Slip Op. 10–109

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and PAKFOOD PUBLIC COMPANY LIMITED, *et al.*, DEFENDANT-INTERVENORS.

Before: WALLACH, Judge
Court No.: 08–00283
PUBLIC VERSION

[Defendant-Intervenors Pakfood Public Co., Ltd., *et al.* 's Partial Consent Motion to Modify the Preliminary Injunction is DENIED.]

Dated: September 27, 2010

Pickard, Kentz and Rowe, LLP (*Andrew W. Kentz* and *Nathaniel Maandig Rickard*) for Plaintiff Ad Hoc Shrimp Trade Action Committee.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini* and *Joshua E. Kurland*), for Defendant United States.

White & Case LLP (*Walter J. Spak*, *Christopher F. Corr*, and *Jay C. Campbell*) for Defendant-Intervenors Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Rubicon Resources LLC.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Warren E. Connelly* and *Jarrod M. Goldfeder*) for Defendant-Intervenors Thai Union Seafood Co., Ltd. and Thai Union Frozen Products Public Co., Ltd.

Trade Pacific PLLC (*Robert G. Gosselink* and *Jonathan M. Freed*) for Defendant-Intervenors Pakfood Public Co., Ltd., Asia Pacific (Thailand) Co., Ltd., Chaophraya Cold Storage Co., Ltd., Okeanos Co. Ltd., and Takzin Samut Co., Ltd.

OPINION

Wallach, Judge:

I.
INTRODUCTION

This matter is before the court on a Partial Consent Motion to Modify the Preliminary Injunction ("Pakfood's Preliminary Injunction Motion") filed by Defendant-Intervenors Pakfood Public Co., Ltd., Asia Pacific (Thailand) Co., Ltd., Chaophraya Cold Storage Co., Ltd., Okeanos Co. Ltd., and Takzin Samut Co., Ltd. (collectively, "Pakfood"). Judgment in the underlying action has been entered in

favor of Defendant United States ("Defendant") and against Plaintiff Ad Hoc Shrimp Trade Action Committee ("Ad Hoc"), and Ad Hoc has appealed. *See* April 29, 2010 Order; Notice of Appeal to the United States Court of Appeals for the Federal Circuit. Because Pakfood has not carried its burden of establishing that changed circumstances necessitate modification of the preliminary injunction while Ad Hoc's appeal is pending, Pakfood's Preliminary Injunction Motion is DENIED.

II
BACKGROUND

A. Preliminary Injunction Overview

In cases challenging antidumping determinations by the U.S. Department of Commerce ("Commerce"), "the United States Court of International Trade may enjoin the liquidation of and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). Entries subject to a preliminary injunction issued by this court "shall be liquidated in accordance with the final decision in the action." *Id.* § 1516a(e)(2). Courts only grant preliminary injunctions when the party seeking such relief establishes that:

> (1) absent the requested relief, it will suffer immediate irreparable harm;
> (2) there exists in its favor a likelihood of success on the merits;
> (3) the public interest would be better served by the requested relief; and
> (4) the balance of hardships on all parties tips in its favor.

Ad Hoc Shrimp Trade Action Comm. v. United States, 562 F. Supp. 2d 1383, 1386–87 (2008) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)).

Preliminary injunctions granted by this court pursuant to 19 U.S.C. § 1516a(c)(2) emphasize the irreparable harm that results from liquidation. *See SKF USA Inc. v. United States*, 28 CIT 170, 176, 316 F. Supp. 2d 1322 (2004) ("Because Plaintiffs have shown that in the absence of a preliminary injunction, they would suffer irreparable harm, they are required only to raise serious, substantial, difficult and doubtful questions to satisfy their burden of proving a likelihood of success on the merits.") (Quotation omitted).

> This court grants preliminary injunctions in antidumping cases when it is essential for the protection of a party's property rights against injuries otherwise irremediable. Liquidation of a party's

> entries is the final computation or ascertainment of duties accruing on those entries. Once liquidation occurs, it permanently deprives a party of the opportunity to contest Commerce's results for the administrative review by rendering the party's cause of action moot.

Id. at 173 (citations omitted); *see Zenith Radio*, 710 F.2d at 809–10.

The Supreme Court in 2008 reversed lower courts for not considering the "likelihood of success on the merits" before ordering a preliminary injunction, the demonstration of which is right." *Munaf v. Geren*, 553 U.S. 674, 128 S. Ct. 2207, 2219, 171 L. Ed. 2d 1 (2008) (internal quotation and citations omitted). The Federal Circuit in 2009 reconciled this concern with preliminary injunctions to prevent liquidation as follows:

> The court takes very seriously the Supreme Court's recent emphasis on the importance of the likelihood of success in the preliminary injunction calculus. But the court also recognizes that 19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions in the antidumping context to preserve proper legal options and to allow for a full and fair review of duty determinations before liquidation.

Qingdao Taifa Group Co. v. United States, 581 F.3d 1375, 1382 (2009) (citation omitted).

B. This Litigation and Pakfood's Preliminary Injunction Motion

Ad Hoc in September 2008 initiated its challenge to numerous Commerce actions that resulted in *Certain Frozen Warmwater Shrimp From Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 73 Fed. Reg. 50,933 (August 29, 2008) ("*Final Results* "). *See* Complaint. Commerce in that administrative review selected four mandatory respondents by largest volume, including Pakfood. *See Ad Hoc Shrimp Trade Action Comm. v. United States*, 675 F. Supp. 2d 1287, 1292–93 (CIT 2009). Commerce calculated antidumping margins for each of the four mandatory respondents, and the remaining cooperative companies subject to the review received the weighted-average dumping margin. *See id.* at 1296; *Final Results*, 73 Fed. Reg. at 50,937–38.

Ad Hoc in September 2008 sought a preliminary injunction to enjoin liquidation of the entries covered by the *Final Results*. Plaintiff's Consent Motion for Preliminary Injunction to Enjoin Liquidation of Certain Entries. Ad Hoc argued that each preliminary injunc-

tion factor favored issuance, *id.* at 4–9, and Defendant consented to the requested relief despite not conceding the likelihood of Ad Hoc succeeding on the merits, *id.* at 9. This court granted the preliminary injunction. September 10, 2008 Order ("Preliminary Injunction"). The Preliminary Injunction enjoined Commerce and U.S. Customs and Border Protection, "during the pendency of this action, from liquidating, or causing or permitting liquidation of, any unliquidated entries of certain frozen warmwater shrimp from Thailand that: (1) are covered by [the *Final Results*];" and "(2) were produced and/or exported by" listed companies that included Pakfood. *Id.* at 1–2. The Preliminary Injunction concluded that "entries subject to this injunction shall be liquidated in accordance with the final court decision in this action as provided in 19 U.S.C. § 1516a(e)." *Id.* at 4.

Pakfood and other mandatory respondents in the underlying administrative review thereafter entered this action as defendant-intervenors. *See, e.g.*, September 16, 2008 Order. In November 2008, Pakfood moved to sever the first two counts of Ad Hoc's Complaint from the remaining counts. *See* Defendant Intervenors' Motion to Sever Counts I and II of Plaintiff's Complaint and To Establish These Counts as a Separate Civil Action ("Pakfood's Motion to Sever"). These first two counts, the only that apply to Pakfood,[1] challenged the process through which Commerce selected the mandatory respondents and the number of mandatory respondents. *See* Complaint ¶¶ 9–20.

In March 2009, Pakfood's Motion to Sever was denied, and Ad Hoc's action was consolidated with a separate challenge to the *Final Results* initiated by Defendant-Intervenors Andaman Seafood Co., Ltd., Chanthaburi Frozen Food Co., Ltd., Chanthaburi Seafoods Co., Ltd., Phatthana Seafood Co., Ltd., Phatthana Frozen Food Co., Ltd., Thailand Fishery Cold Storage Public Co., Ltd., Thai International Seafoods Co., Ltd., and Rubicon Resources LLC (collectively, the "Rubicon Group"). *See* March 17, 2009 Order. In December 2009, this court rendered its determination on the consolidation action. *Ad Hoc Shrimp*, 675 F. Supp. 2d 1287. The Rubicon Group's challenge was voluntarily remanded to Commerce, and every Ad Hoc claim was

[1] Ad Hoc's fourth through ninth counts refer specifically to respondents other than Pakfood. *See* Complaint ¶¶ 25–47. Ad Hoc's third count, challenging Commerce's treatment of warehousing expenses as moving expenses, does not apply to Pakfood. *See id.* ¶¶ 21–24; Memorandum from Stephen J. Claeys, Deputy Assistant for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Frozen Warmwater Shrimp from Thailand – February 1, 2006, through January 31, 2007, appended to *Final Results*, cmt. 2.

denied. *See id.* at 1312. With respect to the first and second counts of Ad Hoc's Complaint, this court held that Commerce properly selected four mandatory respondents by largest volume and that Ad Hoc failed to exhaust its administrative remedies. *See id.* at 12981302.

Pakfood in April 2010 moved for modification of the Preliminary Injunction to exclude Pakfood. *See* Pakfood's Preliminary Injunction Motion. The other defendant-intervenors consented to Pakfood's Preliminary Injunction Motion. *See id.* at 13. Ad Hoc opposed Pakfood's Preliminary Injunction Motion. *See id.* Defendant opposed Pakfood's Preliminary Injunction Motion and also filed a consent motion to sever the Rubicon Group's remanded action from that initiated by Ad Hoc. *See* Defendant's Response to Pakfood's Motion to Amend the Court's Preliminary Injunction; Defendant's Consent Motion to Sever Cases and to Enter Judgment. This court granted the severance, *see* April 29, 2010 Order, and entered judgment in favor of Defendant and against Ad Hoc, *see* April 29, 2010 Order and Judgment. In June 2010, Ad Hoc appealed. *See* Notice of Appeal to the United States Court of Appeals for the Federal Circuit.

III
STANDARD OF REVIEW

Preliminary injunctions issued by this court to prevent liquidation pursuant to 19 U.S.C. § 1516a(c)(2) remain in effect through appeal. *See Hosiden Corp. v. Advanced Display Mfrs.*, 85 F.3d 589, 590–91 (Fed. Cir. 1996) ("[t]he decision of the Court of International Trade is not a final court decision when appeal has been taken to the Federal Circuit."). Nevertheless, as explained in the context of a defendant-intervenor's motion as follows, this court retains the ability to modify its preliminary injunctions in response to changed circumstances:

> The court has inherent power and discretion to modify injunctions for changed circumstances. However, the party challenging the preliminary injunction or seeking to modify it must prove that the injunction is unnecessary and should be reconsidered or dissolved. Accordingly, in order to succeed in obtaining a modification of the [Preliminary] Injunction, *Defendant-Intervenor must establish a change in circumstances of the parties from the time the injunction was issued that would make the modification necessary*. Additionally, the party seeking to modify a preliminary injunction bears the burden of establishing a change in circumstances that would make continuation of the original preliminary injunction inequitable.

Ad Hoc Shrimp, 562 F. Supp. 2d at 1388 (emphasis added).

IV
DISCUSSION

Pakfood argues that changed circumstances necessitate modification of the Preliminary Injunction to exclude Pakfood. *Infra*, Part IV.A. Because the possibility exists that the Federal Circuit could remand this action in a manner that requires a change to the antidumping margin that Commerce calculated for Pakfood in the *Final Results*, Pakfood has not carried its burden and the Preliminary Injunction will not be modified. *Infra*, Part IV.B.[2]

A. Pakfood's Arguments To Modify The Preliminary Injunction

Pakfood acknowledges that the Preliminary Injunction was properly issued. *See* Pakfood's Reply to Defendant's and Plaintiff's Responses to Pakfood's Motion to Modify the Preliminary Injunction ("Pakfood's Reply") at 2 ("Pakfood agrees that the injunctive relief was appropriate at the time it was ordered.") (Emphasis omitted). However, Pakfood contends that the manner in which Ad Hoc litigated the first and second counts of its Complaint presents changed circumstances that necessitate modification of the Preliminary Injunction. *See id.* at 2–5; Pakfood's Preliminary Injunction Motion at 4–10. According to Pakfood, these litigation arguments clarify that Ad Hoc is not seeking relief that could affect the margin calculated for Pakfood in the *Final Results*. *See* Pakfood's Reply at 2–3.

Ad Hoc's first count challenged Commerce's having announced an intention to select mandatory respondents by largest volume as opposed to either by volume or sampling as it had in the past. *See* Complaint ¶¶ 9–13. Pakfood argues that although this count was ambiguous, Ad Hoc clarified in the course of litigation that it only challenged Commerce's statement of intent as opposed to the legality of Commerce's respondent selection. Pakfood's Reply at 3; Pakfood's

[2] At oral argument, Defendant raised the question of a jurisdictional issue based on Federal Rule of Appellate Procedure ("FRAP") Rule 12.1. *See* August 17, 2010 Oral Argument at 5:41–6:09; FRAP R. 12.1 ("Remand After an Indicative Ruling by the District Court on a Motion for Relief that Is Barred by a Pending Appeal."). FRAP Rule 12.1(a) provides as follows: "If a timely motion is made in the district court for relief that it lacks the authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a serious issue." Any FRAP Rule 12.1 issue is moot because the court is not "grant[ing]" Pakfood's Preliminary Injunction Motion. FRAP 12.1(a); *see* August 17, 2010 Oral Argument at 16:18–16:35. Moreover, Pakfood's Preliminary Injunction Motion does not implicate FRAP Rule 12.1 because in this case the court has the authority to grant the requested modification. FRAP Rule 8(a)(1) provides, in part, that: "A party must ordinarily move first in the district court for . . . (C) an order . . . modifying . . . an injunction while an appeal is pending."

Preliminary Injunction Motion at 5. Pakfood notes this court's conclusion that Ad Hoc did not challenge Commerce's "separate, final, superceding respondent selection methodology decision." Pakfood's Preliminary Injunction Motion at 6 n.3 (quoting *Ad Hoc Shrimp*, 675 F. Supp. 2d at 1301 n.9). Pakfood states that "Ad Hoc never identified either any harm it had suffered or any relief that the Court might have provided to remedy this unannounced harm." *Id.* at 6. According to Pakfood, Ad Hoc "through the course of argumentation" made clear that the relief requested in its first count would not affect the antidumping margin calculated for Pakfood in the *Final Results*. Pakfood's Reply at 3.

Ad Hoc's second count challenged Commerce's selection of four mandatory respondents. *See* Complaint ¶¶ 14–20. Pakfood argues that although this count was ambiguous, Ad Hoc clarified in the course of litigation that it only challenged Commerce's selection of more than two or three respondents. *See* Pakfood's Preliminary Injunction Motion at 8–9. Pakfood explains that its status as the [[relative size]] exporter by volume in the administrative review establishes that it would be selected as a respondent even if Ad Hoc were to prevail on its appeal of the second count. *See id.* at 9. According to Pakfood, Ad Hoc has "through the course of . . . briefing" made clear that the relief requested in its second count would not affect the antidumping margin calculated for Pakfood in the *Final Results*. Pakfood's Reply at 4.

In addition, Pakfood emphasizes this court's finding that Ad Hoc had not exhausted its administrative remedies for the first and second counts. Pakfood's Preliminary Injunction Motion at 10–11 (citing *Ad Hoc Shrimp*, 675 F. Supp. 2d at 1299–1303). Pakfood relies upon an instance in which a preliminary injunction to enjoin liquidation was denied because the plaintiff failed to exhaust its administrative remedies. *Id.* at 11 (citing *Zhanjiang Regal Integrated MarineRes. Co. v. United States*, Ct. No. 09–00397, Order (CIT October 27, 2009)). Pakfood asks this court to "consider Ad Hoc's failure to exhaust administrative remedies with respect to Counts 1 and 2 as part of its reconsideration of the Preliminary Injunction with respect to Pakfood entries." *Id.*

B. Pakfood Has Not Established The Requisite Changed Circumstances

Pakfood has not carried its burden of "establish[ing] a change in circumstances of the parties from the time the injunction was issued

that would make the modification necessary."[3] *Ad Hoc Shrimp*, 562 F. Supp. 2d at 1388. Ad Hoc is appealing this court's decision to the Federal Circuit and, as explained below, that appeal could conceivably require a change to the antidumping margin calculated for Pakfood in the *Final Results*. *See* Notice of Appeal to the United States Court of Appeals for the Federal Circuit. The severe consequences of liquidating Pakfood's entries warrant proceeding with caution and maintaining the Preliminary Injunction throughout the pending appeal. *See Qingdao Taifa*, 581 F.3d at 1382 ("19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions in the antidumping context to preserve proper legal options and to allow for a full and fair review of duty determinations before liquidation.").

If the Federal Circuit were to reverse this court's determination as to Ad Hoc's first count, it could order a remand that begins the administrative process anew. Pakfood portrays that count as merely asserting a "generalized grievance" as to Commerce's statement of intent to select respondents by volume. Pakfood's Preliminary Injuction Motion at 6 (citations omitted). However, the Federal Circuit could find Commerce's intent to select respondents by volume unlawful so as to render the *Final Results* void and order a remand through which Commerce employs sampling to select respondents other than Pakfood. *See* Complaint ¶¶ 9–13, 48; 19 U.S.C. § 1677f-1(c). That Pakfood would in this circumstance receive the weighted-average dumping margin belies the assertion that "there is no possibility that the margin for Pakfood will . . . change based on Plaintiff's Count 1 arguments." Pakfood's Preliminary Injunction Motion at 3.

Pakfood's argument based on Ad Hoc's first count assumes that the Federal Circuit will agree with this court that Ad Hoc did not preserve its ability to challenge the legality of Commerce's respondent selection methodology. *See* Pakfood's Preliminary Injunction Motion at 6 & n.3. Indeed, Pakfood references this court's conclusion that Ad hoc "did not contest final agency action" as support for its request to "reconsider whether Ad Hoc ever could have demonstrated a likelihood of success with regard to Count 1." *Id.* at 6. This conflation of standards is not persuasive because, as previously stated:

> the court will not allow Defendant-Intervenor, which is attempting to modify the [Preliminary] Injunction to effectively shift the burden to the plaintiff to reprove the factors for preliminary injunction that have previously been proven to the court's sat-

[3] Because Pakfood has not satisfied this threshold requirement, it need not be resolved whether Pakfood has further carried its "burden of establishing a change in circumstances that would make continuation of the original preliminary injunction inequitable." *Ad Hoc Shrimp*, 562 F. Supp. 2d at 1388.

> isfaction. Rather, the court needs only to examine whether the Defendant-Intervenor has raised circumstances which effectively justify a rehearing of its prior determination.

Ad Hoc Shrimp, 562 F. Supp. 2d at 1387.

Given the possibility that a remand from the Federal Circuit could void the *Final Results* and restart the administrative process, Pakfood has not "raised circumstances which effectively justify a rehearing of" the Preliminary Injunction. *Id.* This also applies to Pakfood's argument based on Ad Hoc's second count because the Federal Circuit could find Commerce unlawfully selected the number of mandatory respondents, *see* Complaint ¶¶ 14–20, 48, and Commerce, on remand, could select respondents through either sampling or largest volume. *See* 19 U.S.C. § 1677f-1(c). Even if Commerce were to once again select respondents by volume, there is no guarantee Pakfood will be selected because—as Pakfood notes—Commerce has on occasion selected only one company for review. *See* Pakfood's Preliminary Injunction Motion at 9 n.5. However unlikely, it is incorrect that "there is no possibility that the margin for Pakfood ever will change based on Plaintiff's Count 2 arguments." Pakfood's Reply at 4.

Finally, Pakfood's reliance on this court's exhaustion determination reveals its attempt to bootstrap the underlying decision into its requested modification of the Preliminary Injunction. *See* Pakfood's Preliminary Injunction Motion at 10–11. Because the Federal Circuit may find that Ad Hoc did exhaust its administrative remedies, this court's exhaustion analysis is not relevant in considering Pakfood's Preliminary Injunction Motion. While the failure to exhaust administrative remedies is considered in assessing the likelihood of success on the merits, Pakfood recognizes that "the standards for obtaining a preliminary injunction and for modifying a preliminary injunction are not the same." *Id.* at 11. To prevail on its Preliminary Injunction Motion, Pakfood must establish that circumstances have changed that necessitate modification of the Preliminary Injunction to exclude Pakfood. *See Ad Hoc Shrimp*, 562 F. Supp. at 1388. Pakfood has not carried its burden because Ad Hoc's litigation arguments on the first and second counts of its Complaint do not foreclose the possibility that Commerce could, upon a remand ordered by the Federal Circuit, require a change to the margin calculated for Pakfood in the *Final Results*.

Pakfood in essence invites this court to presume that the Federal Circuit will agree with the decision in *Ad Hoc Shrimp*, 675 F. Supp. 2d 1287. This court will not do so because it is "far from infallible."

Kaplan v. Burroughs Corp., 426 F. Supp. 1328, 1336 (N.D. Cal. 1977) ("There would be no job for the Court of Appeals if I were infallible. The Court of Appeals is set up for the very purpose of correcting errors of the trial courts, and it is expected that a trial judge will make a certain number of errors. . . . [I]f counsel think I made a mistake, they will have a right to appeal to the Court of Appeals and, in some instances, to the Supreme Court of the United States.").

V
CONCLUSION

For the above stated reasons, Pakfood's Partial Consent Motion to Modify the Preliminary Injunction is DENIED.

Dated: September 27, 2010
New York, New York

__/s/ Evan J. Wallach____
EVAN J. WALLACH, JUDGE

Slip Op. 10–110

CHINA FIRST PENCIL CO., LTD., SHANGHAI THREE STAR STATIONERY INDUSTRY CO., LTD., AND ORIENT INTERNATIONAL HOLDING SHANGHAI FOREIGN TRADE CORPORATION, Plaintiffs, -and- SHANGDONG RONGXIN IMPORT & EXPORT CO., LTD. Consolidated Plaintiff v. UNITED STATES Defendant -and- SANFORD, L.P. and MUSGRAVE PENCIL CO., INC., Defendant-Intervenors.

Gregory W. Carman, Judge
Consol. Court No. 09–00325

[*Plaintiffs' and Consolidated Plaintiff's motions for Judgment on the Agency Record are granted in part and denied in part. The Department of Commerce's Amended Final Results of Antidumping Duty Administrative Review are sustained in part and remanded in part.*]

Dated: September 30, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Francis J. Sailer*, *Andrew Thomas Schutz*, *Mark E. Pardo*, and *Nikolas Edward Takacs*), for Plaintiffs.

deKieffer & Horgan (*John J. Kenkel*, *Gregory S. Menegaz*, and *J. Kevin Horgan*), for Consolidated Plaintiff.

Neville Peterson LLP (*George W. Thompson*, and *Casey Kernan Richter*), for Defendant-Intervenors.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Carrie A. Dunsmore*); and Daniel J. Calhoun, of counsel, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

Plaintiffs China First Pencil Company, Ltd., Shanghai Three Star Stationery Industry Company, Ltd., and Orient International Holding Shanghai Foreign Trade Corporation, (collectively, the "China First Plaintiffs"), and Consolidated Plaintiff Shangdong Rongxin Import & Export Company, Ltd., ("Rongxin") challenge the final determination of the United States Department of Commerce ("Commerce" or "the agency") in the 2006–2007 administrative review of the antidumping duty order on Certain Cased Pencils from the People's Republic of China. *See Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 33,406 (July 13, 2009) ("*Final Results* "); *Certain Cased Pencils from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 45,177 (Sep. 1, 2009) ("*Amended Final Results* "). This administrative review covers entries of subject merchandise made from December 1, 2006, through November 30, 2007. *Final Results*, 74 Fed. Reg. at 33,406. For the reasons set forth below, the Court grants in part and denies in part both the China First Plaintiffs' and Rongxin's USCIT R. 56.2 motions for judgment on the agency record.

Background

The Department of Commerce first imposed an antidumping duty order on certain cased pencils from the People's Republic of China on December 28, 1994. *Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 66,909 (Dec. 28, 1994). Commerce released the preliminary results of the 2006–2007 administrative review on January 7, 2009. *Certain Cased Pencils from the People's Republic of China; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 Fed. Reg. 673 (Jan. 7, 2009) ("*Preliminary Results* "). Commerce's unpublished Issues & Decision memorandum (P.R. # 154, *Issues and Decision Mem. for the 2006–2007 Admin. Rev. of Certain Cased Pencils from the People's Republic of China* ("*I&D Memo* ")), issued on July 6, 2009, and incorporated in the *Final Results* as an appendix, sets out the agency's analysis of the issues raised by the parties at the administrative level. *See I&D Memo* ; *see also Final Results*, 74 Fed. Reg. at 33,409.

The China First Plaintiffs and Rongxin filed separate challenges to the 2006–2007 Administrative Review. After hearing the perspectives

of the parties, the Court initially determined not to consolidate the case. (Letter Filed by Judge Carman, ECF No. 33.) However, after each case was fully briefed, it was clear that not only were similar issues challenged in each case, but the vast majority of the parties' argumentation centered on the overlapping issues. Accordingly, the Court decided that consolidation was appropriate, and consolidated the cases by order entered on September 22, 2010. (Order, ECF No. 59.)

Jurisdiction

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c).[1]

Standard of Review

When reviewing the final results of antidumping administrative reviews, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is more than a mere scintilla." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (*quoting Consol. Edison Co.*, 305 U.S. at 229). In determining the existence of substantial evidence, a reviewing Court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Huaiyin*, 322 F.3d at 1374 (*quoting Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n.*, 383 U.S. 607, 620 (1966) (citations omitted). There must be a "rational connection between the facts found and the choice made" in an agency determination if it is to be characterized as supported by substantial evidence and otherwise in accordance with law. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Discussion

The imposition of an antidumping duty on subject merchandise imported into the United States depends upon "a fair comparison" being made between the export price, or constructed export price, and

[1] All citations to the United States Code refer to the 2006 edition.

the normal value of the subject merchandise. 19 U.S.C. § 1677b(a). If the subject merchandise is produced in a nonmarket economy, and if Commerce "finds that available information does not permit the normal value of the subject merchandise to be determined under [19 U.S.C. § 1677b(a)]," the statutory scheme provides Commerce with an alternative method for computing normal value. 19 U.S.C. § 1677b(c)(1). This method requires Commerce to determine normal value "on the basis of the value of the factors of production utilized in producing the merchandise . . . in a market economy country or countries." 19 U.S.C. § 1677b(c)(1). The Court of Appeals for the Federal Circuit ("CAFC") has described this procedure as aiming "to assess the price or costs of factors of production of [the subject merchandise in a surrogate market economy country,] in an attempt to construct a hypothetical market value of that product in [the nonmarket economy country]." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999).

All of the issues contested by the parties in this case relate to the values selected by the agency for certain factors of production used in constructing normal value. According to the statutory scheme, factors of production "include, but are not limited to—(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3). First, both the China First Plaintiffs and Rongxin challenge the figure used by Commerce to value labor, which was produced by a regression analysis that predicted a country's wage rate according to its level of economic development (*i.e.*, its national income). Second, the China First Plaintiffs and Rongxin challenge various values assigned to raw materials. Both the China First Plaintiffs and Rongxin challenge Commerce's surrogate value for pencil slats and cores. Separately, the China First Plaintiffs challenge the surrogate value for lacquer, and Rongxin challenges Commerce's surrogate values for castor oil and kaolin clay. Last, Rongxin challenges the surrogate value for coal (used as an energy source), and for packaging.

I. Commerce's Use of a Regression Based Wage Rate to Value Labor

Defendant concedes that a remand on the issue of the wage rate is appropriate. Less than two weeks after Rongxin completed briefing its USCIT R. 56.2 motion, and shortly before the government filed a response to the China First Plaintiffs' USCIT R. 56.2 motion, the CAFC ruled in *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010) ("*Dorbest* "), that Commerce's method for valuing labor based

on its regression analysis was contrary to law. In *Dorbest*, the CAFC held that Commerce's regulation establishing the regression analysis for valuing labor as a factor of production, 19 C.F.R. § 351.408(c)(3), did not satisfy statutory requirements. *Dorbest*, 604 F.3d at 1372. Specifically, the figures produced by the regression failed to "utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Instead, Commerce's analysis produced an expected wage by regressing data from countries at all levels of economic development, without regard for whether any of these countries were significant producers of comparable merchandise. Because Commerce's regulation establishing the regression based method for calculating a wage rate has been invalidated by the CAFC, and in light of the parties' collective acknowledgment that the wage rate relied on in the *Final Results* is therefore contrary to law, this issue is remanded to Commerce for action consistent with the holding in *Dorbest*. (*See* Def.'s Opp'n. to Pl.'s Mot. for J. Upon the Agency R. ("Def.'s Resp. to China First") 23; *see also* Def.'s Resp. to Court's Letter Regarding Dorbest Ltd. v. United States, Court No. 09–316, ECF No. 36.)

II. Commerce's Selected Surrogate Values for Raw Materials

A. Slats

1. Parties' Arguments

At the core of the dispute over slats is Commerce's decision to use data on American lumber prices rather than data on Indian slat prices, when valuing slats as a factor of production. During this administrative review, Commerce valued lindenwood pencil slats with data taken from the Hardwood Market Report, which consists of "publicly available, published U.S. prices for American basswood lumber." *I&D Memo* at 39. The China First Plaintiffs and Rongxin would have preferred that Commerce use data from an "Indian stationery journal" called Paper and Stationery, that provided information on the cost of pencil slats for Indian pencil producers. (China First Mot. at 7–8.) Both the China First Plaintiffs and Rongxin use pre-manufactured pencil slats, rather than lumber, in producing the subject merchandise. (China First Mot. at 6–7; Rongxin Mot. at 23.) Consequently, they argue that the decision to value slats using lumber prices, when slat prices were also on the record, is facially inde-

fensible, and is unsupported by substantial evidence on the record. (China First Mot. at 10–11; Rongxin Mot. at 23.)

Commerce heard and rejected this argument at the administrative level, tracing what it called a "preference for wood type over a slat-specific price" back to the original less-than-fair-value investigation. *I&D Memo* at 39. In other words, Commerce believed it had taken a position during the original investigation that, when selecting a surrogate value for slats made from a particular kind of wood, it was preferable to use pricing data for a comparable type of wood, even if not slat-specific, than to use pricing data for slats made from dissimilar wood.

In their USCIT R. 56.2 Motion, the China First Plaintiffs pointedly dispute Commerce's take on the original investigation, and Commerce now partially abandons its position. The China First Plaintiffs assert that "[t]his review constitutes the first instance in which the record has contained pricing data specific to the exact input used by respondents' [sic] in their pencil production," slats, and that consequently, Commerce could never have established a preference during the investigation in the way the agency claims. (China First Mot. at 12.) Defendant now concedes that Commerce was incorrect about the establishment of a preference for wood type over a slat specific price, acknowledging that there were no slat prices on the record during the initial investigation in this case. (Def.'s Resp. to China First at 13.) Nevertheless, Defendant and Defendent-Intervenors defend and maintain the position that wood type is a paramount consideration in selecting a surrogate value for slats, and contend that the similarity of Chinese lindenwood and American basswood is sufficient grounds for the Court's affirmance. (Def.'s Resp. to China First at 10–15; Def-Intervs.' Opp'n. to Pls.' Mot. for J. on the Agency R. ("Def-Intervs.' Resp. to China First") at 18–25.)

The China First Plaintiffs and Rongxin sharpen their criticism of Commerce's reliance on the Hardwood Market Report, by asserting that even if it contains data for a similar species of wood, it does not necessarily include pricing data for the grade of wood that would be used in pencil production. Rongxin emphatically asserts that the quality of wood it uses to manufacture pencil slats is of "the cheapest grade," and that consequently, Commerce's decision to average "all grades" of American basswood in producing a surrogate value was incorrect. (Rongxin Mot. at 23.) The China First Plaintiffs point out that "there is absolutely no record evidence even suggesting that the lumber referenced in the *Hardwood Market Report* is ever used in

connection with pencil production." (*China First Mot.* at 11.) To the contrary, they point out, a previous issue of the Hardwood Market Report indicated that it "is primarily intended to reflect prices of lumber for the construction industry." (*Id.* (*citing* P.R. 72, at Exhibit SV–4.) Rongxin also asks for the Court to remand on the issue of slat prices for Commerce to correct a clerical error that it admitted but was unable to correct after Rongxin had filed suit in this court, since the suit divested the agency of jurisdiction over the case.[2] (*Id*. at 24.)

Defendant and Defendant-Intervenors also point to this lack of evidence in the record pertaining to wood grade, believing its absence weighs in favor of affirmation. Defendant points out that Commerce did not average all grades of American basswood lumber, as Rongxin claims, but rather excluded certain higher grades in producing a surrogate value. (Def.'s Resp. to China First at 16; Def.'s Resp. to Rongxin at 18–19.) Without information that would tend to establish the impropriety of using the American basswood prices, and given that Commerce's use of American basswood lumber prices has been affirmed by this court in the past, Defendant and Defendant-Intervenors urge the Court to do so again. (Def.'s Resp. to China First at 13, 15; Def.-Intervs. Resp. to China First at 23 (both *citing Writing Instrument Mfrs. Ass'n. v. United States Dep't. of Comm*., 21 CIT 1155, 984 F. Supp. 629 (1997), *aff'd without opinion*, 178 F.3d 1311 (Fed. Cir. 1998)).) Finally, Defendant further justifies its position by claiming that the Hardwood Market Report data is of higher quality than the Paper & Stationery data, and by claiming that the agency is entitled to deference from the Court. (Def.'s Resp. to China First at 18–25.)

2. Analysis

Under the statutory scheme, Commerce is required to value the factors of production "based on the best available information," and the Court reviews Commerce's choice of what constitutes the best available information under the "substantial evidence" standard. 19 U.S.C. § 1677b(c) & 1516a(b). The Court's role is not to make that determination anew, but rather to decide "whether a reasonable mind could conclude that Commerce chose the best available information." *QVD Food Co., Ltd. v. United States*, 34 CIT __, 2010 WL 3421963 at *2 (2010) (*quoting Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006)). If there are multiple sources

[2] Rongxin also bids the court to instruct Commerce "that it would no longer be appropriate to use the yield factor from raw lumber to slats, since that ratio would be inherently included in the slat prices[, and t]o include that ratio would be double counting." (*Id*.) Rongxin does not elaborate on this point, and offers no citation to the record in support of this assertion.

of information in the record upon which Commerce could reasonably value a factor of production, the Court will defer to the agency's exercise of discretion. However, Commerce "may not act arbitrarily in reaching its decision," *Goldlink,* 431 F. Supp. 2d at 1327, and if the Court finds that no reasonable mind could conclude that the information relied upon was the best available, the agency's decision will be set aside.

The Court determines that a reasonable mind could not conclude that American basswood lumber prices from the Hardwood Market Report are the "best available information" in this record for valuing pencil slats as a raw material factor of production. When considered in contrast with the pencil slat prices included in the Paper and Stationery article, it is clear that the Hardwood Market Report data, and Commerce's own reasoning, suffer from significant inadequacies that make sustaining the agency's selection impossible. In essence, Commerce's surrogate value selection for pencil slats is based on arbitrarily selected data for an incongruous product from an economy incomparable to that of the nonmarket economy country. Each of these maladies is explained in greater detail below.

Defendant's and Defendant-Intervenors' peculiar insistence that Commerce must use American lumber prices, rather than Indian slat prices, to approximate the value of pencil slats in India, has its roots in a mistake Commerce admits to making but attempts to minimize. During this review, Commerce believed that it had previously rejected slat prices in favor of lumber prices for an analogous type of wood. The agency's judgment was thus clouded by the erroneous belief that the agency had previously determined that slat-specific prices were less important than prices for a correlating type of wood. While Commerce attempts to defend its selection by insisting that comparable wood type is highly important, it may not simply erase an acknowledged mistake in legal reasoning from the challenged administrative determination without warranting a remand.

Although Defendant argues that American basswood lumber prices have been used to value pencil slats in previous phases of this case (and upheld by the court), the use of an incongruous product is neither necessary nor appropriate in this administrative review. First, the input used by the respondents has changed since the initial investigation. Originally, they manufactured their own pencil slats in the production of the subject merchandise; as such, lumber was their actual input. (China First Mot. at 6–7; Rongxin Mot. at 23.) By this administrative review, however, both the China First Plaintiffs and Rongxin use pre-manufactured pencil slats, and not raw lumber, in producing the subject merchandise. Second, this is the first adminis-

trative review in which slat prices, in any form, were placed on the record. Taken together, the change in input used by the respondents and the first time appearance of a product specific surrogate price in the record should have dramatically impacted the agency's surrogate value determination.

The Hardwood Market Report data used by the agency suffer from further inadequacies. For one, the data establish the price of this incongruous product (basswood lumber) in the United States of America—a market economy country that is not at a level of economic development comparable to the nonmarket economy country, China. The use of data from a comparably economically developed country is a statutory obligation, that the agency must adhere to "to the extent possible." 19 U.S.C. § 1677b(c)(4). Moreover, upon hearing respondents' assertions that the grades of basswood in the Hardwood Market Report are not appropriate for use in pencil production, Commerce used pricing data for two grades, "grades 1 and 2 common," while excluding pricing data for "the higher-value Select and Better" grades. (P.R. 97 at 7–8.) This exclusion is arbitrary and unsupported by substantial evidence in the record.

Additionally, while all parties underscore the lack of record evidence correlating the grades of wood in the Hardwood Market Report with the grade(s) of wood used in manufacturing the subject merchandise, the Court views the absence of information as primarily detrimental to the agency's position. Even after Commerce's exclusion of the "Select and Better" grades from the Hardwood Market Report data, the China First Plaintiffs and Rongxin argue that the grades of wood in the Hardwood Market Report (and the prices derived therefrom) are for a higher quality of lumber than is used for pencil production. Defendant and Defendant-Intervenors fault their opponents for failing to place evidence on the record that definitively demonstrates the impropriety of the wood grades in the Hardwood Market Report. In the Court's view, the presence of slat prices on the record for the first time is consequential, and tilts this issue in favor of the respondents. In previous stages of this case, Commerce may have been able to rely on American basswood prices without needing to first establish that grades of wood reflected in those prices correlated with the grade(s) of wood used to manufacture pencils. However, now that there are prices on the record that indisputably correlate with the grade of wood used to manufacture pencils (because the prices are for actual pencil slats), reliance on lumber prices that are not grade-correlated is problematic.

Regardless of how well this data fits the agency's other standards for selecting a surrogate value, the fundamental flaws cited above

mean that the Hardwood Market Report data cannot reasonably be considered the best available information, when considered in light of the alternative. The standards employed by Commerce to determine which data will be used to produce a surrogate value are all oriented around ensuring that the data used is reliable. Commerce explains that such data should be publicly available, countrywide rather than single-source, representative of a range of prices, adequately documented, and tax-exclusive. Regardless of how well the Hardwood Market Report data may fit such standards, they cannot cure the shortcomings identified above. For these reasons, then, Commerce's surrogate value for pencil slats is unsupported by substantial evidence in the record, and is not in accordance with law. Accordingly, on remand, Commerce shall recalculate a surrogate value for pencil slats using the Paper and Stationery data.

B. Cores

1. Parties' Contentions

Commerce composed a value for pencil cores by relying on Indian import statistics contained in the World Trade Atlas ("WTA data"). Specifically, to value cores, Commerce weight-averaged WTA data from the period of review for products imported under the harmonized tariff subheading 9603.20.00 for "PENCIL LEADS, BLACK/COLOURED."[3] (P.R. # 93, at ex. 4.) The resulting figure of 389.96 Rs./kg was used as the surrogate value for four separate raw materials used to manufacture the subject merchandise: black cores, color cores, thick black cores, and thick color cores. (P.R. # 93 at 5.) The China First Plaintiffs also placed on the record prices for domestically (Indian) produced pencil cores, in the form of the Paper and Stationery article, along with price lists from a company that is described in the Paper and Stationery article as the "only . . . known supplier of Lead core [sic] in India, M/s Lead Slips Products Pvt. Ltd, Ahmedabad." (P.R. # 111, at ex. 2.) Commerce declined to use the domestic pricing information.

In determining to use the WTA data rather than the Paper and Stationery data, Commerce again outlined the criteria it has established for selecting surrogate value information. First, the agency explained that "surrogate value information is normally based on the

[3] The weighted average excluded imports from China, a nonmarket economy, and from South Korea, a country known to "provide non-industry-specific export subsidies." (P.R. # 93 at 3.)

use of publically available information." (*I&D Memo* at 37.) Second, Commerce "looks for surrogate values that are 'representative of a range of prices in effect during the POR and information that includes numerous transactions." (*Id*. (internal quotation omitted).) Third, the agency seeks to avoid "using single-source information and prefers country-wide information," to the extent possible. (*Id*.) Finally, Commerce does not use "price data that has inadequate supporting documentation and prefers to use tax-exclusive sources instead of tax-inclusive domestic prices." (*Id*.)

After reproducing the selection criteria, Commerce applied them to the data available in this case, and determined that the WTA import data was preferable to the domestic price lists and Paper and Stationery data for producing a surrogate value for pencil cores. (*Id*. at 42–43.) First, Commerce pointed out that the Paper and Stationery article did not contain evidence to establish whether the prices contained therein "are from a price list or if they represent actual transactions." (*Id*. at 42.) Second, the agency observed that the article did "not appear to be a regular industry survey of prices." (*Id*.) Next, Commerce cited a lack of information regarding the total volume of sales, and whether the prices were tax-exclusive. (*Id*.) Finally, the agency pointed out that the article "refers to a major price revision effected by this party in August of 2006," which, being prior to the start of the POR, left open the question of whether the prices prevailed throughout the POR. (*Id*. (quotation omitted).)

Rongxin notes and objects to Commerce's use of the WTA data to produce a surrogate value specifically for color cores. (Rongxin Mot. at 20–23.) Using math that the Court is unable to follow or reproduce, Rongxin asserts that the WTA values color cores "almost 500% more than *the average price of all sales of domestic* color cores.[4]" (*Id*. at 20 (emphasis in original).) Rongxin also points out that in other cases, Commerce has occasionally declined to use WTA import data when it found the data to be inaccurate. (*Id*.) However, Rongxin does not identify any inaccuracies in the WTA import data used in this case. Rongxin asserts that the WTA import data is not the "best available

[4] Rongxin cites the Paper and Stationery article which states that "coloured leads varied anywhere from Rs. 25 per gross . . . to Rs. 30 per gross," and that the weight of a typical gross is "approximately 190 gms." (P.R. # 111, ex. 2.) Rongxin claims that "[t]his translates to a price of Rs. 59–71 per kg." (Rongxin Mot. at 20.) Assuming that a gross (144) color cores weighs approximately 190 grams, one should multiply the price per gross by a factor of about 5.26 (which is 1000 grams / 190 grams), to calculate a price per kilogram. This would mean that a price range of Rs. 25–30 per gross would translate to a price range of about Rs. 132–158 per kilogram. In turn, this would mean that the surrogate value of Rs. 389.96 per kilogram is between 247% and 296% higher than the figures reported for color cores in Paper and Stationery. While this remains a substantial price disparity, it is roughly half of the size of the price disparity alleged by Rongxin.

information" within the meaning of 19 U.S.C. § 1677b(c)(1), but develops no other cognizable argument as to why the information is not the best available.

The China First Plaintiffs also draft objections to Commerce's use of WTA data to design a surrogate value for all pencil cores. The China First Plaintiffs cite a litany of cases in which this court has set aside the agency's decision to produce a surrogate value using import statistics, when some form of domestic prices were on the record as well. (China First Mot. at 23–28.) A frequent concern noted by the court in these cases is that the import data often yields a higher surrogate value than the rejected domestic data would have—a notable feature of the import and domestic values for pencil cores in the instant case. As the China First Plaintiffs put it, "[t]hese cases reflect the very obvious economic principle that it is unreasonable to presume that a producer acting under market economy conditions would use more expensive imports for a domestically available input unless there was an explanation for this choice." (China First Mot. at 24 (*citing Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617 (2002), *and Hebei Metals and Mineral Import and Export Corp. v. United States*, 29 CIT 288, 300, 366 F. Supp. 2d 1264 (2005)).) Additionally, the China First Plaintiffs point out that the dates of the various price lists and the Paper and Stationery article itself, while not falling within the POR, indicate that comparable prices prevailed before and after the POR, making interpolation with the domestic data reasonable. (China First Mot. at 28–29.)

One last issue contested by the parties is whether the HTS subheading from which the surrogate values for pencil cores were taken is overly broad, which is to say, whether it includes products other than the types of pencil cores (black, color, thick black and thick color) used in producing the subject merchandise. The China First Plaintiffs assert that this is the case, but Defendant and Defendant-Intervenors maintain that there is nothing in the record to establish over-inclusiveness in the manner suggested. (China First Mot. at 25–26 (asserting that the vast range of prices in the WTA data for this input goes unexplained in the *I&D Memo*); Def.'s Resp. to China First at 18–19; Def-Intervs.' Resp. to China First at 26–27.)

2. Analysis

In assigning the same surrogate value to the four types of pencil cores used in producing the subject merchandise (black cores, color cores, thick black cores, and thick color cores), Commerce failed to take into account record evidence which demonstrates that these products have vastly different costs or prices. This failure to "in-

clud[e] whatever fairly detracts from the substantiality of the evidence," means that the agency's determination of a surrogate value for pencil cores is unsupported by substantial evidence and is not in accordance with law. *See Atlantic Sugar*, 744 F.2d at 1562.

The Paper and Stationery article and the price lists from Lead Slips Products Pvt. Ltd. that were placed on the record by the China First Plaintiffs unanimously indicate a wide range of prices that vary in accordance with the type (*i.e.*, color and size) of the pencil lead. For instance, according to the price lists, "Degree or Drawing Leads" that are 3.40 mm in diameter cost 147% more than the same type of lead with a 2.00 mm diameter. (P.R. # 72, at Exs. SV–3C, SV–3D.) Similarly, the price lists reveal that "Non-Toxic 12 Coloured Leads" range in price such that the widest diameter lead is roughly twice as expensive as the narrowest diameter black lead. (*Id*.) This trend is similarly reflected in the Paper and Stationery article, which indicates that colored leads of 2.70 mm to 3.30 mm in diameter cost slightly more than twice what 2.20 mm black leads cost. (P.R. # 111, Ex. 2.) Reviewing all prices submitted by the China First Plaintiffs, the cheapest "Commercial Quality — Black Leads," which the China First Plaintiffs claim to utilize in producing the subject merchandise, are roughly 1/5 the cost of the most expensive thick colored leads. (*Id*., P.R. # 72, Exs. SV–3C, SV–3D; *see also* China First Mot. at 21.) These sources on the record uniformly indicate that colored leads are more expensive than black leads, and that price increases with lead diameter.

Commerce's obligation to take into account evidence that "fairly detracts" from what the agency determines to be the substantiality of the evidence means that these sources may not be wholly disregarded. While Commerce provided several reasons for its belief that the WTA import data was a more reliable pricing source than the Paper and Stationery article and the price lists, the agency's decision to assign the same surrogate price to black cores, color cores, thick black cores and thick color cores is not only unsupported by the record evidence, but is directly controverted by it. Regardless of whether HTS subheading 9609.20.00 includes additional types of pencil lead that are not used in producing the subject merchandise, as the China First Plaintiffs allege, it simply fails to distinguish separate prices for these four separate raw materials. It is a near certainty, then, that the figure for each of the four types of pencil cores misstates their actual cost: the cost of black cores inflated by the cost of color cores, and vice versa, and the cost of thick cores deflated by the cost of thin cores, and vice versa. On remand, Commerce is instructed to identify

separate surrogate values, supported by substantial evidence in the record, for black cores, color cores, thick black cores, and thick color cores.

C. Lacquer

1. Parties' Arguments

The China First Plaintiffs also independently challenge Commerce's selection of a surrogate value for lacquer, "for many of the same reasons discussed . . . with respect to pencil cores." (China First Mot. at 31.) Commerce produced a surrogate value for lacquer by weight-averaging the WTA import data for HTS subheading 3208.10, "Polyestr," after excluding data from certain countries. (P.R. # 93, Ex. 4.) The figure produced by this method, 200.30 Rs./kg, contrasts with a figure for domestically available lacquer, listed in the Paper and Stationery article as 150–160 Rs./kg. The China First Plaintiffs express concern that the WTA import data may not be specific to pencil lacquer, but cite no record evidence to support the view that this HTS subheading is overly broad. Additionally, the China First Plaintiffs complain that the lacquer prices in the WTA import data vary widely, depending on country, from 30.20 Rs./kg to 725.31 Rs./kg. In their view, taking an average from such disparate figures cannot produce "an accurate approximation of a pencil lacquer value," and must therefore be unsupported by substantial evidence in the record. (China First Mot. at 31.) Last, the China First Plaintiffs assert that Commerce's comparison of the domestic and import values at the administrative level was insufficient, ostensibly because Commerce failed to consider any disadvantages of the import data, and failed to consider any merits of the domestic data.

Commerce defends its determination in regard to lacquer prices by reiterating the deficiencies it found with respect to the Paper and Stationery data. That data came "from a single producer," and contained no indication of whether the prices reflected actual transactions, or whether the transactions were nationwide. (Def.'s Resp. to China First at 21; *see also* Def-Intervs.' Resp. to China First at 28–29.) Defendant-Intervenors emphasize that the China First Plaintiffs have provided no substantiated basis for believing that the WTA import data is "inaccurate or inferior in any way." (Def-Intervs.' Resp. to China First at 29.)

2. Analysis

The Court is not persuaded by the China First Plaintiffs' arguments with respect to the surrogate value for lacquer. Unlike with slats and

cores, where the China First Plaintiffs used record evidence to establish a basis for doubting the fundamental appropriateness of the data used by Commerce to create a surrogate value, concerns about the lacquer data appear to be purely speculative. The China First Plaintiffs can point to nothing in the record that demonstrates the impropriety of the WTA import data. The mere fact that the WTA import data spans a relatively wide range of prices does not delegitimize Commerce's use of it. Similarly, simply because there are lower domestic lacquer prices on the record, Commerce does not lose its discretion to determine what it believes constitutes the "best available information" within the meaning of 19 U.S.C. § 1677b(c)(1). Commerce's stated concerns about the lacquer values in the Paper and Stationery data track with the agency's previously articulated standards, and form a legitimate basis for using the WTA import data instead. For the foregoing reasons, then, the Court holds that Commerce's determination with respect to the surrogate value for lacquer is supported by substantial evidence in the record, and is therefore sustained.

D. Castor Oil

Rongxin devotes four sentences of its USCIT R. 56.2 Motion to challenging the surrogate value selected by Commerce for castor oil, and the Court is not persuaded. Without citing to the record, Rongxin claims that the imported price is higher than the domestic price, and claims that the WTA import data "suffer[s]" from certain unnamed "pitfalls." (Rongxin Mot. at 24–25.) Defendant responds by pointing out that Commerce selected a surrogate value for castor oil from nationwide import statistics, rather than the domestic data, which was based on just two Indian markets. (Def.'s Resp. to Rongxin at 21.) Hearing no compelling argument to the contrary, the Court holds that Commerce's rationale for relying on WTA import data to select a surrogate value for castor oil is supported by substantial evidence in the record, and is otherwise in accordance with law, and is therefore sustained.

E. Kaolin Clay

The three sentences of Rongxin's motion devoted to disputing Commerce's selection of a surrogate value for kaolin clay do not produce a winning argument. While Rongxin would have preferred Commerce to use a lower domestic price for kaolin clay, Commerce declined to do so because the domestic values Rongxin provided were "not contemporaneous with the entirety of the period of review," and because Rongxin "fails to explain how its values were derived." (*Id*., *see also* Rongxin Mot. at 25.) Hearing no compelling argument to the contrary,

the Court holds that Commerce's rationale for relying on WTA import data to select a surrogate value for kaolin clay is supported by substantial evidence in the record, is otherwise in accordance with law, and is therefore sustained.

III. *Commerce's Selected Surrogate Values for Energy & Packaging*

A. Coal

In less than 75 words, Rongxin disputes Commerce's surrogate value for coal, by claiming that the import prices are "not representative of domestic prices," and "could contain errors." (Rongxin Mot. at 24.) The Court finds this argument tautological, speculative, and unpersuasive, and therefore affirms Commerce's selection of a surrogate value for coal.

B. Packaging

Rongxin would have preferred that Commerce use domestic prices to obtain a surrogate value for packaging because the import prices are higher than the domestic prices. (Rongxin Mot. at 25.) Commerce rejected domestic packaging prices because Rongxin did not provide product descriptions that would permit the agency to adequately compare the Indian product with the product used by the Chinese manufacturers. (Def.'s Resp. to Rongxin at 21.) Because Commerce's decision was rational and is supported by substantial evidence on the record, and is otherwise in accordance with law, the Court affirms Commerce's selection of a surrogate value for packaging.

Conclusion

For the foregoing reasons, then, it is hereby

ORDERED that Commerce's determination is remanded to the agency for further action consistent with this opinion, and it is further

ORDERED that Commerce shall adjust the surrogate value for labor to conform with the statutory requirements, as explained in *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010) , and it is further

ORDERED that Commerce shall recalculate a surrogate value for pencil slats using the pricing data for pencil slats in the Paper & Stationery article rather than the pricing data for American basswood lumber from the Hardwood Market Report, and it is further

ORDERED that Commerce shall recalculate separate surrogate values for black cores, color cores, thick black cores, and thick color cores that reflect the differences in price established by the Paper & Stationery article and by the price lists in the record, and it is further

ORDERED that Commerce shall file the results of its redetermination on remand no later than **Thursday, October 21, 2010** , and it is further

ORDERED that any comments on the remand results shall be filed no later than **Thursday, November 4, 2010** , and it is further

ORDERED that any replies to any comments on the remand results shall be filed no later than **Monday, November 15, 2010** , and it is further

ORDERED that Commerce's determination is sustained in all other respects.

Dated: September 30, 2010
New York, NY

/*s*/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op 10–111

KING SUPPLY COMPANY LLC, d/b/a KING ARCHITECTURAL METALS, Plaintiff, v. UNITED STATES, Defendant, and WELDBEND CORP., TUBE FORGINGS OF AMERICA INC., AND HACKNEY LADISH, INC., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 09–00477

[Administrative determination that certain pipe fittings from China used in structural applications are within scope of antidumping dutyorder remanded to the International Trade Administration, U.S. Department of Commerce; judgment for the plaintiff.]

Dated: September 30, 2010

Barnes, Richardson & Colburn (*Thomas V. Vakerics, Stephen W. Brophy, Cortney O'Toole Morgan, Jeffrey S. Neeley, Matthew T. McGrath, and Michael S. Holton*), for the plaintiff.

Tony West, Assistant Attorney General, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael D. Panzera*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Natasha Robinson Coates*), of counsel, for the defendant.

Mayor Brown LLP (*Simeon M. Kriesberg* and *Jeffrey C. Lowe*), for the defendant-intervenor Weldbend Corporation.

Neville Peterson LLP (*Lawrence J. Bogard* and *Casey Kernan Richter*), for the defendant-intervenor Tube Forgings of America, Inc.

Saul Ewing, LLP (*John Burt Totaro, Jr.*) for the defendant-intervenor Hackney Ladish, Inc.

Musgrave, Senior Judge:

Introduction

The plaintiff King Supply Co. LLC ("King") invokes jurisdiction under 28 U.S.C. § 1581(c) to contest the ruling by the International Trade Administration of the U.S. Department of Commerce ("DOC" or "Commerce") that King's imports are within the scope of *Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China*, 57 Fed. Reg. 29702 (July 6, 1992) ("Order), which is directed, in pertinent part, to

> carbon steel butt-weld pipe fittings, having an inside diameter of less than 14 inches, imported in either finished or unfinished form. These formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (e.g., threaded, grooved, or bolted fittings). . . .

57 Fed. Reg. at 29703 (italics added). *See* 19 C.F.R. § 351.225(k). [1]

King asserted to Commerce that its imports are used in structural applications, not piping systems, and hence are not within the scope of the Order. Commerce, however, concluded that the second sentence, above, "does not contain an end-use exclusion" that would otherwise exclude King's pipe fittings, implying, in essence, that the Order applies to all pipe fittings regardless of end use. DOC Final Scope Ruling Decision, PDoc 29, at 5. Commerce then ruled that King's imports are within the Order's scope because they meet the physical description of subject merchandise. For the following reasons, the court is persuaded that Commerce's rationale for its decision is incorrect. The matter must therefore be remanded for further proceedings consistent with this opinion.

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[1] 19 C.F.R. § 351.225(k) provides that when considering whether a particular product is included within the scope of an antidumping duty order, Commerce (*viz*. "the Secretary") is obliged to consider the following:

> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.
>
> (2) When the above criteria are not dispositive, the Secretary will further consider:
>
> (i) The physical characteristics of the product;
>
> (ii) The expectations of the ultimate purchasers;
>
> (iii) The ultimate use of the product;
>
> (iv) The channels of trade in which the product is sold; and
>
> (v) The manner in which the product is advertised and displayed."

19 C.F.R. § 351.225(k).

Standard of Review

Review at this stage is pursuant to the substantial evidence standard of 19 U.S.C. § 1516a(b)(1)(B)(i), meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *See also Micron Tech, Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). The context of such "reasonableness" is with respect to the record as a whole. *See Mittal Steel Galati v. United States,* 31 CIT 730, 731, 491 F. Supp. 2d 1273, 1275 (2007) (*citing Nippon Steel Corp. v. United States*, 485 F.3d 1345, 1350–51 (Fed. Cir. 2006)). Although the Court will give "significant" deference to Commerce's interpretation of its own antidumping duty orders, it will not do so with respect to an interpretation that changes the scope of a particular order or contradicts the order's express terms. *See*, *e.g.*, *Sango International L.P. v. United States*, 32 CIT ___, ____, 556 F. Supp. 2d 1327, 1332 (2008); *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004).

Discussion

I

The language of an antidumping duty order is the "cornerstone" of scope analysis. *See Allegheny Bradford*, 28 CIT at 843, 342 F. Supp. 2d at 1184 (citations omitted). Scope language may be clarified for a low-threshold of ambiguity but not be interpreted so as to effectively change an order's scope nor declared ambiguous where no ambiguity exists. *See*, *e.g.*, *id*. (referencing *inter alia Novosteel SA v. United States*, 284 F.3d 1261, 1272 (Fed. Cir. 2002). *See also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) ("review of the petition and the investigation may provide valuable guidance as to the interpretation of the final order . . . [b]ut they cannot substitute for language in the order itself[:] . . . *a predicate for the interpretive process is language in the order that is subject to interpretation* ") (italics added); *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (unfair trade orders may not be interpreted in a manner that changes their scope).

The defendant and defendant-intervenors argue that the second sentence of the Order's scope language is simply meant to distinguish permanent versus non-permanent fastening methods, as opposed to pipe fittings used in piping systems. For example, the defendant's brief describes a key criterion as "permanent, welded connections *of the sort* used in piping systems[.]" Def.'s Br. in Resp. to Pl.'s Mot. for J. Upon the Agency R. at 11 ("Def.'s Br.") (italics added). The problem with this construct is that it does not comport with the actual lan-

guage of the Order. It is well established that operative terms in antidumping duty orders are to be given effect as written and not rendered mere surplusage. *See*, *e.g.*, *Eckstrom Industries Inc. v. United States*, 254 F. 3d 1068, 1073 (Fed. Cir. 2001) ("the Government's interpretation of the conditions of use provision renders this language mere surplusage"); *Bond Street, Ltd. v. United States*, 33 CIT ___, ___, 637 F. Supp. 2d 1343, 1351 (2009) (key language in the order is not to be rendered "mere surplusage"); *Vertex Int'l, Inc. v. United States,* 30 CIT 73, 79–81 (2006) (Commerce is required to give effect to express language in antidumping duty orders). The defendant's (and defendant-intervenors') reading of the Order either renders "used . . . in piping systems" mere surplusage, erroneously conflates the quality of usage embodied by that phrase with joining methods, or inserts other language that simply does not exist in the Order.

Be that as it may, the court concurs with Commerce's finding that consideration of the *Diversified Products* factors of 19 C.F.R. § 351.225(k)(2) was unnecessary. *See Allegheny Bradford*, 28 CIT at 845, 342 F. Supp. 2d at 1185 (where the meaning of an order is plain, there is nothing more to interpret). King's alternative argument regarding subsection (k)(2) therefore need not be addressed. The Order's scope language plainly states, "[t]hese formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded connections, as distinguished from fittings based on other fastening methods (*e.g.*, threaded, grooved, or bolted fittings)" (italics added). The Order describes *the* use (one and only one use) of the pipe fittings subject to the scope of the investigation. No other use is described. As so described, it amounts to an exclusive use. To conclude that this language is merely an example of "possible use" is to impute meaning that the language simply does not possess. *Cf. Duferco Steel*, *supra*, 296 F.3d at 1096 ("Commerce cannot find authority in an order based on the theory that the order does not deny authority"). The reference to use in piping systems does not indicate, for example, a qualification of "for example," "*e.g.*," "such systems as," "chiefly used," "principally used," "capable of being used," or any other such similarly expansive signal that would indicate the interpretation the defendant and defendant-intervenors apparently argue. Further, contrary to Commerce's (and the defendant-intervenors') reading of the second sentence of the scope language, the fastening methods of pipe fittings are a separate consideration from, and do not alter, this apparently explicit product use requirement.

Scope definitions that include use as a defining characteristic of subject merchandise have been routinely upheld[2], and Commerce has apparentlydescribed usage with more precision and specificity in other contexts when including or excluding products from the scope of an antidumping duty order.[3] The defendant-intervenor Tube Forgings of America (TFA) thus argues that in such contexts Commerce often requires end-use certificates when excluding products based on end-use, suggesting that the absence of a certificate requirement is a reason to find there is no end use restriction in the Order, but the Court cannot discern a consistent administrative policy on end-use certification.[4] Even if one could be discerned, TFA's argument would appear to be directed more towards requiring certification in this

[2] *See*, *e.g.*, *IPSCO, Inc. v. United States*, 13 CIT 489, 494, 715 F. Supp. 1104, 1109 (1989) (end-use certification procedure adequate to address concern that pipe actually used in non-OCTG applications not be included within scope of orders) (citing *Mitsubishi Elec. Corp. v. United States*, 12 CIT 1025, 1051 700 F. Supp. 538, 559 (1988) (scope limited to subassemblies "dedicated exclusively for use" in cellular mobile telephones), *aff'd*, 898 F.2d 1577 (Fed. Cir.1990)); *Ericsson GE Mobile Communications Inc. v. United States*, 21 CIT 71, 955 F. Supp. 1510 (1997).

[3] *See*, *e.g.*, *Live Swine from Canada*, 70 Fed. Reg. 12181 (DOC Mar. 11, 2005) (final determination) (excluding live swine used exclusively for breeding stock); *Softwood Lumber Products from Canada*, 69 Fed. Reg. 4489 (DOC Jan. 30, 2004) (final results, new shipper review) (excluding softwood lumber products entered as part of a single family home package or kit that is certified for use solely for the construction of the single family home specified by the home design matching the entry); *Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 Fed. Reg. 55802 (DOC Aug. 30, 2002) (final determination) (excluding *inter alia* "1080 grade tire cord quality wire rod and grade 1080 tire bead quality wire rod" because these quality designations presume use in product applications outside the scope of the investigation); *Engineered Process Gas Turbo-Compressor Systems from Japan*, 62 Fed. Reg. 24394 (DOC May 5, 1997) (final determination) (excluding "turbo-compressor systems incorporating gas turbine drivers, which are typically used in pipeline transmission, injection, gas processing, and liquid natural gas service"); *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Italy*, 60 Fed. Reg. 31981 (DOC June 19, 1995) (final determination) (excluding boiler and mechanical tubing if not produced to certain ASTM standards and not used in standard, line, or pressure applications); *Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15029 (DOC Aug. 19, 1986) (final determination) (excluding pipe not intended for use in drilling for oil or gas).

[4] *Cf. Cellular Mobile Telephones and Subassemblies From Japan*, 50 Fed. Reg. 51724 (DOC Dec. 19, 1985) (requiring end use certification) *with Oil Country Tubular Goods (OCTG) From Canada*, 51 Fed. Reg. 21782 (DOC June 16, 1986) (end-use restrictions imposed but end-use certificates not required), *and IPSCO*, *supra* (noting implementation of administrative end-use certification procedure), *and Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 31970 (DOC June 5, 2008) (final determinations), Issues and Decision Memorandum, comment 1 (observing that although Commerce has implemented certification programs, it disfavors them due to difficulty of administration) (citing Memorandum from Joseph A. Spetrini, to Eric I. Garfinkel, "Final Determination Abolishment of the End Use Certification Procedure" (Sep. 4, 1990) (end-use certification of OCTG from Canada abandoned in 1990). *See also Laminated Woven Sacks Committee v. United States*, Slip Op. 10–81 (July 23, 2010) at 23 (observing that both Commerce and Customs are well-equipped to administer antidumping duty orders "without

instance, since the argument does not imply that "[t]hese . . . pipe fittings are used to join sections in piping systems" has any meaning other than as written.

And lest the reader wonder if there is sufficient ambiguity in "piping systems" to encompass structural applications, the record of the investigation reveals that all the parties, including Commerce and the U.S. International Trade Commission ("ITC" or "Commission"), had a precise understanding of what "piping systems" are: in the context of the Order, theyare essentially conveyances, *i.e.*, systems of pipes that encompass and enable the flow of a gas or fluid.[5] *Cf. Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369 (1998) (upholding Commerce's determination to apply precise and literal terms of an "unambiguous" order referring to principle use and not actual use). The substantial evidence of record, as King points out, supports finding only two apparent uses for carbon steel butt-weld pipe fittings: in piping systems and in structural applications. *Cf.* ITC Final Report at A-7. The latter were plainly not included specifically in the scope language of the Order, which only describes "use[ ] . . . in piping systems."

The remaining points by the defendant and defendant-intervenors do not appear meritorious and need not be further addressed. Commerce has interpreted the Order in a manner inconsistent with its

the burden of implementing a certification program"); *Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania*, 65 Fed. Reg. 48963 (DOC Aug. 10, 2000) (amended final determination) (placing burden on petitioner to show circumvention before requiring end-use certification); *Live Swine From Canada*, *supra* (ditto); *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40485 (DOC July 15, 2008) (final determinations), Issues and Decision Memorandum, comment J:1 (request for end-use certification neither necessary nor appropriate).

[5] *Webster's* defines "conveyance" *inter alia* as "[a] channel or passage for conduction or transmission as of fluids, electricity, *etc*." *Webster's New International Dictionary* at 583 (2nd ed., 1954). The ITC's Final Report describes the product under examination as "butt-weld-pipe fittings . . . [which] are used to connect pipe *sections* where conditions require permanent, welded connections" (italics added) and then elaborates as follows:

> The primary industries that use these butt-weld [pipe] fittings include chemicals, oil refining, energy generation, construction, and shipbuilding. These industries use butt-weld fittings in piping systems that conveygases or liquids in plumbing, heating, refrigeration, air-conditioning, automatic fire sprinkler, electrical conduit, irrigation, and process-piping systems for application in energy production, power generation, and manufacturing.[ ] Butt-weld [pipe] fittings are used to join pipes in straight lines, and to change or divide the flow of oil, water, gas, or steam in commercial, residential, or industrial piping systems. *Structural uses include fences, guardrails, playground equipment, and scaffolding*.

USITC Final Report at A-5 A-7 (italics added). *Cf. Sango International L.P. v. United States*, 484 F.3d 1371, 1373 ("[p]ipe fittings are formed connector pieces that are used in the construction of piping systems"), 1374 (petitioners allege "the principle use of malleable iron pipe fittings are in gas lines, piping systems of oil refineries, and gas and water systems of buildings") (Fed. Cir. 2007).

plain meaning, and therefore the matter must be remanded for further proceedings not inconsistent herewith.

II

It may well be that what Commerce and the domestic industry intended was not what turned out to have been described in the final determination and order and if so, perhaps the result of drafting oversight or clerical error. That is not the concern here, however. Suffice it to state that by treading in Commerce's footsteps and reading the record of the antidumping petition and investigation, the court is unable to find evidence to support Commerce's interpretive conclusion regarding the scope of the Order, as written and as published. *Cf.* 19 C.F.R. § 351.225(k)(1).

From the time of the May 1991 domestic carbon fitting industry petition[6] to the final affirmative determinations by Commerce and the Commission, the operative language "used to join sections in piping systems" remained unchanged even though the domestic pipe fittings industry submitted comments on the scope language of the investigations, with the result that the language was altered in certain ways not relevant to this proceeding. *See Initiation of Antidumping Duty Investigation: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China*, 56 Fed. Reg. 27730 (DOC June 17, 1991) ("[t]hese formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded connections . . .") (italics added); *Preliminary Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China*, 56 Fed. Reg. 66831, 66832 (DOC Dec. 26, 1991) ("[t]hese formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded connections . . .") (italics added); *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings From the People's Republic of China*, 57 Fed. Reg. 21058, 21059 (DOC May 18, 1992) ("[t]hese formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded connections . . .") (italics added); *Certain Carbon Steel Butt-Weld Pipe Fittings From the China and Thailand*, USITC Pub. 2401 at 2 n.2 (Inv. Nos. 731-TA-520 and 521) (Preliminary) (July 9, 1991), *reprinted at* 56 Fed. Reg. 32587, 32587 n.2 (ITC July 17, 1991) ("[t]hese formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded con-

[6] *In the Matter of Certain Carbon Steel Butt-Weld Pipe From the People's Republic of China and From Thailand; Petition For The Imposition of Antidumping Duties*, Public Record Document 30 (DOC May 22, 1991).

nections . . .") (italics added); *Certain Carbon Steel Butt-Weld Pipe Fittings From China and Thailand; Investigation*, 57 Fed. Reg. 2783, 2784 n.1(ITC Jan. 23, 1992) (notice of institution and schedule of final material injury investigation) ("[t]hese formed or forged pipe fittings are *used to join sections in piping systems* where conditions require permanent, welded connections . . .") (italics added); *Certain Carbon Steel Butt-Weld Pipe Fittings From China and Thailand*, USITC Pub. 2528 (Inv. Nos. 731-TA-520 and 521) (Final) (June 25, 1992), *summarized at* 57 Fed. Reg. 29331 (ITC July 1, 1992) (final determination) (repeating the scope of the preliminary determination and final investigation institution notice, specifically with respect to the use in piping systems of subject merchandise). *But cf. Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China and Thailand*, 56 Fed. Reg. 24410 (Inv. Nos. 731-TA-520 and 521) (Preliminary) (ITC May 30, 1991) (notice of institution of preliminary investigation; stating that products being investigated were finished or unfinished carbon steel butt-weld pipe fittings, less than 14 inches in inside diameter, and provided for in subheading 7307.93.30 of the Harmonized Tariff Schedule of the United States). And for that matter, the interpretation of ancillary documentation cannot substitute for or contravene the plain meaning of legally operative terms in the Order. *See Tak Fat Trading Co. v. United States*, 396 F. 3d 1378 (Fed. Cir. 2005) (the language of the order determines its scope); *Duferco Steel*, *supra*, 296 F.3d at 1097 (the language in the order is the "cornerstone" of analysis of an order's scope).

Conclusion

Commerce's scope determination that the Order applies to pipe fittings meeting the physical requirements of the Order's scope language advances an interpretation that is unsupported by the language of the Order and is therefore unlawful. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). At the same time, the court upholds Commerce's decision not to conduct a *Diversified Products* analysis pursuant 19 C.F.R. § 351.225(k)(2) on the ground that the relevant scope language is plain or "unambiguous," *see*, *e.g.*, Def.'s Br. at 11, to wit: "[t]hese . . . pipe fittings are used to join sections in piping systems . . . ." The scope of the Order cannot reasonably be construed to apply to pipe fittings used only to join sections in structural applications. As to what Commerce requires in that regard, to prevent circumvention of the Order, the court expresses no opinion, but the matter must be remanded so that Commerce may issue a scope determination consistent with this opinion.

Judgment will enter accordingly.

Dated: September 30, 2010
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 10–112

GPX INTERNATIONAL TIRE CORPORATION AND HEBEI STARBRIGHT TIRE CO., LTD., Plaintiffs, and TIANJIN UNITED TIRE & RUBBER INTERNATIONAL Consolidated Plaintiff, v. UNITED STATES, Defendant, and BRIDGESTONE AMERICAS, INC., BRIDGESTONE AMERICAS TIRE OPERATIONS, LLC, TITAN TIRE CORPORATION, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Consol. Court No. 08–00285

[Judgment sustaining second remand determination will be entered; no order lifting duty deposit requirement.]

Dated: October 1, 2010

Winston & Strawn LLP (*Daniel L. Porter*, *James P. Durling*, *Matthew P. McCullough*, *Ross E. Bidlingmaier*, and *William H. Barringer*) for the plaintiffs.

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (*Francis J. Sailer, Andrew T. Schutz*, and *Mark E. Pardo*) and *Greenberg Traurig, LLP* (*Philippe M. Bruno* and *Rosa S. Jeong*) for the consolidated plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*, *John J. Todor* and *Loren M. Preheim*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Matthew D. Walden* and *Daniel J. Calhoun*), of counsel, for the defendant.

King & Spalding, LLP (*Joseph W. Dorn*, *Christopher T. Cloutier*, *Daniel L. Schneiderman*, *J. Michael Taylor*, *Jeffrey M. Telep*, *Kevin M. Dinan*, and *Prentiss L. Smith*) for defendant-intervenors Bridgestone Americas, Inc. and Bridgestone Americas Tire Operations, LLC.

Stewart and Stewart (*Geert M. De Prest*, *Elizabeth A. Argenti*, *Elizabeth J. Drake*, *Eric P. Salonen*, *Terence P. Stewart*, *Wesley K. Caine*, and *William A. Fennell*) for defendant-intervenors Titan Tire Corporation and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC.

OPINION

Restani, Chief Judge:

In this case, in addition to various procedural rulings, three full opinions addressing substantive claims have been issued by the court

during the course of litigation. *See GPX Int'l Tire Corp. v. United States*, 587 F. Supp. 2d 1278 (CIT 2008); *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231 (CIT 2009); *GPX Int'l Tire Corp. v. United States*, Slip Op. 10–84, 2010 Ct. Intl. Trade LEXIS 88 (CIT Aug. 4, 2010). This matter is now before the court following a second remand determination. The parties agree that Commerce has complied under protest with the last court decision and *inter alia* has excluded Starbright and TUTRIC from the otherwise applicable countervailing duty ("CVD") determination. Judgment will be entered sustaining this determination. Starbright and TUTRIC, however, also seek an order directing the United States Department of Commerce not to require deposits for CVD for the exports of these parties. The court's first opinion denied Starbright's request for a preliminary injunction seeking essentially the same relief, on grounds of lack of irreparable harm attributable to the CVD determination. *See GPX*, 587 F. Supp. 2d at 1291–92. Starbright makes no new attempt, and TUTRIC makes no attempt at all, to show harm which cannot be remedied through ordinary remedies at law. In the court's earlier opinion, it discussed the law relevant to injunctive relief in this context and thus, there is no need to repeat it here. *See id.* at 1283–84. It makes no difference that plaintiffs have succeeded on the merits. If what they seek is injunctive relief they must still demonstrate the entitlement to equitable injunctive relief under the additional requirements for such relief. *See Winter v. Natural Res. Def. Council, Inc.*, 129 S.Ct. 365, 381 (2008).

Plaintiffs' however, cite *Diamond Sawblades Manufacturers Coalition v. United States*, 650 F. Supp. 2d 1331 (CIT 2009), in support of their request. In that case the court entered a writ of mandamus essentially to enforce its prior judgment. *See Diamond Sawblades*, 650 F. Supp. 2d at 1356. The court in that case required the collection of duty deposits after it overturned a negative injury determination of the International Trade Commission, thus preserving potential remedies. *Id.* at 1357. Underlying the decision, however, is the conclusion that a final judgment of this court sustaining an agency remand determination results in the replacement of an original determination found erroneous. In this case that would mean that there is no underlying determination supporting the CVD order as to plaintiffs and cash deposits may not be collected. That may be the proper interpretation of the statute. Nonetheless, *Diamond Sawblades* has been appealed. The court sees no purpose in extensive discussion of the statutory interpretation issue presented there, given the facts of the case before it now.

Rather, here the government has made it clear that it will appeal the court's decision and the court interprets its opposition to plaintiffs' request as an alternate preemptive request for stay pending appeal, just as plaintiffs' request to direct Commerce not to collect duty deposits presupposes the action the government will take or not take as a result of this judgment. Given the unsettled state of the law with respect to this procedural issue, as well as the unsettled state of the law governing the substance of this action, the court would grant a request by the government to stay pending appeal such portion of the requested judgment that would require the cessation of the collection of duties. In the absence of demonstration of irreparable harm to plaintiffs, and in view of the risk to the government if the duty obligation were unsecured, the court would grant a formal stay request. Accordingly, to avoid further briefing to no effect, the court will deny plaintiffs' request to include this specific direction in the judgment. Obviously, if there is no appeal, the court's final opinion will become conclusive and there appears to be no dispute that in such a case the government would act in a regular manner and cease collection of CVD deposits.

Dated: This 1st day of October, 2010.
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI
CHIEF JUDGE

Slip Op. 10–113

LIZARRAGA CUSTOMS BROKER, Plaintiff, v. BUREAU OF CUSTOMS AND BORDER PROTECTION, U.S. DEPARTMENT OF HOMELAND SECURITY; AND ROSA HERNANDEZ, PORT DIRECTOR, OTAY MESA, CALIFORNIA, Defendants.

Before: Richard K. Eaton, Judge
Court No. 08–00400

[Directing entry of defendant's confession of judgment.]

Dated: October 4, 2010

Sandler, Travis & Rosenberg, P.A. (*Arthur K. Purcell* and *Kenneth N. Wolf*), for plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*,Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Justin R. Miller*), for defendants.

OPINION AND ORDER

Eaton, Judge:

Introduction

This matter is before the court for consideration of defendants' confession of judgment in plaintiff's favor ("Confession of Judgment") and their motion for a stay of the execution of the previously entered remand order[1] pending the judgment's entry. Defendants' self-styled Confession of Judgment was filed in response to the pending motion for a preliminary injunction made by Guillermo Lizarraga Customs Broker ("plaintiff" or "Lizarraga"). By his motion, Lizarraga sought, among other things, an order "enjoining defendants from suspending or deactivating [his] broker entry filer code in the port of San Diego, C[alifornia]." Pl.'s Mem. Supp. Mot. Prelim. Injunc. ("Pl.'s PI Mem.") 1.

Jurisdiction is had under 28 U.S.C. § 1581(i)(4) (2006).[2] For the reasons set forth below, the court will enter the Confession of Judgment in accordance with this opinion.

BACKGROUND

I. Factual Background

A. Entry Filer Code

An entry filer code is a unique, three character code that Customs and Border Protection ("Customs") assigns to a licensed customs broker. 19 C.F.R. § 142.3a(b)(1) (2009). Filing "entries" means the filing of documentation required to ensure the release of imported merchandise from Customs' custody, or the act of filing that documentation. 19 C.F.R. § 141.0a(a).

Entries can be filed either manually or electronically through the Automated Broker Interface ("ABI") system. 19 C.F.R. §§ 143.34, 143.32(a). Currently, ninety-six percent of all entries are filed electronically, and that figure is likely higher for licensed brokers. *See* Automated Broker Interface (ABI), CBP.GOV, http://www.cbp.gov/xp/cgov/trade/automated/automated_systems/abi/ (last visited Sept. 30, 2010). Each electronically-filed entry is identified by an entry

[1] On March 26, 2010, the court remanded the case for development of the record. *See Guillermo Lizarraga Customs Broker v. Bureau of Customs and Border Protection*, Court No. 08–00400, Order at 2–4 (Mar. 26, 2010) ("Remand Order"). The Remand Order directed the appointment of an administrative law judge tohear evidence and make findings related to plaintiff's injury claim. *Id.*

[2] Defendants conceded this Court's jurisdiction over the case in their Answer to the Verified Complaint. Answer ¶ 1.

number created by the broker. 19 C.F.R. § 142.3a(a), (b). The first three digits of the entry number is the broker's entry filer code. 19 C.F.R. § 142.3a(b)(1). Accordingly, the entry filer code identifies the broker filing a particular entry. *Id*. The ABI system is part of Customs' Automated Commercial System ("ACS") that allows entry filers to both submit data electronically and receive messages from Customs. 19 C.F.R. § 143.1. In order to file electronically, the broker must have an active entry filer code and be approved for participation in the ABI system. 19 C.F.R. §§ 143.2, 143.34. The purpose of ABI is "to improve administrative efficiency, enhance enforcement of customs and related laws, lower costs[,] and expedite the release of cargo." 19 C.F.R. § 143.1. The filer code allows the quick filing of entries via ABI and "provides additional time, 10 business days from the date Customs releases the goods, to submit estimated duties." Pl.'s PI Mem. 7.

Once the entry information is put into the ACS system, it is processed electronically through a set of "selectivity criteria." Defs.' Mem. Opp. Mot. Prelim. Injunc. ("Defs.' Mem.") 4; *see also* 19 C.F.R. § 143.32(o). The selectivity criteria allow Customs to target certain shipments for examination based on elevated risk factors. Defs.' Mem. 4.

Under 19 C.F.R. § 142.3a(d), "[t]he Assistant Commissioner, Office of International Trade, or his designee may refuse to allow use of an assigned entry filer code if it is misused by the importer or broker." It is the agency action taken by Customs to suspend Lizarraga's entry filer code that is the subject of this case.

B. Suspension of Plaintiff's Entry Filer Code

On October 21, 2008, the Director of Field Operations at the Otay Mesa Port of Entry in San Diego, California wrote to the Assistant Commissioner of the Office of International Trade and "requested that Mr. Lizarraga's entry filer code be deactivated for misuse." Defs.' Mem. 6 (citing Administrative Record ("AR") 152). Customs then conducted an "internal administrative review" of the Director's request. *See* Defs.' Mem. 6—7 (describing the review process). On November 3, 2008, the Assistant Commissioner "made the final determination to indefinitely and immediately suspend Mr. Lizarraga's entry filer code" for misuse (a final determination later memorialized in a letter to Mr. Lizarraga dated November 10, 2008). Defs.' Mem. 7; *see* AR 156. The Assistant Commissioner noted that "[t]he suspension is necessary to prevent Mr. Lizarraga from using his individual filer code to facilitate smuggling narcotics into the Customs territory of the United States and allowing the use of his license, permit, and filer code . . . by Mexican nationals." AR 155. Customs did not provide

Lizarraga with notice of its internal administrative review or an opportunity for a hearing, or solicit a written submission from him prior to its final determination.

Instead, by letter dated November 10, 2008,[3] Customs notified plaintiff that, effective November 14, 2008, it would "immediately and indefinitely" suspend his entry filer code. AR 156. The notice cited as authority for defendants' action 19 C.F.R. § 142.3a(d),[4] and stated that the action was "necessary to prevent the misuse of [Lizarraga's] filer code in the conducting of customs business." AR 156. The notice also stated that the suspension was to prevent Mr. Lizarraga from using his individual filer code to "facilitate smuggling narcotics" and to ensure that plaintiff's "license, permit, name[,] and filer code are not used by persons who are not employed by [Lizarraga] and authorized to act for [Lizarraga]." AR 156.

The notice further stated:

> By requiring you to use the alternative filing procedures found in 19 C[.]F[.]R[.] § 142.3a(e), [Customs] will be able to effectively review the accuracy of the documentation you are submitting for the entry of merchandise. This will enable you to continue conducting customs business; however, you will be required to file entry/entry summary documentation using customs assigned numbers with estimated duties attached before the merchandise may be released.

AR 156.

Plaintiff argues that Customs' actions were an unlawful denial of due process:

> Besides being given only a few days notice, Mr. Lizarraga was not afforded the benefit of a hearing or an opportunity to make a written submission prior to being notified of his filer code deactivation.

Pl.'s PI Mem. 4.

In addition, although Customs stated that plaintiff would be able to conduct his business without using his filer code, Lizarraga insists that:

> Without access to an entry filer code, in today's electronic environment plaintiff cannot realistically compete with all other brokers who have such filer codes. Without a filer code, plaintiff

[3] Plaintiff received this notice on November 11, 2008. Affidavit of Guillermo Lizarraga ¶ 2.

[4] Under 19 C.F.R. § 142.3a(d), "[t]he Assistant Commissioner, Office of International Trade, or his designee may refuse to allow use of an assigned entry filer code if it is misused by the importer or broker."

> will be forced to spend many hours manually filing entries, incur delays in processing, and be required to immediately pay estimated duties at the time of filing. Moreover, because 90% of plaintiff's clients import FDA-regulated produce, manual filing creates additional processing delays, including the fact that for weekends Customs has imposed on Mr.Lizarraga a mere two-hour window to present FDA documentation.

Pl.'s PI Mem. 7 (citations omitted); *see also* Affidavit of Guillermo Lizarraga ("Lizarraga Aff.") ¶¶ 7, 8 (stating that without an entry filer code "it is virtually impossible to conduct business" and "clients will go to other brokers with active filer codes"). Thus, Lizarraga contends that "suspending a broker's entry filer code effectively puts that broker out of business because it is impossible to compete with other licensed brokers with active filer codes." Pl.'s PI Mem. 2. Accordingly, he argues, suspension of his filer code would be "paramount to a *de facto* suspension or revocation of his license, in which plaintiff has a property interest." Pl.'s PI Mem. 2.

Plaintiff's arguments are echoed by the amicus curiae brief submitted by the National Customs Brokers and Forwarders Association of America, Inc.:

> The inability to use its entry filer code is nothing less than crippling to a customs broker's business. . . .
>
> An importer relies upon its broker for the expedient and accurate filing of customs entries. In today's high-paced trade environment, speed in clearing goods through Customs is of paramount importance to importers. Automation in Customs' systems parallels this trend. Importers simply will not employ the services of a customs broker who can only offer manual entry filing, which will demonstrably result in the delayed release of shipments. In many ports, the Customs entry personnel who would be required to transmit manual entry data into ACS typically only work from 8 a.m. to 4 p.m. Thus, input into ACS for manual entry filings could only occur during those times. Moreover, Customs no longer assigns personnel dedicated to this task since manual filing has become so infrequent.
>
> By contrast, an ABI-enabled broker can file the entry at any time and secure the release of the shipment from Customs virtually 24 hours a day. Customs itself has acknowledged this advantage to ABI, listing "[e]xpedited cargo release" first among several ABI benefits to the trade.

Br. of Amicus Curiae National Customs Brokers and Forwarders Ass'n of America, Inc. in Support of Pl. 4—5 (footnotes omitted); *see also* Mem. Amicus Curiae Pacific Coast Council of Customs Brokers and Freight Forwarders Ass'ns in Support of Pl.'s Mot. 4 ("Lifting of a broker's filer code is tantamount to putting them out of business."). Thus, plaintiff contends that defendants' actions would "put Mr. Lizarraga out of business by removing his right to file entries electronically via his filer code, thereby degrading his commercial brokers' license to the point of making it virtually useless from a competitive standpoint" which defendants "could not do without first providing statutory due process." Pl.'s PI Mem. 3.

II. Proceedings in CIT

On November 13, 2008, plaintiff filed a motion for a temporary restraining order and preliminary injunction seeking to enjoin

> defendants from suspending or deactivating plaintiff's broker entry filer code in the port of San Diego, CA, in order to "prevent" the "misuse" of that filer code. The threatened action, made on three days notice under the alleged authority of 19 C.F.R. § 142.3a(d), was made without a hearing, an opportunity for petition, or other due process.

Pl.'s PI Mem. 1 (footnote omitted). On November 14, 2008, after a hearing with both sides present, the court granted plaintiff's motion, issued an order to show cause why a preliminary injunction should not be granted, and set a hearing date. A briefing schedule was established, which was subsequently modified by the parties. Thereafter, defendants also agreed to take no action against plaintiff's entry filer code until the court ruled on the preliminary injunction. *See Lizarraga Customs Broker v. United States*, Court No. 08–00400, Order at 2 (Dec. 23, 2008) (acknowledging defendant's consent not to suspend plaintiff's entry filer code during the time the preliminary injunction is pending); *see also Lizarraga Customs Broker v. United States*, Court No. 08–00400, Order at 1 (Feb. 24, 2010) (reiterating that defendant will not suspend plaintiff's entry filer code until the court rules on the motion for preliminary injunction).

Also, on November 14, 2008, plaintiff filed his verified complaint alleging, among other things, that he is a licensed customhouse broker and that Customs has "issued a notice . . . that plaintiff's entry filer code will be deactivated effective November 14, 2008." Compl. ¶¶ 2, 5. Plaintiff's complaint alleges that "Customs' plan to suspend or deactivate plaintiff's entry filer code without any explanation or hearing is effectively a revocation or suspension of plaintiff's broker's

license without any showing of good cause and without the benefit of a hearing or other due process protections." Compl. ¶ 21. In addition to the preliminary injunction, the complaint seeks relief in the form of a declaratory judgment and a permanent injunction restraining the defendants from suspending his entry filer code "without a hearing providing for basic due process . . . ." Compl. ¶ 23(c).

On January 12, 2009, defendants filed their answer to the complaint. On January 23, 2009, defendants filed the administrative record, and on March 27, 2009, they filed their motions to dismiss and for judgment on the agency record. Since that time, the parties have briefed requests to file amicus curiae briefs, which the court granted on June 10, 2009. In addition, the parties have briefed, and the court has heard arguments on, defendants' motion for a stay pending voluntary remand, which, based on plaintiff's objections, the court denied on August 6, 2009. Subsequently, the parties briefed and the court granted defendants' request to file an amended answer. The amended answer was filed on September 17, 2009. Briefing of the pending motions was complete as of November 13, 2009. Oral argument was held on February 24, 2010. At the conclusion of the February 24 hearing, the court stayed proceedings until March 10 to provide the parties an opportunity to pursue settlement. Thereafter, the parties informed the court that they were unable to reach a settlement during this period. On March 26, 2010, the court issued an order remanding the matter to Customs solely for the purpose of making a record with respect to plaintiff's claim that the suspension of his entry filer code would be tantamount to a revocation of his broker's license. *See* Remand Order.

On April 23, 2010, defendants filed the Confession of Judgment[5] in plaintiff's favor and a motion for a stay of the execution of the remand order pending entry of the Confession of Judgment. Defendants insist that the Confession of Judgment ends the lawsuit because defendant's "agreement" "not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event (i.e., for any fact or event that will have occurred prior to the entry of the attached proposed Court order) . . . , [means that] there is no longer a justiciable case or controversy between the parties and [thus] this action must be dismissed." Confession of Judgment 3.

In response, plaintiff argues that

[5] The Confession of Judgment requests "judgment granting relief in favor of plaintiff Guillermo Lizarraga (Mr. Lizarraga), as stated herein and in the proposed order, be entered . . . ." Confession of Judgment 1. Further, it offers the following "confession of judgment: we agree not to suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event (i.e., for any fact or event that will have occurred prior to the entry of the attached proposed Court order.)." Confession of Judgment 3 (footnote omitted).

> While defendants may be free to confess a judgment as to whether they will continue to pursue filer code deactivation under the facts of this case, that does not moot the case, as plaintiff's claims also involve requests for declaratory and injunctive relief aimed at addressing the *legality* of defendant's actions and preventing such illegal actions from being repeated against Mr. Lizarraga. As the legality of defendants' action remains in dispute, and this Court has the power to issue declaratory and injunctive relief, the action is not moot.

Pl.'s Resp. Def.'s Conf. Judgment ("Pl.'s Resp.") 2. Plaintiff thus contends that the confession of judgment should be rejected or, alternatively, "must not be construed as rendering moot the claims contained in plaintiff's Complaint, and this action should not be dismissed." Pl.'s Resp. 2. Oral argument on the Confession of Judgment took place on July 15, 2010. *See* Tr. of Conf. Or. Arg. ("Tr. Or. Arg.").

DISCUSSION

I. Mootness

This Court may decide legal questions only in the context of actual cases or controversies. U.S. CONST. art. III, § 2. Where an active case or controversy no longer exists, a case becomes moot. *See Alvarez v. Smith*, __ U.S. __, __, 130 S. Ct. 576, 580—81 (2009)("[A] dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm, falls outside the scope of the constitutional words "Cases" and "Controversies.") (citations omitted) ("*Alvarez* ").

The Supreme Court's admonition, however, is subject to the rule developed to address the situation where a defendant may seek to repeat unlawful behavior. "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation and quotation omitted). Given that, "the test for mootness in cases such as this is a stringent one. . . . A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (quoting *United States v. Concentrated Exp. Phosphate Ass'n*, 393 U.S. 199, 203 (1968)). Accordingly, in order to demonstrate mootness, it must be shown that unlawful behavior cannot "reasonably be expected to recur."

II. Defendant's Confession of Judgment Moots Plaintiff's Claims

Here, it is apparent that the Confession of Judgment eliminates the "concrete actual or threatened harm" facing Mr. Lizarraga. That is, Customs' concession that it will "not suspend or deactivate Mr. Lizarraga's entry filer code for any past fact or event," when reduced to a judgment, will remove the threat that his business will be harmed as a result of the findings of the internal investigation. Thus, the controversy over Customs' disputed conduct will be rendered moot because any injury resulting from the conduct will be voluntarily checked.

Plaintiff, however, would have the court continue the case to make findings as to the legality of defendants' behavior. To do so, however, would require the court to continue its efforts to create an adequate record with respect to the degree of injury that would result to Mr. Lizarraga's business if his entry filer code were revoked (i.e., whether the indefinite suspension of an entry filer code is a "de facto" suspension or revocation of a broker's license). *See generally* Remand Order. Put another way, in order to determine plaintiff's due process rights, the extent to which his entry filer code is required for him to carry on a viable business would have to be known. *See Lowe v. Scott*, 959 F. 2d 323, 339 (1st Cir. 1992) (finding that a doctor had a protected property interest in not only his medical license, but also the part of the license that authorized him to supervise nurse midwives).

Like Dr. Lowe, plaintiff contends that the deactivation of his entry filer code negatively impacts the broker's license in which he has a protected property interest. In order to decide this question, however, the court would have to create a factual record. This was the purpose of the court's Remand Order. To continue this inquiry in the absence of a live case or controversy, however, would result in the kind of holding the Supreme Court has warned against. *See Alvarez*, __ U.S. at __, 130 S. Ct. at 580—81. In other words, it would continue these proceedings even though any findings that would result would have no effect on the concrete question that was the subject of the lawsuit.

In addition, it has been sufficiently demonstrated that defendants' allegedly wrongful behavior cannot reasonably be expected to recur. At oral argument defendants represented to the court that Customs would not seek to summarily suspend a broker's entry filer code: "Well, we know for certain that brokers are entitled to the [Administrative Procedure Act ("APA")][6] if their entry filer code is deactivated,

[6] Counsel was making reference to 5 U.S.C. § 558(c),entitled "Imposition of Sanctions; determination of applicationsfor licenses; suspension, revocation, and expiration oflicenses," which states, in relevant part:

Except in cases of willfulness or those in which public health, interest, or safety requires

the procedur[al] protections of the APA. So with respect to what occurred to Mr. Lizarraga in this instance, the Customs treatment of Mr. Lizarraga, it's certain that that is not going to occur again." Tr. Or. Arg. 10:13—18. Further, in their amended answer defendants state: "[D]efendants admit that the suspension or deactivation of a broker's entry filer code must comport with 5 U.S.C. § 558." Am. Answer ¶ 22(iii); *see also* Tr. Or. Arg. at 11:7—19 (acknowledging same). Given defendants' representations, the court finds that the allegedly wrongful behavior at issue cannot reasonably be expected to reoccur.

It is important to note, however, that the court is not finding that the due process afforded by 5 U.S.C. § 558 will necessarily be legally sufficient under the facts or circumstances of a future case. Thus, the court is not determining whether the provisions of § 558 will provide adequate legal due process under circumstances yet unknown.

CONCLUSION

For the reasons set forth above, defendants' Confession of Judgment shall be entered in the form determined by the court and plaintiff's pending motion for preliminary injunction is therefore declared moot and accordingly denied.

Dated: October 4, 2010
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 10–114

ALL TOOLS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 07–00237

[Defendant's motion for summary judgment granted.]

Dated: October 5, 2010

Peter S. Herrick, *P.A.* (*Peter S. Herrick*), for plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commericial Litigation Branch, Civil Division, United States Department of Justice, (*Edward F. Kenny*); Office of Assistant Chief Counsel for Import Administration, International Trade Litigation United States Customs and Border Protection (*Chi. S. Choy*), of counsel, for defendant.

otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the factsor conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

OPINION

Eaton, Judge:

Introduction

This matter is before the court on defendant's motion for summary judgment based on a claimed lack of subject-matter jurisdiction. By its motion, defendant alleges that plaintiff, All Tools, Inc. ("All Tools"), failed to file timely its summons pursuant to 28 U.S.C. § 2636(a)(1) (2006), and therefore failed to establish jurisdiction before this Court. Def.'s Mem. in Support of Mot. for Summ. J. ("Def.'s Mem.") 1. All Tools argues that the deadline for filing its suit was equitably tolled pending Customs' issuance of a protest number, and therefore its suit is timely. Pl.'s Mem. in Opp. to Mot. for Summ. J. ("Pl.'s Mem.") 1. Because some of the Counts in the Complaint were untimely filed, and others raise issues not found in a timely protest, the court grants defendant's motion for summary judgment and dismisses the case.

BACKGROUND

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment in its favor as a matter of law. USCIT R. 56(c). Here, none of the material facts are in dispute. On August 26, 2003, All Tools, through its customs broker, Mr. Pedro Carmona, entered a shipment of Chinese-origin painting accessories through the Port of San Juan, Puerto Rico. Def.'s Mem. Ex. 1. Mr. Carmona completed the entry summary for the merchandise, stating that the entry included paint brushes classified under HTSUS No. 9603.40.4040 as "Natural Bristle Brushes." Def.'s Mem. Ex. 1. Mr. Carmona was listed on the entry summary as the importer of record. Def.'s Mem. Ex. 1.

Following the filing of the entry summary, Customs concluded that, because the paint brushes had natural bristles, they fell within antidumping duty order No. A570–501–000, and therefore were subject to an unfair trade duty of 351.92 percent. Def.'s Mem. Ex. 2; *see* Natural Bristle Paint Brushes and Brush Heads from the People's Republic of China, 61 Fed. Reg. 52,917 (Dep't of Commerce Oct. 9, 1996) (final results). On January 8, 2004, Customs sent an Informed Compliance Notice addressed to Mr. Carmona, care of All Tools, stating that the paint brushes were subject to this antidumping duty. Def.'s Mem. Ex. 2.

The Informed Compliance Notice also directed All Tools' attention to a Customs Notice (Notice No. 2001–01 of Oct. 4, 2001) regarding the filing of non-reimbursement statements for entries subject to antidumping duties. Def.'s Mem. Ex. 2. The purpose of a non-

reimbursement statement is to assure Customs that the importer will not be repaid the antidumping duty by the exporter or producer of the merchandise. 19 C.F.R. § 351.402(f)(1)-(2) (2009). If an importer fails to file a non-reimbursement statement, Commerce may presume that the exporter or purchaser did, in fact, reimburse the importer for the antidumping duties paid. 19 C.F.R. § 351.402(f)(3). In cases where Commerce relies on this presumption, it will treat the duty as if it had been fully reimbursed, and will charge the importer the duty a second time, in effect doubling the duty rate. *See Id*. All Tools did not file a non-reimbursement statement until February 17, 2006. Def.'s Mem. Ex. 11.

On September 13, 2004, having heard nothing from either Mr. Carmona or All Tools, Customs sent a Notice of Action to Mr. Carmona advising that "dumping duties of 703.84% [were to] be assessed" on the entry as a non-reimbursement statement had not been filed. Def.'s Mem. Ex. 5; *see* 19 C.F.R. § 152.2. Neither Mr. Carmona nor All Tools responded to the Notice of Action. Customs liquidated the entry on October 15, 2004 and assessed the double duty rate. Def.'s Mem. Ex. 6.

On January 14, 2005, 91 days after the liquidation of All Tools' entry, Mr. Carmona filed a protest against liquidation on the company's behalf, contesting the classification of the entry.[1] Def.'s Mem. Ex. 7 ("Protest No. 1"). By seeking to have its merchandise classified as being made of synthetic bristles, All Tools was endeavoring to keep its merchandise from being subject to antidumping duties.

Customs denied Protest No. 1 as untimely on January 18, 2005, stating that it was not filed within ninety days of the liquidation. Def.'s Mem. Ex. 8; *see* 19 U.S.C. § 1514(c)(3)(A) (2000).[2] Pursuant to 19 U.S.C. § 1514(a), an appeal of the denial of Protest No. 1 could have been taken within 180 days of January 18, 2005. All Tools did not appeal the denial of Protest No. 1 to this Court.

On September 2, 2005, Mr. Carmona filed a claim with Customs pursuant to 19 U.S.C. § 1520(c)(1)[3] alleging a mistake of fact. Def.'s Mem. Ex. 9 ("Carmona Letter"). The basis for Mr. Carmona's claim was that the "Informed Compliance Notice [and the] Notice of Action

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[1] All Tools contended, in Protest No. 1, that the brushes should have been classified as HTSUS No. 9603.40.40.60 "other paint brushes," and further that the brushes were made of synthetic filaments, and therefore not subject to the antidumping duty order. Def.'s Mem. Ex. 7.

[2] Until the 2004 Amendments to the Tariff Act went into effect on December 18, 2004, the time limit for protesting a Customs classification determination was ninety days after notice of liquidation or reliquidation. *See* Amendments to the Tariff Act of 1930, Pub. L. 108–429, § 1571 (amended 2004).

[3] 19 U.S.C. § 1520(c)(1) (2000) was repealed on December 3, 2004 (Amendments to Tariff Act of 1930, Pub. L. 108–429, Title II, § 2105 (amended 2004)), but was still in effect as to

. . . treated Carmona as the 'importer' when, in fact, All Tools was the 'importer.'" Carmona Letter 2. Customs denied Mr. Carmona's claim on January 5, 2006, stating that the circumstances "[did] not constitute clerical error, mistake of fact or other inadvertence." Def.'s Mem. Ex. 10.

On March 17, 2006, All Tools filed a protest with Customs to contest the denial of Mr. Carmona's § 1520(c)(1) mistake of fact claim.[4] Def.'s Mem. Ex. 11 ("Protest No. 2"). On April 5, 2006, Customs denied Protest No. 2. Def.'s Mem. Ex. 12.

Following the denial of the protest, counsel for All Tools asked Customs to assign a protest number to Protest No. 2 on four occasions beginning on April 13, 2006, eight days after Customs denied All Tools' protest as untimely, and ending on February 20, 2007. Pl.'s Exs. B, C, D, E. Customs assigned a protest number on February 20, 2007, but has given no reason for its failure to assign a number at an earlier date. Pl.'s Mem. 2.

All Tools commenced this suit on July 3, 2007, 133 days after receiving the protest number, seeking: (1) an order reclassifying its merchandise ("Count I"); (2) an order "that the dumping duties cannot be doubled in this case" ("Count II"); (3) the reliquidation of its merchandise at the "at entered" rate because deemed liquidation had occurred on August 26, 2004 ("Count III"); and (4) an order "approving" Protest No. 2 and ordering Customs to refund the duties ("Count IV"). *All Tools, Inc. v. United States,* Court No. 07–00237, Summons (July 3, 2007); *All Tools, Inc. v. United States,* Court No. 07–00237, Complaint (Apr. 2, 2008). Prior to filing its summons, All Tools paid the duties owed on the entry as required by 28 U.S.C. § 2637(a).[5] Pl.'s Resp. To June 29, 2010 Letter 1. The summons was filed some 896

All Tools' entry. It stated:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct–
>
> (1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, 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 any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction[.]

[4] All Tools, as the ultimate consignee, has standing to file a protest "with respect to merchandise that is the subject of a decision specified in [19 U.S.C. § 1514(a)]". 19 U.S.C. § 1514(c)(2)(A) (2006).

[5] As part of his mistake of fact claim, Mr. Carmona stated "it was a mistake of fact for Customs to look to Carmona for payment of antidumping duties and interest and not All Tools." Carmona Letter 4. Mr. Carmona, however, is not a party to this suit, and both parties agree that, because All Tools paid the duties before commencing suit, his claim is moot. Pl.'s Reply to June 29 Letter 2 ("Mr. Carmona does not have any interest in this case."); Def.'s Reply to June 29 Letter 3 ("[i]t is our position that Mr. Carmona has no interest in the outcome of this lawsuit.").

days after the denial of Protest No. 1, and 274 days after the statutorily-prescribed time for appealing the denial of Protest No. 2. *See* 19 U.S.C. § 1514(a).

Defendant filed its motion for summary judgment on September 30, 2009. Oral argument was held on April 8, 2010, after which the court ordered additional briefing on a number of issues concerning the § 1520(c)(1) mistake of fact claim. *All Tools, Inc. v. United States,* Court No. 07–00237 (Apr. 12, 2010) (order for additional briefing). On June 29, 2010, the court sent a letter to the parties requesting information as to the status of Mr. Carmona's interest in the matter. *All Tools, Inc. v. United States,* Court No. 07–00237 (June 29, 2010) (letter to parties regarding Mr. Carmona).

Plaintiff asserts that this Court has jurisdiction to hear its claims pursuant to 28 U.S.C. § 1581(a). Pl.'s Mem. 6. Under 28 U.S.C. § 1581(a), the United States Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part . . . ."

STANDARD OF REVIEW

The defendant's motion for summary judgment is based on its assertion that the court does not have jurisdiction over the Counts of All Tools' complaint. "A jurisdictional challenge to the court's consideration of [p]laintiff's action raises a threshold inquiry." *Hartford Fire Ins. Co. v. United States*, 31 CIT 1281, 1285, 507 F. Supp. 2d 1331, 1334 (2007) (citations omitted).

Thus, before reaching the merits of plaintiff's Complaint, the court must rule on defendant's motion for summary judgment. "The party seeking to invoke this Court's jurisdiction has the burden of establishing such jurisdiction." *Autoalliance Int'l, Inc. v. United States*, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005) (citations omitted). To avoid dismissal, a plaintiff "must allege in his pleading the facts essential to show jurisdiction." *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

DISCUSSION

The United States, on behalf of Customs, has moved for summary judgment on the basis that All Tools failed to file timely its summons

pursuant to 28 U.S.C. § 2636(a)(1).[6] Such timely filing is a prerequisite for the commencement of an action before this Court under 28 U.S.C. § 1581(a). *See AutoAlliance Int'l, Inc. v. United States*, 26 CIT 1316, 1323, 240 F. Supp. 2d 1315, 1322 (2002) (finding that plaintiff's suit was barred because plaintiff failed to file a summons in this Court within 180 days after Customs' ruling on the protests).

All Tools opposes the motion for summary judgment, but does not dispute any of the jurisdictional facts. Rather, All Tools insists that its lawsuit was timely commenced because the deadline for filing the summons was equitably tolled until Customs issued a protest number for Protest No. 2.

The court finds that All Tools' complaint must be dismissed for the following reasons.

I. The Classification and Antidumping Duty Claim

Plaintiff's primary purpose in filing this suit is to gain review of the classification of the paint brushes in its entry. This is because if All Tools is successful in challenging the classification, it will be able to place its merchandise outside of the antidumping duty order, and thus keep it from being subject to antidumping duties.

As noted, All Tools' protest of the classification of its merchandise (Protest No. 1) was filed on January 14, 2005, ninety-one days after its October 15, 2004 liquidation. Customs denied Protest No. 1 as untimely under 19 U.S.C. § 1514(a), stating that it was filed one day late. Def.'s Mem. Ex. 8; *see* Def.'s Mem. Ex. 12 (referring to this protest as protest no. 490905200003). To contest the finding that Protest No. 1 was untimely filed, and thus to contest the classification of the paint brushes and the resulting antidumping duties, All Tools was required to file suit in this Court by July 18, 2005. 28 U.S.C. § 2636(a)(1) ("A civil action contesting the denial, in whole or in part, of a protest . . . is barred unless commenced . . . within one hundred and eighty days after the date of mailing of notice of denial of a protest . . . ."). All Tools never sought judicial review of Protest No. 1.

All Tools makes no claim that the time to file suit contesting the denial of Protest No. 1 was tolled. Because All Tools did not file its lawsuit within 180 days of the denial of Protest No. 1, the liquidation of the entry under HTSUS No. 9603.40.4040 as "Natural Bristle Brushes" became final and conclusive as of July 18, 2005. 19 U.S.C. §

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[6] 28 U.S.C. § 2636(a) reads, in part:

(a) A civil action contesting the denial, in whole or in part, of a protest under [19 U.S.C. § 1515] is barred unless commenced in accordance with the rules of the Court of International Trade—

(1) within one hundred and eighty daysafter the date of mailing of notice ofdenial of a protest under [19 U.S.C. §1515(a)] . . . .

1514(a)[7]. Therefore, All Tools is foreclosed from further contesting: (1) the paint brushes' classification; and (2) the application of antidumping duties resulting from such classification.[8] *See* 28 U.S.C. § 2636(a)(1). As a result, the claim for refunding antidumping duties based on a misclassification of All Tools merchandise contained in Count I of the complaint is dismissed.

II. The Mistake of Fact Claim

On January 8, 2004, Mr. Carmona was sent the Informed Compliance Notice, care of All Tools, stating that the company's merchandise was subject to the antidumping duties, and further saying "[i]nsure that you abide by Notice No. 2001–01 of 10/04/01 regarding reimbursement statement." Def.'s Mem. Ex. 2. Thereafter, Mr. Carmona received the Notice of Action, dated September 13, 2004, informing All Tools that the double duty was to be assessed on the merchandise and that the entry was in the process of being liquidated. As noted, the entry was liquidated on October 15, 2004, and the double duties were assessed at that time. On September 2, 2005, Mr. Carmona filed a mistake of fact claim with Customs pursuant to 19 U.S.C. § 1520(c)(1). Def.'s Mem. Ex. 9.

The alleged mistake of fact was that the "Informed Compliance Notice [and the] Notice of Action . . . treated Carmona as the 'importer' when in fact All Tools was the 'importer.'" Carmona Letter 2. In other words, the mistake of fact alleged by Mr. Carmona was that he was being treated as the importer of the merchandise, rather than All Tools, for the purposes of filing the non-reimbursement statement.

The Carmona Letter did not challenge the application of the antidumping duty to All Tools' entry and, while it did take issue with the doubling of the duty because Mr. Carmona was incapable of filling out the non-reimbursement statement, it did not assert that the imposition of the double duty was a mistake of fact. That is, the mistake of fact asserted in the letter was that Mr. Carmona was wrongly treated as the entry's importer for purposes of filing the non-reimbursement

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[7] [D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to . . . the classification and rate and amount of duties chargeable . . . shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title.
19 U.S.C. § 1514(a).

[8] Protest No. 1 made no mention of the doubling of the antidumping duties as it sought to challenge the classification of the merchandise and remove it from any antidumping duty liabilities.

statement. Under the then-existing law, a mistake of fact claim could have been made to Customs up to one year after liquidation and still be timely. *See* 19 U.S.C. § 1514(a). Thus, Mr. Carmona's claim appears to have been timely.

On January 5, 2006, Customs denied Mr. Carmona's claim by stating that the allegations in his letter did "not constitute clerical error, mistake of fact or other inadvertence" and therefore did not fall within the bounds of 19 U.S.C. § 1520(c)(1). Def.'s Mem. Ex. 10. On March 17, 2006, All Tools filed a protest of Custom's denial of Mr. Carmona's § 1520(c)(1) mistake of fact claim. Def.'s Mem. Ex. 11 ("Protest No. 2"). In Protest No. 2, All Tools reiterated its claim that Mr. Carmona could not file the non-reimbursement statement. Def.'s Mem. Ex. 11.

Count II of the complaint addresses the claimed mistake of fact. At paragraphs 22 through 24 of the complaint, All Tools alleges that Mr. Carmona "could not file an anti-reimbursement (sic) statement as he was not privy to the transaction between the exporter and the importer." Compl. ¶ 23.

On February 17, 2006, 490 days after its merchandise was liquidated, All Tools filed a non-reimbursement statement. Def.'s Mem. Ex. 11. Based on the claimed mistake that the Informed Compliance Notice wrongly instructed Mr. Carmona to file the non-reimbursement statement, All Tools' Count II apparently asks the court to direct Commerce to accept its late filed non-reimbursement statement, rescind the doubling of the antidumping duty, and reliquidate the entry at the 351.92 percent rate. "Wherefore, the plaintiff respectfully requests the Court to enter an order that the dumping duties in this case cannot be doubled and that half of the dumping duties that have been paid be refunded with interest." Compl. ¶ 24.

In order for plaintiff to have the allegations contained in Count II heard, however, its case must have been timely filed. Plaintiff argues that the court has jurisdiction over this matter because the deadline for filing the summons was equitably tolled until the company received a protest number for Protest No. 2. Thus, according to plaintiff, it was excused by defendant's actions from filing its summons by October 2, 2006, 180 days after Protest No. 2 was denied, and had until 180 days after February 20, 2009, when it received the protest number, to bring suit contesting Protest No. 2. Plaintiff cites *DaimlerChrysler Corp. v. United States* for the proposition that a protest number was required for it to file its lawsuit contesting the denial of a protest. 442 F.3d 1313 (Fed. Cir. 2006) ("*DaimlerChrysler* ").

In *DaimlerChrysler*, plaintiff timely filed various suits contesting the denial of protests relating to the duties on "sheet metal [exported]

to Mexico for painting and assembly into motor vehicles, and then imported the vehicles into the United States." On its summons plaintiff listed some but not all of its protests by protest number. *Id*. at 1315 ("The schedule omitted seven protests covering more than 400 entries . . . ."). Plaintiff later moved to amend its complaint to include the entries covered by the protests for which it had omitted the numbers, but the motion was denied. In affirming the Court of International Trade, the Federal Circuit found that "[t]he essential jurisdictional fact-the denial of the protest-simply cannot be affirmatively alleged without specifically identifying each protest involved in the suit." *Id*. at 1319; *see id.* at 1321–22 ("[A] summons can provide fair notice only if the contested protests are identified with particularity. . . . Daimler failed to identify the seven protests in the summons. The summons was therefore insufficient to 'commence an action' in the Court of International Trade as to the seven omitted protests within the 180-day limitation period.").

Plaintiff's reliance on *DaimlerChrysler* is misplaced. This is because the case does not hold that the inclusion of a protest number is a prerequisite for the filing of a summons. Rather, it stands for the proposition that "a summons can provide fair notice only if the contested protests are identified with particularity." *Id*. at 1321. In keeping with this holding, this Court has held that the inclusion of a protest number is not necessary to commence a lawsuit contesting a protest denial and that identification by other means such as an entry number is sufficient to meet filing requirements. *See Int'l Custom Prods., Inc. v. United States,* 32 CIT ___, ___, Slip Op. 08–53 at 2, n.3 (May 20, 2008) (not reported in the Federal Supplement); *see also, DaimlerChrysler v. United States*, 28 CIT 2105, 2106–07, 350 F. Supp. 2d 1339, 1341 (2004) (holding that "if the entries were listed and it was possible for the United States to relate the entry to the protest, . . . then jurisdiction would also attach").

DaimlerChrysler involved eighty-one protests and hundreds of entries. 442 F.3d at 1316. Here, as has been seen, the sole entry at issue was subject to two protests. Plaintiff's lawsuit seeks to contest Protest No. 2. Plaintiff insists that because it had no protest number for Protest No. 2, it was prohibited from filing its summons under the holding of *DaimlerChrysler*. There is little question, however, that if All Tools had filed a summons listing the entry number and the date that Protest No. 2 was denied, Customs would have received sufficient notice as to the company's claim and grounds upon which it rested. There are, no doubt, other ways that plaintiff could have identified the protest it was disputing and thus have given defendant

sufficient notice for plaintiff to commence the suit. Thus, All Tools was not prevented from filing this action by Customs' failure to assign a protest number.

With this in mind, the court turns to plaintiff's equitable tolling argument itself. Equitable tolling is generally limited to situations either where a claimant "has been 'induced or tricked by his adversary's misconduct into allowing the filing deadline to pass'" or "where a claimant has actively pursued judicial relief by filing a defective pleading within the statutory time period . . . ." *Former Emps. of Siemens Info. Commc'n Networks, Inc. v. Herman*, 24 CIT 1201, 1208, 120 F. Supp. 2d 1107, 1114 (2000) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("*Irwin* ")). In order to assert equitable tolling, the party claiming it must show that it has been diligent in preserving its legal rights. *See Irwin*, 498 U.S. at 96 ("We have generally been much less forgiving in receiving late filings where the claimaint failed to exercise due diligence in preserving his legal rights.").

Because All Tools was not prevented from filing its case, either by defendant inaction or otherwise, equitable tolling is not available to it. Here, while it is clear that Customs failed in its duty to supply the protest number, it is equally clear that, because All Tools could have filed its lawsuit, it was not induced by Customs' misconduct "into allowing the filing deadline to pass" and, as a result, the filing deadline was not tolled. That is, the plaintiff, who was represented by counsel, was not prevented by Customs' failure to supply the protest number from filing its suit. Thus, plaintiff has simply not made out a case that the filing deadline should be tolled based on Customs' behavior.

Nor can it be said that plaintiff can be found to have demonstrated such diligence as to justify equitable tolling. "Courts have found due diligence where a party made reasonable and sustained attempts to resolve questions or ambiguities and reasonably attempted to comply with the statutory time limits." *North Dakota Wheat Comm'n v. United States*, 28 CIT 1236, 1244, 342 F. Supp. 2d 1319, 1326 (2004) (citing *Former Emps. of Quality Fabricating, Inc. v. U.S. Sec'y of Labor*, 27 CIT 419, 424, 259 F. Supp. 2d 1282, 1286 (2003) (holding that plaintiff showed due diligence where plaintiff continuously emailed Department of Labor regional office, checked the Department of Labor website daily and visited the State of Pennsylvania Department of Labor Trade Adjustment Representative, yet was not informed she was consulting the wrong sources of information)).

As evidence of its diligence, All Tools notes that its counsel asked Customs to assign a protest number to Protest No. 2 on four occa-

sions. Pl.'s Mem. Exs. B, C, D, E. Commerce finally assigned a protest number on February 20, 2007. Pl.'s Mem. 2. For purposes of demonstrating due diligence, however, All Tools' efforts are unconvincing. This is because the company made but one request for a protest number prior to the time the statute of limitations had run its course. All Tools made this single request for a protest number on April 13, 2006, shortly after the protest had been denied, and then took no further action until December 21, 2006, well past the 180-day period for bringing suit before this Court. This falls short of the "repeated and sustained" attempts envisioned by the court in *Former Employees of Quality Fabricating* and, as such, All Tools did not make the necessary effort required to demonstrate the exercise of due diligence.

In addition, once the protest number was in hand, All Tools did not act in a diligent fashion to commence its suit. Rather, it waited 133 days before filing its summons.

A claim that equitable tolling should be applied to a deadline to file suit against the government faces a high threshold, and the plaintiff must affirmatively show that either the actions of the government "induced or tricked" the plaintiff into filing its lawsuit after the deadline, or that the plaintiff has diligently attempted to preserve its legal rights, but did not meet the required deadline. All Tools has failed to meet either of these requirements. As such, the complaint contesting Protest 2 was filed late, and the court does not have jurisdiction over it. *See* 28 U.S.C. § 2636(a). Count II of the complaint is therefore dismissed.

III. The Deemed Liquidation Claim

Next, by Count III of the complaint, All Tools insists that its entry was liquidated "by operation of law" pursuant to 19 U.S.C. § 1504(a), prior to the actual liquidation on August 26, 2004. As has been noted, however, plaintiff seeks to invoke this Court's jurisdiction pursuant to 19 U.S.C. § 1581(a). In order for the court to have jurisdiction over a claim under § 1581(a), a challenged decision by Customs must appear in a valid protest. *See, e.g., Novell Inc. v. United States*, 21 CIT 1141, 1142, 985 F. Supp. 121, 123 (1997) (holding that this Court's jurisdiction under 28 U.S.C. § 1581(a) is limited to those civil actions that contest the denial, either in whole or in part, of a protest). All Tools' deemed liquidation claim is raised for the first time in its complaint, and thus does not appear in a protest that Customs has denied. Therefore, the court does not have jurisdiction under 19 U.S.C. § 1581(a) to hear All Tools' claim. As such, Count III of the complaint is dismissed.

IV. The Claim That The Court Should Approve Protest No. 2

Finally, by Count IV, All Tools seeks an order from the court directing Customs to "approve" Protest No. 2 and "refund the duties with lawful interest." Compl. ¶ 34. This claim too is based on the theory that All Tools' complaint, although filed 454 days after Protest No. 2 was denied, is nonetheless timely, based on Customs' failure to assign the plaintiff a protest number. As has been seen, however, Count II of the Complaint, which was based on Mr. Carmona's mistake of fact claim found in Protest No. 2, has been found to have been untimely filed, and therefore does not provide the basis necessary for subject-matter jurisdiction, and has been dismissed. For the same reasons, Count IV of the complaint is dismissed.

CONCLUSION

For the foregoing reasons, this case is dismissed. Judgment shall be entered accordingly.

Dated: October 5, 2010
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON