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INTERNATIONAL TRADE COMMISSION UPDATES

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Eric chairs the firm's practice before the ITC, and he is the leader of the Washington, DC IP group. Eric has litigated nearly 100 ITC cases, including more than two dozen that have gone through trial. He has logged hundreds of hours of in-court time before all of the sitting ALJs and Commissioners. *Global Intellectual Property* magazine has noted that Eric has "an absolute command of the relevant technology" and "the ability to explain complicated science in a straightforward, simplified manner." *Legal 500* describes Eric as "a superstar IP lawyer and well respected by the staff at the ITC." He is currently president of the ITC Trial Lawyers Association.

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Stephanie's practice focuses on IP litigation with an emphasis on Section 337 investigations before the ITC. She has represented complainants, respondents, and third parties in numerous ITC investigations involving a wide array of technologies and various claims, including patent infringement, trade secret misappropriation, trademark infringement, and unfair competition. Stephanie also routinely represents clients in district court litigation involving a range of claims, including patent infringement, trademark infringement, copyright infringement, and trade secret misappropriation.

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Jitsuro devotes his practice to resolving complex global disputes mainly in the areas of intellectual property, antitrust, and governmental investigations. He has advised clients in a wide range of disputes surrounding technologies (i.e. wireless communication, digital imaging, semiconductor, medical devices, pharmaceuticals, automobile parts, etc.) and has more than 15 years of experience litigating before US district courts, international arbitration centers, and at the ITC. Early in his career, Jitsuro worked in-house for two global technology companies, Pioneer Corporation and Fujifilm Corporation, bringing unique expertise to advocate using profound understanding of Japanese company cultures.

The ALJs



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The Administrative Law Judges (ALJs)



Clark S. Cheney
Chief ALJ
(sitting since 2018,
Chief since 2022)



Monica Bhattacharyya
(sitting since 2021)



MaryJoan McNamara
(sitting since 2015)



Cameron Elliot
(sitting since 2019)



Brian Moore
(sitting since 2022)

- ALJ Bhattacharyya was an IP attorney for 12 years in private practice, then served as a Staff attorney for 9 years.
- ALJ Moore was an IP attorney before working as a Staff attorney for 7 years. He then went to the USPTO for 10 years where he served as an Administrative Patent Judge at the Patent and Trial Appeal Board.



Procedures During Covid and the Current Landscape

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Covid Procedures vs. Current Landscape

- Covid Procedures
 - Fully Remote
 - All hearings/teleconferences were held via WebEx
 - All filings were electronic
- Current Landscape
 - ALJs have the discretion whether to hold hearings live or via WebEx
 - Judge Cheney issued an order on January 23, 2023 requiring in person attendance at a *Markman* hearing (337-TA-1328) or face waiver of right to contest any issue scheduled for discussion
 - Filings are still electronic, certain ALJs are requesting paper copies of filings/exhibits

NEXT program



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NEXT Program

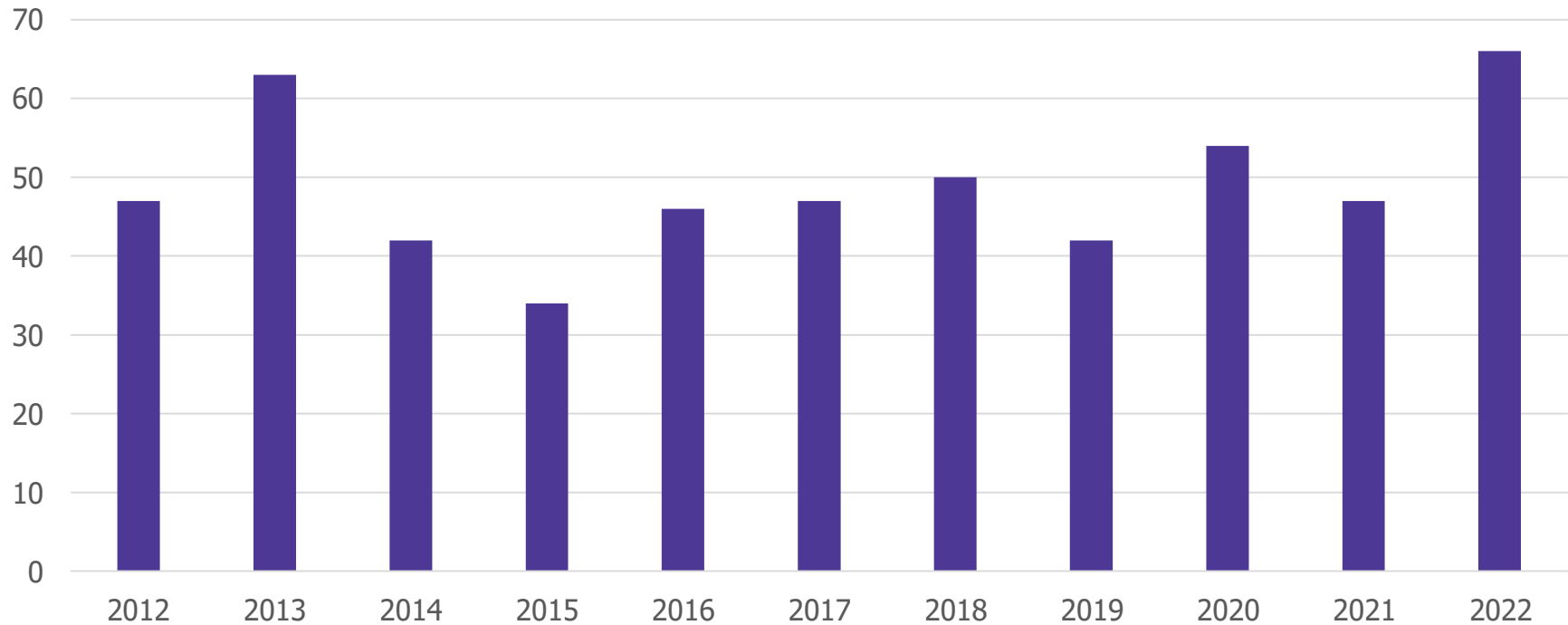
- Initiated by Chief Judge Cheney
- Designed for lawyers who have had three or fewer substantive oral arguments or witness examinations in any federal tribunal
- Under this program, the ALJs will:
 - Give additional time for younger attorneys to participate in oral argument or examine attorneys
 - Entertain requests for arguments on motions that normally are not argued in front of the ALJ if a younger attorney will argue the motion
 - Permit a more-experienced attorney to assist the younger attorney

ITC Trends

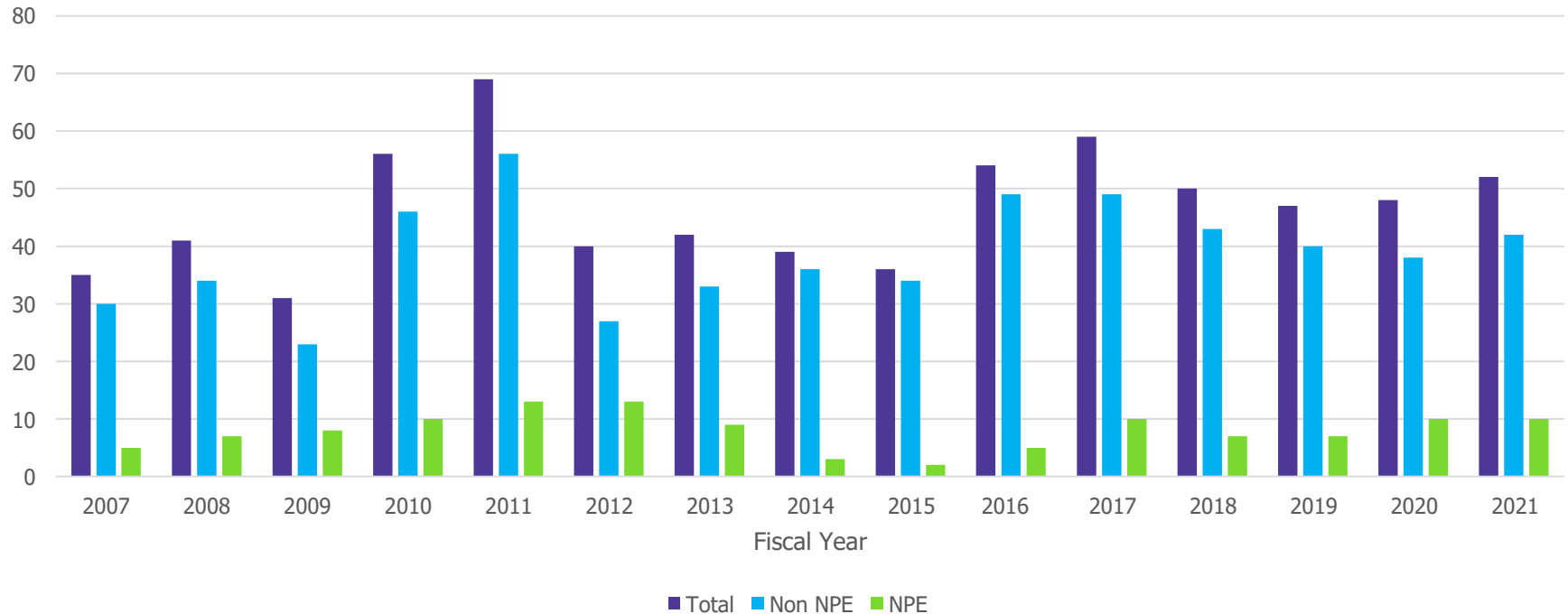
A photograph of a modern building's glass and metal facade at dusk. The building features a grid of dark metal frames and large glass panels. A prominent curved architectural element is visible on the right side. The sky is a deep blue, and the overall scene is illuminated by ambient light, creating a sleek and futuristic appearance.

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Number of Investigations (Fiscal Year)

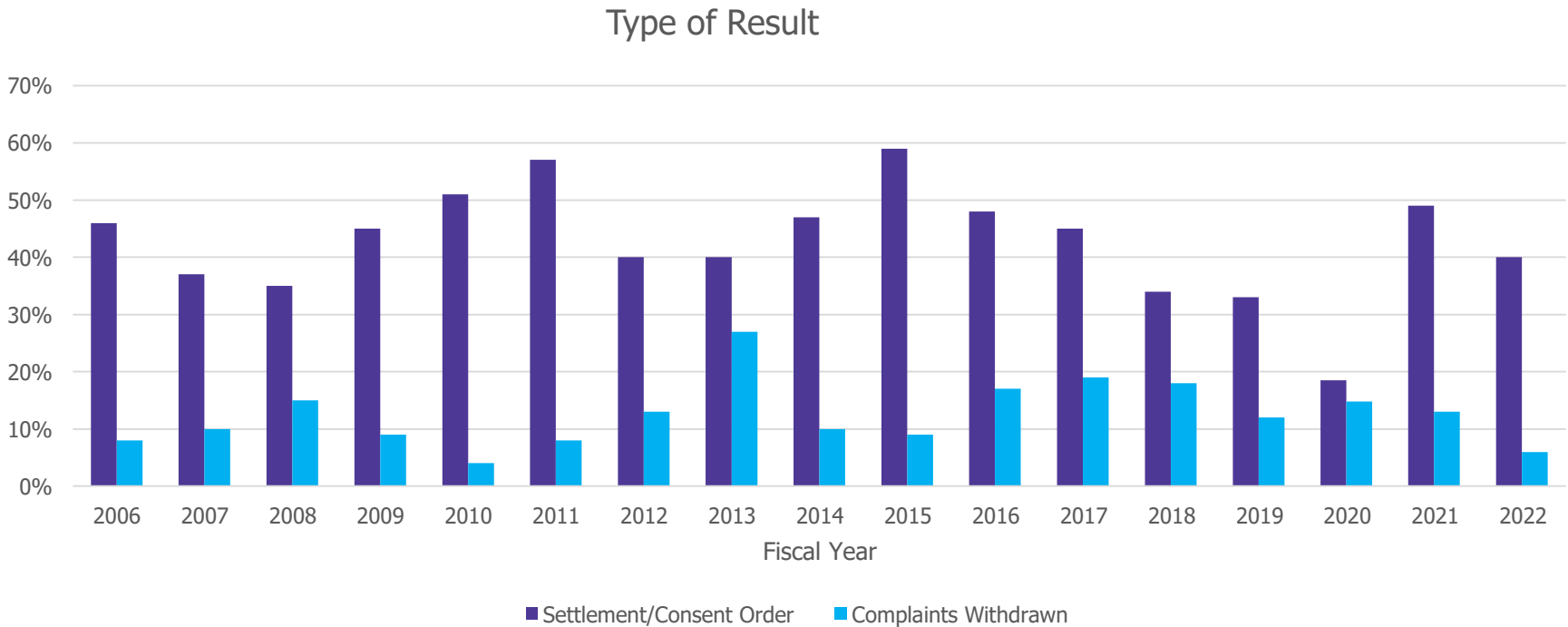


Cases Filed by NPEs

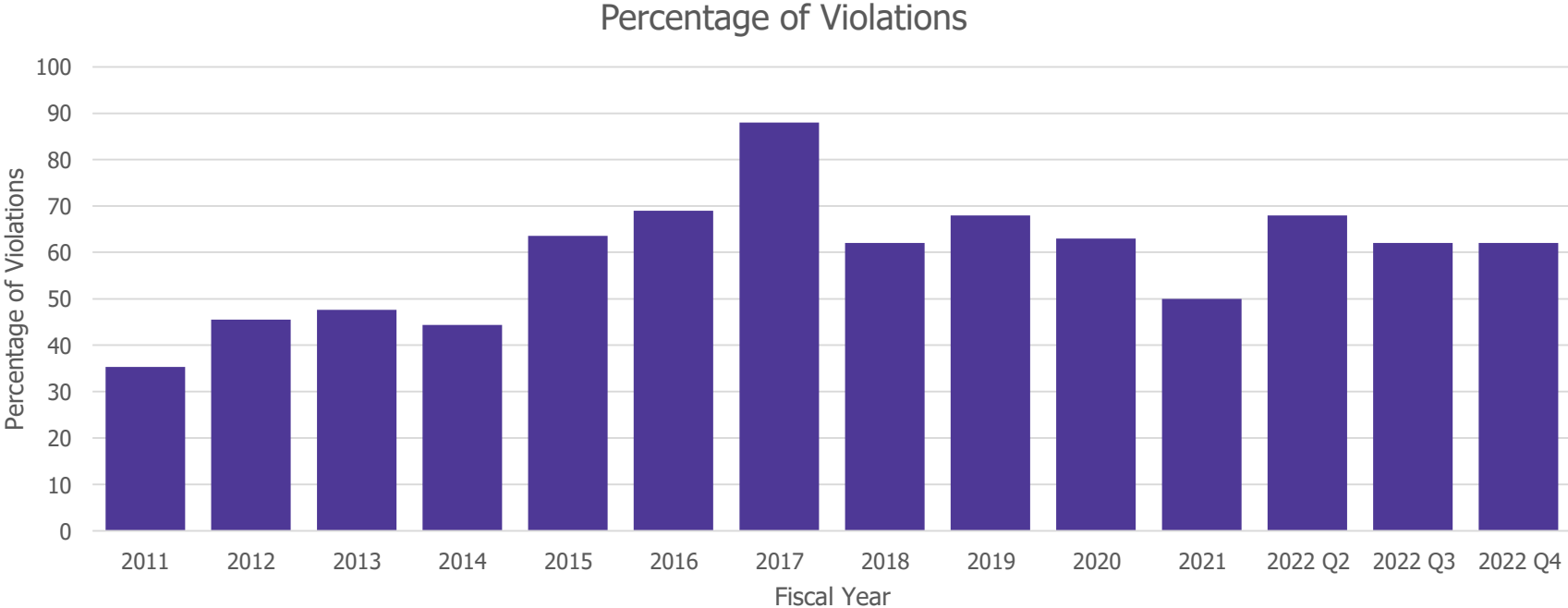


- 2006: NPE lawsuits made up 19% of all patent cases in the U.S.
- 2021: NPE lawsuits made up 87% of all patent cases in the U.S.

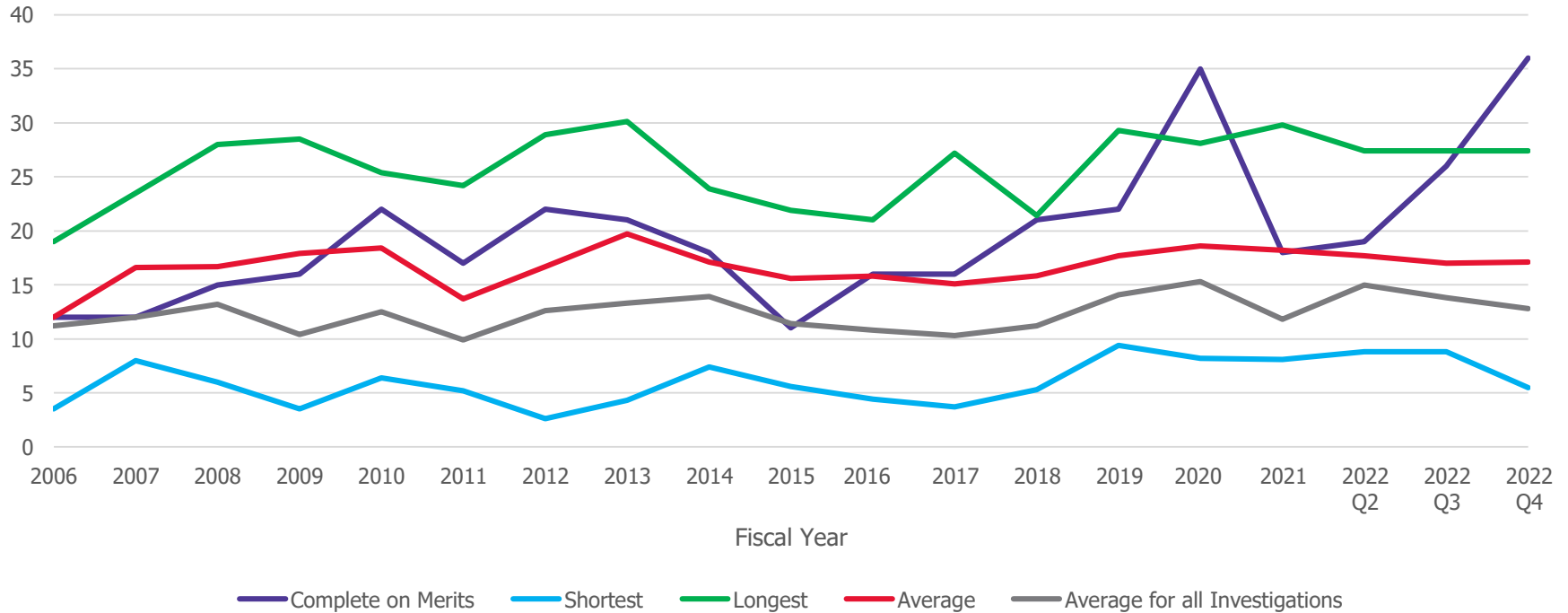
Settlements, Consent Orders, and Complaint Withdrawals



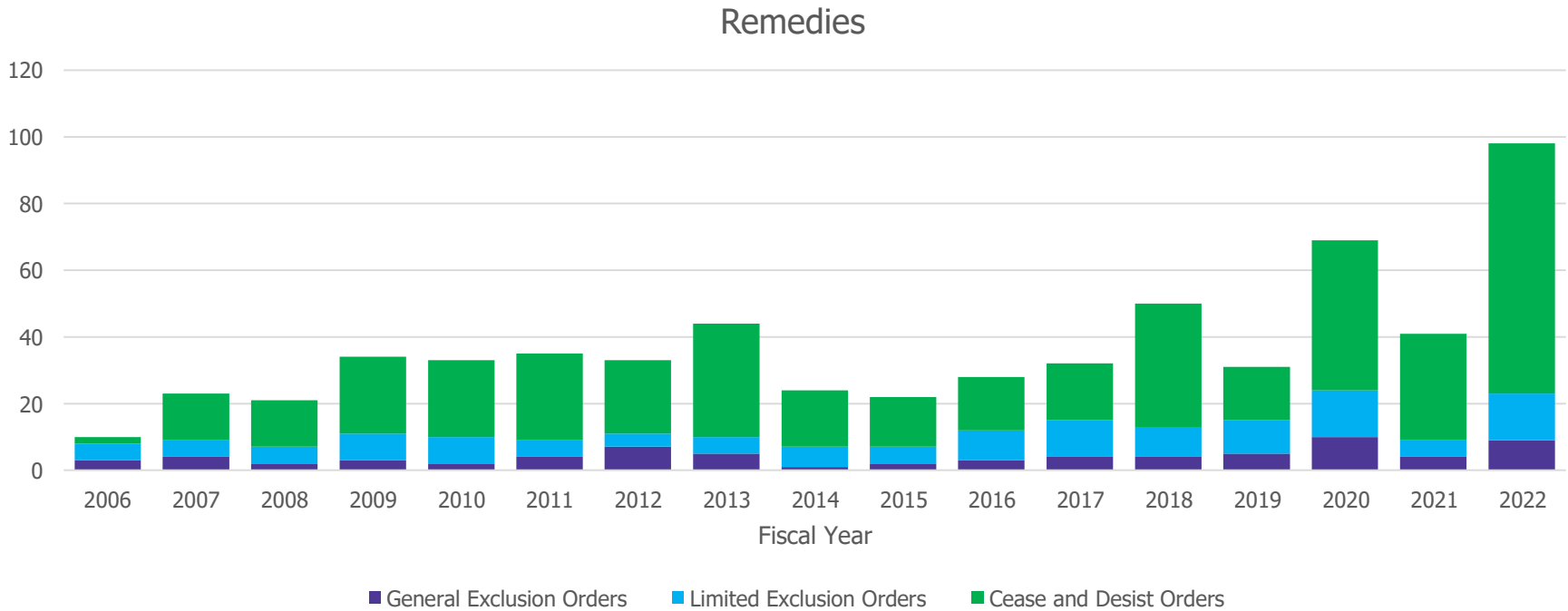
Violations Found



Length of Investigation



Types of Remedies



Delegation of Public Interest

- Since 2010 the Commission has delegated public interest in 127 Investigations
- In FY 2021, the Commission delegated public interest in 16% of the new Investigations

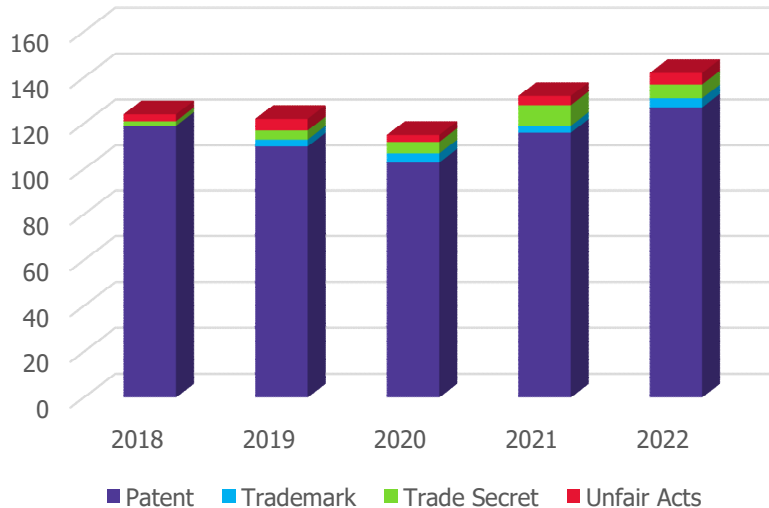


Recent Developments in Trade Secret Litigation

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Types of Cases at the ITC

Types of ITC Cases



	Patent	Trademark	Trade Secret	Unfair Acts
2018	119	0	2	3
2019	110	3	4	5
2020	103	4	5	3
2021	116	3	9	4
2022	127	4	6	5

Commission Decisions

Certain Botulinum Toxin Products, Processes for Manufacturing or Relating to Same and Certain Products Containing Same, Inv. No. 337-TA-1145

- The Commission has jurisdiction over foreign conduct (*e.g.*, trade secret misappropriation) if the importation of the accused products injures a domestic industry
- For standing, only one complainant—not every complainant—has to be the owner or exclusive licensee of the subject intellectual property
- For domestic industry, the complainant's investments in the United States were significant based on the contribution to the overall product and the share of R&D that was performed in the United States
- Injury to the domestic industry based on lost sales and price erosion

Commission Decisions

Certain Bone Cements, Components Thereof and Products Containing the Same, Inv. No. 337-TA-1153

- The Commission held that it has traditionally considered the “nature and significance” of a complainant’s domestic industry
- To determine whether a domestic industry exists, the Commission looks at whether the investments are more than that of a mere importer and, and whether they are sufficient to establish a domestic industry
 - Comparison of US and foreign investments or conducting a value-add analysis

Commission Decisions

Certain Foodservice Equipment and Components Thereof, Inv. No. 337-TA-1166

- The initial determination (ID) terminated the investigation on summary determination based on Complainants' failure to establish a substantial injury to their alleged domestic industry stating Complainants failed to identify a specific injury or threatened injury to the domestic industry
- The Commission agreed that the statute requires a link between the injury and the domestic industry, but found that injury could be shown by either direct evidence or by showing lost sales and diminished profits that have an inference that such injury will have the effect of substantially harming the domestic industry
- The Commission reversed and remanded the investigation to the ALJ
- On remand, the ALJ found that there was no domestic industry. The Commission reviewed and concluded that there was no domestic industry, and thus, no injury to a domestic industry.

Commission Decisions

Certain Lithium Ion Batteries, Battery Cells, Battery Modules, Battery Packs, Components Thereof, and Processes Thereof, Inv. No. 337-TA-1159

- The ID found Respondent SKI in default, noting that SKI had a duty to preserve certain documents but actively and passively destroyed documents subject to preservation
- The Commission agreed, finding that SKI's failure to comply with a discovery order "demonstrates flagrant bad faith and shows a callous disregard for its obligations as a party to this section 337 investigation to preserve evidence relevant to [Complainant LGC's] claim of a section 337 violation"
 - Example: On April 8, 2019, an employee sent an email to the team leaders telling the employees to delete documents that may "potentially trigger unnecessary understanding"
- The Commission found that LGC demonstrated that the destroyed files likely (plausible, concrete suggestions) contained information regarding SKI's misappropriation of LGC's trade secrets, the value of those trade secrets to SKI, and SKI's use of those trade secrets



The 100-Day Program

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100-Day Proceedings at the ITC

- The 100-Day Proceedings were introduced as a pilot program in 2013 and codified in the Commission Rules in July 2018
- The Rule allows the Commission to order, *sua sponte*, or, in certain instances, at the request of the parties, the ALJ to hold a hearing and issue a ruling on certain case dispositive issues within 100 days of institution of the investigation
- These proceedings have been utilized in 12 investigations
 - Most commonly involve domestic industry, but have also addressed standing, Section 101 invalidity, injury, and contract defenses
- Common reasons for denial include that the issue was not dispositive of the entire investigation, the issue was too complex, and the complaint was withdrawn

Early Disposition Pilot Program

- ALJs can issue interim initial determinations (on fewer than all issues)
 - Evidentiary hearing can be held on one or more discrete issues
 - Such as: infringement, patent invalidity, patent eligibility, standing, domestic industry
 - ID will be issued, which is subject to petitions for review, and Commission review
 - Expected to resolve case-dispositive issues or resolve significant issues in advance of the hearing
 - ALJ may (at his/her discretion) suspend the procedural schedule, including discovery, on the remaining issues
 - Parameters:
 - Interim ID must be issued no later than 45 days before the main hearing
 - Petitions for review are due 8 calendar days after the interim ID; responses due 5 business days later
 - Commission will determine whether to review within 45 days of issuance of the interim ID and resolve any review within another 45 days (but it can extend for good cause)
 - Pilot program will be reviewed after 2 years
 - Has been requested (and denied 3 times)



Effects of PTAB Proceedings at the ITC

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PTAB Denial of Institution

- 35 U.S.C. § 314(a) provides that an IPR may not be instituted unless the petition “shows there is a reasonable likelihood that the petitioner would prevail with respect to at least one of the claims challenged in the petition”
- *Mylan Laboratories Ltd. v. Janssen Pharmaceuticals N.V.*, No. 21-1071 (Fed. Cir.)
 - PTAB has complete discretion
 - Appellate review is only possible when there are “colorable constitutional claims”
 - Very unlikely many cases will meet this threshold

PTAB Denial of Institution

Six factors to consider:

- whether the court granted a stay, or evidence exists that one may be granted if a proceeding is instituted;
- proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
- investment in the parallel proceeding by the court and the parties;
- overlap between issues raised in the petition and in the parallel proceeding;
- whether the petitioner and defendant in the parallel proceeding are the same party; and
- other circumstances that impact the Board's exercise of discretion, including the merits.

Effect of PTAB Proceeding at ITC

Certain Unmanned Aerial Vehicles and Components Thereof, Inv. No. 337-TA-1133

- The Commission determined there was a violation of Section 337 and that a LEO and CDO were warranted
- The Commission decided to suspend the enforcement of the remedial orders pending resolution of the PTAB's final written decision on the asserted patent's validity
 - The Commission has, in the past, enforced remedial orders when the PTAB issued a final written decision finding one or more of the claims unpatentable
 - The Commission found that this case is different because the PTAB's final written decision was issued **prior** to the Commission's decision and **prior** to the issuance of the remedial orders

Effect of PTAB Proceeding at ITC

Certain Automated Storage and Retrieval Systems, Robots and Components Thereof,
Inv. No. 337-TA-1228

- Evaluated the five stay factors:
 - (1) the state of discovery and the hearing date; (2) whether a stay will simplify the issues and hearing of the case; (3) the undue prejudice or clear tactical disadvantage to any party; (4) the stage of the PTO proceedings; and (5) the efficient use of Commission resources.
 - Found that the ITC Investigation would be final prior to the PTAB decision
 - There is a possibility that some or all of the patents and claims will survive PTAB review
 - There is public interest in protecting domestic industries from unfair foreign competition
 - “Everyone is entitled to a day in court.”

Effect of PTAB Proceeding at ITC

- *Certain Wearable Electronic Devices with ECG Functionality and Components Thereof*, Inv. No. 337-TA-1266
 - AliveCor, Inc. filed a complaint against Apple Inc. alleging that the Apple Watch violates Section 337 based on infringement of AliveCor's patents.
 - After the ALJ found infringement, the PTAB invalidated the claims at issue
 - Apple filed an emergency motion seeking to keep the ITC from blocking imports of the Apple Watch
 - OUII recommended suspending the ban pending an appeal of the PTAB decision based on public interest, but it "strongly disagreed" with Apple's additional request that the commission stay the entire ITC case against Apple until the PTAB appeal is over
 - Members of Congress submitted comments asking the ITC to overturn the Initial Determination based on public interest.
 - The Commission issued its decision, finding that there was a violation of Section 337 and that the public interest did not preclude the issuance of remedial orders. However, the Commission suspended the issuance of the remedial orders pending the final determination of the PTAB.

Redesigns at the ITC



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Redesigns at the ITC

The Commission uses a four-factor test as to whether a respondent has met its burden to show that infringement of a redesigned product should be adjudicated*:

- Is the product within the scope of the investigation?
- Is the product imported?
- Is the product sufficiently fixed in design?
- Was the product subject to extensive discovery?

* *Certain Road Construction Machines and Components Thereof*, Inv. No. 337-TA-1088

THANK YOU

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