Decisions of the United States
Court of International Trade

Slip Op. 07–160

FORMER EMPLOYEES OF JOY TECHNOLOGIES, INC., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: WALLACH, Judge
Court No.: 06–00088

PUBLIC VERSION

[Plaintiffs' Rule 56.1 Motion for Remand to the Department of Labor for Further Investigation is GRANTED, and Defendant's Denial of Certification is REMANDED.]

Dated: October 31, 2007

LeBoeuf, Lamb, Green & MacRae LLP, (*Melvin S. Schwechter* and *Emily A. Dephoure*) for Plaintiffs Former Employees of Joy Technologies.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Joan M. Stentiford*); and *Stephen Jones*, Office of the Solicitor, U.S. Department of Labor, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

This matter comes before the Court on consideration of the United States Department of Labor's ("Labor") third remand results denying Plaintiffs, Former Employees of Joy Technologies ("FEO Joy"), certification for Trade Adjustment Assistance ("TAA"). Plaintiffs seek review of Labor's determination in *Joy Technologies, Inc.; DBA Joy Mining Machinery; MT. Vernon Plant, MT. Vernon, IL; Notice of Negative Determination on Remand*, 72 Fed. Reg. 1,771 (January 16, 2007), C.R. at 429 ("*Remand Results*"). As set forth below, the *Remand Results* are not supported by substantial evidence or otherwise in accordance with law. Therefore, this matter is remanded to

Labor for further investigation consistent with the instructions contained herein.

II
BACKGROUND

Joy Technologies, Inc. ("Joy") is a subsidiary of Joy Global Inc., which is "the world's leading" manufacturer of underground mining machinery and surface mining equipment used in the extraction of coal, minerals and ores. Joy Global Inc., Annual Report (Form 10–K), at 5 (October 31, 2004), Confidential Record ("C.R.") at 38. Joy Global Inc. is headquartered in Milwaukee, Wisconsin, and maintains operations throughout the United States, and globally, with annual sales in excess of $1.4 billion. *Id.* at 5, 11–12, 16, C. R. at 38, 44–45, 49. Joy Global Inc. has two primary business segments, one of which is Joy Technologies, Inc. d/b/a Joy Mining Machinery, a Delaware corporation headquartered in Warrendale, Pennsylvania. Letter from Lawrence J. Lepidi, Dir. of Law and Gov't Affairs, Joy Mining Mach. ("Lepidi") to Del-Min Amy Chen, Program Analyst, Div. of Trade Adjustment Assistance, Dep't of Labor ("Chen") (January 6, 2006) at 1–2, C.R. at 169–70. Joy has extensive operations in the United States and overseas with key operations in the United Kingdom, Australia, South Africa and China. *Id.* On September 23, 2005, Joy closed its manufacturing operations in Mt. Vernon, Illinois. Joy Response to Dep't of Labor Bus. Confidential Data Request ("CDR") (August 15, 2005) at 1, C.R. at 12. All workers at the Mt. Vernon plant were fired. Dep't of Labor, Findings of the Investigation (September 15, 2005), C.R. at 129.

A
Labor's First TAA Investigation

On August 2, 2005, prior to the plant closing, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483 ("Union") filed a petition for Trade Adjustment Assistance with Labor alleging that the pending job losses were a result of production shifting abroad. Petition for Trade Adjustment Assistance ("Petition") (August 2, 2005), C.R. at 2. In support of its petition, the Union submitted a shipping receipt indicating that crawler track frames made in Mexico had been shipped to the Mt. Vernon plant in August 2005. Shipping Receipt from Extreme Mach. & Fab, Inc. to Joy Mining Mach. (August 16, 2005), C.R. at 23; Transportation Receipt from Joy Mining Mach. (August 16, 2005), C.R. at 24; Memorandum of Law in Support of Plaintiffs' Rule 56.1 Motion to Remand the Case to the Dep't of Labor for Further Investigation and Motion to Supplement the Admin. Record ("Plaintiffs' Motion") at 3. The Union also submitted photographs of underground mining machinery marked "Hecho in Mexico." Fax to

Devon Richardson, Analyst, Dep't of Labor, from Union Committee, Joy Mining Mach. (August 17, 2005) at 4–7, C.R. at 25–28; *see also* Reply Memorandum of Law in Support of Plaintiffs' Rule 56.1 Motion to Remand the Case to the Department of Labor for Further Investigation and Motion to Supplement the Administrative Record ("Plaintiffs' Reply"), Ex. B.

The Department of Labor initiated an investigation into TAA eligibility for the FEO Joy on August 9, 2005. Negative Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance ("First Negative Determination") at 2, C.R. at 133 (September 15, 2005). As part of its investigation, Labor instructed Joy to provide a Business Confidential Data Request which was completed by Mr. Lawrence Lepidi, an attorney for Joy. CDR, C.R. at 12; *see also* Letter from Joyce Nduku, Int'l Trade Analyst, Div. of Trade Adjustment Assistance, Dep't of Labor to Mr. Matt Haley, Manager, Human Res., Joy Mining Mach. (August 16, 2005), C.R. at 19. In the questionnaire, Joy accounted for its activities at the Mt. Vernon facility and stated that the plant "builds and rebuilds Shuttle Cars, rebuilds electrical motors used in certain types of mining machinery, and rebuilds gearboxes for armored face conveyors." CDR at 1, C.R. at 12. In addition, Mr. Lepidi [discussed the work of the Mt. Vernon plant]. Joy also checked boxes indicating [information regarding its levels of sales and productions]. With respect to a shift in production, Joy stated that "the work being performed at Mt. Vernon is being transferred to a new facility," *id.* at 1, C.R. at 12, and [discussed the reasons for transferring the Mt. Vernon plant work and stated that] "the production is being shifted to . . . Kentucky as part of an overall restructuring." *Id.* at 5, C.R. at 16.

During its investigation, Labor Analyst, Devon Richardson, wrote a Memorandum to File in which he stated that [he had received Joy's explanation of its production practices]. In addition, the memorandum recounted an email sent by Mr. Lepidi on August 25, 2005 to Mr. Richardson in which Mr. Lepidi [again discussed Joy's production practices].

On September 15, 2005 Labor issued its first negative determination denying the Former Employees of Joy Technologies ("FEO Joy") eligibility to apply for TAA and Alternative Trade Adjustment Assistance ("ATAA") for Older Workers. First Negative Determination, C.R. at 132; *see also Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance* ("*Notice of Determinations*"), 70 Fed. Reg. 62,344 (October 31, 2005). Labor concluded, based on its investigation, that the statutory criteria for TAA eligibility pursuant to 19 U.S.C. § 2272(a)(2)(A)[1] were not met because

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[1] 19 U.S.C. § 2272(a) provides that:

sales and employment rates had increased overall during the applicable period and that the component parts imported from Mexico were not "like or directly competitive" with the final products produced at the plant and were shipped only due to a lack in domestic capacity. First Negative Determination at 3, C.R. at 134. Hence, the imports were not a contributing factor in the layoff. It furthermore, concluded that the eligibility requirement pursuant to 19 U.S.C. § 2272(a)(2)(B) was not met because the shift in production was to another domestic facility and had not shifted abroad. *Id.* Labor based its finding that all Mt. Vernon production had shifted to the Lebanon, Kentucky facility on Joy's July 29, 2005 press release in its company-wide newsletter, in which it stated that Joy was to open a new facility in Kentucky which will "manufacture shuttle cars, rebuild motors and rebuild AFC gearcases," and in reliance on Mr. Lepidi's repeated assurances. Findings of the Investigation at 3, C.R. at 131. Labor based its denial of the petition for ATAA on the underlying denial of TAA eligibility upon which ATAA certification is contingent. First Negative Determination at 4, C.R. at 135. On October 31, 2005, Labor published its notice of negative determination in the Federal Register. *Notice of Determinations*, 70 Fed. Reg. 62,345.

B

Labor's Reconsideration (Second) TAA Investigation

On November 3, 2005, two Former Employees of Joy, Jerome Tobin and John Moore, submitted a request for reconsideration to Labor. Letter from Jerome Tobin and John Moore to Timothy F. Sullivan,

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(a) In general. A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for adjustment assistance under this chapter pursuant to a petition filed under section 2271 of this title if the Secretary determines that—

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

(2) (A) (i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B) (i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii) (I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Dir., Div. of Trade Adjustment Assistance, Dep't of Labor (November 3, 2005), C.R. at 146. In their petition, the FEO Joy explained that in addition to the activities detailed in Labor's negative determination, the principal function of workers at the Mt. Vernon plant was to supply components of mining machinery to Joy's Franklin, Pennsylvania plant as an upstream supplier, but that Mt. Vernon was also the site of manufacture of the "High Wall mining system, Flexible Conveyor Train haulage system and the original Articulated Battery Haulage Cars." *Id.* In addition, the FEO Joy stated that between 2004 and 2005 the plant had been used to produce 69 conveyors, 72 conveyor supports, and 86 crawler track frames for the Franklin, Pennsylvania site and that this production had shifted to Mexico to a company by the name of Equimin. *Id.* On November 16, 2005, the Department of Labor granted the FEO Joy's request for reconsideration and agreed to conduct further investigations based on new information provided by the petitioners. Dep't of Labor, Notice of Affirmative Determination Regarding Application for Reconsideration, C.R. at 153 (November 16, 2005). The workers were permitted to file a new TAA petition as secondarily-affected workers on the back of Labor's affirmative TAA certification of Joy's Franklin, Pennsylvania plant. Fax from Chen to Bill Staggs (November 15, 2005), C.R. at 152.

On November 17, 2005, Bill Staggs, the FEO Joy's union representative, received an email from Matt Haley of Joy's human resources department, denying the FEO Joy access to information relating to the Franklin, Pennsylvania facility. Email from Matt Haley, Manager, Human Resources, Joy Mining Mach. to Bill Staggs (November 17, 2005) ("Work Order Request") at 1, C.R. at 159. Mr. Haley however, did confirm that the Mt. Vernon facility supplied the Franklin plant, and that track frames fabricated in Mexico were finished at the Mt. Vernon plant. *Id.* at 2, C.R. at 160. Mr. Haley described the Mexican components as "overflow" work from other Joy facilities, "not work Mt. Vernon does regularly," but work that was brought in to keep the Mt. Vernon facility open for a period of time for the benefit of the employees who would lose their jobs as a result of the plant closure. *Id.*

In the course of Labor's second investigation, it resubmitted questions to Joy specifically concerning what parts the Mt. Vernon facility supplied to the Franklin, Pennsylvania plant, whether fabrication was outsourced to Mexico and the nature of the Mexican imports. Letter from Chen to Lepidi (December 21, 2005) at 1–2, C.R. at 163–64. In response to Labor's questions, Joy submitted [information concerning Joy's production practices].

On January 19, 2006, the Department of Labor issued a Notice of Negative Determination on Reconsideration and subsequently published a notice of its determination in the Federal Register. Dep't of Labor, Notice of Negative Determination on Reconsideration (Janu-

ary 19, 2006) ("Second Negative Determination"), C.R. at 180–83; *Joy Technologies, Inc.; DBA Joy Mining Machinery; Mt. Vernon Plant; Mt. Vernon, IL; Notice of Negative Determination on Reconsideration*, 71 Fed. Reg. 4,937 (January 30, 2006), as amended by, *Joy Technologies, Inc. DBA Joy Mining Machinery Mt. Vernon Plant, Mt. Vernon, Illinois; Notice of Negative Determination on Reconsideration*, 71 Fed. Reg. 9,162 (February 22, 2006). Labor denied the FEO Joy's application for TAA as secondarily-affected workers because the TAA certification for Franklin expired on January 19, 2002, prior to the relevant time period. Second Negative Determination at 2–3, C.R. at 181–82; *see also* Dep't of Labor, Notice of Negative Determination on Reconsideration (Corrected) (February 6, 2006), C.R. at 187. Labor affirmed its prior finding that there had been no shift in production to Mexico and that products manufactured in Mexico were not "like or directly competitive" with those produced at Mt. Vernon. *Id.* at 3, C.R. at 189. Labor also characterized any work transferred to Mexico as temporary assignments of "overflow" work were not normally undertaken at the Mt. Vernon facility. *Id.*

C
Labor's Voluntary Remand (Third) Investigation

On March 15, 2006, the FEO Joy sought judicial appeal of Labor's Negative Determination. Letter from John P. Moore and Jerome P. Tobin to the U.S. Court of Int'l Trade (March 15, 2006). Plaintiffs were appointed counsel by the court. On September 25, 2006, the court granted the parties' consent motion to remand the case to Labor for further investigation. Court Order, Ct. No. 06–00088, September 25, 2006. In its motion to the court, Labor stated that the purpose of the voluntary remand was to "further investigate the extent of imports supplied to Joy Technologies, Inc from Mexico, and determine whether that 'contributed significantly' to any movement of jobs out of the United States." Sec'y of Labor, Consent Motion for Voluntary Remand, Ct. No. 06–00088, September 20, 2006.

Upon remand, on September 28, 2006, Labor requested additional information from Joy. Letter from Chen to Lepidi (September 28, 2006), C.R. at 235. Specifically Labor asked Joy to identify "core" and "non-core" manufacturing functions at Mt. Vernon, and explain "what is meant by 'overflow' work," where the "overflow" work orders came from, and where outsourced work from Mt. Vernon and Franklin were done. *Id.* at 2, C.R. at 236. In addition, Labor asked Joy to respond to Plaintiffs' contentions that components manufactured at Mt. Vernon were produced in Mexico, that production had shifted to Mexico, and that Joy purchased component parts from a Mexican supplier named Equimin. *Id.* On October 13, 2006, Joy submitted a response to Labor's questions. Letter from Lepidi to Chen (October 13, 2006), C.R. at 247. In Joy's response, Mr. Lepidi [again discussed Joy's production practices.]

On December 8, 2006, Labor sent follow up questions to Joy. Letter from Chen to Lepidi (December 8, 2006), C.R. at 412. Joy responded on December 15, 2008. Letter from Lepidi to Chen (December 15, 2006), C.R. at 414. In its response, Joy stated [more information concerning its production practices].

On December 27, 2006 and December 29, 2006, Labor followed up with additional requests for information to Joy. On December 27, 2006, Labor requested clarification regarding Joy's import of crawler track frames from Equimin. Letter from Chen to Lepidi (December 27, 2006), C.R. at 420. On December 29, 2006, Labor sought clarification regarding the alleged statements of a Joy employee, Mr. Folkerts, pertaining to the outsourcing of fabrication of continuous miners to Mexico. Letter from Chen to Lepidi (December 28, 2006), C.R. at 421. Joy asserted in its response, [and provided additional information regarding its production practices.]

During the remand period, the FEO Joy submitted the affidavits of several workers to Labor. Buckingham Aff., C.R. at 258–62; Cole Aff., C.R. at 268–73; Lisenbey Aff., C.R. at 281–83; Moore Aff., C.R. at 292–96; Patterson Aff., C.R. at 304–08; Tobin Aff., C.R. at 316–20; Vaughn Aff., C.R. at 328–32; Wilkey Aff., C.R. at 340–44; Hamilton Aff., C.R. at 356–59; Kirkpatrick Aff., C.R. 366–70; Baxley Aff., C.R. at 378–81; Cockrum Aff., C.R. at 394–96 (collectively "Worker Affidavits"). The affidavits contradict Joy's contentions that the production of crawler track frames and components for continuous miners for the Franklin plant was not part of Mt. Vernon's core activities. *See, e.g.*, Buckingham Aff. at 2, C.R. at 259; Cole Aff. at 2–3, C.R. at 269–70; Lisenbey Aff. at 1–2, C.R. at 281–82. Instead the workers attested to the fact that those activities were regular, core manufacturing functions of the Mt. Vernon plant; that Mt. Vernon had always manufactured continuous miner components from scratch for Franklin, and that crawler track frames, which Joy characterized as "overflow" work, had been a regular manufacturing function at Mt. Vernon. *Id.*; *see also* Moore Aff. at 3, C.R. at 294. In addition, workers demonstrated personal knowledge of a shift in production to Mexico during the relevant time. *See* Buckingham Aff. at 3–4, C.R. at 260–62; Cole Aff. at 4–5, C.R. at 271–73. Specifically, the affidavits established that not all of the production at Mt. Vernon had shifted to the Lebanon, Kentucky facility because the new plant does not manufacture mining machinery components from scratch. *Id.*; *see also* Joy Mining Machinery, Global Caplight, Press Release (July 29, 2005), C.R. at 126.

On January 8, 2007, Labor issued its third negative determination denying TAA certification for the FEO Joy. *Remand Results*, 72 Fed. Reg. at 1,771, C.R. at 429. Labor concluded, based on its investigation, that all production at Mt. Vernon had shifted to the Lebanon, Kentucky facility and that the additional information provided by Plaintiffs failed to satisfy the statutory requirements for certifica-

tion. *Id.* at 1,774, C.R. at 446–47. Labor stated that because there was no decline in sales, it could not interpret the plant closure as an attempt to adjust to increased foreign competition. *Id.*, C.R. at 445–46. Furthermore, Labor recited individual workers' affidavits, but noted that "the Department has not received any information to support the allegation of a shift of production abroad." *Id.* at 1,773, C.R. at 442. As a result, Labor denied the FEO Joy's petition for certification for TAA benefits on remand. *Id.* at 1,774, C.R. at 446–47.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(d)(1). Oral argument was held on September 7, 2007.

III
STANDARD OF REVIEW

The court will uphold a determination by the Secretary of Labor denying certification for Trade Adjustment Assistance if it is supported by substantial evidence. 19 U.S.C. § 2395(b). "The findings of fact by the Secretary of Labor . . . if supported by substantial evidence, shall be conclusive." *Id.*; *see also Former Employees of Tyco Elecs., Fiber Optics Div. v. United States*, 27 CIT 685, 686, 264 F. Supp. 2d 1322 (2003). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938). However, while Labor has considerable discretion in its investigation of TAA claims, "there exists a threshold requirement of reasonable inquiry." *Former Employees of BMC Software, Inc. v. United States*, 454 F. Supp. 2d 1306, 1312 (CIT 2006) (citing *Former Employees of Hawkins Oil & Gas, Inc. v. United States*, 17 CIT 126, 130, 814 F. Supp. 1111 (1993). "If Labor fails to undertake a reasonable inquiry, the investigation cannot be sustained upon substantial evidence before the Court." *Former Employees of Merrill Corp. v. United States*, 387 F. Supp. 2d 1336, 1345 (CIT 2005) (internal citations omitted). In reviewing Labor's determination, the court does not owe deference to Labor if Labor's investigation was inadequate. *Id.* Indeed, Courts have not hesitated to set aside agency determinations which are the product of "perfunctory investigations." *Former Employees of BMC Software, Inc.*, 454 F. Supp. 2d at 1312 (citing *Former Employees of Ameriphone, Inc. v. United States*, 27 CIT 1611, 1613, 288 F. Supp. 2d 1353 (2003)). Additionally, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *Former Employees of Rohm and Haas Co., v. United States*, 27 CIT 116, 122, 246 F. Supp. 2d 1339 (2003) (quoting *Int'l Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978)). For good cause shown the court may remand the case to Labor "to take further evidence." *Id.* at 121 (citing 19 U.S.C. § 2395(b)). "Good cause exists if the Secretary's chosen meth-

odology is so marred that his finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Barry Callebaut v. United States*, 25 CIT 1226, 1308, 177 F. Supp. 2d 1304 (2001) (citing *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 469, 715 F. Supp. 378 (1989)).

IV
DISCUSSION

A
Labor's Negative Determination is Not Supported by Substantial Evidence Because the Record is Inconsistent and Labor Failed to Obtain the Necessary Information Regarding Volume of Imports and Shift in Production

1
The Record is Inconsistent on Critical Issues

Plaintiffs argue that Labor's determination is not supported by substantial evidence because Labor failed to take into account inconsistencies in the record and adequately investigate the FEO Joy's allegations. Plaintiffs' Motion at 14–15. Plaintiffs, *inter alia*, contend that Labor adopted Joy's characterization of "core" and "non-core" activities and discounted the workers' sworn affidavits, despite its obligation to conduct its investigation with "the utmost regard for the interest of the petitioning workers." *Id.* at 15–16 (citing *Former Employees of Oxford Auto U.A.W., Local 2088 v. United States*, Slip Op. 2003–129, 2003 Ct. Intl. Trade LEXIS 128, at *23 (CIT 2003)); *see also Former Employees of BMC Software, Inc.*, 454 F. Supp. 2d at 1312. Plaintiffs argue that Labor's investigation of the imports was inadequate because Labor failed to obtain quantitative import data from Joy on which to base its determination. *See, e.g.*, Plaintiffs' Reply at 1–2. Plaintiffs point to the record evidence [concerning Joy's production practices]. Plaintiffs' Motion at 16 (citing CDR at 2–3, C.R. at 13–14, Letter from Chen to Lepidi (December 15, 2006) at 1–2, C.R. at 414–15). Plaintiffs argue that Labor acted contrary to statute by stating that it did not need import data to make its determination because Joy's overall sales did not decline during the relevant period. *Id.* at 16–17.

[ ]. Defendant's Memorandum in Opposition to Plaintiffs' Memorandum of Points and Authorities in Support of USCIT R. 56.1 Motion for Judgment Upon the Agency Record ("Defendant's Response") at 21–22. As a result, Defendant concludes that the record does not support a finding that Joy workers lost their jobs as a result of the Mexican imports. *Id.* at 22. Indeed, Defendant asserts that the relevant question in this case is not whether Joy imported parts from Mexico, but "whether Joy began purchasing from Mexico components that were Mt. Vernon's core function." *Id.* at 19. Defendant re-

jects Plaintiffs' contention that Labor should have obtained additional import data from Joy, and maintain that Labor correctly relied on [Joy's information concerning its production practices]. *Id.* at 22–23. Defendant contends that Labor had no reason to doubt Joy's statements, and that Plaintiffs' entire case is unfounded because it is based on "speculation fueled by nothing more than seeing a few parts, on one occasion, marked 'hecho in Mexico.' " *Id.* at 23–24.

The record is inconsistent on the issue of what constituted "core" and "non-core" functions at the Mt. Vernon plant. Defendant contends that it was correct in relying on conclusory statements made by Joy that crawler track frames, subsequently imported from Mexico, were produced only on an overflow basis at Mt. Vernon. The worker affidavits however, are evidence to the contrary. *See, e.g.*, Buckingham Aff. at 2–4, C.R. at 259–61; Cole Aff. at 2, C.R. at 269; Vaughn Aff. at 3–4, C.R. at 330–31; Wilkey Aff. at 3–4, C.R. at 342–43. In sworn affidavits, the workers stated that crawler track frames constituted 30% to 50% of the total output of the plant during the relevant period, and that manufacturing components for other Joy facilities was, and had always been, a regular manufacturing function of Mt. Vernon. *See* Plaintiffs' Reply at 6–7 (citing Worker Affidavits). These statements were unaccounted for in Labor's findings. Labor's determination must be supported by substantial evidence and may rely on unverified information supplied by company officials, only if there are no obvious contradictions in the record. *See, e.g.*, *Former Employees of Barry Callebaut v. United States*, 357 F.3d 1377, 1383 (Fed. Cir. 2004); 19 U.S.C. § 2395(b). Here, the contradictions are obvious and preclude a conclusion that Labor's decision was based on substantial evidence.

Furthermore, the test for whether Plaintiffs are eligible for TAA due to increased imports is: (1) workers must have been totally (or partially) separated from their work; (2) production or sales must have decreased absolutely; and (3) imports of articles like or directly competitive with articles produced by the subject facility must have increased, and (4) the increase must have contributed importantly to the workers separation, and to the decline in sales or production. 19 U.S.C. §§ 2272(a)(1) and 2272(a)(2)(A). Labor correctly concluded that (1) workers were separated; and (2) production declined absolutely due to the plant closure. *See Remand Results* at 1,774, C.R. at 443. However, with respect to the third prong, Labor stated in its determination that:

> Even if there were increased subject firm imports during the relevant period, the increased imports could not have "contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production" because sales for Joy increased during the relevant period. *Id.*, C.R. at 445.

The statute requires that increased imports contribute to the separation and to the decline in sales *or* production, not both. *See* 19 U.S.C. § 2272(a). Labor agreed that production declined completely. *Remand Results* at 1,774, C.R. at 443. Furthermore, Labor stated that data previously provided by Joy reflected [information concerning Joy's production practices]. CDR at 2–3, C.R. at 13–14, Work Order Request at 1, C.R. at 159, *Remand Results* at 1,774, C.R. at 445. These two statements are inconsistent because overflow work brought in from Mexico constitutes "imports" for purposes of the TAA eligibility requirement, and therefore do not support Labor's conclusion.

2
Labor Failed to Obtain the Data Necessary to Make a Determination Regarding the Volume of Foreign Imports and Shift in Production

Plaintiffs contend that Labor failed to obtain information from Joy regarding the volume of imports from Mexico and to support its finding that no shift in production had occurred. Plaintiffs say that Labor made only a cursory attempt to obtain a list of its imports of mining machinery components before the third remand investigation, requesting this information only a week before issuing its determination, and throughout the investigation failing to utilize its subpoena power to obtain outstanding information. Plaintiffs' Motion at 18. Plaintiffs furthermore, contend that it was impossible for Labor to determine whether increased imports contributed importantly to the employees' separation from their jobs because Joy did not submit any import data to Labor and Labor, in turn, did not have any import data upon which to base its conclusion. *Id.* at 19. As a result, Plaintiffs argue that Labor's decision does not meet the substantial evidence standard. *Id.* at 19–20.

With respect to proving a shift in production, Plaintiffs contend that there is ample evidence in the record that Joy shifted production of mining machinery components, like or directly competitive with those formerly manufactured at Mt. Vernon to Mexico. *Id.* at 20. Plaintiffs submitted affidavits and photographs, and Joy attested to [information concerning Joy's production practices.] *Id.* (citing Letter from Lepidi to Chen (January 6, 2006) at 2, C.R. at 170; Letter from Lepidi to Chen (December 15, 2006) at 1, C.R. at 414). Plaintiffs contend that Labor did not at any point during the investigations receive verifiable data with actual work orders from Mt. Vernon or import data, and therefore should not have relied on Joy's statements to the contrary. *Id.* at 20–21; *see also Remand Results* at 1,774, C.R. at 444.

Defendant argues that Labor's conclusion that Plaintiffs did not lose their jobs because of increased imports is supported by substantial evidence on the record because the job losses were a result of

[Joy's decisions concerning its production practices] and not to Mexico or any other country. Defendant's Response at 24. With respect to Labor's reliance on Joy's statements, Defendant contends that it is appropriate for the Secretary of Labor, as a general matter to rely on unverified statements by company officials, when nothing in the record "suggests that the information provided is inaccurate or unreliable." *Id.* at 15. Defendant cites to authority that Labor need not verify information that it deems "creditworthy" and that does not contradict the record evidence. *Id.* (citing *Former Employees of Barry Callebaut*, 357 F.3d at 1383). Defendant, in fact, seeks to establish a practice by Labor of relying on such "unverified" information and points to cases this practice was upheld by the courts. *Id.* at 15–16 (citing *Local 167, Int'l Molders and Allied Workers' Union AFL-CIO v. United States*, 643 F.2d 26, 31 (1st Cir. 1981); *United Steel Workers of Am., Local 1082 v. United States*, 15 CIT 121, 122 (1991); *Former Employees of Kleinerts, Inc. v. United States*, 23 CIT 647, 653, 74 F. Supp. 2d 1280 (1999)). Defendant furthermore argues that "[a]ll of plaintiffs' allegations were carefully investigated by Labor and refuted by the information provided by the company" and that there is no reason Labor should not have relied on the information provided by Joy. *Id.* at 20. Defendant cites *Former Employees of Barry Callebaut v. United States*, 357 F.3d at 1383, for the proposition that reliance on unverified company statements in and of itself is sufficient to constitute substantial evidence to support a negative determination. Defendant's Response at 28. Defendant contends that the evidence provided by Plaintiffs is insufficient to establish any connection between Joy and [other manufacturers], which would indicate a shift in production of core manufacturing to Mexico of work previously undertaken at Mt. Vernon. *Id.* at 24–25. Defendant argues that Joy adequately explained the connection between itself and [other manufacturers] and that Joy ceased doing business with [other manufacturers]. *Id.* at 25–26. Defendant also contends that the pictures Plaintiffs seek to admit as evidence depict roof supports and not crawler tracks, the production of which is the core function Plaintiffs allege had shifted. *Id.*

Here, Labor did not base its decision on substantial evidence in the record. Plaintiffs requested that Labor obtain work orders, customs records and receipts of imported merchandise during the relevant period. Letter from Melvin Schwechter, LeBoef, Lamb, Greene & MacRae to Chen (October 20, 2006) at 4, C.R. at 255. However, Joy did not furnish Labor with the relevant information and did not submit any quantitative data, even upon request. Letter from Lepidi to Chen (October 13, 2006) at 3, C.R. at 249. Instead, Labor argues that statements by company officials are sufficient to constitute substantial evidence. Defendant is correct that the courts have found that Labor may rely on so-called "unverified" statements by company officials, but only when such statements do not contradict other evi-

dence in the record. Here, there are substantial inconsistencies and contradictions in the record. For example, [Joy provided information concerning its production practices]. In response to its request for import data, Labor chose to rely on statements by Joy to circumvent the request, and disregarded evidence submitted by Plaintiffs. Defendant argues that on all occasions where Labor prompted Joy for information, "Joy responded with cogent answers and explanations from knowledgeable sources." Defendant's Response at 18. However, on several occasions, Joy did not respond to Labor's questions at all. *See, e.g.*, Letter from Lepidi to Chen (January 6, 2006) at 2, C.R. at 170; Letter from Lepidi to Chen (October 13, 2006) at 4, C.R. at 250; Letter from Lepidi to Chen (December 27, 2006), C.R. at 420; Letter from Lepidi to Chen (January 5, 2007), C.R. at 426–27. For example, in response to Labor's query whether Joy had outsourced components abroad, Joy simply stated that employment had increased at the Franklin plant. Letter from Lepidi to Chen (January 6, 2006) at 2, C.R. at 170; Letter from Lepidi to Chen (October 13, 2006) at 4, C.R. at 250. Further, Defendant's assertion [regarding its production practices], is an unsubstantiated statement made by Joy, which is contradictory to evidence in the record. *See, e.g.*, Defendant's Response at 25–26. Labor did not obtain information from Joy regarding its foreign suppliers and imports of continuous miner components, but based its determination solely on statements made by Joy—with no regard for contradictory evidence in the record. These shortfalls in Labor's investigation do not support a finding that its determinations were based on substantial evidence.

B
Labor's Negative Determination is Not in Accordance with Law

Plaintiffs contend that Labor misapplied the TAA statute when it stated that "even if there were increased subject firm imports during the relevant period, the increased imports could not have 'contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production' because sales for Joy increased during the relevant period." Plaintiffs' Motion at 21 (citing *Remand Results* at 1,774, C.R. at 445). Plaintiffs assert that under TAA legislation, a finding of either a decline in production *or* a decline in sales is a sufficient basis upon which to certify workers for TAA eligibility. Consequently, Plaintiffs argue that Labor's statement that import data was irrelevant is legally erroneous. *Id.* at 22. Plaintiffs also argue that Labor misstated the TAA eligibility requirements by concluding, on the basis of Joy's statement [regarding its production practices], that no shift in production could have occurred. *Id.* at 22–23. Plaintiffs allege that Labor failed to inquire fully into the relationship between Joy and [another entity], and

failed to investigate Joy's statement [regarding its production practices]. *Id.* at 22.

Labor denies that its conclusion was based on [information regarding Joy's production practices]. Defendant's Response at 27. Instead Defendant argues that Labor's determination was based on its finding that "no shift of underground mining machinery production abroad and no increased imports of underground mining machinery during the relevant period had occurred." *Id.* (citing *Remand Results* at 1,771, C.R. at 430). [Joy provided information concerning its production practices]. *Id.* (citing *Remand Results* at 1,774, C.R. at 444). Defendant also contends that the worker affidavits corroborate [information concerning Joy's production practices.] *Id.* at 28.

The TAA statute, requires not only that workers were separated, 19 U.S.C. § 2272(a)(1), and that the separation resulted from an increase in imports, 19 U.S.C. § 2272(a)(2)(A)(iii), but also that "the sales or production, or both, of such firm or subdivision have decreased absolutely." 19 U.S.C. § 2272(a)(2)(A)(I). Labor asserts that *both* sales and production must have decreased in order for the Department to certify the workers and concludes, on that basis, that the FEO Joy have not met the statutory requirements for TAA certification. Labor's conclusion is not in accordance with law because production decreased completely due to the plant closure and the statute on its face requires a decline in *either* production or sales or both. *Id.*; *see also Remand Results* at 1,774, C.R. at 443; *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 948, 830 F. Supp. 637 (1993) (stating that the plain language of the statute clearly allows for certification of a claim if Labor determines that production has declined due to increased imports, with no corresponding requirements that Labor find a decline in sales).

In its final determination, Labor stated that "Joy does not have an affiliated production facility in Mexico . . . [t]herefore, there is no facility to which Joy can shift production." *Remand Results* at 1,774, C.R. at 446. Title 19 of the United States Code, section 2272(a)(2)(B)(I) provides that workers are entitled to TAA certification if "there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision . . . ." The statute is silent regarding ownership. However, Labor's regulations clearly state that ownership is not required for production to shift. The Department's instructions for implementation of the TAA, states that "[s]ince the law does not address ownership of the producing firm, the shift in production can be either by the firm or subdivision moving the plant to Mexico or Canada, or the U.S. firm *contracting* with a different firm located in Mexico or Canada." *Operating Instructions for Implementing the Amendments to the Trade Adjustment Assistance for Workers Program in Title V of the North American Free Trade Agreement (NAFTA) Implementation*

Act, 59 Fed. Reg. 3,871, 3,873–74 (January 27, 1994) (emphasis added). Thus, even if Joy did not own Equimin, its relationship with Equimin, or any foreign supplier with which Joy contracts, does not preclude a finding by Labor that production had shifted. Because Labor misstated the TAA requirements, as set forth in 19 U.S.C. §§ 2271(2)(A)(ii) and 2272(a)(B)(I), its determination is not supported by substantial evidence.

V
CONCLUSION

For the foregoing reasons, this matter is remanded to the Secretary of Labor for further investigation consistent with the specific instructions contained herein.

FORMER EMPLOYEES OF JOY TECHNOLOGIES, INC., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: WALLACH, Judge
Court No.: 06–00088

ORDER AND JUDGMENT

Upon consideration of the Department of Labor's ("Labor") Voluntary Remand Determination, filed pursuant to this court's Order dated September 25, 2006; the court having reviewed all comments contesting Labor's Remand Determination and all pleadings and papers on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; now, in conformity with said decision, it is hereby

ORDERED ADJUDGED AND DECREED that Labor's Remand Determination in *Joy Technologies, Inc.; DBA Joy Mining Machinery; MT. Vernon Plant, MT. Vernon, IL; Notice of Negative Determination on Remand*, 72 Fed. Reg. 1,771 (January 16, 2007) is hereby REMANDED; and it is further

ORDERED that Labor shall further investigate this case consistent with the specific instructions of this court and that Labor and Plaintiff shall cooperate on additional information gathering and on verification of existing information in the record; and it is further

ORDERED that Labor shall, within sixty (60) days of the date of this Order, issue a remand determination; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Thursday November 8, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish

deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before Thursday November 8, 2007.

Slip Op. 07–171

ESSO STANDARD OIL CO. (PR), Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 98–09–2814

[Judgment for Plaintiff under 19 U.S.C. § 1520(c) for return of HMT collected on shipments between insular possessions.]

Dated: November 20, 2007

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Steven P. Florsheim, Frances P. Hadfield, Robert F. Seely*, and *Robert B. Silverman*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Tara K. Hogan*); *Richard McManus*, Office of Chief Counsel, U.S. Customs & Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on cross-motions for summary judgment. At issue is plaintiff Esso Standard Oil Co. (PR)'s ("Esso") denied request for refund of Harbor Maintenance Taxes ("HMT") illegally collected on cargo shipped between two insular possessions of the United States.

FACTS*

Between 1993 and 1997, Esso shipped petroleum products from the U.S. Virgin Islands and unloaded those products at the San Juan port in Puerto Rico. (PUF ¶ 1.) When it made entries of those products, Esso declared and paid certain duties and fees, including payment of the HMT.[1] Customs liquidated all of the relevant entries be-

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*This factual statement is drawn from defendant's summary of plaintiff's undisputed facts ("PUF").

[1] Plaintiff's First Cause of Action covers HMT declarations and payments it made on sixty-nine entries filed during the period October 3, 1993, through February 6, 1996, and liquidated during the period March 18, 1994, through May 24, 1996. (DA 120–122.) ("DA" refers to pages of the Defendant's Appendix to Motion for Summary Judgment," filed on May 14, 2007.)

Plaintiff's Second Cause of Action covers HMT declarations and payments it made on

tween 1994 and 1997 without refunding the HMT. (PUF ¶¶ 4, 17, 27.) These entries were the subject of requests for refunds (denominated "requests for reliquidation" by Customs), which Esso filed with the San Juan, Puerto Rico port, seeking refund of the HMT paid on the exempt movements. Two of the "requests for reliquidation" were made more than ninety days after liquidation; one of the requests was made prior to liquidation, which request was denied as premature.[2] Customs denied the requests made after the protest period expired on the grounds that the assessment of the HMT was a mistake of law, which cannot be challenged by a 19 U.S.C. § 1520(c) request for reliquidation.

Following those denials, Esso filed three separate timely protests, pursuant to 19 U.S.C. § 1514(a)(7), of Customs' refusal to reliquidate the entries. (PUF ¶¶ 10, 20, 32.) Those protests were referred to Customs' Commercial Rulings Division for further review, pursuant to 19 C.F.R. § 174.26(b). Customs denied all three protests on March 18, 1998, on the basis that the payment of the HMT and liquidation of the entries without refund of HMT did not meet the criteria for reliquidation under 19 U.S.C.§ 1520 because there was no mistake of fact, clerical error, or other inadvertence not amounting to an error in the construction of the law. (PUF ¶¶ 12, 22, 35, 36.)

In fact, a mistake clearly occurred. At the time the HMT was collected, it was not owed, but Customs, operating from 1993 to 1997 under a regulation and automated procedures that were valid before a 1988 change in law,[3] continued to collect HMT on shipments between insular possessions. *Compare* 19 C.F.R. 24.24(c) (1992) *and* 19 C.F.R. 24.24(c) (2007) (listing exemptions from HMT). Thus, the question before the court is whether this mistake falls within the category of mistakes that may be corrected pursuant to former 19 U.S.C. § 1520(c).

DISCUSSION

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) because all disputed fees have been paid and plaintiff timely protested the denials of reliquidation and those protests were denied.

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sixteen entries filed during the time period June 28, 1995, through October 5, 1996, and liquidated during the time period June 21, 1996, through February 28, 1997. (DA 73.)

Plaintiff's Third Cause of Action covers HMT declarations and payments on two entries: one filed on February 28, 1997, and liquidated June 20, 1997, and the other filed on March 19, 1997, and liquidated on July 7, 1997. (DA 2.)

[2] Nonetheless, as to the request that was alleged to be premature, there apparently was a "request for review" which postdated the liquidations, some of which occurred while the original "refund/reliquidation request" was pending.

[3] *See* Technical & Miscellaneous Revenue Act of 1998, Pub. L. No. 100–647, § 2002(b), 102 Stat. 3342 (Nov. 10, 1998) (adding HMT exemption for waterborne shipments between U.S. insular possessions retroactive to April 1, 1987).

Initially, plaintiff argues that the entire protest/reliquidation scheme normally applicable to importers does not apply because it filed requests for refund, pursuant to the direction of Customs officials in Puerto Rico, as soon as the problem of the invalid regulation and procedures was brought to Customs' attention in 1997. In 1997, there was no time limit for filing refund requests under 19 C.F.R. § 24.24(e)(5).[4] The refund regulation, however, even between 1993 and 1997, clearly applied only to quarterly payers such as exporters or passenger carriers. Importers pay duties and fees in connection with entry of merchandise into the United States.[5] They are not quarterly payers and the refund regulation did not, and does not, apply to them.[6]

Advice of an official to file a refund request will not suffice to remove the obligation to protest or seek reliquidation. The procedures applicable to importers are well-known, and a cursory reading of the regulation makes it clear that the refund procedure specified in 19 C.F.R. § 24.24(e)(5) is not applicable. Whether or not equitable estoppel ever may be applied to toll the statutory time limits at issue here, plaintiff had the opportunity to protect itself by protesting or seeking reliquidation. Relying on the advice of officials, assuming such advice was to ignore a statute, when such officials had just misapplied another statute for a decade, does not seem appropriate. There was no contrary regulation and no mandatory procedures which kept plaintiff from following the proper path to either administrative or judicial relief. Thus, plaintiff's request for relief now based on its simple, not authorized, refund requests on the grounds of equitable estoppel is denied.

Accordingly, the court turns to plaintiff's alternative argument that it made valid "requests for reliquidation" under 19 U.S.C. § 1520(c) when it filed its refund requests and denial of those requests leads to relief under § 1581(a) jurisdiction. This may very well be the last case in which the court must decide the sometimes excruciatingly difficult question of whether or not a mistake is one of the construction of law under 19 U.S.C. § 1520(c). The cases are legion and are not easy to harmonize. *See, e.g.*, *Aviall of Tex., Inc. v.*

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[4] After numerous parties took advantage of this and the United States Court of Appeals recognized this right for exporters in *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358, 1360 (Fed. Cir. 2000), the refund regulation was amended in 2001 to add a time limit and to clarify that the normal protest/reliquidation procedures applied to importers.

[5] Under 19 C.F.R. § 24.24(e)(3), the fee accrues at the time of vessel unloading and is to be added to the other fees and duties payable at formal entry.

[6] Although a January 6, 1989, telex from the Assistant Commissioner to Customs officials throughout the country authorized the refund procedure for exports, domestic shipments, foreign trade zone ("FTZ") admissions and passengers, and plaintiff claims it was directed to that telex in 1997, by its own terms the telex did not apply to imports from outside the Customs territory of the United States, such as the U.S. Virgin Islands. The telex, in that respect, was consistent with the refund regulation.

United States, 70 F.3d 1248 (Fed. Cir. 1995) (failure to file duty-free forms inadvertence); *Executone Info. Sys. v. United States*, 96 F.3d 1383 (Fed. Cir. 1996) (failure to file forms for duty-free treatment not inadvertence); *Brother Int'l Corp. v. United States*, 464 F.3d 1319 (Fed. Cir. 2006) (misclassification based on misunderstanding of the essential character of the merchandise not error of law). In any case, little of the precedent resembles this odd case.

There have been numerous problems in trying to fit the HMT into Customs law. *See, e.g., Swisher*, 205 F.3d at 1359 n.1 (stating that neither statute nor regulation specifies time for seeking refund of HMT); *BMW Mfg. Corp. v. United States*, 23 CIT 641, 69 F. Supp. 2d 1355 (1999) (statute unclear as to payer of HMT upon admission to FTZ). HMT is to be administered as a Customs duty, 26 U.S.C. § 4462(f)(2), but the statute often leaves little clue as to how to do this. Thus, the court returns to the language of the controlling statute. Specifically, 19 U.S.C. § 1520(c) provided that:

> (c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct –
>
> (1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in an entry, liquidation, or other customs transaction, when the error . . . is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction. . . .[7]

19 U.S.C. § 1520(c).

Here, all of the statutory conditions for application of § 1520(c) were met. The error is manifest from the records. The HMT is not owed. The error was brought to the attention of Customs within one year of liquidation or exaction. The error is certainly an inadvertence. *See Hambro Auto. Corp. v. United States*, 66 CCPA 113, 118, 603 F.2d 850, 854 (1979) (inadvertence is an oversight, an involuntary accident). Customs surely did not intend to keep an out-of-date regulation on the books and plaintiff clearly did not want to pay tax not owed. No judgment about the law to be applied or its interpretation was made. Customs slipped up by not implementing the statute, and plaintiff did not discover its slipup. This is clearly a case of inadvertence. There is, of course, eventually an error of law in all of this,

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[7] Section 520(c) of the Tariff Act of 1930, 19 U.S.C. § 1520(c), was repealed in December 2004 with respect to merchandise entered, or withdrawn from warehouse for consumption, on or after December 18, 2004. Miscellaneous Trade & Technical Corrections Act of 2004, Pub. L. No. 108–249, Title II, § 2105, 118 Stat. 2434, 2598 (Dec. 3, 2004). All entries in this action pre-date the effective date of the repeal.

as there is in every § 1520(c) case, even the iconic *United States v. C.J. Tower & Sons of Buffalo, Inc.*, 61 CCPA 90, 499 F.2d 1277 (1974) (error of fact led to error in classification under tariff laws). Here, the tax was not legally owed, but to the court this is not an error in the "construction of the law." No one construed the law. The statute was clear. Customs simply failed to implement the statute by regulation, policy change, software amendments, direction to the port or otherwise.

The court is aware of the language in *Century Importers, Inc. v. United States*, 205 F.3d 1308, 1313 (Fed. Cir. 2000), and similar cases that ignorance of the law is not a correctable inadvertence under § 1520. The court is also aware that the Federal Circuit in *Ford Motor Co. v. United States*, 157 F.3d 849 (Fed. Cir. 1998), stated that "an error in the construction of a law" is the same as a "mistake of law". *Id*. at 859. These cases, of course, involve very different fact scenarios from the one at hand and defendant cites no case denying § 1520 relief where Customs itself was so ignorant of the law that it could not provide a proper regulation or approve adequate software for years.

This is not a case where parties argue about the intricacies of classification and valuation of merchandise under the tariff laws. Such questions were likely the target of the "construction of law" exception. *See, e.g., Hambro*, 66 CCPA at 113, 603 F.2d at 850. This is simply a big mistake by both Customs and the importer in failing to note the change in law and act accordingly. In this case, however, the onus must fall on Customs. It is simply inexcusable for the master of the Customs laws to fail for almost a decade to amend the applicable regulation that governs the conduct of port officials in collecting HMT and to continue to authorize incorrect software.[8] Plaintiff had no choice but to enter its merchandise incorrectly given the automated entry system, the regulation, and the position of the port officials who kept collecting the HMT for this entire period. No one construed the law. Customs just did not implement the law it clearly knew was applicable and it took no steps which would permit the law to function as it should. This is exactly the type of non-arguable blunder § 1520(c) should be allowed to fix. The judicial gloss placed

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[8] The Automatic Broker Interface ("ABI") entry filing system is implemented through software monitored and regulated by Customs. The software is licensed and sold to brokers to make paperless entries. (Aff. of Roberto Mastrapa, Ex. 2 to Pl.'s Mot. for Summ. J.) Defendant does not appear to dispute that the ABI software was not amended to recognize the exemption for insular possessions until May 1997 when Customs authorized the change. (*See generally* Ex. 1 to Pl.'s Mot. for Summ. J.) The website of United States Customs and Border Protection ("CBP") explains that "The Automatic Broker Interface is an integral part of ACS [the Automated Commercial System] that permits qualified participants to file import data electronically with Customs." Automatic Broker Interface (ABI) and Contact Information, http://www.cbp.gov/xp/cgov/import/operations_support/automated_systems/acs/acs_abi_contact_info.xml. CBP provides client representatives to serve as technical advisors and sends ABI participants notices of changes and enhancements to the software.

upon § 1520(c) to resolve very different types of disputes over the years should not defeat the clear language of the statute. As plaintiff timely sought reliquidation as to most of its claims, such reliquidation requests should be granted.

Accordingly, plaintiff's motion for summary judgment is granted, at least in part, and defendant's motion is denied. The court will not enter final judgment at this time, as it is unclear from the papers with respect to the so called "premature protest" whether there was a timely post-liquidation equivalent of a protest or request for reliquidation in place within one year of liquidation. The parties shall review this matter and plaintiff shall submit a proposed judgment with twenty days hereof. If defendant disagrees, it may respond within eleven days thereafter.

SLIP OP. 07–172

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 05–00435

[Defendant's motion for summary judgment granted in part and denied in part.]

Dated: November 20, 2007

Williams Mullen (*Evelyn M. Suarez, Francisco J. Orellana,* and *Dean A. Barclay*) for the plaintiff.

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 (*Edward F. Kenny*); *Michael Heydrich*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for the defendant.

OPINION

BACKGROUND

Restani, Chief Judge: This matter is before the court on Defendant United States' motion for summary judgment. Plaintiff Horizon Lines, LLC, challenges the partial denial of a protest against certain duties required for repairs made to a vessel under 19 U.S.C. § 1466.

Plaintiff operates the U.S.-flag vessel Horizon Crusader ("the Crusader"), a vessel used primarily for trade with Puerto Rico. Following its arrival in Hong Kong on September 4, 2001, with a shipment of empty containers, the Crusader departed for Karimun Sembawang Shipyard ("KSS"), a shipyard in Indonesia. (*See* Pl.'s Ex. 1 (Walla Aff. ¶ 19); *see also* Pl.'s Mem. in Opp'n Mot. Summ. J. ("Pl.'s

Br.") 2–3.) The Crusader was required to undergo American Bureau of Shipping ("ABS") inspections by September 25, 2001.[1] (Pl.'s Ex. 2 (Dolan Aff. ¶ 25).) Since the vessel could not complete inspections by the deadline, the Crusader went into lay-up[2] at KSS on September 7, 2007, at which point the required deadline was held in abeyance. (*Id.* ¶ 26; *see also* Pl.'s Ex. 1 (Walla Aff. ¶ 20).) The Crusader remained in lay-up at KSS until November 28, 2001. (Pl.'s Ex. 1 (Walla. Aff. ¶ 20).) Pursuant to guidelines provided by ABS, a survey was conducted by ABS on October 20, 2007, which determined that the Crusader had been laid-up properly. (*Id.* ¶ 21.)

After securing a dry-dock facility to undergo ABS inspection, the Crusader was towed to the Jurong Shipyard in Singapore ("Jurong") on November 29, 2001. (Pl.'s Ex. 2 (Dolan Aff. ¶¶ 23, 27).) The Crusader was then placed in dry-dock from December 8 to December 15, 2001, where it underwent inspections as well as certain repairs. (*Id.* ¶ 28.) Following the repairs and inspection, the Crusader departed Jurong on January 7, 2002, and returned to the United States, arriving at the Port of Tacoma, Washington on January 26, 2002. (Def.'s Br. 4.)

Upon arrival in the United States, Plaintiff was required to notify U.S. Customs and Border Protection ("Customs") of all foreign repairs conducted on the vessel on a Customs Form CF–226. Such repairs are dutiable at a 50 percent ad valorem rate on the cost of equipment, materials and parts or for expenses of repairs made to U.S.-flag vessels outside the United States. 19 U.S.C. § 1466. Under Section 4.14 of the Customs regulations, vessel owners are required to complete CF–226 within ninety days from the date of arrival. Plaintiff submitted the form on January 31, 2002 (Def.'s Ex. 1 (Horizon's Form 226)), but did not submit all of the supporting documentation detailing the vessel's repairs until June 24, 2002 (Def.'s Ex. 2 (Horizon's June 24, 2002 Letter to Customs)), more than ninety days after the date of arrival. On August 30, 2002, after receiving all the required documentation, Customs liquidated the repair entry and concluded that Plaintiff owed $810,295.99 in duties. (Def.'s Ex. 3 (Custom's Notice of Liquidation).) Customs further concluded that Plaintiff's application for relief from repair duties included in the June 24, 2002 letter was untimely and would not be considered.[3] (*Id.*)

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[1] According to United States Coast Guard ("USCG") regulation, inspections must occur at least twice in a five-year period with no more than three years elapsing between any two examinations. *See* 46 C.F.R. § 91.40–3 (Nov. 14, 2007). The ABS has been delegated inspection authority by USCG. *See* 46 C.F.R. § 8.420 (Nov. 14, 2007).

[2] Lay-up "generally means the ship is taken out of service for an indefinite period of time and certain work is performed to both de-activate and protect the vessel's equipment and systems." (*See* Def.'s Mem. in Supp. Mot. Summ. J. ("Def.'s Br.") 3 n.2.)

[3] Customs' review of Horizon's protest was *de novo* and all provided documentation was considered, regardless of whether it was initially filed in a timely manner. (Def.'s Br. 5 n.4.)

On November 27, 2002, Plaintiff timely filed a protest of Customs' liquidation determination. (Def.'s Ex. 4 (Horizon's Protest and Memorandum to Customs ("Horizon's Protest")).) On December 15, 2004, Customs Headquarters granted Plaintiff's protest in part, and denied it in part. HQ 116237 (Dec. 15, 2004). Pursuant to that decision, Plaintiff's duties were reduced to $534,636.14. (Def.'s Ex. 6 (Custom's Reliquidation Spreadsheet at 3).) On October 13, 2005, Plaintiff filed suit to challenge the partial denial of its protest and to obtain a refund of all excess duties paid. (Def.'s Ex. 7 (Horizon's Complaint).) This Court has jurisdiction pursuant to 19 U.S.C. § 1514 and 28 U.S.C. § 1581(a).

The parties' dispute involves three primary issues. First, Defendant contends that Horizon's decision to lay-up the Crusader in KSS was made, at least in part, for the purpose of obtaining repairs at Jurong Shipyard. Second, Defendant contends that, because various general expenses associated with the lay-up were also incurred to obtain repairs at Jurong, those expenses are dutiable under 19 U.S.C. § 1466, in part. Third, Defendant argues that a variety of expenses incurred in Jurong itself were related entirely or in part to the repair of the vessel. The court will address each issue in turn.[4]

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether any genuine issues of fact are material to the resolution of the action and whether the movant is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Consequently, factual issues may not be tried or resolved upon a motion for summary judgment. *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988).

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[4] Plaintiff also contends that the method employed by Customs to prorate duties for dual-purpose expenses was not in accordance with the law. (Pl.'s Resp. Def.'s Supp. Mem. 1.) Plaintiff claims that Customs "assumes that all dutiable expenses incurred in the voyage caused all dual-purpose expenses" and included dutiable repairs in its ratio calculation which did not have a connection to the dual purpose items. (*Id.* at 3–5.) Customs argues that the methodology used to determine the ratio apportioning for dual purpose expenses, consisting of totaling up all of the dutiable expenses and dividing that amount by the total of the dutiable and free expenses, was a reasonable and equitable interpretation of the Customs' laws. (Def.'s Supp. Mem. 2–4.) On its face it appears that Customs' calculation was rational and therefore entitled to deference. *SL Serv., Inc. v. United States*, 357 F.3d 1358, 1362–63 (Fed. Cir. 2004) ("Customs' long-standing practice of apportioning the cost of various expenses between dutiable repairs and non-dutiable inspections and modifications comports with both the statute and common sense."). As Plaintiff did not raise this issue in its initial briefing, the court will not further explore whether, under the facts of this case, there is a unique problem with the ratio employed.

DISCUSSION

I. Whether the "Lay-Up" of the Crusader Was Made in Part for the Purpose of Obtaining Foreign Repairs

The Federal Circuit has often repeated that the phrase "expenses of repairs" in 19 U.S.C. § 1466 is to be read broadly. *Texaco Marine Serv. Inc. v. United States*, 44 F.3d 1539, 1544 (Fed. Cir. 1994). In cases involving expenses incurred solely for the purpose of repairs, the Federal Circuit applies a "but for" test to determine whether a particular expense is dutiable. *SL Serv., Inc.*, 357 F.3d at 1360. Thus, expenses incurred by repairs include all expenses " 'which, but for dutiable repair work, would not have been incurred.' " *Id.* (citing *Texaco*, 44 F.3d at 1544). That standard, however, does not apply in cases involving so-called "dual-purpose" expenses, i.e., those expenses incurred in part for reasons other than the repair of a vessel. *SL Serv., Inc.*, 357 F.3d at 1361.

Plaintiff contends that lay-up expenses are, as a matter of law, not considered "expenses of repairs." (Pl.'s Br. 8–12.) Plaintiff's primary authority for this proposition is a 1916 decision rendered by the Board of General Appraisers (the "Board"). *See In re Thousand Islands Steamboat Co.*, T.D. 36,685 (1916). In that case, the plaintiff, Thousand Islands, protested duties of $44.46 assessed on expenses associated with laying-up a steamboat in a harbor during the winter season. Applying Rev. Stat. 3114, the Board determined that the laying-up expense did not come within the term of "equipment" or "expense of repairs." *Id.* In its one sentence explanation of its position, the Board stated that "[i]t is merely the expense of putting the boat away in winter quarters." *Id.*

The court is not persuaded that this case implies that no "lay-up" could ever be considered an "expense of repair." Rather, as the Board indicated, it is the purpose for which the lay-up was made that determines whether the costs associated with the lay-up are "expenses of repairs." If, for example, the lay-up is made because the boat is operated on a seasonal basis, but not for the purpose of obtaining repairs, then the costs are not covered by § 1466. If, by contrast, the lay-up occurs in part to facilitate the repair of a vessel, then the expenses of the lay-up may be dutiable in appropriate proportion. Thus, the question of whether the Crusader was "laid up" or merely "parked" at KSS is irrelevant. The relevant question is whether the expenses incurred at KSS were necessary to the repairs scheduled to take place at Jurong. To phrase the question another way, was the lay-up at KSS necessitated, at least in part, by the repairs to be made at Jurong?

Turning to the evidence on the record, Defendant, as the party seeking summary judgment, has met its burden by pointing to evidence indicating that Horizon Lines decided to lay-up the Crusader at KSS in large part because of its proximity to Jurong, where it was

scheduled to be repaired. Defendant notes various email discussions of where to send the Crusader for its scheduled inspection. Those emails conclude that the vessel would best be sent to "an anchorage at an island just off Singapore that has an anchorage and small shipyard." (Def.'s Ex. 14 (Email from Glen Moyer, Horizon Lines, LLC, to Jim McKenna et al. (Aug. 29, 2001)).) Another email notes that the Crusader would lay idle at KSS for two months, with the vessel then "shifting to [Jurong] in early Nov[ember] to commence a longer than usual repair period." (Def.'s Ex. 15 (Email from Joe Breglia, Horizon Lines, LLC, to Francis Lai (Aug. 29, 2001)).) Thus, Defendant has produced evidence from which a reasonable fact-finder could conclude that the lay-up in KSS was made in part to allow for repairs of the Crusader. The burden therefore shifts to Plaintiff.

Plaintiff claims that the lay-up in KSS was not precipitated in any way by the need for repairs in Jurong. Plaintiff points to evidence from its expert witness's deposition, stating that none of the work performed on the Crusader at KSS was "crossover work" that actually advanced the repair work that was done at Jurong. (Def.'s Ex. 9 (Dolan Dep. 60:11–14).) Instead, the lay-up at KSS was purportedly made due to a seasonal decline in the Puerto Rico trade, and for a mandated ABS inspection. Evidence clearly indicates that inspection and seasonal variation in trade were additional considerations prompting the decision to lay-up the Crusader in KSS, and then place her in dry-dock in November. Nevertheless, Plaintiff has pointed to no evidence suggesting that the lay-up was in no way prompted by Horizon's desire to conduct repairs at Jurong. In order to avoid summary judgment, Plaintiff must not only point to evidence suggesting additional reasons to place the Crusader in KSS, it must also point to evidence suggesting that preparation for repairs at Jurong was not among the reasons for the lay-up at KSS. In the absence of such evidence, summary judgment on this issue is proper, and the court concludes that there is no genuine issue of material fact that the Crusader was laid-up in KSS, at least in part, in anticipation of a "longer than usual repair period" at Jurong. Thus, the lay-up itself is an "expense of repair" in part, and all costs related to the lay-up at KSS are in part "expenses of repairs" and dutiable at a prorated amount.

II. Expenses Incurred at KSS During Lay-Up

A. Invoices 2 & 3

These invoices concern expenses incurred by obtaining electric generators to supply the Crusader with power while laid-up in KSS between September 11 and November 9, 2001. Defendant points to evidence that the generators were integral to laying-up the Crusader at KSS. (Def.'s Ex. 19 (Walla Dep. 38:22–39:22).) Plaintiff argues that the generators were not necessary for the actual repairs per-

formed at Jurong. (Pl.'s Br. 13.) Plaintiff fails to present any evidence, however, that the electrical generators were not necessary to the lay-up at KSS. Given that the lay-up itself was in part an "expense of repair" for the Crusader, summary judgment for Defendant with respect to these invoices is proper.

B. Invoice 4

This invoice covers expenses related to the use of devices such as heaters, blowing fans, desiccants, and hoses used to keep parts of the Crusader dry while she was laid-up in KSS. Defendant argues that these items "consist[ ] of foreign equipment purchases for the vessel" and are, therefore, fully dutiable under 19 U.S.C. § 1466. (Def.'s Br. 19.) Plaintiff argues that these items are disposable purchases. (Pl.'s Br. 14.) Customs has ruled that consumable items intended for use in transit, such as disposable silverware, are not dutiable as a vessel's "equipment." *See* C.S.D. 85–18 (treating disposable silverware, retained on board an airplane and not removed for sale or use on other aircraft, as not dutiable). As evidence the items were disposable, Plaintiffs note the testimony of their expert witness, who stated that blowers are "basically a consumable item." (Def.'s Ex. 19 (Walla Dep. 54:24–25).) Such evidence raises a genuine issue of material fact as to whether these items are not part of the vessel's "equipment." Therefore, summary judgment with respect to Invoice 4 is denied.

C. Invoice 5

Invoice 5 concerns expenses for a "lay-up survey" conducted by ABS prior to the Crusader's transfer to Jurong. Defendant argues that the cost of the ABS lay-up inspection was incurred in order to protect the vessel while it was in lay-up awaiting repairs at Jurong, and therefore, is dutiable at an appropriate prorated amount. (Def.'s Br. 20.) Plaintiff argues that the ABS lay-up survey was conducted only to ensure that the vessel is properly put into lay-up, not to verify that it is ready for repairs. (Pl.'s Br. 14–15.) Consequently, Plaintiff argues that the ABS report cannot be an "expense of repair" within the meaning of 19 U.S.C. § 1466. (*Id.*) As discussed above, however, the lay-up at KSS was itself an "expense of repair," at least in part. Plaintiff's evidence does not contradict Defendant's assertion that the ABS survey was incident to the lay-up, and therefore an "expense of repair" at a prorated amount. Having failed to raise a genuine issue of material fact in this regard, summary judgment as to Invoice 5 is granted in favor of Defendant.

D. Invoice 6a

From the pages available on the record, it appears that this invoice covers expenses incurred by the Crusader while at KSS, including transportation of personnel, boat services, port clearances,

agency fees, crew change, visa on arrival, and port navigation dues, which Customs found dutiable at a prorated amount.[5] HQ 116237 at 3. Defendant has pointed to the absence of evidence supporting Plaintiff's contention that these expenses were not "expenses of repairs," arguing that the costs necessary to complete the lay-up were costs associated in part with obtaining repairs at Jurong. (Def.'s Br. 20.) Plaintiff argues that there is a genuine issue as to whether "Horizon incurred these expenses to lay-up the ship pursuant to ABS standards" rather than to "advance repairs made at Jurong." (Pl.'s Br. 15.) Plaintiff admits, however, that the expenses associated with this invoice were necessary to successfully complete the lay-up. (*Id.*) As the court has concluded that the lay-up itself was an "expense of repair" in part, the associated costs in this invoice are likewise "expenses of repair" that are eligible for prorated duties. Summary judgment for Defendant regarding these items is therefore granted.

E. Invoice 6b

Customs found some of the items under this invoice dutiable at a prorated amount, but also concluded that full duties were owed on the "supply [of] manpower for mechanical work," the heating lamp and bilge alarm installation, some flexible cable, and a vent duct cover. (Def.'s Br. 21.) According to Defendant, full duties were charged on certain items because they were billed to an "owner's repair account," implying that the expenses were repairs performed in KSS, not charges related to the lay-up prior to seeking repair in Jurong. (*Id.* at 21–22.)

Plaintiff points to evidence that "manpower for mechanical work" was used to open the boiler for lay-up, to ensure that it would dry. (Pl.'s Br. 19.) This explanation is corroborated by the records kept by the ABS surveyor, who checked to ensure that the boiler doors were kept open as part of the lay-up inspection. (Pl.'s Ex. 5 (ABS Checklist).) Expert testimony also suggests that inspections, but not repairs, would have necessitated opening the boiler. (Def.'s Ex. 19 (Walla Dep. 61:7–24).) Specifically, Walla noted in his deposition that, although a boiler might be opened in places for repairs, it would be highly unusual to open all of the boiler doors in the course of repairs. (*See id.* at 61:22–62:3 ("Typically in a repair you'd only remove those required to gain access to the repair area. In this case, we removed the majority, if not all, of the handholds and doors, again, to allow air circulation to prevent condensation.").) This evidence is sufficient to raise a genuine issue as to whether the boiler doors were opened for the purpose of laying-up the Crusader, not as

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[5] Only pages 5, 6 and 8 of Invoice 6a were produced by Horizon Lines, who stated that they submitted everything they had received from KSS with respect to this invoice. (Oral Arg. Tr. 47:18–25.)

part of repairs. Accordingly, summary judgment with respect to "manpower for mechanical work" is denied.

Plaintiff argues that the "heating lamp and bilge alarm installation" were both necessary to the lay-up of the Crusader, and therefore, were not exclusively for the purpose of repairs, regardless of which account they were charged to. (Pl.'s Br. 19.) To support this claim, Plaintiff points to the fact that both were procured in accordance with the ABS inspection standards for vessel lay-ups. (*Id.*) Furthermore, Plaintiff points to expert evidence asserting that a heat lamp is used to raise the condensation point within a vessel, preventing water damage while the vessel is not being used. (Def.'s Ex. 19 (Walla Dep. 63:8– 10).) Walla also testified that the additional bilge alarm was installed to notify the crew immediately if the vessel began taking on water while the vessel was not manned with a full crew. (*Id.* at 63:24–64:7.) With a full crew, a large influx of water would be identified more easily, and such a bilge alarm would be not be necessary. (*Id.*) This evidence is sufficient to raise a genuine issue of material fact as to whether the "heating lamp and bilge alarm installation" were expenses related to laying-up the Crusader, rather than solely for repairs. There is also evidence that the additional alarm was removed prior to entry of the vessel at Jurong, raising a genuine issue as to whether this item may be classified as "equipment" for the Crusader under 19 U.S.C. § 1466. (Pl.'s Br. 19 (citing Walla Dep. 64:8–19).) Therefore, summary judgment with respect to these items is denied.

With respect to costs incurred to cover the vent ducts, Plaintiff provides the ABS guidelines as evidence that the air intake vents were required to be covered during vessel lay-up (Pl.'s Ex. 6 (ABS Guidelines at 222)), as well as expert testimony stating that these covers actually had to be removed for repairs. (Def.'s Ex. 19 (Walla Dep. 37:8–18).) This evidence is sufficient to raise a genuine issue as to whether the vent duct cover expense was necessary to properly lay-up the Crusader, instead of specifically relating to repairs. Consequently, summary judgment with respect to this item is denied.

Finally, with respect to the "flexible cable" and "shipment of owner's generator," Plaintiff argues that it did not use the generators to make repairs, but to meet the requirements of the ABS for vessel lay-up. (Pl.'s Br. 17–18.) As evidence, Plaintiff notes that ABS guidelines specifically call for the vessel to have power, and that the ABS surveyor for the Crusader found that Plaintiff had complied with this requirement. (Pl.'s Ex. 5 (ABS Checklist); Pl.'s Ex. 6 (ABS Guidelines at 222).) This evidence is sufficient to raise a genuine issue as to whether the shipment of the generator and related cables were necessary to comply with lay-up requirements, rather than solely for repairs. Therefore, summary judgment with respect to these items is denied.

Customs prorated duties on the remaining items under this invoice. *See* HQ 116237 at 3. Plaintiff argues that those items were not necessary for repairs at Jurong. As discussed above, Customs correctly concluded that the lay-up itself was in part necessitated by repairs that would be completed at Jurong as soon as space became available. Therefore, the expenses incurred for the purpose of laying-up the Crusader are dutiable to the extent that the lay-up was made for the purpose of procuring repairs. Plaintiff has not raised any evidence suggesting that the lay-up was not made in part for the purpose of obtaining repairs, and therefore, summary judgment with respect to the remainder of items under Invoice 6b is granted.

F. Invoice 7a

These invoices concern a variety of expenses associated with the lay-up, including long distance telephone charges, transportation of a rental generator to and from the vessel, land transportation for the owner's agent or contractor, port dues, navigation dues, and boat services (other than transportation of crew). Customs found these items dutiable at a prorated amount. (Def.'s Br. 22.) Plaintiff argues that telecommunications charges are "intrinsic to any lay-up," and, therefore, are not expenses of repair. (Pl.'s Br. 20.) Plaintiff has produced no evidence, however, showing that the lay-up was not, at least in part, related to the need for repairs at Jurong. As the expenses associated with the lay-up may be prorated as dutiable under 19 U.S.C. § 1466, telecommunications expenses integral to the lay-up are also dutiable on a prorated basis. Similarly, Plaintiff asserts that the costs associated with transporting a replacement generator are nondutiable because they were costs incurred to place the Crusader in lay-up, not directly used for the purpose of repair. Once again, this argument fails to raise a genuine issue as to whether the lay-up itself was prompted in part by the need for repairs at Jurong. In the absence of a genuine issue of material fact on this issue, summary judgment for Defendant on this item is granted.

G. Invoices 7b1 and 7b2

These invoices cover a number of expenses that were treated as fully dutiable, including expenses for a blank vent, hawse pipe grating, installation of air conditioning, a penetration pipe, an Indonesian flag, and the special shipment of an electric generator. HQ 116237 at 3–4. The invoices also cover expenses that were prorated, including "riggers assistance," garbage disposal, shore power, tug assistance, towing charges, wharfage, security watchman, pilotage, marine gas oil, fresh water and "walkie-talkies." (Def.'s Ex. 18 (Invoice 7b1).) With respect to the prorated items, Plaintiff once again argues that the expenses were incurred for the purposes of the lay-up, implying that they, therefore, cannot be considered "expenses of

repairs." (*See* Pl.'s Br. 21–22.) As noted, as the lay-up itself was made in part for the purpose of obtaining repairs, a prorated duty on expenses associated with the lay-up is appropriate. Consequently, Defendant's motion for summary judgment with respect to these items is granted.

With respect to the blank vent, the expense appears to relate to a covering placed on the air intake or exhaust pipe of the vessel during lay-up. (*See* Def.'s Ex. 19 (Walla Dep. 37:8–18) (stating that exhaust vents were closed during lay-up but opened during repairs at Jurong).) Plaintiff's evidence suggests that the exhaust coverings are not used in repairs, and were removed at the end of the lay-up, and therefore do not constitute an "expense of repair" or "equipment." (*See id.*) Plaintiff has also produced evidence that the penetration pipe was installed to aid in dehumidifying the Crusader during lay-up, and that the pipe was removed at the time the vessel was reactivated. (*See id.* at 68:7–12; *see also* Def.'s Ex 18 (Invoice 22a, Item H–055) (stating that the dehumidifying exhaust penetration was "closed").) As such, summary judgment for Defendant is denied with respect to these items.

Similarly, Plaintiff has produced evidence that the hawse pipe grating was installed to protect the vessel during lay-up. (*See* Pl.'s Ex. 9 (Dolan Report 16).) Plaintiff has also produced evidence indicating that the hawse pipe was removed after the lay-up was finished. (Pl.'s Br. 23 (citing Def.'s Ex. 18, Invoice 22a, Item H–055).) This evidence is sufficient to raise a genuine issue as to whether the hawse pipe was "equipment" or an "expense of repair" within the meaning of 19 U.S.C. § 1466. Therefore, summary judgment with respect to this item is denied.

Similarly, Customs treated installation of an air-conditioning unit as equipment and/or an expense of repair, and, therefore, as fully dutiable. Defendant points to the fact that the air conditioning unit was charged to the "owner's repair account" as evidence supporting Customs's conclusion. (Def.'s Br. 23.) Plaintiff claims that air-conditioning is a necessity for successfully accomplishing the lay-up because it serves to protect electronic equipment, in accordance with ABS guidelines. (Pl.'s Br. 23.) It appears that this system was installed temporarily to assist with the lay-up, and was not used during repairs, nor was it permanently affixed to the vessel. Therefore, Plaintiff has raised a genuine issue as to whether the air-conditioning unit is fully-dutiable as "equipment" or an "expense of repair." Summary judgment with respect to this item is, therefore, denied.

The final item in this invoice is an Indonesian flag. Vessel owners purchased this flag after the September 11, 2001 terrorist attacks in New York and Washington, D.C., in order to protect against sabotage of their vessel. Defendant argues that Plaintiff has not produced any evidence showing that the flag was not part of the vessel's "equip-

ment" within the meaning of 19 U.S.C. § 1466. (Def.'s Br. 23.) Plaintiff has not pointed to any evidence showing that the flag was discarded or treated as a consumable item. As such, the court finds that summary judgment for Defendant is appropriate with respect to this item.

H. Invoice 8a

This invoice also concerns expenses incurred during lay-up, including lay-up charges, hiring a security guard, use of walkie-talkies, and the purchase of marine gas oil. Plaintiff has produced no evidence suggesting that these items are not general lay-up expenses. As noted above, expenses related to the lay-up are dutiable to the extent that the lay-up at KSS was made for the purpose of obtaining repairs at Jurong. Summary judgment for Defendant with regard to this invoice is therefore granted.

I. Invoice 8b

This invoice concerns a number of expenses incurred during lay-up from November 1 to November 28, 2001, including land transportation, certain boat services charges, port navigation dues and port clearance. Plaintiff claims that these expenses were incurred to ensure that the vessel was not dragging its anchor while in lay-up, as required by the ABS lay-up standards. (Pl.'s Br. 24.) As above, the court finds that the lay-up was in part prompted by the need for repairs at Jurong, and therefore is dutiable at a prorated amount. The court thus finds that summary judgment with respect to the land transportation, boat services charges, and port navigation dues is granted.

Plaintiff also points to the fact that Customs appears to have inconsistently granted relief from duties for harbor navigation dues. In Invoice 6a, Customs granted Plaintiff's protest with respect to port clearance. (Def.'s Br. 20.) Such inconsistent treatment raises a genuine issue of material fact as to whether the port clearance fee should be dutiable at all. Therefore, summary judgment with respect to the port clearance fee is denied.

J. Invoice 11a1

This invoice covers the purchase of one twenty-foot long refrigerated container. Plaintiff contends that the container was purchased for another vessel, the CSX Challenger, not the Crusader, and therefore, should not be dutiable. (Pl.'s Br. 24.) As evidence, Plaintiff points to an affidavit submitted by its witness, Joseph Walla, stating that the purchase was for the Challenger. (Pl.'s Ex. 1 (Walla Aff. ¶ 38).) Additionally, Plaintiff points to the fact that the invoice itself, dated November 22, 2001, concerns the "CSX 'Challenger' drydocking at Jurong Shipyard in Singapore." (Def.'s Ex. 18 (Invoice 11a1).)

Defendant argues that the affidavit evidence cannot be accepted because Walla testified at his deposition that the container was purchased for the Crusader. (Def.'s Reply Mem. in Supp. Mot. Summ. J. ("Def.'s Reply Br.") 12.) Defendant is correct in this respect; an affidavit contradicting prior deposition testimony generally cannot be used to create a genuine issue of material fact. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4–5 (1st Cir. 1994) ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed."). The invoice itself, however, corroborates Walla's statement that the container was purchased for the Challenger, not the Crusader. Defendant claims that the date of the invoice, November 22, 2001, indicates that the costs were incurred at the time the Crusader entered dry dock at Jurong. (Def.'s Reply Br. 12.) The Crusader entered Jurong on November 29, 2001, for her scheduled dry-dock. (Def.'s Ex. 4 (Horizon's Protest at 3).) Moreover, the invoice clearly identifies the sale of the container as being "for the subject vessel arrived in Singapore on 7th May 2001." (Def.'s Ex. 18 (Invoice 11a–1).) The contents of the invoice are sufficient to raise a genuine issue as to whether the container was purchased for the Crusader. Consequently, summary judgment with respect to this invoice is denied.

K. Invoice 11a2

This invoice concerns various professional services, "main agency fees," and telecommunications charges for the Crusader while it was laid-up in KSS. Customs assessed full duties on these professional services because Horizon allegedly provided no evidence to show that the expenses did not relate to foreign repairs. HQ 116237 at 4. Customs also assessed prorated duties on the agency fees and telecommunications charges. *Id.* Defendant claims that the professional services charge should be fully dutiable because Plaintiff has not produced evidence demonstrating that it does not consist of foreign repair services. (Def.'s Br. 25.) Plaintiff has presented evidence, however, that the professional services were rendered to ensure that the vessel did not drag anchor while in lay-up. (*See* Def.'s Ex. 19 (Walla Dep. 71:6–13).) Additionally, the invoice itself states that, rather than being repairs, these were "[l]aid-[u]p condition surveys." (Def.'s Ex. 18 (Invoice lla2, Item F).) These facts are sufficient to raise a genuine issue as to whether the inspections were performed in the course of a lay-up, as opposed to being, in and of themselves, repairs. Therefore, summary judgment with respect to this item is denied.

With regard to the remainder of the charges, the court notes that Plaintiff has produced no evidence suggesting that these fees were not incurred in the course of completing the lay-up of the Crusader. Because the lay-up was conducted in part for the purpose of obtain-

ing repairs in Jurong, these fees are dutiable at a prorated amount. Summary judgment with respect to the "main agency fees" and "telecommunications charges" included in Invoice 11a2 is, therefore, granted.

L. Invoice 11a3

This invoice covers expenses for the supply of provisions, which Customs found dutiable because Defendant did not produce evidence showing that the provisions were not foreign equipment or expenses of repairs. HQ 116237 at 4. Plaintiff has submitted an affidavit stating that the cost of hiring the night engineer was prompted by the need to provide assistance while Joseph Blunt was alone on the vessel. (Pl.'s Ex. 1 (Walla Aff. ¶ 39).) The affidavit also states that a night cook and provisions were needed to feed Horizon's personnel who were tending to the ship during the lay-up. (*Id.*) These facts are sufficient to raise a genuine issue as to whether the provisions were fully dutiable as "expenses of repairs" or "equipment."

Customs treated the hotel accommodations as outside the scope of 19 U.S.C. § 1466. HQ 116237 at 4. The remaining costs, including telecommunications expenses, are admitted to have been expenses incurred during the lay-up of the Crusader, and therefore, are dutiable at the prorated amount as discussed above. (Pl.'s Br. 25–26.) Accordingly, summary judgment with respect to the remaining charges in Invoice 11a3 is granted.

M. Invoice 11b1

Invoice 11b1 concerns expenses incurred at KSS during October 2001, including "main agency fee," crew transit, telecommunication equipment, land transportation charges, ferry tickets to Karimun Island, transit visa fees and professional services. Consistent with its prior rulings, Customs determined that crew transit, land transportation, and transit visa fees were outside the scope of 19 U.S.C. § 1466. HQ 116237 at 4. As before, Customs treated the professional services as fully dutiable, and prorated the remaining charges. *Id.* With respect to the prorated charges, Plaintiff argues that summary judgment is inappropriate because the fees were related to the lay-up, and were not directly used for repairs of the vessel. (Pl.'s Br. 25–27.) As noted, because the lay-up was necessitated in part by the repairs at Jurong, summary judgment is appropriate with respect to the prorated fees. With respect to the professional services fees, the invoice itself states that the services consisted of "[l]aid-[u]p condition surveys." (Def.'s Ex. 18 (Invoice 11b1, Item G).) As above, this evidence is sufficient to raise a genuine issue of material fact as to the nature of the professional services. Therefore, summary judgment with respect to this item is denied.

N. Invoice 11b3

This invoice covers expenses for the purchase of a television for the vessel, the purchase of provisions from the KSS store, the hire of a night engineer, and the survey of a damaged portable generator. Customs treated the television and provisions as fully dutiable, and the remainder as dutiable at a pro-rated amount. HQ 116237 at 4. Plaintiff argues, as before, that the provisions and night engineer related to the lay-up, not to the repair of the vessel. (Pl.'s Br. 27.) As noted above, Plaintiff has submitted an affidavit stating that the cost of hiring the night engineer was prompted by the need to provide assistance while Joseph Blunt was alone on the vessel. (Pl.'s Ex. 1 (Walla Aff. ¶ 39).) The affidavit also states that the provisions were needed to feed Horizon's personnel who were tending to the ship during lay-up. (*Id.*) The affidavit raises a genuine issue as to whether the provisions were fully dutiable as "expenses of repairs" or "equipment." Plaintiff does not appear to contest that the television is dutiable as equipment. (Pl.'s Br. 27.) The remainder of the items, including survey of the faulty generator, are admitted to have been expenses incurred during the lay-up of the Crusader, and, therefore, are dutiable at the pro-rated amount as discussed above. (*Id.*) Accordingly, summary judgment with respect to the remaining items on Invoice 11b3 is granted.

O. Invoice 11b4

This invoice consists of charges incurred by the Crusader during September of 2001, including land transportation, courier services, hotel accommodations, and an airline ticket for Wally Becker. Customs treated the land transportation and hotel accommodations as outside the scope of 19 U.S.C. § 1466, and the remainder were assessed duties at a prorated amount. HQ 116237 at 4. Plaintiff contends that the remaining charges relate to the lay-up, not to repairs, and are therefore not dutiable. (Pl.'s Br. 28.) As discussed above, the court finds that the lay-up was made in part to assist the Crusader in obtaining repairs at Jurong. As such, costs associated with the lay-up are dutiable at a prorated amount. Summary judgment with respect to the remaining items is granted.

P. Invoice 11c

This invoice covers the expenses of hiring tug boats to tow the Crusader from its lay-up in KSS to Jurong for repairs. Customs found all the expenses associated with the tow to be dutiable at a prorated amount. HQ 116237 at 5. Plaintiff argues that "only the lay-up necessitated the towage of the vessel from Singapore to Jurong." (Pl.'s Br. 28.) If the Crusader had not been in lay-up, it could have entered Jurong under its own power. Although there may be evidence to support that claim, the court's finding that the lay-up itself was made in part for the purposes of repairs renders the tow-

ing an "expense of repair" that may be assessed at a prorated amount. Consequently, summary judgment with respect to Invoice 11c is granted.

Q. Invoice 11d1

This invoice concerns expenses incurred during November 2001, including main agency fees, telecommunication expenses, crew transit, land transportation expenses, and professional services rendered. As with Invoice 11b1, Customs assessed full duties on professional services, and prorated duties on the main agency fee and telecommunications charges. HQ 116237 at 5. As before, Customs found that crew transit and land transportation were outside the scope of 19 U.S.C. § 1466. *Id.* As noted, because the lay-up was necessitated in part by the repairs at Jurong, summary judgment is appropriate with respect to the prorated fees. With respect to the professional services fees, the invoice itself states that the services consisted of "[l]aid-[u]p condition surveys." (Def.'s Ex. 18 (Invoice 11d1, Item E).) As above, this evidence is sufficient to raise a genuine issue of material fact as to the nature of the professional services. Therefore summary judgment with respect to this item is denied.

R. Invoice 11d2

This invoice concerns expenses incurred in November by the Crusader, including telecommunications, hire of a night engineer, provisions, and freight forwarding. Customs treated the provisions as fully dutiable, the remainder were assessed with prorated duties as expenses related to the lay-up. HQ 116237 at 5. Plaintiff argues, as it did with respect to Invoices 11a3 and 11b4, that these expenses are not related to repairs, and therefore are not dutiable at all. (Pl.'s Br. 29.) Plaintiff has submitted an affidavit stating that the cost of hiring the night engineer was prompted by the need to provide assistance while Joseph Blunt was alone on the vessel. (Pl.'s Ex. 1 (Walla Aff. ¶ 39).) The affidavit also states that a night cook and provisions were needed to feed Horizon's personnel who were tending to the ship during the lay-up. (*Id.*) These facts are sufficient to raise a genuine issue as to whether the provisions were fully dutiable as "expenses of repairs" or "equipment."

The remaining costs, including telecommunications expenses, are admitted to have been expenses incurred during the lay-up of the Crusader, and therefore, are dutiable at the prorated amount as discussed above. (Pl.'s Br. 29.) Accordingly, summary judgment with respect to the remaining charges is granted.

III. Expenses Incurred at Jurong

A. Invoice 22a

This extensive invoice covers numerous activities performed on the Crusader while dry-docked at Jurong between November 29, 2001, and January 7, 2002. (Def.'s Ex. 18 (Invoice 22a).) Although Plaintiff concedes that many of the items on the invoice are dutiable as repairs,[6] it did protest the assessment of prorated duties on items included in Section 1, entitled "services and port charges." (Pl.'s Br. 30–31.) Specifically, Plaintiff argues that certain apportioned duties, including lay-berth charges, telephone services, fireline water, garbage removal, crane services and line handlers should not have been assessed duties because they do not relate to repairs. (*Id.* at 32.)

Plaintiff argues that these tasks were not part of the repairs that were performed at Jurong. Defendant argues that performance of these support tasks was necessary to the completion of the repairs and the scheduled inspection, even if these tasks do not constitute repairs themselves. *SL Serv., Inc.*, 357 F.3d at 1362, held that certain expenses that are not themselves repairs, such as the cost of dry docking, might nonetheless be dutiable if they would have been caused by the repair work, absent the other, non-dutiable inspection. *Id.*

Plaintiff argues, that to complete repairs, Horizon did not need: telephone services or a fireline; to remove the crew's garbage or the dehumidification equipment; the assistance of line handlers; or to place the vessel into a lay-berth. (Pl.'s Br. 32.) Plaintiff has presented an affidavit stating that no repairs, other than repainting and hull work, required dry-docking. (Pl.'s Ex. 1 (Wall Aff. ¶ 35).) Plaintiff has not, however, pointed to any other evidence raising a genuine issue that the telephone services, fireline water, garbage removal, and crane services were not incidental to repairs of the vessel, despite the fact that they did not constitute repairs themselves. Accordingly, summary judgment with respect to these prorated items is granted.

B. Invoice 22b

Under this invoice, Defendant contends that there is no genuine issue as to whether Section 2.1–1, "Dry-docking Time," Section 2.1–9A, "Cargo Hold Tank Top Cleaning," Section 2.1–9B, "Cargo Hold Cell Guide Support Structure Cleaning," and Section 2.1–34, "En-

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[6] Plaintiff did not protest all of Invoice 22a in its initial protest to Customs and conceded that items 3.1, 4.2, 5.1 and 8 were dutiable, and therefore not properly before the court. (*See* Pl.'s Supp. Mem. in Opp'n Mot. Summ. J. ("Pl.'s Supp. Br.") 2–4; Pl.'s Ex. 7 (Horizon's Application for Further Review, dated May 18, 2004, at 8) (stating that Plaintiff protested only items 1–1 to 1–16 under Invoice 22a); Def.'s Ex. 4 (Horizon's Protest at 6). Under 28 U.S.C. § 1581(a), the court cannot resolve claims for items that were not subject to a protest. *XL Specialty Ins. Co. v. United States*, 341 F. Supp. 2d 1251, 1255 (CIT 2004).

gine Room and Fan Room Cleaning," should be prorated because they are necessary to both inspection and repair of the Crusader. (Def.'s Br. 32–34.)

Plaintiff points to evidence that "many challenged items were used exclusively for non-dutiable work." (Pl.'s Br. 34.) Plaintiff provides testimony of their expert, Walla, stating that the garbage removal charge (Section 1–7) was necessary to clean up after the crew. (Def.'s Ex. 19 (Walla Dep. 85:4–7); Pl.'s Supp. Br. 4–5.) Walla's testimony also indicates, however, that garbage removal was a "dual accumulation" and that repairs were occurring along with inspections at this time. (Def.'s Ex. 19 (Walla Dep. 96:8–14).) Walla's testimony, therefore, supports Defendant's argument for summary judgment, and summary judgment with respect to garbage removal is granted.

Plaintiff also points to evidence that the crane service (Section 1–8) was not used for repairs, but to remove items from the vessel that had been placed on various hatches. (Def.'s Ex. 19 (Walla Dep. 97:9–24).) Walla testified that the items would have to be removed in order to allow the hatches to be opened for inspection. (*Id.*) Walla makes no mention of any need to open the hatches for the purpose of repairs. (*Id.*) Indeed, Invoice 22d, covers crane lifts used to open hatches for repairs. (Def.'s Ex. 18 (Invoice 22d, Item 8–10032.2).) This evidence raises a genuine issue as to whether the cranes were necessary to remove loads to allow the hatches to be opened for the purpose of repair. Therefore, summary judgment with respect to the crane fees is denied.

In addition, Plaintiff points to evidence that reefer cooling water was used to provide air conditioning for the crew, not the repair personnel and notes that the invoice does not indicate that the air conditioning was repaired. (Pl.'s Br. 34; Pl.'s Supp. Br. 5 (citing Def.'s Ex. 18 (Invoice 22b at 5).) Walla states, however, that the bridge, where repairs were being conducted on the radar, was air-conditioned; thus, at least one air-conditioned area was the site of repairs. (Def.'s Ex. 19 (Walla Dep. 99:19–24).) As Plaintiff's expert appears to concede that repairs were ongoing in air-conditioned portions of the vessel, the court finds that the reefer cooling water was used, at least in part, for the purpose of repair. Therefore, summary judgment for Defendant with respect to the cooling water is granted.

Plaintiff next points to evidence that charges for fresh water were incurred for the benefit of the crew, not repair workers. (Pl.'s Br. 34.) Walla testified that the fresh water was used for crew showers and washing machines. (Def.'s Ex. 19 (Walla. Dep. 100:3–7).) This raises a genuine issue of material fact as to whether the charge relates to repairs. Summary judgment with respect to the provision of fresh water is therefore denied.

Likewise, Plaintiff points to evidence that compressed air was provided for the use of the crew, either for air-conditioning or for the use

of air-powered tools. (Def.'s Ex. 19 (Walla Dep. 111:3–112:17).) Walla could not confirm whether the crew on board at the time actually used any tools that required compressed air (*id.* at 112:12–17), but this evidence raises a genuine issue as to whether the purpose of the compressed-air hookup was used for repairs. Summary judgment with respect to the provision of compressed air is therefore denied.

Plaintiff also points to evidence that the removal of all debris from cargo holds was necessary for inspections, but not necessarily needed for repairs conducted in the holds. (Def.'s Ex. 19 (Walla Dep. 117:21–119:2).) This evidence is sufficient to raise a genuine issue of material fact regarding the relationship between the cleaning of the holds and repairs. Thus, summary judgment with respect to cargo hold top cleaning (Section 2.1–9A), cargo hold guide support cleaning (Section 2.1–9B), and engine room/ fan cleaning (Section 2.1–34) is denied.

Plaintiff does not point to evidence showing that the lay-berth was used exclusively for the purpose of inspections. Indeed, Walla's testimony suggests that during the time this lay-berth was charged, "[t]here could have been" ongoing repairs on the vessel. (Def.'s Ex. 19 (Walla Dep. 92:15–19).) Plaintiff bears the burden of proof at trial, and therefore, must produce evidence to raise a genuine issue as to its claim. Since Plaintiff concedes that repairs could be ongoing at this time, it also appears that use of telephone services (Section 1–2), fireline water (Section 1–4), a certificate the vessel is "gas free" (Section 1–5), sanitary facilities (Section 1–6), line handlers (Section 1–16), heat lamps (Section 1–18), dock trial (Section 1–19), sea trial (Section 1–20), tank ventilation (Section 1–21), passageway (Section 1–22), and ballast water (Section 1–24), could be related to repairs. Plaintiff has pointed to no evidence to the contrary. Summary judgment with respect to these items is therefore granted.

Finally, Plaintiff concedes in its brief that Section 1 items 1–9 (shore power connection), 1–10 (shore power supply), 1–11 (shore power while the vessel was afloat), and 1–3 (use of the port engineer's office to coordinate activities onboard the Crusader) were dutiable at a prorated amount. (Pl.'s Br. 34 n.33.) Therefore, summary judgment is granted with respect to these items.

Invoice 22b also covers numerous items for cleaning, inspections, and tests that Customs found to be fully dutiable. (Def.'s Ex. 18 (Invoice 22b).) This opinion will address these items in the order in which Defendant has argued in its summary judgment memorandum. (*See* Pl.'s Br. 33–38.)

Defendant argues that item 2.1–12, for rudder inspection, is related solely to repairs of the vessel, and therefore is fully dutiable. (Def.'s Br. 35.) Plaintiff contests this assertion by pointing to evidence that the ABS survey shows that "[r]udder(s), rudder pintle(s) . . . rudder gudgeon(s)[,] rudder stock(s) and stuffing box(es)" were inspected. (*See* Pl.'s Ex. 13 (ABS Dry-dock Report).)

This evidence is sufficient to raise a question as to whether the rudder was inspected, and whether the cleaning was done, for the purpose of those inspections. Summary judgment for this item is denied.

Customs found that item 2.1–18, a cherry picker used for inspection of a box girder, was related to a repair survey, not the general inspection, and therefore, fully dutiable. HQ 116237 at 5. This box girder inspection involved the use of a movable platform to look into hatch covers and the box girder for inspections. Defendant contends that this was necessary for steel renewals and coatings work, citing to a corrosion report prepared by EPS Corrosion Control, Inc. (Def.'s Br. 35 (citing Def.'s Ex. 16 (EPS Corrosion Control Report)).) Plaintiff argues that the movable platform was also necessary for inspections, as evidenced by the ABS Dry-dock Report (Pl.'s Ex. 13), which includes entries for inspection of hatch openings. (Pl.'s Br. 35–36.) Such evidence raises a genuine issue as to whether this item related to inspections or repairs. Therefore, summary judgment with respect to this item is denied.

Similarly, Defendant argues that there is no genuine issue with respect to item 2.1–23, cleaning of port fuel tank, because it was necessary for repair of the vent pipe and sounding tube described in Invoice 22d, item number 8.9000–04, which Plaintiff conceded as dutiable. (Def.'s Br. 36.) Plaintiff argues that this cleaning was carried out soley for purpose of the ABS inspection, and there is no evidence in the invoice or the testimony that show the cleaning was for the purpose of repair. (Pl.'s Br. 36.) Plaintiff cites to Walla's testimony, which states that items 2.1–23 through 2.1–25 were for cleaning for the purposes of inspection by ABS. (Def.'s Ex. 19 (Walla Dep. 121:7–12).) This evidence is sufficient to raise a genuine issue as to whether the cleaning was conducted solely for repair, and should be fully dutiable. Therefore, summary judgment for this item is denied.

Defendant asserts the same arguments with respect to items 2.1–24 (cleaning No. 3 fuel oil tank), 2.1–25 (cleaning No. 5 fuel oil tank), and 2.1–28 (cleaning hydraulic oil from No. 8 cargo hold). (Def.'s Br. 36.) Plaintiff raises similar responses to items 2.1–24 and 2.1–25, but makes no mention of 2.1–28, thus conceding the item as fully dutiable. (Pl.'s Br. 36; Oral Arg. Tr. 59:16–60:10.) Therefore, summary judgment is denied with respect to items 2.1–24 and 2.1–25, but granted with respect to 2.1–28.

Item 4.1–11 covers inspection of the main and emergency switchboards on the Crusader, which was treated as fully dutiable. Defendant notes that Horizon's specifications include vacuum cleaning, replacement of wiring, a replacement of circuit breakers with "pitting or burn spots." (Def.'s Br. 36 (citing Def.'s Ex. 22 (Horizon's Standard Specifications)).) Plaintiff points to evidence that ABS inspected the switchboard, and that the invoice itself does not mention repairs of the switchboard, only cleaning and tightening. (*See* Pl.'s Ex. 13 (ABS Dry-dock Report); *see also* Def.'s Ex. 18 (Invoice 22b, Item 4.1–11).)

Plaintiff notes that where a specification for work conflicts with the actual invoice for the work once it was performed, the invoice will ordinarily prevail. (Pl.'s Br. 36); *see also* HQ 112910 (Dec. 1, 1993) ("Given the frequency with which work orders are changed, we cannot assume that the work actually performed was identical to the work proposed."). The apparent conflict between the specification and invoice raises a genuine issue as to whether the switchboards were repaired at all. Accordingly, summary judgment is denied with respect to this item.

Item 4.1–16 covers expenses for the inspection of a forepeak valve. Defendant argues that the invoice itself describes repairs that were made to a block valve in the forepeak tank, and that the laborers "[f]reed up valve spindle & reassembled back in order." (Def.'s Ex. 18 (Invoice 22b, Item 4.1–16).) Plaintiff argues that this statement is ambiguous, and it is not clear whether freeing up the spindle was part of reassembly after inspection, or part of a repair. (Pl.'s Br. 37.) Reviewing the phrasing of the invoice, the court concludes that a reasonable fact finder could infer that "freeing" the spindle was part of reassembly following inspection, and not necessarily repair. On summary judgment, all reasonable inferences are drawn in favor of the non–moving party, consequently, summary judgment on this item is denied.

Item 4.2–1 covers expenses for the inspection of a "forced draft fan." Customs found this item to be fully dutiable because the "wording of the invoice itself indicates that the work performed was a complete repair overhaul of the fan." (Def.'s Br. 37.) The invoice includes certain tasks that could be taken to suggest repairs, such as placing the "fan shaft in [a] lathe to confirm trueness." (Def.'s Ex. 18 (Invoice 22b, Item 4.2–1).) Plaintiff, however, points to evidence that ABS inspected this item, and contends that "[a]ny work undertaken to ensure the proper reassembly and functioning of the fan was part of the inspection itself." (Pl.'s Br. 37.) Because Plaintiff has not provided sufficient evidence as to whether this invoice was incurred solely for the purpose of repairing the fan, the court finds that summary judgment is granted with respect to this item.

Item 4.2–7 concerns expenses for inspecting the Crusader's boiler stack. Defendant contends that the removal of soot described in the invoice constituted a repair. (Def.'s Br. 37.) Defendant also notes that Horizon's specifications do not mention the inspection of the boiler stack. (*Id.*) Plaintiff points to the ABS Dry-dock Report that shows that the boiler stack was inspected (*see* Pl.'s Ex. 13 (ABS Dry-dock Report)) and testimony that soot removal is necessary for inspection. (Def.'s Ex. 19 (Walla Dep. 131:25–132:9).) The court finds that this evidence is sufficient to raise a genuine issue of material fact, and summary judgment is therefore denied for this item.

Item 4.2–8 relates to expenses for washing of boilers for inspection, which Customs found dutiable as a repair because no evidence

was provided demonstrating that this item was for "periodic inspections or surveys performed by ABS." HQ 116237 at 6. Defendant argues that it is "evident" that washing was necessary for the "extensive boiler repairs." (Def.'s Br. 37–38.) Plaintiff argues that the invoice states that the washing was "for inspections." (Def.'s Ex. 18 (Invoice 22b, Item 4.2–8).) The terms of the invoice raise a genuine issue as to whether the washing was conducted for the purpose of ABS inspections. Consequently, summary judgment with respect to this item is denied.

Item 4.2–10 is an invoice for inspection of the Crusader's Nos. 1 and 2 service pump discharge valves, which Customs found fully dutiable. The invoice states "[r]emoved to workshop for inspection." (Def.'s Ex. 18 (Invoice 22b, Item 4.2–10).) Defendant seeks summary judgment because it contends that the removal of two "globe valves" to a workshop "is indicative that dutiable work on them was actually performed." (Def.'s Br. 38.) Plaintiff points to the terms of the invoice as well, which state that the valves were "removed for inspection." (Def.'s Ex. 18 (Invoice 22b, Item 4.2–10).) Plaintiff also notes that ABS inspected these items. (Pl.'s Ex. 13 (ABS Dry-dock Report).) In addition, Plaintiff argues that the daily status reports from the Crusader refer to "renewal" of packing valve gaskets, which raises a factual dispute as to whether "renewal" constitutes "repair." (Pl.'s Br. 38.) Although "renewal" may be interpreted as a repair, Plaintiff has presented sufficient evidence to raise a genuine issue as to the purpose of removing the globe valves. Summary judgment with respect to this item is denied.

Item 5.1–12 relates to the inspection of a combined first stage heater, gland condenser and drain cooler packing, which Customs found fully dutiable. The invoice for this item refers to hydrostatically testing the heat exchanger to prove that it was leak free. (Def.'s Ex. 18 (Invoice 22b, Item 5.10–12).) As above, the invoice refers to inspections, not repairs, and Plaintiff has pointed to evidence that these items were inspected by ABS. Consequently, summary judgment with respect to item 5.1–12 is denied.

Finally, Defendant argues that summary judgment is warranted with respect to items 5.2–1,[7] 5.2–3, 5.2–4, 5.2–5, 5.2–6 and 5.2–7, which related to inspection of the Crusader's boiler and boiler access doors. Defendant asserts that these items were integral to repairs conducted on the boiler and to determine if repairs were done correctly. (Def.'s Br. 38.) Defendant argues that these services are part of the repairs completed on the boiler that were conceded by Plaintiff as dutiable in Invoice 22d, Section 5.2 ("Machinery Maintenance and Repairs Items Propulsion Boiler"). (*Id.*) Plaintiff, however, points to the invoice, as well as the ABS Dry-dock Report, as evidence that the

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[7] It appears Defendant erroneously listed Item 5.1.1 in its brief, of which there is none, instead of Item 5.2.1 ("Stage Port and Stbd Boilers").

items under Invoice 22b, Section 5.2 ("Machinery Inspection Items Propulsion Boiler") do no relate to repairs but were for the inspection of the boilers. (Pl.'s Br. 38; Def.'s Ex. 18 (Invoice 22b, Section 5.2).) Because the invoice refers only to inspections, and there is a separate invoice for repairs completed on the boiler, and Plaintiff has provided evidence that these items were inspected by ABS, summary judgment with respect to these items is denied.

C. Invoice 26

This invoice involves parts that were used in inspections at Jurong, which Plaintiff conceded to be dutiable at the protest stage. (Def.'s Ex. 4 (Horizon's Protest 2–4).) As noted above, the court lacks jurisdiction to review an item which was not protested. *See XL Speciality Ins.*, 341 F. Supp. 2d at 1255.

D. Invoices 31a through 31c

These invoices cover expenses incurred, as above, for the "main agency fee," telecommunications fee, hiring of a cook, courier services, port dues, pilotage, tug boats, Singapore goods and services tax , and freight forwarding. Customs found these fees relevant to both inspections and repairs and prorated duties. HQ 116237 at 6. Defendant argues that Plaintiff provided no evidence to show the items are non-dutiable. (Def.'s Br. 39.) Plaintiff argues that it incurred these expenses when moving the Crusader from dry-docking to lay-berth in order for the vessel to be reactivated. (Pl.'s Br. 39.) As noted earlier, the court's finding that the lay-up itself was made in part for the purposes of repairs renders these an "expense of repair" that may be assessed at a prorated amount. Consequently, summary judgment for Defendant on this item is granted.

E. Invoice 31e

This invoice concerns various global marine services for the "supply of provision[s]." (Def.'s Ex. 18 (Invoice 31e).) Plaintiff argues that it incurred these expenses in order to feed the crew. (Pl.'s Br. 39.) Plaintiff, however, has not provided any evidence detailing what each expense consisted of, and thus, why the expenses should not be dutiable. Therefore, summary judgement is granted with respect to this item.

F. Invoice 32

This invoice is for emergency and rescue materials. Customs determined that all costs on this invoice were dutiable, with the exception of the first aid kit and seasickness tablets. HQ 116237 at 7. Plaintiff points to the ABS SLE Mandatory Annual Survey as evidence that all of these expenses were required for inspection and not related to repairs. (Pl.'s Br. 39–40; Pl.'s Ex. 15 (ABS SLE Mandatory Annual Survey).) Because Plaintiff provides evidence that ABS in-

spected these items, the court finds that Plaintiff has raised a genuine issue as to whether this invoice was incurred solely for the purpose of inspection. Consequently, summary judgment for this item is denied.

CONCLUSION

In accordance with the opinion above, summary judgment is granted in part and denied in part. Accordingly, summary judgment is granted as to the following items:

- **Invoices 2 & 3**;
- **Invoice 5**;
- **Invoice 6a**;
- **Invoice 6b**: Items 1100 (lay-up charges), 1104 (riggers assistance), 1108 (garbage disposal), 1109 (shore power), 1118 (tug charge), 1118A (towing charges), 1119 (wharfage), 1124 (security watchman), 1135 (pilotage), and 8060 (marine gas oil supply) only;
- **Invoice 7a**;
- **Invoice 7b**: Items 1104 (riggers assistance), 1108 (garbage disposal), 1109 (shore power), 1118 (tug assistance), 1119 (wharfage), 1124 (security watchman), 1135 (pilotage), 8061 (Indonesian flag), 8062 (marine gas oil), and 8071 (walkie talkie) only;
- **Invoice 8a**;
- **Invoice 8b**: Items 9904 (land transportation), 9906 (boat services), and 9908 (port and navigation dues) only;
- **Invoice 11a2**: Items A (main agency fees) and B (telecommunications charges) only;
- **Invoice 11a3**: Items A (telecommunications charges) and C (air ticket for Mr. Joe Blunt) only;
- **Invoice 11b1**: Items A (main agency fees), C (telecommunication equipment), and E (ferry tickets to Karimun Island) only;
- **Invoice 11b3**: Items A (television) and F (survey of damaged portable generator) only;
- **Invoice 11b4**: Items B (courier services) and D (airline ticket for Mr. Wally Becker) only;
- **Invoice 11c**;
- **Invoice 11d1**: Items A (main agency fees) and C (telecommunications expenses) only;

- **Invoice 11d2**: Items A (telecommunications expenses) and F (freight forwarding) only;
- **Invoice 22a**: Items 1–1 (lay berth), 1–2 (telephone services), 1–4 (fireline water), 1–7 (garbage removal), 1–8 (crane services), and 1–16 (line handlers) only;
- **Invoice 22b**: Items 1–1 (lay berth), 1–2 (telephone service), 1–3 (port engineer's office), 1–4 (fireline water), 1–5 (gas free certification), 1–6 (sanitary facilities), 1–7 (garbage removal), 1–9 (shore power connection), 1–10 (shore power supply in drydock), 1–11 (shore power supply afloat), 1–13 (reefer cooling water), 1–16 (line handlers), 1–18 (heat lamps), 1–19 (dock trial), 1–20 (sea trial), 1–21 (tank ventilation), 1–22 (passageway), 1–24 (ballast water), 2.1–28 (cleaning hydraulic oil from No. 8 cargo hold), and 4.2–1 (forced draft fan inspection) only;
- **Invoices 31a through 31c**;
- **Invoice 31e**.

Summary judgment is denied as to the remaining items.

The parties shall consult and prepare an order for further proceedings in this matter within 30 days hereof.

Slip Op. 07–173

DENTAL EZ, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 07–00234

[Plaintiff's motion to stay action granted.]

Dated: November 21, 2007

Barnes, Richardson & Colburn (*David G. Forgue* and *Nicole A. Kehoskie*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Jonathan Zielinski*), of counsel, for the defendant.

OPINION

Restani, Chief Judge: This antidumping duty matter is before the court on plaintiff Dental EZ, Inc.'s ("DentalEZ") motion to stay and defendant United States Department of Commerce's ("Commerce")

motion to dismiss. Plaintiff wishes this matter stayed pending a determination on the merits in *Dental EZ, Inc. v. United States*, Court No. 07–00029, which involves a different periodic administrative review from the matter before the court. Defendant opposes the stay and alleges that jurisdiction is lacking.

FACTS

Plaintiff claims that the liquidation instructions to assess duties on its entries as entries of a reseller at the "all others" rate are erroneous. Defendant alleges that the liquidation instructions reflect a factual determination made in the administrative review, specifically, that Barden Corporation (U.K.) Limited ("Barden"), the producer, did not know that the merchandise of its reseller, DentalEZ's British affiliate, was destined for the United States. Hence, defendant argues, the "all others" rate, not the producer's rate, was applicable. As the reseller did not participate in the review so as to obtain its own rate, Commerce applied the "all others" rate. *See Parkdale Int'l, Ltd. v. United States*, ___ CIT ___ , ___ , 508 F. Supp. 2d 1338, ___ (2007) (explaining procedures for calculation of reseller's rate); 19 C.F.R. § 351.212(c); *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954 (May 6, 2003) (notice of policy concerning assessment of antidumping duties) ("Reseller Policy").

DISCUSSION

Plaintiff's complaint alleges that Commerce did not ask Barden the correct questions during the administrative review and thus made an incorrect decision as to Barden's knowledge of the destination of the sales at issue. Plaintiff claims that it was not required to participate in the review, as it could rely on the Reseller Policy itself, which plaintiff avers entitled it to Barden's rate. Plaintiff, or its affiliate reseller, however, could have alerted Commerce to its error or provided information to prevent the error, without fully participating in the review, and still preserved its claim to Barden's rate. This would appear to be sufficient participation to qualify as a "participant" under 28 U.S.C. § 2631(c) and to be entitled to seek review of the final results of the administrative proceeding in this court under 28 U.S.C. § 1581(c), assuming the other requirements for § 1581(c) jurisdiction were present. *See Specialty Merch. Corp. v. United States*, ___ CIT ___ , ___ , 477 F. Supp. 2d 1359, 1361 (2007) (holding that participation requirement was met by submitting belated notice indicating support for other parties' position); *see also Nucor Corp v. United States*, Slip Op. 07–144, 2007 WL 2789273, * 5–6 (CIT Sept. 26, 2007) (discussing precedents regarding participation requirement). The issue is whether DentalEZ was required to do so because

this was both an adequate and the exclusive path to relief. *See Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

It is not always easy to determine if jurisdiction is appropriate under the various provisions of 28 U.S.C. § 1581. The court must look to the "true nature" of the action to determine if jurisdiction would be proper. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006).

Defendant relies heavily on the distinction drawn in *Parkdale* between facial regulatory challenges that are reviewable under 28 U.S.C. § 1581(i) and factual determinations made in administrative reviews that are reviewable under 28 U.S.C. § 1581(c). *See Parkdale*, ___ CIT at ___ , 508 F. Supp. 2d. at ___ . The distinction holds, but the issue of whether the context of the type of factual determination here lends itself to jurisdiction under 28 U.S.C. § 1581(c) was not before the court in *Parkdale*. *Contrast Dental EZ, Inc. v. United States*, Slip Op. 07–98, 2007 WL 1847615, at * 2 (CIT June 28, 2007) ("*Dental EZ I*"). In *Dental EZ I*, the court addressed a dispute very similar to the one at hand, and that action precipitated the motion for stay now before the court. There, the court determined that jurisdiction under 28 U.S.C. § 1581(i) was appropriate, because the claim was a challenge to liquidation instructions, not a challenge to the results of an administrative review. *Id.* (citing *Consol. Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003)). The court here, however, is not sure as to the true nature of the claim, and even the *Dental EZ I* court hints that what happened (or should happen) is not entirely clear. *See id.* at * 3.

Thus, the court has examined the administrative determination at issue, *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 71 Fed. Reg. 40,064 (July 14, 2006), and searched for the factual determination that defendant alleges was made, but the factual determination does not leap out from the pages of the Federal Register.[1] Whether resellers and their importers have notice that they must participate in administrative reviews at least in some manner to preserve their rights under the Reseller Policy has not yet been fully explained.[2] If they must do so, jurisdiction would lie only under 28 U.S.C. § 1581(c) for review of a specific unfair trade determination listed in 19 U.S.C. § 1516a, and jurisdiction over this case, brought under 28 U.S.C. § 1581(i) regarding ad-

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[1] The fact that defendant provided no pin cite is telling. Perhaps defendant is arguing that because Commerce did not make a positive determination as to the producer's knowledge, it must have made a negative determination. The court does not resolve the issue of whether this is sufficient.

[2] For example, does something in the preliminary determination, the policy notice itself, or elsewhere alert one to what may happen before the agency and that one must participate in the review.

ministration and enforcement of tariff laws, likely would be lacking. *See Miller*, 824 F.2d at 963 (holding that jurisdiction under 28 U.S.C. § 1581(i) is available only where other provisions of § 1581 are manifestly inadequate). As this issue will no doubt be thrashed out as the first Dental EZ case proceeds, and as that court will no doubt have the occasion to consider its jurisdictional decision again[3] when it considers the merits and the applicable procedure is clarified by the parties, the court here will not grapple with this issue on this sparse record.

In the interests of judicial economy and the parties' pocketbooks, these issues should be litigated before one judge at a time. Accordingly, plaintiff's motion to stay is granted. Upon entry of the final appealable judgment in *Dental EZ, Inc.v. United States*, Court No. 07–00029, the parties shall have eleven days to advise the court as to how they wish this matter to proceed.

Slip 07–174

FORMER EMPLOYEES OF BMC SOFTWARE, INC., *Plaintiffs*, v. UNITED STATES SECRETARY OF LABOR, *Defendant*.

Court No. 04–00229

[Calculating award to Plaintiffs for attorneys' fees and expenses under the Equal Access to Justice Act.]

Dated: November 28, 2007

Miller & Chevalier Chartered (*James B. Altman* and *Kathleen T. Wach*), for Plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jane C. Dempsey*), for Defendant.

MEMORANDUM OPINION

RIDGWAY, Judge:

In this action, former employees of Houston, Texas-based BMC Software, Inc. ("the Workers") successfully challenged the determination of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") benefits. *See generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ___ , 454 F. Supp. 2d 1306 (2006) ("*BMC*

[3] Jurisdictional issues may be raised at any time.

I"). The Workers were subsequently awarded attorneys' fees and expenses under the Equal Access to Justice Act ("the EAJA"), in an amount to be finally ascertained in accordance with the principles set forth in *Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 31 CIT ___ , 2007 WL 2994605, Slip Op. 07–150 (2007) ("*BMC II*").

Specifically, *BMC II* directed the Workers to file certain additional information required to calculate the precise amount of their fee award – that is, information on the employment status of each individual whose time was reflected in the Workers' Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act (the "EAJA Application"), as well as information on the cost per hour to the law firm representing the Workers of each paralegal/legal assistant, law clerk, summer associate, and other non-attorney whose time was reflected in the Workers' EAJA Application. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at * 38, Slip Op. 07–150 at 91–92; *see also* Order (Oct. 15, 2007).

Now pending before the Court is the Workers' Supplement to the Application for Attorneys Fees and Costs ("Pls.' Supplement"), as well as the Government's Response thereto. *See* Defendant's Response to Plaintiffs' Supplement to the Application for Attorney Fees and Costs ("Def.'s Response"). The Workers' Supplement advises that they "understand and accept the Court's decision [in *BMC II*] to disallow certain fees and expenses." *See* Pls.' Supplement at 2.

In accordance with the parties' submissions, and in furtherance of *BMC I* and *BMC II*, the Workers are awarded a total of $ 26,930.47 for services rendered by attorneys and non-attorneys, as well as $ 277.65 in other expenses incurred, as outlined in greater detail below.

I. *Analysis*

BMC II analyzed the Workers' EAJA Application in painstaking detail, as well as the Government's objections thereto, rejecting the Government's threshold argument that its underlying position had been "substantially justified," and that an award of attorneys' fees and expenses was therefore unwarranted. *See generally BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 8–18, Slip Op. 07–150 at 16–41. *BMC II* similarly rejected most of the Government's objections to the time expended by the Workers' counsel. *See generally BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 18–40, Slip Op. 07–150at 42–94.

However, *BMC II* disallowed certain hours devoted to public relations and government relations-type work, because the specific tasks at issue could not be said to have been "related to the successful representation of [the] client." *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 35–36, Slip Op. 07–150 at 85–86 (*quoting Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992), *reh'g denied, vacated in part, and remanded*, 984 F.2d 345 (1993)).

Specifically, *BMC II* disallowed the time reflected in an entry dated March 2, 2005, which was devoted to "[d]raft[ing] [a] description of BMC representation for pro bono publication" – a total of 0.5 hours. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at * 35, Slip Op. 07–150 at 85. Also disallowed was the time reflected in a March 7, 2005 billing entry – a total of 0.75 hours spent to "[p]repare proposed draft of revised TAA statute . . . ; research regarding same." *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 35–36, Slip Op. 07–150 at 85–86.

BMC II similarly disallowed time expended on internal law firm administrative matters related to client billing. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 36–37, Slip Op. 07150 at 86–87. Disallowed in their entirety were the 0.75 hours spent on "[d]iscussion . . . regarding issue of recovery of legal fees language for retainer letter; revis[ing] letter to reflect same," documented in an August 4, 2004 entry; the 0.5 hours spent to "[i]nvestigate whether retainer letters have been received from all clients; e-mail . . . regarding missing letter," recorded in an October 27, 2004 entry; and the 0.25 hours spent to "[e]-mail client regarding mailing of follow-up retainer," reported in an entry dated October 28, 2004. In addition, an entry dated July 21, 2004 (which recorded time devoted to numerous tasks, including "complet[ing] new matter form") and an entry dated August 1, 2004 (which documented time devoted to various tasks, including "[d]raft[ing] retainer letter") were docked 0.25 hours and 0.75 hours, respectively. *See id.*

BMC II further disallowed the 0.25 hours recorded in an entry dated July 20, 2005 – time spent "[l]ocat[ing] case-related materials" after all briefing in the underlying litigation had been completed, where there was no indication that the need to locate the file at that time was for the benefit of the Workers. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at * 37, Slip Op. 07–150 at 87.

In addition, *BMC II* noted that various litigation support tasks documented in the billing records submitted with the Workers' EAJA Application were "best characterized as paralegal work," and thus were not compensable at attorneys' rates or subject to a cost of living adjustment. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 37–38, Slip Op. 07–150 at 88–92. However, as *BMC II* further explained, where such tasks implicate some level of specialized training or experience (even though they do not necessarily require a law degree), the work is compensable under the EAJA at a lower rate. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at * 37, Slip Op. 07–150 at 89 (citation and footnote omitted).

BMC II specifically identified as paralegal-type work the 3.0 hours devoted to "[f]iling for CIT password; researching case docket, court rules and forms," recorded in a July 16, 2004 entry; the 2.5 hours spent "[p]rinting out case documents from docket database; preparation of draft PO subscriptions," documented in a July 20, 2004 entry;

the 3.5 hours devoted to "[p]reparation and filing of Motion, Order, PO Subscriptions, and Stipulation at Court of International Trade; service of government and clients; copying and organizing documents for case file," reported in a July 22, 2004 entry; the 2.5 hours spent on "[r]outing and distribution of service copies of letter and proposed order to government and clients; researching and printing court rules re: time computation and service procedures," recorded in a July 27, 2004 entry; the 0.5 hours spent "[o]rganiz[ing] materials and coordinat[ing] creation of case file in Records Department," reported in an entry dated August 5, 2004; the 1.0 hour spent "[r]eview[ing] CIT website for instructions on filing documents electronically . . . ; conference . . . regarding attention to CIT filing issues," documented in a January 18, 2005 entry; the 1.0 hour devoted to "[p]repar[ation] [of] service copies and a Certificate of Service for a BMC filing . . . .," reported in a February 11, 2005 entry; and the 0.75 hours spent on the same tasks, documented in a February 15, 2005 entry. *See BMC II*, 31 CIT at ___ & nn.82, 85, 2007 WL 2994605 at * 37 & nn.82, 85, Slip Op. 07–150 at 88–90 & nn.82, 85.

The entries listed immediately above – with the exception of the entry dated August 5, 2004 – reflect time that was, in fact, billed by non-attorneys. *Compare* EAJA Application *with* Pls.' Supplement at 1 (specifying employment status of timekeepers). Compensable work that is actually done by paralegals/legal assistants, law clerks, summer associates, and other non-attorneys is compensable only at the cost to the law firm. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at * 38, Slip Op. 07–150at 90–91 (discussing *Richlin Sec. Serv. Co. v. Chertoff*, 472 F.3d 1370 (Fed. Cir. 2006), *cert. granted*, 76 U.S.L.W. 3253 (U.S. Nov. 13, 2007) (No. 06–1717)). Thus, both because the work at issue was performed by non-attorneys *and* (independently) because of the nature of the work, the time documented in the entries listed above – with the exception of the time reflected in the August 5, 2004 entry – is compensable only at the cost to the law firm (a figure that is discussed further below). Moreover, due to the nature of the work documented in the August 5, 2004 entry, the time recorded there is also compensable only at a non-attorney rate, even though the work was actually performed by an attorney. *See generally BMC II*, 31 CIT at ___ n.84, 2007 WL 2994605 at * 37 n.84, Slip Op. 07–150 at 89 n.84.

Further, an entry dated July 23, 2004 records time spent on "[r]esearch regarding federal government policy on alternative dispute resolution . . . ." *BMC II* rejected the Government's argument that that time should be disallowed because the research bore "no direct relation to the litigation of [the Workers'] claims." *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 34–35, Slip Op. 07–150 at 81–84 (citation omitted). However, the Workers' Supplement now makes it clear that the research was performed by a non-attorney. *See* Pls.'

Supplement at 1. Accordingly, the 0.5 hours spent on the research is similarly compensable only at a non-attorney rate (that is, at the cost to the law firm).

Finally, *BMC II* deducted 2.0 hours from the 20.75 hours devoted to the preparation of the Workers' fee application, because the Workers did not prevail on their claim to a "special factors" enhancement of their fee award. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at **38–40, 52, Slip Op. 07–150 at 92–94, 124.

Taking into account the various deductions and disallowances summarized above, the Workers are entitled to an award of fees for a total of 102.5 hours of attorney time expended in 2004, 52.0 hours of attorney time expended in 2005, and 20.75 hours of attorney time expended in 2006, as well as an award for a total of 15.25 hours of non-attorney time expended from 2004 through 2006.

All time in this action was billed at rates greater than the statutory fee cap of $125 per hour. *BMC II* therefore held that the Workers' counsel were entitled to an appropriate cost of living adjustment. As set forth in *BMC II*, the applicable EAJA caps (adjusted to reflect cost of living increases) are $147.63 per hour for attorney hours expended in 2004, $153.38 per hour for attorney hours expended in 2005, and $158.50 per hour for attorney hours expended in 2006. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at ** 54–55, Slip Op. 07–150 at 129–30. Further, the Workers have requested an award of $35.00 per hour for non-attorney hours, a figure which the Government has advised is acceptable. *See* Pls.' Supplement at 2; Def.'s Response at 2.[1]

II. *Conclusion*

So calculated, the Workers are entitled to an award of $ 26,930.47 for services rendered by attorneys and non-attorneys in this matter, in addition to $ 277.65 for other expenses incurred, for a total of $ 27,208.12. *See BMC II*, 31 CIT at ___ , 2007 WL 2994605 at * 55, Slip Op. 07–150 at 131–32 (discussing award of expenses).

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[1] The Workers' Supplement explains the derivation of the figure of $35.00 per hour:

> In accordance with [*BMC II*] and with the decision in *Richlin Security Service Co. v. Chertoff*, 472 F.3d 1370 (Fed. Cir. 2006), counsel for the Workers understands that the paralegal work involved in this matter should be reimbursed to the firm as an expense, not as fees. However, *Richlin* did not provide an analysis of the methodology used to calculate this expense. Instead, the Department of Transportation's Board of Contract Appeals "took 'judicial notice of paralegal salaries in the Washington DC area . . . [and] awarded paralegal expenses at a rate of $35 per hour," which the Court accepted. *Id.* at 1374. Rather than attempt to separately determine the actual cost to the firm for the non-attorneys . . . who worked on this matter, counsel for [the] Workers request that this same amount ($35/hour) be applied to determine these expenses here.

Pls.' Supplement at 1–2.

Accordingly, pursuant to the EAJA, Defendant shall pay to Plaintiffs a total of $ 27,208.12 for reasonable attorneys' fees and expenses incurred in this action.

So ordered.