

THE
AM LAW LITIGATION DAILYLitigators of the Week: Sullivan & Cromwell
Helps Turn the Tables for Ocado Group in the
'Robot Wars'

By Ross Todd

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Shortly after Ocado Group, the U.K.-based developer of software and robotics platforms aimed at the online groceries business, paired with The Kroger Co. in 2020 to build automated warehouses across the U.S., the company's rival AutoStore went on the patent offensive. AutoStore struck first at the U.S. International Trade Commission attempting to keep Ocado's products out of the U.S.

The press dubbed the volley of lawsuits that ensued between the two companies on either side of the Atlantic "the Robot Wars."

I think we can now declare a winner.

This past week, the companies announced a global settlement that involves each company taking a license to the other's pre-2020 patents and AutoStore agreeing to pay Ocado more than \$250 million. Ocado's stock price initially jumped by more than 40% in the days after the settlement news.

This week's Litigators of the Week are **Garrard Beeney, Marc De Leeuw** and **Dustin Guzior** of **Sullivan & Cromwell**, who first represented Ocado in beating back AutoStore's claims at a weeklong bench trial before the ITC in 2021 and helped turned the tables by filing a patent complaint against AutoStore in New Hampshire and antitrust claims in Virginia.

Lit Daily: Who was your client and what was at stake?

De Leeuw: Our client was Ocado Group, an innovative U.K. company that developed high-end tech-



Courtesy photos

(L-R) Garrard Beeney, Marc De Leeuw and Dustin Guzior of Sullivan & Cromwell.

nology for automating warehouses. The Ocado technology enabled efficient and effective grocery delivery during the pandemic and beyond, and attracted world-wide leaders in the field such as Kroger—the largest grocer in the United States—to employ the Ocado technology. In late 2020, AutoStore sued Ocado in the United States and United Kingdom without warning, and threatened Ocado's entire technology business by seeking to prevent Ocado from importing any of its systems into the U.S. and making and using its systems in the U.K. If successful, AutoStore's claims would have had a profound impact on Ocado's operations.

I know the press has dubbed this dispute “the robot wars,” but tell me a bit more about the underlying technology. What does your client do and who do they do it for?

Dustin Guzior: The technology in this case is pretty awesome. Imagine a metal grid several football fields across and several stories deep. Then imagine hundreds of robots on top of the grid. The bots move fast (about 10 meters per second) with about 5 millimeters of clearance between each bot, and they work together to retrieve bins stored under the grid, which contain items for customer orders. Working together, the bots can retrieve items for a large grocery order in a matter of minutes. The tech was developed for an online grocery business, but it also is useful for any business with limited warehouse space or a need for rapid completion of orders. Ocado will soon release a new series of robot that is built with 3D printers, the 600 Series, and the YouTube videos of that tech are really interesting to watch.

How did this matter come to the firm?

Garrard Beeney: Our firm has historically had productive relationships with U.K. companies. In the IP space, we represented companies such as Dyson and others through successful trials and appeals. We also have an excellent relationship with skilled IP counsel at the **Powell Gilbert** firm in the U.K. When Ocado sought U.S. counsel, that all came together and we were fortunate that Ocado selected us to partner with them in handling these disputes.

Who was on your team and how have you divided the work?

De Leeuw: One of the greatest strengths of our practice is our talented young lawyers. The cases started during the pandemic, and the team worked remotely but productively and seamlessly. The three of us, along with two special counsel (**Steve Elliott** and **Laurie Stempler**), associates at all levels (primarily **Alex Gross**, **Mark Bennett**, **Austin Mayron**, **Aviv Halpern**, **Michael Lemanski**, **Nav Dhillon**, **Miles Greene**, **Alicia Briggs** and **Haley Sanders**) divided up responsibilities for discovery, trial, appeal and patent office work, but all of us had a hand in almost every aspect of the case. We believe a key to our success generally is for all members of the team to “live” the case, and that happened here. And the team was not just us. To mention

a few, Ocado’s in-house lawyers, **Neill Abrams** and **Lucy Wojcik**, are the best, as are the team we worked with at Powell Gilbert, led by **Simon Ayrton**.

What were your main concerns heading into the bench trial before the ALJ at the ITC in 2021? And what was the key to securing wins on invalidity and infringement there?

Guzior: Early in the case, we dove into the global patent prosecution records for the key patents. When we put all of it on the table, we saw inconsistencies in how the patentee characterized its “invention” over time. Discovery, including depositions of the patent prosecution attorneys, made that story even clearer. So we built the vast majority of our defense on that story—claim construction and non-infringement, inequitable conduct, equitable estoppel, and lack of written description and enablement. When the ALJ rejected our claim constructions on the key issue shortly before the bench trial, we had to make it clear that because he rejected our claim constructions—construing the patent claims to be very broad—our other defenses had to prevail. This was a complex and nuanced argument that easily could get lost in the shuffle during a week-long trial. So, we decided that we needed to use virtually every second of the trial to tell our simple story: Over a decade, the patentee sought to claim far more than it invented. This shone through in the end and it was the key to our success.

After that, how did you flip the case from one where Ocado was playing defense to one where it was on the offensive?

Beeney: Whenever we are retained on the defense side, we look to see what claims our client may have on offense. A key to effective resolution of litigation to achieve a business objective is making sure—to the extent you can—that your adversary does not get a “free shot” at your client. Here, the team looked at the Ocado patent portfolio, and the innovative work of talented people and investment in R&D paid off: We had a number of patent candidates that we believe AutoStore infringed, and we filed an infringement case in New Hampshire. There, we won key rulings rejecting AutoStore’s effort to invalidate the patents and rejecting on the pleadings AutoStore’s inequitable conduct defense. But we did not stop there. We also asserted in a case filed in Virginia

that AutoStore sought to illegally monopolize the market by asserting fraudulently obtained patents against Ocado. At the time of settlement, Ocado had prevailed in its defensive cases, and only the offensive cases in the United States and Europe remained pending.

In a multi-jurisdictional, cross-border case like this, what are the keys to working effectively with counsel abroad? And what are the things to look out for in your own work to avoid creating problems?

Guzior: The IP disputes that we handle have increasingly substantial international components, and a U.S. patent litigator needs to understand what other jurisdictions offer in the context of a global dispute. For example, you have the potential for significant damages in a U.S. jury trial, while the more common remedy in the U.K. and Germany is an injunction. The new Unified Patent Court in Europe also introduces a new option—with a lot of unknowns—in the overall strategy. In the Ocado cases, we effectively leveraged all of these options in partnership with Powell Gilbert in the U.K. and **Wildanger** in Germany.

De Leeuw: One of the keys in working on these type of multi-jurisdictional cases is to develop a plan from the beginning, thinking through issues of timing and requested relief, and ensuring consistency of argument across the jurisdictions. So from the very outset, we had regular video meetings with counsel abroad to talk through the factual development of the case, legal issues, fact and expert witnesses, our global strategy, and how arguments made in one jurisdiction might impact other cases. By doing that, everyone could be confident that they would be consulted as the cases progressed and have a part in decision-making.

What can other companies take away from your client's experience here?

Beeney: I think one lesson is developing trust on the team. If you feel you can't rely on your counsel or trust them to devote every ounce of energy they have to the success of the matter, hire somebody else. Here, it might have been the easiest path for Ocado to fold when sued. After all, its business was threatened. Instead, Ocado had the strength to rely on the

collective advice of all its counsel that we would prevail in the litigations.

What will you remember most about this matter?

De Leeuw: For me it was the excitement of the associates, particularly the junior associates, as they prepared for and then observed the witness examinations and arguments at the ITC trial. For nearly a year, we had been working long hours through remote discovery, brief writing and trial preparation. And even though the ITC trial was conducted remotely, the team was finally able to work together when we conducted the trial in the firm's mock courtroom. There was tremendous energy from the team as we talked to each other every day about what we planned and how the testimony came out. It was a great experience for the whole team, from the most senior lawyer to our junior associates to paralegals.

Guzior: From the first day in October 2020 through the last day of settlement negotiations on July 22, 2023, we had an exceptional relationship with the client, and Neill Abrams and Lucy Wojcik in particular. This was the best kind of relationship—we collaborated with and challenged each other, but in the end, the client trusted our strategic advice. That is a big part of how we achieved the outcome here, and I always will be grateful for the time I got to spend with the smart and talented people from Ocado.

Beeney: As Marc indicated, working with and learning from incredibly talented younger lawyers on the team. But the single moment that stands out for me was learning that the ITC ALJ had adopted our arguments that the four asserted AutoStore patents were either invalid (three of them) or not infringed (the other). Every litigator likes to win, but this was special because it was a win for remarkable people at the client who had worked so hard to achieve a terrific business and led innovation in the field. I think we all feel we remain lifelong friends and look back fondly at the results we were able to achieve together.

Correction: A prior version of this article incorrectly stated that Ocado Group's CEO retired this week. The executive who retired was with Ocado Solutions, a different company.