Slip Op. 04–18

NEW WORLD PASTA COMPANY, PLAINTIFF, v. UNITED STATES, DEFENDANT, AND PASTIFICIO GAROFALO S.P.A. AND PASTIFICIO GUIDO FERRARA, S.R.L., DEFENDANT-INTERVENORS.

Before: Pogue, Judge
Court No. 03–00105

[Plaintiff's motion for judgment on the agency record denied; judgment entered for Defendant.]

Decided: March 1, 2004

Collier Shannon Scott, PLLC (*Jennifer E. McCadney, Paul C. Rosenthal, David C. Smith, Jr.*) for Plaintiff New World Pasta Company.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Ada Bosque*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Marisa Beth Goldstein*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Hunton & Williams LLP (*Richard P. Ferrin, Douglas J. Heffner, William Silverman*) for Defendant-Intervenor Pastificio Garofalo S.p.A.

Law Offices of David L. Simon (*David L. Simon*) for Defendant-Intervenor Pastificio Guido Ferrara, S.r.L.

OPINION

POGUE, Judge: In an administrative appeal, Plaintiff challenges aspects of decisions made by the Department of Commerce ("Commerce") concerning two of the investigated companies in *Certain Pasta From Italy*, 68 Fed. Reg. 6,882, 6,882–84 (Dep't Commerce Feb. 11, 2003) (notice of final results of antidumping duty administrative review and determination not to revoke in part) ("*Final Determination*").[1] With regards to the first company, Pastificio Garofalo

[1] Commerce's *Final Determination* incorporates by reference the agency's Issues and Decision Memorandum. *Final Determination*, 68 Fed. Reg. at 6,883 (citing Dep't of Commerce Mem. from Bernard T. Carreau, Deputy Assistant Sec'y for Imp. Admin., to Faryar Shirzad,

S.p.A. ("Garofalo"), Plaintiff challenges Commerce's decision not to "collapse" Garofalo with an affiliate,[2] and its decision not to use adverse facts available in making its determination. With regards to the second company, Pastificio Guido Ferrara, S.r.L. ("Ferrara"), Plaintiff challenges Commerce's decision to add a product-matching criterion for die-type in defining the "foreign like product"[3] for Ferrara, but not for other companies in the same review. This matter is before the Court on Plaintiff's motion for judgment upon the agency record. The Court has jurisdiction under 28 U.S.C. § 1581(c) (2000). For the reasons discussed below, the Court denies Plaintiff's motion and grants judgment for Defendant.

BACKGROUND

To provide a context for the Court's review of Commerce's decisions, the Court first summarizes aspects of the agency's administrative proceedings. Insofar as they are at issue here, these proceedings began in August 2001, when the Department of Commerce published a notice of initiation of the fifth antidumping duty review for certain pasta from Italy, covering the period from July 1, 2000 to June 30, 2001. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 66 Fed. Reg. 43,570, 43,571 (Dep't Commerce Aug. 20, 2001); *see also Final Determination*, 68 Fed. Reg. at 6,882. Eight days after publishing the notice of initiation of the antidumping review, Commerce sent out initial questionnaires to the companies under review. Def.'s Opp'n to Mot. J. Agency R. at 3 ("Def.'s Br.") (citations omitted). Both Garofalo and Ferrara replied. The Court summarizes relevant parts of each response in turn.

In Garofalo's response, the company disclosed a family relationship between its majority shareholder and the majority shareholders

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Assistant Secretary for Imp. Admin., *Issues and Decisions for the Final Results of the Fifth Antidumping Duty Administrative Review*, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2. (Feb. 3, 2003) ("Decision Memorandum")). The Decision Memorandum, in turn, incorporates by reference a prior memorandum. Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 9 (citing Dep't of Commerce Mem. from The Team, to Melissa G. Skinner, Director, Office of AD/CVD Enforcement VI, *Whether to Collapse Pastificio Garofalo S.p.A.* (*Garofalo*) *and Pastificio Antonio Amato & C. S.p.A.* (*Pastificio Amato*) *in the Final Results*, C.R. Doc. No. 59, Pl.'s Conf. Ex. 8 (February 3, 2003) ("Final Collapsing Memo")). The Final Collapsing Memo incorporates by reference still another memorandum. Final Collapsing Memo, C.R. Doc. No. 59, Pl.'s Conf. Ex. 8 at 1–3 (citing Dep't of Commerce Mem. from The Team, to Melissa G. Skinner, Dir., Office of AD/CVD Enforcement VI, *Whether to Collapse Garofalo S.p.A.* (*Garofalo*) *and Pastificio Antonio Amato & C. S.p.A.* (*Amato*) *in the Preliminary Results*, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4–5 (July 31, 2002) ("Preliminary Collapsing Memo")).

[2] Commerce may, pursuant to 19 C.F.R. § 351.401(f) (2003), treat two affiliated companies as a single entity, i.e., "collapse" the two companies. For the full text of the regulation, see *infra* note 7.

[3] For the statutory definition of "foreign like product," see *infra* note 18.

of another pasta company, Antonio Amato & C. S.p.A. ("Amato"),[4] as well as certain intercompany transactions between the two. Response of Pastificio Lucio Garofalo S.P.A. to Section A of the Department's Antidumping Questionnaire, C.R. Doc. No. 1, Pl.'s Conf. Ex. 10 at A7–A8 (Oct. 25, 2001) ("Garofalo's First Response").[5] However, Garofalo claimed that the two companies were not affiliates as defined by 19 U.S.C. § 1677(33),[6] and did not provide detailed information on Amato. Garofalo's First Response, C.R. Doc. No. 1, Pl.'s Conf. Ex. 10 at A7–A9. Commerce issued a supplemental questionnaire to Garofalo, inquiring further about its relationship with Amato, and later conducted an on-site verification. Letter from James Terpstra, Program Manager, Office of AD/CVD Enforcement VI, Int'l Trade Admin., to William Silverman, Hunton & Williams, *Section A, B & C Supplemental Questionnaire*, C.R. Doc. No. 18, Garofalo's Conf. Ex. 8 at 2–3 (Apr. 19, 2002) ("Second Garofalo Questionnaire"); Dep't of Commerce Mem. from Geoffrey Craig et al., Trade Analysts, Office of AD/CVD Enforcement VI, to James Terpstra, Program Manager, Office of AD/CVD Enforcement VI, *Verification of the Sales Response*

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[4] The Court notes that there is great inconsistency in the record as to Amato's proper or legal name. However, on its own financial report, the company refers to itself as Antonio Amato & C. Molini e Pastifici. *See* Amato's 2000 Financial Statement, Garofalo Verification Ex. 6(e), C.R. Doc. No. 38, Fiche 124 at Frame 45 (July 22, 2002).

[5] Documents existing only in the confidential administrative record are referred to as "C.R. Doc. No." followed by their document number, and the fiche and frame at which they appear. Documents existing only in the public administrative record are referred to as "P.R. Doc. No." followed by their document number, and the fiche and frame at which they appear. Documents in the parties' confidential exhibits to their briefs are referred to by "C.R. Doc. No." followed by the document number, "[Party Name]'s Conf. Ex." and the number of the exhibit. Documents in the parties' public exhibits to their briefs are referred to by "P.R. Doc. No." followed by the document number, "[Party Name]'s Pub. Ex." and the number of the exhibit.

[6] The text of 19 U.S.C. § 1677(33) is as follows:

(33) Affiliated persons

The following persons shall be considered to be "affiliated" or "affiliated persons":

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
(G) Any person who controls any other person and such other person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33)(2000) (emphasis supplied).

of Pastificio Lucio Garofalo S.p.A. (*Garofalo*), C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 2 (July 22, 2002) ("Verification Report").

Information gathered from the supplemental questionnaire and the verification allowed Commerce to preliminarily decide that Garofalo and Amato were affiliated, but that they should not be collapsed. *Certain Pasta from Italy*, 67 Fed. Reg. 51,827, 51,828 (Dep't Commerce Aug. 9, 2002) (notice of preliminary results and partial rescission of antidumping duty administrative review and intent not to revoke in part) ("*Preliminary Results*"); Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4–5. After Commerce issued the *Preliminary Results*, Plaintiff challenged Commerce's decision not to collapse Garofalo with its affiliate as well as Commerce's failure to use adverse facts available against Garofalo. Petitioner's Case Brief Concerning Garofalo before the Int'l Trade Admin. of the U.S. Dep't of Commerce, C.R. Doc. No. 54, Pl.'s Conf. Ex. 12 at 1–12 (Sept. 19, 2002). In its final results, however, Commerce maintained that although Garofalo was affiliated with Amato, Garofalo and Amato should not be collapsed. Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 9–11.

Ferrara, in its response to Commerce's initial questionnaire, requested that Commerce add a new product-matching criterion, reflecting the type of die used to extrude the pasta, in defining "foreign like product" for purposes of the antidumping review. Letter from David L. Simon and Ayla Önder, Law Offices of David L. Simon, to Sec'y of Commerce, *Pasta from Italy: Pastificio Guido Ferrara s.r.l. Response to Sections A–C of the Questionnaire*, C.R. Doc. No. 3, Fiche 58 at Frames 26–27 (Oct. 25, 2001) ("Ferrara's First Response"). Commerce subsequently sent a supplemental questionnaire to Ferrara asking for a demonstration that the added criterion would be valid. *See* Letter from David L. Simon and Ayla Önder, Law Offices of David L. Simon, to Sec'y of Commerce, *Pasta from Italy; Pastificio Guido Ferrara s.r.l. Response to 2nd Supplemental Questionnaire*, C.R. Doc. No. 35, Fiche 94 at Frame 7 (July 16, 2002) ("Ferrara's Second Response"). Ferrara submitted a response, providing the verification report and the production cost verification documents from the previous antidumping review of Certain Pasta from Italy, wherein Commerce had added such a criterion for Ferrara, as well as certain new exhibits. *Id.* at Frames 7–11; *see also* Dep't of Commerce Mem. from Frank Thomson and Mark Young, Case Analysts, Office of AD/CVD Enforcement VI, to James Terpstra, Program Manager, Office of AD/CVD Enforcement VI, *Verification of the Sales Response of Pastificio Guido Ferrara s.r.l.* ("*Ferrara*") *in the 99/00 Antidumping Review of the Antidumping Duty Order of Certain Pasta from Italy*, C.R. Doc. No. 35, Ferrara's Conf. Ex. 2 (July 16, 2002) ("Ferrara Verification Report"); Verification Ex. 20: Production Costs, C.R. Doc. No. 35, Ferrara's Conf. Ex. 3 (July 16, 2002); Production Control System Recipe Screenshots, C.R. Doc. No. 35, Fer-

rara's Conf. Ex. 4 (July 16, 2002); Extracts from HM Database & Package Labelling, C.R. Doc. No. 35, Ferrara's Conf. Ex. 5 (July 16, 2002).

Plaintiff challenged the addition of a fifth criterion in a case brief, but in the final results, Commerce maintained that the die-type product criterion was valid in relation to Ferrara, but that it should not be applied to the other respondents. Plaintiff's Case Brief Concerning Pastificio Guido Ferrara, s.r.l before the Int'l Trade Admin. of the U.S. Dep't of Commerce, C.R. Doc. No. 52, Fiche 107 at Frames 39–43 (Sept. 19, 2002); *see* Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 23.

Plaintiff consequently filed for relief in this Court.

STANDARD OF REVIEW

This Court reviews the actions of the government in antidumping duty proceedings to determine whether they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

DISCUSSION

Four issues are before the Court, two relating to Commerce's treatment of Garofalo, and two relating to Commerce's treatment of Ferrara.

With respect to Garofalo, Plaintiff argues that Commerce acted without support of law or substantial evidence in refusing to collapse Garofalo with its affiliate, Amato, and in refusing to apply adverse facts available to Garofalo in making its collapsing determination.

With respect to Ferrara, Plaintiff argues that Commerce acted without support of law or substantial evidence in adding a product-matching criterion for die-type to the definition of "foreign like product" for Ferrara, and in not adding the product-matching criterion for die-type to the definition of "foreign like product" for other companies in the same review.

The Court will discuss the challenges to Garofalo and Ferrara in turn.

A. Challenges to the Determination Regarding Garofalo

Plaintiff first argues that Commerce's decision not to collapse Garofalo with its affiliate, Amato, was unsupported by law or substantial evidence. Principal Br. of Pl. New World Pasta Company at 7 ("Pl.'s Br."). Second, Plaintiff argues that Commerce's decision not to apply adverse facts available against Garofalo in making the collapsing decision was unsupported by law or substantial evidence. *See* Pl.'s Br. at 10–11. The Court discusses each argument in turn.

Commerce's decision not to collapse Garofalo and Amato was based on Commerce's application of its own regulations regarding "collapsing factors" and its interpretation of the evidence presented.

Pursuant to 19 C.F.R. § 351.401(f)(1),[7] Commerce will collapse two producers where they are affiliated, and "where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and [Commerce] concludes that there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1). Commerce found the first two of the three collapsing factors satisfied here: affiliation and similar production facilities not requiring substantial retooling in order to change manufacturing priorities.

With regards to the first factor, affiliation, under 19 U.S.C. § 1677(33)(A), Commerce will consider persons (including corporations under 19 C.F.R. § 351.102(b)) affiliated where there is a family relationship between them. Under 19 U.S.C. § 1677(33)(F), Commerce will consider persons affiliated when they are under common control. Because Amato's major shareholders include a sister and a sister-in-law of Garofalo's majority shareholder, Commerce found that the two companies were affiliated under 19 U.S.C. § 1677(33)(A). Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4. Commerce also found that a group of related individuals exercised common control over both Garofalo and Amato. *Id*. Hence, Commerce found the two companies affiliated under both 19 U.S.C. § 1677(33)(A) and 19 U.S.C. § 1677(33)(F). *Id*. Plaintiff does not contest this finding.

As to the second factor, similar production lines, Commerce also found that Garofalo and Amato, as pasta companies, had similar production facilities that might not require substantial retooling in order to restructure manufacturing priorities. Preliminary Collaps-

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[7] The text of 19 C.F.R. § 351.401(f) is as follows:

(f) Treatment of affiliated producers in antidumping proceedings—(1) *In general.* In an antidumping proceeding under this part, [Commerce] will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and [Commerce] concludes that there is a significant potential for the manipulation of price or production.

(2) *Significant potential for manipulation.* In identifying a significant potential for the manipulation of price or production, the factors [Commerce] may consider include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

19 C.F.R. § 351.401(f) (emphasis supplied).

ing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4. Plaintiff does not contest this finding.

Plaintiff does, however, challenge Commerce's failure to find that the third collapsing factor, "significant potential for the manipulation of pricing or production," was satisfied. *See* Pl.'s Br. at 12; 19 C.F.R. § 351.401(f)(1). This third factor itself has three sub-factors. *See* 19 C.F.R. § 351.401(f)(2). These are (1) the level of common ownership, (2) the extent to which managerial employees or directors of one firm also sit on the board of the other firm, and (3) whether operations are intertwined. *Id*.

Commerce found that none of the sub-factors were met. Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 10–11. Plaintiff challenges the determinations as to all three sub-factors.

In regards to the first sub-factor, common ownership, Plaintiff contends that Commerce originally found that this factor was met, and then arbitrarily retreated from the finding. Pl.'s Br. at 13–14. In the Preliminary Collapsing Memo, Commerce does state that the first sub-factor of 19 C.F.R. § 351.401(f)(2), common ownership, is met because of the common control exerted over both Garofalo and Amato by the group of related individuals. *See* Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4. However, in the Final Collapsing Memo and the Decision Memorandum, Commerce, while discussing the effect of a sale of stock in Amato by Garofalo's major shareholder, which occurred before the period of review ("POR"), states that the factor of common ownership is not, in fact, satisfied. Final Collapsing Memo, C.R. Doc. No. 59, Pl.'s Conf. Ex. 8 at 3–4; Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 10–11 ("[A]lthough petitioners' new argument implicates the first two criteria of 19 CFR 341.401(f)(2) [sic], based on the record facts and our interpretation of those facts, we have determined that neither criterion has been satisfied.").

While Commerce's two statements could appear inconsistent, a review of the record leads the Court to conclude that any inconsistency does not render Commerce's decision legally flawed. Under the collapsing regulation, 19 C.F.R. § 351.401(f)(1), "the evidence required to justify a collapsing determination 'goes beyond that which is necessary to find common control.' " *Allied Tube and Conduit Corp. v. United States*, 24 CIT ___ , ___ , 127 F. Supp. 2d 207, 222 (2000) (quoting *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578, 55,583 (Dep't Commerce Oct. 16, 1998) (final results of antidumping duty administrative review)). While Commerce did not explain why it chose to regard the factor as unsatisfied in the final results, it did explain in the Preliminary Collapsing Memo that even were the factor of common ownership satisfied, the two parties should not be collapsed because common ownership would be based entirely on the finding of affiliation by common control under 19 U.S.C. § 1677(33)(F). *See* Preliminary Collapsing

Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4. Therefore, even were the sub-factor of common ownership satisfied, it alone could not justify collapse; Commerce would still need to review the other two sub-factors. Commerce did so, and found them unsatisfied.

In regards to the second sub-factor, the extent to which managerial employees or directors of one firm also sit on the board of the other firm, Commerce explained that during the POR, no members of Garofalo's board sat on Amato's board, and there were no shareholders in common. Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 5; *see also* Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 5–6, 10. At verification, Commerce examined the financial records of both Garofalo and Amato, Garofalo's *Libro Soci* (which by Italian Law, must list shareholders), and the tax returns of Garofalo's shareholders. Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 6–7; Garofalo's Financial Statements, Garofalo Verification Ex. 3, C.R. Doc. No. 38, Fiche 123 at Frames 9–12 (July 22, 2002); Amato's 2000 Financial Statement, Garofalo Verification Ex. 6(e), C.R. Doc. No. 38, Fiche 124 at Frames 45–50 (July 22, 2002); Pages from Garofalo's Shareholder's Book, Garofalo Verification Ex. 4(c), C.R. Doc. No. 38, Fiche 123 at Frame 90–92 (July 22, 2002); Tax Returns, Garofalo Verification Ex. 16, C.R. Doc. No. 38, Fiche 126 at Frame 14–56 (July 22, 2002). Moreover, Commerce examined a contract of sale whereby Garofalo's majority shareholder had sold a minority interest in Amato previous to the POR, and found that all legal interest in Amato had passed from the majority shareholder prior to the POR. *See* Verification Report, Garofalo's Conf. Ex. 10 at 7; Final Collapsing Memo, C.R. Doc. No. 59, Pl.'s Conf. Ex. 8 at 3–4.

In regards to the third sub-factor, whether operations are intertwined, Commerce verified the small level of intercompany transactions to which Garofalo had admitted in its questionnaire responses. Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 14–15; Completeness Test of Purchased Semolina Using Bolla Book, Garofalo Verification Ex. 13, C.R. Doc. No. 38, Fiche 125 at Frames 65–66 (July 22, 2002); Completeness Test of Purchased Pasta Using Bolla Book, Garofalo Verification Ex. 19, C.R. Doc. No. 38, Fiche 128 at Frame 1 (July 22, 2002). These involved the purchase by Garofalo of a very small amount of finished pasta from Amato for resale during the POR, and the purchase of some semolina from Amato during the same period. Garofalo's First Response, C.R. Doc. Nos. 1–2, Pl.'s Conf. Ex. 10 at A8–A9; Letter from William A. Silverman et al., Hunton & Williams LLP, to Sec'y of Commerce, *Certain Pasta From Italy*, C.R. Doc. No. 11, Garofalo's Conf. Ex. 7 at 8 (Mar. 26, 2002) ("Mar. 26 Letter"). Garofalo had described these transactions as being conducted at arm's length. Garofalo's First Response, C.R. Doc. Nos. 1–2, Pl.'s Conf. Ex. 10 at A7–A9; Letter from William A. Silverman et al., Hunton & Williams LLP, to Sec'y of Commerce, *Certain*

Pasta From Italy, C.R. Doc. No. 22, Fiche 82 at Frames 17–18 (May 17, 2002) ("Garofalo's Second Response"). Garofalo provided to Commerce, previous to verification, a list of all semolina purchases made during fiscal year 2000. Mar. 26 Letter, C.R. Doc. No. 11, Garofalo's Conf. Ex. 7 at App. 1. At verification, Commerce examined Garofalo's selected records of purchases of semolina and pasta during 2001, up until the end of the POR, compared amounts and prices, and concluded that the semolina transactions were made on the same basis as those being conducted with other, non-affiliated semolina producers, and that the pasta-transactions were both small and within standard business practices. *See* Preliminary Collapsing Memo, C.R. Doc No. 45, Pl.'s Conf. Ex. 7 at 5; Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 14–15. Finally, Commerce did not find that either company was sharing sales data, customer information, or had any links other than the intercompany purchases of pasta and semolina. Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 5.

Plaintiff argues nonetheless that Commerce's decisions as to the three sub-factors were unsupported by law or substantial evidence. As to the first sub-factor, Plaintiff argues that Commerce's unexplained decision to reverse its finding that common ownership was satisfied is arbitrary and unsupported by substantial evidence. *See* Pl.'s Br. at 13–14.[8] While the turnaround could appear troubling, as noted above, even were the factor found to be satisfied, it would not be possible to collapse Garofalo and Amato based on that sub-factor alone. *See Allied Tube & Conduit Corp.*, 24 CIT at ___ , 127 F. Supp. 2d at 222. If Commerce was justified in finding that the other two sub-factors were unsatisfied, then any argument on this sub-factor becomes moot, as its resolution one way or the other could not affect the collapsing decision.

It is a "substantial evidence" argument that predominates in Plaintiff's arguments as to the second and third sub-factors. On the issue of the second sub-factor, the extent to which managerial em-

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[8] The Court notes that Plaintiff's arguments on this point are opaque, as Plaintiff mischaracterizes the language of the Preliminary Collapsing Memo. On page thirteen of its principal brief, Plaintiff states that: "[i]n the Preliminary Results, Commerce determined that the first criterion, the level of common ownership, was sufficient to find that the two companies should be collapsed because the agency found Garofalo and Amato to be under 'common ownership.' " Pl.'s Br. at 13 (referring to the Preliminary Collapsing Memo when it mentions "the Preliminary Results"). Contrary to Plaintiff's claim, while, in the Preliminary Collapsing Memo, Commerce found that the two companies were affiliated because of the operation of both 19 U.S.C. § 1677(33)(A) and 19 U.S.C. § 1677(33)(F) (affiliation by common control), and that the sub-factor of common ownership was therefore satisfied, it did not decide that this sub-factor was sufficient for a finding of collapse. Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4–5. This mischaracterization made it difficult to discern the true nature of Plaintiff's argument: that there had been an unexplained change in Commerce's position on the issue of whether the common ownership sub-factor was satisfied, not in whether collapse was justified.

ployees or directors of one firm also sit on the board of the other firm, Plaintiff advances the argument that Commerce is required by law to look to the future in evaluating the potential for manipulation. *See* Reply Br. of Pl. New World Pasta Company at 7 ("Pl.'s Reply Br."). Therefore, Plaintiff argues, Commerce's determination was unsupported by substantial evidence where Commerce relied on the state of affairs during the POR in finding a lack of significant potential for manipulation. *Id*. Plaintiff also claims that Commerce did not properly take into account Garofalo's majority shareholder's ability to "require" the purchase of the majority shareholder's stock in Amato prior to the period of review. Pl.'s Br. at 17. Plaintiff argues that this should weigh in favor of a finding of significant potential to manipulate. *See id*. Moreover, Plaintiff claims that the small, family-owned structure of Garofalo and Amato, supports a finding of significant potential for manipulation. *See* Pl.'s Br. at 16.

It is true that Commerce "will consider future manipulation" in evaluating the potential for manipulation. *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,346 (Dep't Commerce May 19, 1997) (final rule). However, during the POR there were in fact no board members or managerial employees in common at the two companies, nor was there any interlocking of managerial shareholders.[9] Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 5; Garofalo's Second Response, C.R. Doc. No. 22, Fiche 82 at Frame 16; Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 5–8; *cf*. Organizational Chart, Garofalo Verification Ex. 2, C.R. Doc. No. 38, Fiche 123 at Frame 8 (July 22, 2002), *with* Amato's 2000 Financial Statement, Garofalo Verification Ex. 6(e), C.R. Doc. No. 38, Fiche 124 at Frame 67 (July 22, 2002). While it is reasonable for Plaintiff to argue that common control shows a possibility of manipulation, it is just as reasonable for Commerce to conclude that the lack of board entwinement during the POR provides a reasonable basis for a finding of no likelihood of future manipulation, and Commerce's reasonable interpretation of the evidence will be upheld under the standard of review applicable here. As for Garofalo's majority shareholder's contract to sell the shareholder's interest in Amato, Commerce examined the contract and found that, despite certain monies still being owed during the POR, the material terms of sale

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[9] Plaintiff argues that Commerce's decision does not rest on substantial evidence because Commerce never learned the names of Amato's directors nor the names of upper management. *See* Pl.'s Reply Br. at 8. However, Commerce obtained the names of Amato's directors and management in the course of its verification, when it procured a copy of Amato's publicly available financial report, which lists shareholders, directors, and identifies upper management. Amato's 2000 Financial Statement, Garofalo Verification Ex. 6(e), C.R. Doc. No. 38, Fiche 124 at Frame 67 (July 22, 2002). Cross-checking of this list against Garofalo's organizational chart reveals no overlap. Organizational Chart, Garofalo Verification Ex. 2, C.R. Doc. No. 38, Fiche 123 at Frame 8 (July 22, 2002).

were set before the POR. *See* Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 7; Sales Contract, Garofalo Verification Ex. 6(d), C.R. Doc. No. 38, Fiche 124 at Frames 35–44 (July 22, 2002). Commerce has explained that in antidumping reviews, its regulations specify that sales of "foreign like product" or subject merchandise are regarded as completed as of the date the material terms are set. *See* 19 C.F.R. § 351.401(i); Final Collapsing Memo, C.R. Doc. No. 59, Pl.'s Conf. Ex. 8 at 3. While neither "foreign like product" nor subject merchandise was the subject of this sale, Commerce indicated that the date material terms are set should control. Final Collapsing Memo, C.R. Doc. No. 59, Pl.'s Conf. Ex. 8 at 3. While Commerce might have chosen to deal otherwise with such contracts, its choice is reasonable, and will be upheld.

The family-owned nature of the two businesses is yet another fact that could be weighed differently by reasonable people. The family connections and relative simplicity of the businesses could facilitate manipulation, as Plaintiff contends, or could be completely irrelevant to manipulation, as Commerce appears to have found. The mere fact that two inconsistent conclusions can be drawn from a piece of evidence does not render an agency's decision unsupported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citation omitted). Therefore, despite the small, family-owned nature of the two companies, record evidence indicating that there was no overlap of directors, major shareholders, or managerial employees during the POR supports Commerce's finding that the second factor of the significant potential for manipulation analysis is not met.

In regards to the third sub-factor, whether operations are intertwined, Plaintiff asserts that Commerce's decision is unsupported by substantial evidence because the operations of the two companies are entwined in a way that makes for a significant potential for manipulation. *See* Pl.'s Br. at 18–20. The regulation describing entwinement of operations highlights such practices as sharing of sales information, sharing of facilities, and involvement in production and pricing transactions, none of which are present on this record. 19 C.F.R. § 351.401(f)(2)(iii).[10] The regulation also describes "significant transactions" between affiliated producers as cause to find the third sub-factor satisfied. *Id*. However, Commerce found the transactions here not to be significant, as the transactions did not amount to a majority of Garofalo's purchases of either semolina or pasta, and moreover, appeared customary for the Italian Pasta industry.[11] *See*

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[10] For the text of the regulation, see *supra* note 7.

[11] Commerce states in its Preliminary Collapsing Memo that the types of transactions that were conducted between Garofalo and Amato are common in the Italian pasta industry. Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 4–5. Commerce repeats this statement in its Decision Memorandum and in its brief. Decision Memorandum, P.R.

Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 5; Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 14–15; Completeness Test of Purchased Semolina Using Bolla Book, Garofalo Verification Ex. 13, C.R. Doc. No. 38, Fiche 125 at Frame 65 (July 22, 2002); Garofalo Verification Ex. 19, Completeness Test of Purchased Pasta Using Bolla Book, C.R. Doc. No. 38, Fiche 128 at Frame 1 (July 22, 2002).[12]

Therefore, Commerce's decision not to collapse Garofalo and Amato was supported by substantial evidence and in accordance with law. Commerce acted reasonably in deciding only to consider events occurring during the POR in evaluating the collapsing factors, and while it could have reasonably made different inferences from the facts, the ones it did make were reasonable and supported by the record.

Having found that Commerce's decision not to collapse Garofalo and Amato as a single entity was in accordance with law and supported by substantial evidence, the Court now turns to the second issue involving Garofalo: whether, in making its collapsing determination, Commerce's decision not to apply facts available or adverse

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Doc. No. 134, Pl.'s Pub. Ex. 2 at 10; Def.'s Br. at 17. Commerce does not cite to the evidence that supports this contention. However, during Verification, Garofalo personnel explained that buying pasta for resale from other pastificios allowed Garofalo to round out its product line without reconfiguring its machinery, and that the practice was common. *See* Verification Report, C.R. Doc. No. 40, Pl.'s Conf. Ex. 11 at 14. This explains the practice as regards purchases of pasta, but not purchases of semolina. However, with regard to semolina, Commerce found that the purchases of semolina were conducted at market rates, and that during the POR, the majority of Garofalo's semolina purchases were from providers other than Amato. *Id*.; *see* Completeness Test of Purchased Semolina Using Bolla Book, Garofalo Verification Ex. 13, C.R. Doc. No. 38, Fiche 125 at Frame 65 (July 22, 2002); Mar. 26 Letter, C.R. Doc. No. 11, Garofalo's Conf. Ex. 7 at App. 1.

[12] Plaintiff also argues that Commerce's decision regarding the third sub-factor is unsupported by substantial evidence in that Commerce, in reviewing Garofalo's purchases of semolina and pasta, only had information on purchases from the first half of the POR. Pl.'s Reply Br. at 11. This claim is unsupported by the record. Garofalo provided to Commerce a list of fiscal year 2000 semolina purchases. *See* Mar. 26 Letter, C.R. Doc. No. 11, Garofalo's Conf. Ex. 7 at App. 1. Commerce, during verification, looked at selected purchases from fiscal year 2001 to verify that purchases were at arms length and that the percentage of purchases from Amato remained more or less constant. Completeness Test of Purchased Semolina Using Bolla Book, Garofalo Verification Ex. 13, C.R. Doc. No. 38, Fiche 125 at Frame 65 (July 22, 2002). Garofalo informed Commerce that purchases of pasta from Amato in fiscal year 2000 for resale accounted for only a small percentage of total pasta sales. Mar. 26 Letter, C.R. Doc. No. 11, Garofalo's Conf. Ex. 7 at 8. In its verification report, Commerce noted the amount that Garofalo claimed, and appeared to find no discrepancies. Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 14–15.

facts available[13] to Garofalo was unsupported by law and substantial evidence.

Application of adverse facts available is governed by 19 U.S.C. § 1677e(b), which states that if Commerce finds that an interested party has not acted to the best of its ability to comply with a request for information, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b). While 19 U.S.C. § 1677e(b) allows Commerce to apply adverse inferences where it feels that a party "has failed to cooperate by acting to the best of its ability to comply with a request for information," use of adverse inferences is discretionary. Moreover, such inferences cannot be applied until and

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[13] Plaintiff's brief argues that Commerce acted improperly in not using adverse facts available against Garofalo, on the basis of what Plaintiff perceives of as significant omissions in Garofalo's responses and cooperation. *See* Pl.'s Br. at 10. Plaintiff does not, however, argue for the use of facts available, a prerequisite to adverse facts available under 19 U.S.C. § 1677e. Presumably, this is because the use of facts available, without adverse inferences, would have produced the same result as obtained in the administrative review: a finding of affiliation, but not of collapse. The Court's discussion of the issue, however, deals with both the question of whether Commerce properly declined to use adverse facts available and whether it properly declined to use facts available. The text of 19 U.S.C. § 1677e, which describes the use of both facts available and adverse facts available, is reproduced here:

§ 1677e. Determinations on the basis of the facts available

(a) In general

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

(A) withholds information that has been requested by the administering authority or the Commission under this subtitle,

(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,

(C) significantly impedes a proceeding under this subtitle, or

(D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) Adverse inferences

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,

(2) a final determination in the investigation under this subtitle,

(3) any previous review under section 1675 of this title or determination under section 1675b of this title, or

(4) any other information placed on the record.

19 U.S.C. § 1677e(a)–(b) (2000) (emphasis supplied).

unless 19 U.S.C. § 1677e(a) is operative. 19 U.S.C. § 1677e(a). 19 U.S.C. § 1677e(a) states, among other things, that Commerce "shall use the facts otherwise available" where a party withholds information or fails to submit it in the proper manner. *Id*.

Thus, while Plaintiff's arguments focus on the application of adverse inferences, Plaintiff's argument might be better understood as an argument that "facts otherwise available" should have been applied against Garofalo.[14] In addition, 19 U.S.C. § 1677e(a) is subject to the dictates of 19 U.S.C. § 1677m(d). That provision requires Commerce, if it finds a submission from a party to be deficient, to inform the party of the deficiencies and to allow for remedy or explanation. 19 U.S.C. § 1677m(d).[15]

Assuming that Commerce's issuance of a supplemental questionnaire to Garofalo was inherently a finding that Garofalo's first questionnaire response failed to comply with Commerce's request for information,[16] under 19 U.S.C. § 1677m(d), Garofalo's supplemental questionnaire response would merit use of facts otherwise available only if Commerce found that it, too, was deficient. 19 U.S.C. § 1677m(d). Commerce does not appear to have found Garofalo's sec-

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[14] The mandatory language of the facts available provision—"shall"—appears to remove from Commerce any discretion about whether to use facts available when there is a withholding of information or failure to submit in the proper form, and if read strictly, could mandate the use of facts available wherever there is a slight discrepancy between question and answer. However, this Court has held that Commerce may not use facts available at least until Commerce issues a supplemental questionnaire. *See Nippon Steel v. United States*, 25 CIT ____ , ____ , 146 F. Supp. 2d 835, 837 (2001)(citing *NTN Bearing Corp. v. United States*, 25 CIT ____ , 132 F. Supp. 2d 1102 (2001); *SKF USA Inc. v. United States*, 24 CIT ____ , ____ 116 F. Supp. 2d 1257, 1268(2000)) (rev'd on other grounds). This result obtains because of the dictates of 19 U.S.C. § 1677m(d) (reproduced below, note 15), which require that Commerce give notice of a deficiency and opportunity to remedy the deficiency before applying facts available.

[15] Title 19 U.S.C. § 1677m(d) is as follows:

(d) Deficient submissions

If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

(1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

(2) such response is not submitted within the applicable time limits,

then the administering authority or the Commission as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d) (emphasis supplied).

[16] *See, e.g., China Steel Corp. v. United States*, 27 CIT ____ , ____ , 264 F. Supp. 2d 1339, 1356 (2003); *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT ____ , ____ , 206 F. Supp. 2d 1323, 1332 (2002); *Bergerac, N.C. v. United States*, 24 CIT ____ , ____ , 102 F. Supp. 2d 497, 504 (2000).

ond questionnaire response unsatisfactory, as it did not attempt to apply facts available or adverse facts available in its review. Commerce's decision not to apply facts otherwise available is therefore in accordance with law.

However, Plaintiff argues that Commerce's refusal to use adverse facts available against Garofalo was unsupported by substantial evidence. *See* Pl.'s Br. at 10. Plaintiff argues that because Commerce eventually found that Garofalo and Amato were affiliated, Garofalo's failure to provide "a single response that includes information, including financial statements, for all affiliates" in its questionnaire responses means that Garofalo failed to respond to the questionnaires adequately and that its submissions are therefore deficient. *See id*.[17] Given the Court's discussion of 19 U.S.C. § 1677m(d) above, this argument becomes a question of whether Commerce had substantial support for its finding that Garofalo's first and second responses, taken together, constituted an adequate response to Commerce's questionnaires, such that Commerce could reasonably decide not to apply facts available or adverse facts available.

In its initial questionnaire, Commerce required that Garofalo provide an organization chart and description of its legal structure, including any affiliated persons or companies. U.S. Dep't of Commerce, Imp. Admin. Office of Antidumping and Countervailing Duty Enforcement, Request for Information, Italy, Certain Pasta, P.R. Doc. No. 19, Pl.'s Pub. Ex. 9 at A4 (Aug. 28, 2001) ("Initial Questionnaire"). Garofalo's response admitted that relatives of its majority shareholder owned another pasta company, Amato. Garofalo's First Response, C.R. Doc. No. 1, Pl.'s Conf. Ex. 10 at A7. The response also disclosed that the two companies engaged in intercompany transactions; specifically, Garofalo had purchased from Amato during the POR a quantity of semolina and a small amount of finished pasta. *Id*. at A8–A9. Garofalo contended in its response, however, that Garofalo and Amato were not affiliates. *Id*. at A7–A9.

In its supplemental questionnaire, Commerce asked three questions relating to Garofalo's relationship with Amato. *See* Garofalo's Second Response, C.R. Doc. No. 22, Fiche 82 at Frames 16–17. Commerce first asked Garofalo to state whether Garofalo owned stock in Amato, provided loan or credit guarantees to Amato, or shared customer lists with Amato. Garofalo replied in the negative. *See* Garofalo's Second Response, C.R. Doc. No. 22, Fiche 82 at Frame 16. Next, Commerce requested the names of Amato's shareholders, and

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[17] In its case brief before the agency, Plaintiff also argued that Garofalo's failure to report the sale of Amato stock by Garofalo's major shareholder before the POR rendered Garofalo's responses deficient. *See* Petitioner's Case Brief Concerning Garofalo before the Int'l Trade Admin. of the U.S. Dep't of Commerce, C.R. Doc. No. 54, Pl.'s Conf. Ex. 12 at 3–7 (Sept. 19, 2002). However, Plaintiff does not appear to pursue this argument in its briefs before the Court. *See* Pl.'s Br; Pl.'s Reply Br.

asked Garofalo to specify if there were any other companies that might be affiliated with both Garofalo and Amato, and with whom Garofalo dealt. *Id*. Garofalo revealed the names of Amato's shareholders, as garnered from publicly available sources, and stated that it was not affiliated with any affiliates of Amato, and did not have any dealings with affiliates of Amato. *See* Garofalo's Second Response, C.R. Doc. No. 22, Fiche 82 at Frames 16–17. Third, Commerce asked Garofalo to describe the terms and conditions of intercompany transactions between Garofalo and Amato, and to alert Commerce to any such transactions not described in Garofalo's first questionnaire response. *See* Garofalo's Second Response, C.R. Doc. No. 22, Fiche 82 at Frame 17. Garofalo described the transactions it had already revealed in its first response, and affirmed that there were no others. *See* Garofalo's Second Response, C.R. Doc. No. 22, Fiche 82 at Frames 17–18.

At verification Commerce discovered that Garofalo's major shareholder had previously owned a minority interest in Amato, but found that the interest had been divested prior to the POR, and that it was therefore unnecessary for Garofalo to have reported on it. *See* Preliminary Collapsing Memo, C.R. Doc. No. 45, Pl.'s Conf. Ex. 7 at 3–4; *see also* Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10 at 6–7. No other discrepancies with Garofalo's responses were noted. *See* Verification Report, C.R. Doc. No. 40, Garofalo's Conf. Ex. 10.

Based on the three follow-up questions of the supplemental questionnaire, Commerce appears to have found the original response deficient in only a few respects. Garofalo was responsive to the questions in the supplemental questionnaire, and its responses were later successfully verified. Accordingly, the Court concludes that Commerce's decision not to apply adverse facts available or facts available in making its affiliation and collapsing decisions was supported by substantial evidence.

B. Challenges to the Determination Regarding Ferrara

The remaining two issues in the case deal with Plaintiff's challenges to Commerce's treatment of Ferrara. Plaintiff first argues that Commerce acted in violation of law, and its decision was unsupported by substantial evidence, when it added a product-matching criterion for die-type in identifying Ferrara's "foreign like product." *See* Pl.'s Br. at 21. Plaintiff furthermore argues that Commerce acted in a manner contrary to law when it did not include this criterion in its analysis of the other firms under review. *Id*. The Court discusses the two issues in turn below.

First, Commerce's decision to add a fifth product-matching criterion for die-type with regards to Ferrara was in accordance with law and supported by substantial evidence. Congress has delegated to Commerce the ability to choose product-matching criteria to identify the "foreign like product" to which domestic sales are compared in

order to calculate the dumping margin. *See Pesquera Mares Australes, Ltda. v. United States*, 266 F.3d 1372, 1384 (Fed. Cir. 2001); *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995). However, in defining "foreign like product," Commerce is constrained both by statute and by its own past practice. Under 19 U.S.C. § 1677(16)(A), Commerce must base product-matching criteria on "physical characteristics." 19 U.S.C. § 1677(16)(A).[18] In addition, it is apparently Commerce's past practice, to consider only "meaningful" or "significant" physical characteristics. *Emulsion Styrene-Butadiene Rubber from Mexico*, 64 Fed. Reg. 14,872, 14,875 (Dep't Commerce Mar. 29, 1999) (notice of final determination of sales at less than fair value) (applying a "meaningful" standard); *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom*, 63 Fed. Reg. 18,879, 18,881 (Dep't Commerce Apr. 16, 1998) (final results of antidumping duty administrative review) (applying a "significant" standard). Commerce has defined what makes a physical characteristic "meaningful" or "significant" only by saying, in a notice applying the "meaningful" standard, that it looks to "both price differences in the marketplace and cost differences which may reflect different production processes." *Emulsion Styrene-Butadiene Rubber from Mexico*, 64 Fed. Reg. at 14,875; *see also Certain Pasta from Italy*, 67 Fed. Reg. 300, 302 (Dep't Commerce Jan. 3, 2002) (notice of final results of antidumping duty administrative review, partial rescission of antidumping duty administrative review and revocation of antidumping duty order in part);[19]

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[18] The text of 19 U.S.C. § 1677(16) is as follows:

(16) Foreign like product

The term "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the subject merchandise,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (emphasis supplied).

[19] This final determination, *Certain Pasta from Italy*, 67 Fed. Reg. at 300, incorporates by reference an Issues and Decision Memorandum discussing cost differences and production differences in terms of physical difference. *Certain Pasta from Italy*, 67 Fed. Reg. at 302; Dep't of Commerce Mem. from Bernard T. Carreau, Deputy Assistant Sec'y for Imp.

Certain Pasta from Italy, 64 Fed. Reg. 6,615, 6,623–24 (Dep't Commerce Feb. 10, 1999) (notice of final results and partial rescission of antidumping duty administrative review).

In the antidumping review at issue here, Commerce originally chose four criteria to use in identifying the foreign like product: pasta shape, wheat type, presence of additives, and presence of enrichment. Initial Questionnaire, P.R. Doc. No. 19, Pl.'s Pub. Ex. 9 at III–2. Ferrara, in answering its first questionnaire, requested that a fifth criterion be added, representing the type of die used to extrude the pasta. Ferrara's First Response, C.R. Doc. No. 3, Fiche 58 at Frames 26–27. In response to a supplemental questionnaire requesting explanation of why a fifth criterion should be added, Ferrara provided Commerce's verification, from the review conducted a year previously, that the surface texture of bronze-die and Teflon-die pastas were noticeably different. Ferrara's Second Response, C.R. Doc. No. 35, Fiche 94 at Frames 7–9; Ferrara Verification Report, C.R. Doc. No. 35, Ferrara's Conf. Ex. 2 at 1 (July 16, 2002) (stating that Ferrara's bronze-die pasta is "rougher on the surface" than Teflon-die pasta). This appears to satisfy the statutory requirement that some physical difference exist.

Other evidence that Ferrara provided related to the high cost differential between production of bronze-die and Teflon-die pasta, the slight differences in recipe, and evidence that Amway, Ferrara's customer for bronze-die pasta, paid a premium for pasta produced in that manner and prominently labeled the product as bronze-die pasta. Ferrara's Second Response, C.R. Doc. No. 35, Fiche 94 at Frames 7–11; Verification Ex. 20: Production Costs, C.R. Doc. No. 35, Ferrara's Conf. Ex. 3 (July 16, 2002); Production Control System Recipe Screenshots, C.R. Doc. No. 35, Ferrara's Conf. Ex. 4 (July 16, 2002); Extracts from HM Database & Package Labelling, C.R. Doc. No. 35, Ferrara's Conf. Ex. 5 (July 16, 2002). Production cost and market price differences between pastas produced with the two die-types appear to satisfy Commerce's own rule that the physical difference be "significant" or "meaningful."

Plaintiff nevertheless argues that the fifth criterion impermissibly reflects a non-physical characteristic. Pl.'s Br. at 22–26. Plaintiff's argument is that Commerce's definition of "significant" or "meaningful" physical characteristics hinges on production cost and marketing price, in violation of 19 U.S.C. § 1677(16)(A). Pl.'s Br at 24–25.[20] The

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Admin. to Richard W. Moreland, Acting Assistant Sec'y for Imp. Admin., *Issues and Decision Memorandum for the Fourth Antidumping Duty Administrative Review*, Def.'s Conf. Ex. 7, at cmt. 2 (Jan. 3, 2002) ("Fourth Review Decision Memorandum").

[20] The Court notes that neither Plaintiff nor Commerce use the term "physically significant" in their briefs, preferring the term "commercially significant," although the Court cannot divine from the Federal Register that Commerce has stated a practice of looking for "commercially significant" physical characteristics, rather than merely "significant" or "meaningful" physical characteristics. While the term appears in some Federal Register no-

Court agrees that by statute, Commerce is required to match only "physical" characteristics. 19 U.S.C. § 1677(16)(A). The statute, however, does not require that physical characteristics be significant and, generally, Commerce has wide latitude in choosing what physical characteristics to consider. *Pesquera Mares Australes, Ltda. v. United States*, 266 F.3d 1372 at 1384. Additionally, Commerce has established a practice of considering only "significant" or "meaningful" physical characteristics, defined in terms of cost and price differences, which appear to be non-physical attributes of a good. Consequently, Commerce's practice could appear inconsistent with the statute; were Plaintiff able to demonstrate that the verified physical difference between bronze-die and Teflon-die pasta, i.e., surface texture, is actually inconsequential to the purchaser, it could claim that the cost difference is propelled by a consumer preference for the production method alone. In that case, Commerce's findings here could be contrary to law, as the decision to create a fifth product-matching criterion would appear to be based entirely on non-physical attributes. However, Plaintiff has adduced no such evidence; the record contains no evidence whatsoever on whether the surface texture, standing alone, and unaided by cost or production method, is significant to consumers or not.[21] However, the record does disclose a verified physical difference between bronze-die and Teflon-die pasta,

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tices, and is occasionally used by Commerce to describe characteristics worthy of their own product matching criteria, the Court has not found any document wherein Commerce has explained that "commercial significance" is its standard, nor what "commercially significant" physical characteristics would be. Plaintiff, however, argues that past practice requires Commerce to only consider "commercially significant" physical characteristics in creating product matching-criteria. Pl.'s Br. at 22–23. Plaintiff cites as proof of this practice the Federal Circuit's decision in *Pesquera Mares Australes*. Pl.'s Br. at 23 n.70.

In that case, Commerce asked the Federal Circuit to uphold as reasonable Commerce's interpretation of the statutory phrase "identical in physical characteristics" in accord with commercial practice. *Pesquera Mares Australes, Ltda. v. United States*, 266 F.3d at 1372. The Court notes that the phrase "commercially significant" appears nowhere in that decision. *See id*. Rather, the Federal Circuit opined that the words "identical in physical characteristics" as used in 19 U.S.C. § 1677(16)(A) could reasonably be held to mean "the same with minor differences," rather than absolutely physically identical. *Id*. at 1383. This was in part due to the fact that there may be hundreds of small variations between any two given products, and Commerce would never be able to match an imported product with a "foreign like product" if it were required to evaluate every possible difference. *Id*. (citation omitted). Therefore, the Federal Circuit held that Commerce could ignore differences that were not "commercially recognized" in making product-matching criteria. *Id*. at 1384. This, however, is different from *requiring* Commerce to ignore commercially unrecognized differences, or, to put it another way, from requiring that Commerce prove that a difference is "commercially recognized" when choosing product-matching criteria. *Pesquera Mares Australes* does not so hold. Moreover, the case does not, in of itself, create a past practice of only relying on "commercially significant" characteristics, but rather states that it is reasonable for Commerce to ignore minor characteristics if it so chooses.

[21] Ferrara has introduced evidence that its customer for bronze-die pasta, Amway, prominently advertises the product as such, but this does not inform us as to whether it is the bronze die process, or the resulting physical differences that Amway finds attractive. *See* Extracts from HM Database & Package Labelling, Ferrara's Second Response Ex. 4, C.R. Doc. No. 35, Ferrara's Conf. Ex. 5 (July 16, 2002).

and that the two are markedly different in terms of price and cost to produce. That being so, it appears that Commerce has satisfied both the requirements of 19 U.S.C. § 1677(16)(A) and the requirement of its own practice of relying only on "meaningful" or "significant" physical characteristics.

The next question is whether Commerce's decision was supported by substantial evidence. Responding to the second supplemental questionnaire, Ferrara produced the verification report and exhibits from the review conducted a year earlier regarding treatment of Ferrara on the same issue, and in which Commerce added a fifth matching criterion for die-type. *See* Ferrara's Second Response, C.R. Doc. No. 35, Fiche 94 at Frames 7–9. In the verification conducted during the fourth review, Commerce found and verified an actual physical difference between bronze-die and Teflon-die pasta; i.e., surface texture.[22] Ferrara Verification Report, C.R. Doc. No. 3, Ferrara's Conf.

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[22] Commerce also argues that record evidence shows throughput rates and line speeds differ for bronze-die and Teflon-die pasta, and that this makes for a physical difference. *See* Def.'s Br. at 23; *see also* Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 23 (implicating throughput rate and line speeds in either a physical or cost difference, or both); Fourth Review Decision Memorandum, Def.'s Conf. Ex. 7 at cmt. 2. Record evidence shows that throughput rates and line speeds for bronze-die pasta are slower than those for Teflon pasta. *See, e.g.*, Ferrara Verification Report, C.R. Doc. No. 3, Ferrara's Conf. Ex. 2 at 15.

While Commerce does not explain how line speed or throughput rates implicate a physical difference in either the Decision Memorandum or the Fourth Review Decision Memorandum, it does cite to past pasta reviews in which a fifth matching criterion was added. Decision Memorandum, P.R. Doc. No. 134, Pl.'s Pub. Ex. 2 at 23 (citations omitted); Fourth Review Decision Memorandum, Def.'s Conf. Ex. 7, at cmt. 2 (citing *Certain Pasta from Italy*, 64 Fed. Reg. 6,615 (Dep't Commerce Feb. 10, 1999) (notice of final results and partial rescission of antidumping duty administrative review); *Certain Pasta from Turkey*, 65 Fed. Reg. 77,857 (Dep't Commerce Dec. 13, 2000) (final results of antidumping duty administrative review)). One of these cases appears to indicate that in past reviews, Commerce used line speed as a descriptor for pasta shape, as it is the different speeds at which pastas are run through the die that give them their different lengths and thicknesses. *Certain Pasta from Italy*, 64 Fed. Reg. at 6,623–24. There is also other evidence on the record that appears to show that line speed is a shorthand for shape. See, for example, Initial Questionnaire, P.R. Doc. No. 19, Pl.'s Pub. Ex. 9 at III–3, which asks respondents to support shape classifications with line speed, and Letter from Paul C. Rosenthal et al., to Sec'y Commerce, *Re: Certain Pasta From Italy*, C.R. Doc. No. 32, Fiche 92 at Frames 36–37, 52, 61–63, and 65–67 (Jun. 7, 2002), explaining that line speeds reflect the shape and size of pasta. Therefore, it may be that in addition to the surface texture, bronze-die pasta differs from Teflon-die pasta in its length and thickness, and that it is this fact Commerce is trying to describe in its discussions of line speed and throughput rates. There is language from Commerce in a review previous to the one at issue in this case, however, that seems to indicate that throughput rates and line speeds do not reflect a physical difference so much as a cost difference:

> The fact that a long or short artiginal pasta [bronze die pasta made with coarse semolina] cut takes up to 20 times longer to produce than the comparable industrial long or short pasta cut is sufficiently significant to warrant the creation of a special shape category for artiginal pasta long or short cuts for the same reason that led [Commerce] to create speciality [sic] long and short shapes for industrial pasta long or short cuts; in other words, the production cost for artiginal pasta is significantly influenced by the slower line speeds required to produce the same long or short industrial pasta cut.

Certain Pasta from Italy, 64 Fed. Reg. at 6,624.

Ex. 2 at 1. It also verified the different costs of production and different market prices. *Id*. While Plaintiff claims that Commerce should not rely on evidence that was not produced in response to the particular review at hand, the Court cannot say that Commerce's decision was unsupported by substantial evidence, or that it is unreasonable for Commerce to rely on evidence prepared by its own personnel only a year before. Moreover, Ferrara provided certain new evidence relating to production recipes and Amway's promotion of the bronze-die product to support its bid for a fifth product-matching criterion. Production Control System Recipe Screenshots, C.R. Doc. No. 35, Ferrara's Conf. Ex. 4 (July 16, 2002); Extracts from HM Database & Package Labelling, C.R. Doc. No. 35, Ferrara's Conf. Ex. 5 (July 16, 2002)

The final issue in the case is whether Commerce acted with support of law and substantial evidence when, having added the die-type criterion to the "foreign like product" with regards to Ferrara, it did not add it for the other companies under review. In support of the argument that this decision was not in accordance with law, Plaintiff appears to cite inapposite cases. Pl.'s Br. at 21 n.63. The cases deal not with variations in product-matching criteria between reviewed companies in an investigation, but with Commerce's having given the phrase "foreign like product," as it appears in various places in the dumping statutes, different meanings without explanation. *See RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1346–47 (Fed. Cir. 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001). These cases do no more than defend a basic canon of statutory construction, and factually, do not appear to have application to the issues here, which involve the use of criteria to define a certain category of pasta, rather than a shifting meaning of the phrase "foreign like product" across statutory sections. Moreover, with regard to substantial evidence, Plaintiff appears to render its own argument moot when it admits that none of the other companies ever reported the use of bronze dies. Pl.'s Br. at 26. Requiring companies to report on a characteristic that their pasta does not have would be superfluous indeed.[23] The Court's review of the

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The record before the Court here is unclear on whether line speed in this case primarily affects shape and, in turn, cost, or whether it is primarily a matter of cost that does not reflect a different pasta shape.

Be that as it may, there is at least one verified physical difference between Ferrara's bronze-die and Teflon-die pasta—texture. Ferrara Verification Report, C.R. Doc. No. 3, Ferrara's Conf. Ex. 2 at 1. This difference was verified and, on this record, provides a reasonable basis for fulfilling the statutory requirement that product-matching be based on physical characteristics. *See* 19 U.S.C. § 1677(16)(A).

[23] Any argument that the other reviewed companies may also have been making bronze-die pasta, but were unaware of their ability to request a product-matching criterion is undermined by the fact that Commerce has added a fifth product-matching criterion for die-type for certain companies in past pasta reviews. For example, in the Fourth Antidumping Review of Certain Pasta from Italy, Commerce added a die-type criterion solely for Ferrara,

applicable statutes and regulations does not reveal any reason why Commerce should be barred from using a product-matching criterion solely in relation to the one company under review to which it has application.

CONCLUSION

Because Commerce's review of both Garofalo and Ferrara was in accordance with law and supported by substantial evidence, the Court will deny Plaintiff's motion for judgment upon the agency record, and enter judgment for Defendant.

Slip Op. 04–19

Before: Barzilay, Judge

PEER CHAIN CO., PLAINTIFF, v. UNITED STATES OF AMERICA, DEFENDANT.

Court No. 01–00297

[Defendant's Motion for Summary Judgment granted.]

Decided: March 3, 2004

Coudert Brothers LLP (John M. Gurley, Esq., Matthew M. McConkey, Esq.) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Assistant Branch Director, International Trade Field Office; Commercial Litigation Branch, Civil Division, Department of Justice (*James A. Curley*), Trial Attorney; *Beth C. Brotman*, Office of Assistant Chief Counsel, Bureau of Customs and Border Protection, of counsel; and *Dean A. Pinkert*, Office of Chief Counsel for Import Administration, Department of Commerce, of counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

I. INTRODUCTION

The court is called upon to determine whether any consequence attaches to a considerable delay by the government in liquidating an importer's entries, where that delay was a direct result of the Department of Commerce's failure to timely notify the United States

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the same company at issue here. *See* Fourth Review Decision Memorandum at cmt. 2. Similar results were obtained in an earlier pasta review, where a fifth criterion was added for just one respondent. *See Certain Pasta from Italy*, 64 Fed. Reg. at 6,623–24.

Customs Service[1] that a court-ordered suspension of liquidation of the entries had been lifted, rather than Customs' delay in liquidating once it had been notified. This matter is before the court on the parties' cross-motions for summary judgment, and the court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a).

Plaintiff, Peer Chain Company, imported roller chain from Japan at a zero percent duty rate, only to find nearly fifteen years later that it owed the government significant duties totaling $167,111. This amount would have been markedly less had the government not delayed in liquidating Peer Chain's entries for nearly five years, as interest accrued at a compound rate over this time period. Accordingly, Peer Chain challenges both the duty rate at which its entries were liquidated and the assessment of interest on those duties. Peer Chain urges that its entries be deemed liquidated at the zero percent duty rate because, it argues, the government failed to provide proper notice of a final decision of the Court of Appeals for the Federal Circuit that lifted the suspension of liquidation of its entries,[2] and also because the government delayed liquidating those entries. In addition to raising these claims, which rely on 19 U.S.C. § 1504(d) (1993) ("section 1504(d)"),[3] Peer Chain also argues that it was denied its due process rights under the Fifth Amendment of the United States Constitution. Finally, Peer Chain appeals to the court for equitable relief in the event that it does not prevail on the above-mentioned claims.

The government opposes this motion and cross-moves for summary judgment, arguing that deemed liquidation cannot result from the facts at hand because the entries were liquidated within six months of Customs' receipt of liquidation instructions from Commerce, as directed by section 1504(d). The court holds that neither the statute nor the relevant case law attaches any consequence to governmental delay in liquidating entries that occurs as a result of Commerce's failure to notify Customs that the court-ordered suspension of liquidation has been removed. It further holds that because Customs is free to liquidate entries at any time after a suspension of liquidation has been removed, Customs' liquidation of these entries before receiving "unambiguous and public notice" from Commerce did not render the liquidations void or invalid. Furthermore, the

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[1] Now the Bureau of Customs and Border Protection.

[2] *See Sugiyama Chain Co. v. United States*, 60 F.3d 843 (Fed. Cir. 1995) ("*Sugiyama*").

[3] 19 U.S.C. § 1504(d) (1993) states:
(d) Limitation. When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

court holds that it is unable to fashion any of the equitable remedies requested by Peer Chain. Thus, because Customs liquidated Peer Chain's entries within six months of receiving notice from Commerce that suspension of liquidation had been removed, in accordance with section 1504(d), the liquidation was valid. Finally, the court holds that Peer Chain's due process rights were not violated. Accordingly, Peer Chain's summary judgment motion is denied and the government's motion is granted.

II. BACKGROUND

Peer Chain imported roller chain manufactured by Sugiyama, a Japanese exporter, into the United States on three dates: (1) August 21, 1985; (2) January 28, 1986; and (3) March 14, 1986. At the time Peer Chain imported its merchandise liquidation of all Japanese roller chain was subject to statutory suspension in accordance with a 1973 antidumping duty order and the preliminary antidumping duty rates were set at zero because Commerce's most recent final administrative review determination had found no dumping by Sugiyama. *See Roller Chain, Other Than Bicycle, From Japan*, 38 Fed. Reg. 9226 (Apr. 12, 1973); *Roller Chain, Other Than Bicycle, From Japan; Final Results of Administrative Review of Antidumping Finding*, 48 Fed. Reg. 51,801 (Nov. 14, 1983) (covering 105 of the 119 manufacturers of Japanese roller chain). Thus, the liquidation of Peer Chain's entries was suspended pending Commerce's final determination for the 1985–1986 period of review, and it paid no duties or cash deposits at the time of importation.

Six years after the subject merchandise entered the United States, Commerce established a 43.29 percent duty rate upon Sugiyama roller chain for the 1985–1986 period of review. *See Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 43,697 (Sept. 22, 1992) ("*Final Determination*"). Sugiyama challenged the results of the *Final Determination*, which was sustained in part in *Sugiyama Chain Co. v. United States*. *See* 18 CIT 640, 855 F. Supp. 1313 (1994); 18 CIT 423, 852 F. Supp. 1103 (1994). Although Peer Chain was not a party to Sugiyama's suit, the liquidation of its entries was enjoined by court order, and Peer Chain's entries therefore continued to be suspended. Ultimately, this Court reversed and remanded some of Commerce's administrative findings in the *Final Determination*, but sustained those covering Peer Chain's entries. The Court of Appeals for the Federal Circuit affirmed this Court's ruling in Sugiyama's suit on July 11, 1995, and Sugiyama's petition to the Federal Circuit for rehearing *en banc* was denied on October 5, 1995.

Ninety days later, on January 3, 1996, time for filing for writ of *certiorari* expired, and the court-ordered suspension of liquidation of

Peer Chain's entries was lifted.[4] Commerce never published general notice in the Federal Register of the Federal Circuit's *Sugiyama* decision; it did not provide any form of public notice of the decision; and it never sent direct notice of the decision to the importers whose entries were suspended pursuant to the case. Because Customs cannot liquidate suspended entries, and because Customs had not received any notice that suspension had been removed, Peer Chain's entries remained unliquidated.[5] When Commerce finally sent notice to Customs, it did so via a non-public e-mail on May 22, 2000, although suspension of liquidation had been lifted nearly five years earlier. Customs then liquidated Peer Chain's entries at the 43.29 percent duty rate on June 23, 2000 and August 4, 2000 in accordance with Commerce's liquidation instructions contained in the May 22 e-mail. The government also billed Peer Chain for the interest that had accrued, compounded daily from 1986 until 2000. This demand for payment, totaling $167,111 and received in the summer of 2000, was the first notice of any kind that Peer Chain was given regarding its entries since the *Final Determination* had been published in the Federal Register in 1992.

III. DISCUSSION

Summary judgment is appropriate if the court determines that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact, and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Here, both parties have moved for summary judgment and maintain that there are no genuine issues of material fact to be resolved by a trial on the merits. *Pl.'s Mem. of Law in Supp. of Mot. for Summ. J.* ("*Pl.'s Br.*") at 8; *Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J.* ("*Def.'s Br.*") at 1. The court agrees and accordingly finds that summary judgment is appropriate in this case.

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[4] The date on which suspension of liquidation was lifted is the subject of dispute between the parties. Peer Chain argues that suspension of liquidation of its entries was removed on October 9, 1995—ninety days after the Federal Circuit's July 11, 1995 opinion. The government, on the other hand, argues that suspension of liquidation was removed on January 3, 1996—ninety days after rehearing *en banc* was denied. The correct date is the date on which the time to file a petition for a writ of *certiorari* had run, ninety days from date of denial of a petition for rehearing. *See* SUP. CT. R.13(3) ("The time to file a petition for a writ of *certiorari* runs from the date of entry of the judgment or order sought to be reviewed . . . [b]ut if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of *certiorari* for all parties . . . runs from the date of the denial of the petition for rehearing. . . .").

[5] At oral argument, the government explained that Commerce's delay was due, in part, to an oversight caused by a turnover of personnel. *See* Transcript of Oral Argument held on Oct. 1, 2003 ("*Oral Arg. Tr.*") at 38–39.

A. Plaintiff's Contentions

Peer Chain contends that its entries should be treated as having been liquidated at zero percent, the rate of duty assessed at the time of entry. Peer Chain predicates this contention upon two separate grounds. First, Peer Chain argues that by failing to either publish Federal Register notice of the final decision in *Sugiyama* pursuant to 19 U.S.C. § 1516a(e) ("section 1516a(e)"),[6] or to provide some other form of "unambiguous and public notice" under case law, Commerce frustrated the operation of section 1504(d). *Pl.'s Br.* at 13–15. Peer Chain explains that under sections 1504(d) and 1516a(e), Federal Register publication constitutes the notice to Customs that triggers the operation of the six-month period within which entries must be liquidated by Customs to avoid having been deemed liquidated. *See Pl.'s Br.* at 11. Additionally, according to Peer Chain, recent cases of this Court and of the Federal Circuit indicate that where suspension of liquidation of entries has been lifted, Federal Register publication constitutes the trigger date, and Commerce's non-public liquidation instructions do not. *See Pl.'s Br.* at 13. Peer Chain thus argues that only a public form of notice can trigger the deemed liquidation period, and therefore Commerce's failure to publish Federal Register notice or any other form of public notice prevented the six-month deemed liquidation period from commencing. As a result, Peer Chain argues that the government circumvented section 1504(d), and thus, the court should either set a surrogate notice date at which time Customs was deemed to have received notice, with deemed liquidation of the entries occurring six months later, or hold that the liquidations of its entries were null and void *ab initio*. *See id.*; *see also Oral Arg. Tr.* at 9.

Second, Peer Chain argues that Commerce acted unreasonably and prejudicially when it delayed sending liquidation instructions to Customs for nearly five years. It does not argue for deemed liquidation on this claim alone, however. Instead, it supports its argument that the court should hold entries deemed liquidated by emphasizing that the government's delay was particularly egregious and harmful in this case, such that the court should apply the deemed liquidation provision in order to remedy such egregious harm. Peer Chain also makes a due process claim under the "delay" line of federal due process cases. It cites the Court of International Trade's opinion in *International Trading Co. v. United States* in support of the proposition

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[6] 19 U.S.C. § 1516a(e) states:
If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit . . . entries, the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

that the Fifth Amendment of the Constitution requires a publicly determinable deemed liquidation date. 24 CIT 596, 110 F. Supp. 2d 977, 988–90 (2000) ("*ITC I*"). Arguing that its due process rights were violated by the government's five-year delay in liquidating its entries, Peer Chain contests liquidation at the established duty rate and the assessment of compounded interest on the principal owed. *See Pl.'s Br.* at 22.

Finally, in the event that the assessment of antidumping duties is found to be lawful, Peer Chain urges the court to provide equitable relief, limiting the assessment of interest on antidumping duties owed to the government in order to prevent the government from being "rewarded" with additional money. *Pl.'s Br.* at 27–29. To that end, Peer Chain recommends that the court establish an equitable stop date for the running of interest, that it disallow interest assessed on antidumping duties, or that it recalculate the interest imposed using a simple rate, rather than a compound one. *See id.* at 29.

B. Defendant's Contentions

The government contests Peer Chain's argument that its entries should be deemed liquidated under 19 U.S.C. § 1504(d) (1993), or that the interest charged on such entries should be reduced. As an initial matter, the government argues that Peer Chain is not entitled to deemed liquidation because Customs abided by the statute, liquidating Peer Chain's entries within six months of receiving e-mail notice from Commerce that the court-ordered suspension was removed. *See Def.'s Br.* at 7–9. The government contends that according to relevant case precedent, in order for entries of imported goods whose liquidation was previously suspended by a court order to be deemed liquidated, Customs must not have liquidated the entry at issue within six months of receiving notice from Commerce that the suspension of liquidation has been lifted. *See id.* The government further argues that in this case Customs did in fact liquidate within the six-month period, and therefore, Peer Chain has no claim for relief under section 1504(d). *See Def.'s Br.* at 8 (citing *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002) ("*Fujitsu*")), 28–29.

Moreover, according to the government, Commerce was not required by section 1516a(e) to publish Federal Register notice of the final court decision in *Sugiyama* because the Court sustained Commerce's determination in the specific cause of action covering Peer Chain's entries.[7] *See Def.'s Br.* at 9. The government further argues

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[7] The government notes that section 1516a(e) only requires Commerce to publish notice of a court decision where the cause of action against the government is sustained in whole or in part by the Court of International Trade or the Federal Circuit. It also asserts that each administrative review period constitutes an independent cause of action. Thus, the government argues that because the Court upheld Commerce's determination made in the

that Peer Chain failed to utilize the judicial remedy available, to petition for a writ of *mandamus* under 28 U.S.C. § 1581(i)(4), in order to compel either Commerce to publish notice of the removal of suspension of liquidation or Customs to liquidate its entries. *See Def.'s Br.* at 24–25. Additionally, the government counters Peer Chain's due process claim by arguing that no deprivation of property had been suffered, and therefore there is no basis for relief under the Fifth Amendment. *See Def.'s Br.* at 29, 33–39. Finally, the government asserts that Peer Chain is not entitled to an equitable remedy because the original duties owed are not in dispute, and the interest included in the demand for payment was properly assessed according to the statutory scheme laid out by Congress under 19 U.S.C. §§ 1673f(b) and 1677g(a).[8] *See Def.'s Br.* at 29–33.

C. Analysis

Peer Chain complains, justifiably, of the government's egregious delay in liquidating its entries. Not only did Commerce take nearly eleven years to complete its antidumping investigation and set the duty rate at 43.29 percent, but it waited an additional four and one-half years to notify Customs that the court-ordered suspension of liquidation of Peer Chain's entries had been removed.[9] Peer Chain's reliance on section 1504(d) in seeking a remedy for such delay is, however, unavailing. Because the law provides no other remedy for Commerce's delay in notifying Customs of the removal of suspension of liquidation, Peer Chain turns to the deemed liquidation provision of section 1504(d) and the case law interpreting the statute in an attempt to fashion a claim for relief. Peer Chain argues that because the notice given by Commerce to Customs was not "unambiguous and public," Customs' liquidation of its entries was invalid. Therefore, according to Peer Chain, the court should either set a surrogate notice date occurring shortly after suspension of liquidation was removed—six months after which the entries would have been deemed

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administrative review period covering the entries at issue in this case, that individual cause of action against the government was not sustained in whole or in part. Therefore, the government argues, Commerce was not required by section 1516a(e) to publish Federal Register notice of the final court decision regarding the administrative review period at issue in this case.

[8] The government also asks the court to dismiss Entry No. 85–844092–2 from this action, arguing that the court lacks jurisdiction because Peer Chain did not pay all liquidated duties, charges, or exactions on the entry prior to filing the summons in violation of 28 U.S.C. § 2637(a). *See Def.'s Br.* at 4. Despite Peer Chain's pointed and accurate retort that the government's practices provide no flexibility to importers submitting payments late, while it delayed the liquidation of Peer Chain's own entries for nearly five years, the statute is clear as to the requirements for judicial review. Accordingly, because all duties, charges or exaction were not paid within the time limit, this entry is severed and dismissed for lack of jurisdiction.

[9] Although Peer Chain complains that liquidation was delayed nearly fifteen years, it presently challenges only the government's delay in liquidating the entries once suspension of liquidation was lifted.

liquidated, or rule the liquidations null and void *ab initio*. Peer Chain misreads the statute and relevant case law in supporting its argument, as explained below.

1. Establishing a Surrogate Notice Date in Order to Apply 19 U.S.C. § 1504(d)

The Court notes from the outset that section 1504(d) applies only to delays by Customs in liquidating entries once notice, as specified by the statute, has been received. The statute states, in relevant part:

> When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d) (1993). The statute is specifically worded to indicate that only Customs' inaction triggers deemed liquidation, and only where it fails to liquidate within six months of receiving notice from Commerce, other agency or a court with jurisdiction over the entry. In the case at hand, Customs received its first and only known notice of the removal of suspension on May 22, 2000, and the entries were liquidated well within six months of that date, on June 23, 2000 and August 4, 2000. Thus, section 1504(d) does not and cannot apply to the disputed entries. *See Fujitsu*, 283 F.3d at 1382 ("Deemed liquidation under section 1504(d) can occur only if Customs fails to liquidate entries within six months of having received notice of the removal of a suspension of liquidation"). Nevertheless, Peer Chain claims that Commerce has frustrated the operation of section 1504(d) by delaying notice, and argues that the court should establish a surrogate date, upon which notice was deemed to have been given to Customs for purposes of triggering the six-month deemed liquidation period. To do so would be improper.

Peer Chain urges the court to deem Customs notified on either the date of publication by the court of the *Sugiyama* decision or on the date Commerce was required, as Peer Chain argues, to publish notice in the Federal Register according to section 1516a(e).[10] Both suggested dates were considered and dismissed under nearly identical circumstances by the Federal Circuit in *Fujitsu*. The *Fujitsu*

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[10] Whether Commerce was in fact required to publish notice of the *Sugiyama* decision under section 1516a(e) is a point of dispute between the parties. *See* note 7, *supra*. The court, however, does not decide this issue, as it is not relevant to the issue at hand.

Court stated that "publication of a court decision in a case does not necessarily result in Customs' receipt of notice that a suspension of liquidation that was in effect during the case has been removed." 283 F.3d at 1383. Peer Chain's attempt to distinguish *Fujitsu* on the facts, pointing out that the instant case involves the complete absence of a Federal Register publication results in a distinction without a difference. Instead, the issue of whether the publication of a court decision constitutes notice turns on indications of whether Customs actually received notice. *See id*. at 1379 ("section 1504(d) requires that Customs receive notice that a suspension of liquidation has been removed from the Department of Commerce, other agency, or a court with jurisdiction over the entry"(internal quotations omitted)). Upon the facts at hand, nowhere has it been indicated or alleged that Customs actually received such notice prior to the May 22 e-mail message. Thus, the date of publication of the *Sugiyama* decision cannot serve as a surrogate notice date for purposes of triggering the six-month deemed liquidation period.

Peer Chain further urges the court to rely upon the regime established by section 1516a(e) in setting the surrogate notice date. In Peer Chain's estimation, the date upon which Commerce should have published Federal Register notice of the *Sugiyama* decision would serve as the trigger date for the deemed liquidation period. Further, because Customs did not liquidate within six months of this date, Peer Chain argues that its entries should be deemed liquidated at the rate of duty asserted at the time of entry. This approach is unacceptable even as a suggested surrogate date as it is tantamount to imposing the consequence of deemed liquidation on Commerce's purported violation of section 1516a(e). This approach was also specifically rejected by the Federal Circuit in *Fujitsu*, where the plaintiff in that case argued that "the government should not be allowed to 'sidestep' the six-month limitation period in 19 U.S.C. § 1504(d) by having Commerce ignore for over a year the ten-day publication requirement in section 1516a(e)." 283 F.3d at 1382. The *Fujitsu* Court responded, instructively, that "Commerce's unexplained delay in publishing notice of the [underlying] decision, frustrating though it may be, does not change the result in this case." *Id*. The Court went on to indicate that "there is no language in section 1516a(e) that attaches a consequence to a failure by Commerce to meet the ten-day publication requirement, let alone the consequence of deemed liquidation under section 1504(d)." *Id* (citation omitted). Peer Chain attempts to distinguish *Fujitsu* by arguing that it is not proposing that a violation of section 1516a(e) causes deemed liquidation, but rather that the required date of publication should provide a logical surrogate date for the commencement of the six-month period. *See Oral Arg. Tr*. at 21–22. Whether termed a "consequence" or "suggestion" the result is not changed; a delay by Commerce in publishing Fed-

eral Register notice simply cannot serve as the basis for deemed liquidation under section 1504(d).

2. Declaring Liquidations of Entries Null and Void Ab Initio

As an alternative to establishing a surrogate notice date to apply the deemed liquidation provision of section 1504(d), Peer Chain argues that Customs' liquidation of its entries was invalid, and should be declared null and void *ab initio*.[11] In supporting this claim, Peer Chain misreads *International Trading Company v. United States*, 281 F.3d 1268 (Fed. Cir. 2002) ("*ITC II*") and *Fujitsu*. Peer Chain errs in arguing that Customs' liquidation of its entries on June 23 and August 4 was somehow illegal or invalid because it was not based on unambiguous and public notice. In fact, Customs is always free to liquidate entries, once suspension of liquidation has been removed. According to section 1504(d), Customs need not wait until it receives notice regarding removal of suspension in order to liquidate. Rather, once Customs receives such notice, it must liquidate within six months, or face the consequence of deemed liquidation. Certainly, if the entries are no longer suspended, the absence of unambiguous and public notice does not render liquidations by Customs illegal. Without any such illegal action by Customs, the court has no basis upon which to deem the liquidations null and void *ab initio*, as was done in *AK Steel Corporation v. United States*, 27 CIT ___ , 281 F. Supp. 2d 1318 (2003).

The *ITC II* and *Fujitsu* cases do not hold otherwise, nor do they afford Peer Chain any relief in this case. In *ITC II*, the suspension of liquidation occurred as a result of an administrative review, not a court-ordered suspension, as in the case at hand. Thus, when Commerce completed its review in that case, it published the results of that review and the new duty rate in the Federal Register, as directed by statute. The Federal Circuit held that both the removal of suspension of liquidation and notice for purposes of section 1504(d) were accomplished by publication in the Federal Register. *ITC II*, 281 F.3d at 1276–77. In doing so, the Court expressed a preference for the unambiguous and public notice provided by Federal Register publication, over private e-mail notice. *See id*. at 1275. Nowhere did

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[11] The court notes that Peer Chain's argument, that the entries be declared null and void *ab initio*, is based solely on the Court of International Trade's opinion in *AK Steel Corporation v. United States*, 27 CIT ____ , 281 F. Supp. 2d 1318 (2003) ("*AK Steel*"), which is distinguishable from the case at hand. In *AK Steel*, this Court held that where Customs had liquidated certain entries in violation of a court-ordered injunction, those liquidations were illegal. 281 F. Supp. 2d at 1323. The Court thus held that liquidations through an illegal act of Customs were null and void *ab initio*. In the case at hand, no court-ordered injunction against liquidation was in place when Customs liquidated Peer Chain's entries. *Accord Cemex, S.A. v. United States*, 27 CIT ____ , Slip Op. 03–125 (2003).

it indicate that Customs is required to wait for notice in order to liquidate, or that liquidation before unambiguous and public notice is invalid or illegal.

In *Fujitsu*, as in the instant case, the liquidation of entries was suspended pursuant to a court order. Although the *Fujitsu* trial court held that Customs received notice of the removal of suspension of liquidation only when Commerce published notice in the Federal Register, in affirming that opinion the Federal Circuit merely held that "because no earlier date qualifie[d]," the date of Federal Register publication was the date upon which notice was effected. *Fujitsu*, 283 F.3d at 1378, 1380. Pointedly, the *Fujitsu* Court did not indicate that the exclusive form of notice, for purposes section 1504(d), must be Federal Register publication or that Customs was precluded from liquidating prior to the receipt of Federal Register notice.

Undoubtedly, unambiguous and public notice is preferable to private e-mail communication. As indicated by the Federal Circuit, public notice establishes a clear and identifiable date for commencement of the liquidation period, it prevents the government from unilaterally extending the liquidation of entries, it increases certainty in the importation process, and finally, it helps to ensure that the courts are not called upon to referee debates about what kind of communication qualifies as notice. *See ITC II*, 281 F.3d at 1275; *see also Fujitsu*, 283 F.3d at 1381–82. The fact that such notice is desirable, and that its value has been recognized by the courts cannot, however, be used successfully to argue that the lack of such notice invalidates a liquidation performed on entries that were no longer under any court-ordered suspension.

D. Equitable Remedies

Peer Chain argues that, to the extent the government's assessment of antidumping duties is held to be lawful, the interest assessed on the antidumping duties should be eliminated or reduced. It specifically asks the court to pay special attention to the nearly five year delay in liquidating its entries, and argues that the government should not be "rewarded" with additional money in the form of interest as a result of its tardiness. *Pl.'s Br.* at 26. Thus, Peer Chain asks that the court either set an equitable stop date for the accrual of interest, or alternatively, that the court disallow the government from calculating interest at a compounded rate.

1. Equitable Stop Date for Interest

Peer Chain argues that because the government's excessive delay resulted in interest payments that far surpass the amount of duty actually owed, the court should establish an equitable stop date for the imposition of interest. The court notes from the outset that 19

U.S.C. §§ 1673f(b)[12] and 1677g(a)[13] require the government to collect underpayments of antidumping duties together with interest. In support of its argument, Peer Chain cites to several cases, none of which are instructive, considering the facts at issue in this case.[14] The government, on the other hand, correctly indicates that "principles of equity do not allow an importer to escape liability for interest on underpayment of countervailing duty." *See New Zealand Lamb Co. v. United States*, 149 F.3d 1366, 1368 (Fed. Cir. 1998) ("equitable estoppel is not available against the government in cases involving the collection or refund of duties on imports" (citation and quotations omitted)).

2. Disallowance of Compound Interest

Peer Chain itself acknowledges that the statute "seems to allow for the imposition of interest." *Pl.'s Br.* at 29. It argues however, that the imposition of compound interest on entries that are fifteen years old is "grossly unfair and is punitive." *Id*. The court first notes that regardless of whether the government had published and liquidated in accordance with the relevant statutes, Peer Chain would have lawfully been required to pay interest on its entries until removal of suspension of liquidation, a period of nearly eleven years. The court

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[12] 19 U.S.C. § 1673f states:

(b) Deposit of estimated antidumping duty under section 1673e(a)(3) of this title.

If the amount of an estimated antidumping duty deposited under section 1673e(a)(3) of this title is different from the amount of the antidumping duty determined under an antidumping duty order published under section 1673e of this title, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption after notice of the affirmative determination of the Commission under section1673d(b) of this title is published shall be—

(1) collected, to the extent that the deposit under section 1673e(a)(3) of this title is lower than the duty determined under the order, or

(2) refunded, to the extent that the deposit under section 1673e(a)(3) of this title is higher than the duty determined under the order,

together with interest as provided by section 1677g of this title.

[13] 19 U.S.C. § 1677g states:

(a) General rule.

Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—

(1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or

(2) the date of a finding under the Antidumping Act, 1921.

(b) Rate.

The rate of interest payable under subsection (a) for any period of time is the rate of interest established under section 6621 of Title 26.

[14] Peer Chain cites to *Pagoda Trading Co. v. United States*, 9 CIT 407, 617 F. Supp. 96 (1985), which does not address the issue of the imposition of interest; *St. Paul Fire & Marine Ins. Co. v. United States*, 16 CIT 663, 799 F. Supp. 120 (1992), which was reversed—a fact that Peer Chain fails to indicate; and *Koyo Seiko Co. v. United States*, 16 CIT 366, 796 F. Supp. 517 (1992), which Peer Chain also fails to mention was reversed. In any event, the statute is clear on its face that interest was properly assessed.

is sympathetic to the notion that the assessment of interest at a compound rate for the nearly five years of governmental delay exacerbates the effect of the failure to liquidate in a timely manner. There is, however, no basis for the court to fashion such an equitable remedy. It is Congress' role, rather than the court's, to establish the antidumping laws. Under the Trade and Tariff Act of 1984, Congress specifically amended section 1677 to provide that interest on antidumping duty payments must be compounded in accordance with 26 U.S.C. § 6621. Thus, there is no basis for the assertion that the assessment of compound interest is punitive, and therefore contrary to the remedial intent of the antidumping law. *See Fujitsu General v. United States*, 24 CIT 733, 110 F. Supp.2d 1061, 1083 (2000), *aff'd*, 283 F.3d 1364 (Fed. Cir. 2002).

E. Due Process

Peer Chain further claims that as a result of the government's delay in liquidating its entries, its rights were violated under the Due Process Clause of the Fifth Amendment to the United States Constitution.[15] To remedy this alleged violation of its due process rights, however, Peer Chain does not seek any notice, hearing or other procedural remedy. Instead, it asks the court to reduce the interest assessed on the liquidated entries. *See Pl.'s Br.* at 27.

"[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 541 (1985). In order to establish a due process violation under the Fifth Amendment, Peer Chain must show some property interest at stake. Peer Chain points to the interest added to the amount due, which was inflated as a result of the significant time it took Commerce to notify Customs to liquidate the entries. This challenge seems to rest on the proposition that at some point, a delay in collecting an amount due becomes so egregious that it violates due process to permit collection. The court notes, however, that during the time of the delay, Peer Chain retained control and use of the money rightfully owed to the government. Therefore, Peer Chain is claiming that its due process rights were violated by the government delaying collecting on money to which the government was rightfully entitled. Peer Chain is merely claiming the government violated its due process rights by not forcing it to pay a bill. Thus, Peer Chain has failed to establish that a property interest is at stake under the current facts. *See Valley Forge Christian College*

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[15] The court notes that Peer Chain's due process claim depends upon *ITC I*, a Court of International Trade opinion which was affirmed by the Federal Circuit without addressing the due process issue; and *Koyo Seiko Co. v. United States*, 16 CIT 740, 796 F.Supp. 517 (1992), which was affirmed in part, reversed in part, and remanded. *See ITC II*; *Koyo Seiko Co. v. United States*, 20 F.3d 1160 (Fed. Cir. 1994).

v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 473 (1982) ("The exercise of judicial power . . . is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate").

Seeking any other substantive remedy would confuse substance and procedure. Were this court to rule otherwise, the Due Process Clause "would be reduced to a mere tautology." *Loudermill*, 470 U.S. at 541. Peer Chain focuses its argument on whether there was a deprivation of due process—a question of whether sufficient procedures were afforded—but then seeks a substantive remedy. " 'Property,' [however,] cannot be defined by the procedures provided for its deprivation any more than can life or liberty." *Id*. Upon the facts presented, assuming *arguendo* that the Due Process Clause does apply, the court notes that Peer Chain was afforded significant process. During the delay period, Peer Chain was free to petition for a writ of *mandamus* to compel liquidation of its entries. After its entries were liquidated and interest was assessed, Peer Chain availed itself of the opportunity to protest Customs' liquidation. After Customs reviewed and denied the protest, Peer Chain thereafter filed a summons in this court. Therefore, Peer Chain is not entitled to a reduction in the interest assessed on its entries under the Due Process Clause of the Constitution.

IV. CONCLUSION

The court holds that Peer Chain is not entitled to have its entries deemed liquidated under section 1504(d) (1993), despite the government's delay of nearly five years.[16] Further, the court holds that Customs validly liquidated Peer Chain's entries, and thus the liquidation is not null and void *ab initio*. The court is also unable to fashion an equitable remedy in this instance that might, at the very least, lessen the impact of the government's delay by limiting or preventing the imposition of interest during this period of delay. Finally, Peer Chain's due process rights have not been violated by Commerce's failure to publish public notice. The court, therefore, denies Plaintiff's motion for summary judgment and grants Defendant's motion.

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[16] As a statutory remedy to this problem is unavailable, where no consequence attaches to Commerce's delay in notifying Customs that the suspension of liquidation has been lifted, the court will establish a judicial remedy. In subsequent cases, the court will order Commerce to publish the results of its final antidumping determinations in the Federal Register when such cases become final. This remedy, however, cannot be imposed retroactively and is thus, unfortunately, unhelpful to the current plaintiff.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/7 2/9/04 Goldberg, J.	Toyota Motor, Mfg.	94–11–00712	7318.15.80 9.5%	7318.15.50 4.7%	Agreed statement of facts	Not stated Certain round-headed fasteners known as "wheel studs"
C04/8 2/13/04 Restani, C.J.	Toolex USA, Inc.	02–00301	8479.89.97 2.5%	8520.90.00 Free of duty	Agreed statement of facts	Los Angeles Miniliner Plus CD Finishing Lines and Miniliner Plus Interface
C04/9 2/20/04 Restani, C.J.	Polymet Alloys, Inc.	02–00207	7202.99.50 5%	2850.00.05 Free of duty	Agreed statement of facts	Savannah "Calcium silicide cored wire"
C04/10 2/20/04 Restani, C.J.	Polymet Alloys, Inc.	03–00067	7202.99.50 5%	2850.00.05 Free of duty	Agreed statement of facts	New York "Calcium silicide cored wire"
C04/11 2/23/04 Musgrave, J.	Polymet Alloys, Inc.	01–00484	7202.99.50 5%	2850.00.05 Free of duty	Agreed statement of facts	Savannah "Calcium silicide cored wire"
C04/12 2/25/04 Musgrave, J.	Simon Mktg., Inc.	99–10–00619	7326.20.005 0 4.3%	9503.90.00 0%	Agreed statement of facts	Pittsburgh "Create-A-Gotchi"
C04/13 2/25/04 Musgrave, J.	Simon Mktg., Inc.	99–10–00622	7326.20.005 0 4.3%	9503.90.00 0%	Agreed statement of facts	Atlanta "Create-A-Gotchi"
C04/14 2/25/04 Musgrave, J.	Simon Mktg., Inc.	99–10–00624	7326.20.005 0 4.3%	9503.90.00 0%	Agreed statement of facts	Chicago "Create-A-Gotchi"
C04/15 2/25/04 Restani, C.J.	Sony Elecs. Inc.	00–07–00371	9013.80.90 2.55	9010.50.60 Free of duty	Agreed statement of facts	Los Angeles Sony Lean Integrated Mastering System

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/16 2/26/04 Eaton, J.	Avecia, Inc.	03–0001	3204.14.30 10.8%	3215.19.00 1.8%	Agreed statement of facts	New York Black- and non-black colored merchandise
C04/17 2/26/04 Eaton, J.	Avecia, Inc.	03–00197	3204.14.30 10.8% or 9.9% 3204.14.50 13.2% or 11.9%	3215.11.00 1.8% 3215.19.00 1.8%	Agreed statement of facts	New York Black- and non-black colored merchandise

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*VALUATION*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
V04/4 2/13/04 Restani, C.J.	Mast Indus., Inc.	02–00428 & 02–00431	Transaction value	Invoiced fabric charge, cut and make charge and trim charge, and excludes the identified amount for "export handling fee"	Agreed statement of facts	Chicago Ladies' wearing apparel