

ITC Complainant Throws a Wrinkle in Korean Pharmaceutical's Bid to Introduce New Botox Product into the U.S.

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On February 28, 2019, United States International Trade Commission (ITC) instituted an investigation into the botulinum toxin (BTX) products of Korean drug-maker Daewoong Pharmaceuticals Co., Ltd. (Daewoong) and its California-based exclusive licensee, Evolus, Inc. The complaint was filed by Korean rival Medytox Inc., alongside Allergan entities in California and Ireland, alleging that Daewoong's DWP-450, a biosimilar for BOTOX® was a product of stolen trade secrets.

Allergan is the manufacturer of the leading botulinum toxin product, BOTOX®, which accounted for \$3.2 billion in 2017 revenue. Allergan is also exclusively licensed by Medytox to market and distribute Medytox's BTX product MT10109L in the U.S. The complainants allege that a former Medytox researcher, BK Lee, printed out and emailed various confidential company reports, batch records, and underlying test data to his personal email account, and took test samples of the toxin strain with him in a vial before he left Medytox's labs in mid-2008.

Lee reportedly began consulting for Daewoong as early as 2010, and was paid at least \$110,000 by Daewoong for his services. The complainants allege that Lee improperly shared stolen trade secrets with Daewoong, which enabled the company to fast-track through years of research. Interestingly for a case pending in the United States, the alleged theft between the Korean competitors appears to have taken place outside the U.S. The ITC action comes after Medytox's Indiana State Court misappropriation claims against Lee were dismissed for *forum non conveniens* as to his conduct in Korea, and stayed as to the remaining claims grounded in conduct occurring in Indiana, pending the outcome of the parallel civil suit in Seoul. Analogously, Medytox's California state court case against Daewoong was dismissed on *forum non conveniens* grounds, and stayed as the remaining claims against Evolus, also pending outcome of the Korean lawsuit. Lee and Daewoong are also the subjects of an ongoing criminal investigation in Korea.

TIP: This case highlights the complex litigation avenues available in circumstances where trade secrets are alleged to have been stolen. While trade secret cases are typical in criminal, federal, and state courts in the U.S. and in Asia, the use of the ITC's jurisdiction over imports derived from misappropriated trade secrets is an underutilized but trending forum in which to address even extraterritorial conduct.

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