Slip Op. 06–95

FORD MOTOR CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Court No. 99–00394

[Customs' motion to dismiss is granted.]

Dated: June 21, 2006

Stein Shostak Shostak Pollack & O'Hara LLP (*Stanley Richard Shostak* and *Heather Christi Litman*) for Plaintiff Ford Motor Co.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Saul Davis*), for Defendant United States.

OPINION

GOLDBERG, Senior Judge: In this action, Plaintiff Ford Motor Co. ("**Ford**") seeks review of the denial of its Protest No. 2704–98–101394 contesting certain actions taken by Defendant United States Customs and Border Protection ("**Customs**") regarding the Entry CE 231–5174793–0 entered in Los Angeles on June 9, 1997 and liquidated on May 8, 1998 ("**the L.A. Entry**"). Customs filed a motion to dismiss for lack of jurisdiction and lack of standing under Article III of the U.S. Constitution ("**Customs' Mot.**") on October 31, 2005.[1]

[1] Customs refers alternately to its October 31, 2005 motion as a "cross-motion for summary judgment" and a "motion to dismiss and for summary judgment." The motion seeks dismissal of the case for want of subject matter jurisdiction and standing, two matters normally dealt with on a motion under USCIT Rule 12 and not USCIT Rule 56. *See Robinson v. Union Pac. R.R.*, 245 F.3d 1188, 1191 (10th Cir. 2001) ("Seeking summary judgment on a jurisdictional issue . . . is the equivalent of asking a court to hold that because it has no jurisdiction, the plaintiff has lost on the merits.") (quotation marks omitted); *Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987) (noting that because summary judgment has res judicata effect on the merits of the case, it would be inappropriate in cases where a court has not considered the merits, as with a jurisdictional challenge); *cf. also Pringle v. United*

Ford filed a motion for summary judgment on the same day. On January 23, 2006, Customs filed a motion for summary judgment on the merits. Also on January 23, 2006, Ford filed a response to Customs' motion to dismiss ("**Ford's Resp.**"). Both parties filed replies on February 13, 2006. For the reasons that follow, the Court grants Customs' motion to dismiss and dismisses the case for lack of subject matter jurisdiction.

I. *BACKGROUND*

Although this case is limited to a review of Ford's protest of the L.A. Entry, the underlying dispute between Customs and Ford dates back much further. The L.A. Entry itself is comprised of 288 3.4L production engines that Ford purchased from Yamaha Motor Co., Ltd. ("**Yamaha**") for installation in 1996 1/2 Ford Taurus SHO automobiles in the United States. Those production engines were developed and produced pursuant to a series of agreements between Ford and Yamaha. Ford and Yamaha entered in to a "3.4L Engine Development Agreement" ("**Development Agreement**") effective as of September 1990. The purpose of the Development Agreement was to modify and improve the existing automobile engines used in the Taurus SHO. Ford and Yamaha also entered into a Supply Agreement effective in 1996 that outlined the terms according to which successful development projects would yield purchasable production engines. Engine prototypes constituted a crucial component of the development process. The Development Agreement itself explains the role prototypes were to play:

> 4. Prototypes
>
> A (1) Prototype Engines and prototype parts that are required by Ford shall be purchased by Ford from Yamaha under separate purchase orders, in accordance with payment terms of Net 15th and 30th Prox. A specimen copy of the purchase order form is annexed hereto as Attachment VI. The printed terms and conditions of the purchase order shall apply to purchases pursuant to this Section 4. Ford, from time to time, may change its purchase order form but such change shall not amend or modify the respective rights and obligations of the parties hereunder.

States, 208 F.3d 1220, 1222 (10th Cir. 2000) (holding that a motion to dismiss for lack of subject matter jurisdiction may be converted to a summary judgment motion only when "resolution of the jurisdictional question is intertwined with the merits of the case"). As such, Customs' motion is a motion to dismiss under USCIT Rule 12(b)(1), and will be referred to as such in this opinion.

Development Agreement ¶ 4A. In total, Ford issued purchase orders to Yamaha for the purchase of 298 prototype engines, for which Ford paid Yamaha a total of ¥891,747,801, or $9,058,310.

Though some of the prototype engines purchased by Ford remained in Japan, many were imported into the United States. The majority of the imported prototypes entered under bond as temporary imports, that is, the prices paid to Yamaha for the prototype engines were declared but duties were not paid. Ford imported a smaller number of prototype engines by means of consumption entries with payment of duties.

This 3.4L SHO engine program was not the first time Ford and Yamaha had collaborated in the design, development, and supply of prototype and production engines for use in Ford's Taurus model. Years earlier, Ford and Yamaha had entered into similar agreements in connection with Ford's 3.2L SHO engine development program, which also involved Ford's importation of prototype engines from Yamaha. The 3.2L SHO prototype program occasioned a dispute with Customs regarding the dutiability *vel non* of prototype engines. By the time the L.A. Entry arrived in the United States, Customs had already issued two Customs Headquarters Rulings[2] regarding the dutiability of prototype engines in connection with the by-then obsolete 3.2L SHO engine development program.

In April 1994, Customs issued HQ 545278, in which it ruled on two issues impacting the duty treatment of the 3.2L prototype engine program as follows: (1) the value of imported prototype engines did not constitute an "assist,"[3] and was properly considered part of the "price actually paid or payable," 19 U.S.C. § 1401a(b)(4)(A), of the imported prototype engines themselves; and (2) the payments made to Yamaha for design and development of *prototype* engines should also be included in the transaction value[4] as part of the "price actually paid or payable" for subsequently imported *production* en-

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[2] An importer may request a ruling letter from a Customs field office respecting the treatment of a prospective customs transaction. *See* 19 C.F.R. § 177.9(a) (2005). Customs' field offices may themselves request "internal advice" from Customs Headquarters "at any time." *Id.* § 177.11(a). The result of the process is usually a Customs Headquarters Ruling, detailing Customs Headquarters' "official position" as to the transaction in question. *Id.* § 177.11(b)(6). In the case of the two Headquarters Rulings relating to the 3.2L engine program, Customs officials at the Port of Detroit made a request for internal advice. Then, Ford requested reconsideration of the ruling, and Customs Headquarters responded by affirming its original ruling.

[3] An "assist" is a good or service that is "supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the [imported] merchandise[.]" 19 U.S.C. § 1401a(h)(1)(A) (1999).

[4] The "transaction value" of imported merchandise is the statutorily preferred method of valuing merchandise for purposes of duty calculation. *See* 19 U.S.C. § 1401a(1) (1999). The transaction value of imported merchandise is "the price actually paid or payable for the merchandise when sold for exportation to the United States, plus" other specified additions. *Id.* § 1401a(b)(1).

gines. *See* HQ 545278 (April 7, 1994), *available at* 1994 U.S. Custom HQ LEXIS 327. Customs determined that the prototype payments were "inextricably linked to the design and development process." *Id.* at *8. In other words, Customs' treatment of the 3.2L prototype program amounted to "double-counting" the cost of the imported prototype engines by fully allocating the prototype costs to the transaction values of both the production engines *and* the imported prototypes themselves.

In October 1996, Customs affirmed its conclusion in response to Ford's request for reconsideration, stating that "[p]ayments relating to the prototypes are part of the price actually paid or payable of the imported production engines notwithstanding the fact that many of the prototypes were subject to duties upon their importation into the United States." HQ 545907 (Oct. 11, 1996), *available at* 1996 U.S. Custom HQ LEXIS 1946, at *10–11.

On May 9, 1997, Customs notified Ford that it had initiated a formal investigation of the 3.4L SHO Engine program under 19 U.S.C. § 1592[5] for its suspected "fail[ure] to declare the total value of engineering, design and development costs for prototypes utilized in the subsequent importation of production merchandise." Decl. of Paul Vandevert, Ex. 4 ("**Notice Letter**"). After receiving the letter and reviewing its records, Ford conducted a conference call with Customs agents and determined that, applying the logic of HQ 545278 and assuming a conservative estimate of $17 million in payments to Yamaha for prototype engines, it owed Customs $425,000 in back duties for merchandise imported over a period of three years.

On November 5, 1997, Ford submitted a letter to Special Agent Robert L'Huillier of Customs' Office of Investigations, stating that it had completed a more thorough review and its records indicated $226,458 in back duties owed, based on $9,058,310 in payments to Yamaha since April 1994. *See* Decl. of Paul Vandevert, Ex. 5 ("**Nov. 5 Letter**"). That letter quoted from HQ 545907, and also provided that the additional duties owed "will be included with an unliquidated 3.4L SHO engine entry so as to permit Ford to file a formal protest under Section 514 (19 U.S.C. 1514) and later to serve Customs with a summons to institute Court proceedings." *Nov. 5 Letter*.

On November 20, 1997, Ford's customs broker Expeditors International of Washington, Inc. ("**Expeditors**") sent another letter to Detroit Customs attaching a copy of the *Nov. 5 Letter* and enclosing a check for $226,458 "as a supplemental tender of duties on payments

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[5] Section 1592 of Title 19 outlines the civil penalties for fraud, gross negligence, and negligence where an importer, depriving the U.S. Treasury of duties owed, "may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or any omission which is material[.]" 19 U.S.C. § 1592(a)(1)(A) (1999).

to Yamaha for prototypes for the 1996 1/2 MY SHO Engine Program." Decl. of Paul Vandevert, Ex. 6 ("**Nov. 20 Letter**"). The *Nov. 20 Letter* did not specify the entry, if any, to which the duties were to be allocated "so as to permit Ford to file a formal protest[,]" *Nov. 5 Letter*.

On January 29, 1998, another letter from Expeditors arrived on the desk of Linda Connor, a Customs agent at the Port of Detroit. *See* Decl. of Paul Vandevert, Ex. 7 ("**Jan. 29 Letter**"). That letter requested that the already deposited $226,458 in duties be "allocated" to the L.A. Entry, which Customs had not yet liquidated. *See Jan. 29 Letter.* Ford included a copy of the Customs receipt for the $226,458 with the *Jan. 29 Letter.*

Customs accepted the tender of duties. The L.A. Entry, one of many entries of production engines, occurred on June 9, 1997. Ford paid Yamaha a total of $1,329,629 for the production engines (along with various containers) in the L.A. Entry and declared, via Expeditors, the total "entered value" on its Entry Summary Form 7501[6] to be as much. *See* Customs' Mot., Ex. B (Customs Form 7501). The L.A. Entry was accounted for in the Entry Summary Form 7501 by dividing the total invoiced payment of $1,329,629 into three separate transaction values for the three duty treatments to which the entry was entitled. Thus, Ford noted that $201,600 of the invoice price was entitled to duty-free treatment because the engines contained "other articles assembled abroad of domestically fabricated components," *see* Harmonized Tariff Schedule of the United States ("**HTSUS**") subheading 9802.00.8065. In addition, Ford noted an entered value of $65,979 for substantial containers and holders, which also corresponded to a zero duty rate, under HTSUS subheading 9803.00.50. The entered dutiable value for the 288 production engines was $1,062,050. Given the applicable duty rate of 2.7 percent, Customs assessed duties of $28,675.35 for the production entries, plus the addition of certain fees of $2147.03, for a total of $30,822.38. Nowhere in the Entry Summary Form 7501 did Ford or Expeditors mention the $226,458 in supplemental duties tendered.

On May 8, 1998, Customs liquidated the L.A. Entry. The computer printout documentation relating to that liquidation[7] demonstrates that Customs liquidated the L.A. Entry at a "paid amount" and "liquidated amount" of $30,822.38. An annotation appeared on the second page of the printout associating that entry with the $226,458

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[6] The customs regulations permit customs brokers to file an Entry Summary Form 7501 at the time of entry in order to obtain the immediate release of imported merchandise from Customs' possession. *See* 19 C.F.R. §§ 142.3(b), 142.12(a) (2005). The Entry Summary Forms expedite the customs processing of entries, but rely on accurate statements made by importers and their customs brokers.

[7] The Customs printout is the product of the Customs Automated Commercial Systems ("**ACS**") program that tracks, controls, and processes data on U.S. customs transactions. *See* Decl. of Chi S. Choy ¶ 2.

payment, and categorizing the tender as "PRIOR DISCLOSURE ONLY — LIQUID." Upon liquidation, the Entry Summary Form 7501 was stamped in red "AS ENTERED."

Ford filed Protest No. 2704–98–101394 on August 6, 1998. Customs denied the protest on December 31, 1998. On June 28, 1999, Ford commenced this case.

II. *DISCUSSION*

Absent jurisdiction, a court may not proceed in any cause, and must dismiss the case before it. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Steel Co. v. Citizens for a Better Envm't*, 523 U.S. 83, 94–95 (1988) (*quoting Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 384 (1884)); *see also* USCIT R. 12(h)(3) ("Whenever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). Because the Court is convinced that subject matter jurisdiction does not lie in this case, it must dismiss the case forthright, and need not therefore consider the respective motions for summary judgment on the merits.

A. A Valid Protest of a Customs Decision Must Be Timely.

Ford invokes the U.S. Court of International Trade's ("**CIT**") subject matter jurisdiction under 28 U.S.C. § 1581(a). That jurisdictional grant enables the CIT to assert jurisdiction over "any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (1999). The referenced section 515 is codified at 19 U.S.C. § 1515, and lays out the procedures for administrative review of Customs decisions under the protest system. Therefore, a prerequisite to the Court's 28 U.S.C. § 1581(a) jurisdiction is the filing of a valid protest under the protest statute, 19 U.S.C. § 1514. *See Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1365 (Fed. Cir. 2006).

The protest statute provides that "decisions of the Customs Service . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section. . . ." 19 U.S.C. § 1514(a) (1999). One of the necessary elements of a valid protest is that it is timely. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). Under 19 U.S.C. § 1514(c)(3), the time period within which a protesting importer must file its protest varies according to the circumstances of the protest. The statute provides that "[a] protest of a decision, order, or finding . . . shall be filed with the Customs Service within ninety days after but not before (A) notice of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made." 19 U.S.C. § 1514(c)(3) (1999). In deciding whether a valid protest has occurred, then, a court must determine if sub-

paragraph (A) *is* applicable to the facts of the case. In most cases, this inquiry is summary; however, where, as here, the protest presents an unordinary and complicated customs transaction, a quick look will not suffice.

B. An Importer May Run the Ninety-Day Protest Period from the "Notice of Liquidation" Only When the Liquidation Is Materially Affected by the Protested Customs Decision.

Subparagraph (A) runs the ninety-day protest period from the date an importer receives notice of a liquidation or reliquidation. The Court reads that subparagraph as containing an implicit requirement that the "liquidation or reliquidation" be materially affected by the substance of the challenged decision.[8] Without imposing such a requirement, the terms of the statute are such that any "decision of the Customs Service" could be protested within ninety days of the "notice of [any] liquidation or reliquidation," which is patently absurd because it would vitiate the institution a ninety-day time limitation period in the first place. Put another way, "notice of liquidation" must refer to a *specific* liquidation, otherwise importers could bring challenges to Customs decisions years after the decisions were made, respecting entries that evince no logical connection to the protested decision. *Cf. Gould v. U.S. Dep't of Health & Human Serv.*, 905 F.2d 738, 746 (4th Cir. 1990) (en banc) (rejecting as contrary to the purpose of a statute of limitations the possibility of an "open-ended rule"). Ford is therefore only entitled to the application of subparagraph (A) if the Court finds that the liquidation of the L.A. Entry was materially affected by the challenged Customs decision.

On the other hand, Subparagraph (B) applies to protests when Customs discloses the terms of its protested decisions independent of any liquidation. *See* 19 C.F.R. § 174.12(e)(2) (2005) (providing a non-exhaustive list of "decisions of the Customs Service" to which subparagraph (B) applies). In such circumstances, the protest period will run from "the date of the decision as to which protest is made." 19 U.S.C. § 1514(c)(3)(B) (1999). If subparagraph (B) applies in this case, then the protest period began running from "the date of the decision," which was either (1) a date in mid- to late-1997 when Customs, after notifying Ford of its ongoing investigation, demanded a tender of back duties[9], or (2) October 11, 1996 (the date Customs

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[8] This is not to say that the notice must communicate to the importer the substance of Customs' decision *for the first time* in order to fall within the purview of subparagraph (A). Whether the notice represents the initial notification of a Customs decision, or whether the notice reiterates a position established prior to liquidation, some substantial nexus must exist between the liquidation being noticed and the substance of the protested decision.

[9] Between May 9, 1997 (the date Customs informed Ford of its investigation), and Nov. 5, 1997 (the date Ford determined its final liability from its invoices), Customs and Ford had been in negotiations as to the ultimate amount of liability Ford owed for its 3.4L prototype engines. The Court assumes that some "decision" to demand duties from Ford occurred dur-

published HQ 545907, putting Ford on notice of Customs' decision that the cost of the prototype engines were includable in the transaction value of production engines[10]). In either event, Ford's filing of a protest on August 6, 1998 was well after these ninety day windows had expired. As such, Ford's protest is valid only if the Court determines that subparagraph (A) applies to this dispute.[11]

In this case, Ford is challenging "Customs' decision that the costs of the prototypes were properly includable in the 'price actually paid or payable' for the production engines in the subject entry." Ford's Resp. at 6–7 (*quoting* 19 U.S.C. § 1401a(b)(1) (1999) (defining dutiable "transaction value" as including "the price paid or payable")). However, the liquidation of the L.A. Entry relates to this protested decision only by virtue of a legal and accounting contrivance that Ford concocted itself. Specifically, Ford attempted to allocate the duty amount owed for the entire prototype program to the transaction value of the production engines in the L.A. Entry.

C. The Terms and Circumstances of the Liquidation of the L.A. Entry Demonstrate No Material Link to the Protested Decision.

Assuming *arguendo* that the Customs officials at the Port of Detroit agreed to Ford's request to allocate the $226,458 to the L.A. Entry, and endeavored to communicate as much to the Customs officials at the Port of Los Angeles, there is no evidence that such allocation was actually and practically accomplished.[12] As such, the

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ing that period. *Cf. Alcan Alum. Corp. v. United States*, 28 CIT ____ , ____ , 353 F. Supp. 2d 1374, 1378–79 (2004) (holding that Customs' calculation of back duties owed and subsequent demand of that amount following an investigation was a protestable decision under 19 U.S.C. § 1514). However, even assuming the protestable decision occurred on the last day of this period, Ford's protest would still have been late.

[10] Nothing in 19 U.S.C. § 1514 prevents an importer from protesting a 19 C.F.R. § 177 Headquarters Ruling, *see supra* note 2, provided the strictures of Article III standing under the U.S. Constitution are met. Though the case law is sparse in this regard, examples of such cases do exist. *See, e.g., Conair Corp. v. United States*, 29 CIT ____ , Slip Op. 05–95 (Aug. 12, 2005). In that case, the importer first requested and received a letter ruling from the Port of New York regarding the classification of merchandise. *See* NY F83276 (Mar. 15, 2000), *available at* 2000 US Customs NY LEXIS 1803. Then, the importer requested and received reconsideration from Customs Headquarters, which affirmed NY F83276. *See* HQ 964361 (Aug. 6, 2001). Thereafter, the importer protested, and Customs denied the protest. Finally, the importer commenced a case in the CIT, which asserted its 28 U.S.C. § 1581(a) jurisdiction. *See* Conair, 29 CIT at ____ , Slip. Op. 05–95 at *3–*4.

[11] Lamentably, Ford did not avail itself of the most obvious course of action in this case. Had Ford simply declared the costs of its prototype program from the outset, it would have had ninety days from the liquidation of the first entry of production engines within which to file its protest, over which the Court would unambiguously possess jurisdiction. Instead, Ford was subject to an investigation under the penalty statute 19 U.S.C. § 1592 and attempted to craft a "do-it-yourself" solution.

[12] It is of no legal relevance that Customs, or any of its officials, may have intended to accommodate Ford's request to commence an action under 28 U.S.C. § 1581(a). An administrative agency may not waive the U.S. government's sovereign immunity by consenting to

Court finds that the requisite nexus between the protested decision and the liquidation of the L.A. Entry is lacking. For this reason, subparagraph (A) cannot apply, and the protest was untimely and invalid.

As discussed above, on November 5, 1997, Ford informed Customs of its intention to have the $226,458 payment "*included* with an unliquidated 3.4L SHO engine entry so as to permit Ford to file a formal protest. . . ." *Nov. 5 Letter* (emphasis added). On November 29, 1997, Expeditors transmitted that payment to Customs. *See Nov. 29 Letter.* Over two months later, Expeditors requested that the payment be *allocated* to [the L.A. Entry]." *Jan. 29 Letter* (emphasis added). Customs admits that its agents "appeared to agree to this process, because [they] *allocated* the payment of the $226,458.00 to the entry which Ford requested be liquidated, by adding this amount to the entry. . . ." Customs' Mot. at 11 (emphasis added).

However, "allocation" and "inclusion" are distinct concepts from liquidation.[13] The seed of any valid protest under subparagraph (A) must be a liquidation that is affected by the protested decision, *see* 19 U.S.C. § 1514(c)(3)(A). If "allocation" and "inclusion" simply refer to the process of appending documentation relating to another separate transaction, then those processes have no relevance to the question of whether subparagraph (A) will apply to the liquidation. An importer may not avail itself of the protest procedures by simply allocating a payment to an entry that otherwise is logically unconnected to the protested decision. Absent a formal rule-making process, neither an importer nor Customs may create a new analogue to statutorily-recognized liquidation. Customs makes this distinction in its motion to dismiss, noting that despite the undeniable association of the payment with the L.A. Entry, "Customs never actually liquidated this entry to include the $226,458.00 in the actual value and liquidated duties for this entry."[14] Customs' Mot. at 11. After examin-

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be sued. Such consent may only come from an unequivocal expression of Congress. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Because Congress provided a framework, in 19 U.S.C. § 1514, for civil suits challenging Customs decisions, a plaintiff must look to that statute, and that statute alone, to obtain its relief.

[13] "*Liquidation* means the final computation or ascertainment of the duties . . . accruing on an entry." 19 C.F.R. § 159.1 (2005).

[14] Ford points out that in its Answer, Customs admits to paragraph 16 of Ford's Amended Complaint, which states: "The ¥891,747,801 paid by Ford to Yamaha for the 3.4 liter prototype engines, was treated as part of the price 'actually paid or payable' for the 288 production engines in the [L.A. Entry]." Complaint ¶ 16; *see also* Answer ¶ 16 (admitting the same). In spite of that admission, Customs is currently arguing that the payment of duties that corresponded to the ¥891,747,801 at issue was never included in the transaction value of the production engines in the L.A. Entry.

The Court interprets the evidence independently, and may rely on the extensive discovery in this case occurring over a seven year period. At such a late stage in the proceedings, a court is hardly compelled to bind itself to the mast of a defendant's pleadings and assert its jurisdiction over a case it has no authority to adjudicate. *See* USCIT R. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the

ing the ACS printout, the Court agrees with Customs that, despite any allocation or inclusion, "[t]here was never any liquidation or appraisement of merchandise encompassed by this case that actually included any portion of the amount in dispute." *Id.*

The ACS printout documentation consists of two pages. The first page is the routine document relating the specifics of the liquidation. That page lists the "paid amount" and the "liquidated amount" at $28,675.35. That sum was derived from applying the then applicable 2.7 percent duty rate to the declared value of the entered production engines themselves, independent of any supplemental amount, on either a pro rata or lump-sum basis, for the prototype engines. The page also indicates that the entry was subject to fees and taxes amounting to $2147.03. In total, the amount owed on the L.A. Entry was $30,822.03. The notation "NO CHANGE—LIQ" appears below the liquidation data, and is evidence that the liquidation was based on the declared values without any changes or modifications in the transaction.[15] There is no mention of the $226,458 payment Ford made for the prototype engines on the first page.

By contrast, the second page of the ACS printout mentions the $226,458 payment and contains the notation "PRIOR DISCLOSURE ONLY—LIQUID." That terminology signifies to Customs that the tender was treated as relating to an entry that already had been liquidated. *See* Decl. of Mary Ann Morris ¶ 9. The reference to the prior disclosure procedures is almost certainly inapposite, since those procedures permit an importer to disclose instances of underpayment of duties *prior* to Customs' discovery in exchange for limited immunity from 19 U.S.C. § 1592 negligence and fraud liability. *See* 19 C.F.R. §§ 162.73(b), 162.74(a) (2005). Here, both parties acknowledge that Ford discussed its prototype program with Customs only *after* Customs informed Ford of an ongoing section 1592 investigation. However, that notation is instructive in placing the unordinary $226,458 payment in context.

The use of the "prior disclosure" notation accentuates the anomaly of Ford's attempted accounting feat. Typically, a prior disclosure will

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subject matter, the court shall dismiss the action."); *cf. also Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979) ("The district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists."); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. BP Amoco P.L.C.*, 319 F. Supp. 2d 352, 368–69 (S.D.N.Y. 2004) (noting that a court, when ruling on a motion to dismiss for lack of jurisdiction, must construe pleadings in favor of plaintiff only when jurisdictional discovery has not occurred). The Court therefore has no difficulty disregarding the purported admission of jurisdiction contained in Customs' Answer.

[15] The Court's interpretation of the "NO CHANGE—LIQ" notation is supported by a similar notation that appears on the Entry Summary Form 7501. At the time of liquidation, the L.A. Entry Form 7501 was stamped "AS ENTERED," a label that "possesses the same meaning as 'No Change Liq' — it means that Customs liquidated this entry at the amount deposited by the importer at the time of entry." Decl. of Chi S. Choy ¶ 8.

occur after entry and liquidation. The notation is helpful to signify that although the entry and liquidation documentation is incomplete, Customs may not pursue the full panoply of civil penalties for deprivation of duties under 19 U.S.C. § 1592. In a typical case, this is an unremarkable "tender on an entry that had already been liquidated." Decl. of Mary Ann Morris ¶ 9. When the Customs officials borrowed this terminology from an obviously inapposite context, the Court supposes they were doing their best to document a unique transaction.[16] Whatever its underlying impetus was, the notation clearly places the payment in the context of a settlement of the negligence and fraud claim that Customs had already started investigating under 19 U.S.C. § 1592.

Section 1592(d) requires Customs to recoup any deprived duties, "whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d) (1999). The ACS documentation relating to the L.A. Entry is consistent with a routine liquidation of the production engines, accompanied by an appended form documenting the settlement of a 19 U.S.C. § 1592 claim. Even if the tender is not construed as a settlement of the section 1592 claim, it is pellucid that the L.A. Entry was not liquidated to include the prototype engine costs. The documentation testifies to two distinct and unrelated transactions. Therefore, the Court is unable to find any evidence that the protested decision materially affected the liquidation of the L.A. Entry, and the protest period did not run from the date of liquidation under subparagraph (A).

As such, any protest was untimely and invalid, and the Court lacks jurisdiction under 28 U.S.C. § 1581(a). *See Saab Cars USA*, 434 F.3d at 1365.

III. *CONCLUSION*

The Court finds that the L.A. Entry was not materially affected by the protested "decision of the Customs Service," 19 U.S.C. § 1514(a). Therefore, Ford is not entitled to have its protest period run from the date of liquidation of the L.A. Entry as contemplated by subparagraph (A) of 19 U.S.C. § 1514(c)(3), and its protest was untimely under subparagraph (B). Accordingly, there can be no valid protest under 19 U.S.C. § 1514 and subject matter jurisdiction does not lie under 28 U.S.C. § 1581(a). This case is dismissed for lack of subject

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[16] The Court expresses its doubts whether Customs possesses the authority, given an ongoing 19 U.S.C. § 1592 enforcement proceeding, to effectuate this unique liquidation transaction in the first place. Because the Court finds that whatever the parties' intentions, such a transaction was not in fact effectuated in this case, it need not decide the tougher question of whether this sort of transaction would have been ultra vires and invalid if successfully accomplished.

matter jurisdiction. The Court will issue an order in accordance with this opinion.

Slip Op. 06–96

AGRO DUTCH INDUSTRIES, LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR MUSHROOM TRADE, Defendant-Intervenor.

Before: MUSGRAVE, Judge
Court No. 04–00493

[Further clarification ordered regarding antidumping duty administrative review.]

Dated: June 23, 2006

Garvey Schubert Barer (*Lizbeth R. Levinson*, *Ronald M. Wisla*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Richard Schroeder*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Matthew D. Walden*), of counsel, for the defendant.

Kelley Drye Collier Shannon (*Michael J. Coursey*, *Adam H. Gordon*), for the defendant-intervenor.

OPINION AND ORDER

Without concluding whether substantial evidence supported the administrative finding that the expenses of transporting recalled merchandise from the United States to India constitute indirect selling expenses associated with U.S. sales, the Court remanded for reconsideration and clarification of Commerce's antidumping duty calculus on the matter. *See* Slip Op. 06–40 (CIT Mar. 28, 2006); *Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 51630 (Aug. 20, 2004) & accompanying *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review on Certain Preserved Mushrooms from India – February 1, 2002, through January 31, 2003* (Aug. 20, 2004) ("*Decision Memorandum*"), as amended by *Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms From India*, 69 Fed. Reg. 55405 (Sep. 14, 2004). The Department of Commerce, International Trade Administration ("Commerce" or "DOC") was also asked to consider whether the entire movement of the merchandise from India to the United States and back should be treated as an extraordinary expense that would distort the dumping calculation if included therein. Draft administrative remand results went to the par-

ties on April 28, 2006 and Commerce submitted the same to the Court after time passed without comment. *See Results of Redetermination Pursuant to Remand* (May 11, 2006) ("*Redetermination*"). The Clerk of the Court recently confirmed that neither Agro Dutch nor the Coalition for Fair (Preserved) Mushroom Trade (CFMT) intend to comment on the remand results.

As mentioned, the Court deferred discussion of Agro Dutch's argument that the recall of the merchandise to India involved direct expense to subsequent third country sale(s), that the recall was strictly a business decision that ultimately proved correct, and that therefore Commerce wrongly included the movement costs in U.S. indirect selling expenses. *See* Pl.'s Rule 56.2 Mot. for J. Upon the Agency Rec. ("Pl.'s Br.") at 8–9 . The government's response was that Commerce's practice is to treat expenses related to returned or rejected merchandise as indirect selling expenses in the market for which the expenses were incurred. Def.'s Mem. in Opp'n to Pl.'s Mot. ("Def.'s Br.") at 9 (referencing *Decision Memorandum* at 3; *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Televisions From Malaysia*, 69 Fed. Reg. 20592, and attached *Issues and Decision Memorandum* at comment 2 (April 16, 2004) (freight expenses associated with returns of subject merchandise should be included in indirect selling expense calculation of the entity that incurred the expenses); *Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom*, 61 Fed. Reg. 51411, 51416–17 (Oct. 2, 1996) (regarding return freight charges, "[w]here an expense cannot be tied to a sale within the POI, the expense is considered indirect")). The government argued that Commerce's inclusion of the return expenses in Agro Dutch's U.S. indirect selling expense calculation was consistent with this practice and that only if the rejected merchandise at issue had been shipped directly to such other country or countries without being returned to inventory in India might Agro Dutch have a viable argument. *Id.* at 9–10 (referencing *Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 42496, 42502 (Aug. 7, 1997) (noting that "freight charges for later sales would begin at the point of shipment associated with the later sale")). In light of Commerce's *Redetermination* and the absence of further comment thereon, it is now appropriate to address Agro Dutch's claim.

The standard for judicial review of an administrative review of an outstanding antidumping duty order is whether the agency's determination is supported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(1)(B)(i). That requires review of the record as a whole: that which supports as well as that which "fairly detracts from the substantiality of the evidence." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). But, where the

record may lead to inapposite findings, if Commerce's conclusion is not unreasonable the Court must refrain from substituting its own conclusion thereon. *See American Silicon Technologies v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001) (determination may be supported by substantial evidence of record "[e]ven if it is possible to draw two inconsistent conclusions from evidence in the record") (citation omitted); *Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (same). *Cf. Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988) ("[w]hen the court said Commerce's merchandise comparison methodology was 'unreasonable,' it was using a shorthand word for unsupported by substantial evidence on the record").

Agro Dutch attempts to persuade that Commerce's conclusion is unreasonable, but arguing that the movement expenses resulted from a legitimate business decision and are direct rather than indirect does not persuade, *a fortiori*, to the extent that it would be unreasonable to treat these expenses as indirect selling expenses associated with U.S. sales during the period of review. That is to say, it is not apparent from the evidence of record that the U.S.-to-India movement cost *must* be treated as direct expenses attributable to the ultimate foreign market sale. It may be true, as Agro Dutch argues, that its situation differed from the administrative determinations cited by the government and CFMT to support the notion that these expenses are indirect, selling, and associated with U.S. sales, and that certain aspects of the referenced determinations might be interpreted as supportive of Agro Dutch's rather than the government's position,[1] but without more, Agro Dutch's arguments reduce to a difference of opinion with Commerce. For example, if there is a precise generally accepted accounting principle that would require that these moving expenses be accounted a direct cost of the foreign sale to which the recalled merchandise was ultimately delivered, taking into account their intermediate return to inventory in India, Agro Dutch does not elaborate. It does not, therefore, successfully attack Commerce's general cost methodology, with which the instant administrative determination appears consistent.[2] *Cf.* 19 U.S.C.

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[1] *See* Pl.'s Br. at 8–9; Def.'s Resp. at 9–10; Resp. Br. of Def.-Int. The Coalition for Fair Preserved Mushroom Trade at 6; Pl.'s Reply at 3–4 (distinguishing *Certain Porcelain-on-Steel Cookware From Mexico*, *supra*, 62 Fed. Reg. at 42502; *Certain Color Television Receivers From Malaysia*, *supra*, 69 Fed. Reg. 20952 at comment 2; *Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom*, *supra*, 61 Fed. Reg. at 51416–17).

[2] According to the *Oxford English Dictionary*, "direct" means "6. a. Effected or existing without intermediation or intervening agency; immediate . . . f. Of or pertaining to the work and expenses actually incurred during production as distinct from subsidiary work and overhead charges, *i.e.*, to prime or initial costs or charges" while "indirect" means "1 a. Of a way, path, or course: Not straight; . . . 5. Of or pertaining to the work and expenses which cannot be apportioned to any particular job or undertaking[;] pertaining to overhead charges and subsidiary work. (*Cf.* ['direct'] *a.* 6[.] f.)" *Oxford English Dictionary*, vol. IV, pp. 702–03, vol. VII p. 872 (2d ed. 1989). *Cf.* 19 C.F.R. § 351.410(c) (" '[d]irect selling expenses'

§ 1677b(f) (requiring consideration of all available evidence on proper allocation of costs); *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363 (Fed. Cir. 2005) (respondent's methodology insufficient to undermine agency's preferred method so long as agency method supported by substantial evidence on the record); *Thai Pineapple*, *supra*, 187 F.3d at 1365 (methodologies relied upon by Commerce in making its determinations are presumptively correct) (citation omitted). In short, Agro Dutch's arguments do not lead to the inevitable conclusion that the administrative treatment of the movement expenses of the recalled sales from the United States to India, as indirect expenses associated with United States sales, was unreasonable.

Commerce was also asked upon remand whether the expense of recalling the merchandise was extraordinary or otherwise distortive of Agro Dutch's experience. The *Redetermination* reports that there is no information on the record indicating that these expenses are extraordinary or otherwise distortive to Ago Dutch's margin because Commerce has

> no benchmark for establishing Agro Dutch's normal experience. No party raised this issue during the course of the review. Commerce has stated in a previous segment of this proceeding that "it is incumbent upon the respondent, as the party knowledgeable about the industry and country, to provide evidence supporting" a claim that a cost or expense is extraordinary or distortive. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India*, 63 FR 72246, 72251 (December 31. 1998). Agro Dutch did not provide any evidence that incurring expenses for recalling rejected merchandise is an extraordinary event. Accordingly, we do not find these expense to be extraordinary or otherwise distortive. *See id*. (finding the death of an employee, flooding and crop disease not to be extraordinary).

Redetermination at 4–5.

Arguably, declaring that there is no benchmark ignores or even undermines determinations of "normal" value for Agro Dutch. *See, e.g.*, *Certain Preserved Mushrooms From India*, 68 Fed. Reg. 41303 (Jul. 11, 2003) (final review results). Also, to conclude that the U.S.-to-India movement costs are not attributable to third country sales

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are expenses, such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question") & § 351.412(f)(2) ("[i]n making the constructed export price offset, 'indirect selling expenses' means expenses, other than direct selling expenses or assumed selling expenses (*see* § 351.410), that the seller would incur regardless of whether particular sales were made, but that reasonably may be attributed, in whole or in part, to such sales"). *See also* Slip Op. 06–40 at 6. On a close call as to accounting treatment, the apportionment of a charge or expense would appear to be in the eye of the beholder.

is restating that such expenses would be considered extraordinary to such sales. But, since Agro Dutch chose not to comment or provide Commerce with a reason to conclude otherwise, the determination that the expenses at issue were not extraordinary, relative to sales during the period of review, is supported by substantial evidence on the record.

As mentioned, the Court remanded for clarification of the impact of the movement expenses on Commerce's dumping calculation. Commerce's response is that the movement expenses affected Agro Dutch's margin through the calculation of the commission offset, which is a circumstance-of-sale adjustment to normal value pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii). The commission offset regulation is as follows:

> (e) Commissions paid in one market. The Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under considerations [*sic*], and no commission is paid in the other market under consideration. The Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

19 C.F.R. § 351.410(e).

The *Redetermination* explains that the commission offset entailed upward adjustment of normal value[3] because most U.S. export price sales did not involve payment of a commission, whereas the surrogate foreign market selling expense data for Agro Dutch (*i.e.*, the weighted average selling expense data for Premier and Weikfield) showed positive ratios for commissions in the home market, *viz*:

> The statute instructs Commerce to include selling expenses in the calculation of [constructed value ("CV")] that are ". . . in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." *See* section 773(e)(2)(B)(ii) of the Act.
>
> To calculate these selling expenses, Commerce used the weighted-average comparison market selling expenses derived from the data of the other respondents in the review. These calculations, expressed as ratios to be applied in the CV calculation, appear at Attachment 1 to the August 13, 2004, Memoran-

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[3] The Court earlier noted that the offset had been explicitly applied to Premier and Weikfield but not to Agro Dutch and wondered whether, if such were applicable to Agro Dutch's situation, it might actually have been to Agro Dutch's benefit. *See* Slip Op. 06–40 n.3. The impact in this instance, however, was upward adjustment of normal value by approximately 1.26 percent, according to Commerce's "Hypothetical Recalculation of Agro Dutch's Amended Final Results." *Cf. Redetermination* at 4 (referencing Remand Conf. Doc. 1).

> dum to the File entitled "Agro Dutch Final Results Notes and Margin Calculation" (Proprietary Document 50) (Final Results Calculation Memorandum). The attachment shows a positive ratio for home market commissions. Agro Dutch incurred commissions on some, but not most, U.S. sales in this review (*see* May 21, 2003, Questionnaire Response at pages C–28–29 (Public Document 29)). Therefore, for comparisons to U.S. sales where no commission expenses were incurred, 19 CFR 351.410(e) applies and Commerce made a circumstance-of-sale adjustment to Agro Dutch's CV-based [normal value ("NV")] up to, or capped by, the amount of other selling expenses incurred in the U.S. market, *i.e.* the U.S. indirect selling expenses, including the expenses at issue. . . .
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> * * *
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> Net Effect: The reduction in NV for the comparison market commissions is offset by the addition of an amount equal to the total of U.S. indirect selling expenses, which includes the expenses for the rejected sales.

Redetermination at 2–4. That being the case, the following lines of program, to which the *Redetermination* refers in part, appeared relevant:

line 1992:	DINDIR3U and DINSIR4U are added to other indirect selling expenses to create the aggregate variable XPTINDSU.
line 2458:	XPTINDSU (U.S. indirect selling expense variable) is renamed MUSOTHIS, which is used in the calculation to determine the offset amount to the home market commission amount.
line 2488:	Comparison market commissions (CMCOMMIS) are set equal to "HMCOMM". The explanatory note defines this process as the comparison market commission in U.S. dollars.
lines 2493–94:	These lines appear to test whether comparison market commissions (CMCOMMIS) are equal to zero; if so then "CMINCOMM" is defined as constructed value comparison market indirect selling expenses, plus certain additions (CMINDSEL), otherwise CMINCOMM is set to zero;
lines 2573, 2577, 2588:	According to the *Redetermination*, this is where the comparison market commissions are calculated (referenced in the *Redetermination* as CMCOMMIS) and net constructed value is calculated exclusive of these commissions.

line 2612:	The weighted average selling expense and profit ratios for constructed value from Premier and Weikfield are calculated, CMINCOMM is apparently redefined to the relevant comparison market indirect selling expenses (ISELCV) plus certain additions (INVCVR * COPCV) and converted into dollars (MUSXRATE).
line 2691:	(1) If the amount of comparison market commissions (CMCOMMIS) is greater than the amount of U.S. commissions (MUSCOMM), the commission offset is the lesser of either (a) the U.S. indirect selling expenses (MUSOTHIS), or (b) the difference between the comparison market commissions and U.S. commissions. (2) If the amount of U.S. commissions (MUSCOMM) is greater than the amount of comparison market commissions (CMCOMMIS), the commission offset is the lesser of either (a) CMINCOMM or (b) the difference between the U.S. commissions and the comparison market commissions. (3) If there are no U.S. commissions (*i.e.*, MUSCOMM = 0), the commission offset is equal to the lesser of U.S. indirect selling expenses (MUSOTHIS) or comparison market commissions (CMCOMMIS).
line 2700:	Calculation of the NV in this EP situation, which subtracts the offset amount from comparison market net price in U.S. dollars (FUPDOL). (Since OFFSET is a negative value, it is actually added to FUPDOL.)

See Conf. Doc. 53 at 145–152.

The foregoing is too convoluted. First, if CMCOMMIS is defined by lines 2573, 2577 and 2588, it is intelligible. There is, however, a definition of COMMCV at line 2573. Also, the commission offset regulation supposedly applies only when commissions in one of the markets under consideration obtains a reasonable allowance "and *no* commission is paid in the other market under consideration." 19 C.F.R. § 351.410(e) (italics added). By contrast, the computer program appears to calculate a commission offset under any circumstance, not only when "no commission is paid in the other market under consideration." Condition (2) should never occur, given that the concern in this instance is supposedly over "a positive ratio for home market commissions," and, in accordance with 19 C.F.R. § 351.410(e), condition (1) should only apply so long as there are no U.S. commissions (MUSCOMM = 0), in which case condition (3)

would also apply. But it is unclear whether the data should only trigger such conditionality, given that the *Redetermination* explains that some sales to the U.S. involved commissions and some did not.

Some, apparently, involved both. Referencing the ten highest and five lowest margins for each type of comparison for Agro Dutch, the *Redetermination* undertakes a walk-through of the effect of the programming using the first observation of output as representative, but examination of observations six and seven indicates that a commission offset was calculated despite positive amounts of commissions for both the U.S. and the comparison market sales. *Cf. Redetermination* at 4 *with* Conf. Doc 50 at 167–172.

With Commerce's indulgence, it is therefore necessary to obtain a fuller picture before the matter may be sustained. Commerce shall provide a brief explanation of why its computer program comports with 19 U.S.C. § 351.410(e) within ten days from the date hereof.

SO ORDERED.

SLIP OP. 06–97

NIPPON STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and U.S. STEEL GROUP, A UNIT OF USX CORPORATION, ISPAT INLAND INC., GALLATIN STEEL, IPSCO STEEL, INC., STEEL DYNAMICS, INC., and WEIRTON STEEL CORPORATION, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Consol. Court No. 99–08–00466

[Defendant's partial consent motion for leave to reliquidate entries of subject merchandise granted.]

Dated: June 27, 2006

Gibson, Dunn & Crutcher, LLP (*Daniel J. Plaine* and *Gracia M. Berg*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Kyle E. Chadwick*), for the defendant.

Skadden, Arps, Slate, Meagher & Flom, LLP (*John J. Mangan*, and *Robert E. Lighthizer*) for defendant-intervenors U.S. Steel Group, a unit of USX Corporation and Ispat Inland Inc.

Schagrin Associates (*Roger B. Schagrin*) for the defendant-intervenors Gallatin Steel, IPSCO Steel Inc., Steel Dynamics, Inc., and Weirton Steel Corporation.

MEMORANDUM OPINION AND ORDER

Restani, Chief Judge: This matter is before the court on defendant's motion to reliquidate entries of merchandise that were the subject of antidumping duty litigation and which were erroneously liquidated.

FACTS

Liquidation of entries of hot-rolled steel subject to the antidumping duty order and produced by Nippon Steel Corporation was suspended by the court's injunction of October 7, 1999. *See* Order Granting Mot. Prelim. Inj., Oct. 7, 1999. The injunction was requested by Nippon Steel to preserve its interests and those of importers of subject merchandise produced by Nippon Steel during the pendency of this litigation.

Notwithstanding this injunction, on July 29, 2005, the United States Department of Commerce ("Commerce") issued liquidation instructions to the United States Bureau of Customs and Border Protection ("Customs") instructing Customs to liquidate twenty-eight entries of subject merchandise produced by Nippon Steel Corporation. Def.'s Mot. at Attach. 2. Specifically, Customs was instructed to "assess antidumping duties . . . at the cash deposit rate in effect on the date of entry." Def.'s Mot. at Attach. 2. On the date of entry, the twenty-eight entries at issue were subject to a cash deposit rate of 18.37%. Between September 9, 2005, and December 23, 2005, the twenty-eight entries were liquidated and assessed antidumping duties at this rate by the Ports of Buffalo, Chicago, Nashville, New Orleans, San Francisco, Savannah, and St. Louis.

On February 22, 2006, the court entered a final judgment in this case, which established an antidumping duty rate of 21.12% for all entries that occurred between February 19, 1999, and November 21, 2002. *Nippon Steel Corp. v. United States*, Slip Op. 06–23, 2006 WL 416369 (CIT Feb. 22, 2006); *Final Results of Redetermination Pursuant to Court Remand*, A–588–846, POI 97–98 (Dep't Commerce Nov. 28, 2003), *available at*: http://ia.ita.doc.gov/remands/99-08-00466.pdf. For entries that occurred on or after November 22, 2002, the liquidation rate was set at 19.95%. At some point after the court's issuance of its final judgment, Commerce apparently recognized that it had violated the court's injunction with respect to the twenty-eight entries. Although defendant's motion provides no information on how or when Commerce recognized its error, on April 12, 2006, Commerce apparently issued a correction to its instructions for liquidation of entries of the subject merchandise produced by Nippon Steel Corporation. Def.'s Mot. at Attach. 3.

DISCUSSION

All parties agree that erroneous liquidations occurred here in violation of an outstanding court injunction. The court has previously found liquidations in violation of outstanding injunctions to be void. *See Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1162, 1169 (CIT 2004); *AK Steel Corp. v. United States*, 281 F. Supp. 2d 1318, 1321–23 (CIT 2003); *LG Elecs., U.S.A., Inc. v. United States*, 21 C.I.T. 1421, 1428, 991 F. Supp. 668, 675 (1997).[1] Plaintiff opposes defendant's request to recognize the erroneous liquidations as void because it avers defendant should not benefit from its own wrongdoing. Plaintiff, however, offers no evidence that in regard to the liquidations at issue defendant had any improper purpose or was even negligent, and does not contest that defendant acted promptly to correct its error. Certainly, private party defendant-intervenors did nothing warranting loss of the beneficial results of litigation. The court sees no reason to deny defendant and defendant-intervenors the benefit of the court's equitable power to restore the order required by the court's injunction. All things being otherwise equal, a void liquidation is void for all purposes.

CONCLUSION

Upon consideration of the defendant's motion to reliquidate certain entries of subject merchandise, and plaintiff's response thereto, it is hereby:

ORDERED that the defendant's motion is granted; and further, permanently

ORDERED that the entries shall be liquidated in accordance with the final court decision as provided in 19 U.S.C. § 1516a(e) (2000), notwithstanding the provisions of 19 U.S.C. § 1504(d) (2000 & West Supp. 2006), as previously ordered; and

ORDERED that the Bureau of Customs and Border Protection shall liquidate or reliquidate the inadvertently "liquidated" entries in accordance with the court's final judgment dated February 22, 2006.

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[1] *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (CIT 2004), recognized the jurisdiction of the Court under 28 U.S.C. § 1581(i) (2000) to order correction of liquidations following antidumping duty litigation, if the erroneous liquidation resulted from improper instructions from Commerce, as in this case. *See Shinyei*, 255 F.3d at 1305. *Shinyei*, however, was a post-litigation APA action brought by parties injured by government action, not an action by the government to correct its own errors. Further, there is no discussion of any permanent injunction in *Shinyei*, and any preliminary injunction would have dissolved. In this case, the "preliminary" injunction was still in place. The court's final judgment issued after the putative liquidations occurred.

SLIP OP. 06–98

UNITED STATES, Plaintiff, v. UPS CUSTOMHOUSE BROKERAGE, INC., dba UPS SUPPLY CHAIN SOLUTIONS, INC., Defendant.

BEFORE: CARMAN, JUDGE
Court No. 04–00650

[Plaintiff's motion to strike is denied. Defendant's partial motion for summary judgment is denied.]

June 28, 2006

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Melinda D. Hart*, *Nancy Kim*), *Edward Greenwald*, Department of Homeland Security, Bureau of Customs and Border Protection, Of Counsel, for Plaintiff.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Lars-Erik Hjelm*, *Lisa W. Ross*, *Thomas J. McCarthy*), Washington, D.C., for Defendant.

Tompkins & Davidson, LLP (*Laura Siegel Rabinowitz*), New York, New York, for Amicus (National Customs Brokers & Freight Forwarders Association of America, Inc.).

OPINION & ORDER

CARMAN, JUDGE: This matter comes before the Court on Defendant's Rule 56 Motion for Summary Judgment ("Summary Judgment Motion") and Plaintiff's Motion to Strike Defendant's $10,000 Penalty Refund Claim ("Motion to Strike"). Defendant, UPS Customhouse Brokerage, Inc. ("UPS" or "Defendant") and Plaintiff, the United States ("Plaintiff" or "Customs") each filed timely responses and replies to the respective briefs. The Court, having considered the parties' submissions and for the reasons that follow, denies both motions.

PROCEDURAL HISTORY

Defendant is a licensed customs broker responsible for preparing and filing customs entry documents on behalf of its clients. On May 15, 2000,[1] the United States Customs Service (now the Bureau of Customs and Border Protection) ("Customs") concurrently issued three pre-penalty notices to UPS for violations of section 641 of the

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[1] The parties appear to be in complete confusion about the year in which Customs issued the first pre-penalty notice. The parties variously listed the year as 2000 (Def.'s Statement of Material Facts Not in Dispute ("Def.'s Stmt. of Facts") ¶ 5; Pl.'s Statement of Genuine Issues ("Pl.'s Stmt. of Facts") ¶ 10), 2004 (Def.'s Stmt. of Facts ¶ 6), and 2005 (Pl.'s Stmt. of Facts ¶¶ 5–6). Based upon the record before it, the Court presumes that Customs concurrently issued three separate pre-penalty notices on May 15, 2000.

Tariff Act of 1930, 19 U.S.C. § 1641 (2000)[2] ("the broker statute").[3] The broker statute requires that Customs notify a broker prior to enforcing a penalty against it for a violation of the statute. 19 U.S.C. § 1641(d)(2)(A) (2000) ("§ 1641(d)(2)(A)").[4] On September 15, 2000, Customs issued three penalty notices covering the three pre-penalty notices issued on May 15, 2000. (Def.'s Statement of Material Facts Not in Dispute ("Def.'s Stmt. of Facts") ¶ 8; Pl.'s Statement of Genuine Issues ("Pl.'s Stmt. of Facts") ¶ 8.) On October 1, 2001, Defendant remitted to Customs $5,000 in satisfaction of each of the three May 15, 2000, pre-penalty notices, for a total remission of $15,000. (Def.'s Stmt. of Facts ¶ 9.)

On July 11, 2000, Customs issued another three pre-penalty notices,[5] and on August 8, 2000, Customs issued two more pre-penalty notices.[6] On September 26, 2000, Customs issued three penalty notices to UPS for violations of the broker statute noticed in the July 11, 2000, pre-penalty notices. (Def.'s Stmt. of Facts ¶ 2; Pl.'s 1st Am. Compl. ¶¶ 8–10.) On October 19, 2000, Customs issued an additional two penalty notices to UPS for violations of the broker statute noticed in the August 8, 2000, pre-penalty notices. (Def.'s Stmt of Facts ¶ 2; Pl.'s 1st Am. Comp. ¶¶ 11–12.) The May 15, July 11, and August 8, 2000, pre-penalty notices each alleged violations of the responsible supervision and control provision of the broker statute regarding the erroneous classification of merchandise entered between January 10 and May 10, 2000. (Def.'s Stmt. of Facts ¶ 1, ¶ 4; Pl.'s 1st Am. Compl. ¶¶ 8–12.)

UPS failed to remit the $75,000 in penalties imposed by the September 26, and October 19, 2000, penalty notices. On December 17, 2004, Plaintiff filed a complaint against UPS seeking to enforce the monetary penalties Customs imposed on Defendant. On February 14, 2006, with leave of Court, Plaintiff filed its First Amended Complaint seeking to recover $75,000, in total, for the five unpaid penalties assessed against Defendant.[7]

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[2] Section 641(b)(4) of the Tariff Act of 1930, 19 U.S.C. § 1641(b)(4), requires a customs broker to "exercise responsible supervision and control over the customs business that it conducts." Section 641(d)(1)(C) permits Customs to impose a monetary penalty when a broker "has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision." 19 U.S.C. § 1641(d)(1)(C).

[3] The May 15, 2000, pre-penalty notices initiated case numbers 2000–4196–300217, 2000–4196–300218, and 2000–4196–300219. (Def.'s Stmt. of Facts ¶¶ 5–6.)

[4] The statute states that "the appropriate customs officer shall serve *notice in writing* upon any customs broker to show cause why the broker should not be subject to a monetary penalty. . . ." 19 U.S.C. § 1641(d)(2)(A) (emphasis added).

[5] The July 11, 2000, pre-penalty notices initiated case numbers 2000–4196–300221, 2000–4196–300222, and 2000–4196–300223. (Pl.'s Summ. J. Resp. at 5.)

[6] The August 8, 2000, pre-penalty notices initiated case numbers 2000–4196–300319 and 2000–4196–300320. (Pl.'s Summ. J. Resp. at 5.)

[7] Plaintiff's original complaint claimed $80,000 in unpaid penalties against Defendant.

On April 21, 2005, Defendant filed its answer to Plaintiff's complaint. The answer included nine affirmative defenses and no counterclaims. On August 2, 2005, Defendant filed its Summary Judgment Motion.[8] Defendant's Summary Judgment Motion requests that this Court hold "that 19 U.S.C. § 1641 (d)(2)(A)[9] bars Plaintiff . . . from collecting more than a single monetary penalty, not to exceed $30,000, for all violations of 19 U.S.C. § 1641 . . . preceding the issuance of a Pre-penalty notice." (Def.'s Summ. J. Mot. at 1 (footnote added).) Defendant's Summary Judgment Motion also included a prayer for the refund of $10,000 Defendant previously paid to Customs in the form of a penalty. (*Id.* at 3; *see also* Mem. of Law in Supp. of Def.'s Mot. for Summ. Judg. ("Def.'s Summ. J. Br.") at 30.)

Also on August 2, 2005, the National Customs Brokers & Freight Forwarders Association of America, Inc. ("NCBFFAA") filed a partial consent motion to appear as amicus curiae in this matter. On August 22, 2005, Customs filed its opposition to the NCBFFAA's motion to appear in this case. On January 13, 2006, this Court granted–over Plaintiff's objections–the NCBFFAA's motion to appear as amicus curiae.

On October 14, 2005, Plaintiff concurrently filed its Motion to Strike Defendant's inclusion of the $10,000 penalty refund demand, which appears for the first time in Defendant's partial Summary Judgment Motion, and Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Summary Judgment Response").[10]

The parties are in substantial agreement on the facts as presented and as relevant to the issues presently before this Court. Before this Court are Plaintiff's Motion to Strike and Defendant's Summary Judgment Motion.

The amended complaint deleted a duplicate count. For purposes of resolving the motions before this Court, the $75,000 sum is accepted as accurate.

[8] The Court notes that Defendant captioned its motion rather misleadingly as a motion for summary judgment. Despite the title given by Defendant, its motion does not seek to dispose of all of the issues in this case and, therefore, is treated by this Court as a *partial* motion for summary judgment. *See* USCIT R. 56(d); *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848 (1993) ("the Court may grant partial summary judgment").

[9] 19 U.S.C. § 1641(d)(2)(A) states in relevant part that "the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a monetary penalty not to exceed $30,000 in total for a violation or violations of this section."

[10] On August 31, 2005, Plaintiff requested an extension of time to October 14, 2005, to file its response to Defendant's partial Summary Judgment Motion. This Court granted Plaintiff's request for an extension of time on September 7, 2005. Accordingly, Plaintiff's response to Defendant's partial Summary Judgment Motion was timely filed.

PARTIES' CONTENTIONS

I. *MOTION TO STRIKE*

A. *Plaintiff's Contentions*

The essence of Plaintiff's argument is that UPS failed to raise the issue of the requested $10,000 penalty refund in its answer as a counterclaim and failed to seek leave of this Court to amend its answer to properly plead a counterclaim. (Pl.'s Mot. at 1.) Plaintiff states that Court of International Trade Rule 13(a)[11] requires that all claims against an opposing party be set forth in a pleading. If not set forth in a pleading, Plaintiff asserts that the pleader must seek leave of court to amend its pleading and add the counterclaim. (Pl.'s Mot. at 2 (quoting USCIT R. 13(e)[12]).) Plaintiff posits that Defendant's penalty refund claim is not only "impermissible and improperly asserted, but . . . also inexcusably late." (Pl.'s Mot. at 2.) As a result, Plaintiff urges this Court to strike Defendant's penalty refund claim.

In the alternative, Plaintiff argues that Defendant's penalty refund claim is outside the scope of this Court's counterclaim jurisdiction. (*Id.* at 3.) Plaintiff cites 28 U.S.C. § 1583(a) as controlling this issue. The statute states that

> In any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim, cross-claim, or third-party action of any party, if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim is to recover upon a bond or customs duties relating to such merchandise.

19 U.S.C. § 1583 (2000). "[E]ven assuming, for argument's sake, that UPS's penalty refund claim had been the subject of a counterclaim, it would involve imported merchandise unrelated to the 45 merchandise entries that are the subject of this civil action." (Pl.'s Br. at 3.) Plaintiff contends that the monies for which UPS claims a refund involve entries that are not subject to this litigation and, therefore, are not within the jurisdiction of this Court. (*Id.*) As such,

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[11] Court of International Trade Rule 13(a) states

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if (1) the claim involves the imported merchandise that is the subject matter of the civil action, or (2) the claim is to recover upon a bond or customs duties relating to such merchandise.

[12] Court of International Trade Rule 13(e) states

When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

Plaintiff concludes that Defendant's penalty refund claim must be rejected.

B. *Defendant's Contentions*

Defendant first argues that Plaintiff's Motion is untimely under Court of International Trade Rule 12(f)[13] "because Plaintiff did not file the Motion within 20 days of Defendant's service of its August 2, 2005 pleading, i.e., Defendant's Rule 56 Motion for Summary Judgment." (Def.'s Resp. in Opp'n to Pl.'s Mot. to Strike Def.'s $10,000 Penalty Refund Claim & Def.'s Alternative Mot. to Treat the Affirmative Defense & Prayer for Relief as a Countercl. or to Set Up the Countercl. by Amendment ("Def.'s Resp.") at 1.) Defendant submits that Plaintiff's failure to obtain an extension of time to file its motion renders the motion out of time. Defendant also complains that–in violation of Court of International Trade Rule 7(b)[14]– Plaintiff failed to consult with Defendant prior to filing Plaintiff's Motion. (*Id.* at 2.)

Defendant next suggests that its fifth affirmative defense in its answer "squarely interposed the affirmative defense that Customs exceeded its statutory authority and sought the Court's order for further relief as is just and proper." (*Id.*) Defendant purports that its "affirmative defense and prayer for relief amount to a counterclaim that Customs make [UPS] whole for Customs' conduct that exceeds its statutory mandate." (*Id.* at 3.)

Next, Defendant insists that "this Court has plenary authority under [Court of International Trade] Rule 8(d)[15] to treat the designation of an affirmative defense and prayer for relief as a counterclaim,

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[13] Court of International Trade Rule 12(f) states

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

[14] Court of International Trade Rule 7(b) states

> Before a motion for an extension of time . . . , a motion for intervention . . . , a motion for a preliminary injunction to enjoin the liquidation of entries, a motion for a hearing . . . , a motion for the designation of a test case or suspension . . . , or a motion for an order compelling disclosure or discovery . . . , is made, the moving party shall consult with all other parties to the action to attempt to reach agreement, in good faith, on the issues involved in the motion. . . .

[15] Court of International Trade Rule 8(d) states

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, discharge in bankruptcy, duress, estoppel, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

if justice so requires." (*Id.* (footnote added).) As such, Defendant requests that this Court "treat the designation of the affirmative defense and prayer for relief as a counterclaim for the refund of the $10,000 assessed" by Customs. (*Id.*)

Defendant maintains that the merchandise "at issue in the two penalty cases for which [UPS] seeks a $10,000 refund" is merchandise Customs alleges UPS misclassified under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 8473.30.9000. (*Id.*) Defendant offers that the merchandise at issue in this case is also merchandise that Customs alleges that Defendant misclassified under HTSUS subheading 8473.30.9000. (*Id.*) Defendant reasons, therefore, that the merchandise that is the subject of the this case is the same merchandise that is the subject of the $10,000 penalty refund claim. (*Id.* at 3–4.)

Lastly, Defendant requests that–if the Court is unwilling to treat its affirmative defense and prayer for relief as a counterclaim–it be allowed to amend its answer to properly plead its counterclaim. Defendant presses that "[j]ustice so requires this amendment." (*Id.* at 4.)

C. *Plaintiff's Reply*

In Plaintiff's Reply in Support of Its Motion to Strike and Opposition to Defendant's Alternative Motion to Assert a Counterclaim ("Plaintiff's Reply"), Plaintiff addresses Defendant's arguments against its Motion to Strike. Plaintiff points out that Defendant's $10,000 penalty refund claim was not asserted in a pleading filed in this case. (Pl.'s Reply at 2.) Plaintiff notes that Defendant first asserted its $10,000 penalty refund claim in a motion for summary judgment, which–according to Plaintiff–is not a pleading. (*Id.*) Plaintiff submits that the twenty-day filing requirement of Court of International Trade Rule 12(f) is triggered *only* by service of a pleading. Therefore, Plaintiff contends that the rule is inapplicable in this case and does not render Plaintiff's Motion untimely. (*Id.*)

Plaintiff also takes issue with Defendant's invocation of Court of International Trade Rule 7(b) and its consultation requirement. Plaintiff advises that the rule does not include motions to strike amongst those requiring consultation prior to filing. Accordingly, Plaintiff concludes that its motion was proper and no pre-filing consultation was required. (*Id.* at 2–3.)

Plaintiff next contends that "[i]t is plain that UPS never asserted a $10,000 penalty refund claim as a counterclaim or affirmative defense within any pleading." (*Id.* at 3.) Plaintiff posits that the fifth affirmative defense does not support Defendant's penalty refund claim because the fifth affirmative defense "is nothing more than an asserted cap upon its liability in this action." (*Id.*) Plaintiff, therefore, reasons that Defendant's "prayer for relief cannot be construed as encompassing a $10,000 penalty refund claim." (*Id.* at 3–4.)

Lastly, Plaintiff reasserts that Defendant's $10,000 penalty refund claim falls outside the jurisdiction of this Court. According to Plaintiff, Defendant's "$10,000 penalty refund claim concerns the reimbursement of paid penalties from 15 entries involving specific imported merchandise that was misclassified under subheading 8473.30.9000 of the HTSUS." (*Id.* at 4.) Plaintiff claims that the present matter relates to "the collection of *unpaid* penalties involving specific imported merchandise from 45 *different* entries." (*Id.* (emphasis in original).) Plaintiff concludes by stating that "[b]ecause the entries for which penalties are still outstanding involve merchandise that is different from the imported merchandise involved in the 15 entries for which penalties have already been paid, UPS's [$]10,000 penalty refund claim is beyond the scope of this Court's counterclaim jurisdiction." (*Id.* at 5.)

II. *PARTIAL MOTION FOR SUMMARY JUDGMENT*

A. *Defendant's Contentions*

Defendant argues that Plaintiff is statutorily barred from pursuing a penalty case against Defendant because Plaintiff is limited to

> (1) a *single* monetary penalty against a broker for any violation or violations of the broker statute that precede the pre-penalty notice, which penalty Defendant has satisfied; *or*
>
> (2) a maximum penalty of $30,000 for all alleged violations that occurred prior to the first pre-penalty notice Customs issued, of which amount Plaintiff has already collected $15,000.

(Def.'s Summ. J. Br. at 12–13.)

In support of its positions, Defendant states that "[t]he phrase 'for a violation or violations' makes clear the Customs [Fines, Penalties and Forfeitures ("FP&F")] Officer is limited to the issuance of a single penalty (and consequently a single Pre-penalty Notice), subject to the $30,000 maximum, even where the broker has committed multiple violations of the broker statute." (*Id.* at 15.) Defendant further argues that the statute "clearly evinces an intent to place a monetary cap on the penalty Customs may impose against a customs broker." (*Id.*) Defendant maintains that the statute's legislative history and prior case law support its interpretation. Specifically, Defendant quotes testimony of the then-President of the NCBFFAA before the House Ways and Means Subcommittee.

> The first sentence of § 641(d)(2)(A) specifies *a $30,000 maximum monetary penalty.* This maximum amount is *intended to apply* to *all violations committed prior to the date of issue of notice under this provision.*

(*Id.* at 16 (citation omitted) (underscoring in original) (italics added).) Defendant explains that the language in question was "the result of a deliberated and negotiated agreement between Customs and the customs brokerage industry." (*Id.* at 17.) Defendant alleges that Customs is now engaged in an effort to "undo the delicate balance struck by Congress, the industry and the agency at the time of enactment." (*Id.*) Defendant concludes that because (1) Customs is limited to one pre-penalty notice and penalty covering all violations of the broker statute prior to the issuance of the notice, and (2) Defendant received and paid not one, but three, penalties covering the same period of time, Customs is precluded from seeking the five additional penalties claimed in its Complaint. (*Id.* at 20–21.)

Defendant next argues–even if Customs is allowed to issue multiple pre-penalty notices for violations that occurred prior to the issuance of the first pre-penalty notice–that the total of the multiple notices cannot exceed $30,000. Defendant reasons that any other result would render superfluous the statutory phrase "in total for a violation or violations." (*Id.* at 21.) After comparing other penalty provisions in the broker statute, Defendant asserts that "only subsection (d)(2)(A) contains language limiting the aggregate penalty amount that Customs may assess." (*Id.* at 22.) Defendant posits that Congress would have chosen different language had it intended the statute to limit the penalty amount Customs could impose for a single violation. (*Id.* at 23.) Defendant adds that the statutory provision in question implements the negotiated positions of both Customs and the brokerage industry. (*Id.* at 24.) In addition, Defendant suggests that statutory grants of authority to agencies to impose penalties must be narrowly construed. (*Id.* at 24–26.) Lastly, Defendant advocates that Customs' position in this case contravenes the agency's regulations and past practices and, therefore, should not be upheld by this Court. (*Id.* at 28–29.)

B. *Plaintiff's Contentions*

In its Response, Plaintiff argues that Defendant's interpretation of § 1641(d)(2)(A) is without merit because

(1) Section 1641(d)(2)(A) is clear and unambiguous and does not prohibit Customs from pursuing multiple penalties, which in total exceed $30,000, for violations of the broker statute that occurred prior to the first pre-penalty notice;
(2) The legislative history does not suggest that Congress sought to limit a broker's liability for multiple violations, and, in fact, quite the contrary is true;

(3) Customs construed and applied its statutory grant of authority in a reasonable manner; therefore, the agency is entitled to deference;[16]
(4) The statute, existing regulations, administrative procedures, mitigation guidelines, and *de novo* review by this court act in concert to prevent Customs from abusing its discretion and assessing excessive penalties against any one broker; and
(5) Adopting Defendant's position would inhibit Customs from enforcing the customs laws and provide undue protection to customs brokers who violate their statutory obligations.

(Pl.'s Summ. J. Resp. at 2–3.)

According to Plaintiff, § 1641(d)(2)(A) has only two requirements: "(1) no single monetary penalty may exceed $30,000, and (2) each monetary penalty must be preceded by written notice" (i.e., a pre-penalty notice). (*Id.* at 8.) Plaintiff maintains that § 1641(d)(2)(A) does not restrict Customs to only one penalty covering all violations of the broker statute that occurred prior to the issuance of the pre-penalty notice. Instead, Plaintiff states that Congress' use of the disjunctive "or" ("violation *or* violations") in § 1641(d)(2)(A) "must be construed as providing Customs with the flexibility and discretion to include either a single violation or multiple violations within any given pre-penalty notice." (*Id.* at 9.) Plaintiff submits that reading § 1641(d)(2)(A) to limit Customs to one pre-penalty notice for all violations occurring before that pre-penalty notice "would eviscerate Customs' ability to include a single violation within any given pre-penalty notice, and it would render the word 'violation' superfluous and inoperative." (*Id.* at 9–10.) Had Congress intended the singe-penalty interpretation pressed by Defendant, Plaintiff insists that Congress would not have included "violation" or, alternatively, would have inserted the phrase "for all violations of this subsection" into the statute. (*Id.* at 10.)

Plaintiff next contends that the language of the statute does not limit Customs to a single aggregate penalty of $30,000 for multiple violations of the broker statute. In support of this position, Plaintiff notes that application of the last antecedent rule[17] to § 1641(d)(2)(A) results in a reading contrary to Defendant's interpretation. Because

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[16] *See Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[17] The last antecedent rule is

> A cannon of statutory construction that relative or qualifying words or phrases are to be applied to the words or phrases immediately preceding, and as not extending to or including other words, phrases, or clauses more remote, unless such extension or inclusion is clearly required by the intent and meaning of the context, or disclosed by an examination of the entire act.

Black's Law Dictionary 882 (6th ed. 1990).

the phrase "in total" succeeds "monetary penalty not to exceed $30,000," Plaintiff reads that

> . . . the words 'monetary penalty not to exceed $30,000 in total for a violation or violations' demonstrate a clear congressional intent to establish a per-penalty maximum of '$30,000 in total,' and not an aggregate monetary limitation of $30,000 for all violations preceding a pre-penalty notice. The phrase 'in total' modifies '$30,000,' while the phrase 'not to exceed $30,000' acts as a modifier of the words 'monetary penalty.'

(*Id.* at 10–11.) Plaintiff also refutes that other penalty provisions in § 1641 indicate the intent of Congress to limit Customs to a single monetary penalty or aggregate assessment of $30,000. (*Id.* at 11–13.)

Next, Plaintiff states that the legislative history of § 1641 supports its reading of the statute. Plaintiff points out that the purpose of § 1641(d)(2)(A) was to give " 'Customs the opportunity . . . to apply penalties more effectively when brokers have violated the terms of their licenses.' " (*Id.* at 14 (*quoting* S. Rep. No. 98–308, at 72 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4910, 5031).) Plaintiff urges that the NCBFFAA's statement in the legislative history used by Defendant to bolster its position is "self-serving" and was not countenanced by Congress. (*Id.* at 17.) Plaintiff adds that congressional committee testimony that precedes passage of legislation is "weak evidence of legislative intent." (*Id.* (quotation & citation omitted).) Furthermore, Plaintiff asks this Court to reject the NCBFFAA's submission as unreliable and containing unsupported assertions. (*Id.* at 18–20.) According to Plaintiff, this Court should ascribe no weight to any interpretation of § 1641(d)(2)(A) that relies upon the unreliable, extrinsic evidence put before the Court by Defendant and the NCBFFAA. (*Id.* at 20.)

Next, Plaintiff affirms that Customs' broad discretion to regulate broker conduct has a long history and that the 1984 amendment to the broker act only added flexibility to the agency's existing discretion. (*Id.* at 21.) Plaintiff ratiocinates that the position advanced by Defendant to "limit[ ] Customs to a single monetary penalty or aggregate monetary assessment of $30,000 for all violations preceding the issuance of a pre-penalty notice" is antithetical to Congress' grant of broad discretion to Customs to monitor and regulate broker conduct. (*Id.*) Plaintiff adds that Customs' discretion is not without limit. Plaintiff explains that before issuing a penalty Customs must undertake a specific administrative course, which is then subject to *de novo* review by this Court. (*Id.* at 27.) These procedural safeguards–Plaintiff claims–protect brokers from agency abuse. (*Id.*)

Plaintiff also suggests that Defendant's reading of § 1641(d)(2)(A) would "eviscerate the flexibility that Congress provided" by restricting Customs to license suspension or revocation for violations of the broker statute that were not noted in the single pre-penalty notice

Defendant advocates. (*Id.* at 29.) Plaintiff further complains that limiting Customs to a single pre-penalty notice for all preceding violations would "imped[e] the effective enforcement of the customs laws" because the notice would apply to all violations regardless of type, seriousness, frequency, or "geographic scope." (*Id.* at 28–29.)

In the alternative, Plaintiff argues that this Court should grant *Chevron* deference and uphold Customs' interpretation of § 1641(d)(2)(A) as a "reasonable construction and application" of the broker statute. (*Id.* at 22.) Plaintiff adverts to the Customs regulations found in 19 C.F.R. §§ 111.90–94, which implement § 1641(d)(2)(A) of the broker statute. Plaintiff calls the Court's attention to 19 C.F.R. § 111.91, which states

> **§ 111.91 Grounds for imposition of a monetary penalty; maximum penalty.**
>
> Customs may assess a monetary penalty *or* penalties as follows:
>
> (a) In the case of a broker, in an amount not to exceed an aggregate of $30,000 for one or more of the reasons set forth in [the preceding Subpart]. . . .

19 C.F.R. § 111.91 (2000) (emphasis added). Plaintiff submits that Customs' use of the disjunctive "or" ("penalty or penalties") in its regulation "demonstrates that Customs may choose to assess a single penalty or multiple penalties for a broker's violations, provided that no single penalty exceeds the $30,000 per penalty cap as mandated by the statutory text of section 1641(d)(2)(A)." (*Id.* at 23.)

Plaintiff notes that Customs' mitigation guidelines corroborate the agency's position and should receive some deference. (*Id.* at 24–25.) Plaintiff points out that the mitigation guidelines state that " '[a] broker shall be penalized a maximum of $30,000 for any violation or violations of the statute *in any one penalty notice*.' " (*Id.* at 24 (quoting 19 C.F.R. Pt. 171, App. C, § XII(A) (2000)) (emphasis in Plaintiff's brief).) Plaintiff concludes that "both the number of penalties and the amount of each penalty assessed was not only permitted under the regulations, but consistent with suggested guidelines," and are not "an overly burdensome financial hardship for [Defendant]." (*Id.* at 26.) As a result, Plaintiff insists that "Customs' construction and application of its monetary penalty authority under section 1641(d)(2)(A) is both reasonable and permissible, as demonstrated by its regulations, mitigation guidelines, and actions in this case." (*Id.*)

C. *Defendant's Reply*

Defendant first argues that Plaintiff is owed no deference as to Customs' interpretation of § 1641(d)(2)(A) because this Court reviews broker penalties *de novo* as to the facts, law, and amount of penalty. (Def.'s Reply to Pl.'s Br. in Opp'n to Def.'s R. 56 Mot. for

Summ. J. ("Def.'s Summ. J. Reply") at 2–3.) Defendant then claims that Plaintiff exceeded its statutory authority by issuing more than one penalty notice for violations that occurred prior to the issuance of the first pre-penalty notice when those penalty notices totaled more than $30,000. According to Defendant, the plain language of "§ 1641(d)(2)(A) provides that a customs broker may (1) be subject to *a monetary penalty* (2) *not to exceed $30,000* (3) *in total* (4) *for a violation or violations*." (*Id.* at 5 (citing § 1641(d)(2)(A)) (emphasis supplied in Defendant's brief).) Defendant presses that "[t]he plain language simply mandates that a customs broker is only 'subject to a monetary penalty . . . for a violation or violations' preceding the Pre-penalty Notice, and that this monetary penalty is 'not to exceed $30,000 in total,' regardless of the number of violations." (*Id.* at 6 (citation omitted).)

Defendant also argues that Plaintiff mischaracterizes the legislative history of the penalty provision of the broker statute. Defendant accuses Plaintiff of misleading this Court about the extent of agreement between Customs and the NCBFFAA on the penalty provision of the broker statute. (*Id.* at 8–9.) Defendant refutes Plaintiff's argument by stating that in his testimony before Congress "the [then] Commissioner [of Customs] *specifically* identifies the monetary penalty provision at subsection (d) as 'one of the more significant areas *where* {Customs and the NCBF[F]AA} do agree.' " (*Id.* at 9 (citation omitted) (emphasis supplied in Defendant's brief).)

Defendant next calls Plaintiff's application and interpretation of § 1641(d)(2)(A) in this case "arbitrary and unprincipled." (*Id.* at 12.) Defendant suggests that prior case law indicates a conflict in Customs' reasoning. In two cases it cited, Defendant points out that Customs limited the penalties it sought to the statutory $30,000 maximum for violations Customs discovered in the context of audits. (*Id.*) Defendant takes issue with Plaintiff's argument that these cases are irrelevant because Customs has imposed upon itself the statutory limit of $30,000 for all violations discovered in the context of an audit. (*Id.*) Defendant objects to Customs' distinction between violations discovered in the context of an audit and those discovered outside an audit.

Lastly, Defendant stresses that judicial review is not an adequate restraint on Customs' ability–under Customs' interpretation of the broker penalty statute–to impose "exorbitant" penalties against a broker. (*Id.* at 13–14.) Defendant states that "[j]udicial review is an important safeguard to be sure, but it does not replace the statutory bar Congress established to protect against the potential harm to a customs broker's livelihood that may result from the imposition of unlimited penalty assessments." (*Id.* at 14.)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C.§ 1582(1) (2000).

DISCUSSION

I. *Motion to Strike*

A. *Plaintiff's Motion to Strike is Denied.*

As a general rule, courts do not favor motions to strike. *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932 (1986). As a result, such motions are not often granted. *See id.* Whether to grant a motion to strike is within the broad discretion of the court. *Id.*

A motion to strike is an "extraordinary remedy" that a court should grant "only in cases where there has been a flagrant disregard of the rules of court." *Id.* Consequently, a court will grant a motion to strike only when "the brief demonstrates a lack of good faith" or when "the court would be prejudiced or misled by the inclusion in the brief of the improper material." *Id.*

> [T]here is no occasion for a party to move to strike portions of an opponent's brief (unless they be scandalous or defamatory) merely because he thinks they contain material that is incorrect, inappropriate, or not a part of the record. The appropriate method of raising those issues is by so arguing, either in the brief or in a supplemental memorandum, but not by filing a motion to strike.

Acciai Speciali Terni S.P.A. v. United States, 24 CIT 1211, 1217, 120 F. Supp. 2d 1101 (2000) (*quoting Dillon v. United States*, 229 Ct. Cl. 631, 636 (1981)). If requiring an amended filing by the offending party would resolve the dispute, the court should consider such, rather than the more drastic measure of striking a filing or portion thereof. *See Beker Indus. Corp. v. United States*, 7 CIT 199, 203, 585 F. Supp. 663 (1984).

In the matter before this Court, Plaintiff has not demonstrated that Defendant's penalty refund claim was made in bad faith or would prejudice or mislead the Court. *See Jimlar*, 10 CIT at 673. Further, this Court sees no indication that Defendant's penalty refund claim is scandalous or defamatory. *Acciai Speciali*, 24 CIT at 1217. Accordingly, this Court will not strike Defendant's penalty refund claim from the record.

Although technically moot given the Court's denial of Plaintiff's motion, it is worth mentioning that the Court agrees with Plaintiff that its Motion to Strike was timely and properly filed. A motion for summary judgment is not a pleading (*see* USCIT R. 7(a)), and only the filing of a pleading triggers the twenty-day filing limitation of Court of International Trade Rule 12(f). Also, as a general principal,

this Court encourages and expects cooperation amongst parties engaged in litigation before it. However, Plaintiff–despite Defendant's accusation to the contrary–was not required by this court's rules to consult with Defendant prior to filing its Motion to Strike. *See* USCIT R. 7(b).

B. *Defendant's Requests in the Alternative Are Denied.*

In its response brief, Defendant requests that this Court treat its "designation of an affirmative defense and prayer for relief as a counterclaim." (Def.'s Resp. at 3.) This Court cannot oblige Defendant. In order to consider Defendant's fifth affirmative defense[18] as a counterclaim, it must comply with this court's rules. Rule 8(a) requires that a counterclaim

> . . . contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. . . .

USCIT R. 8(a). Defendant's affirmative defense lacks both "a short and plain statement of the claim showing [Defendant] is entitled to relief" and "a demand for judgment for the relief [Defendant] seeks." *Id*. The first time Defendant's $10,000 penalty refund claim appears is in its Summary Judgment Motion. This Court will not read into Defendant's Answer a claim that is not present therein. Moreover, Defendant's request in its Answer for an order granting "such further relief as is just and proper" (Def.'s Answer & Jury Demand at 7) is overly broad and insufficient for this Court to consider it Defendant's demand for a $10,000 penalty refund. Accordingly, this Court declines to treat Defendant's affirmative defense as a counterclaim.

Defendant also requests that this Court allow it to amend its Answer to properly plead the $10,000 penalty refund as a counterclaim. (Def.'s Resp. at 4.) Although this Court will not strike Defendant's $10,000 penalty refund claim, neither will the Court hear of it further. As Plaintiff correctly points out, this Court has jurisdiction over only a counterclaim or cross-claim if

> (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or
> (2) such claim or action is to recover upon a bond or customs duties relating to such merchandise.

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[18] Defendant's fifth affirmative defense states that "Plaintiff may not recover civil penalties against [Defendant], a licensed customs broker, in excess of $30,000 under 19 U.S.C. § 1641(d)(2)(A) for the entries filed during the time period covered by the six penalty cases referenced in Paragraphs 8–13 of the Complaint." (Def.'s Answer & Jury Demand at 6.)

28 U.S.C. § 1583. The action before this Court is not one seeking to "recover on a bond or customs duties." Further, Defendant's counterclaim relates solely to penalties it paid Customs related to the misclassification of imported merchandise that was entered on entries that are not now before this Court. (*See* Pl.'s Mot. to Strike at 3.)

Defendant's argument that the alleged violation–misclassification of imported merchandise–is the same on each pre-penalty notice Customs issued does not compel this Court's jurisdiction. (Def.'s Resp. at 3–4.) The Court must have jurisdiction over a claim or action related to the specific imported merchandise that is the subject matter of the litigation. Those entries and the specific imported merchandise entered thereon for which Defendant remitted payments on penalty notices are not a part of Plaintiff's Amended Complaint. Plaintiff is before this Court seeking to enforce penalties for alleged violations that occurred on other entries, separate and distinct from those for which Defendant complied with the penalty notices. Therefore, the entries for which Defendant remitted payment on penalty notices are not part of the present litigation.

Even if this Court were to allow Defendant to amend its answer to include the $10,000 penalty refund claim, this Court would be unable to hear the claim because it lacks jurisdiction over the underlying entries. *See United States v. Shabahang Persian Carpets, Ltd.*, 21 CIT 360, 361, 963 F. Supp. 1207 (1997) (court found no counterclaim jurisdiction where claim did not involve merchandise that was the subject of the pending action). The most expeditious and judicially efficient course is for this Court to rule on the jurisdiction issue now. Because this Court does not have jurisdiction over the entries that are the bases of Defendant's asserted counterclaim, this Court denies Defendant's request to amend its Answer.

II. *Partial Motion for Summary Judgment*

A. *Standard of Review*

"This case involves issues of statutory interpretation, which is a question of law subject to de novo review." *Lee v. United States*, 329 F.3d 817, 820 (Fed Cir. 2003) (*citing U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000)). However, the broker statute does not specify the standard of review the court should apply when resolving disputes over agency decisions pursuant to § 1641(d)(2)(A). Although there is no standard of review specified for the relevant agency decision, the broker statute does establish that Customs' findings of fact are conclusive if supported by substantial evidence. 19 U.S.C. § 1641(e)(3) (2000). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961 (1986) (citations omitted), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). In reviewing an

agency decision, "[t]he Court may not substitute its judgment for that of the administrative agency," and "the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence." *Barnhart v. U.S. Treasury Dep't*, 9 CIT 287, 290, 613 F. Supp. 370 (1985).

To fix the standard of review, the court looks, first, to 28 U.S.C. § 2640, which provides the *scope* of review that applies in this case. *United States v. Ricci*, 21 CIT 1145, 1146, 985 F. Supp. 1145 (1997). Section 2640 requires that the court resolve disputes brought pursuant to § 1641(d)(2)(A) "upon the basis of the record made before the court." 28 U.S.C. § 2640 (2000). However, § 2640 also does not specify a *standard* of review. As a result, the Court must look to the Administrative Procedure Act ("APA") for the applicable standard of review.[19] Section 706 provides the standard of review for the APA and in relevant part reads

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall–
> . . .
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be–
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2)(A)–(F).

Section 706 sets forth six separate standards. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971), *rev'd on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In *Overton*

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[19] In its brief, Defendant invokes the APA as setting forth this Court's standard of review, though not to the extent done here. (Def.'s Summ. J. Mot. at 11.) On the other hand, Plaintiff does not acknowledge the APA as providing the applicable standard of review and, instead, relies solely on *Chevron* as the source of this Court's standard of review in this case. (Pl.'s Summ. J. Resp. at 6–7.)

Park, the United States Supreme Court offered guidance on when to apply these various standards. *Id.* at 413–14. The Supreme Court directed that when reviewing agency actions, subsections A through D always apply but subsections E and F should only be applied in narrow, limited situations. *Id.*; *see also Hyundai Elecs. Indus. Co., Ltd. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1208 (Fed. Cir. 1990). Since the agency action in question in this case neither arises out of a rulemaking provision of the APA nor is based on a public adjudicatory hearing, subsection E does not apply. *Overton Park*, 401 U.S. at 414. Subsection F *de novo* review is applicable only when (1) "the action is adjudicatory in nature and the agency factfinding procedures are inadequate," or (2) "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." *Id.* at 415. On the record before this Court, Defendant has made no allegations of inadequate fact-finding, and no new issues are raised. Consequently, subsection F is also inapposite.

Regardless of the inapplicability of subsections E and F, the "generally applicable standards of section 706 require the reviewing court to engage in a substantial inquiry," which means that the review must be "thorough, probing, in-depth." *Id.* at 415. This does not mean, however, that the court is "empowered to substitute its judgment for that of the agency." *Id.* at 416; *see also Duty Free Int'l, Inc. v. United States*, 19 CIT 679, 681 (1995). This Court notes that the "ultimate standard of review is a narrow one." *Overton Park*, 401 U.S. at 416.

Two standards[20] articulated in section 706 are relevant in this matter. Because Plaintiff asserted a statutory violation claim, subsection C is invoked: (C) in excess of statutory jurisdiction, authority, or limitation. 5 U.S.C. § 706(2)(C). In addition to this standard, the residual standard, subsection A, also applies. *See In re Robert J. Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) ("courts have recognized that the 'arbitrary, capricious' standard is one of default"). The "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard is deemed the most deferential. *Id.* ("this standard is generally considered to be the most deferential of the APA standards of review"). Courts have noted that "the 'touchstone' of the 'arbitrary, capricious' standard is rationality." *Id.* (citing *Hyundai*, 899 F.2d at 1209). Thus, if either subsection A or C is not satisfied, this Court will set aside the agency action. *But see Ricci*, 21 CIT at 1146 (in reviewing a case brought under 19 U.S.C.

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[20] Subsection D appears to be irrelevant to the case at hand. Agency action "without observance of procedure required by law" indicates a due process-type allegation, which was not presented in this case. 5 U.S.C. § 706(D). Likewise, subsection B is inapposite because no "constitutional right, power, privilege, or immunity" is invoked in this matter. 5 U.S.C. § 706(B).

§ 1641(d)(2)(A), the court derived the standard of review from section F of the APA).

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). On a motion for summary judgment, the moving party bears the burden of proving that there is no genuine issue of material fact that would preclude judgment in its favor. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985). However, the party opposing the motion for summary judgment may not rest on its pleadings. *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848 (1993). Rather, the nonmovant must present "specific facts" that establish a genuine issue of triable fact. *Id.* Further, "[t]he inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), and the court "must resolve all doubt over factual issues in favor of the party opposing summary judgment" *SRI*, 775 F.2d at 1116. "Partial summary judgment is appropriate when it appears that some aspects of a claim are not genuinely controvertible and genuine issues remain regarding the rest of the claim." *Ugg*, 17 CIT at 83 (quotation and citation omitted).

B. *Plaintiff's Partial Summary Judgment Motion is Denied.*

At the outset, this Court notes that Plaintiff is in substantial concurrence with Defendant's Statement of Material Facts Not in Dispute. (Pl.'s Stmt. of Facts.) The issues with which Plaintiff is in disagreement are not material to the matter before this Court. Thus, partial summary judgment is appropriate.

The issue this Court has been asked to decide is the meaning of the statutory phrase "a monetary penalty not to exceed $30,000 in total for a violation or violations of" 19 U.S.C. § 1641(d)(1). 19 U.S.C. § 1641(d)(2)(A). Defendant asks this Court to interpret the statute as limiting Customs to one-and-only-one monetary penalty for all violations of the broker statute that occurred prior to the issuance of that single pre-penalty notice. In the alternative, Defendant argues that the broker statute caps the monetary penalty Customs may assess to $30,000 for all violations that occur prior to the issuance of the *first* pre-penalty notice. On the other side, Plaintiff asks this Court to interpret the statute as allowing Customs the discretion to issue multiple pre-penalty notices for violations that occur during a period prior to the issuance of the first pre-penalty notice,

provided no single monetary penalty exceeds $30,000. The scope of this provision in the broker statute is an issue of first impression before this court.

Frequently courts are called upon to resolve a conflict between parties on the interpretation of a statute. In some such instances, the legislation before the court is drafted ambiguously by accident. In other instances (as this Court suspects is the case here), the legislation is drafted purposefully in an unartful manner as the only way to arrive at a compromise position that could then be passed on to law. *See* Mikva, Abner & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* 31–33 (Aspen Law & Bus. 1997) (discussing the enactment of the Civil Rights Act of 1991). A third–though not necessarily final–alternative is legislation drafted with a known ambiguity to be resolved by agency regulation. When the ambiguities in legislation lead to litigation, the courts are left to ferret out legislative intent, competing interests, and agency interpretation. Having carefully considered the parties' and amicus briefs and other papers, this Court finds in favor of Plaintiff and denies Defendant's partial Summary Judgment Motion.

Both parties and the amicus have exhaustively briefed this Court on how and why the Court should adopt their chosen reading of the broker penalty statute. This Court has considered the respective arguments and has concluded that this matter boils down to a question of deference.

Congress delegated authority to Customs to "prescribe such rules and regulations relating to the customs business of customs brokers as the [agency] considers necessary to protect importers and the revenue of the United States." 19 U.S.C. § 1641(f) (2000). Accordingly, Customs promulgated a regulation for the imposition of a monetary penalty against a broker pursuant to § 1641(d)(2)(A). The regulation states that Customs may impose a monetary penalty against a broker "in an amount not to exceed an aggregate of $30,000 for one or more" of the violations specified in the broker statute and regulations, "provided that no license or permit suspension or revocation proceeding has been instituted against the broker." 19 C.F.R. § 111.91(a). In the mitigation guidelines for the regulations, Customs added that "[a] broker shall be penalized a maximum of $30,000 for any violation or violations of the statute in *any one* penalty notice." 19 C.F.R. Pt. 171, App. C, XII(A) (emphasis added). The mitigation guidelines also provide that "[i]f a broker is penalized to the maximum that statute will allow and continues to commit the same violation or violations, revocation or suspension of his license would be the appropriate sanction. Barring such revocation or suspension action, he may *again* be penalized to the maximum the statute will allow." *Id.* at XII(B) (emphasis added).

"In reviewing an agency's construction of a statute that it administers, this court addresses two questions outlined by the Supreme

Court in *Chevron*." *U.S. Steel Group v. United States*, 225 F.3d 1284, 1286 (Fed. Cir. 2000). This Court first must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If congressional intent is clear, both the courts and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43 (footnote omitted); *see also Household Credit Serv., Inc. v. Pfenning*, 541 U.S. 232, 239 (2004).

If the statute is silent or ambiguous concerning the issue before it, the second question the court must assess is whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular questions is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843–44 (footnotes omitted).

However, courts are the final arbiters of statutory construction and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate congressional policy underlying a statute." *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (quotation and citation omitted). Nevertheless, "[a] great amount of deference is owed to an agency's interpretation of its own regulations." *Lee*, 329 F.3d at 822. "To survive judicial scrutiny, an agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citations omitted).

In accordance with *Chevron*, this Court first considers whether Congress spoke directly on the issue before the Court. To reiterate, the provision in question states that

> the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a monetary penalty not to exceed $30,000 in total for a violation or violations of this section.

19 U.S.C. § 1641(d)(2)(A). This Court finds that the language of the statute is ambiguous and does not speak to the precise question before the Court.

The broker penalty statute contemplates that a broker may receive a monetary penalty for one or more violations of the broker statute. However, the statute does not confine–as Defendant argues–Customs to one-and-only-one penalty notice. Further, the statute does not delimit a temporal restriction on Customs issuing more than one monetary penalty for discrete violations that occurred prior to the issuance of the first pre-penalty notice. In addition, the statute does not indicate that–if multiple pre-penalty notices are allowed–the notices that cover the period prior to the issuance of the first pre-penalty notice are limited in aggregate to $30,000.

This Court contemplates that to clearly arrive at Defendant's reading the statute may have stated to the effect that ". . . why the broker should not be subject to a *single* monetary penalty not to exceed $30,000 for *any and all* violations of this section *that occurred prior to the issuance of the pre-penalty notice*." On the other hand, for the statute to have clearly enunciated Plaintiff's position, it might have read ". . . why the broker should not be subject to a monetary penalty for one or more violations of this section, *provided that no single monetary penalty, whether or not it includes multiple violations, exceeds $30,000*." However, because Congress did not provide this Court or the parties with unambiguous language, this Court is left to contemplate the second question posed in *Chevron*: whether the agency's interpretation is reasonable.

Separate and apart from its brief, Customs articulated its interpretation of § 1641(d)(2)(A) in its regulations, 19 C.F.R. § 111.91, and the mitigation guidelines. As stated previously, the regulations state that "Customs may assess a penalty or *penalties* . . . in an amount not to exceed an aggregate of $30,000 for one or more" violations of the broker statute. 19 C.F.R. § 111.91 (emphasis added). In promulgating the broker penalty regulations, which were subject to notice and comment, 50 Fed. Reg. 31,871 (Aug. 7, 1985), Customs clearly adopted the position that it was entitled to impose more than one monetary penalty for violations of the broker statute. Although the regulation might be read to limit any penalties imposed to an aggregate of $30,000, Customs clarified its position in the mitigation guidelines, which state that Customs may penalize a broker "a maximum of $30,000 for any violation or violations of the statute in *any one* penalty notice." 19 C.F.R. Pt. 171, App. C., XII(A) (emphasis added). While the mitigation guidelines were not subject to notice and comment, they are "still entitled to some deference, since [they are] a 'permissible construction of the statute.' " *Reno v. Koray*, 515 U.S. 50, 61 (1995) (quotation and citations omitted).

Neither the broker penalty statute nor Customs regulations place any temporal restriction on a penalty issued by Customs, and this

Court sees no reason to read one into the statute.[21] This Court also does not read the statute as prescribing a limit on the number of pre-penalty notices Customs may issue. This Court finds that the regulations and mitigation guidelines express a reasonable interpretation of the broker penalty statute. Accordingly, Customs' reading of the broker penalty statute is owed deference by this Court. If the statute is not written in a manner consistent with the understanding of Defendant and the NCBFFAA, this Court is not the proper venue in which to attempt to effect a change.

By the foregoing, this Court has decided the substance of this matter. Nonetheless, the Court adds that it agrees with Plaintiff that Defendant's "parade of horribles" is without bases. (Pl.'s Summ. J. Resp. at 26.) As previously noted, the scope of § 1641(d)(2)(A) is an issue of first impression before this court. As such, it is apparent to this Court that Customs has not taken advantage of or abused the penalty authority the agency was granted in the broker statute. Had Customs been in the practice of imposing multiple penalties for violations that occurred prior to the issuance of the first pre-penalty notice, this Court certainly would have expected to have had this issue presented before now. Indeed, accepting–as it must–the facts in the light most favorable to Plaintiff, Defendant's own allegedly egregious flaunting of its responsibilities under the broker statute after repeated training and warning by Customs precipitated the agency's monetary sanctions.[22]

Further, Customs should not be hamstrung by Defendant's narrow reading of the broker penalty statute. Were this Court to accept Defendant's interpretation, Customs would be required to ferret out all possible broker violations before issuing its one-and-only-one pre-penalty notice. To require such of the agency is absurd. Over time, circumstances and information may give rise to Customs gaining knowledge of various broker indiscretions. At such times, Customs must have the discretion–and the broker penalty statute gives Customs the authority–to immediately take action to bring the errant broker back into line. Were this Court to embrace Defendant's one-and-only-one penalty concept, Customs would have to choose between missing an opportunity for swift, corrective action whilst foregoing sanction for other potential, prior errors or waiting to amass information concerning other violations whilst the broker continues to contravene its obligations under the broker statute. This Hobson's choice is neither efficient nor effective in carrying out the main ob-

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[21] The Court notes that all brokers and the NCBFFAA had the opportunity to provide Customs with comments on the proposed regulations before such were adopted.

[22] This Court notes that Defendant might count itself fortunate that–in light of Defendant's many alleged violations–Customs merely sought monetary penalties against Defendant, rather than the more onerous penalty of suspension or revocation of Defendant's license. *See* 19 C.F.R. Pt. 171, App. C, XII(B).

jective of the broker penalty statute, which is to "to apply penalties more effectively when brokers have violated the terms of their licenses." S. Rep. No. 98–308, at 72.

Although this is Court appreciative of NCBFFAA's interest in this matter, it cannot accept the self-serving comments and recollections of the former president of the NCBFFAA as controlling the outcome of this case. The Court recognizes that "the testimony of witnesses before congressional committees prior to passage of legislation is generally weak evidence of legislative intent." *Public Citizen v. Farm Credit Admin.*, 938 F.2d 290, 292 (D.C. Cir. 1991). When called upon to interpret a statute,

> the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.' Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members–or, worse yet, unelected staffers and lobbyists–both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobil Corp. v. Allapattah Serv., Inc., 125 S.Ct. 2611, 2626 (2005) (internal citation omitted). This Court notes that while the NCBFFAA appears to have arrived at one interpretation of the broker penalty statute, Congress did not clearly adopt legislation consistent with that construction, or–rather– inconsistent with Customs' reading of the legislation. Nothing in the legislative history refutes Plaintiff's position, and Plaintiff's interpretation of the statute is reasonable.

This Court also will briefly address Defendant's argument that Customs' actions in this matter are inconsistent with prior agency precedent. This is a contention the Court does not accept. Defendant identifies two cases in which Customs issued a single pre-penalty notice for $30,000 covering multiple offenses committed by the respec-

tive broker. *See Ricci*, 21 CIT 1145; *Lee*, 26 CIT 384.[23] The facts of each case reveal that Customs imposed each monetary penalty against the broker subsequent to an audit. Customs' mitigation guidelines limit the agency to an aggregate penalty of $30,000 for all violations discovered during an audit. 19 C.F.R. Pt. 171, App. C, XXII(C). Because the matter before this Court does not involve violations discovered during an audit or the mitigation guideline therefor, the cases are inapposite.

As a result of the deference accorded to Customs' construction of § 1641(d)(2)(A) and for the other reasons stated herein, this Court does not reach the other issues raised by the parties.

CONCLUSION

For the foregoing reasons, this Court denies Plaintiff's Motion to Strike, denies Defendant's request to amend its answer, and denies Defendant's partial Summary Judgment Motion.

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[23] *Lee* is of dubious relevance to the matter before this Court. In *Lee*, the plaintiff brought suit against the government for revoking his customs broker license. The matter of the monetary penalties Customs imposed against the plaintiff was not before the court.