U.S. Court of International Trade

Slip Op. 18–19

QUIEDAN COMPANY, Plaintiff, v. UNITED STATES, Defendant, and REBAR TRADE ACTION COALITION, Defendant-Intervenor

Before: Jennifer Choe-Groves, Judge
Court No. 16–00275

[Sustaining the U.S. Department of Commerce's final scope ruling on agricultural training stakes made of steel concrete reinforcing bar from the People's Republic of China and the issuance of instructions to U.S. Customs and Border Patrol to continue suspension of liquidation of all entries.]

Dated: March 9, 2018

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OPINION

Choe-Groves, Judge:

This case involves a scope ruling on Chinese-produced agricultural and horticultural stakes used to train grape vines. Before the court is a motion for judgment on the agency record contesting an affirmative final scope ruling issued by the U.S. Department of Commerce ("Commerce" or "Department") regarding agricultural training stakes made of steel concrete reinforcing bar ("rebar") from the People's Republic of China ("China") imported by Plaintiff Quiedan Company ("Plaintiff" or "Quiedan"). *See* Pl. Quiedan Co.'s Rule 56.2 Mot. J. Agency R., May 12, 2017, ECF No. 27 ("Pl.'s Br."); *see also* Antidumping Duty Order on Steel Concrete Reinforcing Bars from the People's Republic of China: Final Scope Ruling on Agricultural Training Stakes, PD 15, bar code 3526397–01 (Nov. 22, 2016) ("Final Scope Ruling"). Plaintiff

challenges Commerce's determination that Quiedan's goods are within the scope of the antidumping duty order on rebar from China and several other countries ("Order"), as well as the instructions to U.S. Customs and Border Protection ("Customs") to assess antidumping duties retroactively on Plaintiff's unliquidated entries. *See* Pl.'s Br. 6–7. Defendant-Intervenor Rebar Trade Action Coalition ("RTAC"), the petitioner in the original antidumping investigation, supports the Final Scope Ruling. *See* Def.-Intervenor Rebar Trade Action Coalition's Resp. Br., July 26, 2017, ECF No. 37 ("RTAC Br.").

For the reasons discussed below, the court concludes that the Department's scope determination is supported by substantial evidence and in accordance with the law. The court concludes also that Commerce did not err in issuing instructions to Customs to continue suspending liquidation of and assessing duties on entries prior to November 22, 2016, the date that Commerce issued its Final Scope Ruling.

BACKGROUND

Commerce published an antidumping order on rebar from China on September 7, 2001. *Steel Concrete Reinforcing Bars From Belarus, Indonesia, Latvia, Moldova, People's Republic of China, Poland, Republic of Korea and Ukraine*, 66 Fed. Reg. 46,777 (Dep't Commerce Sept. 7, 2001) (antidumping duty orders) ("*Order*"). The scope of the Order describes the subject merchandise as follows:

> [T]he product covered is all steel concrete reinforcing bars (rebar) sold in straight lengths, currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) under item number 7214.20.00 or any other tariff item number. Specifically excluded are plain rounds (*i.e.*, non-deformed or smooth bars) and rebar that has been further processed through bending or coating. HTSUS subheadings are provided for convenience and Customs purposes. The written description for the scope of this proceeding is dispositive.

Id.

Plaintiff filed a scope ruling request on May 6, 2016 seeking a determination from Commerce that its agricultural training stakes "are excluded from and/or outside the scope of" the Order. Quiedan Company: Agricultural Training Stakes Scope Ruling Request at 1, PD 1, bar code 3467055–01 (May 6, 2017) ("Scope Ruling Req."). Quiedan described its merchandise as "finished products that are designed, manufactured, and dedicated for use in agricultural/

horticultural pursuits." *Id.* at 2. "Specifically, the Training Stakes consist of steel concrete reinforcing bar ('rebar') that is further processed to form 4 to 5 foot stakes according to growers' specifications with a sharp point at one end." *Id.* Quiedan stated that the stakes are used to "train" grape vines and other plants, aiding in their vertical growth and vitality. *See id.* at 2–3. Plaintiff requested that its merchandise be excluded from the Order as "further processed" rebar. *See id.* at 2. Alternatively, Quiedan argued that its merchandise is not subject to the order because the stakes are angled at the tip and are no longer straight lengths. *See id.* Quiedan contended also that its merchandise fell outside the scope of the Order because the stakes are not straight-length rebar, but are separate goods described as "merchant bar." *See id.* at 9.

RTAC filed its opposition to Quiedan's Scope Ruling Request on May 26, 2016, arguing that the agricultural stakes fall within the plain language of the scope order. *See* Opposition to Quiedan's Scope Exclusion Request for Agricultural Training Stakes at 1, PD 6, bar code 3473522–01 (May 26, 2016).

Commerce issued its Final Scope Ruling on November 22, 2016, finding that "the training stakes imported by Quiedan are covered by the scope of the *Order*." Final Scope Ruling at 2. Concluding that the stakes meet the "physical description of the merchandise," Commerce stated that Quiedan's stakes are rebar that are "neither smooth, nor further worked through bending or coating, and thus do not fall within the category of specifically excluded merchandise." *Id.* at 5 (footnotes omitted). Commerce found that Quiedan's stakes comported with the descriptions of the subject merchandise provided in the petition and the Second Sunset Review conducted by the U.S. International Trade Commission ("ITC"). *Id.; see also Steel Concrete Reinforcing Bar from Belarus, China, Indonesia, Latvia, Moldova, Poland, & Ukraine* at I-25, USITC Pub. 4409, Inv. Nos. 731-TA-873–875, 878–880, and 882 (July 2013) ("*ITC Second Sunset Rev.*"). The Department instructed Customs to continue suspending liquidation of Quiedan's entries that were imported prior to the publication of the Final Scope Ruling. *See* Pl.'s Br. at Attach. 1.

In this matter, Quiedan challenges the Department's decision that the company's agricultural training stakes are within the scope of the Order. *See* Pl.'s Br. 6. Quiedan argues that the Department's refusal to initiate a formal scope inquiry with regard to the training stakes is unsupported by substantial evidence and not in accordance with the

law. *See id.* at 6. The United States ("Defendant") defends the Department's finding in the Final Scope Ruling. *See* Def.'s Opp'n Pl.'s Rule 56.2 Mot. J. Agency R. 2, July 25, 2017, ECF No. 35 ("Def.'s Opp'n"). RTAC supports the Department's finding in the Final Scope Ruling. *See* RTAC Br. 7. Quiedan filed its reply in support of the contentions made in its Rule 56.2 brief. *See* Pl.'s Reply Gov't & Pet'r's Opp'n Pl.'s Rule 56.2 Mot. J. Agency R., Aug. 24, 2017, ECF No. 40 ("Pl.'s Reply"). Plaintiff filed an unopposed motion for oral argument, which was denied because the court concluded that the written submissions alone are sufficient for the court to render its decision. *See* Unopposed Mot. Oral Arg., Aug. 30, 2017, ECF No. 43; Order, Oct. 2, 2017, ECF No. 45. Plaintiff filed a notice of supplemental authority on August 30, 2017. *See* Notice Suppl. Auth., Aug. 30, 2017, ECF No. 44.

Quiedan also contests the Department's instructions to Customs to suspend liquidation of, and assess antidumping duties on, unliquidated entries of Quiedan's stakes that were entered into the United States prior to the Department's issuance of its Final Scope Ruling. *See* Pl.'s Br. 7. Defendant argued initially that the court lacked jurisdiction over Quiedan's challenge to the Department's instructions to Customs. *See* Def.'s Opp'n 20–21. Plaintiff requested in its reply brief that the court grant leave to amend Plaintiff's complaint to properly assert jurisdiction over the issue. *See* Pl.'s Reply 16. The court allowed the Defendant and Defendant-Intervenor to file a response to Plaintiff's request. *See* Letter Filed by the Hon. Jennifer Choe-Groves, Oct. 27, 2017, ECF No. 47. The two Parties filed a joint response stating that they did not object to Plaintiff's request. *See* Joint Resp. Request Am. Compl., Nov. 8, 2017, ECF No. 48. The court ordered Plaintiff to amend its complaint, which Plaintiff filed on November 29, 2017, and directed the Parties to submit supplemental briefing regarding the Department's instructions to Customs. *See* Order, Nov. 15, 2017, ECF No. 49; Am. Compl., Nov. 29, 2017, ECF No. 50. All Parties filed additional briefs. *See* Pl.'s Supp. Br., Nov. 29, 2017, ECF No. 51 ("Pl.'s Supp. Br."); Def.-Intervenor Rebar Trade Action Coalition's Resp. Pl.'s Supp. Br. & Am. Compl., Dec. 20, 2017, ECF No. 56; Def.'s Resp. Pl.'s Supp. Br., Dec. 20, 2017, ECF No. 58 ("Def.'s Supp. Br."); Pl.'s Reply Gov't & Pet'r's Resp. Pl.'s Supp. Br., Jan. 5, 2018, ECF No. 60 ("Pl.'s Supp. Reply Br.).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012).[1] Under Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended,

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

the court will sustain a decision by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2012);[2] *see also NSK Ltd. v. United States*, 510 F.3d 1375, 1379 (Fed. Cir. 2007). "'Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *A.L. Patterson, Inc. v. United States*, 585 Fed. Appx. 778, 781–82 (Fed. Cir. 2014) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)).

With respect to Commerce's suspension of liquidation instructions to Customs, the court has jurisdiction under 28 U.S.C. § 1581(i)(4). This provision encompasses issues related to the "administration and enforcement" of antidumping duty investigations. *See id.* The court looks to 28 U.S.C. § 2640(e) when evaluating claims brought under this section, which directs the court to utilize the standard of review set forth in the Administrative Procedure Act, as amended. The court will uphold an agency's action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A) (2012). Under this standard, an agency acted in an arbitrary and capricious manner if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Al. Aircraft Indus., Inc. v. United States*, 586 F.3d 1372, 1375 (Fed. Cir. 2009) (stating the same).

DISCUSSION

I. The Department's Scope Determination

Quiedan argues that the Department's determination in the Final Scope Ruling is unsupported by substantial evidence and is otherwise contrary to the law. *See* Pl.'s Br. 20. Plaintiff contends that its argument is supported by the plain meaning of the scope language and the factors specified in 19 C.F.R. § 351.225(k)(1) (2016)[3] ("(k)(1) factors"). *See id.* Quiedan argues also that the court should remand the matter to Commerce in order to conduct a scope inquiry and engage in an analysis of the factors listed in 19 C.F.R. § 351.225(k)(2) ("(k)(2)

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[3] Further citations to Title 19 of the Code of Federal Regulations are to the 2016 edition.

factors"). *See id.* at 6, 24. Defendant submits that Commerce was not required to conduct a formal scope inquiry because the scope determination based on the plain meaning of the scope language and the (k)(1) factors is supported by substantial evidence and in accordance with the law. *See* Def.'s Opp'n 2.

Whether an importer's merchandise is subject to an antidumping duty order depends on the scope language used to define the merchandise, which may lead to issues "because the descriptions of the subject merchandise contained in the Department's determinations must be written in general terms." 19 C.F.R. § 351.225(a). Commerce is authorized to issue "scope rulings" that "clarify the scope of an order." *Id.*

The first step in determining whether an importer's merchandise is subject to an antidumping duty order is for Commerce to look to the plain language of the order. *See Duferco Steel Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) ("[A] predicate for the interpretive process is language in the order that is subject to interpretation."). If Commerce determines that the scope language in the order is unambiguous with regard to the merchandise in question, it explains the plain meaning of the scope language and the ruling ends there. *See ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 84 (Fed. Cir. 2012). Commerce may continue its analysis by examining the submitted application, the description of the merchandise, and the (k)(1) factors, which include the description of the merchandise contained in the petition, the initial investigation, prior scope determinations, and prior determinations issued by the ITC. *See* 19 C.F.R. § 351.225(d), (k)(1). The interpretive analysis ends if Commerce finds that the descriptions of the merchandise from these sources and the scope language are dispositive.[4]

Commerce must determine within forty-five days of receiving a scope ruling request from an interested party whether the merchandise is within the scope based on these factors, or conduct a formal scope inquiry under 19 C.F.R. § 351.225(e). 19 C.F.R. § 351.225(c)(2). The court provides Commerce with deference in interpreting and clarifying an antidumping duty order. *See Ericsson GE Mobile Commc'ns, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (citing *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)). Commerce cannot change, however, the scope of an order

[4] When the scope language and the sources considered under the (k)(1) factors are not dispositive, Commerce may consider the (k)(2) factors, which are derived from the factors articulated in *Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). These factors are: (1) the "physical characteristics of the product," (2) the "expectations of the ultimate purchasers," (3) the "ultimate use of the product," (4) the "channels of trade in which the product is sold," and (5) the "manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2).

or "interpret an order in a manner contrary to its terms." *Walgreen Co. of Deerfield, Ill. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010) (citing *Duferco*, 296 F.3d at 1095).

Here, Commerce issued its decision on Quiedan's agricultural training stakes pursuant to "the language of the *Order*, the description of the product contained in this scope-review request, and other sources pursuant to 19 C.F.R. § 351.225(k)(1)." Final Scope Ruling at 5. Commerce concluded that "Quiedan's training stakes meet the physical description of the merchandise identified in the scope of the *Order*;" that the goods were "neither smooth, nor further worked through bending or coating," which prevented them from falling "within the category of specifically excluded merchandise;" and that the goods comport "with the physical description of the merchandise RTAC discussed in its original Petition, and in the ITC Second Sunset Review." *Id.* at 5 (footnotes omitted). Commerce stated that it found "it unnecessary to consider the additional factors specified in 19 C.F.R. 351.225(k)(2) *[sic]." Id.* (footnote omitted). For the reasons discussed below, the court sustains the Department's decision as supported by substantial evidence.

A. The Department's Analysis

Quiedan's Scope Ruling Request describes Quiedan's agricultural training stakes as "steel concrete reinforcing bar ('rebar') that is further processed to form 4 to 5 foot stakes according to growers' specifications with a sharp point at one end." Scope Ruling Req. at 2. Plaintiff portrays the stakes as "finished products that are designed, manufactured, and dedicated for use in agricultural/horticultural pursuits," specifically to "'train' grape vines in vineyards as well as other types of plants" to aid in their development. *Id.* at 2–3. To produce the training stakes, Quiedan states that a Chinese fabricator takes coiled rebar and feeds it through a machine "that cuts and straightens the rebar into 4 and 5 foot sections." *Id.* at 3. The rebar is then put into a stamping machine to form a point, after which it is put into another stamping machine to remove burrs from the point. *Id.*

In the Final Scope Ruling, Commerce concluded that Quiedan's stakes were within the scope of the Order, noting that the stakes were "non-alloy steel, hot rolled or hot drawn not further worked" steel concrete reinforcing bars. Final Scope Ruling at 5. Commerce found that Quiedan demonstrated that "its training stakes are neither smooth, nor further worked through bending or coating" post-fabrication processing that would exempt the stakes from the Order.

Id. (footnotes omitted). Commerce determined also that Quiedan's stakes comported with the physical descriptions of the subject merchandise in the original petition and the ITC Second Sunset Review. *See id.*

Commerce first considered Quiedan's argument that the training stakes did not meet the terms of the scope language because a training stake is pointed at the end and therefore no longer "straight through its length." Final Scope Ruling at 6. Citing *Merriam-Webster Dictionary*, the Department defined straight as "generated by a point moving continuously in the same direction and expressed by a linear equation." *Id.* (footnote omitted). Commerce compared this definition to Quiedan's subject merchandise, noting that "[f]rom the tip of the point to the center of the butt end, Quiedan's rebar continuously moves in the same direction on the same plain *[sic]*, and the bar is objectively straight from end to end." *Id.* Commerce found it immaterial that Quiedan had stamped the tip of the rebar to form a point to make the stake easier to place into the ground, determining that "this point is technically composed of multiple angles" and "does not change the fundamental character of the bar as being straight through its length." *Id.* (footnote omitted). Based on these conclusions, the Department found that Quiedan's merchandise is straight and therefore not excluded from the Order.

Commerce determined next whether the stamping process to form the stake's pointed angle constituted further processing that would exclude the stakes from the Order. *See id.* The Department first clarified that, as defined by the scope of the Order, "further processing" is limited to either "bending" or "coating" the rebar. *Id.* Commerce again looked to *Merriam-Webster Dictionary*, which defines bending as "the use of force to cause something, such as a wire or pipe to become curved." *Id.* (footnote omitted). Curving, in turn, requires "a turn, change, or deviation from a straight line or plane surface without sharp breaks or angularity." *Id.* (footnote omitted). The Department noted that "Quiedan's manufacturer grinds the rebar using sharp angles to create a tip," but concluded that such a process "does not qualify as bending." *Id.* Instead, the Department found that the training stakes "follow the same linear direction" and have "no deviation from a straight line," indicating that the subject products were the type of rebar sold in "straight lengths" contemplated by the Order. *Id.* Commerce concluded further that there was no record evidence suggesting that the training stakes were coated. *Id.* Commerce thus determined that the training stakes did not meet the "bending" or "coating" fabrication exclusions of the scope language based on these observations.

Finally, Commerce rejected Quiedan's contention that its training stakes are exempt from the Order because they constitute "merchant bars." *Id.* at 7. The ITC Second Sunset Review states that some "U.S. rebar producers produce additional products using the same equipment, machinery, and production workers that are used to produce straight-length rebar." *ITC Second Sunset Rev.* at I-25. These products include "merchant bars," which are described as bars with "round, square, flat, angled, and channeled cross sections" that are "used by fabricators and manufacturers to produce a variety of products, including steel floor and roof joists, safety walkways, ornamental furniture, stair railings, and farm equipment." *Id.* Noting that there is no record evidence demonstrating that sharpening rebar to a point at one end converts it into a merchant bar, Commerce rejected the notion that "the slight change in appearance of the rebar that has been stamped to a point and deburred changes the character of the deformed rebar to such a degree that it becomes merchant bar." Final Scope Ruling at 7.

The Department recognized also that it had previously determined that the scope of the Order covers "all rebar . . . and contains no requirement or exception for the end usage." *Id.* (discussing Antidumping Duty Order on Steel Concrete Reinforcing Bars from the People's Republic of China: Transmittal of Source Documents Referenced to the File at Attach. 2, PD 16, bar code 3526853–01 (Jan. 19, 2012)). Commerce noted that Quiedan's Scope Ruling Request did not "assert that the end use or the length of its training stakes be taken into consideration for the purposes of the Department's finding in the instant proceeding." *Id.* Commerce determined that Quiedan's stakes are not merchant bars based on the record evidence before it.

B. Plaintiff's Challenges to the Final Scope Ruling

1. Plaintiff's Contention that its Merchandise is Outside the Scope of the Order

Plaintiff challenges the Department's findings before the court for several reasons. Plaintiff argues that the training stakes cannot be considered "steel concrete reinforcing bars sold in straight lengths" because the goods are not straight, but "have pointed, angled ends." Pl.'s Br. 23. Plaintiff argues that Commerce ignored the definition of "straight" from *Merriam-Webster Dictionary* placed on the record by the Department when it defined straight as "free from curves, bends or angles or irregularities." *Id.* (citing Antidumping Duty Order on Steel Concrete Reinforcing Bars from the People's Republic of China:

Transmittal of Source Documents Referenced to the File at Attach. 1, PD 16, bar code 3526853–01 (Dec. 5, 2016)). Plaintiff avers that the stakes are not straight because they are pointed or angled. *See id.*

Quiedan's argument ignores, however, additional definitions of the term "straight" from *Merriam-Webster Dictionary* that were placed on the record, including one definition of straight as "generated by a point moving continuously in the same direction and expressed by a linear equation." Antidumping Duty Order on Steel Concrete Reinforcing Bars from the People's Republic of China: Transmittal of Source Documents Referenced to the File at Attach. 1, PD 16, bar code 3526853–01 (Dec. 5, 2016). By that definition, Quiedan's training stakes are straight regardless of the pointed end because, from end to point, the stake continuously moves along the same direction. This is the definition of "straight" that Commerce used in determining that the training stakes are subject to the Order. *See* Final Scope Ruling at 6. While Quiedan's alternative definition of "straight" may be plausible, it is the court's obligation to assess whether the Department's interpretation that the training stakes are within the scope of the Order is reasonable and supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). The court is not persuaded by Plaintiff's argument, and the court concludes that the Department's interpretation of "straight" as moving continuously in the same direction with respect to the training stakes at issue is a reasonable interpretation based on the evidence in the record.

Plaintiff argues also that Quiedan's merchandise is not subject to the Order based on the plain language and the (k)(1) factors. *See* Pl.'s Br. 20. Plaintiff contends that the term "rebar" is not defined in the scope language and, as a result, the court "should consider the common meaning of the term rebar, the context and trade usage of this term, and then the factors specified in 19 C.F.R. § 351.225(k)(1)." *Id.* Citing *Merriam-Webster Dictionary*, Plaintiff states that the common meaning of rebar is "a steel rod with ridges for use in reinforced concrete." *Id.* Plaintiff avers that "the scope of the Rebar Order is limited to a steel rod with ridges which is used for a particular purpose; that is, to reinforce concrete." *Id.* Plaintiff's argument fails, however, based on the plain language of the Order and the (k)(1) sources.

First, the scope language of the Order does define rebar. The Order states that the subject merchandise includes "all steel concrete reinforcing bars (rebar) sold in straight lengths," *Order*, 66 Fed. Reg. at 46,777, making Plaintiff's resort to a dictionary definition unnecessary. *See Meridian Prods., LLC v. United States*, 851 F.3d 1375, 1382

(Fed. Cir. 2017) (quoting *Duferco*, 296 F.3d at 1097) ("Although a party's description of merchandise in [the (k)(1)] sources may aid Commerce in making its determination, that description 'cannot substitute for language in the order itself' because '[i]t is the responsibility of [Commerce], not those who [participated in] the proceedings, to determine the scope of the final orders.'").

Second, Quiedan's Scope Ruling Request belies its argument that, because its training stakes "have been further processed into a product which will be used as an agricultural stake, and not to reinforce concrete, this product no longer falls within the common meaning of the term 'rebar.'" Pl.'s Br. 20. The Scope Ruling Request states that "the training stakes consist of steel concrete reinforcing bar ('rebar');" thus, Plaintiff is defining its merchandise as rebar itself. Scope Ruling Req. at 2. For Plaintiff to argue otherwise in its briefing contradicts its own submission before Commerce.

Plaintiff argues that its training stakes do not meet the definition of "rebar" because of their size and use, "factors which the Department is required to consider in its scope analysis; especially here where rebar has a common and well-defined purpose and use considered by the ITC in its analysis." Pl.'s Br. 21. Quiedan discusses the ITC Reports on the record, which Plaintiff argues "unequivocally reveal that rebar is used solely to reinforce concrete." *Id.* According to the First Sunset Review of the Order, however, all six Commissioners found in the original antidumping duty investigation that rebar is "*primarily* used for the reinforcement of concrete structures." *First Review on Steel Concrete Reinforcing Bar from Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine* at 24, USITC Pub. No. 3933, Inv. Nos. 731-TA-873–875, 877–880, and 882 (July 2007) ("*ITC First Sunset Rev.*") (emphasis added). While Plaintiff's rebar is not being used for rebar's primary purpose, it does not cease to be rebar subject to the Order based on this factor alone. Plaintiff's argument that its product does not meet the definition of rebar therefore fails.

Quiedan argues that its "product is used exclusively in the agricultural and farming industry" and should be considered merchant bar, which Plaintiff defines as outside the scope of the Order.[5] Pl.'s Br. 22. As discussed above, merchant bar is mentioned in the ITC Second

[5] Quiedan contends that remand is justified because Commerce, in a footnote to the Final Scope Ruling, mistakenly used the description of a "merchant bar" found in the ITC Second Sunset Review to define the subject merchandise. *See* Pl.'s Br. 22 (citing Final Scope Ruling at 5 n.31). In addressing Quiedan's argument that its training stakes are merchant bars and not subject merchandise, however, Commerce does not conflate the two descriptions, and explains its findings that Quiedan's training stakes are subject merchandise and not merchant bars. *See* Final Scope Ruling at 7. As a result, the Department's minor error in its footnote did not influence its decision and is not a justified reason for remand.

Sunset Review as one of the "additional products" produced by "[s]ome U.S. rebar producers" using the same "equipment, machinery, and production workers that are used to produce straight-length rebar." ITC Second Sunset Rev. at I-25. The ITC states that merchant bar products "include bars with round, square, flat, angled, and channeled cross sections" and can be used "by fabricators and manufacturers to produce a variety of products, including . . . farm equipment." *Id.*

The ITC Second Sunset Review appears to be one of three documents on the record that discusses and defines the term "merchant bar."[6] The other two sources are webpages attached to Quiedan's Scope Ruling Request. *See* Scope Ruling Req. at Attach. 3. The first webpage, from merchant bar producer Steel Dynamic's Roanoke Bar Division, states that its merchant bars "are typically used in light commercial construction, joist manufacturing, industrial/commercial fabrication, and in the manufacturing process of trailers and other heavy equipment." *Id.* The second webpage, from merchant bar producer Infra-Metal, describes the products as "[a] group of commodity steel shapes that consist of rounds, squares, flats, strips, angles and channels, which fabricators, steel service centers and manufacturers cut, bend and shape into products." *Id.* The Infra-Metal webpage notes that "[m]erchant products require more specialized processing than reinforcing bar." *Id.* This evidence suggests that merchant bars are processed more than the subject merchandise, contain a variety of different cross-sections, and are cut, bent, or shaped in a fabrication process, including in the fabrication of farm equipment. While this information is pertinent to defining a merchant bar, it does not overcome the Department's conclusion that Quiedan's training stakes are subject to the Order.

The Court of Appeals for the Federal Circuit has stated that the (k)(1) factors are helpful in determining whether merchandise is within the scope of an Order, but cannot substitute for the plain language of the Order itself. *See Meridian Prods., LLC* , 851 F.3d at 1382. While Quiedan's training stakes could arguably be considered "farming equipment" that was further fabricated from rebar (*i.e.*, a stamping and deburring process to create a point at one end), this evidence alone does not remove it from the scope of the Order. "[E]ven if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determi-

[6] The ITC First Sunset Review mentions merchant bars as well, but does not define or discuss these products in any detail. *See ITC First Sunset Rev.* at I-23 (stating that U.S. rebar producers make additional products, including "merchant and special-quality (SBQ) bars, and fence and sign posts.").

nation from being supported by substantial evidence." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (citing *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001)). Commerce found that Quiedan's training stake is a straight, non-plain round length piece of rebar from end to tip and contains no bending or coating, which is the only further processing that would remove such straight length rebar from the scope of the Order according to the scope language. *See* Final Scope Ruling at 5. Commerce's conclusion, while perhaps not the only one that can be drawn from the record evidence, is supported nonetheless by substantial evidence.

Based on the record evidence, the description of the goods, and the descriptions of subject merchandise contained within the (k)(1) sources, the court concludes that the Department's decision is reasonable and supported by substantial evidence. The court sustains the Department's decision that the training stakes are within the scope of the Order.

2. Plaintiff's Contention that Commerce Should Have Engaged in a Formal Scope Inquiry

Plaintiff contends that the court should remand the instant matter because Commerce failed to conduct a formal scope inquiry. *See* Pl.'s Br. 24. If Commerce cannot reach a finding of whether the merchandise is within the scope of an order by means of the plain scope language and the (k)(1) factors (*i.e.*, the petition, the initial investigation, and previous determinations of Commerce and the ITC) within forty-five days of receiving the scope ruling request, it may initiate a formal scope inquiry. 19 C.F.R. § 351.225(c)(2), (e). In a formal scope inquiry, Commerce assesses the (k)(1) factors and may also consider the (k)(2) factors, such as the physical characteristics of the product, the expectations of the ultimate purchaser, and the channels of trade in which the product is sold, to a name a few. *See* 19 C.F.R. § 351.225(e), (k). Plaintiff argues that Commerce could not have reached a decision that its training stakes are within the scope of the Order based on the scope language and the (k)(1) factors and, thus, should have at least initiated a formal scope inquiry to assess the issue further. *See* Pl.'s Br. 24–27. Plaintiff urges the court to remand the decision on this basis. *Id.*

Plaintiff reiterates essentially the same arguments it has already made that the court is rejecting: that the training stakes are "merchant bars" excluded from the scope, that the training stakes are not covered by the Order because they are not "concrete reinforcing," and that the training stakes have different physical characteristics (*i.e.*, a

sharpened point) and a different use (*i.e.*, training plants and vines) than rebar. *See id.* at 25–27. Plaintiff argues that these factors indicate that "the Department erred in its decision that the K-1 factors 'are dispositive on the question whether' Plaintiff's *Training Stakes* are covered by the Rebar Order." *Id.* at 27. For the same reasons articulated above, Quiedan has not persuaded the court that a formal scope inquiry is warranted in this case. The court concludes that the Department's decision that the training stakes are within the scope of the Order according to the plain meaning of the scope language and the (k)(1) factors is supported by substantial evidence and in accordance with the law.

Plaintiff argues that its training stakes merited a full scope inquiry based on the complexity of issues that necessitated the extension of time for Commerce to make its determination. *See id.* In particular, Quiedan notes that "[o]n four separate occasions, Commerce extended its deadline for a scope ruling determination because the issues presented were so 'complex' that it could not issue a decision within the mandated 45 days under 19 C.F.R. § 351.225(c)(2)." *Id.* Quiedan asserts that "[i]f this Rebar Order was unambiguous and the language so clear that the *Training Stakes* fall within the plain language, Commerce would have not required so many extensions." *Id.* Plaintiff cites nothing to support this proposition. To the contrary, Commerce may extend a time limit for good cause, unless expressly precluded by statute. 19 C.F.R. § 351.302(b). Commerce stated in each of its extensions that it sought to extend the deadline because of "the complexity of the request and comments received." *See* Letter re: Steel Concrete Reinforcing Bars from the People's Republic of China, PD 9, bar code 3493156–01 (Aug. 1, 2016); Letter re: Steel Concrete Reinforcing Bars from the People's Republic of China, PD 11, bar code 3507652–01 (Sept. 20, 2016); Letter re: Steel Concrete Reinforcing Bars from the People's Republic of China, PD 14, bar code 3518785–01 (Nov. 2, 2016). The court is not persuaded by Plaintiff's argument that the Department's need for extensions required Commerce to engage in a full scope inquiry.

II. The Department's Instructions to Suspend Liquidation Retroactively

Plaintiff contests the Department's instructions to Customs to continue suspension of liquidation of all entries of steel concrete reinforcing bars from China subject to the Order, including Quiedan's training stakes. *See* Pl.'s Br. 28. Quiedan contends that these instructions should have been limited to only those goods that entered the United States after November 22, 2016, the date of the issuance of the

Final Scope Ruling, and are therefore contrary to law. *See id.* Defendant disagrees, arguing that the Department's instructions to Customs were proper under 19 C.F.R. § 351.225. *See* Def.'s Opp'n 21; Def.'s Supp. Br. 2–3.

19 C.F.R. § 351.225(l)(3) states clearly that when the Department issues a final scope ruling and finds that the "product in question is included within the scope of the order, any suspension of liquidation . . . will continue." If the Department finds that the final scope ruling encompasses a particular product, but an ambiguity existed as to whether the products were subject to an antidumping duty order at the outset, then suspension of liquidation instructions should be limited to entries imported on or after the date of initiation of the scope inquiry. *See Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 38 CIT __, __, 961 F. Supp. 2d 1291, 1304 (2014) ("Where . . . a scope ruling confirms that a product is, and has been, the subject of an order, the Department has not acted beyond its authority by continuing the suspension of liquidation of the product.").

As stated above, the Department correctly found that Quiedan's training stakes fell unambiguously within the scope of the Order. Because no ambiguity existed, the products were subject to the liquidation instructions for the entire investigatory period, and the Department's issuance of instructions to Customs properly followed 19 C.F.R. § 351.225(l)(3). Plaintiff concedes that if the court holds that its products "fall within the Rebar Order's scope based solely upon the words of the Orders and the physical characteristics of the merchandise, then [antidumping duties] can be asserted retroactively." Pl.'s Supp. Br. 5; *see also* Pl.'s Supp. Reply Br. 3. Because the Department adhered to its regulation and relevant case law, the court concludes that the Department's issuance of instructions was not arbitrary and capricious, and that the Department acted in accordance with the law.

CONCLUSION

For the foregoing reasons, the court concludes that the Department's Final Scope Ruling is supported by substantial evidence and in accordance with the law. Therefore, pursuant to the foregoing:

(1) the court denies Plaintiff's motion for judgment on the agency record;

(2) the court denies Plaintiff's request to remand the matter with instructions for Commerce to issue a determination excluding the

agricultural training stakes from the scope of the order or, in the alternative, to initiate a formal scope inquiry under the (k)(2) factors; and

(3) the court denies Plaintiff's request with respect to the retroactive suspension of liquidation and upholds Commerce's instruction to Customs to retroactively suspend liquidation and assess duties on entries of Plaintiff's shipments of agricultural training stakes entered prior to the issuance of Commerce's November 22, 2016 Final Scope Ruling.

Judgment will be entered accordingly.

Dated: March 9, 2018
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–20

UNITED STATES, Plaintiff, v. RUPARI FOOD SERVICES, INC., Defendant.

Before: Gary S. Katzmann, Judge
Consol. Court No. 10–00119

[Plaintiff's motion for default judgment pursuant to USCIT Rule 55(b) is granted.]

Dated: March 9, 2018

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Plaintiff. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, of Washington, DC. Of counsel on the brief was *Brian J. Redar*, Deputy Associate Chief Counsel, U.S. Customs and Border Protection, of Miami, Fl.

Lawrence M. Friedman, Barnes Richardson & Colburn, of Chicago, IL and *Peter A. Quinter*, Gray Robinson, P.A., of Miami, FL, for Defendant, on the motion for summary judgment.

OPINION

Katzmann, Judge:

The court today issues default judgment in a case whose background spans more than two decades, and which has seen the reorganization of a federal agency, a bankruptcy, the withdrawal of counsel, and an issue of first impression before this Court.[1] Plaintiff, the United States ("the Government"), on behalf of United States Customs and Border Protection ("Customs"),[2] brought this action against defendant, Rupari Food Services, Inc. ("Rupari") to recover civil penalties in the amount of $2,784,636.18, plus post-judgment interest and costs as provided by law, for Rupari's alleged fraudulent violation of Section 592 of the Tariff Act of 1930, 19 U.S.C. § 1592(a)[3] (2012).[4] Pl.'s Am. Compl. ¶¶ 70–72, 78, Aug. 31, 2015, ECF No. 110 ("Am.

[1] *See United States v. Rupari Food Servs., Inc.*, 41 CIT ___, 254 F. Supp. 3d 1367 (2017), discussed *infra* p.17.

[2] At the inception of these events, Customs was known as the United States Customs Service. After March 1, 2003, the United States Customs Service was split into two agencies within the newly created Department of Homeland Security. The functions of the United States Customs Service relevant to this case were assumed by United States Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002).

[3] 19 U.S.C. § 1592(a)(1)(A)(i) mandates, in relevant part, that "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement."

[4] Further citations to the Tariff Act of 1930, as amended, are to the relevant provision of Title 19 of the U.S. Code, 2012 edition, unless otherwise noted.

Compl."). The Government alleges that Rupari knowingly and falsely claimed that five seized entries of frozen Chinese crawfish tail meat, which Seamaster Trading Co., Ltd. ("Seamaster") attempted to enter into the United States in 1998 and which were subject to an anti-dumping duty order, originated in Thailand. *Id.*

After years of proceedings before Customs and litigation before this court, described *infra*, as well as several stays in proceedings and extensions of filing deadlines, on April 10, 2017, Rupari filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. Joint Status Report, Apr. 17, 2017, ECF No. 148. On November 2, 2017, the Clerk of Court entered default judgment against Rupari pursuant to USCIT Rule 55(a). ECF No. 172.

The Government now moves for default judgment pursuant to USCIT Rule 55(b), over which motion the court has jurisdiction pursuant to 28 U.S.C. § 1582(1) (2012). Pl.'s Mot. for Default J. and Mem. in Support of Pl.'s Mot. ("Pl.'s Br."), Dec. 18, 2017, ECF No. 173. The Government asks the court to enter default judgment against Rupari for civil penalties in the amount of $2,784,636.18, the alleged domestic value of the merchandise whose entry was attempted, plus post-judgment interest and costs as provided by law. *Id.* at 1; Pl.'s Br. Decl. of Yolanda Benitez ("Benitez Decl.") ¶¶ 3, 10, Dec. 15, 2017, ECF No. 173–2; Pl.'s Br. Attach. A ("Attach. A"), ECF No. 173–2.[5]

Because the Government's well-pleaded complaint and supporting evidence adequately establish Rupari's liability for a fraudulent violation of Section 1592 as a matter of law, and because the Government's claim is for a civil penalty amount within the statutory limit for such violations, the court grants the Government's motion for a default judgment, insofar as it seeks fixation of a penalty amount rather than enforcement of that penalty.

BACKGROUND

The court notes at the outset that a defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint. *See, e.g., United States v. NYCC 1959 Inc.*, 40 CIT ___, 182 F. Supp. 3d 1346, 1347 (2016) (citing *City of New York v. Mickalis Pawn*

[5] Certain of the Government's citations and supportive exhibits, such as the Benitez Decl. and Attach. A, represent the civil penalties sought as totaling $2,784,636.17, rather than $2,784,636.18 — a discrepancy of one cent. Even though the Amended Complaint states that the "[t]he domestic value of the merchandise Rupari attempted to enter into the United States was $2,784,636.17," Am. Compl. ¶ 63, the court considers the amount of $2,784,636.18 to be correct, as this is the amount sought in the Government's Prayer for Relief, Am. Compl. ¶ 78. Further, as explained *infra* n.10, the mathematical subtotals of the itemized values associated with the civil penalties sought, which are listed in Attach. A, yield a grand total of $2,784,636.18.

Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011)); *United States v. Deladiep, Inc.*, 41 CIT ___, ___, 255 F. Supp. 3d 1326, 1336 (2017) (citing *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981)). The following facts are undisputed.

A. *Factual Background*

At the time of the events giving rise to this action, Rupari was a Florida corporation that purchased crawfish from abroad and sold it to restaurants in the United States. Am. Compl. ¶ 3; Ans. to Am. Compl. ¶ 3, Sept. 21, 2015, ECF No. 11 ("Ans."); Ct. No. 11–00203, Original Compl. Against Rupari, ¶¶ 3, 12, June 20, 2011, ECF No. 2; Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") Ex. 10 at 13, Purchase Agreement, Mar. 7, 1997, ECF No. 94–6. Rupari's seafood sales team consisted of Larry Floyd, Vice President of Rupari's Seafood Sales Division, and William Vincent ("Rick") Stilwell, a commissioned seafood salesman. Am. Compl. ¶ 14; Ans. ¶ 14; Def. Rupari Food Services, Inc. R. 56.3 Stmt., Sec. I. "Response to Plaintiff's Statement of Facts" ¶ 3, Feb. 24, 2016, ECF No. 120–12 ("Def. RPSF");[6] Pl.'s Opp'n Ex. 1, Tr. of Dep. of William Vincent Stilwell ("Stilwell Dep.") at 13–14, Apr. 3, 2013, ECF No. 94–1; Pl.'s Opp'n Ex. 2, Tr. of Dep. of Rupari Food Services Inc. ("Rupari Dep.") at 15–17, Apr. 4, 2013, ECF No. 94–2.

From March 1, 1996 through August 31, 1996, the United States Department of Commerce ("Commerce") conducted an antidumping investigation concerning crawfish tail meat from the People's Republic of China ("China"). Am. Compl. ¶ 9; Ans. ¶ 9. Commerce published the final determination of its antidumping investigation of freshwater crawfish tail meat from China on August 1, 1997. *Freshwater Crawfish Tail Meat From The People's Republic Of China*, 62 Fed. Reg. 41,347 (Dep't Commerce Aug. 1, 1997) (subsequently amended to correct ministerial errors at 62 Fed. Reg. 48,218 (Dep't Commerce Sept. 15, 1997)) (Final Determination) ("*Antidumping Duty Order*"). Commerce determined that Chinese crawfish tail meat was being sold for less than fair value and entered Antidumping Duty Order A-570–848, which covers "freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged),

[6] At the time that the Government filed its motion for summary judgment on January 15, 2015, *see infra*, the USCIT Rules did not require the annexation of a statement of undisputed facts. *Compare* USCIT R. 56.3(b) (2015) ("In the papers opposing a Rule 56 motion for summary judgment, the factual positions described in Rule 56(c)(1)(B) must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant[.]"). In its February 24, 2016 response to the Government's motion, Rupari numbered certain sentences contained in the facts section of the Government's motion for summary judgment and responded to them as if they had been set out in separately numbered paragraphs. *See* Def. RPSF.

grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved or prepared," and excludes live and other whole crawfish. *Id.* at 48,219. Commerce calculated the "China-wide" antidumping duty rate, applicable to Chinese crawfish tail meat exporters other than those specifically identified and individually examined, to be 201.63 percent. *Id.* at 48,219.

Lianyugang Yupeng Aquatics Products Co. Ltd., also known as Yupeng Fisheries Ltd. ("Yupeng"), a Chinese producer and exporter of crawfish tail meat, was among the firms investigated by Commerce. Am. Compl. ¶ 11; Ans. ¶ 11. Yupeng did not receive a separate antidumping rate, and its crawfish tail meat exports were subject to the China-wide rate of 201.63 percent. Am. Compl. 12; Ans. ¶ 12; *Antidumping Duty Order* at 41,358.

From 1996 to 1998, Yupeng sold Rupari whole cooked frozen crawfish and crawfish tail meat. Am. Compl. ¶ 13; Ans. ¶ 13; Def. RPSF ¶ 2; Stilwell Dep. at 17–18. Rupari's seafood sales team engaged in multiple communications with Yupeng regarding crawfish. Am. Compl. ¶ 14; Ans. ¶ 14; Def. RPSF ¶ 3. They communicated with Tian Wei, a Yupeng salesman, and with Wang Yon Min, Yupeng's owner, regarding the sale of crawfish to Rupari. Am. Compl. ¶ 15; Ans. ¶ 15; Stilwell Dep. at 12, 21.

In 1997 and 1998, Rupari sold crawfish to members of the Popeye's Operators' Purchasing Cooperative Association ("POPCA"). Am. Compl. ¶ 23; Ans. ¶ 23. Richard L. Porter, the POPCA director of purchasing and distribution, communicated with Rupari through Floyd regarding the sale of crawfish. Am. Compl. ¶ 24; Ans. ¶ 24; Pl.'s Opp'n Ex. 10 at 1, Decl. of Richard L. Porter ("Porter Decl.") ¶¶ 6–7, Mar. 16, 2014, ECF No. 94–6. On March 7, 1997, Porter and Floyd signed a Purchase Agreement wherein Rupari would sell POPCA 148,000 pounds of "Chinese [c]rawfish [t]ail [m]eat." Am. Compl. ¶ 25; Ans. ¶ 25; Purchase Agreement at 13. The agreement also stated that a formal POPCA supply agreement would be sent shortly thereafter. Purchase Agreement at 13. Floyd and Porter consummated the formal POPCA supply agreement on June 8, 1997. Am. Compl. ¶ 25; Ans. ¶ 25; Purchase Agreement at 14.

On October 17, 1997, POPCA sent Floyd and Rupari a letter confirming that Popeye's would purchase 1,500 cases of crawfish. Pl.'s Opp'n Ex. 10 at 30, Crawfish Confirmation Letter from James Brailey, Purchasing Manager, POPCA, to Floyd, Oct. 17, 1997.

In November 1997, Wang, Yupeng's owner, created Seamaster, which was located in Thailand. Am. Compl. ¶ 16. Yupeng shipped crawfish tail meat from China to Seamaster in Thailand. Pl.'s Ex. 6, Opp'n Packing List, Bill of Lading, Invoice, Manifest or Freight List,

ECF No. 94–5. Rupari was aware that Wang created Seamaster and was the principal owner of both Yupeng and Seamaster. Am. Compl. ¶ 17; Rupari Dep. at 5.

Wang approached Somchai Sriviroj, the owner and managing director of Sea Bonanza Foods Company ("Sea Bonanza"), a fish processing company in Thailand, and asked if Sea Bonanza could repackage frozen crawfish tail meat. Pl.'s Opp'n Ex. 4, Tr. of Dep. of Sea Bonanza Foods Company, Ltd. at 8, July 8–9, 2013, ECF No. 94–3 ("Sea Bonanza Dep.").

On November 8, 1997, Seamaster entered into a contract with Sea Bonanza wherein Seamaster would ship crawfish tail meat from China to Thailand, and Sea Bonanza would repackage the crawfish tail meat in exchange for a processing fee. Am. Compl. ¶¶ 18–19; Pl.'s Opp'n Ex. 5, Contract between Seamaster and Sea Bonanza at 2, Nov. 8, 1997, ECF No. 94–4.

In January and April 1998, Yupeng shipped from China to Seamaster, in Thailand, product invoiced as "frozen crawfish." Am. Compl. ¶ 20; Def. RPSF ¶ 12; Invoice at 1, 3, Jan. 8, 1998. Sea Bonanza repacked the crawfish tail meat for Seamaster and labelled the meat a "Product of Thailand." Am. Compl. ¶ 21; Def. RPSF ¶¶ 14–15; Sea Bonanza Dep. at 8, 22. According to the Agricultural Affairs Office at the American Embassy in Bangkok, crawfish is not harvested in Thailand; moreover, Sea Bonanza never processed live crawfish. Sea Bonanza Dep. at 22–24, 44; Packing List at 1, Apr. 18, 1998; Pl.'s Opp'n Ex. 8, Facsimile from the Agricultural Affairs Office at the American Embassy in Bangkok, Thailand to Roy Johnson, Louisiana Dept. of Agriculture at 1, Aug. 5, 1998, ECF No. 94–5.

Rupari assisted Seamaster with obtaining a customs broker, and Seamaster became a nonresident importer. Rupari Dep. at 4; Pl.'s Opp'n Ex. 11A at 1–42, Entry Documents, Mar. 13, 1998, ECF No. 94–7 ("Entry Documents"). Rupari stopped purchasing crawfish tail meat directly from Yupeng and began purchasing crawfish tail meat from Seamaster. Stilwell Dep. at 18, 20. Rupari had never previously purchased crawfish from a source in Thailand prior to purchasing crawfish tail meat from Seamaster. *Id.*

On February 24, 1998, Porter sent a letter to Caro Produce regarding POPCA's Crawfish Etouffee promotion beginning March 9, 1998, and ending April 11, 1998. Pl.'s Opp'n Ex. 10 at 36, Letter from Porter to Caro Produce-Angel Homan, Feb. 24, 1998. The letter recited that POPCA had ordered 1,200 cases of crawfish in 24.1 pound bags from Rupari. *Id.*

On March 13, 1998, Seamaster filed a consumption entry describing the imported merchandise as 1,900 cartons of frozen crawfish, classified under U.S. Harmonized Tariff Schedule ("HTSUS") 0306.19.0010, free of duty, and marked as a product of Thailand. Am. Compl. ¶ 32; Entry Documents at 1, Entry Summary.

On April 18, 1998, Seamaster filed three consumption entries that described the imported merchandise as 1,750 cartons of cooked crawfish meat, classified under HTSUS 1605.40.1000, free of duty, and marked as products of Thailand. Am. Compl. ¶ 33; Entry Documents at 10, Entry Summary. Seamaster did not identify any of the entries as being subject to antidumping orders as required by 19 C.F.R. § 141.61(c) (1998). Am. Compl. ¶ 34; Entry Summary at 10. 19 C.F.R. § 141.61(c) (1998) states:

> Identification number for merchandise subject to an antidumping or countervailing duty order. The entry summary filed for merchandise subject to an antidumping or countervailing duty order shall include the unique identifying number assigned by [Commerce]. Any entry summary filed for merchandise subject to an antidumping or countervailing duty order not containing the identifying number shall be rejected.

Rupari was listed as the notifying party on certificates of origin that accompanied these four entries. Am. Compl. ¶ 35; Ans. ¶ 35; Entry Documents at 7, 15, 26, 37. The entry summaries, entry documents, invoices, and certificates of origin all stated that the crawfish meat originated in Thailand. *See* Entry Documents.

Altogether, Seamaster, as the importer of record, entered four containers of crawfish tail meat into the commerce of the United States through the Los Angeles/Long Beach Seaport by means of documents filed with Customs that claimed the merchandise originated in Thailand. Am. Compl. ¶¶ 36–37. The four entries were released for consumption, and Rupari sold some or all of the entries to POPCA. Am. Compl. ¶ 36; Porter Decl. ¶ 10. All four entries were subject to a 201.63 percent antidumping duty under the *Antidumping Duty Order*. Am. Compl. ¶ 38; *United States v. Am. Cas. Co. of Reading Pa.*, 39 CIT ___, ___, 91 F. Supp. 3d 1324, 1330 (2015), *as amended* (Aug. 26, 2015) (*Rupari I*) (citing *Antidumping Duty Order*, 62 Fed. Reg. at 41,358). Seamaster did not classify the entries as subject to antidumping duties, nor did it remit any amount of the applicable duties to Customs. Am. Compl. ¶ 34.

On May 4, 1998, Porter had a telephone conversation with Floyd, Rupari's Vice President of Seafood Sales, regarding the crawfish tail meat purchased from Rupari and upcoming shipments of frozen crawfish tail meat. Am. Compl. ¶ 29; Porter Decl. ¶ 10. According to Porter:

> During that conversation, I asked Larry [Floyd] how it was that Rupari could sell its Chinese crawfish tail meat so cheaply. I also commented that Rupari's crawfish was cheaper than all of the other Chinese crawfish tail meat being sold in the United States at that time. Larry responded that they, which I understood to be Rupari, "can get it in where it would not be known as Chinese crawfish." I asked Larry how and he explained that the Chinese crawfish tail meat was shipped to Thailand where it was "processed." He said that the country of origin could be the place where the crawfish is packed. Larry also used the word "tariff," stating that Rupari's crawfish would not have to pay the same amount in tariffs. I responded, "Is that on the up-and-up?" I was uncomfortable with this approach and shared my concern with Larry.

Porter Decl. ¶ 10; Am. Compl. ¶ 30. Later that day, Floyd sent Porter a facsimile on Rupari letterhead, in which he wrote:

> As per our conversation on the telephone earlier concerning cooked peeled crawfish meat from Thialand, [sic] this product was cooked in China and sent to Thialand [sic] in the whole round and totally processed in Thialand [sic] and packed under the Seamaster lable [sic]. I really don't understand what all the comotion [sic] is all about because we could bring in the whole cooked product into the United States and peel and pack it here and it would become product of the U.S.A.

Am. Compl. ¶ 31; Ans. ¶ 31; Def. RPSF ¶ 26; Pl.'s Opp'n Ex. 20 at 1, Fax from Floyd to Porter, May 4, 1998, ECF No. 94–11.

Between June 13 and June 20, 1998, Seamaster, as the importer of record, attempted five additional entries of frozen cooked peeled crawfish meat or frozen crawfish meat, and the entries were detained by Customs.[7] Am. Compl. ¶¶ 39–40, 42; Ans. ¶¶ 39–40, 42; Def. RPSF ¶¶ 30–31; Pl.'s Ex. 11B at 1–28, Opp'n Entry/Immediate Delivery Forms, Certificates of Origin, Bills of Lading, Invoices, ECF No. 94–8 ("Attempted Entry Documents"). Seamaster classified the crawfish tail meat in these five entries as duty free under 1605.40.1000 HTSUS. Am. Compl. ¶ 40; Ans. ¶ 40; Attempted Entry Documents at 1–28. Seamaster labeled all five entries as products of Thailand. Am. Compl. ¶ 40; Ans. ¶ 40; Attempted Entry Documents at 1–28. The crawfish tail meat was subject to antidumping duties of 201.63 percent, because it originated in China, but Seamaster did not classify the merchandise properly. Am. ¶ 41; Ans. ¶ 41; Attempted Entry

[7] These five attempted entries were numbered 595–2093518–6, 595–2093516–0, 595–2093510–3, 595–2093512–9, and 595–2093514–5. Am. Compl. ¶ 39.

Documents at 1–28; *Antidumping Duty Order*, 62 Fed. Reg. at 48,219. Customs examined and seized the five entries of crawfish tail meat under 19 U.S.C. § 1595a(c)(2)(E),[8] because the cartons were intentionally marked as products of Thailand in violation of 19 U.S.C. § 1304.[9] Am. Compl. ¶ 42; Ans. ¶ 42.

On June 26, 1998, Customs issued a request for information to Seamaster, as importer of record, asking them to substantiate the claimed Thai origin of the five seized entries, and asking for an explanation of Seamaster's relationships with Rupari and Sea Bonanza. Am. Compl. ¶ 43; Ans. ¶ 43; Def. RPSF ¶ 33; Pl.'s Opp'n Ex. 13 at 1, U.S. Customs Service Request for Information, June 26, 1998, ECF No. 94–10. In response to the first request for information, Seamaster advised that it was the exporter and importer, identified Rupari as the domestic buyer of the crawfish tail meat entries, identified Sea Bonanza as the packer and producer of the crawfish, and stated that all of the crawfish had been harvested at Mahyam Tingham in Thailand. Def. RPSF ¶ 34.

On June 29, 1998, Customs commenced a fraud investigation against Rupari for the possible circumvention of antidumping duties. Pl.'s Opp'n Ex. 12, Tr. of Dep. of C. Vernon Francis at 12, Sept. 24, 2013, ECF No. 94–9 ("Francis Dep.").

On July 1, 1998, Rupari, through its employee, Stilwell, filed a letter with Customs on behalf of Seamaster, the importer of record, wishing to clarify the origin of the crawfish tail meat in Seamaster's five entries. Am. Compl. ¶ 44; Ans. ¶ 44; Def. RPSF ¶ 35; Pl.'s Opp'n Ex. 15 at 1, Letter from Stilwell to David Shaw, U.S. Customs Service, July 1, 1998, ECF No. 94–11. Stilwell stated in the letter that the crawfish tail meat in the five seized entries was "cooked, peeled, and processed" by Sea Bonanza at its plant in Thailand. Am. Compl. ¶ 44; Ans. ¶ 44; Def. RPSF ¶ 36; Letter from Stilwell to David Shaw at 1.

On July 6, 1998, Customs issued a second request for information to Seamaster asking for records from Sea Bonanza to substantiate the facts in the letter referenced claiming that the crawfish tail meat was processed in Thailand from raw crawfish harvested in Thailand. Am. Compl. ¶ 45; Ans. ¶ 45; Pl.'s Opp'n Ex. 13 at 2–4, Second Request for

[8] At the relevant time, 19 U.S.C. § 1595a(c)(2)(E) provided that "[m]erchandise which is introduced or attempted to be introduced into the United States contrary to law . . . may be seized and forfeited if . . . it is merchandise which is marked intentionally in violation of [19 U.S.C. § 1304]."

[9] At the relevant time, 19 U.S.C. § 1304 provided that "[e]xcept as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."

Information. On July 10, 1998, Rupari, through its employee Stilwell, filed documents in response to this second request for information. Am. Compl. ¶ 46; Def. RPSF ¶ 37. One of those documents was a letter written by Seamaster that authorized Rupari to act as Seamaster's representative in all dealings with Customs related to the release of the seized entries of Chinese crawfish tail meat. Am. Compl. ¶ 46; Pl.'s Opp'n Ex. 23 at 46, Letter of Authorization from Seamaster to U.S. Customs, July 9, 1998, ECF No. 94–12.

On July 13, 1998, Customs issued a third request for information to Seamaster again asking for further substantiation of the claim that the crawfish originated in Thailand. Am. Compl. ¶ 47; Ans. ¶ 47; Pl.'s Opp'n Ex. 13 at 5, Third Request for Information, July 13, 1998.

On July 13, 1998, Rupari, through its employee Stilwell, filed a series of documents with Customs. Am. Compl. ¶ 48; Ans. ¶ 48. Among those documents was a purported letter from Mahyam Tingham Fisheries Co. Ltd. stating that it had cultivated crawfish in Bangkok, Thailand, which it had sold to Sea Bonanza, complete with invoices for the sale of live crawfish. Am. Compl. ¶ 48; Ans. ¶ 48; Pl.'s Opp'n Ex. 15 at 25, Letter of Explanation from Mahyam, July 10, 1998. The Bureau of Business Information of the Government Service Division in Thailand has confirmed that they failed to find any business registration for the name "Mahyam Tingham Fisheries Co., Ltd." Pl.'s Opp'n Ex. 18, Letter from the Bureau of Business Information of Thailand to Ms. Barry Tang, May 10, 2013, ECF No. 94–11. There was also a letter from Sea Bonanza stating that it purchased raw crawfish from Mahyam that it processed into tail meat for sale to Seamaster, which Seamaster then imported into the United States. Am. Compl. ¶ 50; Ans. ¶ 50; Pl.'s Opp'n Ex. 23 at 47, Letter of Confirmation from Sea Bonanza, July 10, 1998.

On or about July 20, 1998, Customs monitored a call between Floyd and a confidential informant, during which Floyd confirmed that Rupari was getting crawfish tail meat from China that had been peeled in Thailand. Confidential Ex. 2, Transcribed call between confidential informant and Floyd, July 20, 1998, ECF. No. 76.

On July 25, 1998, Wang, the owner of Yupeng, sent a facsimile to Rupari, specifically to Floyd, Stilwell, and Rupari's President, Robert Mintz, by fax regarding the five seized entries, which stated that Yupeng did not have the money to pay the ocean freight to ship crawfish to Thailand; however, Yupeng would fulfill Rupari's order of "whole crawfish" which could be mixed with "ten tons of crawfish meat." Am. Compl. ¶ 55; Def. RPSF ¶ 38; Pl.'s Opp'n Ex. 16, Facsimile from Wang to Rupari, July 25, 1998, ECF No. 94–11.

Sea Bonanza never processed live crawfish. Am. Compl. ¶ 22; Def. RPSF ¶ 17. As noted *supra*, the Bureau of Business Information of the Government Service Division in Thailand has confirmed that they could not find any business registration for the name "Mahyam Tingham Fisheries Co., Ltd." Am. Compl. ¶ 49; Letter from the Bureau of Business Information of Thailand to Ms. Barry Tang. Also as noted, the Agricultural Affairs Office of the American Embassy in Thailand confirmed that there was no commercial production of indigenous freshwater crawfish in Thailand. Am. Compl. ¶ 56; Facsimile from Agricultural Affairs Office, American Embassy, Bangkok, Thailand, to Roy Johnson, Louisiana Dept. of Agriculture. Dr. Greg Lutz, Ph.D., an expert in crawfish, has confirmed that the crawfish tail meat in question in this matter did not originate at Mahyam Tingham, and environmental requirements do not exist in Thailand for commercial production levels of crawfish. Pl.'s Br. Ex. 3, Tr. of Dep. of Charles Gregory Lutz, Ph.D. at 36–37, Apr. 30, 2015.

B. *Procedural Background*

On April 9, 2001, Customs issued Rupari and Stilwell a Pre-penalty Notice which set the tentative determination of the level of culpability at fraud, but also noted that "[i]nasmuch as the Government may plead in the alternative in any de novo proceeding before the Court of International Trade, Customs alternatively alleges that the violation in question occurred as a result of negligence or gross negligence." Pl.'s Opp'n Ex. 19 at 1–2, Pre-penalty Notice, Apr. 9, 2001, ECF No. 94–11 ("Pre-penalty Notice"). On November 14, 2001, Customs issued Rupari and Stilwell a Penalty Notice, which included the same language as the Pre-penalty Notice. Pl.'s Opp'n Ex. 24 at 18–20, Penalty Notice, Nov. 14, 2001, ECF No. 94–13 ("Penalty Notice").

On April 7, 2010, Customs filed a complaint against American Casualty Co. of Reading Pennsylvania ("American Casualty"), claiming that it owed the United States $1,279,648.83 plus statutory interest for unpaid customs duties under bonds pursuant to 19 U.S.C. §§ 1505, 1592(d), 1505(c), and 580. Original Compl. Against American Casualty ¶ 1, April 7, 2010, ECF No. 2. American Casualty issued customs bonds to Seamaster for the importation of the four completed crawfish tail meat entries in March and April 1998. *Id.*¶ 6, Customs Bonds Ex. A at 2–5, Apr. 15, 1998, ECF No. 2–1. American Casualty, as surety, guaranteed payment for any duty, tax, or charge, or compliance with law or regulation, as a result of Seamaster's imports. Original Compl. Against American Casualty ¶ 6.

In a separate proceeding, on June 20, 2011, Customs filed a complaint against Rupari and Stilwell for violations of 19 U.S.C. §

1592(a). Original Compl. Against Rupari ¶ 1, June 20, 2011, Ct. No. 11–00203, ECF No. 2. The complaint in that proceeding alleged that Rupari attempted to enter five containers of Chinese crawfish tail meat by means of documents falsely claiming that the crawfish tail meat originated in Thailand. *Id.*¶ 8. Customs sought the domestic value of the merchandise Rupari attempted to enter into the United States, or in the alternative, the maximum amount for grossly negligent or negligent violations of 19 U.S.C. § 1592. *Id.*¶ 52 & Attach. A. The domestic value of the merchandise is $2,784,636.18, which is the sum total of the invoice value of the five seized attempted entries, the antidumping duties owed on those entries assessed at 201.63 percent, and other costs, fees, and profit associated with those entries.[10] *Id.* Attach. A.

On December 22, 2011, this Court ordered that the case against American Casualty be consolidated with the case against Rupari, constituting the instant case. ECF No. 22.

On May 13, 2013, Stilwell died. Def.'s Mot. to Dismiss Ex. 5 at 1, Death Certificate, July 19, 2013, ECF No. 75–5. Additionally, Floyd died, however, his date of death is not known by the court. *Rupari I*, 91 F. Supp. 3d at 1332. Pursuant to USCIT Rule 41(a)(1)(A)(ii), on July 21, 2015, the parties stipulated partial dismissal of this case as to Stilwell. ECF No. 105.

Rupari filed a motion to dismiss this action on December 9, 2013, and a revised motion to dismiss on November 3, 2014, arguing that the Government had failed to properly allege fraud, Count I of the original complaint, with particularity, and that Customs had failed to exhaust its administrative remedies regarding its gross negligence and negligence claims, Counts II and III of the original complaint, respectively. ECF Nos. 47–48, 75–76. The Government filed a response in opposition to Rupari's motion to dismiss on March 16, 2015. Pl.'s Opp'n. Rupari filed its reply in support of its motion to dismiss on March 29, 2015. ECF Nos. 97–98. Oral argument on the motion to dismiss was held before this court on July 21, 2015. ECF No. 106. On

[10] The domestic value of entry 595–2093518–6 is $566,245.90, equivalent to an invoice total of $177,700.00, plus $358,296.51 in antidumping duties owed, plus other costs, fees, and profit of $30,249.39. The domestic value of entry 595–2093516–0 is $573,739.83, equivalent to an invoice total of $179,950.00, plus $362,833.19 in antidumping duties owed, plus other costs, fees, and profit of $30,596.64. The domestic value of entry 595–2093510–3 is $573,379.83, equivalent to an invoice value of $179,950.00, plus $362,833.19 in antidumping duties owed, plus other costs, fees, and profit of $30,596.64. The domestic value of entry 595–2093512–9 is $522,260.85, equivalent to an invoice value of $163,821.00, plus $330,312.28 in antidumping duties owed, plus other costs, fees, and profit of $28,127.57. The domestic value of entry 595–2093514–5 is $549,369.77, equivalent to an invoice value of $172,371.00, plus $347,551.65 in antidumping duties owed, plus other costs, fees, and profit of $29,447.12. Orig. Compl. Against Rupari Attach. A; *see* Benitez Decl. ¶¶ 3–5.

August 24, 2015, the court found that the Government alleged fraud with particularity, and that administrative remedies had been properly exhausted for gross negligence and negligence. *Rupari I*, 91 F. Supp. 3d at 1334–39; ECF Nos. 107–08. The court thus denied Rupari's motion, granted the Government's request for leave to amend its complaint, and ordered that proceedings continue pursuant to a revised schedule. *Rupari I*, 91 F. Supp. 3d at 1338–39.

The Government filed a motion for summary judgment on January 15, 2015. ECF Nos. 79–81. On August 31, 2015, the Government filed its amended complaint as to Rupari. Am. Compl. On February 24, 2016, Rupari filed a response in opposition to the Government's motion for summary judgment, and cross-moved for summary judgment. ECF Nos. 119–20. Also on February 24, 2016, American Casualty filed a response in opposition to the Government's motion for summary judgment, and cross-moved for summary judgment. ECF No. 118. Pursuant to USCIT Rule 41(a)(1)(A)(ii), on March 21, 2016, the parties stipulated partial dismissal of this case as to American Casualty. ECF No. 121. Rupari then became the sole remaining defendant in this case.

Further briefing on the motions for summary judgment was subsequently stayed and the corresponding deadlines extended multiple times. *See* Order, April 15, 2016, ECF No. 131; Scheduling Order, October 17, 2016, ECF No. 138. Following the retirement of the original judge, this case was reassigned to a new judge on September 21, 2016. ECF No. 136.

C. *Rupari's Bankruptcy and Default*

Beginning on February 17, 2017, the parties filed, and the court granted, several motions to stay proceedings, in which the parties represented that they were attempting, in good faith, to resolve this action by way of settlement. *See* ECF Nos. 139–47. However, on April 10, 2017, Rupari filed for Chapter 11 bankruptcy protection. *See In re Rupari Food Servs., Inc.*, No. 17–10794 (Bankr. D. Del. filed Apr. 10, 2017). The court maintained the stay on briefing, and ordered that parties report to the court their joint position or, in the absence of a joint position, their respective positions regarding the applicability to this proceeding of the automatic stay effected by 11 U.S.C. § 362(a) (2012), or recommend what further action, if any, be taken in this action prior to the resolution of the bankruptcy proceeding. ECF No. 149. The Government reported its position on July 3, 2017, maintaining that it was seeking entry, but not execution, of a monetary judgment, and that the civil penalty action pursuant to 19 U.S.C. § 1592(a), commenced to enforce police or regulatory powers, was ex-

empt from the automatic stay provision of the bankruptcy statute pursuant to 11 U.S.C. § 362(b)(4). ECF No. 154. Rupari reported its opposing position on July 27, 2017. ECF No. 160.

During this time period, on June 30, 2017, counsel for Rupari moved to withdraw their representation in this case pursuant to USCIT Rule 75(d). ECF No. 153. Counsel filed an amended motion to withdraw on July 20, 2017. ECF No. 159. The Government responded in opposition to the motion to withdraw on August 1, 2017. ECF No. 163. Counsel for Rupari filed a reply on August 9, 2017. ECF No. 166.

On August 10, 2017, as a matter of first impression, the court found that this 19 U.S.C. § 1592 civil penalty action was exempt from the automatic stay in bankruptcy by virtue of 11 U.S.C. § 362(b)(4), insofar as it constitutes an action for the entry, rather than the enforcement, of a money judgment against Rupari. *United States v. Rupari Food Servs., Inc.*, 41 CIT ___, 254 F. Supp. 3d 1367 (2017).

On August 23, 2017, the court granted counsel's amended motion to withdraw, and ordered that Rupari had thirty days thenceforth to retain substituted counsel. ECF No. 169. The court noted that, should Rupari fail to retain substitute counsel, it would entertain a motion for default judgment upon the Government's filing pursuant to USCIT Rule 55. *Id.* Rupari was electronically served notice of the court's order on the same day. *Id.* Rupari was served by mail on October 23, 2017. Proof of Service, Oct. 27, 2017, ECF No. 170.

Regarding default, USCIT Rule 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." As to representation before this Court, USCIT Rule 75(b)(1) provides that "[e]xcept for an individual (not a corporation, partnership, organization or other legal entity) appearing pro se, each party and any amicus curiae must appear through an attorney authorized to practice before the court." *See Lady Kelly, Inc. v. U.S. Sec'y of Agric.*, 30 CIT 82, 83, 414 F. Supp. 2d 1298, 1299 (2006) ("The rule is well established that a corporation must always appear through counsel.") (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201–02 (1993)).

Rupari failed to retain substitute counsel within thirty days as required by the court's August 23, 2017 order — and has not retained substitute counsel since then. Because Rupari is a corporation, is required to be represented by counsel, discharged its counsel on June 30, 2017, and failed to retain substitute counsel, the Government requested entry of default pursuant to USCIT Rule 55(a) on November 1, 2017. ECF No. 171. The clerk of the court entered default against Rupari on the following day. ECF No. 172.

Finally, on December 18, 2017, the Government moved for default judgment pursuant to USCIT Rule 55(b). Pl.'s Br.; USCIT R. 55(b) ("In all cases the party must apply to the court for a default judgment."). Rupari has not retained substitute counsel and did not respond to the Government's motion.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1582(1). The court reviews all issues de novo in actions under Section 1592. 19 U.S.C. § 1592(e)(1).

DISCUSSION

In a motion for default judgment, the moving party must first demonstrate to the Clerk of the Court by affidavit or otherwise that the opposing party has failed to plead or otherwise defend. USCIT R. 55(a). Upon such a showing, the Clerk must enter default, as has occurred here. *Id.* USCIT Rule 55(b) mandates that "[w]hen the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the court—on the plaintiff's request with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing."

A defendant who defaults thereby admits all well-pleaded factual allegations contained in the complaint. *See NYCC 1959*, 182 F. Supp. 3d at 1347 (citing *Mickalis*, 645 F.3d at 137); *Deladiep*, 255 F. Supp. 3d at 1336 (citing *Au Bon Pain*, 653 F.2d at 65). The defaulting party's admission of liability for all well-pleaded facts, however, does not also function as an admission of damages. *See United States v. Freight Forwarder Int'l, Inc.*, 39 CIT ___, ___, 44 F. Supp. 3d 1359, 1362 (2015) (citing *Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012)); *Deladiep*, 255 F. Supp. 3d at 1336. Thus, when considering a motion for default judgment, the Court accepts as true all well-pleaded facts in the complaint, but must reach its own legal conclusions. *See United States v. Callanish, Ltd.*, 37 CIT ___, ___, 2013 WL 1277018, *2 (Mar. 28, 2013).

Accordingly, pursuant to USCIT Rule 55(b), the court must enter judgment against Rupari if (1) the Government's allegations establish Rupari's liability as a matter of law, and (2) "the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation." USCIT R. 55(b); *see NYCC 1959*, 182 F. Supp. 3d at 1347 (citing *Mickalis*, 645 F.3d at 137).

I. *Accepted as True, the Government's Factual Allegations Establish Rupari's Liability as a Matter of Law.*

Section 1592 prohibits the entry of merchandise into the commerce of the United States by means of "any document or electronically transmitted data or information, written or oral statement, or act which is material and false," if the responsible person acted with "fraud, gross negligence, or negligence." 19 U.S.C. § 1592(a)(1)(A)(i). In Count I of its complaint, Am. Compl. ¶¶ 70–72, the Government alleges fraud. An alleged violation of Section 1592 is determined to be fraudulent "if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, i.e., done voluntarily and intentionally, as established by clear and convincing evidence." 19 C.F.R. Pt. 171, App. B(C)(3); *see* 19 U.S.C. § 1592(e)(2) ("[I]f the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence[.]").

A. *Rupari's Statements Were Material and False.*

Here, clear and convincing evidence establishes the materiality and falsehood of Rupari's representations to Customs. Rupari, on behalf of Seamaster, attempted to enter merchandise into the commerce of the United States using entry documents that falsely indicated to Customs that the merchandise in question was not subject to any antidumping duties. Am. Compl. ¶¶ 70–72. Specifically, Rupari asserted that the merchandise originated in Thailand, and was thus duty-free, when in fact it originated in China.

On the well-pleaded facts in the Government's complaint, which Rupari has admitted, *see NYCC 1959*, 182 F. Supp. 3d at 1347 (citing *Mickalis*, 645 F.3d at 137), the merchandise in question — crawfish from China — was in actuality subject to the *Antidumping Duty Order*, whereas Rupari attempted to enter the merchandise duty-free as a product of Thailand. *See Antidumping Duty Order*. The false information that Rupari submitted to Customs at the time of its attempted entries was material to Customs' evaluation of Rupari's duty liability for these entries because it affected Rupari's antidumping duties. *See NYCC 1959*, 182 F. Supp. 3d at 1348 (citing *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) ("[T]he measurement of the materiality of the false statement is its potential impact upon Customs' determination of the correct duty for the imported merchandise.")); 19 C.F.R. Pt. 171, App. B(B) (2013) (defining materiality for purposes of Section 1592 as being "[a] document, statement, act, or omission is material if it has the natural

tendency to influence . . . a Customs action regarding the classification, appraisement, or admissibility of merchandise[,] . . . determination of an importer's liability for duty[,] . . . [or] determination as to the source, origin, or quality of merchandise."); Am. Compl. ¶ 61.

Therefore, the Government's factual allegations, deemed admitted by Rupari as the defaulting party, establish that Rupari entered or attempted to enter merchandise into the Commerce of the United States by submission of information that was both material and false.

B. *Rupari Knowingly Submitted Material and False Statements to Customs.*

The following admitted facts constitute clear and convincing evidence establishing that Rupari "voluntarily and intentionally," and therefore "knowingly,"[11] submitted materially false information to Customs, and thus are sufficient to establish Rupari's liability under 19 U.S.C. § 1592 for a monetary penalty based on fraud. 19 U.S.C. § 1592(a)(1)(A)(i), (e)(2). The court again notes that these facts are deemed admitted by Rupari as the defaulting party. *See NYCC 1959*, 182 F. Supp. 3d at 1347 (citing *Mickalis*, 645 F.3d at 137).

Rupari knew that Wang, Yupeng's owner, had created Seamaster in Thailand in November 1997, shortly after Commerce's antidumping order relating to Chinese crawfish tail meat became effective in August 1997 and imposed a 201.63 percent antidumping duty on any of Yupeng's crawfish tail meat exports to the United States. Am. Compl. ¶¶ 918. Rupari knew that the crawfish tail meat that it was purchasing from Seamaster originated in China and, through Floyd, Rupari's Vice President of Seafood Sales, stated as much to Porter of POPCA approximately two months before submitting to Customs the documents containing the false statement that Seamaster's crawfish tail

[11] The knowledge of Rupari's employees, as described in the record before the court, is imputed to Rupari under principles of agency law. This Court has previously applied principles of agency law to customs violations under 19 U.S.C. § 1592 fraud actions. *See United States v. Greenlight Organic, Inc.*, 41 CIT ___, ___, 2017 WL 6504002, at *2 (Dec. 18, 2017); *United States v. Pan Pac. Textile Grp., Inc.*, 29 C.I.T. 1013, 1022–24, 395 F. Supp. 2d 1244, 1251–55 (2005). Agency is defined as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) Of Agency § 1.01 (2006). "Corporations act through their employees; the general rule is that an agent's knowledge is imputed to the principal when employees are acting within the scope of their authority or employment, absent special circumstances." *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1369 (Fed. Cir. 2013), *opinion corrected on denial of reh'g,* 563 F. App'x 769 (Fed. Cir. 2014); *see Long Island Sav. Bank, FSB v. United States*, 503 F.3d 1234, 1250 (Fed. Cir. 2007) (explaining the general rule of imputation of a culpable state of mind in the context of common-law fraud); *Jones v. N.Y. Guar. & Indem. Co.*, 101 U.S. 622, 628 (1879) ("A corporation can act only by its agents."). Here, the record firmly establishes, and it is not disputed, that employees acting in the scope of their employment for Rupari acted as Rupari's agents during the events that gave rise to the instant action.

meat was harvested, processed, and packed in Thailand. Am. Compl. ¶¶ 23–31. Indeed, Porter testified that during his May 4, 1998 conversation with Floyd, in response to Porter's inquiry as to how Rupari's crawfish was cheaper than all of the other Chinese crawfish tail meat being sold in the United States at the time, Floyd responded that Rupari could "get it in where it would not be known as Chinese crawfish." Am. Compl. ¶ 30. Further, in its May 4, 1998 statement to Porter concerning these and other entries, Rupari, through Floyd, stated that the crawfish that it was supplying to Popeye's was cooked in China and sent to Thailand, and packed under the Seamaster label. Am. Compl. ¶ 31. This statement to POPCA, the company that had ordered the crawfish tail meat from Rupari and from whom Rupari stood to profit, constitutes an admission by Rupari that it knew, months before its false submissions to Customs, that Seamaster's crawfish originated in China, and not in Thailand.

Between June 13 and June 20, 1998, Seamaster attempted to enter five shipments of crawfish tail meat into the United States, which entries were classified as duty free under HTSUS subheading 1605.40.1000 and labeled as products of Thailand. Am. Compl. ¶¶ 39–40. Customs examined and seized the five entries of crawfish tail meat under 19 U.S.C. § 1595a(c)(2)(E) because the cartons were intentionally marked as products of Thailand — when they originated in China — in violation of 19 U.S.C. § 1304. Am. Compl. ¶ 42.

In June and July of 1998, Rupari submitted, on behalf of Seamaster, numerous documents to Customs containing false information that were intended to secure the release of Seamaster's five seized crawfish tail meat entries into the commerce of the United States. Am. Compl. ¶¶ 44–53. In response to requests for information that sought to verify the country of origin of Seamaster's crawfish tail meat entries, Rupari initially falsely advised Customs that Seamaster's crawfish tail meat had been cooked, peeled, and processed at Sea Bonanza in Thailand. Am. Compl. ¶ 44. Rupari afterwards submitted documents to Customs that stated that Sea Bonanza produced crawfish tail meat from raw crawfish harvested by Mahyam Tingham. Am. Compl. ¶¶ 48, 50. However, there is no record that Mahyam Tingham existed, or that there was commercial production of crawfish in Thailand. Am. Compl. ¶¶ 49, 56. Further, although it contracted with Seamaster to repack frozen crawfish tail meat and label it a product of Thailand, Sea Bonanza never processed raw crawfish. Am. Compl. ¶¶ 19, 21–22, 51. In addition, Rupari had never purchased crawfish from a source in Thailand prior or subsequent to purchasing crawfish from Seamaster, a company created by Rupari's Chinese crawfish tail

meat supplier after the *Antidumping Duty Order* had been issued and the dumping rate of 201.3 percent had been established. Am. Compl. ¶¶ 50–53. Seamaster admitted that the crawfish tail meat in its seized entries originated in China, and not in Thailand. Am. Compl. ¶ 57. Therefore, although Rupari submitted documents to Customs that Sea Bonanza purchased live crawfish from Thailand, and cooked, peeled, and processed that crawfish into crawfish tail meat, Rupari knew that the information it supplied to Customs was false.

Even assuming arguendo that Rupari was unaware that the crawfish in the seized entries originated in China, and not Thailand, and were thus subject to the *Antidumping Duty Order*, it regardless learned that information soon after the seizure and withheld it from Customs. Less than a month after Rupari submitted false material information to Customs, on or about July 20, 1998, Customs monitored a call between Floyd and a confidential informant, during which Floyd confirmed that Rupari was getting crawfish tail meat from China that had been peeled in Thailand. Am. Compl. ¶ 54. On July 25, 1998, Yupeng sent a fax to Rupari that discussed the fact that certain additional shipments of its Chinese crawfish tail meat were still at the wharf and that Yupeng could not afford to ship them to Thailand because of the seizure of the five entries. Am. Compl. ¶ 55.

II. *The Alleged Penalty Amount is Proper.*

Section 1592 provides a maximum civil penalty amount for penalties based on fraudulent violations. 19 U.S.C. § 1592(c)(1). "A fraudulent violation of [§ 1592(a)] is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise." *Id.* As noted *supra*, per USCIT Rule 55(b), "[w]hen the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation, the court—on the plaintiff's request with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing."

Here, the Government seeks a civil penalty in the amount of the domestic value of the merchandise. Pl.'s Br. at 1. The Government alleges, and provides supporting evidence, that the domestic value of the merchandise Rupari attempted to enter into the United States was $2,784,636.18. *Id.*; Benitez Decl. ¶¶ 3, 10; Attach. A; Am. Compl. ¶ 63. In its supportive evidence, the Government provided a breakdown of Customs' assessments of the costs associated with each attempted entry. Attach. A; Benitez Decl. ¶¶ 3–5, 9. The breakdown reflects the invoice value, antidumping duties owed based on the *Antidumping Duty Order* rate of 201.63 percent, and other costs, fees, and profit associated with each attempted entry, resulting in a sum

total of $2,784,636.18.[12] Attach. A; Benitez Decl. ¶¶ 3–5, 9. Accordingly, the maximum allowable penalty for Rupari's fraudulent violation of Section 1592 with respect to these entries is $2,784,636.18. *See* 19 U.S.C. § 1592(c)(1).

Customs took appropriate administrative steps pursuant to 19 U.S.C. § 1592(b) to perfect its penalty claim against Rupari at the administrative level. *See* 19 U.S.C. § 1592(b) (requiring Customs' issuance of a pre-penalty notice and subsequently a penalty claim, and providing an opportunity to respond); *United States v. Ford Motor Co.*, 463 F.3d 1286, 1298 (Fed. Cir. 2006). On April 9, 2001, Customs issued a pre-penalty notice to Rupari proposing a monetary penalty on the basis of fraud and in an amount equal to the domestic value of all four entered entries and the five seized entries of Chinese crawfish tail meat. Am. Compl. ¶ 65 (citing Pre-penalty Notice). Customs also asserted alternative penalties on the basis of gross negligence and negligence in the pre-penalty notice. *Id.* On November 21, 2001, Customs issued a penalty notice to Rupari and Stilwell assessing penalties against these parties for fraudulent violations of 19 U.S.C. § 1592(a) based on their actions in aiding the entry and attempting to enter the Chinese crawfish tail meat by means of false, material representations concerning the country of origin of the merchandise. Am. Compl. ¶ 66 (citing Penalty Notice). Customs again asserted alternative penalties on the basis of gross negligence and negligence in the penalty notice. *Id.* On May 14, 2002, Customs issued a demand for unpaid duties against Rupari to recover the antidumping duties that were avoided on the entries. Am. Compl. ¶ 67. These penalties remain unpaid. Am. Compl. ¶ 69.

The Government's assessed penalty is equivalent to the domestic value of the merchandise and is therefore within the scope of authority provided by 19 U.S.C. § 1592(c)(1). Because Rupari has defaulted, it raises no equitable claim, argument, or factual allegations supportive of a lesser penalty amount. Judgment shall therefore be entered for the unpaid penalty amount of $2,784,636.18, plus post-judgment interest, *see* 28 U.S.C. § 1961(a) ("Interest shall be allowed on any money judgment in a civil case recovered in a district court."), (b), and costs. *See* USCIT R. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."), 55(b) (mandating inclusion of costs in default judgment).

[12] *See supra* n.10.

CONCLUSION

For the foregoing reasons, the Government's motion for a default judgment against Rupari for a fraudulent violation of 19 U.S.C. § 1592(a) is granted. Judgment shall be entered in the amount of $2,784,636.18, plus post-judgment interest, computed in accordance with 28 U.S.C. § 1961(a)–(b), plus costs. Accordingly, the court need not reach the Government's alternative claims based on gross negligence and negligence contained in Counts II and III of its complaint. Am. Compl. ¶¶ 73–78. Any outstanding motions in this case are dismissed as moot.

SO ORDERED.

Dated: March 9, 2018
New York, New York

/*s*/ *Gary S. Katzmann*
JUDGE

Slip Op. 18–21

EVONIK REXIM (NANNING) PHARMACEUTICAL CO. LTD. and EVONIK CORPORATION, Plaintiffs, and BAODING MANTONG FINE CHEMISTRY CO., LTD. and GEO SPECIALTY CHEMICALS, INC., Consolidated Plaintiffs, v. UNITED STATES, Defendant, and GEO SPECIALTY CHEMICALS, INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Consol. Court No. 15–00296

[Sustaining the U.S. Department of Commerce's remand redetermination in the 2013–2014 administrative review of the antidumping duty order on glycine from the People's Republic of China.]

Dated: March 12, 2018

Matthew T. McGrath, Barnes, Richardson & Colburn, LLP, of Washington, D.C., for Plaintiffs Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation.

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Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Chad A. Readler*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Robert M. Norway*, Trial Attorney. Of Counsel on the brief was *Nanda Srikantaiah*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

David M. Schwartz, Thompson Hine LLP, of Washington, D.C., for Consolidated Plaintiff and Defendant-Intervenor GEO Specialty Chemicals, Inc.

OPINION

Choe-Groves, Judge:

This consolidated action involving a remand determination was brought by Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. and Evonik Corporation (collectively, "Evonik" or "Plaintiffs"), Baoding Mantong Fine Chemistry Co., Ltd. ("Baoding"), and GEO Specialty Chemicals, Inc. ("GEO") (collectively, "Consolidated Plaintiffs") for judicial review of decisions made by the U.S. Department of Commerce ("Commerce" or "Department") during the 2013–2014 administrative review of the antidumping duty order on glycine from the People's Republic of China ("China" or "PRC"). *See Glycine From the People's Republic of China*, 80 Fed. Reg. 62,027 (Dep't Commerce Oct. 15, 2015) (final results of antidumping duty administrative review and partial recession of antidumping duty administrative review; 2013– 2014) ("*Final Results"); see also* Issues and Decision Memorandum for the Final Results of Antidumping Administrative Review,

A-570–836 (Oct. 5, 2015), *available at* https://enforcement.trade.gov/frn/summary/prc/2015–26270–1.pdf (last visited Mar. 6, 2018) ("I&D Memo"). Before the court are the Final Results of Redetermination Pursuant to Court Remand, Oct. 20, 2017, ECF No. 83 ("Remand Results"), filed by the Department pursuant to the court's remand order in *Evonik Rexim (Nanning) Pharmaceutical Co. Ltd. v. United States*, 41 CIT __, 253 F. Supp. 3d 1364 (2017) ("*Evonik*"). For the reasons set forth below, the court sustains the Remand Results.

BACKGROUND

Commerce issued the Final Results and accompanying memorandum on October 15, 2015. *See Final Results*, 80 Fed. Reg. at 62,027. In the Final Results, Commerce calculated Baoding's normal value by using import statistics for aqueous ammonia as the surrogate value for Baoding's liquid ammonia factor of production input, and used financial statements from two Indonesian companies to determine the surrogate financial ratios. *See id.*; I&D Memo at 11–12, 17–19. Commerce assigned Baoding a weighted-average dumping margin of 143.87 percent. *See Final Results*, 80 Fed. Reg. at 62,028.

Plaintiffs and Consolidated Plaintiffs initiated multiple actions challenging Commerce's determination. The court sustained Commerce's determinations that (1) Evonik's sales during the period of review were not *bona fide*, (2) Baoding's sale was *bona fide*, and (3) Baoding should receive a by-product offset. *Evonik*, 41 CIT at __, 253 F. Supp. 3d at 1377–78. The court remanded the Department's findings with respect to Baoding on (1) the surrogate value selection for liquid ammonia, and (2) the selection of companies used for Baoding's surrogate financial ratios. *Id.* at __, 253 F. Supp. 3d at 1378. In remanding the two issues, the court explained that Commerce should have accepted Baoding's administrative case brief as originally submitted to the Department on May 8, 2015, and should have addressed Baoding's arguments regarding the surrogate value selection. *Id.* at __, 253 F. Supp. 3d at 1373–75. The court found further that the Department failed to adequately support its determination that the two Indonesian companies engaged in similar production processes to Baoding. *Id.* at __, 253 F. Supp. 3d at 1375–76. Accordingly, the court instructed Commerce to readdress the two issues on remand. *Id.* at __, 253 F. Supp. 3d at 1378.

The Department filed the final Remand Results on October 20, 2017. *See* Remand Results. Commerce followed the court's instructions, accepted Baoding's administrative case brief, and provided GEO with an opportunity to respond. *See id.* at 1. After considering both parties' arguments, Commerce determined that the Global

Trade Atlas ("GTA") import data for anhydrous ammonia was the most product-specific data placed on the record for the period of review for Baoding's liquid ammonia input. *See id.* at 12. The Department determined also that PT Budi's financial information should be used to generate surrogate financial ratios for Baoding because the Indonesian company produced merchandise comparable to glycine. *See id.* at 15. Pursuant to its modified calculations, the Department assigned Baoding a weighted-average dumping margin of zero percent. *See id.* at 21–22. Baoding filed a comment in support of the Remand Results. *See* Consolidated Pl.'s Comments Final Remand Results, Nov. 20, 2017, ECF No. 87. GEO challenges the Remand Results, contending that Commerce's two findings are not supported by substantial evidence and not in accordance with law. *See* Def.-Intervenor's Comments Final Results Redetermination Pursuant Ct. Remand 8, Nov. 20, 2017, ECF No. 85 ("GEO Comments"). Defendant responded to both comments. *See* Def.'s Corrected Resp. Comments Remand Redetermination, Dec. 18, 2017, ECF No. 92.

JURISDICTION

The court has jurisdiction over Commerce's final determination in an administrative review of an antidumping duty order. *See* 28 U.S.C. § 1581(c) (2012);[1] 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012).[2] The court will uphold the Department's "determinations, findings, or conclusions" unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The court assesses whether the agency's actions are "unreasonable" given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006).

DISCUSSION

When conducting an antidumping duty investigation involving a non-market economy ("NME"), if Commerce determines that available information does not permit the use of the standard normal value calculation, then the Department will calculate normal value using the best available information from "a market economy country or countries considered to be appropriate by" the agency. 19 U.S.C. § 1677b(c)(1)(B). Commerce will examine "the value of the factors of production utilized in producing the merchandise" plus "the cost of containers, coverings, and other expenses." *Id.* The statute directs the Department to "utilize, to the extent possible, the prices or costs of

[1] Further citations to Title 28 of the U.S. Code are to the 2012 edition.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." *Id.* § 1677b(c)(4).

When valuing the factors of production, the Department "normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." 19 C.F.R. § 351.408(4) (2014); *see also* Remand Results 13. It is the agency's policy "to use data from market-economy surrogate companies based on specificity, contemporaneity, and quality of the data." Remand Results 13–14 (footnote omitted); *see also Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014). The Department furthermore has "developed a three-part test for identifying comparable merchandise which examines, where appropriate, the physical characteristics, end uses, and production processes." Remand Results 14. Finally, the Department will take into account the proposed surrogate company's production experience in comparison to the NME respondent's production experience. *Id.*

I. Commerce's Switch to the Anhydrous Ammonia Surrogate Value

Commerce originally selected the surrogate value for aqueous ammonia to calculate Baoding's normal value. *Evonik*, 41 CIT at __, 253 F. Supp. 3d at 1369. The court directed Commerce to accept Baoding's brief, which supported the use of the surrogate value for anhydrous ammonia, and consider its arguments on the merits. *See id.* at __, 253 F. Supp. 3d at 1374–75. The Department did so on remand and chose anhydrous ammonia to represent the surrogate value for Baoding's liquid ammonia input. *See* Remand Results 11. Commerce found that the Indonesian GTA import data for anhydrous ammonia "were the most product-specific data placed on the record" for the administrative review period and "representative of a broad-market average," and, accordingly, assigned the surrogate value for liquid ammonia as $619.21 USD per metric ton. *Id.* at 12

GEO asserts that Commerce's switch from selecting aqueous ammonia to anhydrous ammonia for the surrogate value is not supported by the record evidence and not in accordance with law. *See* GEO Comments 8–9. GEO argues that Commerce reversed its position on remand despite the fact that "the record evidence on the liquid ammonia surrogate value issue did not change; all that changed was Commerce's reinstatement of the original briefs filed by Baoding and GEO providing legal arguments addressing this issue." *Id.* at 9. The presence of additional briefing at the administrative level was significant, however, because the Department had more information and

arguments to consider in making its decision. The Department is allowed to "change its conclusions from one review to the next based on new information and arguments, as long as it does not act arbitrarily and it articulates a reasonable basis for the change." *Qingdao Sea-Line Trading Co., Ltd.*, 766 F.3d at 1387. Commerce discussed the merits of Baoding's administrative brief and GEO's rebuttal arguments in the remand results. *See* Remand Results 5–12. Baoding's briefing explained in particular how mistakes contained in Baoding's questionnaire responses "as to the precise make-up of the input" in the 2010/2011 administrative review led to errors in the Department's valuation of liquid ammonia, *id.* at 7, as well as "why the Department determined that anhydrous ammonia had been used in the company's glycine production for" previous administrative reviews. *Id.* at 10. After considering the information provided by Baoding, Commerce stated, "When these earlier findings are taken into account, they support the conclusion that, based on the information provided by Baoding Mantong in the 2013/2014 [review], the valuation of liquid ammonia should be based on the import data for anhydrous ammonia." *Id.* at 11. Because Commerce's determination was reasonably based on record evidence, GEO's argument has little merit.

GEO contends further that the Department relied incorrectly on findings from the 2005/2006, 2006/2007, and 2007/2008 administrative reviews, which were unverified, and should have used information instead from the 2003/2004 and 2010/2011 reviews, "which were the only two reviews where Commerce verified" Baoding's factors-of-production information. *See* GEO Comments 11–12. GEO asserts that deference should be given to verified findings. *See id.* at 12–13 (citing *Timken U.S. Corp. v. United States*, 28 CIT 1828, 1832 (2004)). GEO's reliance on *Timken* is misplaced. That case distinguishes between verified and unverified findings in the same administrative proceeding, *see Timken U.S. Corp.*, 28 CIT at 1382, whereas here, GEO contends that Commerce should defer to verified findings in other administrative proceedings. *See* GEO Comments 11–12. The Department treats each proceeding independently because "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." *Qingdao Sea-Line Trading Co., Ltd.*, 766 F.3d at 1387. Although the Department discussed previous administrative reviews, it clearly stated that it relied on the import data for anhydrous ammonia from the 2013/2014 review period placed on the record by Baoding in

making its decision. *See* Remand Results 16–17. The court concludes that Commerce's selection of anhydrous ammonia for the surrogate value is supported by substantial evidence and in accordance with law.

II. Commerce's Finding on Surrogate Financial Ratios

The Department utilizes a three-part test when determining surrogate financial ratios, which requires it to compare the physical characteristics, end uses, and production processes for the respondent's and surrogate company's goods. *See* Remand Results 14. The court concluded previously that "the Department failed to adequately support its determination that PT Budi and PT Lautan engaged in production processes comparable to Baoding's glycine production." *Evonik*, 41 CIT at __, 253 F. Supp. 3d at 1376. The Department determined on remand that PT Budi and PT Lautan "produce comparable merchandise to glycine" and "share similar, if not identical, production processes" to Baoding. Remand Results 15. "[G]iven this conclusion and the specificity, contemporaneity, and quality of the data provided by the" companies, the Department found it appropriate to use the data for determining Baoding's surrogate financial radios. *Id.* When reaching its ultimate determination, however, Commerce only utilized information pertaining to PT Budi because the financial statements of PT Lautan showed "that the majority of the company's business activities in 2013 were not related to the manufacturing of products comparable to the subject merchandise," and were thus inappropriate to use in the investigation. *Id.* at 21.

GEO asserts that the Department rejected PT Lautan's financial statement correctly, but disagrees with the Department's determination that PT Budi satisfied the three-part test. *See* GEO Comments 13–14. Defendant-Intervenor contends that PT Budi and Baoding do not share similar production processes because there are no chemical reactions required for manufacturing PT Budi's "primary product, tapioca starch."[3] *See* GEO Comments 17. GEO requests that the court remand this issue and direct the Department to consider data from the companies that GEO placed on the record for surrogate financial

[3] GEO also disputes that PT Budi's products do not have similar physical characteristics or comparable end uses to Baoding's products. *See* GEO Comments 14–17. The Department found that PT Budi "produce[s] basic chemicals and additives to be used in food and pharmaceutical products, as does Baoding Mantong with its production of glycine," Remand Results 14, and determined that "the physical characteristics (*i.e.*, a chemical powder with sweetening properties) of the products produced by the two companies and the end uses of the products are virtually identical." *Id.* at 20. The court did not take issue with these two prongs of the Department's three-part test in its prior opinion, but nevertheless concludes that the Department's determinations are satisfactory.

ratios. *See id.* at 17–18. GEO's focus, however, is misplaced. Although PT Budi does produce tapioca starch, thirty-two percent of its revenue is derived from the manufacture and sale of sweeteners. *See* Financial Statements: PT Budi Starch and Sweetener Tbk at 34–35, Exhibit 7 of Evonik Surrogate Value Comments, PD 98–99, bar code 3229327–02 (Sept. 19, 2014). The Department cited to information regarding PT Budi's manufacturing process for sweeteners, along with Baoding's glycine manufacturing process. *See* Remand Results 14–17. The Department found, after examining these documents, that Baoding and PT Budi share similar production processes because they both "involve chemical reactions and heating, cooling and drying processes." *Id.* at 15. Based on the information in the record, the court concludes that this determination was supported by substantial evidence and in accordance with law.

CONCLUSION

For the reasons set forth above, the court finds that Commerce has complied with the court's previous opinion and remand order by (1) considering Baoding's administrative brief in selecting the surrogate value for liquid ammonia, and (2) providing its reasoning with respect to the issue of financial surrogate ratios. The court concludes that Commerce's choice to utilize anhydrous ammonia for the surrogate value, as well as its selection of PT Budi as the surrogate company for determining the financial surrogate ratio, were supported by substantial evidence and in accordance with law. The court sustains Commerce's remand redetermination.

Judgment will be issued accordingly.

Dated: March 12, 2018
New York, New York

/*s*/ *Jennifer Choe-Groves*
JENNIFER CHOE-GROVES, JUDGE

Slip Op. 18–22

IRVING PAPER LIMITED, Plaintiff, and GOVERNMENT of The PROVINCE of NEW BRUNSWICK and GOVERNMENT of CANADA, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and VERSO CORPORATION, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Court No. 17–00128

MEMORANDUM AND ORDER

Before the court is the partial consent motion for leave to file a brief as *amicus curiae*, filed by the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations ("the COALITION").[1] Partial Consent Mot. Leave to File a Brief as *Amicus Curiae*, Jan. 30, 2018, ECF No. 56 ("Amicus Mot."). Defendant United States and Defendant-Intervenor Verso Corporation consent to the motion. *See id.* at 2. Plaintiff Irving Paper Limited and Plaintiff-Intervenors the Government of Canada ("GOC") and the Government of the Province of New Brunswick do not consent to the motion. *See id.*; Pl.-Intervenor's Opp'n to the [COALITION's] Mot. Leave to File Br. *Amicus Curiae*, Feb. 20, 2018, ECF No. 60 ("GOC's Opp'n Br."); [Pl.'s] Letter, Feb. 20, 2018, ECF No. 61 ("Pl.'s Opp'n Letter") (agreeing with and endorsing the GOC's opposition brief). For the reasons that follow, the motion is granted and the COALITION may participate in this action as *amicus curiae*.

The COALITION seeks to participate in the action as *amicus* to respond to the court's letter asking the parties to provide the specific authority according to which Commerce promulgated 19 C.F.R. § 351.214(k) (2015),[2] establishing expedited reviews in countervailing duty ("CVD") proceedings. Amicus Mot. at 1–9; *see* Court's Letter, Dec. 28, 2017, ECF No. 46. The COALITION explains that its interest in the action "relates to the question of whether an expedited review of a non-individually investigated producer in a CVD proceeding is a determination provided for by 19 U.S.C. § 1675, governing the 'administrative review of determinations.'" Amicus Mot. at 6 (quoting 19

[1] The COALITION is an "ad hoc association" of lumber companies whose members are: U.S. Lumber Coalition, Inc.; Collum's Lumber Products, L.L.C.; Hankins, Inc.; Potlatch Corporation; Rex Lumber Company; Seneca Sawmill Company; Sierra Pacific Industries; Stimson Lumber Company; Swanson Group; Weyerhaeuser Company; Carpenters Industrial Council; Giustina Land and Timber Company; and Sullivan Forestry Consultants, Inc. Amicus Mot. at 1 n.1.

[2] Further citation to the Code of Federal Regulations is to the 2015 edition, the edition in force at the time the Department of Commerce initiated the expedited review at issue in this case. The language of 19 C.F.R. § 351.214(k) has remained the same since the regulation originally appeared, in the 1998 edition of the Code of Federal Regulations. *See* 19 C.F.R. § 351.214(k) (1998).

U.S.C. § 1675 (2012)[3]). The COALITION has presented "analysis and argument" of this issue to Commerce in a different CVD proceeding and contends that the same argument and analysis has "a direct bearing on the statutory jurisdictional issues raised by Defendant's motion to dismiss" in the present case, rendering its participation as *amicus* for this purpose useful to the court. *Id.* at 4. The COALITION conditionally submitted its proposed *amicus* brief simultaneously with its motion to appear as *amicus curiae*, as is permitted by USCIT Rule 76. *See Amicus Curiae*'s Comments in Resp. to the Court's Dec. 28, 2017, Letter, Jan. 30, 2018, ECF No. 56–2; *see* USCIT R. 76. The COALITION's proposed *amicus* brief puts forward a legal analysis which it argues "demonstrat[es] that an expedited review of a non-individually investigated producer from the underlying investigation cannot be deemed a determination provided for by 19 U.S.C. § 1675." Amicus Mot. at 8. The COALITION contends that its "summary and analysis is likely to be broader and more comprehensive than the substance of the responses" provided by the parties to this action, such that its participation as *amicus* would provide "a more fulsome discussion of the jurisdictional issues presented[.]" *Id.*

Plaintiff-Intervenor the GOC and Plaintiff Irving Paper Limited oppose the COALITION's motion. *See* GOC's Opp'n Br.; Pl.'s Opp'n Letter (agreeing with and endorsing the GOC's opposition brief). The GOC contends that the court should not permit the COALITION to serve as *amicus curiae* in this action because the COALITION's position is not neutral and because its comments are not likely to assist the court in its review of the issues presented. *Id.* at 2–4. Specifically, the GOC contends that the COALITION's request to join as *amicus* in this action constitutes "an attempt to pre-litigate" its own challenge to Commerce's authority to conduct expedited reviews in the *Softwood Lumber Products from Canada* proceedings now before Commerce, proceedings in which the Plaintiff and Plaintiff-Intervenors here are also involved. *Id.* at 2. The GOC argues that, because the COALITION is opposed, in the *Softwood Lumber Products from Canada* proceedings, to the position taken by Plaintiff and Plaintiff-Intervenors, the COALITION is seeking to enter this case "as an adversary to the Plaintiff and Plaintiff-Intervenors" rather than as a "friend of the court," as is the role of an *amicus curiae*. *Id.* The GOC also contends that the COALITION's submission is unlikely to meaningfully assist the court in its consideration of the issues raised in this case. *Id.* at 3–4. The GOC requests in the alternative that, should the court grant the COALITION's motion, the court

[3] Further citations to Title 19 of the U.S. Code are to the 2012 edition.

allow the parties to respond to the arguments made by the COALITION in its proposed *amicus* brief. *Id.* at 4.

Rule 76 of the United States Court of International Trade provides that

> [t]he filing of a brief by an *amicus curiae* may be allowed on motion made as prescribed by Rule 7, or at the request of the court. . . . The motion for leave must identify the interest of the applicant and state the reasons why an *amicus curiae* is desirable. An *amicus curiae* must file its brief within the time allowed the party whose position the amicus curiae brief will support unless the court for cause shown grants leave for later filing. In that event the court will specify within what period an opposing party may answer. . . .

USCIT R. 76.

The role of an *amicus curiae* is to serve as a friend of the court by providing arguments or information helpful to the court in its consideration of the issues presented.[4] *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir. 1953) (explaining that an *amicus curiae* is "a friend of the court whose sole function is to advise, or make suggestions to, the court."). A motion to submit a brief as *amicus curiae* in an action may be granted at the discretion of the court. *Changzhou Hawd Flooring Co. v. United States*, 38 CIT __, __, 6 F. Supp. 3d 1353, 1356 (2014) (citing *In re Opprecht*, 868 F.2d 1264, 1266 (Fed. Cir. 1989)); *see N.* Sec. Co. v. United States, 191 U.S. 555, 555–56 (1903) ("[D]oubtless it is within our discretion to allow [the grant of a motion for *amicus curiae* status] in any case when justified by the circumstances."). Although "strict prerequisites" do not exist to qualify a movant for *amicus* status, courts generally consider whether the submission of an *amicus* brief would assist the court in its review of the issues presented. *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Ca. 1991) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)). Courts have considered several factors when determining whether it is appropriate to grant a motion for *amicus* status, including: (1) whether the proposed *amicus* is a disinterested entity; (2) whether there is opposition to the entry of the *amicus*; (3) whether counsel is capable of making arguments without the assistance of an *amicus*; (4) the strength of the information and argument presented by the potential *amicus curiae*'s interests; and (5) the usefulness of information and argument presented by the potential *amicus curiae* to the court. *See Ass'n Am. Sch. Paper Suppliers v. United States*, 34 CIT 207, 209, 683 F. Supp. 2d 1326, 1328 (2010) (citing *Advanced Sys.*

[4] In Latin, "*amicus*" means "friend" and "*curiae*" means "of the court." *See* Black's Law Dictionary 102 (10th ed. 2014).

Tech, Inc. v. United States, 69 Fed. Cl. 355, 357 (2006); *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991)).

Upon examination of these factors, the COALITION's motion to appear as *amicus curiae* in this action is granted because the COALITION's proposed brief will assist the court in its review of the case by presenting a view on a central issue not otherwise represented. Regarding whether the proposed *amicus* is a disinterested entity, the COALITION states that it has an interest in a different "case that may be affected by a decision in the present case."[5] Amicus Mot. at 4. There is no requirement that an *amicus* be a disinterested party. *See Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n.*, 801 F.2d 1120, 1124–25 (9th Cir. 1986) ("[T]ak[ing] a legal position and present[ing] legal arguments in support of it [is] a perfectly permissible role for an amicus"). On the contrary, emphasizing that USCIT Rule 76 requires the movant to "identify [its] interest" in the case, this court has noted that "it is not easy to envisage an amicus who is 'disinterested' but still has an 'interest' in the case." *Changzhou Trina Solar Energy Co. v. United States*, 40 CIT __, __, 161 F. Supp. 3d 1343, 1347 (quoting *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 131 (3d Cir. 2002)); *see* USCIT R. 76 (requiring a movant seeking to file an *amicus curiae* brief to "identify the interest of the applicant"). Further, although the role of *amicus curiae* was historically to serve as an impartial friend of the court, rather than an adversarial party in interest, some courts "have recognized a very limited adversary support of given issues through brief and/or oral argument." *United States v. State of Mich.*, 940 F.2d 143, 164–65 (6th Cir. 1991) (emphasis omitted) (citing *Funbus Sys., Inc.*, 801 F.2d at 1124–25, and Krislov, *The Amicus Curiae Brief: from Friendship to Advocacy*, 72 Yale L. J. 694 (1963)). The COALITION is not seeking to serve as a real party in interest to these proceedings, but rather seeks to brief the court on a different viewpoint on a central issue to the case. In doing so, the COALITION's interest in the case is not inconsistent with, and indeed is envisioned by, *amicus* status. *See* USCIT R. 76 (requiring a movant seeking to file an *amicus curiae* brief to "identify the interest" that the movant has in the case). Indeed, an *amicus* brief will assist the court more in instances "in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case[.]" *Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003). Such is the case here, and this factor points in favor of granting the motion for *amicus* status.

[5] Specifically, the COALITION explains that, "[w]hile the COALITION has no direct interest in this appeal and could not have participated as a party, the COALITION does have an interest in some other case that may be affected by a decision in the present case." Amicus Mot. at 4.

Regarding whether there is opposition to the entry of the *amicus*, as discussed above, Plaintiff and Plaintiff-Intervenor the GOC oppose the COALITION entering the case as *amicus*. *See* GOC's Opp'n Br. at 1–5; Pl.'s Opp'n Letter. Opposition by the parties is a factor weighing against allowing participation of the proposed *amicus curiae*. *Ass'n Am. Sch. Paper Suppliers*, 34 CIT at 211, 683 F. Supp. 2d at 1330 (citing *Am. Satellite Co.*, 22 Cl. Ct. at 549). Although the court takes seriously the GOC's concern that the COALITION is seeking *amicus* status in order to essentially "pre-litigate" its own case that is currently at the agency level, *see* GOC's Opp'n Br. at 2, the COALITION will present an analysis of this issue not already represented by the parties in this action. That objective is a legitimate reason to seek *amicus* status and weighs in the court's consideration of granting the motion, as the analysis could potentially assist the court in its comprehensive consideration of the issue. Ultimately, the grant or denial of a motion is by the court's discretion, after considering all relevant factors. Given the factors that weigh in favor of granting the motion, the parties' opposition does not outweigh the usefulness of the COALITION's participation as *amicus*.

Although counsel to the parties are certainly capable of presenting their sides of the argument in support of their respective positions, the COALITION has presented an alternate analysis of the jurisdictional question that is in opposition to the positions presented by the parties. The court requested that the parties provide clarification of the statute which authorizes Commerce to promulgate 19 C.F.R. § 351.214(k), Commerce's procedures for conducting an expedited review in a CVD proceeding. Court's Letter at 3–4, Dec. 28, 2017, ECF No. 46. The parties grounded their responses in the statutory provisions which implement the Uruguay Round Agreements, with Plaintiff and Plaintiff-Intervenors responding that Commerce's authority to promulgate a regulation for expedited CVD reviews lies in sections 101 through 103 of the Uruguay Round Agreement, 19 U.S.C. §§ 3511–3513, and Defendant responding that the authority lies in 19 U.S.C. § 3513(a), which authorizes Commerce to promulgate the necessary regulations to ensure compliance with the Uruguay Round Agreement. *See* Pl.'s Resp. Court's Dec. 28, 2017, Letter, Jan. 30, 2018, ECF No. 50; Pl.-Intervenor the Government of the Province of New Brunswick's Resp. Court's Dec. 28, 2017 Letter, Jan. 30, 2018, ECF No. 51 (agreeing with and endorsing Plaintiff's letter); Pl.-Intervenor GOC Letter, Jan. 30, 2018, ECF No. 52; Def.'s Resp. Court's Dec. 28, 2017 Order, Jan. 30, 2018, ECF No. 53. Plaintiff,

Plaintiff-Intervenors, and Defendant have also argued that the regulation is authorized by 19 U.S.C. § 1675(a). *See* Pl.'s Resp. Court's Dec. 28, 2017, Letter, Jan. 30, 2018, ECF No. 50; Pl.-Intervenor Government of the Province of New Brunswick's Resp. Court's Dec. 28, 2017 Letter, Jan. 30, 2018, ECF No. 51; Pl.-Intervenor GOC Letter, Jan. 30, 2018, ECF No. 52; Def.'s Resp. Court's Dec. 28, 2017 Order at 2, Jan. 30, 2018, ECF No. 53; Def.'s Opp'n to Pl.'s Mot. to Consolidate and Mot. to Dismiss at 8, Sept. 21, 2017, ECF No. 39. The COALITION presents an alternate analysis, contending that none of the statutory provisions cited by the parties authorizes Commerce to conduct expedited reviews in CVD proceedings. *See* Proposed Amicus Br. at 2–17. The COALITION presents the position that it is, in fact, "unclear what legal authority in U.S. law supports [expedited CVD] proceedings." *Id.* at 2. This position is in stark contrast to the position presented by the parties. An *amicus* brief will assist the court in its review of the issues when it "present[s] ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices*, 339 F.3d at 545. Further, an *amicus* brief will assist the court more in instances in which, inter alia, "the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Id.* (citing *Nat'l Org. for Women, Inc. v. Scheidler,* 223 F.3d 615, 616–17 (7th Cir. 2000); *Ryan v. Commodity Futures Trading Comm'n,* 125 F.3d 1062, 1063 (7th Cir. 1997); *Georgia v. Ashcroft,* 195 F. Supp. 2d 25, 32 (D.D.C. 2002)). Such is the case here. This factor weighs in favor of granting the motion.

The last two factors, the strength and usefulness of the information and argument presented by the potential *amicus curiae*'s interests, are intertwined. The proposed *amicus* brief presents a thorough and reasoned analysis of an alternative viewpoint on this issue and therefore is useful. That this argument and analysis is not currently represented by any party to the action renders the COALITION's comments useful to the court's review of this jurisdictional issue of first impression. The COALITION is offering additional information to the court and serving the proper role of an *amicus*; that is, to assist the court in its review of the issues by "presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices*, 339 F.3d at 545. As this court has previously stated, "*[a]micus* briefs are 'solely for the benefit of the [c]ourt.'" *Changzhou Hawd Flooring Co.*, 40 CIT at __, 6 F. Supp. 3d at 1357 (quoting *Stewart–Warner Corp. v. United States*, 4 CIT 141, 142 (1982)). This factor significantly impacts the court's consideration of the present motion. *See id.*, 40 CIT at __, 6 F. Supp. 3d at 1357–58;

Ass'n of Am. Sch. Paper Suppliers, 683 F. Supp. 2d at 1328 ("[T]he usefulness of information and argument presented by the potential *amicus curiae* to the court" is the most important consideration); *Am. Satellite Co.*, 22 Cl. Ct. at 549 ("Perhaps the most important [consideration] is whether the court is persuaded that participation by the *amicus* will be useful to it, as contrasted with simply strengthening the assertions of one party.").

On balance, upon consideration of the factors, the court finds that the potential usefulness of the COALITION's position to the court in its review of the issues outweighs the opposition to and concerns regarding the COALITION's appearance in the case as *amicus*. Accordingly, for the foregoing reasons, and upon due deliberation, it is

ORDERED that the COALITION's partial consent motion to appear in this action as *amicus curiae* is granted; and it is further

ORDERED that the COALITION is designated as *amicus curiae* in this action; and it is further

ORDERED that the COALITION's *amicus* brief, *Amicus Curiae*'s Comments in Resp. to the Court's Dec. 28, 2017, Letter, Jan. 30, 2018, ECF No. 56–2, is accepted for filing; and it is further

ORDERED that the parties shall submit any comments in response to the COALITION's *amicus* brief on or before Wednesday, March 28, 2018.

Dated: March 14, 2018
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE