# U.S. Customs and Border Protection

Slip Op. 09–132

PAPIERFABRIK AUGUST KOEHLER AG and KOEHLER AMERICA, INC., Plaintiffs, - and - MITSUBISHI INTERNATIONAL CORPORATION, MITSUBISHI HITECH PAPER FLENSBURG Gmbh, and MITSUBISHI HITECH PAPER BIELEFELD Gmbh, Plaintiff-Intervenors, v. UNITED STATES and the UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, - and - APPLETON PAPERS INC., Defendant-Intervenor.

Before: Pogue, Judge
Court No. 08–00430
**Public Version**

[Plaintiffs' motion for judgment on the agency record denied; judgment entered for Defendants.]

Dated: November 17, 2009

*Hunton & Williams LLP* (*Richard P. Ferrin* and *William Silverman*) for Plaintiffs.

*Steptoe & Johnson LLP* (*Jamie B. Beaber* and *Eric C. Emerson*) for Plaintiff-Intervenors.

*James M. Lyons*, General Counsel, *Neal J. Reynolds,* Assistant General Counsel for Litigation, Office of the General Counsel, U.S. International Trade Commission (*Marc A. Bernstein*) for Defendant U.S. International Trade Commission.

*King & Spalding LLP* (*Gilbert B. Kaplan*, *Daniel L. Schneiderman* and *Joseph W. Dorn*) for Defendant-Intervenor.

## *OPINION*

**Pogue, Judge:**

### Introduction

In this action, Plaintiff Papierfabrik August Koehler AG and its subsidiary importer Koehler America, Inc. (collectively "Plaintiffs" or "Koehler") seek review of the United States International Trade Commission's ("Defendant" or "the Commission" or "ITC") final determination that the domestic producers of certain light weight thermal paper ("LWTP") are threatened with material injury by reason of imports of subject LWTP from Germany. *See Certain Lightweight Thermal Paper from China and Germany*, 73 Fed. Reg. 70,367 (ITC

Nov. 20, 2008) (final determinations) ("*Comm'n Final Determination*").[1]

Because the court concludes that the Commission's determination, issued pursuant to Section 735(b)(1)(A)(ii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(b)(1)(A)(ii) (2006),[2] is supported by substantial evidence, Plaintiffs' motion for judgment on the agency record is denied, and the Commission's determination is affirmed in all respects. Plaintiffs essentially request that the court re-weigh evidence that the Commission alone has been authorized to weigh. *See Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1008–09, 33 F. Supp. 2d 1082, 1104 (1998) ("[T]he ITC has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis[,] [and] the court may not reweigh the evidence or substitute its judgment for that of the ITC.") (quotation marks and citations omitted), *aff'd* 216 F.3d 1357 (Fed. Cir. 2000).

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c).

## Background

### *A. Administrative Proceedings Below*

Beginning with its September 19, 2007, petition to the United States Department of Commerce ("Commerce" or "the Department") and the Commission to initiate investigations of certain LWTP from China, Germany, and Korea,[3] Appleton Papers, Inc. ("Appleton" or "Defendant-Intervenor") has alleged, inter alia, that these products were being sold at less than fair market value ("LTFV"). (Compl. ¶ 6; Def.-Intervenor's Mem. in Opp'n to Pls.' Mot. for J. on Agency R. Under Rule 56.2 ("Def.-Intervenor's Mem.") 3–4; *Comm'n Final Determination*, 73 Fed. Reg. at 70,367.)

After notice and administrative proceedings, Commerce, on October 2, 2008, issued its final determination, pursuant to 19 U.S.C. § 1673d(a)(1), finding that imports of LWTP from Germany are being,

[1] The views of the Commission are contained in *Certain Lightweight Thermal Paper from China and Germany*, Views of the Commission, USITC Pub. 4043, Inv. Nos. 701–TA–451 & 731–TA–1126–1127 (Final) (Nov. 2008), Admin. R. Pub. Doc. 285 ("*Comm'n Views* ").

[2] Further citation to the Tariff Act of 1930 is to Title 19 of the U.S. Code, 2006 edition.

[3] The investigation with respect to Korea was terminated due to insufficient import quantity. *Certain Lightweight Thermal Paper From China, Germany, and Korea*, 72 Fed. Reg. 70,343 (ITC Dec. 11, 2007) (preliminary determinations) ("The Commission also determines that imports of certain lightweight thermal paper from Korea are negligible, and therefore, terminates its investigation with regard to Korea."). The Commission's "determination concerning subject imports from China is not the subject of any litigation." (Def.'s Mem. in Opp'n to Mot. of Pls.' for J. on Agency R. Under Rule 56.2 ("Def.'s Mem.") 5 n.1.)

or are likely to be, sold in the United States at LTFV. *Lightweight Thermal Paper from Germany*, 73 Fed. Reg. 57,326 (Dep't Commerce Oct. 2, 2008) (notice of final determination of sales at less than fair value) ("*Commerce Final Determination* "). Koehler was a mandatory respondent in this investigation, *id.* at 57,327 n.4, and was assigned a weighted-average dumping margin[4] of 6.50% for all subject merchandise. *Id.* at 57,328. All other respondents received the same 6.50% rate. *Id.* There is no indication in the record that Koehler contested this final determination.

Following Commerce's determination, on November 20, 2008, the Commission issued its final determination that a domestic industry is threatened with material injury by reason of LWTP imports from Germany. *Comm'n Final Determination*, 73 Fed. Reg. at 70,367; *but see id.* at 70,367 n.2 (noting the dissenting opinions of Chairman Shara L. Aranoff, Vice Chairman Daniel R. Pearson, and Commissioner Deanna Tanner Okun). Giving effect to the Commission's determination, Commerce issued an antidumping duty order on LWTP from Germany. *Lightweight Thermal Paper from Germany and the People's Republic of China*, 73 Fed. Reg. 70,959 (Dep't Commerce Nov. 24, 2008) (antidumping duty orders)

Plaintiffs and Plaintiff-Intervenors now challenge the Commission's determination. Specifically, Plaintiffs contest the Commission's treatment of the relevant domestic industry; its decision to include the entire class of subject imports within its threat analysis; its determination regarding the likelihood of increase in German LWTP imports; its likely price effect determination; and its determination with respect to the vulnerability of the domestic industry. After describing the Commission's determinations and reasoning and explaining the relevant standard of review, the court will discuss each challenge in turn.

*B. Commission Determinations and Reasoning*

LWTP is paper with a thermal active coating which, when used in printers containing thermal print heads, reacts to heat to form images on paper. *Comm'n Views* at 5. This type of paper "is typically (but not exclusively) used in point-of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts." *Commerce Final Determination*, 73 Fed. Reg. at 57,327. Commerce's definition of the scope of imported merchandise under investigation included both "jumbo" rolls, a semifinished version of

[4] The weighted-average dumping rates were determined for the period from July 1, 2006 to June 30, 2007. *Commerce Final Determination*, 73 Fed. Reg. at 57,328. The Commission's period of investigation ("POI") was from January 1, 2006 to June 30, 2008. *Comm'n Views* at 3–4.

the product, and "slit" rolls, the end-use product. *See Commerce Final Determination*, 73 Fed. Reg. at 57,327 n.5; *Comm'n Views* at 5. Producers of jumbo rolls are referred to as "coaters," whereas producers who subsequently convert the jumbo rolls into slit rolls are referred to as "converters." *See Comm'n Views* at 5–8. Koehler and Plaintiff-Intervenors are coaters who accounted for all imports of LWTP from Germany subject to the investigation at issue in this case. *Id.* at 3. Appleton is one of the two domestic coaters of LWTP. *Id.* at 15.

Most LWTP is sold in the United States in basis weights of either 48 grams per square meter ("48 gram") or 55 grams per square meter ("55 gram"). *Id.* at 16. During the POI, the Commission found that domestic coaters' shipments of 55 gram LWTP far exceeded their shipments of 48 gram LWTP, *id.*; in fact, "domestic industry did not produce comparable 48 gram jumbo rolls for the vast majority of the period of investigation." *Id.* at 30. Appleton introduced a 48 gram product in 2007, which became available in the fall of that year. *Id.* At the same time, the quantity of shipments to the United States of 55 gram LWTP from Germany declined during the POI, while the quantity of shipments of 48 gram LWTP increased. *Id.* at 16–17.

The Commission determined that subject imports of 55 gram LWTP from Germany generally oversold the domestic like product, *see id.* at 32, while subject imports of 48 gram LWTP from Germany generally undersold the domestic like product. *See id.*[5] Nevertheless, the Commission found that sales of 48 gram LWTP from Germany "could not have taken significant sales or revenues from domestically produced 48 gram jumbo rolls throughout 2007, because Appleton did not offer such products during much of the year and [the other domestic coater] did not offer a competitive [] product." *Id.* at 36.

Although the Commission determined that "[o]verall domestic industry financial performance declined from 2005 to 2007," *id.* at 35, it did not "attribute the declines in 2007 financial performance to the increased quantities of subject imports from Germany, [] because the subject imports from Germany increased at a time of rising demand, did not capture significant additional market share, and did not have significant adverse price effects." *Id.* (footnote omitted). The Commission found that "the increase in subject imports from Germany involved [48 gram jumbo rolls, which were] types of products not consistently offered by the domestic industry, although by interim 2008 the domestic industry was increasingly selling 48 gram jumbo rolls."

[5] *See Certain Lightweight Thermal Paper from China and Germany*, Confidential Views of the Commission, Admin. R. Con. Doc. 522 ("*Comm'n Views (Conf.)* ") at 52–53 ("The [55 gram]subject imports from Germany oversold the domestic like product in [[ ]] quarterly comparisons. . . . The [48 gram]subject imports undersold the domestically produced product in [[ ]] quarterly comparisons.") (footnotes omitted).

*Id.* at 30–31 (footnote omitted). Accordingly, the Commission "conclude[d] that the subject imports from Germany did not have a significant adverse impact on the domestic industry as a whole during the [POI]." *Id.* at 36 (footnote omitted).

Nevertheless, the Commission determined that a threat of material injury did exist to the domestic industry by reason of the subject LWTP imports from Germany. *Comm'n Final Determination*, 73 Fed. Reg. at 70,367; *but see Comm'n Views* at 36 n.236 (noting that "Chairman Aranoff, Vice Chairman Pearson, and Commissioner Okun have made negative determinations on Germany and do not join the [threat of material injury portion] of this opinion" (citation omitted)). Specifically, the Commission found that "a continuation of the gradual increase in subject import volumes from Germany that occurred during the [POI] is likely in the imminent future," *Comm'n Views* at 36, noting that "[w]hile the German producers did not add any new LWTP production facilities during this period, they were able to increase capacity through a combination of achieving greater efficiencies and using capacity previously devoted to producing other products to produce LWTP instead," *id.* (citations omitted), and that "[t]he record contains no indication that the German producers cannot continue to increase capacity through such means in the imminent future." *Id.* (footnote omitted).

Further, the Commission found that "[a]s the German producers' capacity and shipments increased during the [POI], their exports to the United States increased roughly commensurately," *id.* at 37, and that this was "likely to continue in the imminent future," *id.*, because "[t]he United States was a significant export market for the German producers during the [POI], and the German producers project[ed] it [would] remain so in the imminent future." *Id.* (citation omitted). The Commission noted that Koehler planned to open a new coating facility in the United States that would not become operational until 2010, and that this "provide[d] a further incentive for Koehler, [a significant[6]] exporter of subject merchandise from Germany, to continue to increase its presence in the U.S. market in the imminent future while its projected U.S. facility is being planned and constructed." *Id.* (citation and footnote omitted).[7]

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[6] *See Comm'n Views (Conf.)* at 62 (characterizing Koehler as"the [[ ]] exporter of subject merchandise fromGermany"). *See also Comm'n Views* at 37 (same).

[7] Chairman Aranoff, Vice Chairman Pearson, and Commissioner Okun dissented, arguing that [[

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*Certain Lightweight Thermal Paper from China and Germany*, Confidential Dissenting Views of Chairman Aranoff, Comm'rs Pearson & Okun, Admin. R. Con. Doc. 532, at 1. The

Finally, the Commission determined that these "increased subject imports from Germany that are likely in the imminent future will have greater price effects than those observed during the [POI]." *Id.* It noted that "several considerations indicate that imports entering in the imminent future will be heavily concentrated in the 48 gram product," *id.*,[8] and that, due to Appleton's recent construction of a new facility[9] and introduction of its own 48 gram product, "48 gram jumbo rolls will increasingly be the focus of competition between [the like domestic product and the subject imports from Germany]." *Id.* at 38. Accordingly, the Commission concluded that "the [sales data for] German 48 gram jumbo rolls observed during the [POI][[10]] will have far greater significance in the imminent future." *Id.*; *see also id.* ("Because the record contains no evidence that the [trend] observed during the [POI] with respect to [48 gram LWTP] is likely to change, we conclude that it will likely continue in the imminent future.") (footnote omitted). So too the Commission found the domestic industry "vulnerable to the effects of additional subject imports," *id.* at 39, because of the "consistently unprofitable financial performance of the domestic industry during the [POI]." *Id.*

In determining the relevant domestic industry, in addition to jumbo roll coaters, the Commission also included converters within the scope of that domestic industry. *Id.* at 8. The Commission received questionnaire responses from twenty domestic converters, estimated to account for 62.1 percent of domestic LWTP conversion activities during the relevant period. *Id.* at 15. The Commission noted that while both of the two domestic coaters supported the petition for the imposition of an antidumping duty order, twelve out of twenty converters opposed the imposition of duties, and only three of these

dissenters noted that [[

]] *Id.* at 4. They further argued that [[

]] *Id.*

[8] *See Comm'n Views* at 37 (listing considerations including the fact that "Koehler, which is the predominant exporter of subject merchandise from Germany, discontinued its shipments of its principal 55 gram product to the United States in March 2008″; that "interim 2008 U.S. shipments of subject German imports of 48 gram jumbo rolls exceeded those of 55 gram jumbo rolls"; and that "the 48 gram product has seen increasing acceptance in the U.S. market").

[9] Appleton opened a new coating facility in West Carrollton, Ohio ("the West Carrollton facility") on August 6, 2008, *id.* at 15, which substantially increased domestic coating capacity. *Id.* at 34.

[10] *See Comm'n Views (Conf.)* 64 ("[T]he [[

]] by German 48 gram jumbo rolls observed during the [POI] will have far greater significance in the imminent future.").

twenty supported the petition with respect to Germany. *Id.* at 39 n.261. The Commission explained, however, that "[t]his is not especially surprising, insofar as the subject producers supply, and do not compete with, the U.S. converters," *id.*, and that, "[i]n any event, the positions of domestic producers in support or opposition to the petition do[] not override [the Commission's] review of the trade, pricing, financial data, and other information in the record indicating whether the domestic industry is materially injured or threatened with material injury by reason of the subject imports." *Id.* (citing *Certain Orange Juice from Brazil*, USITC Pub. 3930, Inv. No. 731–TA–1089 (Final) (Remand) (June 2007) at 14).

**Standard Of Review**

Where, as here, an action is brought under 19 U.S.C. § 1516a(a)(2) seeking review of a final determination of the Commission under 19 U.S.C. § 1673d, "[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).

The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting *SSIH Equip. S.A. v. U. S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983)). The agency's decision must be supported by substantial evidence on the record as a whole, *see generally Gerald Metals, Inc. v. United States*, 132 F.3d 716 (Fed. Cir. 1997), and "must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Thus, where only one reasonable conclusion can be drawn from the record, a determination contrary to that conclusion cannot be supported by substantial evidence. *Gerald Metals*, 132 F.3d at 720–723. On the other hand, the possibility of drawing two inconsistent conclusions from the evidence does not render the agency's determination unreasonable, *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966), and where "[s]ubstantial evidence exists on both sides of the issue[,] . . . the statutory substantial evidence standard compels deference to the [agency]." *Nippon Steel*, 458 F.3d at 1354.

## Discussion

### *A. Relevant Domestic Industry Analysis*

#### *1. Purported Focus on Appleton*

Plaintiffs first argue that the Commission unlawfully "limited [its] threat analysis entirely [to] predictions of the effect of future imports of 48-gram German jumbo rolls on one producer, Appleton." (Mem. in Supp. of Pls.' Mot. for J. on Agency R. Under Rule 56.2 ("Pls.' Mem.") 12 (citing *Comm'n Views (Conf.)* at 63–64 [*Comm'n Views* at 38]).)[11] In support of their argument, Plaintiffs point to 19 U.S.C. § 1673(2)(A) (Commission required to make determination with respect to "an industry in the United States") and 19 U.S.C. § 1677(4)(A) (defining "industry" as "the producers as a whole of a domestic like product") (Pls.' Mem. 10), and the Commission's own determination that the domestic industry "encompass[es] all converters and coaters of LWTP" (*id.* at 12 (citing *Comm'n Views (Conf.)* at 15 [*Comm'n Views* at 10])).

The record before the court, however, does not support Plaintiffs' argument. Contrary to Plaintiffs' assertions, the Commission did not focus exclusively on the effect of future German imports of 48 gram LWTP on Appleton, but rather consistently discussed its conclusions as to the effect of such importation on the industry as a whole. *See Comm'n Views* at 38 ("[T]he increased lower-priced imports of 48 gram jumbo rolls from Germany that are likely in the imminent future . . . will begin to have significant price effects on domestically produced 55 gram jumbo rolls."); *id.* ("[A]s 48 gram products become more important in the U.S. market, the low prices German producers offer on their 48 gram products will restrict the ability of domestic producers to adjust prices on 55 gram products commensurately with costs."); *id.* at 39[12] ("In light of the consistently unprofitable financial performance of the domestic industry during the [POI], we find the industry to be vulnerable to the effects of additional subject imports." (footnote omitted)); *see also id.* 35 ("Overall domestic industry financial performance declined from 2005 to 2007. The combined operating margin of coaters and converters was negative [throughout the POI]." (citation and footnote omitted)).

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[11] Plaintiffs claim that the Commission's analysis made no mention of the subject imports' threatened impact on either the other domestic coater, or the twenty converters included in the scope of the Commission's industry determination. (Pls.' Mem. 13–14; Reply in Supp. of Pls.' Mot. for J. on Agency R. Under Rule 56.2 ("Pls.' Reply") 2–4.)

[12] The court notes that, in addition to Appleton's 55 gram product, "Kanzaki's [the other domestic coater] 53 gram product is included in the tabulation for 55 gram products." *Comm'n Views* at 16 n.107.

Moreover, it is within the Commission's discretion to place greater weight on certain members of the domestic industry, in proportion to their relative importance. "[A]s legislative history shows[,] . . . '[i]n making its injury determination, the [Commission] may give greater weight to one or the other group within the industry, in proportion to their relative importance, if either group accounts for a significant portion of the total value of the processed product.'" *Tropicana Prods., Inc. v. United States*, 31 CIT __, __, 484 F. Supp. 2d 1330, 1341–42 (2007) (quoting S. Rep. No. 100–71, at 111 (1987)); *see also General Motors Corp. v. United States*, 17 CIT 697, 703–06, 827 F. Supp. 774, 782–83 (1993) (upholding the Commission's reliance on data from a particular member of the industry when "the majority did not disregard other data in the record, [and] emphasized that it considered all the survey data").

Weighing the evidence before it, the Commission determined that 48 gram standard-sensitivity jumbo rolls will increasingly be the focus of competition between German subject imports and the domestic industry, *Comm'n Views* at 38, and that Appleton was the sole domestic producer of such rolls. *See id.* at 16, 30, 36.[13] Accordingly, where, as noted above, the Commission has emphasized the likelihood of future injury to the domestic industry as a whole, to the extent that the Commission also devoted substantial discussion to Appleton, its placement of a particular emphasis on the most significant domestic competitor was reasonable under the circumstances.[14] *See* Tropicana Prods., 31 CIT at __, 484 F. Supp. 2d at 1341–42.

*2. Consideration of Domestic Industry Opposition*

Plaintiffs also contend that the Commission acted contrary to law by disregarding twelve domestic converters' opposition to the petition,

[13] *See also Certain Lightweight Thermal Paper from China and Germany*, Confidential Staff Report to the Commission, Inv. Nos. 701–TA–451 and 731–TA–1126–1127 (Final) (Oct. 20, 2008), Admin. R. Con. Doc. 497 ("*Comm'n Final Staff Report (Conf.)* ") V–11 n.26 (explaining that, [[

]]). Conversely, German imports of such merchandise during the POI consisted of products from only two German producers. *See Comm'n Views* at 3, 16.

[14] (*See* Def.'s Mem. 24 ("Because, as Koehler acknowledged to the Commission, 'German imports do not compete with U.S. producers of slit rolls,' and there was no competition for sales between the German exporters and the U.S. converters, the Commission's analysis reasonably focused on the significant area of competition between the subject imports and the domestic industry." (quoting German Resp'ts' Prehr'g Br. (Final) (Sept. 22, 2008), Admin. Pub. R. Doc. 170, at 8)).) Further, as Defendant-Intervenor points out, "Appleton's introduction of a 48 gram product in the fall of 2007 and its increasing capacity to produce 48 gram product with its construction of the New Carrollton facility was a pivotal difference between the injury analysis (based on data through June 2008) and the threat analysis (which considered the start-up of Appleton's new plant in August 2008)." (Def.-Intervenor's Mem. 16 (citing *Comm'n Views (Conf.)* at 24, 63–64 [*Comm'n Views* at 15, 38]).)

citing the court's ruling in *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 17 CIT 146, 163, 818 F. Supp. 348, 364 (1993), aff'd, 44 F.3d 978, 986 (1994), for the proposition that "careful consideration of opposition to the petition by domestic producers is even more important in evaluating a threat case than in a present material injury analysis." (Pls.' Mem. 14; Pls.' Reply 6.) Plaintiffs further argue that, because the Commission did not exclude any converter from consideration under the statute's related party provision,[15] the Commission cannot "ignore or reject the fact that German imports have either no effect or a positive effect on a large segment of the domestic industry." (Pls.' Reply 8–9 & n.4 (listing evidence in the record in support of its claim that "converters depend on German jumbo rolls of 48-gram as a vital input").)

There is, however, no statutory requirement that the Commission give dispositive weight to industry opposition to the petition in making its threat of material injury determination. *See generally* 19 U.S.C. §§ 1677(7)(B) & (F). Although, "[i]n making a determination of threat of material injury, [the] ITC must *weigh* industry views and views of other interested parties, together with all other relevant economic factors as appropriate under the record of each particular investigation," *Suramerica*, 44 F.3d at 984 (emphasis added),[16] the Commission "may use its sound discretion in determining the weight to afford these and all other factors." *Id* at 984. Further, "if the independent data clearly support a finding of threat of injury," then a threat of injury determination may be warranted "even where the majority [of the domestic industry] either does not support or actively opposes the initiating petition." *Suramerica*, 17 CIT at 163, 818 F. Supp. at 364.

Recognizing the ITC's authority to determine the weight of evidence of industry support, Defendant-Intervenor correctly points out that,

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[15] *See* 19 U.S.C. § 1677(4)(B)(i) ("If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry.").

[16] *See also id.* at 983–84 (explaining that 19 U.S.C. § 1677(7)(F)(i) "directs that [the] ITC 'shall' consider all relevant economic factors in a threat investigation," and that "[b]ecause the ITC must consider all 'relevant economic factors,' it must examine, beyond the factors specified in section 1677(7), any other factors that tend 'to make the existence of a [threat of material injury] more probable or less probable than it would be without the [factors]" (alteration in original) (quoting Fed. R. Evid. 401 (defining relevancy)) (additional citation omitted)).

when members of the domestic industry are viewed proportionately, based on their total production values, a majority of the domestic industry supported the petition.[17]

With respect to the opposing converters, the Commission found that these members of the domestic industry are supplied by, and are not in competition with, the subject imports, *Comm'n Views* at 39 n.261, and that their opposition "does not override [the Commission's] review of the trade, pricing, financial data, and other information in the record," *id.*, on the basis of which Defendant made its affirmative threat of injury determination. Accordingly, the Commission "properly considered and discounted the opposition to the petition,"[18] and it is not the province of this court to "reweigh the evidence or substitute its judgment for that of the ITC." *Goss Graphics*, 22 CIT at 1008–09, 33 F. Supp. 2d at 1104 (citations omitted).

### *B. Consideration of 48 Gram Product Included in Commerce's Published Margin*

Next, Plaintiffs contend that the Commission erred by not removing Koehler's 48 gram product from its threat of material injury analysis, arguing that "Koehler submitted [to the Commission] the record from the Commerce investigation showing . . . that none of Koehler's 48-gram product was dumped" (Pls.' Mem. 16 (emphasis omitted) (citing Papierfabrik August Koehler AG & Koehler America, Inc. Post Hr'g Br. (Final), Admin. R. Con. Doc. 490, at [6–7], Ex. H[19])) and that "it is vital that the Commission consider whether [] the allegedly threatening subset of imports were in fact being dumped."

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[17] (See Def.-Intervenor's Mem. 20 ("Both domestic coaters and three converters supported the petition, and together they represent [[ ]] the LWTP production performed by the domestic industry. In addition to the three supporting converters, [[ ]]." (citing *Comm'n Views (Conf.)* at 13 n.46, 67 n.261 [*Comm'n Views* at 9 n.46, 39 n.261]; *Comm'n Final Staff Report (Conf.)* at III-3 Table III-1 (identifying each industry member's position on the petition), III-5 Table III-2 (identifying coaters' production values), III-7 Table III-4 (identifying converters' production values), III-8 Table III-5 (identifying production values of supporting converters))).)

[18] *See Tropicana Prods.*, 31 CIT at __, 484 F. Supp. 2d at 1348 (explaining that in *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1216–17, 704 F. Supp. 1075, 1093 (1988), "the Commission expressly found that the processors opposing the petition were more dependent upon [subject] imports than those supporting the petition," and that "[t]he court affirmed the determination").

[19] At oral argument, Plaintiffs' counsel informed the court that the evidence allegedly showing that none of Koehler's 48 gram product was dumped is actually included in Koehler & Mitsubishi HiTec Prehr'g Br. (Final), Admin. R. Con. Doc. 460, Ex. 13. This confusion further emphasizes the uncertainty with regard to the factual basis underlying Plaintiffs' argument.

(Pls.' Mem. 17.)[20] In support of their argument, Plaintiffs point to the language of the antidumping statute,[21] the legislative history to the Uruguay Round Amendments Act,[22] the Federal Circuit's decision in *Gerald Metals*, 132 F.3d 716,[23] the Commission's own policy of removing from its analysis companies individually found to have had zero or *de minimis* dumping margins,[24] as well as the Federal Circuit's decision in *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989).[25]

As the court will explain below, however, because a reasonable reading of the record on this issue supports the Commission's factual conclusions, and because the legal framework within which those factual conclusions have been made is sufficiently clear and established, the court need not resolve any potential tension between the parties' competing legal positions on this issue.

First, the Commission is presumed to have considered all of the evidence before it. *See Gonzales v. West*, 218 F.3d 1378, 1381 (Fed. Cir. 2000) ("[A]bsent specific evidence indicating otherwise, all evidence

[20] In making this argument, Koehler omits to note that the exhibit it submitted was only for calculating an estimated margin, *see* 19 U.S.C. § 1673d(c)(1)(B)(i)(I), for Koehler's sales during Commerce's period of investigation. *See Commerce Final Determination*, 73 Fed. Reg at 57,327.

[21] (*See* Pls.' Mem. 17–18 (quoting 19 U.S.C. § 1677(7)(F)(ii) (characterizing the Commission's determination as "whether further *dumped* or subsidized imports are imminent" (emphasis added))).) Plaintiffs argue that because "Congress included specific language in one section of [the] law [19 U.S.C.§ 1677(7)(F)(i)] but omitted it from another, related section of the same law [19 U.S.C. § 1677(7)(F)(ii)]" (Pls.' Reply 13), the court should "presume that the use of the term [d]umped imports [in 19 U.S.C. § 1677(7)(F)(ii)] rather than [s]ubject imports was deliberate." (*Id.*) Because Congress could have said 'subject imports' but said 'dumped imports,' Plaintiffs contend that "Congress did not intend the term [dumped imports] to have the same meaning as [s]ubject imports." (*Id.* at 14 (emphasis omitted).)

[22] (*See* Pls.' Mem. 18 (quoting H.R. Rep. No. 103–826, pt. 1, at 854 (1994) (excerpt from Statement of Administrative Action, explaining that changes to the portion of the antidumping statute dealing with determinations of threat of material injury were made "to track more closely the language contained in Articles 3.7 and 15.7 of the [Uruguay Round] Agreements requiring that further *dumped* or subsidized imports be 'imminent' and that 'material injury would occur' absent relief" (emphasis added)).)

[23] (*See* Pls.' Mem. 19 (quoting *Gerald Metals*, 132 F.3d at 723 ("[P]roper consideration of the effect of fairly-traded imports on the domestic market . . . is also necessary to assess whether the dumping duties are remedial rather than punitive.")).)

[24] (*See* Pls.' Mem. 20 (citing *Wooden Bedroom Furniture from China*, USITC Pub. 3743, Inv. No. 731–TA–1058 (Final) (Dec. 2004), at IV-18 Table IV-8; *Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, USITC Pub. 3273, Inv. Nos. 701–TA–387–391 (Final) and 731–TA–816–821 (Final) (Jan. 2000), at 22 n.122).)

[25] (*See* Pls.' Mem. 21 (citing *Algoma Steel*, 865 F.2d at 242–43 (explaining that "there is no *per se* rule either way" with respect to the issue of whether the Commission must consider acomputer printout from Commerce showing that only half of a company's individual sales were at LTVF).)

contained in the record at the time of the [agency]'s determination . . . must be presumed to have been reviewed by [the agency], and no further proof of such review is needed." (citations omitted)); *Suramerica*, 17 CIT at 164, 818 F. Supp. at 365 (quoting *Rhone Poulenc, S.A. v United States*, 8 CIT 47, 55, 592 F. Supp. 1318, 1326 (1984)). The Commission's decision not to give more weight to the Plaintiffs' particular piece of evidence, in light of Commerce's finding of dumping for the class of Plaintiffs' merchandise, was not unreasonable on the record here. *Accord Algoma Steel*, 865 F.2d at 242 ("[I]t is not arbitrary, capricious, or contrary to law for the ITC to refuse to consider a computer printout showing the breakdown of [specific] sales during a six-month period between LTFV and [more than fair value] sales ['MTFV']."). 

The *Algoma Steel* court also opined that "[t]his is not to say that a similar printout might not justify consideration if the raw data were supported by reasons specific to the particular case, why sales at MTFV were not relevant to the injury determination." *Id.* But Plaintiff makes no demonstration of reasons specific to this case why the alleged MTFV sales are not relevant here. To the contrary. Here the agency concluded, as noted above, that Plaintiff's "lower-priced imports of 48 gram jumbo rolls . . . will begin to have significant price effects on domestically produced 55 gram jumbo rolls." *Comm'n Views* at 38. Plaintiff does not challenge this conclusion. Thus, contrary to Plaintiff's claim, the 48 gram jumbo rolls are directly relevant to the ITC's finding of a threat of material injury.

Second, the problem with Plaintiffs' legal argument is that the statute requires that the Commission's threat of material injury determination must be based on a finding that the threat to relevant domestic industry is by reason of imports "*of the subject merchandise*." 19 U.S.C. § 1677(7)(F)(i) (emphasis added).[26] The statute defines "subject merchandise" as "the class or kind of merchandise that

[26] Plaintiffs are correct in interpreting the antidumping statute to require the Commission, in an appropriate case, to differentiate between dumped and fairly traded merchandise. *See Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006); *Gerald Metals*, 132 F.3d at 723. This, however, is not such a case. The issue presented here differs from that addressed by the Federal Circuit in *Bratsk*, where the court held that "[w]here commodity products are at issue and fairly traded, price competitive, *non-subject* imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers." *Bratsk*, 444 F.3d at 1373 (emphasis added). In this case, there were no fairly traded non-subject imports competing with the relevant domestic products: "During the [POI], the domestic industry and the subject imports supplied virtually the entire U.S. LWTP market. . . . [T]he domestic industry supplies both jumbo rolls and slit rolls of LWTP, subject imports from China are exclusively slit rolls, and subject imports from Germany are

is within the scope of an investigation [] . . . ." 19 U.S.C. § 1677(25). "The ITC may not modify the class or kind of imported merchandise examined by Commerce." *USEC Inc. v. United States*, 34 F. App'x 725, 730 (Fed. Cir. 2002); *see also Algoma Steel Corp. v. United States*, 12 CIT 518, 522, 688 F. Supp. 639, 644 (1988) ("In applying [the antidumping] statute, ITC does not look behind [Commerce]'s determination, but accepts [Commerce]'s determination as to which merchandise is in the class of merchandise sold at LTFV."), *aff'd* 865 F.2d 240 (Fed. Cir. 1989); *Nippon Steel*, 458 F.3d at 1350 ("Congress created a highly specialized system for resolving antidumping allegations, which recognizes and exploits each participant's area of expertise.").

By statute, therefore, the Commission is required to make a determination of whether an industry in the United States is threatened with material injury "by reason of imports . . . of the merchandise with respect to which [Commerce] has made an affirmative determination under [19 U.S.C. § 1673d(a)(1)]." 19 U.S.C. § 1673d(b)(1). For purposes of this section, a "determination" of Commerce under section 1673d(a)(1) is the final determination published in the Federal Register. *See id.* § 1673d(d).

In this case, the Department of Commerce, exercising its authority under 19 U.S.C. § 1673d(a)(1), "determined that imports of [LWTP] from Germany are being, or are likely to be, sold in the United States at [LFTV]." *Commerce Final Determination*, 73 Fed. Reg. at 57,326. Commerce did not differentiate among the various products included within the scope of the subject merchandise — LWTP — and published a single weighted-average dumping margin for the entire class. *Id.* at 57,327–28. Indeed, the Department specifically stated that:

> As [Commerce's] final determination is affirmative and in accordance with section 735(b)(2) of the Act[19 U.S.C. § 1673d(b)(2)], the ITC will determine . . . whether the domestic industry in the United States is. . . threatened with material injury, by reason of imports or sales (or the likelihood of sales) for *importation of the subject merchandise*. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing [United States Customs and Border Protection] to assess antidumping duties *on all imports of the subject merchandise* . . . .

*Id.* at 57,328 (emphasis added).

exclusively jumbo rolls." *Comm'n Views* at 16. *See also Comm'n Views (Conf.)* at 25 ("Nonsubject imports supplied a very small share of the market, never accounting for more than [[ ]] percent of apparent U.S. consumption at any point during the [POI].").

Accordingly, contrary to Plaintiffs' assertions, the Commission properly included all merchandise within the class of merchandise determined by Commerce to have been sold at LTFV within the scope of its threat of material injury determination. *Accord Algoma Steel*, 12 CIT at 522, 688 F. Supp. at 644.[27]

Plaintiffs place significant weight upon the evidence that they claim shows that some particular subset of sales were found by Commerce not to have been dumped. However, as Defendant points out, if Commerce's final weighted-average dumping margin for the entire class of subject merchandise may be too high for some set of sales, it is conversely too low for others.[28] *Accord Algoma Steel*, 865 F.2d at 241 ("Commerce, determining that sales at LTFV have occurred, normally . . . states a 'dumping margin' which is a weighted average adjusting appropriately for the MTFV sales."). Moreover, Plaintiffs' argument seeks to isolate one alleged component of the data from Commerce's record, ignoring the other factors that contribute to Commerce's affirmative dumping determination with respect to the entire class of subject imports.

The thrust of Plaintiffs' argument appears to be that Koehler's 48 gram product should have been excluded from Commerce's dumping determination, but if Plaintiffs believed that the assessed 6.5% dumping margin failed to accurately reflect their pricing practices, or that 48 gram LWTP should have been excluded from the scope of subject merchandise, this is a matter that should have been taken up in a challenge of that determination under 19 U.S.C. § 1516a(a)(2)(B)(i). Plaintiffs have failed to do so,[29] and the Commission did not err in considering within the scope of its threat of material injury determi-

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[27] *See also Sony Corp. of Am. v. United States*, 13 CIT 353,360, 712 F. Supp. 978, 984 (1989) ("Because [the relevant] imports were part of the class or kind of merchandise for which Commerce had made an affirmative determination, the Commission was required to include such imports in its injury investigation. As noted in *Algoma* [,] . . . in applying 19 U.S.C. § 1673 ITC does not look behind [Commerce]'s determination as to which merchandise is in the class of merchandise sold at LTFV." (alteration and quotation marks and citation omitted)); *USEC, Inc. v. United States*, 25 CIT 49, 56, 132 F. Supp. 2d 1, 8 (2001) (quoting *Algoma* for proposition that the Commission does not look behind Commerce's determination as to which merchandise is in the class of merchandise sold at LTFV); *Goss Graphics*, 22 CIT at 995, 33 F. Supp. 2d at 1093 (same).

[28] (*See* Def.'s Mem. 18 n.8 ("[A]s a logical matter, accepting Koehler's argument that imports in discrete non-dumped transactions are 'fairly traded' would change the margin for the remaining imports, those Koehler presumably deems to be 'dumped.' The applicable margin for the imports Koehler would deem to be 'dumped' would be higher than the margin published by Commerce.(This is because the amount of dumping would be no lower, but the volume of imports in dumping transactions would be reduced.)").)

[29] 19 U.S.C. § 1516a(a)(2)(A)(i)(II) requires that such challenge be brought within thirty days of the date of publication of the antidumping duty order in the Federal Register. Plaintiffs have missed that deadline.

nation the entire class of subject merchandise for which Commerce published an affirmative dumping determination.[30]

*C. Likelihood of Increase in German LWTP Imports*

*1. Determination of Likely Further Product-Shifting*

Plaintiffs next argue that the Commission relied on conclusions based on mere conjecture or supposition in making its determination that German producers are likely to increase imports to the United States in the immediate future. (Pls.' Mem. 26–31; Pls.' Reply 18–23.) Plaintiffs argue that the Commission's extrapolation of trends observed during the POI — when German producers "were able to increase capacity through a combination of achieving greater efficiencies and using capacity previously devoted to producing other products to produce LWTP instead," *Comm'n Views* at 36 — was not supported by substantial evidence. Plaintiffs contend that "[t]he German producers' inability to prove the negative [*i.e.*, that trends observed during the POI would not continue] . . . does not constitute substantial evidence on the record." (Pls.' Mem. 27.)

Contrary to Plaintiffs' assertions, however, the Commission properly considered the potential for product-shifting as part of its determination with respect to the likelihood of increased subject imports, *see* 19 U.S.C. § 1677(7)(F)(i)(VI) (listing "the potential for product-shifting" among factors that the Commission is required to consider in its threat of material injury analysis), and properly employed a 'trend' analysis to extrapolate to the near future trends observed during the POI. *See Asociacion de Productores de Salmon y Trucha de Chile AG v. U.S. Int'l Trade Comm'n*, 26 CIT 29, 38, 180 F. Supp. 2d 1360, 1370 (2002) ("The Court of International Trade has previously approved such a 'trend' analysis as reasonable." (citing *Bando Chemi-*

[30] Because the case law and past Commission practice cited to by Plaintiffs in support of their arguments on this issue all involved situations where, unlike here, Commerce published zero or *de minimis* margins, they do not affect the analysis in this case. The court notes that there is no tension between the Commission's practice of excluding companies for which Commerce has published zero or *de minimis* margins from its injury analysis and the Commission's position that it is not required to look behind Commerce's final dumping determination in this case — where, unlike here, Commerce itself has published zero or *de minimis* margins as part of its final determination, the Commission may exclude such companies from its investigation without supplanting Commerce's own analysis.

Neither is the court's reasoning affected by, as Plaintiffs suggest, recasting the inquiry as one of causation. (*See* Pls.' Reply 10.) The requirement that the Commission provide a showing of causal connection between the LTFV merchandise and the threat of injury is derived from language in the statute mandating that the threat be "by reason of imports . . . of the merchandise with respect to which [Commerce] has made an affirmative determination under [19 U.S.C. § 1673d(a)(1)]," 19 U.S.C. § 1673d(b)(1); *see Gerald Metals*, 132 F.3d at 720 — in this case, the entire class of subject merchandise.

*cal Industries, Ltd. v. United States*, 17 CIT 798, 807 (1993), *aff'd*, 26 F.3d 139 (Fed. Cir. 1994); *Iwatsu Elec. Co. v. United States*, 15 CIT 44, 55, 758 F. Supp. 1506, 1515–16 (1991))). The record as a whole demonstrates that product-shifting in fact occurred to a significant degree during the POI, *Comm'n Views* at 36, whereas, as the Commission pointed out, "[t]he record contains no indication that the German producers cannot continue to increase capacity through such means in the imminent future." *Id.*

Again, "[b]ecause of th[eir] expertise, Commissioners are the fact-finders in the material injury determination: 'It is the Commission's task to evaluate the evidence it collects during its investigation.'" *Nippon Steel*, 458 F.3d at 1350 (quoting *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996)). On the record before the court, the Commission's projections based on product-shifting trends observed during the POI are reasonable.

*2. Effect of Appleton's New West Carrollton Facility*

Plaintiffs also contend that the Commission's determination of a likely increase in German subject imports "is further contradicted by substantial evidence on the record showing that product entering the market from Appleton's new West Carrollton facility will result in increased U.S. shipments and decreased German shipments." (Pls.' Mem. 27.) Plaintiffs argue that the Commission "implicitly conclude[d], without any basis, that German producers would continue an endless upward trajectory in exports to the United States in the face of not only a projected slowdown in U.S. demand, but also a [significant] increase in Appleton's coating capacity." (*Id.* 30.)

Again, the Commission is presumed to have considered all of the evidence before it. *Gonzales*, 218 F.3d at 1381; *Suramerica*, 17 CIT at 164, 818 F. Supp. at 365. Further, as reflected in the Commission's extensive discussion of Appleton's new West Carrollton facility throughout its opinion, as well as the crucial role played by this factor in supporting the Commission's affirmative threat of injury determination, notwithstanding its negative present injury determination, *see Comm'n Views* at 38–39, it is clear that the Commission considered the effect of this new facility in reaching its conclusions.

As noted above, unless the presence of this evidence in the record creates a situation where only one reasonable conclusion can be drawn, *see Gerald Metals*, 132 F.3d at 720, the fact that Plaintiffs can interpret the evidence in a way contrary to the interpretation reached by the Commission does not make the Commission's determination unsupported by substantial evidence. *See Consolo*, 383 U.S. at 620;

*Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). Here, a reasonable reading of the record permits the conclusion that the product-shifting trends experienced during the POI were likely to continue in the near future and that these trends would not be negated by Appleton's increased capacity at West Carrollton, because the new facility's effect on domestic production would be moderated.[31] The record also evidences that demand would continue to grow. *See Comm'n Views* at 14–15. Accordingly, the record does not point to only one reasonable conclusion, and it is once more not the province of this court to re-weigh the evidence that the Commission alone is, in its expertise, entrusted to consider and weigh. *See Nippon Steel*, 458 F.3d at 1350.

*3. Effect of Koehler's Plan to Open a New U.S. Facility in 2010*

Finally, Plaintiffs contend in this regard that the Commission's conclusion that Koehler's plans to open a new coating facility in the United States in 2010 provide an added incentive for Koehler to increase its presence in the U.S. market in the interim (*i.e.*, imminent future) is also based on conjecture. (Pls.' Mem. 30.) Plaintiffs argue that the Commission "provide[s] not a shred of support in the record for this assumption, and indeed it is contradicted by Koehler's own business plans, and rendered highly implausible by the massive increase in capacity that came online in August 2008 from Appleton's West Carrollton facility." (*Id.* 30–31.)

Defendant responds that the Commission's decision not to rely on Koehler's own business plans was within the Commission's discretion. (Def.'s Mem. 30.)[32] In supporting its decision to disregard Plaintiffs' projections, Defendant points to what it perceived as internal

[31] (*See* Def.'s Mem. 36 ("Koehler mistakenly assumes that Appleton's capacity would increase commensurately with the increase in capacity at West Carrollton. In fact, Appleton planned to [[

]]."(citing Appleton Papers Inc. U.S. Producers' Questionnaire (Final), Admin. R. Con. Doc. 367 ("Appleton Questionnaire"), Ex. [1] at 45–46)).)

[32] The Defendant cites *Salmon y Trucha*, 26 CIT at 37–38,180 F. Supp. 2d at 1370 (Commission acted reasonably in not relying principally on data furnished by respondents projecting capacity declines); *Companhia Paulista de Ferro-Ligas v. United States*, 20 CIT 473, 484–85 (1996) (Commissioner acted reasonably by not relying on respondent's projections when they were inconsistent with historical pattern of conduct and could not be reconciled with other evidence)). (Def.'s Mem. 30–31.) *See also* Def.-Intervenor's Mem. 23 (citing *Geo Specialty Chems., Inc. v. United States*, No. 08–00046, 2009 WL 424468, at *6 (CIT Feb. 19,2009) (approving the Commission's rejection of "foreign producers' projections that imports would decrease").

inconsistencies within Koehler's business plan.[33] Further, Defendant notes that "Koehler's business plan attributed likely export declines in part to a consideration whose importance a Koehler official downplayed in sworn testimony [before the Commission]" (*id.* 32), and that this "also provided a basis for [the] Commission's decision not to give weight to the projected declines." (*Id.*) Thus, Defendant argues that:

> the Commission reasonably concluded that Koehler would not voluntarily retreat from the U.S. market during the year it was building its new facility, thereby surrendering market share to Appleton. To the contrary, the Commission's conclusion that Koehler's projected U.S. facility provided it with an incentive to increase its presence in the U.S. market was entirely consistent with the thrust of the Koehler business plan.

(*Id.* 31.)

Defendant-Intervenor further argues that "the incentive to build customer relationships and product acceptance in advance of constructing a production facility is a reasonable presumption." (Def.-Intervenor's Mem. 27 (quoting *Nippon Steel Corp. v. United States*, 19 CIT 450, 480 (1995) ("Once purchasers have an established supply relationship, the established supplier has an advantage, and the competing supplier is forced to beat the import price, probably by a substantial margin.")).)

With respect to this issue, Plaintiffs again essentially ask the court to re-weigh the evidence before the Commission, which the court must again decline to do. As noted above, the Commission reasonably concluded, based on the record before it that, in light of trends experienced during the POI, subject German imports are likely to continue to increase in the immediate future. Because it is not unreasonable for the Commission to have concluded "that Koehler would not voluntarily retreat from the U.S. market during the year it was building its new facility" (Def.'s Mem. 31), the court cannot agree that Plaintiffs' interpretation of the effect of Koehler's plans to open a new U.S. facility is the only reasonable interpretation. *See Gerald Metals*, 132 F.3d at 720. Accordingly, the court cannot agree that the Commission's determination is unsupported by substantial evidence.

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[33] (See Def.'s Mem. 31 ("On the one hand, [Koehler] projected [[ ]]. On the other, it [[ ]]." (citing Papierfabrik August Koehler AG Foreign Producers' Questionnaire, Admin. R. Con. Doc. 525, Attach. 3 at 6, 10)); *see also* Def.-Intervernor's Mem. 24 (noting that while Koehler asserted that "'it had [[ ]],' [] the Commission observed that Koehler [[ ]]." (quoting *Comm'n Views (Conf.)* at 61 n.239)).)

*D. Likely Price Effects Determination*

The Commission generally defends its determination of likely price effects as based on two unchallenged findings. First, the Commission determined that the 48 gram product, as opposed to the 55 gram product, "would be the focus of competition between the domestic like product and the subject imports in the imminent future" (Def.'s Mem. 33); *see also Comm'n Views* at 38, and, second, that "the subject imports from Germany [tended to undersell] the domestically produced 48 gram product during the [POI]." (Def.'s Mem. 33.)[34] Defendant explains that "[t]he Commission consequently concluded that the [price differential] observed for the 48 gram product during the [POI] was likely to continue in the imminent future, and that it would impede the domestic industry's attempts to gain or maintain sales of that product." (*Id.*)

Plaintiffs maintain that the Commission should have instead concluded that, regardless of any price effects from increased subject imports from Germany, Appleton would lower its prices, as purportedly evidenced by (1) Appleton's business plan, and (2) basic laws of supply and demand. The court will consider each of these arguments in turn.

*1. Likelihood of Lower Domestic Prices Based on Appleton's Business Plan*

Plaintiffs first argue that the Commission's finding of likely price effects is unsupported by substantial evidence by asserting that the Commission unreasonably failed to conclude from the record that Appleton's new West Carrollton facility was intended to allow Appleton to cut its prices on 48 gram LWTP, thereby preempting any price effects from cheaper German products. (*See* Pls.' Mem. 31–33.) Specifically, Plaintiffs contend that Appleton's business plan, "the only contemporaneous documentation provided regarding the [West Carrollton] investment decision (*i.e.*, that was not prepared in the context of the investigation)" (Pls.' Mem. 32) supports the conclusion that Appleton intended to cut prices once the new facility was up and running.[35]

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[34] (*See* Def.'s Mem. 33 (noting that subject imports from Germany "[[ ]] the domestically produced 48gram product during the [POI]); s*ee also Comm'n Views (Conf.)* at 53 ("The [48 gram] subject imports [from Germany] undersold the domestically produced product in [[ ]] quarterly comparisons." (citation omitted)).)

[35] (*See* Pls.' Mem. 33 ("[[

]]" (emphasis omitted)).)

Defendant contests Plaintiffs' interpretation of Appleton's business plan,[36] and argues that the Commission's alternative reading of this plan "was consistent with the public testimony of Appleton's Chief Executive Officer that Appleton's decision to invest in its West Carrollton's facilities was based on the pricing and demand conditions that existed when the investment decision was made in 2006, and that subsequent pricing declines imperiled that investment." (Def.'s Mem. 35 (citing Transcript of Open Session of Comm'n Hr'g held on Oct. 2, 2008 (Revised and Corrected Copy), Admin. R. Pub. Doc. 258, at 58–60).) Finally, Defendant asserts that Plaintiffs "point[] to nothing in the record indicating that Appleton was making any profit from LWTP production at its [n]ew [West] Carrollton facility, much less that its production was so profitable that it would have an incentive to cut prices." (*Id.* at 35–36 (emphasis omitted)).[37]

The Defendant is correct. There is nothing manifestly unreasonable about the Commission's reading of Appleton's business plan and its reliance on testimony from Appleton's Chief Executive Officer. The Commission's reasoning with respect to its likely price effects determination — that, unlike the situation during the POI, the 48 gram product rather than the 55 gram product will be the focus of competition between subject German imports and domestic producers, and that, given trends seen during the POI, the 48 gram product from Germany will likely undersell domestically produced 48 gram product, *see Comm'n Views* at 32, 37–39 — is also not unreasonable on the evidence before it.

### *2. Likelihood of Lower Domestic Prices Based on Increased Domestic Supply*

In support of their challenge to the Commission's finding of likely price effects, Plaintiffs further argue that basic economic principles of supply and demand also support a conclusion from the record that Appleton would cut prices after opening its new facility. (Pls.'s Mem.

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[36] (*See* Def.'s Mem. 35 ("The Commission found, and Koehler concedes, that the Appleton business plan projected [[ ]]. The Commission further found, and Koehler does not contest, that the prices Appleton charged for the [[ ]]. Consequently, Appleton's projections in its business plan [[ ]], than the most recent prices in the record before the Commission." (citing *Comm'n Views (Conf.)* at 65 n.257; Appleton Questionnaire, Ex. [1] at 43; Pls.' Mem. 33)).)

[37] (*See also id.* at 36 (noting that "[t]he record[] . . .indicates that Appleton had [[ ]] in 2006 on LWTP operations." (citing *Comm'n Final Staff Report (Conf.)* at VI-5–6; *Certain Lightweight Thermal Paper from China and Germany*, Verification Report, Inv. Nos. 701–TA–451 and 731–TA–1126–1127 (Final) (Oct. 7, 2008), Admin. R. Con. Doc. 486)).)

33–36.) Plaintiffs note that the Commission acknowledged Appleton's projection that its new facility "will increase its capacity of the subject product" (*id.* 31 (quoting *Comm'n Final Staff Report (Conf.)* at III-4)) and argue that "businesses simply do not spend $125 million to increase capacity by [a significant] percent[age] without using it" (*id.* 34), and that the resulting increase in quantity of the 48 gram product to be supplied to the market once Appleton's new facility is fully operational will naturally lower the market equilibrium price, provided demand remains relatively unchanged. (*Id.* 34–35.)

The record, however, does not require the conclusion that an increase in domestic supply will negate the effect of German underselling. Rather, available domestic supply is just one factor in the Commission's analysis, and it must be weighed against the undisputed evidence of underselling by the German producers. In addition, as mentioned above, the record demonstrates that Appleton's lack of profitability will militate against price cuts. Contrary to Plaintiffs' contention, therefore, basic principles of supply and demand do not make the Commission's likely price effects determination unreasonable, and the court concludes that this determination is supported by substantial evidence. *See Nippon Steel*, 458 F.3d at 1351.

*E. Vulnerability of Domestic Industry*

Finally, Plaintiffs argue that the Commission's conclusion that the domestic industry is vulnerable to the likely impact of additional subject imports — based on the Commission's finding regarding "the consistently unprofitable financial performance of the domestic industry during the [POI]" (Pls.' Mem. 36 (quoting *Comm'n Views* at 39)) — is also unsupported by sufficient evidence. Plaintiffs once more in effect request the court to re-weigh the evidence that the Commission alone is authorized and entrusted to gather, consider, and weigh in coming to its threat of injury determination. (*See id.* 36–38.)

As evidenced by the citations supplied in its Views, the Commission's finding that "[o]verall domestic industry financial performance declined [during the POI]" is supported by substantial evidence. *See Comm'n Views* at 26. (*See also* Def.'s Mem. 37–38 ("An examination of the combined operations of all U.S. coaters and converters of LWTP demonstrates [that] . . . [c]oaters and converters combined had operating losses of $1.0 million in 2005, $93,000 in 2006, $11.2 million in 2007, $3.6 million in interim 2007, and $6.5 million in interim 2008," (citing *Comm'n Final Staff Report (Conf.)* at VI-4 Table VI-3)).) Accordingly, the Commission's finding that "[i]n light of the consistently unprofitable financial performance of the domestic industry during the [POI], . . . the industry [is] vulnerable to the effects of additional

subject imports," *Comm'n Views* at 39 (footnote omitted), is also supported by substantial evidence, particularly as the record does not indicate that trends observed during the POI are likely to change in the immediate future.

**Conclusion**

For all of the foregoing reasons, the Commission's final determination that a domestic industry is threatened with material injury by reason of LWTP imports from Germany is supported by substantial evidence. Plaintiffs' Motion for Judgment on the Agency Record is therefore DENIED, and the Commission's determination is AFFIRMED in all respects. Judgment will issue for the Defendants.

Dated: November 17, 2009
New York, N.Y.

/*s*/ *Donald C. Pogue*
DONALD C. POGUE, JUDGE

Slip Op. 10–5

UNITED STATES, Plaintiff, v. TIP TOP PANTS, INC., and SAAD NIGRI, Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 07–00171

[Dismissing defendant Nigri from the action and denying plaintiff's motion for summary judgment]

Dated: January 13, 2010

*Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David M. Hibey* and *Meredyth C. Havasy*); *Chris Yokus*, Office of the Assistant Chief Counsel, United States Customs and Border Protection, of counsel, for plaintiff.

*Ballon Stoll Bader & Nadler, P.C.* (*Vano I. Haroutunian*) for defendants.

***OPINION AND ORDER***

**Stanceu, Judge:**

***I.***
***Introduction***

Plaintiff brought this action under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2006) ("Section 592"), to recover from defendants Tip Top Pants, Inc. ("Tip Top") and Saad Nigri a civil penalty of $55,636.90 and duties of $1,640.53, plus interest, for al-

leged material false statements or acts, or material omissions, made in connection with a single entry of apparel made in 2002. Compl. ¶¶ 1, 3, 8. Defendants make an untimely motion to dismiss the complaint against Nigri for failure to state a claim upon which relief can be granted. Notice of Mot. to Dismiss the Compl. against Sadi Nigri for Failure to State a Claim upon which Relief Can Be Granted pursuant to USCIT R. 12(b)(5), at 1 ("Mot. to Dismiss"). Plaintiff moves for summary judgment against both defendants to recover on its penalty claim, for which it alleges a degree of culpability of negligence. Pl.'s Mot. for Summ. J. ("Pl.'s Mot.). Because plaintiff has failed to demonstrate that it is entitled to a judgment as a matter of law, the court denies plaintiff's motion. Because the complaint fails to state a claim under Section 592 against Nigri upon which relief can be granted, and because plaintiff has maintained its action against Nigri on that complaint, the court *sua sponte* dismisses Nigri as a party defendant.

## *II.*
## *Background*

The court sets forth below the procedural background of this case and identifies certain uncontested facts relevant to the court's consideration of the two pending motions, as established by the various submissions.

### *A. The Entry of the Merchandise for Consumption in 2002*

An entry for consumption was filed with United States Customs and Border Protection ("Customs") in 2002 at the port of Laredo, Texas for a shipment from Mexico of 954 dozen of men's denim cotton shorts and pants and 960 dozen of boys' denim cotton shorts. Pl.'s Statement of Material Facts pursuant to Rule 56(h)(1) ¶¶ 1–2 ("Pl.'s Statement of Material Facts"); Pl.'s Mot. app. at 25–28 (setting forth the entry summary form and commercial invoices). The entry summary form for the shipment showed a total entered value of $215,398 and a date of entry of May 24, 2002; it listed as the importer of record "Tip Top Pant Inc, 1407 Broadway Suite 521, New York, NY 10018." Pl.'s Mot. app. at 25. The form set forth a tariff classification of Subheading 6203.42.4050, Harmonized Tariff Schedule of the United States ("HTSUS") (2002) for the men's apparel items and Subheading 6203.42.4060, HTSUS for the boys' shorts. *Id.* app. at 25–26. Both provisions were subject to a General (MFN) duty rate of 16.8% *ad valorem*; goods classified thereunder that qualified as originating goods under the North American Free Trade Agreement ("NAFTA") Implementation Act, as provided for in General Note 12, HTSUS, were eligible for duty-free tariff treatment. Subheading 6203.42.40, HTSUS; Subheading 9802.00.9000, HTSUS; General Note 12, HT-

SUS. The entry summary form made a claim for duty-free treatment under Subheading 9802.00.9000, HTSUS.[1] Pl.'s Mot. app. at 25–26.

*B. The Customs Form 28 Request for Information and the Customs Form 29 Notice of Proposed Action*

On November 19, 2002, Customs issued to Tip Top a request for information ("Customs Form 28") requesting various items of documentation pertaining to the subject entry. Pl.'s Statement of Material Facts ¶¶ 3–4; Pl.'s Mot. app. at 10–11. The Customs Form 28 also stated as follows: "Due to the fact that this office is already reviewing your invalid claims, you are no longer eligible for the provisions set forth under 19 CFR 162.74." Pl.'s Mot. app. at 11. The provisions of the Customs Regulations to which the Customs Form 28 cited are procedures for prior disclosures made according to, *inter alia*, Section 592(c). *Id.* ; *see* 19 U.S.C. § 1592(c)(4); 19 C.F.R. § 162.74 (2002).

On January 16, 2003, Customs issued a notice of proposed action ("Customs Form 29") stating that it was proposing to disallow Tip Top's claim for preferential tariff treatment under Subheading 9802.00.0090, HTSUS due to Tip Top's failure to respond to the Customs Form 28 and allowing Tip Top twenty days to supply the documentation previously requested. Pl.'s Statement of Material Facts ¶ 4; Pl.'s Mot. app. at 12. The Customs Form 29 also contained the following statements: "This office will be disallowing all 9802.00.9000 claims, and duties will be assessed at the general rate of duty. Your firm has made false claims under this program and is subject to possible penalties." Pl.'s Mot. app. at 12.

*C. The Administrative Penalty and Protest Proceedings*

Customs issued a pre-penalty notice to Tip Top on May 7, 2003, citing "material false statements, acts and/or omissions," "HTS 9802.00.9000," an alleged degree of culpability of negligence, and a proposed penalty of $55,636.90, which it described as "two (2) times the potential loss of revenue." Pl.'s Mot. app. at 14; Pl.'s Statement of Material Facts ¶ 5. In the section of the pre-penalty notice labeled "Material Facts Establishing Violation," the pre-penalty notice cited only one fact, Tip Top's failure to respond to the Customs Form 28 "requesting documentation to substantiate the 9802 claim." Pl.'s Mot. app. at 14. Even though the notice was a pre-penalty notice, and not a claim for penalty, the notice stated: "Importer has failed to respond resulting in entry being rate advanced in the sum of $27,818.45 and

[1] Subheading 9802.00.9000 provided duty-free treatment for apparel goods assembled in Mexico from fabric components wholly formed and cut in the United States, subject to certain conditions. Subheading 9802.00.9000, Harmonized Tariff Schedule of the United States ("HTSUS") (2002); *see* Chapter 98, Subchapter II, U.S. Note 4, HTSUS.

penalty assessment." *Id.* Tip Top filed a response to the pre-penalty notice on June 26, 2003. Pl.'s Mot. app. at 15–20; Pl.'s Statement of Material Facts ¶ 6. Among other arguments, the response claimed that the apparel items on the entry at issue "were . . . entered duty-free as products of Mexico eligible for duty-free treatment under the provisions of the North American Free Trade Agreement ('NAFTA')" and that "[t]he entry in question was filed on the basis of a NAFTA blanket Certificate of Origin, covering the period of January 1, 2002 through December 31, 2002 . . . ." Pl.'s Mot. app. at 17.

Following the liquidation of the entry on April 4, 2003, Tip Top filed a protest and request for further review on June 30, 2003.[2] *Id.* app. at 76–82. The protest contested "the decision of Customs to deny duty-free treatment to the merchandise imported and entered under the captioned entry under HTSUS subheading 9802.00.9000, and under subheadings 6203.42.4050 [or] 6203.42.4060, as qualifying products of Mexico under NAFTA (North American Free Trade Agreement)" and the assessment of duties at 16.8% *ad valorem*. *Id.* app. at 77. The submissions of the parties do not indicate whether Customs has ruled on the protest.

Customs issued a claim for a civil penalty in the amount of $55,636.90, in the form of a notice of penalty (Customs Form 5955A) dated October 6, 2003 and a cover letter dated October 7, 2003. Pl.'s Mot. app. at 60–62; Pl.'s Statement of Material Facts ¶ 9. The notice of penalty stated that Tip Top "entered or caused to be entered merchandise into the commerce of the United States by means of material false statements, acts and/or omissions." Pl.'s Mot. app. at 62. The notice of penalty cited, as the reason for the "penalty assess-

[2] The court is unable to determine from the submitted documentation how the duties upon liquidation were determined. If the merchandise were dutiable without the benefit of preferential tariff treatment under General Note 12, HTSUS or Subheading 9802.00.9000, HTSUS, it would appear from the information set forth on the entry summary that the duties owed would have been $36,186.86, based on an entered value of $215,398 and a duty rate of 16.8% *ad valorem*. *See* Pl.'s Mot. for Summ. J. ("Pl.'s Mot.) app. at 25–26 (setting forth the entry summary); Subheading 6203.42.40, HTSUS. Plaintiff's USCIT Rule 56(h) submission contains the statements that "[o]n July 18, 2006, Tip Top paid a portion of the duties owed, or $33,842.45" and that "[a]s of this filing, Tip Top still owes $1,695.36 in duties and interest." Pl.'s Statement of Material Facts pursuant to Rule 56(h)(1) ¶ 13 ("Pl.'s Statement of Material Facts") (citing Pl.'s Mot. app. at 122). Plaintiff submitted printed results of two bill number queries, one dated December 28, 2006, Pl.'s Mot. app. at 122, and one dated September 9, 2006, *id.* app. at 123. The former indicates that three separate bill numbers apply to the entry at issue in this case, one of which is designated as "void." *Id.* app. at 122. The latter indicates, for one of those three bill numbers, a "total bill amount" of $33,842.45 and a "paid amount" of $33,842.45. *Id.* app. at 123. That amount is the sum of an indicated "principal amount" of $28,056.70 and an indicated "interest amount" of $5,785.75. *Id.* The December 28, 2006 bill number query result shows an unpaid balance on a third bill of $1,695.36, but this amount is derived from the first bill indicated, which is designated thereon as "void." *Id.* app. at 122.

ment," Tip Top's failure to respond to the Customs Form 28. *Id.* The cover letter stated as the basis for the assessment of a penalty that "[a]lthough the entry is being protested, and you claim a correct NAFTA Certificate of Origin submitted [*sic* ], we find that the failure to provide the Certificate within the time allowed is material to the orderly and proper assessment and collection of duties by Customs and Border Protection and demonstrates negligence." *Id.* app. at 60.

On November 4, 2003, Tip Top filed with Customs a petition seeking cancellation or substantial mitigation of the penalty. Pl.'s Mot. app. at 63–64 (setting forth *Letter from Follick & Bessich to Bureau of Customs & Border Prot.* 1–2 (Nov. 4, 2003) ("Petition")); Pl.'s Statement of Material Facts ¶ 10. Tip Top advanced various arguments in its petition, among which was that the failure to respond to the Customs Form 28 was the fault of its freight forwarder, South Texas International ("STI") of Laredo, Texas, upon whom Tip Top relied to maintain the required records and respond to the request for information. Pl.'s Mot. app. at 65–66 (Petition 3–4). It also argued that the merchandise at issue qualified for duty-free treatment under Subheading 9802.00.9000, HTSUS, that documentation, although filed late, established that the merchandise was entitled to duty-free tariff treatment, and that Tip Top had claimed duty-free entry under NAFTA on the basis of facts, circumstances, and documents (albeit late filed) that supported such entry. Pl.'s Mot. app. at 66–69 (Petition 4–7). Although arguing that no penalty was warranted, it also argued that any penalty should be canceled or substantially mitigated because of Tip Top's excellent compliance record, because this was Tip Top's first experience with importing merchandise duty-free under NAFTA, and because of Tip Top's reliance "upon professionals, customs brokers and freight forwarders who held themselves out as qualified and informed in handling NAFTA importations and their documentary requirements." Pl.'s Mot. app. at 69 (Petition 7). The documentation submitted as evidence in support of plaintiff's motion for summary judgment contains no decision by Customs responding to the arguments in Tip Top's Petition.

Plaintiff's appendix contains a second Customs Form 5955A bearing a date of January 9, 2006, that plaintiff describes as an "amended penalty notice." *Id.* app. at 121; Pl.'s Statement of Material Facts ¶ 12. The text substantively is the same as the penalty notice dated October 6, 2003, except that the following sentence was added: "The fact that the fabric was cut and assembled in Mexico disqualifies you from claiming 9802.00.9000; therefore, your HTS 9802.00.9000 claim

was false." *Compare* Pl.'s Mot. app. at 121 *with id.* app. at 60–62. In June 2006, Tip Top paid Customs $33,842.45. Pl.'s Statement of Material Facts ¶ 13; Pl.'s Mot. app. at 122–23.

*D. Judicial Proceeding*

Plaintiff commenced this action by filing a summons and complaint on May 18, 2007. With the consent of the parties, the court entered a scheduling order on May 6, 2008 and, on several occasions since then, has granted unopposed motions to extend dates in the scheduling order. Discovery was required to be completed by February 27, 2009. Order, Dec. 15, 2008. On June 9, 2009, defendants moved to dismiss the complaint as to Nigri for failure to state a claim upon which relief can be granted. Mot. to Dismiss 1. Two days later, plaintiff moved for summary judgment against both defendants for a civil penalty of $55,636.90 and unpaid duties and interest of $1,640.53. Pl.'s Mot. 13.

## *III.*
## *Discussion*

The court exercises jurisdiction according to 28 U.S.C. § 1582, which grants the Court of International Trade exclusive jurisdiction over actions to recover civil penalties claimed under 19 U.S.C. § 1592 and customs duties. *See* 28 U.S.C. § 1582 (2006).

*A. Plaintiff Has Failed to Demonstrate that It Is Entitled to Judgment as a Matter of Law*

Summary judgment "should be rendered if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT Rule 56(c). The court concludes that the pleadings, discovery and disclosure materials on file, and affidavit do not show that plaintiff is entitled to judgment as a matter of law.

*1. Plaintiff Has Failed to Demonstrate that Its Penalty Claim Against Tip Top Was Perfected in Accordance with the Requirements of Section 592*

Plaintiff is suing under Section 592(e) to recover a penalty on a claim arising from the administrative penalty proceeding that Customs initiated by issuing the May 7, 2003 pre-penalty notice. *See* 19 U.S.C. § 1592(e); Pl.'s Mot. app. at 13–14. The undisputed facts plaintiff establishes in support of summary judgment do not demonstrate that Customs complied with the requirements that Section 592 imposes. Among those statutory requirements is that a person to whom a written penalty claim is issued "shall have a reasonable

opportunity under section 1618 of this title [*i.e.*, 19 U.S.C. § 1618] to make representations, both oral and written, seeking remission or mitigation of the monetary penalty." 19 U.S.C. § 1592(b)(2). Tip Top timely submitted a petition for remission or mitigation of the October 7, 2003 penalty claim. Pl.'s Mot. app. at 63–70 (Petition at 1–8); Pl.'s Statement of Material Facts ¶ 10; *see* 19 C.F.R. § 171.2(b)(2) (2009) (allowing 60 days for submission of a petition). Section 592(b)(2) requires that "[a]t the conclusion of any proceeding under such section 1618, the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based." 19 U.S.C. § 1592(b)(2).

Plaintiff has produced the second Customs Form 5955A, Pl.'s Mot. app. at 121, which plaintiff describes in its Rule 56(h)(1) statement as an "amended penalty notice." Pl.'s Statement of Material Facts ¶12. The issuance of this document does not cure the apparent procedural defect. The statute and regulations required that Customs issue to Tip Top a response to the November 4, 2003 Petition, which sought not only remission but also presented arguments for mitigation of the penalty. *See* Pl.'s Mot. app. at 63–70 (Petition at 1–8). Plaintiff has not shown that Tip Top withdrew its Petition or that Customs ever ruled on that Petition.[3] If agency action on Tip Top's Petition was still pending at the time Customs issued the second Customs Form 5955A, and if no decision under 19 U.S.C. § 1618 was ever issued, then the requirements of the statute and the regulations were not satisfied. *See* 19 U.S.C. § 1592(b); 19 C.F.R. § 171.21 (2009) ("If a petition for relief relates to a violation of section[] 592 . . . , the petitioner will be provided with a written statement setting forth the decision on the matter and the findings of fact and conclusions of law upon which the decision is based."). The second Customs Form 5955A does not satisfy

[3] Plaintiff's statement of material facts pursuant to USCIT Rule 56(h)(1) does not state that a decision under 19 U.S.C. § 1618 was issued. *See* Pl.'s Statement of Material Facts. In support of its summary judgment motion, plaintiff states as follows:

> After review of Tip Top's November 2003 letter [*i.e.*, Tip Top's petition in response to the written penalty claim], Customs contacted counsel for Tip Top and requested a conference regarding the petitions for relief. Customs also requested that Tip Top waive the statute of limitations. In a letter dated February 26, 2004, counsel indicated that the firm no longer represented Tip Top and gave Customs Tip Top's last known mailing address, telephone, and facsimile numbers.

Pl.'s Mot. 5. These allegations are missing from the USCIT Rule 56(h)(1) statement, but even if they were presumed to be true, they would not suffice. Although the statute and regulations grant a person to whom a penalty claim has been issued the opportunity to make an oral presentation, they do not authorize Customs to demand, as a condition of obtaining a decision on a petition for remission or mitigation, that a person appear before Customs. *See* 19 U.S.C. § 1592(b) (2006); 19 C.F.R. § 171.3 (2009).

the statutory and regulatory requirements for a written statement setting forth the final determination and the findings of fact and conclusions of law on which the determination is based. *See* 19 U.S.C. § 1592(b); 19 C.F.R. § 171.21. On its face, the second Customs Form 5955A indicates that it is not a final determination, and it does not respond to the points in the Petition. *See* Pl.'s Mot. app. at 121. The statute specifies that the "written statement" issued at the conclusion of the proceeding conducted under 19 U.S.C. § 1618 is to be a determination separate from, and subsequent to, the issuance of the written penalty claim. 19 U.S.C. § 1592(b).

The United States, in an action brought under Section 592(e), commences a proceeding "for the recovery of any monetary penalty claimed under this section," *i.e.*, Section 592. *Id.* § 1592(e). Congress directed that Customs adjudicate the penalty claim in an administrative proceeding conducted under 19 U.S.C. § 1618 and issue a written decision concluding that proceeding before any recovery action is brought in the Court of International Trade. 19 U.S.C. § 1592(b)(2) (requiring Customs to issue a "written penalty claim" and conduct thereon a proceeding under 19 U.S.C. § 1618). Plaintiff has failed to show either that the § 1618 proceeding took place and culminated in a written decision or that some circumstance, not apparent from the summary judgment motion, occurred that could have justified any failure to conduct a § 1618 proceeding. Therefore, plaintiff has not met its burden of demonstrating that it "is entitled to judgment as a matter of law." USCIT Rule 56(c).

*2. Plaintiff's Rule 56(h)(1) Statement Contains Unsupported Factual Contentions But Was Not Controverted by Defendants*

Plaintiff's failure to demonstrate that the penalty claim on which it seeks to recover resulted from a proceeding conducted according to Section 592(b) is sufficient, by itself, to preclude the court from granting plaintiff's summary judgment motion. The court observes in addition that the statement, made pursuant to USCIT Rule 56(h)(1) in support of plaintiff's motion, contains facts as to which there is alleged to be no genuine issue to be tried, and the court further observes that certain of these stated facts are unsupported by plaintiff's citations to admissible evidence.[4] The court notes that defendants did not file a statement satisfying the requirements of USCIT Rule 56(h)(2) to controvert the statements in plaintiff's Rule 56(h)(1)

[4] Each statement by the movant for summary judgment must be followed by citation to evidence which would be admissible. USCIT Rule 56(h)(4).

statement.[5] USCIT Rule 56(h)(3) deems such statements to be admitted. USCIT Rule 56(h)(3). These statements, even when deemed admitted, do not establish that plaintiff is entitled to judgment as a matter of law because of the absence of a showing that Customs conducted an administrative proceeding under 19 U.S.C. § 1618 that fulfilled the requirements of Section 592(b).

Plaintiff alleges that "Mr. Nigri testified that he did not have oversight over his broker," relying on a portion of the transcript, Nigri Dep. 55:3–17, Jan. 15, 2009, of the deposition plaintiff took of Nigri. Pl.'s Statement of Material Facts ¶ 14 (citing Nigri Dep. 55:3–17, Jan. 15, 2009). In the cited passage, Mr. Nigri did not testify that he did not have "oversight" over his broker. Instead, he testified that he did not "know more than [his] broker" or "as much as [his] broker."[6]

Plaintiff also submits as an undisputed material fact that "Tip Top . . . admits that the apparel was misclassified as duty free on May 24, 2002, and that Tip Top was the importer of record for this transaction," citing pages 8 and 119 of the appendix to plaintiff's motion for summary judgment. *Id.* ¶ 15 (citing Pl.'s Mot. app. at 8, 119). In the cited pages, which contain Tip Top's responses to plaintiff's requests for admission, Tip Top did not make a general admission that the apparel was misclassified as duty-free.[7] There is an admission by Tip Top that the imported apparel was misclassified under subheading

[5] In their opposition to plaintiff's motion for summary judgment, defendants include a statement of facts but do not present numbered paragraphs responding to the statements in plaintiff's Rule 56(h)(1) statement. *See* USCIT Rule 56(h)(2); Defs.' Opp'n to Pl.'s Mot. for Summ. J. 2–4 ("Defs.' Opp'n").

[6] The portion of the transcript on which plaintiff relies reads as follows:
Q. Oversight by Tip Top, over your broker?
A. I don't know more than my broker, no, I don't. I relied on my broker and I rely on my lawyer.
Q. Do you know as much as your broker?
A. Me?
Q. Yeah.
A. I should? My question. If I should, I'll learn, but I don't.
Q. Okay.
A. I think custom and legality aspect is — that's why we use them, I guess. Pl.'s Mot. app. at 125; Nigri Dep. 55:3–17, Jan. 15, 2009. Plaintiff submitted only pages 1 and 55 of the deposition transcript with its motion for summary judgment. *See* Pl.'s Mot. app. at 124–25. Pages 1, 51, 53, and 54 are appended to Plaintiff's Reply in Support of its Motion for Summary Judgment. *See* Pl.'s Reply in Supp. of its Mot. for Summ. J. Ex. A. None of the submitted pages establishes the absence of a genuine issue of fact as to whether Nigri "did not have oversight over his broker." *See* Pl.'s Statement of Material Facts ¶ 14.

[7] Plaintiff submits documents including statements by Tip Top that can be construed as maintaining that the goods qualified for duty-free treatment under the NAFTA. *See, e.g.*, Pl.'s Mot. app. at 17 (in which Tip Top claimed during the administrative pre-penalty proceeding that the apparel items "were . . . entered duty-free as products of Mexico eligible for duty-free treatment under the provisions of the North American Free Trade Agreement ('NAFTA')" and that "the entry in question was filed on the basis of a NAFTA blanket Certificate of Origin, covering the period of January 1, 2002 through December 31, 2002").

9802.00.9000 as duty-free because Tip Top's broker, J.O. Alvarez, Inc., identified the apparel with the incorrect entry number. Pl.'s Mot. app. at 4–5 (referring to pages 4–5 of Tip Top Pants, Inc.'s Resp. to Pl.'s First Set of Interrogatories). There is also an admission that the imported apparel was manufactured from material shipped in roll form from the United States to Mexico. Id. app. at 8, 119. This constitutes an admission that the merchandise did not meet a condition of entry under Subheading 9802.00.9000, HTSUS because the apparel items were assembled from components that were not cut in the United States. *See* Subheading 9802.00.9000, HTSUS (requiring that the apparel goods be assembled in Mexico from fabric components wholly formed and cut in the United States). It is not an admission that the merchandise did not qualify for duty-free treatment as originating goods eligible for the NAFTA preference.[8]

*B. Because Plaintiff's Complaint Fails to State a Valid Claim Against Nigri, and Because Plaintiff Has Continued this Action against Nigri on that Complaint, the Court Will Dismiss Nigri as a Party Defendant*

The court next considers defendants' motion to dismiss Nigri as a party defendant. Plaintiff argues in a footnote in its opposition to the motion to dismiss that Nigri has waived any defense under USCIT Rule 12(b) by moving to dismiss "nearly two years after he answered the complaint." Pl.'s Opp'n to Def. Saad Nigri's Mot. to Dismiss 3 n.11 ("Pl.'s Opp'n"). Plaintiff is correct that USCIT Rule 12(b) requires that the defense of failure to state a claim upon which relief can be granted be made before a responsive pleading, if one is allowed. USCIT Rule 12(b). The court notes, further, that under the original scheduling order entered in this action, motions regarding the pleadings were to have been submitted by July 22, 2008. Scheduling Order, May 5, 2008. Although the Scheduling Order was amended, upon joint motion of the parties, to continue discovery and for other reasons, the date for filing a motion to dismiss based on USCIT Rule 12(b)(5) was not extended. *See* Order, Dec. 15, 2008. For both of these reasons, defendants' motion to dismiss the complaint as to Nigri is untimely. The court, therefore, will not dismiss Nigri upon defendants' motion.

The court is unable to find on the entry summary or in other entry documentation a "written declaration" that the entered goods qualified for NAFTA preferential tariff treatment. *See* 19 C.F.R. § 181.21 (2002).

[8] The submissions of the parties do not address the question of whether defendant Tip Top filed a retroactive claim for NAFTA preferential tariff treatment. *See* 19 U.S.C. § 1520(d) (2006); 19 C.F.R. §§ 181.31, 181.32 (2003).

The court concludes, nevertheless, that the untimeliness of defendants' motion does not resolve all issues arising from plaintiff's having brought an action, and having continued that action, against Nigri. The court may dismiss a defendant from an action *sua sponte* when it appears that a plaintiff is maintaining a groundless lawsuit against a defendant. *See Anaheim Gardens v. United States*, 444 F.3d 1309, 1315 (Fed. Cir. 2006). It is, of course, improper for any action to be maintained against a defendant where no valid basis for such an action could be shown. *See* USCIT Rule 11(b)(2)-(3). For the present, the court sees no need to decide the question of whether plaintiff possibly *could* show a basis for continuing this lawsuit against Nigri. At this stage of the litigation, the court cannot rule out entirely the possibility that plaintiff still could plead and prove facts under which Nigri could incur liability under Section 592 and that plaintiff could seek leave to amend its complaint accordingly.[9] Nevertheless, the court does *see* a need to decide at this time whether an action against Nigri should be allowed to continue on the basis set forth in the complaint.

In the circumstances presented here, the court's dismissal of Nigri as a party defendant is the appropriate result. Since bringing this action in May 2007, plaintiff has had ample opportunity to conduct discovery. It also has had the opportunity to seek to amend its complaint but has not chosen to do so. Instead, it has proceeded to move for summary judgment against Nigri on that complaint, which alleges as to Nigri only one fact: "At all times relevant to the matters described in the complaint, Saad Nigri[10] was the Chairman and Chief Executive Officer of Tip Top." Compl. ¶ 6. Even if the court, for purposes of considering the sufficiency of the complaint as to Nigri, accepts as true all well-pleaded facts in the complaint and draws all reasonable inferences in plaintiff's favor, the court still must conclude that the complaint states no claim against Nigri upon which relief can be granted. Section 592(a)(1)(A) provides, in pertinent part, that "no person . . . may *enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States* by means of — (i) any document . . . written . . . statement, or act which is material and false, or (ii) any omission which is material." 19 U.S.C. § 1592(a)(1)(A)

[9] Plaintiff would face a considerable procedural burden in seeking modification of the scheduling order at this time so as to permit filing of a motion for leave to amend the complaint. *See* USCIT Rules 15(a)(2), 16(b)(4).

[10] In the text of certain pleadings, defendants refer to a person named Sadi Nigri, who was the Chairman and Chief Executive Officer of Tip Top at the time of the subject importation and move for dismissal of Sadi Nigri as a defendant. Notice of Mot. to Dismiss the Compl. against Sadi Nigri for Failure to State a Claim upon which Relief Can Be Granted pursuant to USCIT R. 12(b)(5), at 2 ("Mot. to Dismiss"); Defs.' Opp'n 2.

(emphasis added). The complaint does not allege that Nigri entered, introduced, or attempted to enter or introduce any merchandise into the commerce of the United States. It instead alleges the fact that the importer of the merchandise was Tip Top, which is an uncontested fact in this case. Compl. ¶¶ 8–9; Pl.'s Statement of Material Facts ¶ 2; Pl.'s Mot. app. at 8, 119. Although identifying Nigri as Tip Top's Chairman and Chief Executive Officer at the time of the 2002 importation, the complaint does not allege that Nigri did, or failed to do, anything whatsoever. The complaint sets forth no facts upon which liability allegedly incurred by Tip Top, based on negligence in importing the merchandise, could be imputed to Nigri. Thus, not only does plaintiff's complaint fail to plead facts which, if true, would entitle plaintiff to recover from Nigri a penalty under Section 592, but it also can be fairly described as failing to state *any* claim against Nigri.[11]

For the reasons discussed above, the court is denying plaintiff's motion for summary judgment on grounds that do not relate specifically to the question of Nigri's potential liability under Section 592. Nevertheless, the court notes that nothing in plaintiff's motion for summary judgment establishes or alleges facts implicating Nigri in any violation of Section 592 that may have occurred. Were the court not to dismiss Nigri as a party defendant, it potentially would be allowing this case to go to trial against both defendants even though plaintiff, despite ample opportunity, has failed to plead, develop, or support any claim against one of those defendants, Nigri, that rests on an adequate basis in law or fact.

In opposing dismissal of Nigri, plaintiff makes only one argument other than that defendants' motion to dismiss is untimely. Plaintiff argues that "[c]orporate officers have repeatedly been held liable for violations that were committed in the capacity of their employment." Pl.'s Opp'n 4 (citing *United States v. Priority Prods., Inc.*, 793 F.2d 296, 299 (Fed. Cir. 1986), *United States v. Matthews*, 31 CIT 2075, 2082–83, 533 F. Supp. 2d. 1307, 1313–14 (2007), and *United States v. Golden Ship Trading*, 22 CIT 950, 956 (1998)). Although plaintiff is correct in its contention that officers of a corporation, in some factual circumstances, have been held liable under Section 592, neither that contention nor the cases plaintiff cites address the shortcoming in plaintiff's case, apparent from plaintiff's complaint and its motion for summary judgment, pertaining to any potential liability of Nigri.

*United States v. Priority Products, Inc.* is not on point. That case held that the failure by Customs to serve corporate officers, directors, or shareholders of a corporation with written pre-penalty or penalty

[11] In addition, the complaint, in its demand for relief, seeks a judgment against Tip Top and makes no mention of Nigri. Compl. 4.

notices during the administrative penalty proceeding does not deprive the Court of International Trade of subject matter jurisdiction over a complaint against those persons to recover a civil penalty originally assessed against the corporation. *See Priority Prods.*, 793 F.2d. at 300. The case also concludes that the failure to include the individual defendants in the pre-penalty and penalty notices, where those defendants had actual notice of the proceeding, was not a deprivation of due process. *Id.* at 301. The case does not hold that a party's serving as an officer of a corporation at the time the corporation imports merchandise is, by itself, sufficient to establish that officer's liability for acts committed by the corporation that are found to be in violation of Section 592. Nor did *Priority Products* involve the issue of the sufficiency of pleadings in an action to recover a penalty sought under Section 592.

*United States v. Matthews* and *United States v. Golden Ship Trading* are not binding precedent, and both are readily distinguished from this case. *See Matthews*, 31 CIT 2075, 533 F. Supp. 2d. 1307; *Golden Ship Trading*, 22 CIT 950. In *Matthews*, corporate and individual defendants were found jointly and severally liable for violations of Section 592 based on fraudulent false statements of origin that were made in the entry documentation to avoid payment of antidumping duties on imports of silicon metal from China. *See Matthews*, 31 CIT at 2076, 533 F. Supp. 2d. at 1308 (ordering summary judgment for the United States "[b]ecause Defendants knowingly and purposely misrepresented the country of origin on the entries in question in order to avoid antidumping duties that would have been assessed upon that merchandise by Customs."). The Court of International Trade cited specific acts committed by the individual defendant Matthews in furtherance of the fraudulent scheme and, on the part of individual defendant McGuire, joint action with Matthews pursuant to a common plan. *Id*. at 2080–81, 533 F. Supp. 2d. at 1312–13. Like *Priority Products, Matthews* involved issues other than the issue of what factual allegations against an individual defendant suffice to avoid dismissal for failure to state a claim upon which relief can be granted.

In *Golden Ship Trading*, which also involved allegations of false statements of country of origin, the Court of International Trade denied the motion of defendants to dismiss individual defendant Wu that was made, in part, under USCIT Rule 12(b)(5). *Golden Ship Trading*, 22 CIT at 951. In contrast to the facts of this case, the government's complaint in *Golden Ship Trading* alleged a specific act on the part of the individual defendant, stating that this individual "signed the country of origin declaration falsely, stating that the

country of origin was the Dominican Republic, and that these materially false statements, acts and/or omissions were performed without due care and constitute negligent violations of 19 U.S.C. § 1592." *Id.* *Golden Ship Trading* not only is distinguishable from this case but also was decided prior to the decisions of the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). To avoid dismissal for failure to state a claim upon which relief can be granted, the "[f]actual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic*, 550 U.S. at 555.

In support of its motion for summary judgment against Nigri, plaintiff reiterates the same arguments it makes in opposing defendants' motion. Pl.'s Reply in Supp. of its Mot. for Summ. J. 6–7. Plaintiff adds, however, that "evidence beyond the complaint . . . shows that Mr. Nigri was not only the founder, chairman and CEO, but also one of two 50 percent shareholders, one of two corporate officers, and one of only two employees for the company." *Id.* at 6. Plaintiff also states that "defendants do not dispute that no one at Tip Top knew or possessed more information than Mr. Nigri concerning the day-to[-]day operations of Tip Top." *Id.* Plaintiff's arguments fail in two respects. First, and most obviously, these allegations are not in the complaint. Second, even were these allegations in the complaint, plaintiff still would not have pleaded or demonstrated a basis on which Nigri, in his personal capacity, would have incurred any liability for a negligent violation of Section 592 that Tip Top may have committed.

In summary, the court will not allow this case to go to trial against Nigri on the complaint before it. Even if the court assumes the truth of every allegation made against Nigri in plaintiff's complaint, the court still is left with nothing beyond Nigri's serving as Chairman and Chief Executive Officer when Tip Top entered merchandise that, the government alleges, was entered according to a material false statement or act that occurred as a result of negligence.

## *IV.*
## *Conclusion*

For the reasons discussed in the foregoing, the court will deny plaintiff's motion for summary judgment and dismiss defendant Nigri from this action.

***Order***

Upon consideration of all papers and proceedings herein, it is hereby

**ORDERED** that all claims in the complaint be, and hereby are, dismissed to the extent that they seek relief against defendant Nigri, who is hereby dismissed from this action as a party defendant; it is further

**ORDERED** that the Clerk of the Court be, and hereby is, directed to amend the caption in this case to read "United States, Plaintiff, v. Tip Top Pants, Inc., Defendant"; it is further

**ORDERED** that the Rule 56 motion of plaintiff for summary judgment be, and hereby is, DENIED; and it is further

**ORDERED** that counsel for plaintiff, after consulting with counsel for defendant, shall submit, by February 12, 2010, a joint proposed schedule to govern the remainder of these proceedings. Should counsel be unable to agree upon a proposed schedule, plaintiff shall notify the court of that fact by February 12, 2010.

Dated: January 13, 2010
New York, New York

*/s/ Timothy C. Stanceu*
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–6

NUCOR CORPORATION, GERDAU AMERISTEEL CORPORATION, and COMMERCIAL METALS COMPANY, Plaintiffs, v. UNITED STATES, Defendant, and IÇDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Defendant-Intervenor.

IÇDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, GERDAU AMERISTEEL CORPORATION, and COMMERCIAL METALS COMPANY, Defendant-Intervenors.

Consolidated
Court No. 05–00616

**JUDGMENT**

This action having been duly submitted for decision; the Court, after due deliberation, having rendered decisions herein; and in the absence of any substantive comments in opposition to the Final Results of Redetermination Pursuant to Court Remand (filed November 9, 2009);

Now, therefore, in conformity with said decisions, it is hereby

ORDERED, ADJUDGED, and DECREED that the U.S. Department of Commerce's Final Results of Redetermination Pursuant to Court Remand be, and hereby are, sustained.

Dated: January 19, 2010
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY, JUDGE