

Bartko, ASML Run Up the Trade Secret Score to \$845 Million

By Scott Graham

The battle between ASML U.S. Inc. and XTAL Inc. over trade secrets to computational lithography is over, with ASML being awarded a whopping \$845 million.

Little money will actually change hands, though, as XTAL has filed for Chapter 11 bankruptcy protection. But ASML has negotiated with XTAL for an injunction before Santa Clara County Superior Court Judge Sunil Kulkarni that prevents XTAL and its employees from work in the same business as ASML for three years. XTAL is also assigning ASML its intellectual property.

“ASML’s \$845 million judgment against XTAL sends a powerful message to competitors and the world,” said ASML’s lead trial attorney, Bartko, Zankel, Bunzel & Miller partner Patrick Ryan, in a written statement. That is that “ASML vigorously protects



Patrick Ryan, Bartko Zankel partner

its valuable intellectual property, including trade secrets, and that it is prepared to prosecute cases—even through a jury trial—against anyone who violates ASML’s intellectual property rights.”

ASML Holding is based in the Netherlands but has a large presence in San Jose from its 2006 acquisition of Brion Technologies. Its computational lithography technology

helps enable the printing of microscopic geometries on semiconductors.

The company accused former ASML employees of working secretly on behalf of XTAL, stealing trade secrets, and helping XTAL land a contract with Samsung, which had been one of ASML’s largest customers. Jurors also found violations of California’s Computer Data Access and Fraud Act, and that

XTAL's conduct was malicious, entitling it to punitive damages and attorneys fees.

XTAL had argued that ASML did not make reasonable efforts to protect its trade secrets.

XTAL filed for bankruptcy before judgment was entered, raising concerns at ASML that its IP might get auctioned to a third party, and that a fully litigated punitive phase might drain XTAL's estate. So the parties struck a settlement that includes the injunction, the return of hard drives containing ASML's source code, and an assignment of XTAL patents to ASML.

U.S. Bankruptcy Judge M. Elaine Hammond approved the settlement Friday, the same day Kulkarni entered judgment and the injunction.

"The case is more about stopping behavior and sending a

message to the industry" than money damages, Ryan said Sunday.

That said, Ryan believes the massive award could help popularize the approach his team took. ASML argued that XTAL was unjustly enriched by using trade secret theft to avoid research and development costs.

"It's a big problem in a lot of trade secret cases: If you catch the theft early enough, they may not have had much time to monetize it yet," he said.

The R&D theory is simpler for jurors to grasp than lost profits, Ryan said. "The defendants basically stole a head start," he said. "It seems fair to the jury that people shouldn't be able to accelerate their development by stealing. It's intuitive."

Also trying the case with Ryan were Bartko partners Stephen Steinberg, Sean McTigue and Brian Smith. They were supported by partners Alden Lee and Chad DeVeaux, senior counsel Joseph Fraresso, and associates Andrew Winetroub and Rishi Gupta. Ryan, McTigue and Richard Lapping of Trodella & Lapping represented ASML's interests in XTAL's bankruptcy proceedings.

XTAL was represented at trial by Putterman + Yu, and in bankruptcy by Alston & Bird and Young Basile Hanlon & MacFarlane.

Scott Graham focuses on intellectual property and the U.S. Court of Appeals for the Federal Circuit. He writes ALM's *Skilled in the Art* IP briefing. Contact him at sgraham@alm.com.