Slip Op. 04–66

PAM, S.p.A. and JCM, Ltd., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and A. ZEREGA'S AND SONS, DAKOTA GROWERS PASTA COMPANY, NEW WORLD PASTA COMPANY, & AMERICAN ITALIAN PASTA COMPANY Defendant-Intervenors.

Court No. 04–00082

[Defendant's Motion for Partial Reconsideration of the Court's Order of March 15, 2004, is denied. After consideration of the Joint Stipulation of Facts and Defendant's Memorandum in Support of its Motion, this Court reaffirms its Order of March 15, 2004, enjoining the Government from liquidating certain entries until there is a final decision in the action pursuant to 19 U.S.C. § 1516a(e) (2000).]

Dated: June 10, 2004

Law Offices of David L. Simon (*David L. Simon*), *Washington, D.C., for Plaintiffs.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne M. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Ada E. Bosque*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for Defendant.

Collier Shannon Scott, P.L.L.C. (*David C. Smith, Jr.*), Washington, D.C., for Defendant-Intervenors.

BEFORE: GREGORY W. CARMAN

OPINION

Based on the materials presented to the Court, this Court denies Defendant's Motion for Partial Reconsideration of the Court's Order issued on March 15, 2004, and presents the following facts and conclusions of law in support of this Court's order, which granted the preliminary injunction and enjoined liquidation until there was a final decision in the action. In issuing the preliminary injunction, this Court appropriately applied the binding precedents of the Court of Appeals for the Federal Circuit that have held that a final court decision in the action under 19 U.S.C. § 1516a(e), does not occur until

appeals are exhausted and the time for petitioning for a writ of certiorari has expired.

BACKGROUND

On March 11, 2004, Plaintiffs filed a Motion for Preliminary Injunction pursuant to 19 U.S.C. § 1516a(c)(2). (Mot. of PAM, S.p.A. and JCM, Ltd. for Prelim. Inj. to Enjoin Liquidation of Entries ("Pl.'s Mot. for Prelim. Inj.") at 1, 4–5.) Plaintiffs' motion was made on consent. (*Id.* at 2 ("Pursuant to [USCIT] Rule 7, [Plaintiffs'] counsel has consulted with other persons with a direct interest in this litigation and has gained their consent as follows: counsel for petitioners, David Smith, Esq., of Collier Shannon Scott, PLLC, consented to plaintiffs' motion to enjoin liquidation after consultation on March 3, 2004, and counsel for Defendant United States of America, Ada E. Bosque, Esq., of the Department of Justice, consented to plaintiffs' motion to enjoin liquidation after consultation on March 10, 2004.").) Plaintiffs submitted a proposed order with their motion which stated that the Government would be enjoined from liquidating the subject entries "during the pendency of this litigation in the United States Court of International Trade." (*See* Attach. to Pls.' Mot. for Prelim. Inj. at 1.) Although Plaintiffs' motion stated that it was made on consent, the motion did not indicate that the consent was premised or conditioned upon the exact language in the proposed order. This Court granted Plaintiffs' Motion for a Preliminary Injunction on March 15, 2004. *PAM, S.p.A. v. United States*, No. 04–00082 (Ct. Int'l Trade March 15, 2004) (order granting preliminary injunction) ("Preliminary Injunction Order"). However, this Court did not sign the proposed order that was submitted with Plaintiffs' Motion for a Preliminary Injunction. Rather, this Court drafted and signed an order granting the preliminary injunction which states that the Government is "enjoined during the pendency of this litigation" from liquidation the subject entries, and orders "that the entries subject to this injunction shall be liquidated in accordance with the final decision in the action as provided in 19 U.S.C. § 1516a(e). Accordingly, liquidation shall remain suspended under this injunction during the pendency of this litigation." (Prelim. Inj. Order at 1–3.)

On March 29, 2004, pursuant to USCIT Rule 59, Defendant filed a Motion for Partial Reconsideration of this Court's Preliminary Injunction Order. (Mot. for Partial Reconsideration of the Court's Order of March 15, 2004 ("Def.'s Motion") at 1.) Defendant's motion notes that Plaintiffs' counsel "indicated [Plaintiffs'] opposition to this motion." (*Id.* at 2.) Defendant requests that this Court vacate the Preliminary Injunction Order and enter the proposed order that was submitted with Plaintiffs' motion, because Defendant contends that the Preliminary Injunction Order violates the statutory scheme. (Def.'s Mem. in Support of its Mot. for Reconsideration of the Court's Prelim. Inj. ("Def.'s Br.") at 2.)

This Court contacted the parties to schedule a hearing regarding Defendant's Motion for Partial Reconsideration. In lieu of a hearing, the parties requested that the Court accept "factual information and argument as to whether the preliminary injunction should issue" by written submission. (Letter from Counsel for Plaintiffs, David. L. Simon, to the Court of 04/20/04). The parties submitted a Joint Stipulation of Facts on April 30, 2004. In that stipulation, the parties agree that "Defendant conditioned its consent [to Plaintiffs' Motion for a Preliminary Injunction] upon incorporation of its comments to the proposed preliminary injunction, including language expressly providing for liquidation to be enjoined only 'during the pendency of this litigation in the Court of International Trade.' " (Stip. ¶3.) The parties note that this Court "add[ed] language [in the Preliminary Injunction Order] which this Court has interpreted to extend the preliminary injunction through any appeal." (*Id.* ¶4.)

DISCUSSION

"A final decision of the Court of International Trade in a . . . decision granting or refusing a preliminary injunction shall be supported by — (1) a statement of findings of fact and conclusions of law; or (2) an opinion stating the facts upon which the decision is based." 28 U.S.C. § 2645(a) (2000). In most countervailing and antidumping duty cases, it is the general practice before this Court that motions for preliminary injunctions come before the court on consent of the parties. In granting such motions, the Court usually cites the parties' consent to the motion as the "facts upon which the decision" to grant the injunction is based. *See id.* Here, Defendant withdrew its consent to Plaintiffs' Motion for a Preliminary Injunction when it filed its Motion for Partial Reconsideration. (*See* Def.'s Motion at 2; Stip. ¶3.) Thus, in accordance with 28 U.S.C. § 2645(a), this Court issues this opinion stating the facts and conclusions of law upon which the Preliminary Injunction Order issued on March 15, 2004, was granted.

Under 19 U.S.C. § 1516a(c)(2), the Court of International Trade is specifically granted the authority to "enjoin the liquidation of some or all entries of merchandise covered" by a challenged antidumping or countervailing duty determination. 19 U.S.C. § 1516a(c)(2). The liquidation of entries that have been enjoined by the Court of International Trade pursuant to § 1516a(c)(2) is governed by § 1516a(e) which specifically states that "[i]f 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 Appeal 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*." 19 U.S.C. § 1516a(e)(2) (emphasis added).

The requirements for granting a preliminary injunction are 1) the threat of irreparable harm; 2) the likelihood of success on the merits; 3) facts indicating that the public interest is better served by issuing the injunction; and 4) facts indicating that the balance of the hardships favors the issuance of the preliminary injunction. *Fuyao Glass Indus. Group Co., Ltd. v. United States*, No. 02–00282, 2003 Ct. Int'l Trade LEXIS 115, at *7 (Ct. Int'l Trade Sept. 2, 2003) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)); *see also FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993). "The court, in its analysis of these factors, employs a 'sliding scale' and, consequently, need not assign to each factor equal weight." *Fuyao Glass*, Ct. Int'l Trade LEXIS 115, at *7 (quoting *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1353–54 (Ct. Int'l Trade 2002)). The "crucial element" in granting a preliminary injunction "is that of irreparable injury." *Id.* at *8 (citing *Corus*, 217 F. Supp. 2d at 1354).

I. Threat of Irreparable Harm.

The parties stipulate that the "crucial element," irreparable injury, is met. (*See* Stip. ¶5.) The stipulation states that "[i]f the entries of subject merchandise entered during the [period of review] are liquidated *prior to the completion of judicial review in this case*, [Plaintiffs] will suffer irreparable harm." (*Id.* (emphasis added).)

II. Likelihood of Success on the Merits.

The stipulation states that Plaintiffs "believe[ ] that their action raises serious questions of law regarding the correctness of [the United States Department of] Commerce's application of adverse facts available," and regarding Commerce's failure "to provide notice to [Plaintiffs] as required by an express regulation." (Stip. ¶6.) However, "Defendant disputes [Plaintiffs'] allegations," but "agree[s] that the liquidation of the entries should be suspended until *this Court* has resolved the merits of [Plaintiffs'] complaint." (Stip. ¶7 (emphasis added).) Defendant further states that "[s]hould [Plaintiffs] desire a further injunction pending any appeal, Defendant would consider at that time whether to consent to a continued suspension of liquidation." (*Id.*) Defendant contends that "after this Court has determined the merits of [Plaintiffs'] Complaint, all involved will be better situated to consider [Plaintiffs'] likelihood of success" on appeal. (*Id.*)

To satisfy their burden of proving a likelihood of success on the merits, Plaintiffs are only required to raise "serious, substantial, difficult and doubtful questions" regarding the agency's determination. *Ugine-Savoie Imphy v. United States*, 121 F. Supp. 2d 684, 689 (Ct. Int'l Trade 2000) (quoting *PPG Indus., Inc. v. United States*, 11 Ct. Int'l Trade 5, 8 (1987)). First, Plaintiffs allege that Commerce improperly applied adverse facts available, "insofar as [Commerce] selected as adverse facts available the highest rate applicable to any

respondent in a previous review." (Pl.'s Mot. for Prelim. Inj. at 6; Stip. ¶6.) Second, Plaintiffs allege that petitioners failed to provide the required notice to PAM prior to the initiation of the administrative review for this period of review as required by regulations. (Pl.'s Mot. for Prelim. Inj. at 6; Stip. ¶6.) These allegations are sufficient to satisfy Plaintiffs' burden of establishing a likelihood of success on the merits. The issues that Defendant raises regarding the duration of the preliminary injunction are addressed in Part V below.

III. The Public Interest is Better Served by Issuing the Injunction.

The parties stipulate that "[t]he public interest will be served by granting the injunctive relief requested by ensuring compliance with the applicable law and meaningful judicial review." (Stip. ¶ 8.)

IV. The Balance of the Hardships Favors the Issuance of the Injunction.

The parties stipulate that "[a] balancing of the hardships in this action favors issuance of the preliminary injunction *pending conclusion of proceedings before this Court*." (Stip. ¶9 (emphasis added).) Based upon the parties' stipulation and the arguments presented by Defendant, this Court finds that the balance of the hardships favors the issuance of a preliminary injunction until there is a final decision in the action under 19 U.S.C. § 1514a(e). As discussed below, in applying the plain language of the statute and the binding precedent of the Federal Circuit, this Court affirms the Preliminary Injunction Order that was issued pursuant to 19 U.S.C. § 1514a(c)(2), which enjoins liquidation "during the pendency of this litigation." (Prelim. Inj. Order at 1, 3.)

V. The Duration of the Preliminary Injunction.

A. Defendant's Contentions.

In its Motion for Partial Reconsideration, Defendant asks this Court to vacate the Preliminary Injunction Order, which "revised the language describing the duration of the preliminary injunction," and "adopt the order [that was] proposed by the parties." (Def.'s Mot. at 3.) Defendant asserts that "[t]he Government would not have consented to a proposed order that contained the language in the Court's order of March 15, 2004." (*Id.* at 4.) Defendant concedes that "the Court determines the nature and content of its orders," but contends that the proposed order that was submitted with Plaintiff's Motion for a Preliminary Injunction had been "specifically negotiated." (*Id.* at 1–2.) Defendant contends that the "specifically negotiated" language of the proposed order stated that liquidation would only be enjoined "during the pendency of this litigation in the United States Court of International Trade." (*Id.* at 3.) Defendant contends that the Preliminary Injunction Order should be vacated because the

"issuance of a preliminary injunction that extends throughout all appeals is inconsistent with the statutory framework." (Def.'s Br. at 2.)

First, Defendant claims that 19 U.S.C. § 1516a(c) "does not alter the fundamental principles of federal procedure and administrative law." (*Id.* at 3.) Defendant notes that although "there have been recent decisions" in the Court of International Trade "to the contrary, virtually every circuit that has addressed the duration of preliminary injunctions agrees those injunctions dissolve upon judgment." (*Id.* at 3–4.) Defendant asserts that "preliminary injunctions are interlocutory and, as such, are subsumed into the judgment." (*Id.* at 4.)

Second, Defendant claims that by enjoining liquidation through appeals, this Court "has presumed Commerce's determination is incorrect." (*Id.* at 3.) Defendant asserts that "it is well settled that an agency's determination is entitled to a presumption of validity unless and until a court decides that determination is invalid." (*Id.* at 4 (citing *Timken Co. v. Untied States*, 893 F.2d 337, 342 (Fed. Cir. 1990)).) Defendant contends that "Congress did *not* intend to alter the presumption of correctness at the onset of the proceedings" when it authorized this Court to issue injunctions under 19 U.S.C. § 1516a. (*Id.* at 5.) Defendant contends that in issuing an injunction at the early stages of litigation, the court "relies heavily upon the showing of irreparable harm" because the court "has not had an opportunity at that early state to review the record or consider the arguments upon the merits." (*Id.*) Defendant contends that the presumption of correctness demands that the plaintiff bear the burden of demonstrating that an injunction pending appeal should be granted. (*Id.* at 9.) Defendant contends that issuing an injunction that continues through the appeal process contravenes the presumption of correctness. (*Id.*) Defendant contends that "it is incumbent upon the court to revisit the appropriateness of an injunction pending appeal." (*Id.* at 10.) Defendant contends that after the court has issued its decision on the merits, the court "can better assess whether an injunction pending appeal is appropriate." (*Id.*)

Defendant contends that if the Court of International Trade issues a decision that "sustains the agency's determination," then the preliminary injunction dissolves because the court found that "the agency's determination is presumptively valid." (*Id.* at 6.) Defendant asserts that if the Court of International Trade issues a decision that is "not in harmony" with the agency's determination, then the preliminary injunction dissolves and liquidation is *administratively* suspended until there is a "final court decision in the action." (*Id.* at 6–7 (citing *Timken*, 893 F.2d at 341).) Defendant contends that there is no basis for a preliminary injunction to continue when liquidation is administratively suspended because there is no showing of irreparable harm. (*Id.* at 7.)

Defendant contends that the court has previously relied on "dicta" in the Federal Circuit's holding in *Fujitsu General America, Inc. v.*

United States, 283 F.3d 1364 (Fed. Cir. 2002), to support its holding that preliminary injunctions continue throughout the appellate process. (*Id.* at 10–12 (citing *SKF USA Inc. v. United States*, 2004 Ct. Intl. Trade LEXIS 14 (Ct. Int'l Trade Feb. 18, 2004); *Yancheng Baolong Biochemical Prods. Co. v. United States*, 277 F. Supp. 2d 1349 (Ct. Int'l Trade 2003)).) Defendant contends that "*Fujitsu* did not address the dissolution of trial court injunctions." (*Id.* at 10.) Defendant contends that the liquidation of entries in *Fujitsu* was "administratively suspended, not enjoined." (*Id.* at 12.) Further, Defendant contends that the court's reliance on *Hosiden Corp. v. Advanced Display Manufacturers of America*, 85 F.3d 589 (Fed. Cir. 1996), is also misplaced because the court's decision in that case was " 'not in harmony' with Commerce's determination; thus . . . liquidation was administratively suspended." (*Id.* at 12.)

Third, Defendant contends that "[t]o the extent that [19 U.S.C. § 1516a] is ambiguous with regard to the duration of injunctions, this Court accords 'substantial deference to Commerce's statutory interpretation, as the International Trade Administration is the 'master' of the antidumping laws.' " (*Id.* at 7 (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995) (in turn quoting *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994)). Defendant asserts that, "[c]onsistent with *Timken*, Commerce reasonably interprets injunctions issued pursuant to 19 U.S.C. § 1516a as dissolving upon a trial court's decision upon the merits." (*Id.*) Defendant contends that Commerce's interpretation "gives meaning to the 'in harmony' and disjunctive language of the statute." (*Id.*)

Defendant asserts that Commerce's interpretation of 19 U.S.C. § 1516a "also reflects the important policy concerns that the issuance of an injunction extending through appeals raises." (*Id.* at 8.) Defendant claims that "[t]he wisdom of Commerce's legitimate policy choices is not subject to review." (*Id.* (citing *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992)). Defendant contends that there is a legitimate "danger of actions being filed simply to forestall, indefinitely, the administrative process." (*Id.*) Defendant contends that it is possible that "injunctions issued in cases involving negative determinations would remain in effect indefinitely . . . even though liquidation may not pose irreparable harm." (*Id.* (citing *Am. Lamb Co. v. United States*, 785 F.2d 994, 998 (Fed. Cir. 1986); *Am. Spring Wire Corp. v. United States*, 578 F. Supp. 1405 (Ct. Int'l Trade 1984)).) Further, Defendant contends that even plaintiffs who lack standing could "obtain[ ] injunctions that remain in effect throughout all appeals." (*Id.* (citing *Cambridge Lee Indus., Inc. v. Untied States*, 916 F.2d 1578 (Fed. Cir. 1990).)

B. Plaintiffs' Contentions.

Plaintiffs did not submit a brief in response to Defendant's Motion for Partial Reconsideration. However, it is noted in Defendant's Motion that "[c]ounsel for plaintiffs . . . has indicated [Plaintiffs'] opposition to this motion." (Def.'s Mot. at 2.)

ANALYSIS

The court has held that "it is well established that a motion for reconsideration should be granted, and the underlying judgment or order modified, when a movant demonstrated that the judgment is based on manifest errors of law or fact." *Union Camp Corp. v. United States*, 53 F. Supp. 2d 1310, 1317 (Ct. Int'l Trade 1999) (citations omitted). This Court finds that Defendant has failed to demonstrate that this Court's Preliminary Injunction Order of March 15, 2004, is based on errors of law or fact.

This Court holds that the Preliminary Injunction Order, which enjoins liquidation until there is a final decision in the action, is consistent with the statutory scheme and the binding precedent of the Federal Circuit. This Court declines to adopt the language of the submitted order which attempts to limit the duration of the preliminary injunction to the proceedings before this Court because such limitation contravenes the plain language of the statute and would result in a waste of the litigants' time and judicial resources.

Plaintiffs made their application for a preliminary injunction pursuant to 19 U.S.C. § 1516a(c)(2). (*See* Pls.' Mot. for Prelim. Inj. at 4–5.) Plaintiffs' motion does not address the duration of the preliminary injunction. However, the duration of preliminary injunctions granted under § 1516a(c) is expressly addressed by Congress in § 1516a(e)(2): "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*." 19 U.S.C. § 1516a(e)(2). The Preliminary Injunction Order issued by this Court on March 15, 2004, orders that "the entries subject to this injunction *shall be liquidated in accordance with the final decision in the action* as provided in 19 U.S.C. § 1516a(e)." (Prelim. Inj. Order at 2.) Although this Court possesses the power to issue injunctions of varying duration under its general equitable powers, the power to issue injunctions suspending liquidation until there is a "final court decision in the action" was specifically granted to the Court of International Trade in 19 U.S.C. § 1516a(c)(2).

As discussed in other opinions of the court, under § 1516a(c)(2), the Court of International Trade may issue preliminary injunctions which enjoin the liquidation of covered entries through the pendency of the action until all appeals have been exhausted. *See Yancheng Baolong Biochemical Prods. Co. v. United States*, 2004 Ct. Int'l Trade LEXIS 41 at *8–*10 (Ct. Int'l Trade April 28, 2004); *SKF USA Inc.*,

2004 Ct. Int'l Trade LEXIS 14, at*17–*43; *Yancheng Baolong Biochemical Prods.*, 277 F. Supp. 2d at 1357–64. If liquidation were not enjoined through all appeals, importers would suffer irreparable harm if the subject entries were liquidated prior to appeal because the appellate courts would be constitutionally powerless to remedy any improvident determinations by the trial court. *See Zenith Radio Corp.*, 710 F.2d at 810. As the courts have held, suspension of liquidation is necessary to provide plaintiffs with meaningful judicial review because "[t]he statutory scheme does not provide for either reliquidation or imposition of higher duties should a party later be successful on the merits." *SKF USA Inc.*, 2004 Ct. Intl. Trade LEXIS 14, at *40 (citing *PPG Indus.*, 11 Ct. Int'l Trade at 7)). "Once liquidation occurs, judicial review is ineffective and thus, 'allowing the liquidation to proceed would be tantamount to denial of the opportunity to challenge administrative determinations.' " *Id.* (quoting *PPG Indus.*, 11 Ct. Int'l Trade at 7)).

This Court must apply the binding precedent of the Court of Appeals for the Federal Circuit. Although Defendant labels the Federal Circuit's holding in *Fujitsu* as "dicta," (Def.'s Br. at 12), in reaching its conclusion in that case, the Federal Circuit clearly held that "there is not a 'final court decision' in an action that originates in the Court of International Trade and in which there is an appeal to the Federal Circuit until, following the decision of the Federal Circuit, the time for petitioning the Supreme Court for certiorari expires without the filing of a petition." *Fujitsu*, 283 F.3d at 1379. Further, in *Hosiden*, the Federal Circuit held that "[a] decision of the Court of International Trade that has been appealed 'is not a 'final court decision' within the *plain meaning* of § 1516a(e).' " *Hosiden*, 85 F.3d at 591 (quoting *Timken*, 893 F.2d at 339). "Statute and precedent are clear that the decision of the Court of International Trade is not a 'final court decision' when appeal has been taken to the Federal Circuit." *Id.*

This Court is not persuaded by Defendant's various contentions that the statutory scheme requires the court to "consider anew whether injunctive relief pending appeal is appropriate" for injunctions issued pursuant to 19 U.S.C. § 1516a(c). (*See* Def.'s Br. at 9.) Section 1516a states that once the Court of International Trade has enjoined liquidation, liquidation remains suspended until there is a "final court decision in the action." 19 U.S.C. § 1516a(e). As the court reasoned in *SKF USA Inc.*, "[t]he court . . . is not persuaded that the Plaintiffs, having met their burden of persuasion initially in order to receive the preliminary injunction, must again convince the court of its necessity in order to appeal the court's judgment." *SKF USA Inc.*, 2004 Ct. Intl. Trade LEXIS 14, at *30. This Court agrees that it is "incumbent upon the Defendant to persuade the court that

the injunction is unnecessary and should be reconsidered or dissolved." *Id.*[1]

Further, this Court is not persuaded by Defendant's arguments that the administrative process is in danger of being forestalled "indefinitely" if injunctions granted under § 1516a(c)(2) last through all appeals. (*See* Def.'s Br. at 8.) It is well established that "before issuing a preliminary injunction[,] inquiry must first be made as to the nature of the administrative determination under judicial consideration." *Am. Spring Wire*, 578 F. Supp. at 1408. Additionally, Defendant's arguments are not persuasive because there are other mechanisms in place for this Court or the appellate court to review the injunction should the circumstances indicate that the injunction is being used merely as a means to forestall the administrative process. *See, e.g.*, USCIT R. 60(b).

CONCLUSION

This Court denies Defendant's Motion for Partial Reconsideration and reaffirms the Preliminary Injunction Order issued on March 15, 2004, which enjoins liquidation of the subject entries until there is a final court decision in the action under 19 U.S.C. § 1516a(e).

Slip Op. 04–67

BROTHER INTERNATIONAL CORP., Plaintiff, v. UNITED STATES, Defendant.

Consol. Court No. 00–01–00006

[Plaintiff's motion for summary judgment is denied; Defendant's cross-motion for summary judgment is denied.]

Dated: June 10, 2004

Barnes, Richardson & Colburn (*Sandra Liss Friedman, Jennifer L. Morgan, Helena D. Sullivan*), New York, New York, for Plaintiff.

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[1] This Court notes that this interpretation and application of § 1516a is consistent with the Court of International Trade's application of this statute since it was adopted by Congress in the Trade Agreements Act of 1979, Pub. L. 96–39, 93 Stat. 144. *See Indus. Fasteners Group v. United States*, 495 F. Supp. 911 (Cust. Ct. 1980). In *Industrial Fasteners*, the court stated that the plaintiffs' application for an injunction under 19 U.S.C. § 1516a was "a matter of novel impression." *Id.* at 912. The court granted the injunction "effective during the pendency of this litigation in the Customs Court and its appellate tribunals." *Id.* at 913. As the court stated, "plainly . . . if plaintiff were successful on the merits, and most certainly if plaintiff were not successful on the merits, plaintiff faced a perilous interval in the period after judgment rendered by the Customs Court and the taking of an appeal to the appellate tribunal." *Id.*

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office; *Bruce N. Stratvert*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, Of Counsel, for Defendant.

OPINION

CARMAN, JUDGE: Plaintiff Brother International Corporation ("Plaintiff") moves for summary judgment. Plaintiff challenges the United States Customs Service's, now organized as the Bureau of Customs and Border Protection ("Customs"), denial of its protest asking Customs to reliquidate thirty-eight entries of merchandise consisting of Multi-Function Centers ("MFCs") which were misclassified due to a mistake of fact, as provided by 19 U.S.C. § 1520(c)(1) (2000). Defendant cross-moves for summary judgment, asserting that Plaintiff's misclassification of the merchandise was not a mistake of fact; rather, it was a mistake of law, which cannot be remedied under § 1520(c)(1). This Court has jurisdiction to review this matter under 28 U.S.C. § 1581(a) (2000). The Court denies Plaintiff's motion for summary judgment and denies Defendant's cross-motion for summary judgment for the reasons articulated below.

BACKGROUND

The merchandise at issue is MFCs with model numbers: MFC–4550, MFC–4550DS, MFC–6550MC, and MFC–7550MC. (Pl.'s Statement of Material Facts Not in Dispute Pursuant to R. 56(h) ("Pl.'s Statement") ¶4; Def.'s Resp. to Pl.'s Statement of Undisputed Facts ("Def.'s Resp.") ¶4.) Models MFC–4550 and MFC–4550DS are known as "five-in-one" MFCs, and consist of a laser printer, copier, facsimile machine, PC fax, and a scanner. (Pl.'s Statement ¶5; Def.'s Resp. ¶5.) Models MFC–6550MC and MFC–7550MC, referred to as "six-in-one" MFCs, consist of a laser printer, copier, facsimile machine, PC fax, a scanner, and an answering machine. (Pl.'s Statement ¶6; Def.'s Resp. ¶6.) All models at issue "employ a printing mechanism that uses laser technology." (Pl.'s Statement ¶8; Def.'s Resp. ¶8.) For convenience, the Court will refer to all models of the subject merchandise as MFCs. The MFCs were entered between June 24, 1996, and February 5, 1997, and liquidated between October 11, 1996, and May 23, 1997. Customs Ruling Letter HQ 228629 (Sept. 17, 2002) (Def.'s Ex. 6); (Def.'s Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Mem.") at 3.)

Prior to importation, Mitchell von Poederoyen, a national account manager for Plaintiff's customs broker, FedEx Trade Networks[1], classified the MFCs under subheading 9009.12.0000 of the Harmo-

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[1] Formerly Tower Group International. (von Poederoyen Aff. of June 20, 2003, ¶1 (Pl.'s Ex. 1).)

nized Tariff Schedule of the United States ("HTSUS"). (Pl.'s Statement ¶¶19, 35–37; Def.'s Resp. ¶¶19, 35–37.) Accordingly, Customs liquidated the entries at 3.7% *ad valorem*.[2] Customs Ruling Letter HQ 228696 (Def.'s Ex. 6).

In July 1997, Plaintiff requested a tariff classification ruling for the MFC–4550, one of the MFC models at issue in this case. Customs Ruling Letter NY B87982 (Aug. 4, 1997) (Def.'s Ex. 4). In August 1997, Customs issued a ruling letter responding to Plaintiff's request. *Id.* In that letter, Customs described the MFC–4550 as "a multi-function machine in one common housing that can perform[ ] printing, copying, scanning, fax and PC fax functions," and found that "the printing function . . . dictates the principal function of [the] machine." *Id.* Based upon this finding, Customs concluded that the MFC–4550 should be classified under subheading 8471.60.6200,[3] HTSUS, "which provides for other laser printer units," and is a duty free provision. *Id.*

In April 1999, Brother filed protests requesting reliquidation of the entries at issue in this case. *See* Summons at 1, *Brother Int'l v. United States*, No. 00–01–00006 (Ct. Int'l Trade filed Jan. 6, 2000) (challenging Protest No. 2701–99–100963 (Apr. 13, 1999)); Summons at 1, *Brother Int'l v. United States*, No. 03–00026 (Ct. Int'l Trade filed Jan. 21, 2003) (challenging Protest No. 2704–99–100964 (Apr. 13, 1999)).[4] Customs denied both protests. *See* Customs Ruling Letter HQ 228696 at 5 (Def.'s Ex. 6); Summons at 1, *Brother Int'l*, No. 00–01–00006. Plaintiff requested further review of Protest Number 2704–99–100964 and again requested reliquidation of the entries al-

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[2] Subheading 9009.12.0000 provides:

9009	Photocopying apparatus incorporating an optical system or the of the contact type and thermocopying apparatus; parts and accessories thereof:	
	Electrostatic photocopying apparatus:	
***		
9009.12.00	Operating by reproducing the original image via an intermediate onto the copy (indirect process)	3.7%

[3] Subheading 8471.60.6200 states:

8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:	
8471.60	Input or output units, whether or not containing storage units in the same housing:	
***		
8471.60.62	Other	Free

[4] Both cases were consolidated under Court Number 00–01–00006. *See Brother Int'l v. United States*, No. 03–00026 (Ct. Int'l Trade Apr. 9, 2003) (order granting consent motion to consolidate).

leging a mistake of fact pursuant to 19 U.S.C. § 1520(c)(1). Customs Ruling Letter HQ 228696 at 1 (Def.'s Ex. 6). Customs denied the protest, finding that any misclassification was due to a mistake of law. *Id.* at 8, 10–11. Plaintiff timely filed its summons in this Court to challenge both Customs' decisions. (Pl.'s Statement ¶3; Def.'s Resp. ¶3.)

STANDARD OF REVIEW

Summary judgment will be granted when "the pleadings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "[T]he inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *see also Avia Group Int'l v. L.A.Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). The party moving for summary judgment "bears the burden of demonstrating the absence of all genuine issues of material fact." *Avia Group Int'l*, 853 F.2d at 1561; *Black and White Vegetable Co. v. United States*, 125 F. Supp. 2d 531, 536 (Ct. Int'l Trade 2000) (citations omitted).

PARTIES' CONTENTIONS

I. *Plaintiff's Contentions*

Plaintiff alleges that Customs' refusal to reliquidate the entries of MFCs to correct the result of a mistake of fact as permitted pursuant to 19 U.S.C. § 1520(c)(1) is "in error and without legal justification." (Pl.'s Mem. of Law in Support of Mot. for Summ. J. ("Pl.'s Mem.") at 7.) Plaintiff identifies four requirements that an importer must satisfy in order to be entitled to reliquidation of an entry made in error due to a mistake of fact: (1) "there must be a mistake of fact;" (2) the mistake "must not amount to an error in the construction of the law;" (3) the mistake is adverse to the importer; and (4) the mistake is established by documentary evidence. (*Id.* at 9 (citing 19 U.S.C. § 1520(c)(1); 19 C.F.R. § 173.4 (Customs regulation implementing § 1520(c)(1))).) Plaintiff advances the following arguments to demonstrate its compliance with the statutory requirements.

First, Plaintiff contends that the circumstances surrounding the classification of the MFCs amount to "the kind of misapprehension" that courts have identified as a mistake of fact. (*Id.* at 11 (citing *Degussa Canada Ltd. v. United States* 87 F.3d 1301, 1304 (C.C.P.A. 1996); *C.J. Tower & Sons v. United States*, 336 F. Supp. 1395, 1399 (Cust. Ct. 1972), *aff'd*, 499 F.2d 1277 (Fed. Cir. 1974).) Plaintiff argues that a mistake of fact occurred because of its customs broker's

employee's "lack of knowledge regarding the exact physical properties of MFCs" and his "unaware[ness] of the history of the development of the MFCs," specifically that the MFC evolved from a printer and that additional functions were added to the existing printing function. (*Id.* at 7–8, 11–12 (citing von Poederoyen Aff. of June 20, 2003, ¶¶6–8, 11 (Pl.'s Ex. 1); Hatano Aff. of Aug. 1, 2003, ¶4 (Pl.'s Ex. 2); Cummins Aff. of July 7, 2003, ¶¶7–9, 12 (Pl.'s Ex. 3).) Plaintiff adds that Mr. von Poederoyen's belief that all of the functions of the MFCs were of equal importance is "a fact that [he] thought existed . . . [but] in reality did not exist." (*Id.* at 12 (citing von Poederoyen Aff. of June 20, 2003, ¶¶6, 8 (Pl.'s Ex. 1); Hatano Aff. of Aug. 1, 2003, ¶4 (Pl.'s Ex. 2).) Plaintiff explains that this lack of knowledge formed Mr. von Poederoyen's belief that all of the functions of the MFCs — printing, copying, and faxing — were of equal importance and that the MFCs had no primary function or essential character. (Pl.'s Mem. at 4, 7; von Poederoyen Aff. of June 20, 2003, ¶8 (Pl.'s Ex. 1).) Plaintiff asserts that Mr. von Poederoyen did not personally examine the MFCs prior to classification. (*Id.* at 4.) Plaintiff attributes Mr. von Poederoyen's erroneous belief on his reliance on conversations with Tomohisa Hatano, Plaintiff's import manager at the time, and on the "line art consisting of a draft of product literature supplied by Brother." (*Id.* at 4 (citing von Poederoyen Aff. of June 20, 2003, ¶¶5–7 (Pl.'s Ex. 1); Hanato Aff. ¶3 (Pl.'s Ex. 2)).) It was Mr. von Poederoyen's erroneous belief, Plaintiff argues, that led him to use General Rule of Interpretation ("GRI") 3(c), which resulted in the misclassification of the MFCs under subheading 9009.12.0000, HTSUS, "the heading that occurs last in numerical order among the potential suitable provisions." (Pl.'s Mem. at 4–5, 7; von Poederoyen Aff. of June 20, 2003, ¶¶8–9 (Pl.'s Ex. 1).)

Second, Plaintiff contends that there is no error in the construction of law. (*Id.* at 17 (citing *Hambro Auto. Corp. v. United States*, 603 F.2d 850, 855 (C.C.P.A. 1979) (in turn quoting 58 C.J.S. *Mistake* § 832)).) Plaintiff asserts that the error made by its customs broker was an "ignorant mistake" and not a "decisional mistake." (*Id.* at 15–16.) Plaintiff contends that a decisional mistake occurs when "a party make[s] the wrong choice between two known, alternative set of facts," and acknowledges that such a mistake cannot be corrected under § 1520(c)(1); however, an ignorant mistake occurs when "a party is unaware of the existence of the correct alternative set of facts," and such a mistake "must be remedied under [§ 1520(c)(1)]." (*Id.* at 15–16 (quoting *Universal Coops., Inc. v. United States*, 718 F. Supp. 1113, 1114 (Ct. Int'l Trade 1989)).) According to Plaintiff, "[a]s demonstrated conclusively in the affidavits . . . , the facts informing the classification of the MFCs were *not* known when the subject MFCs were first imported." (*Id.* at 17.) Plaintiff contends that Mr. von Poederoyen was working with "one[ ] erroneous fact scenario," and not "choos[ing] between two fact scenarios." (*Id.* at 8.) Plaintiff

adds that after Mr. von Poederoyen misclassified the MFCs, he was erroneously reassured by his discovery of the "Lanier Ruling," a New York Customs ruling "in which Customs classified a 'Multi-functional fax/copier/printer' in HTSUS subheading 9009.12.0000 as electrostatic photocopying apparatus." (*Id.* at 5 (citing von Poederoyen Aff. of June 20, 2003, ¶10 (Pl.'s Ex. 1); Customs Ruling Letter NY 897546 (May 9, 1994) ("Lanier Ruling")).) Plaintiff contends that Mr. von Poederoyen's reassurance was misplaced because he was, in fact, unfamiliar with the details of the Lanier Ruling, unaware of significant differences between the merchandise that he classified and the merchandise addressed in the Lanier Ruling, including differences in size, weight, printing speeds, print resolution, and differences in the types of customers Plaintiff and Lainer target and the difference in services provided to their customers. (*Id.* at 5 (citing von Poederoyen Aff. of June 20, 2003, ¶10 (Pl.'s Ex. 1); Cummins Aff. of July 7, 2003, ¶16(a–d) (Pl.'s Ex. 3)).)

Third, Plaintiff contends that mistake of fact is established by documentary evidence in this case. (*Id.* at 17.) Plaintiff states that the documentary evidence necessary to support the existence of a mistake of fact is: "(a) the correct state of facts; and (b) that either the importer or Customs had a mistaken belief as to the correct state of facts." (*Id.* (quoting *Chrysler Corp., v. United States*, 87 F. Supp. 2d 1339, 1352 (Ct. Int'l Trade 2000)) .) Plaintiff offers the affidavit of Donald Cummins, Plaintiff's Director of Marketing at the time of classification, to establish the "correct state of facts." (*Id.* (citing Cummins Aff. of July 7, 2003 (Pl.'s Ex. 3)).) Plaintiff contends that the affidavits of Mr. von Poederoyen and Mr. Hatano establish that Brother, as the importer, "had a mistaken belief as to the correct state of facts." (*Id.* at 18.) Plaintiff advances that a Customs ruling letter issued after the classification and liquidation of the MFCs at issue in this case is evidence that "Customs has acknowledged [the correct state of] facts by incorporating them into its classification analysis for the MFC 4550," one of the models at issue in this case. (*Id.* at 18 (citing Customs Ruling Letter NY B87982).) Plaintiff concludes that it has made the showing of documentary evidence required by § 1520(c)(1). (*Id.*)

Fourth, Plaintiff contends the mistake of fact is adverse to it, the importer, because the resulting misclassification led to the MFCs being entered under subheading 9009.12.0000, HTSUS, at 3.7% *ad valorem*, rather than under subheading 8471.60.6200, HTSUS, which provides for duty-free entry. (*Id.*) As a result, Plaintiff asserts that it overpaid duties on the MFCs. (*Id.*) Plaintiff points out that this Court has held that overpayment of duties is adverse to the importers. (*Id.* (citing *Taban Co. v. United States*, 960 F. Supp. 326, 336 (Ct. Int'l Trade 1997).)

Lastly, Plaintiff notes that, after establishing that a mistake of fact has been made, the importer does not need "to demonstrate the

underlying cause of the factual misunderstanding." (*Id.* at 18–19 (citing *Chrysler Corp.*, 87 F. Supp. 2d at 1352).) Plaintiff adds that such a requirement would render the remedy provided under § 1520(c)(1) nearly impossible to attain. (*Id.* at 19.)

II. *Defendant's Contentions*

Defendant contends that summary judgment should be granted in its favor because Customs' decision to deny Plaintiff's request to reliquidate the MFCs was correct. (Def.'s Mem. at 2.) Defendant asserts that Plaintiff's "mistake in the classification of the [MFCs] as copiers pursuant to GRI 3(c) was an error in the construction of law, which is not remediable under 19 U.S.C. § 1520(c)(1)." (*Id.* at 2, 5.) Defendant states that "[i]ncorrect determinations as to 'the proper meaning of specific terms in the tariff provision' constitute mistakes of law, whereas incorrect determinations as to 'whether the importer erroneously described the merchandise on the invoice used to prepare the entry' constitute mistakes of fact." (*Id.* at 12 (quoting *Executone Info. Sys. v. United States*, 96 F.3d 1383, 1388 (Fed. Cir. 1996)).) Defendant asserts that Plaintiff "determined what it considered the appropriate tariff classification to be for its planned first importations of MFCs" in 1995. (*Id.* at 3 & n.3 (noting that Plaintiff's November 13, 1995, news release describes the predecessor MFCs as "true Laser Multi-Function Centers (MFCs)").) Defendant notes that the MFCs were "described on the commercial invoices as MFC Multi-functional Copier/Printer/Fax . . . [and were] liquidated as entered, as copiers . . . in subheading 9009.12.00, HTSUS, at 3.7% *ad valorem*." (*Id.* at 2.) Defendant adds that a copy of the Lanier Ruling was included in the documents accompanying each MFC entry. (*Id.* at 3 (referring to Customs Ruling Letter NY 897540).) Defendant also submits "'line Art' for the MFCs consisting of a drawing and product specifications," such as printing speed, rate of facsimile transmission, etc., to establish its contention that Mr. von Poederoyen knew the physical details of the merchandise he was classifying. (*Id.* at 3–4 (referring to Def.'s Ex. 1; von Poederoyen Aff. of June 20, 2003 ¶5 (Pl.'s Ex. 1); Hatano Aff. of Aug. 1, 2003 ¶3 (Pl.'s Ex. 2)).)

Defendant states that Plaintiff's assertion that a lack of knowledge of the physical characteristics and the historical development of the MFCs resulted in a mistake of fact which led to the alleged misclassification of the MFCs is without merit. (*Id.* at 7.) Defendant argues that the conclusion that the MFCs' other functions (i.e., faxing and copying) were not equally important as the printing function does not necessarily follow from "the fact that the MFCs were developed from printer technology." (*Id.* at 7, 14.) Defendant asserts that "the manufacturing history of a multifunction machine is but one minor factor that can be taken into account in determining the principle function of a multifunction machine," and "it does not follow

that knowledge of this fact would have resulted in a different classification of the subject machines." (*Id.* at 15.) Defendant asserts that in the Customs ruling letter denying Plaintiff's request for reliquidation, Customs thoroughly examined the affidavits of Messrs. von Poederoyen, Hatano, and Cummins and concluded that "the true nature of the product was NOT unknown to . . . Messrs. von Poederoyen and Hatano." (*Id.* at 10 (quoting Customs Ruling Letter HQ 228696 at 10).) Defendant notes that Customs found that the record does not demonstrate Mr. von Poederoyen and Mr. Hatano made a mistake of fact and, further, found "neither proof nor allegation of [Messrs. von Poederoyen or Hatano's] mutual or independent knowledge of any fact regarding the nature of the machines to be other than true, and that, fully knowledgeable of all true facts, they determined that the machines were classifiable in accordance with Customs ruling NY 897540 [the Lanier Ruling]." (*Id.* at 8 (quoting Customs Ruling Letter HQ 228696 at 7–8).) Defendant contends that this conclusion is unchanged by the "new affidavits" submitted in support of Plaintiff's motion for summary judgment. (*Id.* at 9–10.) Accordingly, Customs' denial of the protest based on its finding of an error in the construction of a law should be affirmed. (*Id.* at 10 (citing Customs Ruling Letter HQ 228696).)

Defendant observes some inconsistencies between Messrs. von Poederoyen and Hatano's "new affidavits" and the earlier affidavits of these individuals used by Customs in deciding not to reliquidate the MFCs under § 1520(c)(1). (*Id.* at 9.) Specifically, Defendant notes that in the "new affidavits," both Messrs. von Poederoyen and Hatano "claim that they became aware of [the Lanier Ruling] *after* deciding to classify the merchandise as copiers in subheading 9009.12.00, HTSUS;" however, in deposition testimony and in the earlier affidavit submitted in support of Plaintiff's request for reliquidation, Defendant asserts that Mr. von Poederoyen "stated that he based his classification of the MFCs on his review of the [GRIs] and the Lanier Ruling." (*Id.* at 4, 9 (citing von Poederoyen Dep. at 22–23; von Poederoyen Aff. of March 19, 1999, ¶5; von Poederoyen Aff. of June 20, 2003, ¶10).) Defendant also points out that the Customs' ruling letter noted that neither Mr. von Poederoyen's nor Mr. Hatano's affidavits made mention of the way in which correct knowledge of the characteristics of the MFCs would have altered the classification of the MFCs, (*Id.* at 9 (quoting Customs Ruling Letter HQ 228696 at 8–9)); yet, in the "new affidavits," both individuals claim that "had they 'been aware of the true physical nature' of the MFCs, it would have affected their classification determinations." (*Id.* at 10.) Defendant concludes that, for the reasons articulated in its motion, summary judgment should be granted in its favor, and the case should be dismissed. (*Id.* at 20–21.)

DISCUSSION

There is a Genuine Issue of Material Fact as to Whether Plaintiff's Customs Broker Knew the Physical Characteristics of the MFCs at the time of Classification.

"[A]t the summary judgment stage the [Court's] function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Whether a disputed fact is material is identified by the substantive law and whether the finding of that fact might affect the outcome of the suit." *E.I. Dupont de Nemours & Co. v. United States*, 123 F. Supp. 2d 637, 639 (Ct. Int'l Trade 2000) (citing *Anderson*, 477 U.S. at 248). In this case, the parties dispute whether Plaintiff's customs broker, Mr. von Poederoyen, was aware of the physical characteristics of the MFCs at the time of classification. This dispute constitutes a genuine issue as to a material fact, rendering summary judgment inappropriate.

The factual dispute is genuine because a reasonable fact finder could return a verdict for either Plaintiff or Defendant, finding that Mr. von Poederoyen possessed or did not possess the correct facts about the physical characteristics of the MFCs. Plaintiff argues that Mr. von Poederoyen did not possess the correct facts, because the information presented to him by Mr. Hatano and contained in the line art was incorrect and incomplete. (Pl.'s Mem. at 4–5.) Defendant counters that the line art included a complete and accurate picture of the physical characteristics of the MFCs, and, despite possessing the correct set of facts about the MFCs, Mr. von Poederoyen misclassified the machines. (Def.'s Mem. at 3–4; Def.'s Ex. 1.) Defendant additionally raises a credibility issue, stating that in an affidavit submitted to Customs in support of Plaintiff's request for reliquidation, Mr. von Poederoyen stated that he relied on the Lanier Ruling to classify the MFCs, but in the affidavit submitted in support of Plaintiff's motion for summary judgment, Mr. von Poederoyen states that he learned of the Lanier Ruling *after* classifying the MFCs, and the Lanier Ruling merely affirmed his classification decision. (*Id.* at 4, 9 (comparing von Poederoyen Aff. of March 19, 1999, ¶5, with von Poederoyen Aff. of June 20, 2003, ¶10).)

Further findings of facts are necessary to determine the extent of knowledge that Mr. von Poederoyen possessed about the physical characteristics of the MFCs at the time of classification.

CONCLUSION

For the reasons identified herein, Plaintiff's motion for summary judgment and Defendant's cross-motion for summary judgment are denied.