognize that SKI would be held in violation and that the Commission's remedies could potentially impact its EV battery supply. And with the Target Date still more than 5 months away, Ford cannot be heard to complain if it has not made arrangements to mitigate any alleged projected delay to its product line should the Commission issue its remedies.

LG Remedy Br. 40 (citation omitted). Thus, LG asserts that Ford made no effort to mitigate the risks associated with SK's misconduct, and LG does not believe that delay of the Ford F-150 electric program is an interest that should warrant withholding relief. *Id.*

As to VW, LG argues:

> Volkswagen already has qualified LG Chem to supply batteries for EVs for the European market, concluding that LG Chem can supply commercially acceptable MEB cells. LG Chem can expand its production capacity at the existing Holland facility in Michigan within the same amount of time SKI would have required to begin production of VW MEB cells. Until then, LG Chem could supply any necessary battery cells from its existing plants in Poland or China. Volkswagen also has already qualified Samsung SDI to supply MEB cells for the European market, providing Volkswagen with yet another option to replace SKI for the North American market. Either alone or in combination with other suppliers LG Chem can effectively replace SKI and timely meet the needs of Volkswagen for its U.S. MEB program.

Id. at 40 (citations omitted). The Commission received other comments supporting LG and explaining that SK's trade secret misappropriation threatens investment and jobs in Michigan or Ohio.[32]

[32] Sens. Brown & Portman Comments (EDIS Doc. ID 709363); Rep. Huizenga Comments at 1-2 (EDIS Doc. ID 709253); Rep. Ryan Comments at 1-2 (EDIS Doc. ID 711280); Rep. Upton Comments at 1-2 (EDIS Doc. ID 709392); Gov. DeWine Comments at 1-2; Mich. Econ. Development Corp. Comments (EDIS Doc. ID 709330).

In reply, LG asserts that the public interest concerns raised by SK, Ford, and VW have been exaggerated. LG reiterates that it could supply VW with batteries from Holland, Michigan, by mid-2022 and from LG's plants in China or Poland by the early 2022 start of VW's U.S. production. LG Remedy Reply Br. 25-26. LG also takes issue with VW's assertion that [[**REDACTED**]]. *Id.* at 26. LG explains that LG has already been qualified to supply batteries for VW in Europe, and that the batteries are interchangeable with VW's U.S. production. *Id.* at 26. LG also notes that Samsung can supply VW, *id.* at 26, and that Samsung has (and will be expanding) domestic production of batteries, *id.* at 24.

LG's reply asserts that Ford misunderstands LG's battery capabilities and that LG batteries could work for the Ford F-150. *Id.* at 28-30 & n.9. LG also contends that it is not too late for Ford to switch battery suppliers, both because Ford exaggerates the difficulty of so doing at this stage, and because it appears that the electric F-150 already is delayed. *Id.* at 30. LG castigates Ford for not finding a fallback supplier in view of Ford's knowledge of the complaint and ongoing Commission proceedings. *Id.* at 31. LG also believes that the EV F-150 is a negligible part of Ford's business, much less the overall U.S. automotive market. *Id.* at 32-33. As to the numerous letters filed by Ford's suppliers, LG notes that they appear to be form letters that fail to identify the marginal effect on their businesses from electric F-150s. *Id.* at 33-34.

v. OUII's Comments

OUII principally addresses VW and Ford in connection with competitive conditions in the United States economy and the production of like or directly competitive articles in the United States. OUII Remedy Br. 10-12. OUII's opening brief on remedy asserts that VW and Ford could replace SKI as their battery supplier, albeit with the possibility of delay. *Id.* at 11.

As to Ford, OUII further asserts: "In view of the large number of other EVs coming onto the market, OUII is of the view that this potential for a delay in the release of the Ford F-150 EV is not by itself a reason to forego, or further tailor, any remedial order that may issue in this investigation. Accordingly, subject to the other public interest submissions from SKI and third parties to this investigation, OUII has formed an initial view that these public interest factors do not substantially weigh against the imposition of remedial orders." *Id.* at 12.

OUII's reply (later submitted after receipt of further public interest submissions) acknowledges that tailoring should be considered if the Commission were to find that the public interest would be adversely impacted by the remedial orders. *See* OUII Remedy Reply Br. at 16-17 ("If the Commission determines here that there is likely to be a significant adverse effect on any of the four statutory public interest factors, then the Commission should also consider whether tailoring of the remedies could be used to alleviate those adverse effects."); *see also id.* at 22.

In connection with U.S. consumers, OUII states that any remedial orders should contain an exemption for repair, replacement, and warranty for batteries for Kia Niro EV and Kia Soul EV automobiles originally equipped with SK batteries. *Id.*; OUII Remedy Reply Br. 10.

b. Analysis

i. Ford and VW's Inability to Replace SK's Batteries

The Commission finds several important aspects of the market for EV batteries that are particularly relevant to its consideration of the statutory public interest factors. EV batteries are designed and manufactured to the technical specifications of OEMs for each electric vehicle that incorporates the batteries. *See* Ford Comments at 3. Ford and VW plan to employ hundreds of U.S. workers in their operations producing electric vehicles. Ford Comments at 10 (300 jobs);

VW Comments at 4 (projecting the creation of 1,000 jobs). Unless multiple battery suppliers have already been approved (as for VW), the EV batteries themselves are not standardized products for which one producer's battery can be substituted out for another's (as for Ford). Presently, there are no domestic substitutes for VW and Ford, so to satisfy Ford's and VW's goals of tariff avoidance and possible statutory or regulatory compliance. Rather, as discussed below, it will take years for LG, or potentially other domestic suppliers, to provide Ford and VW with batteries that meet the automakers' highly specialized needs and are capable of substituting for SK's batteries. Accordingly, the record demonstrates a lack of any available substitute EV batteries for the Ford F-150 and VW MEB vehicles if SK's batteries are immediately excluded.

More specifically, the record demonstrates that because batteries (or arrays of batteries) for electric vehicles are highly specialized, they are generally designed and produced by a battery manufacturer, through a multi-year process, in collaboration with an automaker for a particular vehicle or vehicles. Ford Reply Comments at 8; VW Comments at 2-3. In approximately 2018, SK reached agreements with Ford and VW to supply those automakers with batteries for certain projects,[33] as will be discussed in more detail below.

In Ford's case, the Commission credits Ford's concerns as to the four-year period it would need to work with a new EV battery supplier to design, test, and prepare for mass production for the EV F-150 vehicle. Ford further explains that it has already sunk substantial costs into the EV F-150's design and development, and that if an exclusion order were to take

[33] *See* **[[** **REDACTED** **]]** (Ex. 7 to EDIS Doc ID 697506); **[[** **REDACTED** **]]** (Ex. 8 to EDIS Doc ID 697506); **[[** **REDACTED** **]]** (Ex. 9 to EDIS Doc ID 697506). On November 3, 2020, LG and SK represented to the Commission that there are no additional contracts between SK and Ford and Volkswagen that are pertinent to this investigation.

effect now and exclude components for SK's batteries for the EV F-150, it would not just **[[**

REDACTED

]] *Id*. at 8, 9. Based on Ford's coordination with SK since 2018, the record demonstrates that it would take approximately four years for Ford to work with another battery manufacturer to develop batteries for the EV F-150 and to build out a U.S. facility for producing them. *See* Ford Reply at 8 ("with every new electric vehicle, the EV battery supplier must be selected approximately four years (and sometimes more) before vehicle launch, as the supplier must perform substantial preproduction work relating to design, testing, material sourcing, and certification of the EV battery cell before it is ready for mass production."). LG acknowledges that its current production capacity is committed to existing purchasers' EV programs and that to supply batteries to the Ford EV F-150 program would require building additional capacity. *See, e.g.,* LG Remedy Br. at 30-31, 40, 42.

[[**REDACTED**

]] Ford Reply Comments at 4. Later in **[[**

]] *id.* at 5, **[[**

REDACTED **]]**, *id.* at 3-4. *See also* Ford Comments at 4-7. Ford Reply Comments at 4-5. LG disputes Ford's characterization of LG's technical capabilities in connection with Ford's 2025 date, contending that Ford never sought a proposal from LG and thus misunderstood LG's technical capabilities in 2018, and that its technology is superior to that which is available from SK. LG Reply at 28-30. LG points to its BEV3 battery for the GM Hummer EV, which LG contends is a "similar large vehicle[]," LG Remedy Reply Br. 29, with a

[[REDACTED]] that is sufficient to provide a range of 400 miles. *See* LG Remedy Br., Ex. 1 (Whitacre Decl. ¶ 31, Table 3); LG Remedy Reply, Ex. 56, (Eun Decl.) ¶ 4; Ex. 57 (Whitacre Rebuttal Decl.) ¶ 14; LG Remedy Reply Br. 29. LG states that it is building a plant in Lordstown, Ohio to produce EV batteries for the GM Hummer and other GM vehicles and may have excess production capacity at that plant to supply other OEMs. LG Remedy Br. 23. The four-year lead time identified by Ford, and demonstrated by Ford's relationship with SK, coincides with Ford's own evaluation of LG's readiness by **[[REDACTED]]** to substitute for SK's batteries in the EV F-150.

The record for VW demonstrates that its bid solicitation process began in approximately **[[REDACTED]]**, according to the testimony of VW Group of America's corporate witness, **[[VW WITNESS]]**, Dep. Tr. 22:11-12, **[[REDACTED]]**, *id.* at 121:6-20 & Ex. 5. **[[REDACTED]]**. *Id.* at 152:2-153:16. VW reached an agreement with SK between September and October 2018. *See supra* note 33. **[[REDACTED]]**. **[[VW WITNESS]]** Dep. Tr. at 29:20-31:4, 195:6-205:21, 235:13-236:18, 252:6-14 & Ex. 12. As the evidence indicates, SK misappropriated LG's business trade secrets, including LG's competition pricing information. It is therefore consistent with the record that SK's proposal would be the lowest cost. VW's preference for less expensive batteries using misappropriated LG trade secrets—in perpetuity, no less—is not a compelling public interest.

In VW's case, the record demonstrates that several battery manufacturers, including SK and LG, have already been certified by VW or Volkswagen AG to supply batteries for VW's MEB platform, and that LG's batteries can be used for VW's vehicles in North America. **[[VW**

WITNESS]] Dep. Tr. at 221:18-21 (Oct. 24, 2019); *see also* Eun Decl. ¶¶ 4, 7 (batteries supplied by LG for VW MEB vehicles in Europe and batteries needed for the United States are "interchangeable"). LG provided evidence indicating that it could expand its capacity to supply VW with batteries manufactured in the United States at its Holland, Michigan plant by the middle of 2022 (*i.e.*, two years from the date of LG's submission to the Commission) and with overseas LG batteries by early 2022 (*i.e.*, less than two years from the date of LG's submission). LG Remedy Br., Ex. 2 (Eun Decl. ¶ 10). The Commission interprets LG's submission to reflect LG's need for two years to supply VW with batteries manufactured in the United States.

The Commission's consideration of each public interest factor is discussed below.

ii. Public Health and Welfare

SK contends that the Commission's decision in *Certain Automatic Crankpin Grinders*, Inv. No. 337–TA–60, USITC Pub. 1022 (Dec.1979) ("*Crankpin Grinders*"), supports denial of a remedy here. SK Br. at 4, 15, 22. *Crankpin Grinders* involved energy efficient automobiles and took place during the oil shock of 1979. The crankpin grinders at issue were large machines for grinding engine crankshafts that customer Ford needed in its Cleveland, Ohio, engine plant to manufacture smaller engines to meet fuel economy standards. *Crankpin Grinders*, Comm'n Op. at 18-19. In that investigation, the Commission found that consideration of the public health and welfare factor precluded issuance of a remedy. The Commission based its decision on the unavailability of non-infringing, substitute crankpin grinders (*see id*. at 18) and the impact exclusion of the infringing crankpin grinders would have on a broad range of energy-efficient automobiles:

> In view of the fact that Congress and the President have also clearly established a policy requiring automotive companies to increase the fuel economy of the automobiles they produce and that some of these companies are encountering difficulties in obtaining automatic

> crankpin grinders on a timely basis, to produce the statutorily mandated energy efficient automobile, we believe that it is not in the public interest to provide a remedy in this case. In this period of rapid changes in the energy field, there are overriding public interest considerations in not ordering a remedy which will hamper the supply of energy efficient automobiles. This is not merely a matter of meeting the demands of individual consumers for fuel efficient automobiles. The public as a whole has an interest in conserving fuel through the provision of energy efficient automobiles. The public as a whole has an interest in conserving fuel through the provision of energy efficient alternatives represented in this case by automobiles with more efficient engines which are produced with the assistance of crankpin grinders which are the subject of this investigation. The engine needs of automotive companies cannot always be anticipated two or more years in advance. Therefore, we have concluded that the public interest considerations, namely the domestic industry's inability to supply crankpin grinders which can be used to produce on a timely basis more energy efficient automobiles, and the engine producer's need for additional automatic crankpin grinders prior to the expiration of the patent are stronger than complainant's rights to enforcement of its patent monopoly through a remedy pursuant to section 337. Accordingly, we are providing no remedy for the violation of section 337, which we have found to exist.

Crankpin Grinders, Comm'n Op. 20-21.

In the present case, the parties and numerous non-parties have discussed the growing demand for electric vehicles and the environmental benefits associated with fully electric vehicles. SK asserts, and it is not disputed, that "EVs are a key asset in U.S. efforts to reduce emissions." SK Remedy Br. 20. VW explains that the "public has an interest in the broader adoption of EVs for energy conservation and environmental perseveration [sic]. EV adoption reduces reliance on gasoline-powered vehicles and decreases direct automotive emissions that are harmful to the environment." VW Comments at 5 (footnotes omitted). Likewise Ford explains: "There is tremendous pressure on automotive manufacturers and the consuming public by politicians, policy makers, and environmental groups alike to transition to electric vehicles, spurred by concerns over both environmental pollution and dependence on non-U.S. sources of

oil. The transition to electric vehicles is viewed as a necessary step to diminish air pollution from internal combustion engines and to strengthen energy security." Ford Comments at 13. Ford also asserts that it is a "well-accepted fact that 'switching to electric vehicles reduces public health impacts' in many ways, including reducing harmful emissions that 'contribute to serious respiratory diseases and can even cause premature death.'" Ford Reply Comments at 13.

Ford also cites the California Air Resources Board, which has indicated the importance of battery EVs generally, and battery pick-up trucks specifically, to reducing nitrogen oxide emissions in California. *Id.* at 14. Indicative of the push to adopt EVs in connection with the public health and welfare, Ford discusses the emissions requirements of California and other states, and the importance to Ford of its EV F-150 program in meeting those requirements.[34] *Id.* at 16-17. Ford contends that **[[REDACTED]]**. Ford Comments at 10. LG states that, in the event of delays in Ford's EV F-150 program, Ford's "internal combustion F-150 would be the likely alternative for buyers."[35] LG Remedy Reply Br. at 33.

---

[34] Ford notes, however, that the state-law requirements have been effectively withdrawn because of federal regulatory action but may be restored. *Id.* at 17 n.28.

[35] As Ford has argued in its public interest submissions, the F-150 has been the best-selling pickup truck in the United States for over 43 years, and will be one of, if not the first, fully electric pickup truck commercially available in the United States. While the record is unclear on the extent to which consumers desiring to purchase an EV F-150 would substitute another electric pickup truck (if one even existed) or other electric vehicle, or rather would substitute the internal combustion version of the F-150 (which LG states is "the likely alternative," LG Remedy Reply Br. at 33), given the popularity of the F-150, the limited availability (if any) of other fully electric pickup trucks, and the likelihood of consumers that are unable to substitute another type of vehicle for a pickup truck, the Commission finds that **[[REDACTED]]** may result in a potentially significant (although admittingly an unknown) number of consumers forgoing purchases of an electric vehicle that otherwise would have purchased the EV F-150.

Crankpin Grinders demonstrates a reluctance to impose a remedy that would hamper domestic production of energy efficient automobiles when the record demonstrates that doing so would have a negative impact on energy conservation.[36] In the present investigation, the Commission has considered the public health and welfare interests discussed above—in combination with the other statutory public-interest factors—in determining the appropriate remedy. In particular, in taking into account the relevance of this public-interest factor, the Commission is cognizant of the contribution EVs make to reducing automobile emissions and the contribution reduced automobile emissions make in efforts to combat climate change and its adverse impacts on public health and welfare. The Commission also recognizes, analogous to the views expressed in *Crankpin Grinders*, that it is in the public interest to avoid imposing a remedy that would hamper efforts to reduce automobile emissions and the consequent contribution such efforts make to combatting climate change and its adverse effects on public health and welfare. We take into account the relevance of this issue to the public health and welfare in determining the appropriate remedy in this investigation.[37]

[36] In *Crankpin Grinders*, the asserted patent expired in less than two years, and the complainant was unable to "deliver any additional crankpin grinders for at least two years." *Crankpin Grinders*, Op. of Comm'r Parker 3. For that reason, the Commission declined to issue an exclusion order; given the limited remaining life of the patent, an exclusion order tailored to allow time for producers to find and adapt to alternative suppliers would not have been feasible. In contrast to *Crankpin Grinders*, the trade secrets in this investigation have no such expiration, and the Commission has determined that the duration of any limited exclusion order or cease and desist orders should be ten years. Accordingly, in view of two and four years that VW and Ford respectively require to substitute other batteries for SK's batteries, a limited exclusion order tailored accordingly would allow VW and Ford the time they need to substitute SK batteries in the EVs.

[37] While Commissioner Schmidtlein agrees that electric vehicles are a key asset in efforts to reduce emissions that negatively impact the environment (*see* SK Remedy Br. 20), in her view, the record in this particular investigation is insufficient to assess the impact, if any, on the environment from the delay or elimination of the specific vehicles in question potentially resulting from an exclusion order. The submissions in this case regarding public interest speak

(footnote continued on next page)

iii. Competitive Conditions in the U.S. Economy

The demand for lithium-ion batteries used in electric vehicles is expected to triple by 2030. *See* Ford Comments at 14. The Office of the U.S. Trade Representative has estimated that the USMCA's higher regional value content thresholds for vehicles and auto parts will necessitate $5.2 billion in domestic advanced battery purchases within the first five years of the USMCA's implementation. *Id.* To obtain favored treatment under the USMCA, U.S. automakers must use 75% of North American made parts (*i.e.*, parts made in the U.S., Canada, or Mexico) in their vehicles by 2023 (up from the 62.5% under the North American Free Trade Agreement or NAFTA), which drives Ford and VW to source their EV battery cells for their F-150 and MEB NAR electric vehicles respectively from North America. *See id.* at 9. This demand for EV batteries exceeds the ability of EV battery manufacturers to meet that demand currently, and additional capacity is being built in the United States to meet this growing demand. *See id.* at 14. Ford contends that U.S. EV battery supply constraints affect the ability of the U.S. automotive industry to compete in the global electric vehicle market. *See id*. at 14-15. Ford observes that the United States trails behind China and Europe in cultivating domestic EV battery production programs. *Id.* at 15.

---

in broad, general terms about the environmental benefits of electric vehicles but they do not offer evidence or specifics with regard to how the delay or elimination of the limited number of vehicles slated to use the SK batteries would actually impact the environment. For example, the record does not address the extent to which the **[[REDACTED]]** of the Ford EV F-150 and VW MEB NAR vehicles due to an exclusion order will lead purchasers to select a conventional gasoline powered vehicle, rather than a different electric vehicle, as an alternative choice, and further does not address any resulting impact on the environment. When considering whether to afford less than full remedial relief, the impact on each of the public interest factors must be balanced against the protection of intellectual property rights. In her view, carving an exception to remedial relief for an established violation of intellectual property rights should require more than general assertions even when the goods at issue are energy efficient products. Thus, in light of the record, Commissioner Schmidtlein affords the public health and welfare factor no weight in favor of her conclusion that relief should be tailored in this investigation.

Ford asserts that Ford's ability to launch a fully electric F-150 is a critical aspect of Ford's competitive strategy and that its inability to continue to use SK's batteries "would be far-reaching and would have a profound impact on Ford's electric vehicle programs, its employees, **[[REDACTED]]** and its ability to compete in the burgeoning market for electric pickup trucks." *Id.* at 9-10. Similarly, VW asserts: "Such orders will significantly decrease U.S. employment and training opportunities, negatively impact U.S. automobile dealers nationwide, and harm U.S. consumers interested in purchasing competitively-priced EVs that will improve the environment. These effects will be particularly acute given the devastating impact that COVID-19 has had on the U.S. economy." VW Br. at 1.

As discussed above, Ford has asserted that there are at least 300 Ford jobs in Michigan dedicated to the EV F-150 program that are at risk of being lost if an exclusion order is entered. Ford Comments at 8. VW projects 1,000 jobs for the vehicles that VW "plans to produce in Chattanooga." VW Comments at 6. SK has asserted that it hopes to employ "over 2,500 workers" in Georgia.[38] SK Remedy Br. 1. LG employed 837 people in it Holland, Michigan facility as of June 30, 2019, and LG (along with its partner General Motors) were investing approximately $2.3 billion to build a new EV battery plant in Lordstown, Ohio. LG Remedy Br. at 30-31.

Taking account of such considerations, the Commission is mindful of an exclusion order's impact on U.S. jobs, in light of the current unavailability of substitutes for SK batteries.

---

[38] SK's remedy submissions do not indicate how many workers are presently employed at SK's facility in Georgia, *see* SK Remedy Br. at 1 & Exs. 1, 4, although it appears that SK hired a large number of Korean nationals (as opposed to U.S. residents) to assist in building that facility, *see, e.g.*, Letter from Rep. Doug Collins to Acting Director Matthew T. Albence (Aug. 26, 2020) (EDIS Doc. ID 718601).

A key competitive factor in the U.S. EV battery market is that, although there are multiple EV battery producers in the United States other than SK, none is in a position to step in and replace SK for Ford's F-150 and VW's MEB NAR programs in the short term. Immediate exclusion of SK's batteries is likely to result in **[[REDACTED]]** in these programs, which in turn risks the U.S. jobs associated with these programs. At the same time, the Commission must not countenance SK's rampant trade secret misappropriation. The Commission balances these considerations in a way that attempts to mitigate disruption to Ford and VW by providing sufficient time to source alternative U.S. batteries while not unduly rewarding SK for its unfair acts as discussed further below.

iv. The Production of Like or Directly Competitive Articles in the United States

The parties acknowledge that there are other EV battery manufacturers in the United States, including LG, and that production capacity of EV batteries is being built out to supply automobile OEMs in the United States. OUII Remedy Br. at 9-10; SK Remedy Br. at 8; LG Remedy Reply Br. at 23-24. LG contends that domestic production of EV battery cells is robust, growing quickly, and is more than sufficient to offset any SKI EV batteries excluded from the U.S. market whereas SK contends that there is a dearth of available domestic supply of batteries. *See* LG Remedy Br. at 24; SK Remedy Br. at 8. According to the parties, these other U.S. suppliers and their plans for EV battery production include the following: LG, at its Michigan and Ohio facilities; Tesla and Panasonic, which have a cell manufacturing plant in Nevada; Panasonic and Toyota, which have announced a large joint venture to produce lithium-ion batteries for EVs for Toyota; Samsung SDI, which has plans to expand its EV battery facility in Michigan; Envision AESC, which has an EV battery manufacturing facility in Tennessee; Daimler, which has created its own EV battery facility in Alabama; and BMW, which has

created its own EV battery facility in South Carolina. *See* OUII Remedy Br. at 9; SK Remedy Br. at 8; LG Remedy Reply Br. at 23-24. The record does not demonstrate that any EV batteries currently produced in the United States by these other manufacturers would be adversely impacted by the issuance of relief in this investigation. SK contends, however, that these U.S. battery producers "are largely captive to the pre-existing needs of particular OEMs."[39] SK Remedy Reply Br. at 4; *see also id.* at 4-6. Accordingly, SK does not view such producers as domestic producers of like or competitive articles. SK Remedy Br. 14-15.

The Commission has found that "[t]he presence of other suppliers … weighs against the potential impact" of a remedial order on the production of like or directly competitive articles, where these suppliers have the capacity to replace the excluded products. *See Certain Road Constr. Machs. & Components Thereof*, Inv. No. 337-TA-1088, Comm'n Op. at 55 (July 15, 2019) (finding no adverse effect on the production of like or directly competitive products in the United States where other U.S. suppliers, including the complainant, exist and have the capacity to replace the excluded products). Here, however, to the extent that any domestically-produced batteries are like or directly competitive with SK's batteries, the record does not demonstrate that any of these other domestically-produced batteries would be able to replace SK's batteries to be produced in Georgia for Ford's EV F-150 program or VW's MEB NAR vehicles in time to commercially supply substitute EVs for their stated launch dates in 2022. As discussed above, the USMCA incentivizes U.S. automakers, like Ford and VW, to procure EV batteries from domestic suppliers to obtain the benefits of the USMCA and that this is a factor affecting the commercial viability of these programs. Also as discussed above, Ford contends that for its F-

[39] In addition, SK asserts that Samsung, Daimler, and BMW rely on imported battery cells in their U.S. facilities. SK Remedy Reply Br. at 5-6.

150 program, it would take four years to switch suppliers to another U.S.-based EV battery producer. With regard to VW, although LG's batteries can substitute for SK's, LG recognized that it **[[REDACTED]]**.

Thus, unlike in *Road Construction Machines,* other U.S. suppliers of EV batteries exist, but they are largely captive to particular OEMs' programs and do not currently have the capacity to meet the immediate specialized needs of the Ford EV F-150 and VW MEB NAR programs in time for their 2022 launch dates. The Commission's tailoring of its remedies, as discussed below, takes into account the transition time required for U.S. producers to supply like or directly competitive EV batteries to replace SK batteries for these programs. Accordingly, consideration of U.S. production of like or directly competitive articles in the United States does not weigh against the issuance of relief in this investigation. Rather, at most, the facts regarding the current state of U.S. production of like or directly competitive EV batteries support the Commission's tailoring of its remedial orders to take into account the current technical capability and production capacity of U.S. EV battery producers to design, develop and prepare for commercial production of suitable substitutes to replace SK's U.S.-produced batteries for the Ford EV F-150 and VW MEB NAR programs after the expiration of the period of exemption as discussed below.[40]

---

[40] Commissioner Schmidtlein agrees that consideration of "the production of like or directly competitive articles in the United States" factor does not weigh in support of denying relief because the record contains no evidence that remedial relief would adversely impact the U.S. production of EV batteries to replace the SK batteries. In her view, the same reason also supports finding that this public interest factor does not weigh in support of delaying/tailoring relief—*i.e.*, the record contains no evidence that remedial relief would adversely impact the U.S. production of EV batteries to replace the SK batteries.

Section 337(d)(1) directs the Commission to consider "the effect" of exclusion upon the statutory public interest factors and after considering that effect to determine whether the

(footnote continued on next page)

v. U.S. Consumers

The ability of Ford and VW to continue production of their EVs as planned is important to competitive conditions in the United States as elaborated above. Since Ford and VW will be future consumers of SK's batteries, the U.S consumers factor in the present investigation largely takes into account the same considerations that have previously been discussed with regard to public interest factors discussed above.

In addition, U.S. consumers who have purchased Kia Niro EV and Kia Soul EV automobiles will need replacement batteries for these vehicles in order to safely continue operating them. *See* OUII Remedy Sub. at 12. The record indicates that the interests of these consumers would be impacted by exclusion of SK products.

vi. Conclusion Regarding the Public Interest

Upon consideration of the record concerning all of the public interest factors implicated in this investigation, the Commission concludes that the evidence does not justify withholding the issuance of a limited exclusion order but rather demonstrates that any such order should be carefully tailored to account for the time for Ford to obtain substitute batteries for Ford's F-150 program and for VW to obtain substitute batteries for its MEB NAR program.[41] *Cf. Certain*

---

violative articles "should not be excluded from entry." 19 U.S.C. § 1337(d)(1). Because there is no evidence that remedial relief would adversely impact the U.S. production of EV batteries to replace the SK batteries, Commissioner Schmidtlein does not see a basis to find that this public interest factor supports denying the immediate entry of relief.

Instead, Commissioner Schmidtlein finds that the current inability of U.S. producers to meet the immediate specialized needs of the Ford EV F-150 and VW MEB NAR programs to replace SK batteries is more appropriately considered under the "competitive conditions in the United States economy" factor. It more naturally fits under that factor since the remedial relief will impact competitive conditions in the United States by leaving Ford and VW without any available EV batteries to replace SK's batteries in the short term.

[41] Several comments submitted urged, without taking sides in the underlying dispute, that the Commission engage in such careful balancing. Sen. Alexander Comments at 1 (EDIS Doc.

(footnote continued on next page)

Personal Data and Mobile Communication Devices and Related Software, Inv. No. 337-TA-710, Comm'n Op. 79-81 (Dec. 29, 2011) (providing a transition period of four months to telephone carriers to obtain alternative Android smartphones). The tailoring of its remedial orders will allow SK to import components in order to supply batteries—that are the fruit of SK's misappropriation—to Ford and VW until such time as Ford and VW can transition their EV programs identified above to other domestic suppliers. This tailoring will take into account the effect of exclusion upon the public interest as discussed above. [42]

With respect to Ford, as discussed above, the evidence supports a four-year time period for Ford to source EV batteries for the EV F-150 from an alternative domestic supplier, *see* Ford Reply Comments at 9, and thus a four-year allowance for SK to import components for domestic production of batteries for the EV F-150. The Commission has determined that—consistent with the duration of the remedial order itself—that the four-year exemption is from the date of the exclusion order, and not from the date of Ford's submission in this investigation. The Commission finds that this exemption should enable Ford to switch domestic battery suppliers without jeopardizing its February 2022 launch date. This tailored remedy will allow consumers access to an EV version of the best-selling truck in the United States.

The Commission has determined not to extend that exemption to Ford's alleged unannounced new vehicles. Ford's basis for extending the exemption is to take advantage of economies of scope by using similar SK batteries with misappropriated technologies across

---

ID 709599); Rep. Dingell Comments at 1-2 (EDIS Doc. ID 709111); Rep. Latta Comments at 1-2 (EDIS Doc. ID 709308); Rep. Mitchell Comments at 1-2 (EDIS Doc. ID 709249).

[42] Commissioner Schmidtlein supports the decision to tailor the remedial relief in this investigation. She finds that the record showing the impact of immediate relief upon "competitive conditions in the United States economy" and "United States consumers," as explained above in this opinion, weighs in support of tailoring the relief.

several unnamed vehicles. Ford Comments at 4 n.5. The Commission finds the evidence concerning the public interest does not support Ford's request. Specifically, the Commission finds that, unlike for the EV F-150, no evidence has been placed on the record showing specific harms to the roll out of such other vehicles from excluding SK unfair imports and switching sources for batteries to another supplier for unannounced new vehicles. The record also lacks evidence of any contractual relationships for the supply of batteries from SK to Ford for vehicles other than the F-150. Likewise, while the submissions address at length the public interest considerations regarding the EV version of the F-150 (the most popular vehicle in the United States), Ford's submissions lack any details that would demonstrate the public interest considerations for unidentified vehicles (at, apparently, a more nascent stage of development) that include batteries with LG's misappropriated technologies.

Moreover, on November 8, 2019, when Ford's corporate witness in this investigation was deposed, the only vehicle for which SK had been selected and contracted to supply was the EV F-150. Dep. Tr. of Registered Agent for Ford Motor Co., **[[FORD WITNESS]]** at 233:16-19 (Nov. 8, 2019); *see also id.* at 62:11-16, 77:1-21. That deposition occurred *after* SK's misconduct in this investigation had come to light, and after LG had moved for default. There is no explanation in the record why Ford would choose to ignore or excuse SK's egregious misconduct. Indeed, SK itself ultimately and largely admitted its misconduct, but SK urged the Commission nonetheless not to find it in default. The fault here belongs with SK, as well as with those, like Ford, who deliberately chose to continue to cultivate prospective business relationships predicated on SK's trade secret misappropriation. For the foregoing reasons, the Commission has determined to tailor the limited exclusion order to allow SK to import unfairly

traded products in order to manufacture EV batteries for the Ford F-150, and not for unannounced vehicles, in SK's Georgia facility for a period of four years.[43]

With respect to VW, given the facts of the investigation as discussed earlier regarding suppliers that have already been approved for the MEB platform by VW, and the close proximity of those dates, the Commission finds that the appropriate tailoring is to allow SK to import components for the domestic production of batteries for VW's MEB vehicles in its Georgia facility for two years from the date of the remedial orders. This will provide VW with sufficient time to begin procuring batteries free of trade-secret misappropriation from LG's Michigan facility (or from another supplier of VW's choosing in the United States that has not benefited from misappropriation of LG's trade secrets).

Having credited Ford's and VW's needs for U.S.-supplied EV batteries, *supra*, and exempted from the order imported components for SK's U.S. battery production as to them for four and two years, the remedial orders will allow Ford and VW the opportunity to transition to alternative domestic suppliers of like or directly competitive EV batteries manufactured in the United States, by LG or others.

We have also determined, based on the record and consistent with past practice,[44] that the limited exclusion order contain an exemption to allow importation of batteries for repair, replacement, and warranty of batteries for the Kia Niro EV and Kia Soul EVs that have been sold

---

[43] The exemptions herein take effect from the date of the issuance of the order and not from the date of the expiration of Presidential review under 19 U.S.C. § 1337(j).

[44] *See, e.g.*, *Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same,* Inv. No. 337-TA-972, USITC Pub. 4927, Comm'n Op. at 24-26 (June 12, 2017); *id.* at 26-27 & n.15 (collecting Commission precedents).

to U.S. consumers as of the date of the Commission's remedial orders.[45] This exemption serves to mitigate public interest concerns of U.S. consumers who have purchased these Kia vehicles, to be able to continue to safely operate their vehicles in the United States. These imported vehicles included SK batteries at the time of importation, and the Commission has determined that the interest of U.S. consumers warrants allowing their vehicles to be serviced using SK batteries.[46]

2. **Other Considerations as to the Form of the Exclusion Order**

LG and OUII submitted proposed limited exclusion orders. OUII submits that the remedial orders should not cover production and testing systems. OUII observes, correctly, that although LG's complaint alleges violations based on the "importation into the United States, sale for importation into the United States, and/or sale within the United States after importation, of certain lithium-ion batteries, battery cells, battery modules, and battery packs, components thereof, and production and testing systems, including equipment for manufacturing same," OUII Remedy Reply 2-3 (quoting Compl. ¶ 1), the "Commission excluded 'production and testing systems from the scope of the investigation," *id.* at 3 (quoting Letter from Lisa Barton, EDIS Doc. ID. 677297 (May 29, 2019)). Both the title of the investigation and the plain English language statement of the products at issue in the Notice of Investigation omit the "production and testing systems." *Id.* (citing 84 Fed. Reg. 25828-29 (June 3, 2019)); *see* 19 C.F.R. § 210.10(b)(1) ("The notice [of investigation] will define the scope of the investigation in such

---

[45] Similar to the SK batteries for the Ford F-150 and VW MEB vehicles, the record demonstrates that the SK batteries in question for the Kia Niro EV and Kia Soul EVs are specifically designed for those vehicles and there are no substitute batteries available to consumers. SK Remedy Br. at 41. LG does not object to such an exemption. LG Reply Br. at 14.

[46] We note that LG did not propose that the Commission name Kia as a respondent, and thereby would not be entitled to relief that covered imported vehicles that incorporate EV batteries.

plain language as to make explicit what accused products or category of accused products . . . will be the subject of the investigation . . . ."). Accordingly, any relief must be limited to the plain English statement. To the extent that SK has production and testing systems that do not also fall within the plain language statement in the Notice of Investigation, those products will not be subject to the remedial orders.

OUII proposes that the "covered articles" subject to the exclusion order be:

> Lithium-ion batteries, battery cells, battery modules, battery packs, components thereof, and processes therefor, using any of the LG Chem Trade Secrets that are manufactured abroad . . . .

OUII Remedy Br. Ex. A at 2 ¶ 1 (Proposed Limited Exclusion Order). OUII does not explain or support its proposal to bar imports of "processes therefor" here. SK notes that the accused "processes" are not imported articles, but rather processes for manufacturing batteries in the United States. *See* SK Remedy Reply Br. 24. The Commission will not issue relief in this investigation as to "processes therefor." Notably, LG's proposed order does not include "processes therefor." LG Remedy Br. App'x A at 2 ¶ 1 (Proposed Limited Exclusion Order). It is properly limited to the unfair SK imports at issue here:

> Lithium ion batteries, battery cells, battery modules, or battery packs that are manufactured using any of the LG Chem Trade Secrets, and components thereof used to make such lithium ion batteries, battery cells, battery modules, or battery packs . . . .

LG Remedy Br. App'x A at 2 ¶ 1 (Proposed Limited Exclusion Order). LG's proposed language is also clearer than OUII's in that OUII's proposed language suggests that LG's trade secrets "are manufactured abroad." If LG is correct that SK "intends to import the 'vast majority' of the accused specific components for use in the assembly of batteries in the United States," LG Remedy Br. 10-11, such components will generally be subject to exclusion. Only if the component in question is unrelated to any of the specific trade secrets covered by the order

would it not be subject to the order. And given the number and breadth of the trade secrets covered by the order, the Commission expects that most components will be subject to the order. *See id.* (stating that "many of the misappropriated trade secrets, including the BOMs [bills of materials], pertain to highly customized components made specifically for the battery manufacturer to be used to manufacture battery cells, including electrolytes, active materials, CNT [carbon nanotube] slurries, anode and cathode slurries and their constituent elements, conductive additives, foils, packaging, in addition to the cells themselves").

In reply, SK argues that a remedy should be limited to batteries for electric vehicle end use and that no remedy should include "components." SK Remedy Reply Br. at 15-23. The Commission determines that issuing a remedy that does not cover components would be tantamount to declining to issue any remedy at all. The Commission has the authority to proscribe such conduct. *Cisco Sys., Inc. v. Int'l Trade Comm'n*, 873 F.3d 1354, 1362-63 (Fed. Cir. 2017).

Consistent with other trade-secret misappropriation investigations, including such investigations that resulted in a default as a result of spoliation misconduct,[47] the Commission will require that "the importer or Respondent must seek a ruling from the Commission to determine whether articles sought to be imported are covered by this Order." Limited Exclusion Order ¶ 3. In this manner, SK can seek to demonstrate, for example, that it has redesigned its battery technologies in such a manner as not to take advantage of the misappropriated trade secrets. As discussed earlier, SK has asserted that it would take as little as one year to do so. SK

[47] *See Opaque Polymers*, Limited Exclusion Order ¶ 3 (Apr. 17, 2015); *Stainless Steel*, Limited Exclusion Order ¶ 3 (May 25, 2016).

argues that such a requirement is inappropriate because the spoliation here was not as egregious as in *Opaque Polymers*. SK Remedy Reply Br. 25.

The Commission rejects SK's argument for several reasons. The principal purpose of such a provision is that it may be unclear to Customs whether, at the time of importation, the imported articles are subject to the exclusion order. Another purpose is that, having misappropriated trade secrets and having tried to cover up that misappropriation by destroying its records, SK's representations to Customs may be less trustworthy than by respondents in other cases. Finally, *Opaque Polymers* does not set the floor for the propriety of a certification provision requiring presentation to the Commission. Comparisons of malfeasance are unnecessary to require certification based on a Commission determination that SK has independently developed its own battery technology without the benefit of LG's trade secrets. Moreover, even under the comparison that SK urges, the Commission notes that SK's misconduct here is sufficiently egregious to warrant this provision.

SK believes that LG overreaches with its request for presentation of articles to the Commission, which purports to require anyone importing components for SK to present the articles to the Commission. LG Remedy Br. App'x A at 3 ¶ 3 ("Prior to the importation of lithium ion batteries, battery cells, battery modules, battery packs, and components thereof that may be subject to this Order, *the importer or* Respondent must seek a ruling from the Commission . . . ."); SK Remedy Reply Br. 26. The Commission's provision in this investigation does not include "the importer or." It is incumbent on SK—not third parties—to present the articles for adjudication to the Commission, and if products are imported on SK's behalf, including if such products are specially customized so that only SK can use them, importation may be attributed to SK. *See Comcast*, 951 F.3d at 1309. Should SK fail to do so,

SK, as opposed to SK's component suppliers, may then be subject to civil penalties for violation of the cease and desist orders discussed, *infra*.

Finally, the Commission notes that its remedial orders include "entry into a bonded warehouse or foreign trade zone ["FTZ"]" among the types of forbidden entries. The Commission has determined that inclusion of these entries, in addition to consumption entries, is necessary to avoid circumvention in view of the Commission's time-limited exemptions for the Ford F-150 and VW MEB NAR programs. By including such entries within the scope of the exclusion order here, the order prevents the possibility that SK's imports could escape the limited exclusion order if SK's Georgia plant or other U.S. properties are designated as FTZs or if bonded warehouses are used in conjunction with SK's business operations.

C. Cease and Desist Orders

Under section 337(f)(1), the Commission has the discretion to issue a cease and desist order in "addition to, or in lieu of" an exclusion order, and upon consideration of the effect of such an order upon the statutory public interest factors. 19 U.S.C. § 1337(f)(1). Cease and desist orders are generally issued when, with respect to the unfair imports, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order.[48] *See, e.g.*, *Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Comm'n Op. at 4-6 (Feb. 1, 2017) (public version) ("*Table Saws*"); *Certain Protective*

---

[48] The Commissioners have adopted different approaches to analyze when it is appropriate to issue cease and desist orders. In particular, Commissioner Schmidtlein has explained that she does not believe that a commercially significant inventory is a prerequisite for obtaining a cease and desist order, as explained, for example, in *Table Saws*, Comm'n Op. at 6-7 n. 2. There is no disagreement in the present investigation, however, as to the appropriateness of the issuance of a cease and desist order.

Cases and Components Thereof, Inv. No. 337-TA-780, Comm'n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. at 22 (June 14, 2007)).

LG seeks the issuance of cease and desist orders against both SK respondents. LG Remedy Br. at 21. The Commission concludes that cease and desist orders are appropriate. As the Commission explained in *Stainless Steel*, a "complainant seeking a cease and desist order must demonstrate, based on the record, that this remedy is necessary to address the violation found in the investigation so as not to undercut the relief provided by the exclusion order." *Stainless Steel*, Comm'n Op. at 40.

The Commission has found, that in "investigations in which a domestic respondent is found in default, the Commission presumes the presence of commercially significant inventories in the United States to warrant a cease and desist order." *Stainless Steel*, Comm'n Op. 41. SK Battery America, Inc. ("SKBA") is a defaulting domestic respondent here, and, thus, a cease and desist order is warranted against it.

The Commission determines that a cease and desist order also issue to SK Innovation Co., Ltd. ("SKIC"), which controls SK Battery America, Inc. ("SKBA"), and which directed the destruction of documents, as well as the deletion of the email that ordered the destruction of documents. *See* Order No. 34 at 46-47, 94, 117. The record shows (and it appears to be undisputed) that SKIC has actively engaged in promoting sales of its unfair imports in the United States, to Ford and VW among others, thus showing it has significant business operations in the United States. *See, e.g., id.* at 114, 117. For example, SKIC negotiated directly with both Ford

and VW to supply those automakers with batteries in the United States.[49] Indeed, SKBA did not even exist until at least November 2018.[50] SKIC directed the construction of the SKBA Georgia plant that would utilize components to be imported from SKIC. *See, e.g.*, ID at 26. It appears to be undisputed that SKIC continues to direct the activities of its wholly-owned subsidiary SKBA in connection with supplying Ford and VW, the agreements concerning which are SKIC's and not SKBA's. Where, as here, the foreign respondent directs and controls U.S. business operations concerning importation or sales of imports that use misappropriated trade secrets in the United States, a CDO directed to that respondent is appropriate. *See Certain Cast Steel Railway Wheels*, Inv. No. 337-TA-655, Comm'n Op. at 9 n.3 (citations omitted) (issuing cease and desist orders against foreign Tianrui respondents, which set up a joint venture in the United States with a domestic respondent "for the purpose of selling the accused cast steel railway wheels."), *aff'd, TianRui Grp. Co. Ltd. v. Int'l Trade Comm'n,* 661 F.3d 1322 (Fed. Cir. 2011). The Commission determines based on the roles and relationship between the two SK

[49] *E.g.*, **[[** **REDACTED** **]]** (SK00992355-79); **[[** **REDACTED** **]]** (SK00992380-89); **[[** **REDACTED** **]]** (SK00728339-41); **[[** **REDACTED** **]]** (SK728335-38). These agreements were appended as Exs. 7-9 to Respondents' Mot. for Summ. Determination of No Violation of Section 337 Based on the Absence of Existing or Threatened Substantial Injury Attributable to Unfair Imports (Dec. 17, 2019) (EDIS Doc. ID 697506). On November 3, 2020, after the Commission requested that the parties jointly file on EDIS the pertinent contracts between SK and Ford and Volkswagen, the parties jointly responded that there was nothing further to file beyond Exs. 7-9 above already in the administrative record.

[50] Complainants LG Chem, Ltd. and LG Chem Michigan Inc/'s Mot. for Default Judgment, Contempt, and Sanctions (Nov. 5, 2019) (EDIS Doc. ID 693365) at Ex. 88 (SKBA Georgia registration), Ex. 89 (SKVA Delaware registration); *see also* Resp., of SK Innovation Co., Ltd. & SK Battery Am., Inc. to the Compl. & Notice of Investigation ¶ 26 (Apr. 29, 2019) (EDIS Doc. ID 674347) ("SKI admits that SKBA was incorporated in Delaware on or about February 26, 2019").

respondents, as well as the rampant spoliation and trade secret misappropriation at issue, that an effective remedy must include cease and desist orders against both respondents.

LG and OUII each submitted proposed cease and desist orders. LG asks for the cease and desist orders to cover "the domestic sale and distribution of domestically made and assembled batteries that incorporate the Accused Components and Processes." LG Remedy Br. 20. LG also asks "that the Commission (i) confirm that its standard CDO language prohibits SKI's domestic manufacture of covered products using LG Chem's misappropriated trade secrets or (ii) adopt LG Chem's proposed CDO, which expressly prohibits such conduct." *Id.* at 26. LG asserts that precluding such domestic production "is necessary to prevent SKI from evading the Commission's remedial relief." *Id.* at 24.

In LG's parlance, a "covered product" is a battery, battery pack or the like, and a "covered component" means "components used in the manufacture or assembly of covered products." LG Remedy Br. App'x B ¶ 1(I)-(J) (Proposed Cease and Desist Order). "Covered processes" are "processes or methods developed using LG Chem's misappropriated trade secrets and/or utilized in the manufacture of covered products." *Id.* ¶ 1(K). LG's list of proscriptions from its proposed remedial order is set forth in the left column; OUII's in the right (with OUII's proscriptions lined up with LG's counterpart):

LG's Proposed Cease and Desist Order	**OUII's Proposed Cease and Desist Order**
(A) import or sell for importation into the United States covered products; (B) import or sell for importation into the United States covered components; (C) manufacture or assemble in the United States covered products;	(A) import or sell for importation into the United States covered products;

<table>
<tr>
<td>(D) utilize covered components in the United States for the manufacture or assembly of covered products;

(E) utilize covered processes in the United States for the manufacture or assembly of covered products;

(F) advertise imported covered products;

(G) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation) in the United States any covered products;

(H) solicit U.S. agents or distributors for imported covered products;

(I) solicit U.S. agents or distributors for imported covered components; and/or

(J) aid or abet other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of covered products.</td>
<td>(C) advertise imported covered products;

(B) market, distribute, sell, or otherwise transfer (except for exportation) imported covered products;

(D) solicit U.S. agents or distributors for imported covered products; or

(E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.</td>
</tr>
</table>

LG’s (B) and (I) proscriptions have no counterpart in OUII’s proposed cease and desist order because OUII does not cleave “components” from “products.” Put differently, LG’s (B) and (I) proscriptions fall within OUII’s (A) and (D). LG’s (C)-(E) are in addition to what OUII has proposed.

A cease and desist order can cover domestic conduct incidental to the importation of unfair imports. *See Certain Hardware Logic Emulation Systems and Components Thereof*, USITC Pub. 3089, Comm’n Op. on Remedy, the Public Interest, and Bonding at 27 (Mar. 1, 1998) (“Our remedial authority extends to the prohibition of all acts reasonably related to the importation of infringing products and is not limited to articles that directly infringe a United States patent.”). LG provides no evidence to establish that LG’s (C) and (E) proscriptions are reasonably related to importation of the unfair imports at issue here. LG’s (D) proscription

involves components, but makes no distinction between whether those components are imported or not.

Citing district court remedies, LG contends that a "production injunction" encompassing (C)-(E) is appropriate. LG Remedy Br. 20. But none of the Commission trade-secret investigations LG cites involve domestic production. *Id.* And LG has not established that simply because a district court may enjoin domestic conduct, *id.* at 20, that these decisions control the statutory remedy of a cease and desist order under section 337(f)(1), especially in the absence of showing a closer relationship to importation of the unfair imports here. LG's paragraphs (C)-(E) are not incidental to any acts of importation, and the Commission will not include them within the cease and desist orders here.

OUII's proposed cease and desist order proposes:

> The term "covered products" shall mean lithium-ion batteries, battery cells, battery modules, battery packs, components thereof, and processes therefor, manufactured by or on behalf of Respondents using any of the LG Chem Trade Secrets."

OUII Remedy Br. Ex. 2 ¶ 1(H) (Proposed Cease and Desist Order). As discussed above, the Commission determined not to include "processes therefor" in the "covered articles" for the limited exclusion order, and the Commission likewise does not include "processes therefor" in the "covered products" of the cease and desist orders. LG has failed to demonstrate in this investigation that the "processes therefor" are appropriate for inclusion in the CDOs.

The Commission has determined, consistent with prior practice and the analysis of the statutory public interest factors (as discussed above with respect to the limited exclusion order), that the duration of the cease and desist orders will be the same as for the exclusion order, and that the same exemptions for the limited exclusion order as to Ford, VW, and Kia, should apply to the cease and desist orders.

D. Bonding

During the period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3). 19 U.S.C. § 1337(j)(3). The amount of bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.* "The Commission typically sets the bond based on the price differential between the imported infringing product and the domestic industry article or based on a reasonable royalty. However, where the available pricing or royalty information is inadequate, the bond may be set at one hundred (100) percent of the entered value of the infringing product." *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, USITC Pub. 4871, Comm'n Op. at 19 (June 26, 2015) (citations omitted).

OUII asserts that there "is insufficient evidence to reliably determine a bond amount based on either price differential or a royalty determination" and that a one hundred percent (100%) bond is warranted. OUII Remedy Reply Br. at 22. LG agrees. LG Remedy Br. at 26-29. SK contends that no "bond is needed to protect LG from injury during the Presidential review period because LGC has not shown any lost sales, lost profits, lost royalty income, or any other injury that would be caused by SK's importation or sale of accused products during the Presidential review period." SK Remedy Br. at 48; *see also* SK Remedy Reply Br. 37-38. That argument, however, reframes the issue of bonding during the period of Presidential review with arguments SK made concerning injury to the domestic industry on which SK defaulted. In the alternative, SK requests a four-percent bond, corresponding to what SK contends would be a reasonable royalty, based on, apparently, an unconsummated business partnership between LG and VW. SK Remedy Br. 49; *see also* SK Remedy Reply Br. 39. In reply, LG argues that no

reliable record exists on price differential because SK is presumed to have destroyed documents that would have made those comparisons. LG Remedy Reply Br. 21.

The Commission agrees with LG and OUII. This case is unlike *Stainless Steel*, for example, which involved default, but dealt with commodities with adequate evidence of price differential in the record. *Stainless Steel*, Comm'n Op. 51-55. Nor were the documents that would have demonstrated price differential subject to spoliation in *Stainless Steel*; the documents there involved the trade secrets, while the documents here include the trade secrets as well as any documents referencing LG. Moreover, the Commission notes that SK's belief that it would have few products subject to the bond,[51] does not provide evidence from which an appropriate bond may be calculated. Accordingly, the Commission has determined to set the amount of bond during the period of Presidential review to one hundred percent (100%) of the entered value of the subject articles.

V. OTHER PENDING MOTIONS

SK, Ford, and Volkswagen each ask the Commission to conduct a hearing on remedy and the public interest. None of those parties explains what information it has been prevented from presenting, and how a hearing would benefit the Commission and the public. SK's elaboration—its motion for a hearing—is the most extensive, at two pages. SK argues that relief sought by LG in this case would be unprecedented as to domestic operations, and that Commission precedent precludes awarding such relief. SK Hr'g Mot. 2. The motion also points out that persons who filed submissions might have an opportunity to be heard, and SK cites the EDIS numbers of all the submissions, including the form submissions by Ford's suppliers. *Id.* at 1-2. But nowhere

[51] This bond does not apply to articles exempted from the remedial orders for Ford, VW, and Kia discussed in detail herein.

does SK explain what evidence or argument has not been submitted but which ought to be heard in further proceedings. LG opposes such further proceedings, and the Commission agrees, based the party and non-party submissions, that no further proceedings are warranted. The Commission has been mindful of the public interest submissions, especially those of Ford and VW, and has fashioned its relief accordingly. Accordingly, the Commission declines to conduct a hearing.

On June 26, 2020, LG filed a motion for leave to file a supplemental submission on remedy, the public interest and bonding. EDIS Doc. ID 713494. On July 8, 2020, SK opposed the motion. EDIS Doc. ID 714176. LG's supplemental submission informs the Commission that on May 29, 2020, Customs "intercepted 33 Korean nationals who were entering the United States with fraudulent employment papers, with the goal of working on the construction of Respondent's Georgia facility." LG Supp. Sub. at 1-2. LG asserts that this further demonstrates that SK cannot be trusted, and underscores LG's request that SK obtain a ruling from the Commission (as in the *Opaque Polymers* and *Stainless Steel* exclusion orders) prior to the importation of any accused batteries or components. *Id.* at 3. SK's opposition states that this is a Customs matter, not a Commission matter, involves SK's contractors rather than itself, and is irrelevant.

On July 13, 2020, SK filed a notice of new developments related to issues raised in remedy and bonding briefing. EDIS Doc. ID 714468. On July 23, 2020, LG filed a response. EDIS Doc. ID 715492. On July 28, 2020, SK filed a motion for leave to file a reply in support of the notice of new developments. EDIS Doc. ID 715888. SK's notice states that although construction of its plant had been delayed by COVID, construction "has now progressed to the point where that plant expects to engage in pre-production testing of manufacturing equipment

and sample (‘pre-run’) cell production, which are standard parts of the plant commissioning process.” SK Notice at 2. SK states that the products to be imported within 60 days include “battery cells required for equipment testing, as well as a variety of input materials needed to manufacture pre-run cells at SKBA.” *Id.* at 3. SK contends that, notwithstanding such admitted importations, that LG “[f]ailed to make out a prima facie case for reaching imported inputs” in the investigation. *Id.* SK also states that it has determined to increase its investment in the Georgia plant “by nearly” $1 billion, “bringing its total commitment to $2.58 billion.” *Id.* at 4. LG’s response calls out numerous SK statements in the investigation that importation of components was not likely to occur, LG Resp. at 2, and accuses SK of misleading the Commission on such matters of importation, *id.* at 3. In reply, SK contends that nothing was hidden, and that it should not be faulted for its voluntary disclosure. SK Reply at 4.

The Commission has determined to grant the motions for leave to file these submissions (LG’s opening submission and the reply, and SK’s reply). That said, LG’s submission concerning the Korean nationals’ immigration papers is too far afield of this investigation to be pertinent to the issues adjudicated here. SK’s submission concerning its importation of components, however, further demonstrates the propriety of the remedial orders issued here.

On September 1, 2020, LG filed a notice of supplemental facts that included an August 26, 2020, letter from Representative Doug Collins of Georgia (who submitted a letter to the Commission in support of SK on April 29, 2020) to U.S. Immigrations and Customs Enforcement (“ICE”). EDIS Doc. ID 718601. The letter explains the Georgia Congressional delegation’s support of SK, and the jobs to Georgians that SK promised, and exasperation at SK’s “large-scale, ongoing effort to subvert United States immigration laws in an effort to illegally employ [hundreds of] Korean foreign nationals at the SK battery construction site in

Commerce, Georgia." Letter at 1. Representative Collins urged ICE to "suspend visas for any SK employee traveling to Georgia from any part of the world until this matter is resolved," and in a confidential addendum, provided a list of locations where some of the illegal workers were living. *Id.* at 2. No further action is required on the immigration matters. They are properly before ICE.

On November 25, 2020, SK filed a motion for leave to file a supplemental submission in connection with remedy and the public interest. EDIS Doc. ID 726460. The submission noted automakers' recalls of certain automobiles containing LG batteries. *Id.* at 2-3. SK's submission provides attorney argument alleging that its batteries are safer than LG's. *Id.* at 5-6. On December 2, 2020, LG opposed the motion, arguing that SK's submission was both tardy and irrelevant. EDIS Doc. ID 726955 at 1. The Commission has determined to grant SK's motion for leave to file. Having accepted SK's submission, the Commission agrees with LG that it is irrelevant. SK has failed to demonstrate that its batteries are safer than LG's. Moreover, SK's submission does not implicate batteries produced by LG in the United States, which are LG's potential substitutes for SK's batteries at issue here.[52]

VI. CONCLUSION

The Commission finds a violation of section 337 based upon the importation into the United States, the sale for importation, or the sale within the United States after importation of articles misappropriating trade secret numbers 2, 8, 31, 33, 60, 66, 80, 81, 84, 94, 95, 96, 97, 117, 119, 124, 138, 139, 144, 145, 146, and 147 in Complainants' Final Trade Secret Disclosure (Oct. 7, 2019). The Commission has determined that the appropriate remedy is the limited exclusion

[52] Nor does SK's submission implicate LG's batteries currently produced overseas for VW vehicles sold outside the United States.

order and cease and desist orders discussed above and that these tailored orders would not adversely affect the statutory public interest considerations. The Commission has further determined that the bond amount during the period of Presidential review should be one hundred percent (100%) of the entered value of the imported lithium ion batteries, battery cells, battery modules, battery packs, and components thereof subject to the exclusion order and cease and desist orders.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 4, 2021

CERTAIN LITHIUM ION BATTERIES, BATTERY CELLS, BATTERY MODULES, BATTERY PACKS, COMPONENTS THEREOF, AND PROCESSES THEREFOR **Inv. No. 337-TA-1159**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **OPINION, COMMISSION** has been served via EDIS upon the Commission Investigative Attorney, **Claire Comfort**, and the following parties as indicated, on **March 4, 2021.**

Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants LG Chem, Ltd. and LG Chem Michigan, Inc.:

Bert C. Reiser, Esq.
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
Email: bert.reiser@lw.com

☐ Via Hand Delivery
☐ Via Express Delivery
☐ Via First Class Mail
☒ Other: Email Notification of Availability to Download

On Behalf of Respondents SK Innovation Co., Ltd. and SK Battery America, Inc.:

Sturgis M. Sobin, Esq.
COVINGTON & BURLING LLP
One City Center
850 Tenth Street, NW
Washington, DC 20001
Email: ssobin@cov.com

☐ Via Hand Delivery
☐ Via Express Delivery
☐ Via First Class Mail
☒ Other: Email Notification of Availability to Download