Decisions of the United States
Court of International Trade

Slip Op. 04–55

BEFORE: RICHARD K. EATON, JUDGE

HONTEX ENTERPRISES, INC., D/B/A/ LOUISIANA PACKING CO., PLAINTIFF, v. UNITED STATES, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, THE LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY, AND BOB ODOM, COMMISSIONER, DEFENDANT-INTERVENORS.

COURT NO. 00–00223
PUBLIC VERSION

[United States Department of Commerce's final antidumping duty determination remanded to Commerce a second time.]

Dated: May 21, 2004

Coudert Brothers LLP (*John M. Gurley* and *Matthew J. McConkey*), for Plaintiff Hontex Enterprises, Inc.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, International Trade Section, Commercial Litigation Branch, Civil Division, United State Department of Justice (*David S. Silverbrand*); *Marisa Beth Goldstein*, of counsel, Office of the Chief Counsel for Import

Adduci, Mastriani & Schaumberg, L.L.P. (*James Taylor, Jr.* and *Will E. Leonard*), *John C. Steinberger*, of counsel, for Defendant-Intervenors Crawfish Processors Alliance, the Louisiana Department of Agriculture and Forestry, and Bob Odom, Commissioner.

OPINION AND ORDER

EATON, *Judge*: This matter is before the court following remand to the United States Department of Commerce ("Commerce"). In *Hontex Enterprises, Inc. v. United States*, 27 CIT ___ , 248 F. Supp. 2d 1323 (2003) ("*Hontex I*"), this court remanded Commerce's determination contained in Freshwater Crawfish Tail Meat From the P.R.C., 65 Fed. Reg. 20,948 (ITA Apr. 19, 2000) (final results admin. rev.; rescission of new shipper rev.) ("Final Results"). Plaintiff

Hontex Enterprises, Inc. ("Hontex")[1] had challenged certain aspects of that determination with respect to Ningbo Nanlian Frozen Foods Company ("NNL"),[2] covering its imports of freshwater crawfish tail meat from the People's Republic of China ("PRC"). The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons set forth below, this matter is remanded to Commerce with instructions to conduct further proceedings in conformity with this opinion.

BACKGROUND

The relevant facts and procedural history in this case are set forth in *Hontex I*. A brief summary of those facts is included here. Commerce conducted its original investigation of the subject merchandise for the period of review of March 1, 1996, through August 31, 1996. *See* Freshwater Crawfish Tail Meat From the PRC, 62 Fed. Reg. 41,347 (ITA Aug. 1, 1997) (final determination). As a result of this investigation, Commerce issued an antidumping duty order pursuant to which several exporters received company-specific antidumping duty margins, several received "cooperative" margins, and the remainder received the "PRC-wide" margin, which was set at 201.63%. *See id*. at 41,358. One of the exporters investigated was Huaiyin Foreign Trade Corporation (5) ("HFTC5"). *See* Final Results, 65 Fed. Reg. at 20,949.

On March 27, 1998, NNL requested a new shipper review. *See* Freshwater Crawfish Tail Meat From the PRC, 63 Fed. Reg. 25,449 (ITA May 8, 1998) (initiation of new shipper rev.). This review covered the period of September 1, 1997 (the anniversary date of the original investigation), through March 31, 1998.[3] *Id*. at 25,449. Following this review Commerce determined that for this period NNL's antidumping duty margin was 0.0%. *See* Freshwater Crawfish Tail Meat From the PRC, 64 Fed. Reg. 27,961, 27,966 (ITA May 24, 1999) (final results of new shipper rev.).

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[1] As a domestic importer of the subject merchandise, Hontex is an "interested party" within the meaning of 19 U.S.C. § 1677(9)(A) (2000), and is entitled to challenge Commerce's determination pursuant to 19 U.S.C. § 1516a(a)(2) (2000). In addition to being a domestic importer of the subject merchandise, Hontex is also part-owner of Ningbo Nanlian Frozen Foods Company.

[2] Throughout its papers Hontex refers to NNL as "Plaintiff" in this action. As it was NNL and not Hontex that was investigated by Commerce, the court understands that any argument as to the propriety of Commerce's actions is limited to NNL.

[3] The period of review ("POR") for HFTC5 and NNL was generally identified as March 26, 1997, through August 31, 1998. *See* Initiation of Antidumping and Countervailing Duty Admin. Rev., 63 Fed. Reg. 58,009, 58,010 (ITA Oct. 29, 1998) (initiation of review). Because NNL had participated in a new shipper review, however, NNL's POR was identified as April 1, 1998, through August 31, 1998. *See* Freshwater Crawfish Tail Meat From the PRC, 64 Fed. Reg. 55,236, 55,237 (ITA Oct. 12, 1999) (prelim. results of rev.).

Subsequently, pursuant to a request for administrative review, Commerce initiated a review of HFTC5 and NNL. *See* Initiation of Antidumping and Countervailing Duty Admin. Rev., 63 Fed. Reg. at 59,010 (ITA Oct. 29, 1998). In response to the antidumping questionnaires sent by Commerce, both NNL and HFTC5 claimed that they did not share managers or owners, or share common control with other crawfish tail meat exporters. *See* NNL Sec. A Resp., Pub. R. Doc. 19, at 3 ("NNL Sec. A Resp."); HFTC5 Section A Resp., Pub. R. Doc. 24, at 4 ("HFTC5 Sec. A. Resp.").

Prior to verification, however, questions arose as to the relationship between NNL and HFTC5 with respect to possible affiliation. Despite the companies' representations that they did not share managers, a "Mr. Wei"[4] was listed on NNL's business license as its "Vice G. Manager," and this name also appeared on a HFTC5 sales invoice dated during NNL's POR. *See* NNL Sec. A Resp., Ex. 4; HFTC5 Sec. A Resp., Ex. 7. In order to clarify this relationship, Commerce sent NNL[5] a letter asking it to "explain the contradiction between Ningbo Nanlian's claim [in its original questionnaire response] not to share managers with other Chinese crawfish exporters and the evidence on the record of this review that shows Mr. Wei Wei was a manager at both Ningbo Nanlian and [HFTC5] in 1998." Letter from Commerce to Arent Fox of 1/12/00, Pub. R. Doc. 141, at 1. NNL responded to this letter and claimed that Mr. Wei was not a manager of HFTC5 during NNL's POR but was, since his resignation from HFTC5 on October 26, 1997, "a part-time independent consultant" to that company. *See* Letter from Arent Fox to Commerce of 1/31/00, Pub. R. Doc. 146 at 4. NNL also stated that during its POR, Mr. Wei "was not an officer or manager of Ningbo Nanlian either. He was a consultant." *Id*. at 2 n.1.

Commerce then published the results of its investigation. Based on evidence contained in the antidumping duty questionnaires and gathered at NNL's verification (including Mr. Wei's responses to questions about his relationships with NNL, HFTC5, and HFTC5's customers), Commerce determined that the companies were "affiliated" and that their operations were "intertwined." Final Results, 65 Fed. Reg. at 20,949. As a result, Commerce concluded that NNL did not merit a separate rate from HFTC5, and assigned to it HFTC5's antidumping duty margin of 201.63%. *See id*. (adopting reasoning set forth in Issues and Decision Mem. for the Admin. Rev. of the An-

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[4] The person referred to here as "Mr. Wei" is variously identified on the record and in the parties' papers as "Mr. Wei," "Philip Wei," or "Mr. Wei Wei." No party to this action disputes that these various names refer to the same person, and the court will refer to him as Mr. Wei.

[5] HFTC5 refused to participate in verification on the grounds that it "could not persuade [its] suppliers to cooperate." Letter from law firm of Arent Fox Kintner Plotkin & Khan ("Arent Fox") to Commerce of 5/21/99, Pub. R. Doc. 56, at 1.

tidumping Duty Order on Freshwater Crawfish Tail Meat from the P.R.C.—March 26, 1997 through August 31, 1998, Pub. R. Doc. 214 (Apr. 7, 2000)). Subsequently Hontex filed a motion for judgment upon the agency record, and the court in *Hontex I* remanded the matter to Commerce.

Pursuant to the court's instructions, Commerce conducted remand proceedings and ultimately sustained its earlier finding that there was evidence that NNL and HFTC5 were affiliated and that their operations were intertwined, and that NNL therefore did not merit a separate antidumping duty rate from HFTC5. *See* Final Results of Determination Pursuant to Court Remand ("Remand Results") at 2. Hontex argues here that the Remand Results do not clearly explain Commerce's collapsing methodology and fail to identify the existence of substantial evidence to support Commerce's decision to collapse the companies. *See* Comments on Def.'s Resp. to Remand at 4 ("Comments on Def.'s Resp.").

STANDARD OF REVIEW

When reviewing a final determination in an antidumping or countervailing duty investigation, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "more than a mere scintilla." *Consol. Edison*, 305 U.S. at 229. The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

I. Exhaustion of Administrative Remedies

Commerce issued its Draft Remand Results ("Draft Results") on August 4, 2003. Hontex was instructed to provide comments on the Draft Results by August 6, 2003 (i.e., in less than two business days), but did not do so, on the grounds that it had no new information or arguments that were not already addressed in its administrative and court briefs. *See* Pl.'s Surreply in Opp'n to Def.'s Comments on Pl.'s Resp. to Remand ("Pl.'s Surreply") at 5. In its Response in Opposition to Plaintiff's Comments upon Commerce's Final Results of Redetermination ("Def.'s Resp."), Commerce argues that because Hontex failed to respond to the Draft Results, it "frustrated the con-

gressional goal of resolving disputes, where possible, at the agency level." Further, by this failure to respond, Hontex did not allow Commerce "to address the argument[s] [that Hontex now raises before the court] and thus prepare the issue for judicial review." Def.'s Resp. at 5 (internal quotation omitted).

For its part, Hontex maintains that

> [f]irst, . . . by issuing the draft results on August 4, 2003, and requesting comments by August 6, 2003 (less than two business days), the Department deprived Plaintiff of any meaningful chance to provide the Department with comments on the draft results.
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> Second, after the exhaustive briefing and oral argument that has occurred in this case, this Court is quite familiar with the facts and law at issue. Even a cursory review of the Department's Remand Response reveals that it in fact points to no new facts or law to support the Department's determination. It is, in fact, a mere reorganization of facts and argument relied upon by the Department throughout these proceedings (administrative and judicial). Accordingly, it would have been futile for Plaintiff to submit comments to the Department on the draft results.

Pl.'s Surreply at 4.

The doctrine of exhaustion "requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT ___ , ___ , 155 F. Supp. 2d 801, 805 (2001) (internal citation omitted). In this Court, exhaustion of administrative remedies is required "where appropriate," 28 U.S.C. § 2637(d) (2000), and is an absolute requirement only in classification actions, with a limited exception for pre-importation classification rulings. *See, e.g., Crawfish Processors Alliance v. United States*, 28 CIT ___ , ___ , slip op. 04–47 at 46 (May 6, 2004); *Timken Co. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1264, 1284 (2003); *Alhambra Foundry Co. v. United States*, 12 CIT 343, 346, 685 F. Supp. 1252, 1255 (1988). The Court "enjoys discretion to identify circumstances where exhaustion of administrative remedies does not apply." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (citing *Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998)). It is "generally conceded that plaintiff is not required to perform an act which would be futile at the administrative level." *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984).

Although Commerce argues that it was deprived of the opportunity "to address the argument[s] and thus prepare the issue for judicial review," Def.'s Resp. at 5 (bracketing in original), it is unable to cite any arguments made by Hontex to which it was unable to re-

spond, or any issues that had not been previously addressed at the administrative level or in this action. Moreover, Hontex maintains, and the court agrees, that it had no new information or arguments to which Commerce could have responded. Hontex had no new points to raise; thus, responding to Commerce's Draft Results would have been a "useless formality." *Timken Co.*, 27 CIT at ___, 264 F. Supp. 2d at 1284 (quoting *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982)). "A reviewing court usurps the agency's function when it sets aside the administrative determination *upon a ground not theretofore presented* and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (emphasis added) (footnote omitted).

Even had Hontex new information or arguments to present, Commerce's decision to provide Hontex with less than two business days in which to submit its comments effectively deprived it of any meaningful chance to comment on the Draft Results. *See United States v. KAB Trade Co.*, 21 CIT 297, 301 (1997) (internal citation omitted) (not reported in the Federal Supplement) ("The court will dismiss an enforcement action for failure to exhaust administrative remedies if Customs does not allow adequate time for defendants to respond."); *United States v. Stanley Works*, 17 CIT 1378, 1382, 849 F. Supp. 46, 50 (1993) (where Commerce denied the defendant an opportunity to respond by providing "a truncated response period," court dismissed the action for failure to "provide [the defendant] with a reasonable opportunity to be heard. . . ."); *United States v. Chow*, 17 CIT 1372, 1376, 841 F. Supp. 1286, 1289–90 (1993) (internal citations omitted) ("Because [Customs] failed to provide [defendant] with a 'reasonable opportunity to make representations, both oral and written,' as to [his claim], the Court must dismiss [Customs'] action for failure to exhaust its administrative remedies and for failure to provide [defendant] with a fair opportunity to be heard. . . ."). Here, Hontex did not respond because it had nothing new to add. In addition, Commerce is foreclosed from making its exhaustion argument by failing to give Hontex a reasonable time to respond. Based on the foregoing, the court finds that Hontex has satisfied any exhaustion of administrative remedies requirement.

II. Commerce's Collapsing Methodology

A. In Accordance with Law

In *Hontex I*, the court found that, based on past precedent of this Court, Commerce's practice of assigning entities a single antidumping duty margin—i.e., "collapsing" them into a single entity—was a reasonable interpretation of the statute. *See Hontex I*, 27 CIT ___, ___, 248 F. Supp. 2d 1323, 1338 (2003); 19 C.F.R. § 351.401(f)

(2000)[6]; *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 160, 90 F. Supp. 2d 1284, 1287 (2000) ("Commerce's collapsing practice has been approved by the court as a reasonable interpretation of the antidumping statute.") (citing *Asociacion de Colombiana de Exportadores de Flores v. United States*, 22 CIT 173, 201, 6 F. Supp. 2d 865, 893 (1998); *Queen's Flowers de Colom. v. United States*, 21 CIT 968, 971–72, 981 F. Supp. 617, 622–23 (1997)). In a market economy context, Commerce follows several steps when determining whether producers should be collapsed:

> First, Commerce must determine whether two or more market economy producers are "affiliated." . . . The next step in Commerce's market economy collapsing methodology is to determine whether producers share "production facilities for similar or identical products. . . ." . . . Finally, Commerce must determine whether there is evidence that one affiliated producer has the "significant potential for the manipulation of price or production" of the other.

Hontex I, 27 CIT at ___ , 248 F. Supp. 2d at 1339 (internal citations omitted).

In *Hontex I*, the court reviewed Commerce's decision to apply its market economy collapsing methodology to the NME exporters in this case, and summarized the methodology used by Commerce:

> Commerce examined: (1) whether the [c]ompanies were connected–i.e., "affiliated"–through "operational control" between two "persons"; and (2) whether any such control relationship presented the "significant potential for manipulation" of pricing or export decisions through "intertwining."

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[6] This regulation provides:

Treatment of affiliated producers in antidumping proceedings—

(1) In general. In an antidumping proceeding under this part, the Secretary 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 the Secretary 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 the Secretary 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).

Hontex I, 27 CIT at ___ , 248 F. Supp. 2d at 1341 (footnote omitted). In addition, because NME exporters are involved here, Commerce expanded the market-economy inquiry into the "potential for manipulation" to include NME exporters' export decisions, rather than whether or not the companies share production facilities.

In reviewing Commerce's chosen methodology, the court will defer to Commerce "if [its chosen] method is based on a reasonable construction of the pertinent statutes." *Torrington Co. v. United States*, 82 F.3d 1039, 1046 (Fed. Cir. 1996); *see Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379 (Fed. Cir. 2001) ("We conclude that *Chevron* deference is afforded to Commerce's statutory interpretations as to the appropriate methodology. . . ."). After examining the methodology as applied in this case, the court in *Hontex I* found that

> to the extent that Commerce has followed its market economy collapsing regulations the NME exporter collapsing methodology is necessarily permissible. Where the NME exporter methodology departs from these regulations, however, the court must examine it to determine whether it is a permissible interpretation of the antidumping statute.

Id. at ___ , 248 F. Supp. 2d at 1342.

Because the court found that Commerce departed from its collapsing methodology, in certain respects, upon remand it instructed Commerce to "clearly set out the NME collapsing methodology used to reach the Final Results and clearly articulate why such methodology is a permissible interpretation of the antidumping statute. . . ." *Id*. at ___ , 248 F. Supp. 2d at 1350.

In the Remand Results, Commerce stated that in NME cases, government control of exporters is presumed. Thus, a single, country-wide antidumping duty rate is assigned to all exporters, unless an exporter can demonstrate that it is independent of government control. With respect to other types of control among exporters, however, Commerce stated:

> Neither the statute nor the regulations contain guidelines for determining when two or more NME exporters should receive the same rate for reasons *other* than being subject to government control. However, the export activities of two or more NME exporters may be "intertwined" by means other than government control, such that it is appropriate to treat such exporters as a single entity and to determine a single weighted-average margin for that entity. . . .

Remand Results at 5 (emphasis in original). Commerce stated that, in determining whether two or more NME exporters are intertwined, it

> may evaluate whether exporters in an NME context are controlling one another or are under the common control of another entity. We may also examine whether individuals in the employ of both companies are making, or are in the position to make, decisions concerning export sales, including decisions concerning export prices and terms of sale, for both companies.

Id. at 7. Thus, as it described its methodology in the Remand Results, Commerce first was required to determine whether or not the companies were "affiliated," and then determine whether a significant potential for manipulation of prices and/or export decisions[7] existed as a result of such affiliation. The court will address each factor in turn.

1. Affiliation

In evaluating whether NNL and HFTC5 were controlling one another or were under the common control of another entity, Commerce first turned to the statutory definition of "affiliated" as used in the context of a market economy, stating:

> We find the following control provisions of [19 U.S.C. § 1677(33)] to be instructive: (F) Two or more persons[8] 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.

Remand Results at 5–6 (citing 19 U.S.C. § 1677(33) (1999)).[9]

Title 19 C.F.R. § 351.102(b) provides the criteria for deciding whether "control" exists. The regulation states that

> the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining

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[7] Because NME exporters are involved here, Commerce expanded the market-economy inquiry into the "potential for manipulation" to include NME exporters' export decisions.

[8] The court in *Hontex I* found that Commerce's decision to include within the scope of "persons" those entities identified as NME exporters was a reasonable interpretation of the antidumping duty statute. *Hontex I*, 27 CIT at ____ , 248 F. Supp. 2d at 1342.

[9] Commerce applies this statutory definition in determining whether an NME exporter and its U.S. importer should be considered affiliated. *See* 19 C.F.R. § 351.102(b).

> whether control exists; normally, temporary circumstances will not suffice as evidence of control.

19 C.F.R. § 351.102(b). Thus, in order for Commerce to find that two or more exporters are affiliated, one must control the other(s), or all of the exporters must be under common control. *See* 19 U.S.C. § 1677(33); *see also Firth Rixson Special Steels Ltd. v. United States*, 27 CIT ___ , ___ , slip op. 03–70 at 21 n.9 (June 27, 2003) (not reported in the Federal Supplement) ("The definition of 'affiliate' under U.S. international trade law implicates operational control.").

Once a finding of affiliation is made, the affiliated producers are treated as a single entity, or collapsed, for the purposes of calculating antidumping duty margins where Commerce concludes that, based on several factors,[10] there is "a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f)(1) and (2); *see also China Steel Corp. v. United States*, 28 CIT ___ , ___ , slip op. 04–6 at 15 (Jan. 26, 2004) ("Commerce is precluded from concluding that a person controls another unless their relationship 'has the potential to impact decisions concerning the . . . pricing . . . of the subject merchandise.' ") (internal citation omitted). Because NME exporters were involved here, Commerce also expanded the "potential to impact" to include export decisions, since "portions of the collapsing regulations were inapplicable to the extent that they addressed only market economy entities and not 'NME exporters' and their 'export decisions.' " *Hontex I*, 27 CIT at ___ , 248 F. Supp. 2d at 1340 (internal citations omitted).

The court in *Hontex I* approved of Commerce's decision to include export decisions in its analysis, finding it to be "a sufficient articulation of Commerce's NME exporter collapsing methodology in the instant investigation as far as it goes," *Hontex I*, 27 CIT at ___ , 248 F. Supp. 2d at 1343; *see also Crawfish Processors Alliance*, 28 CIT at ___ , slip op. 04–47 at 49. However, the court cautioned that

> [s]imply increasing the scope of [Commerce's] analysis to include the [c]ompanies' "export decisions" . . . is insufficient. By regulation, in market economy situations, Commerce must consider the "temporal aspect of entities' relationships." . . . As it is not "clear . . . which set of factors formed the basis of Commerce's collapsing determination," the court cannot find Commerce's interpretation of "control" to be a permissible interpre-

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[10] In a market economy situation, those factors include whether or not the 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 the Secretary concludes that there is a significant potential for the manipulation of price or production.

19 C.F.R. § 351.401(f)(1).

> tation of the antidumping statute such that it is entitled to judicial deference.

Id. at ___ , 248 F. Supp. 2d at 1343–44 (internal citations omitted). Thus, the court instructed Commerce to "explain how the temporal aspect of the [c]ompanies' relationship affected its determination, and if the temporal aspect of the relationship was not taken into account, take it into account, or explain why [not] . . . ." *Id.* at ___ , 248 F. Supp. 2d at 1350.

Commerce addressed the court's instruction in the Remand Results, stating:

> In considering the extent to which control occurs in an NME context, the Department examines the temporal aspect of such control. While the Department does not "rule out the possibility that a short-term relationship could result in control," it does examine the extent to which control occurs across any given period of review.

Remand Results at 8 (internal citation omitted). Commerce also provided a time line detailing, in its view, the periods during which Mr. Wei's activities for NNL and HFTC5 overlapped, finding that "Mr. Wei's actions on behalf of both companies spanned both periods [of review for NNL and HFTC5] and did not constitute 'sporadic contacts' or 'temporary circumstances.' " Remand Results at 27. Based on the foregoing, the court is satisfied that Commerce has complied with its instructions to explain how the temporal aspect of the companies' relationship affected its methodology and determination.

2. Significant Potential for Manipulation

With respect to the significant potential for manipulation, the court In *Hontex I* stated:

> While the factors enumerated in 19 C.F.R. § 351.401(f)(2) for determining whether two entities are "intertwined" are non-exhaustive, the court cannot find Commerce's "articulation" of "intertwining" in the instant investigation to be a permissible interpretation of the antidumping statute because it is not "clear . . . which set of factors formed the basis of Commerce's collapsing determination."

Hontex I, 27 CIT at ___ , 248 F. Supp. 2d at 1344. The court then instructed Commerce to "state with specificity the 'numerous factors' used to reach its finding that a 'significant potential for manipulation' of pricing and export decisions existed . . . ." *Id.* at ___ , 248 F. Supp. 2d at 1350 (citations omitted in original).

In the Remand Results, Commerce described the factors it considered:

> First, the fact that Mr. Wei and the tandem of YFF and Louisiana Packing[11] were each legally or operationally in a position to exercise restraint or direction over (*i.e.*, control) both HFTC5 and Ningbo Nanlian during the POR . . . necessarily leads to the conclusion that there was significant potential for the manipulation of decisions on export prices and terms between these NME exporters. . . .

Remand Results at 25. Commerce also considered

> whether Ningbo Nanlian and HFTC5's operations were intertwined, such as through the sharing of sales information, the sharing of employees, or significant transactions between the two entities.

Id. at 26. Commerce further considered factors it considered appropriate in an NME context:

> In addition to examining the criteria in its collapsing regulation, however, it is also appropriate in an NME context, where the Department examines the export activities of NME exporters, to consider whether such operations are intertwined through the involvement in both entities' export decisions. The Department examines both companies' export decisions because the export decisions are of primary concern to the Department in the NME context for purposes of assigning antidumping rates.

Id. at 8.

Based on the foregoing, the court finds that Commerce has stated with acceptable specificity the factors it took into account in reaching its conclusion concerning the "significant potential for manipulation." *See* 19 C.F.R. § 351.401(f)(2). Thus, Commerce has satisfied the court's remand instructions by setting out its NME collapsing methodology. The court will now address whether or not Commerce has provided substantial evidence to support its conclusion that NNL and HFTC5 should be collapsed according to such methodology.

B. Substantial Evidence

1. "Web of Control Relationships" as Substantial Evidence of Control

In *Hontex I*, the court stated:

> In concluding that a "web of control relationships" existed between NNL and HFTC5, Commerce stated that "numerous factors reflect that the relationship between these parties is such

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[11] Yinxian No. 2 Freezing Factory ("YFF") and Louisiana Packing Company are the joint owners of NNL.

> that there is potential to impact pricing and exports of the subject merchandise. . . . " Reviewing the record, however, the court is able to discern only one such "factor": the activities of Mr. Wei.

Hontex I, 27 CIT at ___ , 248 F. Supp. 2d at 1345 (internal citation omitted). The court therefore instructed Commerce to

> identify specific evidence on the record of: (1) how the activities and relationship of Mr. Wei with respect to NNL and HFTC5 constituted a "web of control relationships" such that [a] finding of affiliation between NNL and HFTC5 was justified; (2) how the activities and relationship of Mr. Wei with respect to NNL and HFTC5 could justify a finding that a "significant potential for the manipulation" of pricing and export decisions existed.

Id. at ___ , 248 F. Supp. 2d at 1350.

Although Commerce has made an effort to comply with these instructions, the precise nature of the supposed control relationship remains unclear both in the Final Results and the Remand Results. In the Remand Results, Commerce stated that "the Department must be prepared to address a situation in which one exporter that chooses not to cooperate, and is therefore assigned a high adverse facts available rate, seeks to channel exports through another exporter with a lower rate *over which it has control*." Remand Results at 7–8 (emphasis added). In other words, Commerce appears to be saying that to justify collapsing in this case, it must demonstrate that HFTC5, which chose not to participate in the verification process, was legally or operationally in a position to exercise control over NNL, which had a lower antidumping duty rate than HFTC5. If this is Commerce's contention, however, it must fail because nowhere in the Remand Results does Commerce offer any evidence to support a contention that HFTC5 was in a position to control NNL.

Also in the Remand Results, however, Commerce appears to argue that both companies were subject to the potential for *common* control, through the activities of Mr. Wei, and that his activities resulted in significant potential for manipulation of both companies' export decisions. *See* Remand Results at 20. What remains unclear is whether this means that Commerce has found that Mr. Wei himself controlled both entities, or that he exercised control on behalf of another. Finally, as discussed under the heading "Close Supplier Relationships," *infra*, Commerce also argues that YFF and Louisiana Packing, as the joint venture owners of NNL, were in a position to control both NNL and HFTC5. The court will examine each contention in turn.

a. Mr. Wei's Relationship with NNL

Commerce maintains that the record evidence supports the conclusion that Mr. Wei had the potential to control NNL. First, Com-

merce asserts that "Mr. Wei was in a legal and operational position to exercise restraint or direction over Ningbo Nanlian" because, according to NNL's business license, Mr. Wei was one of two members of NNL's management during the POR. *See* Remand Results at 10–11. Commerce further relies on its finding that Mr. Wei was asked by Mr. Lee, the sole owner of Louisiana Packing, to work on the formation of the joint venture between Louisiana Packing and YFF, the companies that formed NNL, and that Mr. Wei's signature appears on the joint venture contract. *Id.* at 13. Commerce stated:

> It is reasonable to conclude that a founder of a small business entity would be unavoidably involved in setting up the business structure and operations of that entity. Thus, as a founder of Ningbo Nanlian, involved in setting up the business structure and operations for Ningbo Nanlian, Mr. Wei would have been in a position to exercise restraint or direction over Ningbo Nanlian, at the very least during the period over which the company was formed.

Id.

Although Mr. Wei was involved in setting up the joint venture involving NNL, Commerce's contention that, because Mr. Wei's signature appears on the joint venture contract, it necessarily follows that he "would have been in a position to exercise restraint or direction" over NNL, is unsupported by the record evidence. Mr. Wei stated at verification that he signed the contract on Mr. Lee's behalf—i.e., as his representative—because Mr. Lee did not have time to sign the documents himself. *See* Mem. from Thomas Gilgunn to Maureen Flannery of 3/13/00, Conf. R. Doc. 29, at 8 ("Verification Rep."). Mr. Lee confirmed that he considered Mr. Wei his "agent." *Id.* at 10. All of the evidence indicates that in setting up the joint venture, Mr. Wei was acting at Mr. Lee's direction. There is no indication that Mr. Wei had an ownership interest in NNL, which was a joint venture between Louisiana Packing, a U.S. importer and reseller of crawfish, and YFF, a Chinese-owned company.

Likewise, the court does not agree that the presence of Mr. Wei's name on NNL's business license is *ipso facto* proof of his control over NNL. Although Mr. Wei's name appears on the business license, the evidence nevertheless does not support Commerce's conclusion that Mr. Wei had the potential to exercise control over NNL. Rather, the evidence tends to show that Mr. Wei's name appears on NNL's business license because Mr. Wei signed the joint venture contract as Mr. Lee's agent. *See* Verification Rep. at 8.

Next, Commerce relies upon the presence of Mr. Wei's approval stamp or "chop" (the equivalent of a signature in the United States) on various export documents and invoices as "[e]vidence of Mr. Wei's potential to influence, control or manipulate Ningbo Nanlian's U.S. sales efforts during the POR." Remand Results at 12. Commerce also

points out that Mr. Wei represented NNL at verification, stating that "Mr. Wei's preparation and approval of 'various' sales and export documents, and his full participation in the verification of Ningbo Nanlian, constitute further evidence that Mr. Wei was operationally in a position to exercise restraint or direction over Ningbo Nanlian." *Id.*

Again, the evidence cited is not in any way probative of the facts Commerce hopes to establish. First, as to Mr. Wei's stamp of approval on export documents and invoices constituting proof of his potential to control NNL, these tasks are merely administrative, and were performed at Mr. Lee's request, so that Mr. Lee would know that Mr. Wei had prepared the documents, as the other NNL employees were unfamiliar with the shipping paperwork. *See* Verification Rep. at 8. In addition, Mr. Wei worked only on NNL's first few shipments to the United States. *See id.* After that, Mr. Wei stated, NNL employees grew more competent in handling this paperwork, and his services were no longer needed. *See id.* The court is not convinced that Mr. Wei's activities rise to the level of exercising restraint or direction over NNL using the substantial evidence standard. Mr. Wei's activities consisted of approving and stamping routine paperwork, not controlling the company's prices or export decisions. *See* Conf. R. Doc. 32, Ex. 3, Lee Aff.

Finally, Mr. Wei's presence at NNL's verification is not substantial evidence that Mr. Wei was in a position to exert control over NNL. Commerce maintains that "Mr. Wei also represented Ningbo Nanlian at . . . verification, and fully participated in the verification process. . . . [Mr. Wei's] full participation in the verification of Ningbo Nanlian[ ] constitute[s] further evidence that Mr. Wei was operationally in a position to exercise restraint or direction over Ningbo Nanlian." Remand Results at 12. However, Mr. Wei's presence at verification was *specifically requested* by Commerce. *See* Letter from Commerce to Arent Fox of 2/23/00, Conf. R. Doc. 176, at 3 ("We will discuss Ningbo Nanlian's February 17, 2000 response with Ningbo Nanlian officials and with Mr. Wei. Please make certain that Mr. Wei is available for this portion of the verification."). Moreover, regardless of whether Mr. Wei's presence at verification was specifically requested or not, his presence and participation, without more, simply does not support the conclusion that Mr. Wei was in a position to exert control over NNL. In order to demonstrate control, Commerce must present evidence showing that Mr. Wei, by virtue of his activities with respect to NNL, would have been in a position to exert "restraint or direction" over the company. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While Commerce is to weigh the evidence and may draw reasonable inferences therefrom, the existence of substantial evidence is determined nonetheless "by considering the record as a

whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar*, 744 F.2d at 1562). Taken as a whole, the court finds that substantial evidence does not support Commerce's contention that Mr. Wei's activities for NNL gave him the potential for control of that company. The court will now examine the nature of Mr. Wei's relationship with HFTC5.

b. Mr. Wei's Relationship with HFTC5

The parties do not dispute the substance of Mr. Wei's activities for HFTC5 during the POR. *See* Comments on Def.'s Resp. at 14. During that time, Mr. Wei acted as HFTC5's representative and identified himself as the company's "assistant to the general manager." *See* Verification Rep. at 7. According to its organizational chart, HFTC5 employed three Vice Managers, all of whom served under one General Manager, the highest-level manager in the company. *See* HFTC5's Sec. A Resp., Ex.1. Mr. Wei discussed, negotiated, and signed sales contracts between HFTC5 and other companies, and corresponded with the United States Customs Service ("Customs")[12] on HFTC5's behalf. Remand Results at 15–16. Mr. Wei was paid by HFTC5 for his work. *Id*. at 16.

Because HFTC5 did not participate in verification, Commerce claims that it

> never had the opportunity to establish the accuracy of HFTC5's claims that Mr. Wei was not a manager, or that he did not have the potential to exercise restraint or direction over HFTC5." Nevertheless, . . . evidence on the record demonstrates that Mr. Wei was the vice general manager of HFTC5 during the POR (and was therefore in a position to exercise restraint or direction over HFTC5).

Id. at 18. Although HFTC5 did not participate at verification, Mr. Wei did. Mr. Wei stated at verification that the general manager of HFTC5 sought his assistance because Mr. Wei "was familiar with the crawfish business, spoke English, and had contacts with many of HFTC5's U.S. customers." Verification Rep. at 6. Mr. Wei's contacts with HFTC5's customers were "[u]pon HFTC5's request," and his correspondence with Customs was "at the request of the general manager [of] HFTC5." *Id*. Therefore, it does not appear that Mr. Wei was in a position to take any independent actions with respect to HFTC5, or otherwise had the potential to exercise restraint or direction over the company. Moreover, Mr. Wei stated that he used the "Vice General Manager" title in order to gain credibility with Cus-

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[12] Effective March 1, 2003, the Customs Service was renamed the Bureau of Customs and Border Protection. *See* Reorganization Plan Modification for the Dep't of Homeland Security, H.R Doc. 108–32, at 4 (2003).

toms. *See* Conf. R. Doc. 32, Ex. 1, Wei Aff. Although Mr. Wei held himself out as the "Vice General Manager" of HFTC5 on numerous occasions during the POR, the court finds no evidence on the record to indicate that the use of this title actually conferred upon Mr. Wei the potential to exercise control over HFTC5. In addition, Commerce cited no evidence tending to indicate that Mr. Wei was in a position to determine that HFTC5 should direct exports to take advantage of NNL's lower rate. Finally, Commerce at no point stated that it found Mr. Wei's testimony to be either incredible or evasive.[13]

In sum, Commerce has not provided substantial evidence to show that Mr. Wei was in a position of control with respect to either company, let alone both companies. Rather, the evidence tends to show that Mr. Lee, not Mr. Wei, was in a position to exert control over NNL, and that Mr. Lee directed all of Mr. Wei's activities at NNL. There is no evidence, however, to indicate that Mr. Lee was in a like position with HFTC5. Because neither Mr. Wei nor Mr. Lee had the potential for control at *both* companies, the statute is not satisfied, since the statutory definition of affiliation requires that "two or more" companies be "controlled by, or under common control with, any person." 19 U.S.C. § 1677(33).[14] Moreover, Commerce provided no evidence to support its contention that HFTC5 had control over NNL as a result of Mr. Wei's activities. *See* Remand Results at 7–8. For these reasons, the court finds that the activities of Mr. Wei are

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[13] The court's review of the record yielded only two instances in which Mr. Wei or his testimony could be called into question. First, Commerce cited Mr. Wei's behavior in failing to produce bank records for any payments he received from NNL or HFTC5. *See* Verification Rep. at 1. As for Mr. Wei's testimony, Commerce stated with respect to his relationship with NNL, "Mr. Wei initially stated that he did not have a relationship with Ningbo. However, Mr. Wei later revealed that Mr. Lee asked him to help set up Ningbo in 1998." *Id.* at 7. Taken as a whole, however, the record indicates that Commerce considered Mr. Wei's testimony to be truthful, and at no time did Commerce state otherwise.

[14] Title 19 C.F.R. § 351.102(b) provides the criteria for deciding whether "control" exists in a market economy setting. The factors include, *inter alia*, corporate or family groupings, franchise or joint venture agreements, debt financing, and close supplier relationships. *See, e.g., New World Pasta Co. v. United States*, 28 CIT ____ , ____ , slip op. 04–18 at 12 (Mar. 1, 2004) (common control found where one company's major shareholders included a sister and sister-in-law of a second company's major shareholder); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 CIT 804 (1999) (not reported in the Federal Supplement) (a combination of control factors contributed to the finding of affiliation, such as Ta Chen's possession of a signature stamp for the disbursements of a second company, Sun; Ta Chen's unlimited monitoring of Sun's accounts payable, accounts receivable, and inventory; and the existence of a debt financing agreement between Ta Chen and Sun). Although "[t]he traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm 'operationally in a position to exercise restraint or direction' over another even in the absence of an equity relationship[,] . . . equity ownership remains a highly relevant consideration in determining whether parties are affiliated through common control. . . ." *Corus Staal BV v. United States*, 27 CIT ____ , ____ , 259 F. Supp. 2d 1253, 1266 (2003) (internal citation omitted); *see also China Steel*, slip op. 04–6 at 8 (substantial control was found based on five factors, including acquisition by China Steel of a significant percentage of another company's stock).

not sufficient to demonstrate control such that the two companies should be collapsed.

c. Temporal Aspects of the Control Relationship

In connection with Mr. Wei's activities, Commerce must also consider other matters, pursuant to 19 C.F.R. § 351.102(b), in deciding whether "control" exists. Among them is the caveat, "The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control." 19 C.F.R. § 351.102(b).

In *Hontex I*, the court interpreted Commerce's regulation regarding the temporal aspects of a control relationship "to mean that Commerce must weigh the nature of entities' contacts over time, and must determine how such contacts potentially impact each entity's business decisions. Sporadic or isolated contacts between entities, absent significant impact, would be less likely to lead to a finding of control." *Hontex I*, 27 CIT at ___ , 248 F. Supp. 2d at 1344 n.17. On remand, Commerce provided a time line to show the overlap in Mr. Wei's activities for both companies in order to support its contention that Mr. Wei acted for NNL and HFTC5 simultaneously and repeatedly. *See* Remand Results at 27–29. Regarding the time line, Commerce stated:

> In sum, far from providing "occasional" assistance with translating documents and using his English skills, as Mr. Lee claimed Mr. Wei did, the fact remains that record evidence demonstrates that Mr. Wei served as a Vice General Manager for both Ningbo Nanlian and HFTC5 in overlapping periods during the POR and contributed significant time and efforts to both companies.

Id. at 30.

The time line itself, however, does not support these conclusions. Although it is true that Mr. Wei was employed by both NNL and HFTC5 during the same period of time, merely demonstrating that the companies shared an employee, without more, is not sufficient to demonstrate control. *See Hontex I*, 27 CIT at ___ , 248 F. Supp. 2d at 1350. Commerce must also show that the companies' contacts through Mr. Wei were substantial enough to warrant a finding of control. *See id*. at ___ , 248 F. Supp. 2d at 1344 n.17. Here, Commerce's time line indicates that, from March 1997 through at least October 1997, Mr. Wei was an employee of HFTC5. *See* Remand Results at 27. After Mr. Wei's resignation on October 26, 1997, he continued to perform work for HFTC5. *Id*. On December 15, 1997, HFTC5 paid Mr. Wei for work completed from October 27, 1997, through December 31, 1997. *Id*. at 28.

On January 21, 1998, Mr. Wei invited several representatives of one of HFTC5's customers to visit HFTC5 in the coming months to

discuss the frozen crawfish business. Two days later, on January 23, 1998, while still performing work for HFTC5, Mr. Wei was identified as Vice Chairman and Vice General Manager on a business license issued to NNL. *Id*. at 28. From March 4, 1998, through November 25, 1998, Mr. Wei continued to perform activities for HFTC5, including contacting Customs on HFTC5's behalf. During a five-month overlapping period, from April 1, 1998, through August 31, 1998, Mr. Wei was paid by Mr. Lee for work completed on behalf of NNL.

Thus, from January 23, 1998, through August 31, 1998, Mr. Wei performed work for both HFTC5 and NNL. During this time, Mr. Wei was identified, or identified himself, as the "Vice General Manager" for both companies. Based on this representation, Commerce urges the court to find that Mr. Wei actually served as the Vice General Manager for both companies,[15] and was therefore in a position to exert control over both of them.

The court finds that regardless of Mr. Wei's job title, his activities for each company were very different, and in neither case do his activities constitute substantial evidence for a finding of control. Thus, Commerce's inference is refuted by the actual evidence. The vast majority of Mr. Wei's activities during NNL's POR were for HFTC5. His duties included writing letters, contacting U.S. customers, signing sales documents, and attending trade fairs on behalf of HFTC5. Remand Results at 27. However, after his resignation from HFTC5 in October 1997—before NNL's POR began—Mr. Wei was no longer a day-to-day employee of HFTC5. *See* Verification Rep. at 6 ("Mr. Wei explained that the general manager of HFTC5 would *sometimes* contact him for assistance because he was familiar with the crawfish business, spoke English, and had contacts with many of HFTC5's U.S. customers.") (emphasis added). Rather, his work for the company became consultative in nature, as evidenced by the fact that he was under no contract with HFTC5 and was not paid a salary.[16] *See id*. at 7 ("[Mr. Wei] stated that he considered himself to be a 'consultant' to HFTC5 and that he still performs services for them *periodically*.") (emphasis added). Thus, Mr. Wei performed work for HFTC5 only intermittently, upon request.

During this same period, Mr. Wei's activities at NNL consisted solely of stamping his name on export documents for NNL's first few shipments to the United States, since none of the individuals working for NNL had any experience in exporting the product from

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[15] While he was identified in various places as the Vice General Manager for both companies, it is beyond dispute that Mr. Wei resigned from HFTC5 on October 26, 1997. *See* Comments on Def.'s Resp. at 14; Remand Results at 14.

[16] Mr. Wei stated at verification that he was not on HFTC5's payroll after his resignation in October 1997. *See* Verification Rep. at 5. After his resignation, HFTC5 paid Mr. Wei two lump-sum cash payments, one in November 1997 and the other in November 1998. *See id*. at 9.

China. *See* Verification Rep. at 8. Mr. Wei stamped the documents with his name so that when Mr. Lee received them, he would know that Mr. Wei had prepared them. *See id.* Mr. Wei stated that he stopped working for Mr. Lee after NNL's first few shipments. *Id.* at 9. He also indicated that helping to set up the joint venture that formed NNL and stamping the export documents "were the only services that he performed with regard to Ningbo." *Id.* at 8.

For his part, Mr. Lee described Mr. Wei as his agent, and indicated that although he had wanted to make Mr. Wei a full-time employee of NNL, Mr. Wei declined on the grounds that he did not like Ningbo city and missed his family. *See id.* at 10. Thus, much like his association with HFTC5, Mr. Wei's work for NNL appears to be intermittent, limited to a few instances at Mr. Lee's request, and was by no means day-to-day employment. This is further evidenced by the fact that Mr. Wei declined full-time employment with NNL; only "rarely" performed work for NNL after its first few shipments; had no contract with Mr. Lee, NNL, or any other related company; and was paid, in cash, directly by Mr. Lee, not by NNL or any other company. *See id.* at 8–9. Thus, any authority that Mr. Wei may have had to manipulate prices would have come directly from Mr. Lee, as part-owner of NNL. The potential to *control* NNL remained with Mr. Lee, not Mr. Wei.

Based on the foregoing, the court finds that although Commerce has demonstrated that Mr. Wei performed work for both NNL and HFTC5 for the duration of NNL's POR, "Mr. Wei's mere employment by both NNL and HFTC5 will not be found to justify" a conclusion that Mr. Wei exercised sufficient control over both entities such that they should be collapsed. *Hontex I*, 27 CIT at ___ , 248 F. Supp. 2d at 1350. Moreover, Commerce's time line and Mr. Wei's undisputed verification responses both indicate that Mr. Wei's activities for HFTC5 occurred on an intermittent basis, and that Mr. Wei's activities for NNL—assisting Mr. Lee in setting up the joint venture forming NNL, and stamping the export documents for NNL's first few shipments to the United States—were limited to a few isolated instances. *See* Verification Rep. at 7–8; *see also* Remand Results at 27–29. Indeed, the court is not convinced that substantial evidence supports the conclusion that Mr. Wei was in a position to exercise control over either company. Moreover, Commerce has not presented any substantial evidence to show that Mr. Wei's contacts with the companies "impact[ed] each entities' business decisions." *Id.* at ___ , 248 F. Supp. 2d at 1344 n.17.

d. Close Supplier Relationships

In order to support a finding of control, 19 C.F.R. § 351.102(b) directs Commerce to consider, among other factors, the existence of "close supplier relationships" among the companies under investigation. However, Commerce is precluded from finding control on the

basis of a close supplier relationship "unless the relationship has the potential to impact decisions concerning the . . . pricing[17] . . . of the subject merchandise. . . ." 19 C.F.R. § 351.102(b); *see also China Steel Corp. v. United States*, 28 CIT ___ , ___ , slip op. 04–6 at 15 (Jan. 26, 2004). A close supplier relationship is one "in which the supplier or buyer becomes reliant upon the other." *Corus Staal*, 27 CIT at ___ , 259 F. Supp. 2d at 1266.

In a market economy context, such relationships "may constitute sufficient control to satisfy 19 U.S.C. § 1677(33)(G)," though the term "close supplier relationship" is not specifically defined. *Mitsubishi Heavy Indus., Ltd. v. United States*, 23 CIT 326, 333, 54 F. Supp. 2d 1183, 1190 (1999) (citing Statement of Administrative Action, H.R. Doc. No. 103–316, 103d Cong., 2nd Sess., (1994), at 4174–4175, *reprinted in* Uruguay Round Agreements Act, Legislative History, Vol. VI, at 838 ("SAA")). Where "Congress leaves a term undefined, it is within Commerce's discretion to develop the meaning of the term on a case-by-case basis so long as its application in a given case is reasonable." *Id.* at 333, 54 F. Supp. 2d at 1190–91.

To that end, in *Hontex I* the court instructed Commerce to "detail the manner in which NNL and HFTC5 were 'little more than separate distribution channels from the same producer to the same customer'[18] during NNL's POR." *Hontex I*, 27 CIT at ___ , 248 F. Supp. 2d at 1350 (citation omitted from original). In the Remand Results, Commerce "conclude[d] that [Company A] and [Company B][19] (the joint venture owners of Ningbo Nanlian) had the ability to control HFTC5 and Ningbo Nanlian by virtue of their positions as supplier and U.S. importer for each entity." Remand Results at 20. Thus, although Commerce did not employ the "separate distribution channels" language of the remand instructions in *Hontex I*, the court understands Commerce's argument with respect to Companies A and B to be in response to those instructions. In other words, Commerce appears to argue that NNL and HFTC5 were merely separate distribution channels from the same producer (Company A) through the same U.S. importer (Company B) during NNL's POR.

In 1997, HFTC5 purchased 100% of the crawfish produced by Company A. Also in 1997, 45% of the crawfish tail meat sold in the United States by HFTC5 was supplied by Company A, and sold

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[17] Because NME exporters are involved here, Commerce expanded the market-economy inquiry regarding the potential to impact pricing to also include the potential to manipulate NME exporters' export decisions.

[18] This language appears to be echoed by the language employed in the Remand Results, where Commerce stated that "the Department must be prepared to address a situation in which one exporter that chooses not to cooperate, and is therefore assigned a high adverse facts available rate, *seeks to channel exports through another exporter* with a lower rate over which it has control." Remand Results at 7–8 (emphasis added).

[19] The court will refer to YFF and Louisiana Packing as Company A and Company B, respectively, for ease of reading while maintaining confidentiality.

through Company B. The following year, in 1998, NNL purchased 100% of the crawfish produced by Company A, and made 100% of its U.S. sales through Company B.[20] Commerce further maintains that "[t]he relationships between these entities were long-term, covering entire production seasons. HFTC5 and Ningbo Nanlian were also both exporting to the United States during that portion of the POR applicable to both entities (i.e., April 1, 1998 to August 31, 1998)." *Id.*

Commerce's main argument, then, is that because HFTC5 and NNL each purchased their crawfish, in 1997 and 1998, respectively, exclusively from Company A, Company A had the potential to impact both companies' business decisions, an essential element of control. *See* Remand Results at 20 ("[Commerce] also concludes that [Company A and Company B] (the joint venture owners of Ningbo Nanlian) had the ability to control HFTC5 and Ningbo Nanlian by virtue of their positions as supplier and U.S. importer for each entity."[21] The court agrees that Commerce could justifiably infer that Company A and Company B had the potential to impact business decisions at NNL. Company A and Company B jointly owned NNL, and were NNL's exclusive supplier and importer, respectively, to the United States in 1998. There is also evidence on the record that one individual, Mr. Lee, was both the owner of Company B and a part-owner of NNL.

With respect to HFTC5, however, the court finds that Commerce has not sufficiently demonstrated how Company A and Company B would have the ability to influence the business decisions of that company. The one connection that Commerce cites—that Company A was a major supplier to HFTC5—is not sufficient. This is particularly true in 1998 when HFTC5 sold none of its crawfish through Company B and Company A supplied none of its product to HFTC5. The court finds *Ta Chen* instructive on this point. In *Ta Chen*, Commerce concluded that Ta Chen and another company, Sun, had a

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[20] Based on this evidence, Commerce stated:

> Thus, YFF, HFTC5, and Louisiana Packing were reliant upon one another for a major portion of HFTC5's U.S. sales during the POR. Furthermore, because during the POR, 100 percent of the crawfish tail meat sold in the United States by Ningbo Nanlian was supplied by YFF and sold through Louisiana Packing, Ningbo Nanlian was reliant upon both YFF and Louisiana Packing for its U.S. sales during the POR.

Remand Results at 21.

[21] Commerce stated:

> Ningbo Nanlian was a joint venture, formed and owned by YFF and Louisiana Packing. Entities that are the founders and owners of a third entity would certainly have the potential to impact business decisions of the third entity. Company A and Company B would have further influence over Ningbo Nanlian by virtue of their roles as Ningbo Nanlian's exclusive supplier and exclusive U.S. importer, respectively. Similarly, Company A and Company B would have the ability to influence the business decisions of HFTC5 (though Company A was a major, but not exclusive, supplier of HFTC5).

Id. at 22.

close supplier relationship because Sun distributed only Ta Chen products in the United States. *See* 23 CIT at 811. Ta Chen argued that although Sun bought all of its product from Ta Chen, it was at liberty to buy from other producers as well, and in any event "Commerce recognizes that [exclusive] contracts are 'common commercial arrangements,' and that affiliated party status does not necessarily arise from a customer buying all of its product from one supplier." *Id.* (internal citation omitted).

The situation in *Ta Chen* is useful when examining the facts before the court. Here, Commerce claimed that a close supplier relationship existed between NNL and HFTC5, since Company A sold 100% of its crawfish to HFTC5 in 1997, and sold 100% of its crawfish to NNL the following year. As in *Ta Chen*, however, there is no evidence to suggest that HFTC5 had any difficulty obtaining crawfish from other suppliers in 1998, the year in which Company A sent all of its output to NNL. Nor is there any evidence that Company A was HFTC5's exclusive supplier; to the contrary, Commerce acknowledged that Company A was a major, but *not* exclusive, supplier of HFTC5. *See* Remand Results at 22. Moreover, even where there are exclusive sales contracts, Commerce has found that insufficient for an affiliation finding. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea*, 62 Fed. Reg. 18,404, 18,441 (ITA Apr. 15, 1997) (final results) ("The arrangements [respondent] has entered into with its home-market distributors are simply exclusive sales contracts which are a common commercial arrangement all over the world. These arrangements are typically made at arm's length and do not normally indicate control of one party over the other.").

Moreover, Company A sold 100% of its crawfish to HFTC5 in 1997, the year *before* NNL was formed. Company A then sold 100% of its crawfish to NNL the following year. It is therefore difficult to see how Company A could be in a position to control HFTC5 in 1998, when it sold none of its product to HFTC5 in that year. And, because NNL did not yet exist in 1997, the year that Company A sold all of its product to HFTC5, there was no temporal overlap between Company A's sales to HFTC5 and its sales to NNL.

e. Mr. Lee/Company B and NNL/HFTC5

Commerce further contends that Mr. Lee, as both the sole owner of Company B and 44% owner of NNL, was "legally or operationally in a position to exercise restraint or direction over the operations of both NNL and HFTC5." Remand Results at 22. Commerce stated that Mr. Lee

> had the ability to exercise direction over NNL, as evidenced by the fact that Mr. Lee himself directed Mr. Wei to set up the Ningbo Nanlian joint venture, and work on the company's crawfish tail meat export sales efforts during the POR, and by

> the fact that Mr. Lee participated in the Ningbo Nanlian verification as a representative and co-owner of Ningbo Nanlian, answering questions and providing explanations on . . . Ningbo Nanlian's behalf.

Id. at 22–23. With respect to Mr. Lee's involvement with HFTC5, Commerce maintains that

> Mr. Lee had actually been paying the antidumping legal fees of HFTC5. It stands to reason that, in paying HFTC5's legal fees, Mr. Lee was taking some degree of responsibility for HFTC5's U.S. sales activities during the POR. After all, antidumping legal fees are a business expense attributable to HFTC5's U.S. sales of crawfish tail meat. It is therefore also reasonable to infer that Mr. Lee had some actual–or at the very least, potential–control over HFTC5's U.S. sales activities during the POR.

Id. at 23.

The court agrees that the evidence tends to justify Commerce's inference that Mr. Lee, as a founder and co-owner of NNL, likely had the potential to exercise control over NNL. However, the court is not convinced that Mr. Lee's payment of antidumping for HFTC5 gives rise to an inference that Mr. Lee had the potential to control HFTC5's U.S. sales activities during the POR. Commerce's use of language such as "it stands to reason" does not justify its conclusions in the absence of substantial evidence. "Conjectures are not facts and cannot constitute substantial evidence." *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1229, 1240 (2003); *see also China Nat'l Arts & Crafts Imp. and Exp. Corp. v. United States*, 15 CIT 417, 424, 771 F. Supp. 407, 413 (1991) ("Guesswork is no substitute for substantial evidence in justifying decisions."). Based on the evidence, the court finds that merely paying HFTC5's legal fees does not demonstrate that Mr. Lee was in a position to exercise control over HFTC5.

f. Cooperation

Although Mr. Wei described the two companies as competitors, Commerce maintains that they were in fact cooperative. As evidence of this cooperation, Commerce stated that

> throughout the administrative review, HFTC5 provided Ningbo Nanlian with numerous documents (several of which contained significant quantities of business proprietary information), which Ningbo Nanlian then submitted to the Department on its own behalf. In fact, one of Ningbo Nanlian's responses contains several proprietary documents of HFTC5 that actually reveal HFTC5's U.S. customers.

Remand Results at 23.

However, Commerce's Verification Agenda reveals that Commerce specifically asked NNL to provide information about HFTC5. *See* Letter from Commerce to Arent Fox of 2/23/00, Pub. R. Doc. 176, Attach. at 2 (indicating that NNL would be required to present at verification "[a]ny additional correspondence that Mr. Wei has been able to obtain from HFTC (5) in addition to that provided in your February 17, 2000 response."). Thus, NNL requested the documents in question from HFTC5 in order to comply with Commerce's request. With respect to Commerce's request, the court in *Hontex I* stated:

> Specifically, Commerce asked that NNL provide information about payments Mr. Wei received from HFTC5 beginning in June of 1997, as well as information about his business relationship with HFTC5, the services he provided to HFTC5, and the nature of his involvement with HFTC5's customers following his "resignation" from that company on October 26, 1997. NNL timely submitted responses to this supplemental questionnaire.

Hontex I, 27 CIT at ___ , 248 F. Supp. 2d at 1327 (internal citation omitted). In the Verification Report, Commerce noted that "Mr. Wei contacted HFTC5 and requested various documents but that HFTC5 only sometimes complied with his requests." Verification Rep. at 6 n.4. The fact that Mr. Wei, on behalf of NNL, was successful in obtaining some documentation from HFTC5 is not sufficient to support Commerce's conclusion that this constitutes "evidence of cooperation between the two entities that should be considered" in determining whether the two companies were under common control. Remand Results at 23–24.

2. Significant Potential for Manipulation of Pricing and Export Decisions

In its analysis of whether Mr. Wei had the potential to manipulate pricing and export decisions for NNL and HFTC5, Commerce relied on 19 C.F.R. § 351.401(f)(2)(ii)–(iii), which provide that in identifying "a significant potential for the manipulation of price or production," Commerce may consider

> (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)(2)(ii)–(iii). With respect to these factors, Commerce stated:

> Mr. Wei was a high level managerial employee for both Ningbo Nanlian and HFTC5, who was regularly involved, as the record evidence demonstrates, in the selling and exporting functions of both companies during the same period. Section 351.401(f)(2)(iii) considers the very factual situation at issue in this case as one that would lead to a significant potential for manipulation of pricing and export decisions. . . . Mr. Wei's positions at both companies as a high level manager would naturally result in Mr. Wei having access to the business plans for both companies, and the business contacts for both companies, as well as having the ability to communicate information between the two companies that would normally be kept confidential between two businesses that consider themselves competitors.

Remand Results at 30–31.

As stated above, Commerce asserts that Mr. Wei was "regularly involved" in the selling and exporting functions of NNL. However, the record evidence indicates that the extent of Mr. Wei's "selling and exporting" functions consisted of approving and stamping routine export documents, not controlling the company's prices or export decisions. *See* Conf. R. Doc. 32, Ex. 3, Lee Aff. Even if approving and stamping the export paperwork did put Mr. Wei in a position to manipulate prices at NNL, potential for manipulation must not be confused with potential for control. With respect to NNL, Mr. Wei would have been merely the *instrument* for manipulation; control rested with Mr. Lee, at whose request all of Mr. Wei's activities were conducted. Thus, regardless of whether Mr. Wei had the ability to manipulate prices at NNL, the potential for ultimate control of that company would rest with the part-owner, Mr. Lee, not Mr. Wei.

Likewise, Mr. Wei's activities at HFTC5 consisted of writing letters, contacting U.S. customers, signing sales documents, and attending trade fairs on behalf of HFTC5. *See* Remand Results at 27. By signing sales documents, Mr. Wei may have been in a position to manipulate prices at HFTC5. However, Mr. Wei stated at verification that all of HFTC5's salespeople had the authority to sign sales contracts. *See* Verification Rep. at 6. More importantly, all of Mr. Wei's activities were "upon HFTC5's request," and under the direction of that company's general manager. *Id*. Thus, Mr. Wei would not have been in a position to exert control over HFTC5.

Pursuant to 19 C.F.R. § 351.401(f)(2)(iii), Commerce also considered "significant transactions" between NNL and HFTC5 in determining whether significant potential for manipulation existed. Commerce stated:

> In this case, NNL's owner, [Company A], regularly sold its crawfish to HFTC5. HFTC5, in turn, sold its crawfish to [Company B], Ningbo Nanlian's other owner. However, in the year

> after the antidumping duty order was issued, Company A shifted all of its output from HFTC5, where Mr. Wei was a high-level manager, to Ningbo Nanlian, a joint venture between Company A and Company B, which was set up by Mr. Wei. At that precise time, Company B switched its imports from HFTC5 and became Ningbo Nanlian's exclusive importer.

Remand Results at 32–33 (internal citations omitted). In other words, both of NNL's owners had transacted business with HFTC5 in 1997, the year before NNL was formed. After NNL was formed in 1998, however, its owners dealt exclusively with their own creation, NNL, instead of HFTC5. At no time does Commerce claim that NNL's owners transacted business with both NNL and HFTC5 simultaneously. Thus, the circumstance that NNL's owners dealt with HFTC5 *before* NNL's formation, then dealt exclusively with NNL after its formation, does not support Commerce's conclusion that there were "significant transactions between the affiliated producers."

CONCLUSION

The court finds that Commerce has not provided substantial evidence to support its conclusion that NNL and HFTC5 were affiliated and should therefore be collapsed. On remand, Commerce shall revisit its finding with respect to affiliation. If it should conclude that its findings on remand with respect to affiliation are justified, it shall explain specifically and in detail, with reference to specific documents and page numbers in the record, what person or entity was in control of each company (NNL and HFTC5) during particular time periods, as well as what person or entity, if any, exercised common control over the companies. Commerce shall further state precisely how control was exercised, and the basis for its conclusions. Commerce shall also explain in detail, with reference to specific documents and page numbers in the record, the following:

> (1) In light of the court's findings with respect to the nature of Mr. Wei's activities for NNL and HFTC5, what evidence, if any, demonstrates how Mr. Wei's involvement with each company constituted the potential to control both entities; and how his simultaneous employment by both companies justified the conclusion that the companies' contacts through Mr. Wei were substantial enough to warrant a finding of control by Mr. Wei;
>
> (2) How Mr. Lee's payment of antidumping legal fees for HFTC5 justified the finding that Mr. Lee was legally or operationally in a position to exercise restraint or direction over the operations of HFTC5;

(3) What evidence, if any, supports the conclusion that NNL and HFTC5 cooperated with one another;

(4) What evidence, if any, supports the conclusion that Mr. Wei had the "significant potential" for manipulation of pricing and export decisions of both companies; and

(5) What evidence, if any, supports the conclusion that Company A and Company B had the potential to exert control over HFTC5 in both 1997 and 1998. Commere shall consider that in order to support a finding of control on the basis of a close supplier relationship, it must provide evidence to show how Company A and Company B were in a position to impact pricing, exports, or other business decisions at HFTC5.

In particular, Commerce must state not only the evidence relied upon and the conclusion reached, but also the reasoning that led Commerce to its conclusion and a detailed explanation of any inferences drawn. If Commerce finds that the record evidence does not support its conclusions, Commerce shall reconsider whether its reliance on such evidence is well-founded.

Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

Slip Op. 04–81

UNITED STATES, Plaintiff, v. ITT INDUSTRIES, INC., d/b/a ITT JABSCO, Defendant.

Before: Pogue, Judge
Consol. Court No. 97–01777

[Plaintiff's motion for summary judgment granted in part, denied in part. Defendant's motion denied. Trial ordered.]

Decided: July 8, 2004

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, *Mikki Graves Walser*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *AnnMarie R. Highsmith*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, *Edward N. Maurer*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Plaintiff.

Barnes, Richardson & Colburn (Rufus E. Jarman, Jr., Diane A. MacDonald, Helena D. Sullivan) for Defendant.

OPINION

Pogue, Judge: Plaintiff United States Bureau of Customs and Border Protection[1] moves for summary judgment pursuant to USCIT Rule 56, seeking payment of a civil penalty, together with pre-judgment and post-judgment interest. Defendant ITT Industries, Inc., d/b/a ITT Jabsco ("Jabsco"), opposes Plaintiff's motion and moves for summary judgment, asserting that because Customs improperly calculated the actual loss of antidumping duties Jabsco owed, the agency also inappropriately assessed the civil penalty. Accordingly, Jabsco seeks a refund of excess antidumping duties paid with interest, and either a reassessment of the penalty owed based upon the correct calculation of antidumping duties or a rescindment of the penalty demand. Jurisdiction is predicated on 28 U.S.C. § 1581(a) (1988) and 28 U.S.C. § 1583 (1988).[2] For the reasons dis-

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[2] This case arises from the Court's consolidation of two separate actions: a denied protest action, Court No. 97–00379, and a penalty action, Court No. 97–01777. The former action, filed by Defendant, proposed jurisdiction under 28 U.S.C. § 1581(a) or (i), *infra*, while the latter, filed by Plaintiff, proposed jurisdiction under 28 U.S.C. § 1582, the statutory provision granting this Court jurisdiction to hear civil penalty claims.

Title 28 U.S.C. § 1581(a) states that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a). Subsection (i) contains the Court's residual jurisdiction, and provides, in part, that:

> the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for—
>
> . . .
>
> (2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1) – (3) of this subsection and subsections (a) – (h) of this section.

28 U.S.C. § 1581(i). Section 1583 states in relevant part that:

> [i]n any civil action in the Court of International Trade, the court shall have exclusive jurisdiction to render judgment upon any counterclaim . . . if (1) such claim or action involves the imported merchandise that is the subject matter of such civil action, or (2) such claim or action is to recover upon . . . customs duties relating to such merchandise.

28 U.S.C. § 1583

Jabsco argues that the Court has independent jurisdiction over its claim for a refund of duties under 28 U.S.C. § 1581(a), or in the alternative, § 1581(i). Def.'s Mem. Supp. Mot. Summ. J. at 6 ("Def.'s Mem."). Plaintiff, in response, concedes jurisdiction, but nevertheless, contends that the Court lacks independent jurisdiction over the denied protest action because Jabsco failed to satisfy the statutory prerequisites for filing an independent action under either subsection (a) or (i) of 28 U.S.C. § 1581. *See* Pl.'s Resp. to Def. Mot. Summ. J. at 6–7 ("Pl.'s Resp."). The Court does not reach these arguments here, as it has previously considered and decided the parties' jurisdictional dispute. Order to Show Cause and Memorandum (May 30, 2001).

cussed below, the Court grants Plaintiff's motion for summary judgment in part, denies its motion in part, and denies Jabsco's motion for summary judgment. The Court orders trial on the penalty amount.

Background

The Department of Commerce issues antidumping duty orders for imported merchandise that is sold in the United States below its fair market value and materially injures or threatens to injure a domestic industry. *See* 19 U.S.C. § 1673d. These orders impose antidumping duties reflecting the difference between the foreign exporter's sales price and the domestic price of the subject merchandise. *See* 19 U.S.C. § 1673e(a)(1). Upon the entry of merchandise covered by an antidumping order, an importer is required to make a deposit of estimated duties. *See* 19 U.S.C. § 1673e(a)(3).

The actual liquidation[3] of entries subject to an antidumping order may occur years after importation. Before final liquidation, any interested party may request an administrative review of the antidumping order. *See* 19 U.S.C. § 1675. The final results of such a review serve as the basis for the actual assessment of antidumping duties on entries of merchandise covered by Commerce's determination. 19 U.S.C. § 1675(a)(2). Commerce publishes the final results of an administrative review in the Federal Register, and later issues liquidation instructions to Customs directing that agency to collect antidumping duties at the rates determined in the review proceeding. *Id.*; 19 C.F.R. § 353.53a(c)(8); *see Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ("Commerce's liquidation instructions direct Customs to implement the final results of administrative reviews."); *J.S. Stone, Inc. v. United States*, 27 CIT ___ , , 297 F. Supp. 2d 1333, 1338 (2003) ("Commerce issues its final results [of the administrative review] and directs Customs to collect the appropriate antidumping duties."). If an interested party fails to request an administrative review, Commerce generally directs Customs to liquidate the merchandise at the cash deposit rates in effect at the time the merchandise entered the United States, which rate is published in the Federal Register as the "all others" cash deposit rate, *see J.S. Stone, Inc.*, 27 CIT at ___ , 297 F. Supp. 2d at 1344 (internal citation omitted); 19 C.F.R. § 353.53a(d)(1),[4] unless that

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[3] Liquidation is defined as "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1 (1988).

[4] For the full text of 19 C.F.R. § 353.53a(d)(1), *see infra* p. 31.

Effective April 27, 1989, Commerce's regulations were revised to conform to the provisions of the Trade and Tariff Act of 1984. *See Antidumping Duties*, 54 Fed. Reg. 12,742, 12,742 (Dep't Commerce Mar. 28, 1989) (final rule); *Antidumping Duties*, 54 Fed. Reg. 13,294, 13,294 (Dep't Commerce Mar. 31, 1989) (correcting the effective date of the final rule issued three days earlier). The revisions reorganized the regulations, renumbering this

party received an individual rate in the original investigation. *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954, 23,959 (Dep't Commerce May 6, 2003) (notice of policy concerning assessment of antidumping duties) ("*Assessment Notice*").

Defendant Jabsco, a division of ITT Corporation, manufactured and sold marine and other liquid pumps, which incorporated cylindrical roller bearings and/or radial ball bearings, types of antifriction bearings, in the United States. Jt. Statement Mat'l Facts Not in Dispute, Def.'s Ex. 1 paras. 1–3 ("Jt. Stat.").[5] Jabsco imported through the Port of Los Angeles seventy entries of bearings from a related party in the United Kingdom, ITT Jabsco UK ("Jabsco UK"), between November 1988 and April 1991. *Id.* paras. 5–7. Jabsco UK, which also manufactured and sold marine and other liquid pumps incorporating the same bearing components, purchased the bearings from a division of SKF Ltd. in the United Kingdom. *See id.* paras. 3–4, 6; Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Imp. Specialist Androvich, Dist. Dir. of Customs, Customs, Pl.'s Ex. 2 at 1 (June 5, 1992); Jabsco's Responses to Pl.'s First Interrogatories and Request for Production of Documents Directed to Def., Pl.'s Ex. 1 para. 17(a) ("Jabsco's Inter. Resp."). The bearings, however, were manufactured by SKF companies located in France, Germany, and Italy. *See* Jt. Stat., Def.'s Ex. 1 para. 3; Pl.'s Mem. Supp. Mot. Summ. J. at 3 ("Pl.'s Mem."). Upon receipt, Jabsco UK placed the bearings into its inventory and shipped them to Jabsco as needed. Jabsco's Inter. Resp., Pl.'s Ex. 1 para. 5(a).

Jabsco described the bearings entered between November 1988 and August 1990 as "pump parts" on the Entry Summaries; entries made between September 1990 and April 1991 were either described as "needle roller bearings" or "pump parts." Jt. Stat., Def.'s Ex. 1 paras. 9–10. Customs subsequently liquidated the entries as identified between December 1988 and December 1991, *id.* para. 8, incorrectly classifying the bearings as other parts of pumps for liquids under subheading 8413.91.90 of the Harmonized Tariff Schedule of the

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provision, known as the automatic assessment regulation, to 19 C.F.R. § 353.22(e). *See Antidumping Duties*, 54 Fed. Reg. at 12,756. That provision was again renumbered to its current regulatory provision, 19 C.F.R. § 351.212(c)(1), as of June 18, 1997. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,296, 27,392 (Dep't Commerce May 19, 1997) (final rule) ("*1997 Rule*").

[5] The Court notes that the summary judgment record contains evidence compiled by the parties and attached to their various memoranda. For purposes of clarity, the Court will reference exhibits attached to the parties original motions for summary judgment as such: the respective party name, exhibit and the corresponding exhibit number, followed by the pinpoint page or paragraph reference. Defendant's exhibit attached to its Memorandum of Law in Response to Plaintiff's Motion for Summary Judgment will be referenced as "Def.'s Resp. Ex. 1." Also, Customs' incorporation by reference of an exhibit from a previously filed motion will be cited as "Pl.'s Orig'l Ex. 5d."

United States ("HTSUS"),[6] 19 U.S.C. § 1202, or Item 660.97 of the Tariff Schedules of the United States ("TSUS"), the predecessor classification statute, or as needle roller bearings under subheading 8482.40.00, HTSUS. *See* Jt. Stat., Def.'s Ex. 1 paras. 12–13.[7]

Properly identified at the time of entry, the bearings would have been subject to pending antidumping duty investigations and subsequent orders. *Id.* para. 14. Jabsco neither made any cash deposits of estimated antidumping duties, nor participated in any of Commerce's review proceedings involving the bearings. *Id.* paras. 19–20. Rather, on October 30, 1991, Jabsco voluntarily disclosed to Customs that it had incorrectly identified the seventy bearing entries as "pump parts" or "needle roller bearings" on its Entry Summaries, a violation of 19 U.S.C. § 1592(a).[8] *See* Jt. Stat., Def.'s Ex. 1 paras. 12–13, 46–47; Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir. of Customs, Customs, Pl.'s Ex. 3 at 1–2 (Oct. 30, 1991) ("Prior Disclosure Letter").[9] That letter offered to tender

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[6] The HTSUS became effective on January 1, 1989. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1217, 1988 U.S.C.C.A.N. (102 Stat.) 1107, 1163; *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997).

[7] Merchandise classifiable under subheading 8413.91.90, HTSUS, includes:

8413	Pumps for liquids, whether or not fitted with a measuring device; liquid elevators; part thereof . . . :
. . .	
	Parts:
8413.91	Of pumps:
. . .	
8413.91.90	Other.

Subheading 8413.91.90, HTSUS (1989–91); U.S. Int'l Trade Comm'n Report to Congress and the Pres., *Investigation with Respect to the Operation of the Harmonized System Subtitle of the Omnibus Trade and Competitiveness Act of 1988*, at 10 & n.100 (June 1990) ("*ITC Report*"). Merchandise classifiable under Item 660.97, TSUS, includes:

	Pumps for liquids, whether or not fitted with a measuring devices; . . . and parts thereof:
. . .	
660.07	Other.

Item 660.97, TSUS (1988); *ITC Report* at 7 n. 54. Merchandise classifiable under subheading 8482.40.00, HTSUS, includes:

8482	Ball or roller bearings, and parts thereof:
. . .	
8482.40.00	Needle roller bearings.

Subheading 8482.40.00, HTSUS (1989–91); *ITC Report* at 10 & n.100.

[8] For the full text of 19 U.S.C. § 1592(a), see *infra* p. 23.

[9] Jabsco contends that had it been on notice that its bearings were subject to antidumping duties, among other things, it may have participated in the administrative review pro-

"any" actual lost duties within thirty days of Customs' notification of its calculation of duties. Prior Disclosure Letter, Pl.'s Ex. 3 at 2.

Five days later, Customs notified Jabsco that it was required to pay $36,344.50 in regular customs duties and $681,127.50 in antidumping duties. Jt. Stat., Def.'s Ex. 1 para. 49. Payment was required within thirty days for Jabsco to perfect its "prior disclosure." *Id.*[10] Customs' calculation of such duty amounts was based on the cash deposit rates for estimated antidumping duties and the application of liquidation instructions from Commerce for antifriction bearings subject to antidumping duties at the time Jabsco's bearings en-

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ceedings. Def.'s Mem. at 18 n.4, 29. Jabsco, however, fails to provide any affidavits or other evidence to support its contention. Because Jabsco's contention lacks support on the record, and is therefore mere speculation, the Court does not reach this argument. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998) ("Conclusory allegations, conjecture, and speculation . . . are insufficient to create a genuine issue of fact.") (internal citation omitted); *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001) ("Summary judgment must be granted against a party who has failed to introduce evidence sufficient to establish the existence of an essential element of that party's case, on which the party will bear the burden of proof at trial.") (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Jabsco makes no claim that it was unaware of its errors at the time of the administrative reviews. The Court notes therefore that Jabsco could have participated in the administrative review proceedings, in addition to filing its prior disclosure letter, as the anniversary months for interested parties to initiate an administrative review of Commerce's final results occurred in May 1990 for the first review and May 1991 for the second. *See* 19 C.F.R. § 353.53a(a); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany*, 54 Fed. Reg. 18,992, 18,992 (Dep't Commerce May 3, 1989) (final determinations of sales at less than fair value); *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France*, 54 Fed. Reg. 19,092, 19,092 (Dep't Commerce May 3, 1989) (final determinations of sales at less than fair value); *Antifriction Bearings (Other Than Spherical Plain and Tapered Roller Bearings) and Parts Thereof from Italy; and Spherical Plain Bearings and Parts Thereof, from Italy*, 54 Fed. Reg. 19,096, 19,096 (Dep't Commerce May 3, 1989) (final determinations of sales at less than fair value).

[10] Title 19 C.F.R. § 162.74(a) states that:

> [a] prior disclosure is made if the person concerned discloses the circumstances of a violation (as defined in [19 C.F.R.] § 162.71(e) of this part), in writing to [Customs] before, or without knowledge of, the commencement of a formal investigation of that violation, and makes a tender of any actual loss of duties.

19 C.F.R. § 162.74(a). The phrase "discloses the circumstances of [a] violation" is defined in the regulations at 19 C.F.R. § 162.71(e) and provides:

> (e) *Discloses the circumstances of [a] violation.* When used in [19 C.F.R.] § 162.74(a), the term "discloses the circumstances of the violation" means the act of providing to Customs a written statement which:
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> (1) Identifies the class or kind of merchandise involved in the violation;
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> (2) Identifies the importation included in the disclosure by entry number or by indicating each Customs port of entry and the approximate dates of entry;
>
> (3) Specifies the material false statements or material omissions made; and
>
> (4) Sets forth to the best of the violator's knowledge, the true and accurate information or data which should have been provided in the entry documents, and states that the person will provide any information or data which is unknown at the time of disclosure within [thirty] days of the initial disclosure date or within an extension of the [thirty]-day period as [Customs] may permit in order for the person to obtain the information or data.

19 C.F.R. § 162.71(e).

tered the United States. *Id.* para. 50. The first instructions, dated June 25, 1991, directed Customs to liquidate all entries of bearings during the period November 9, 1988 through April 30, 1990 and assess antidumping duties at the cash deposit rate required at the time of entry, unless the company had requested an administrative review. *Id.* para. 31. Those instructions were corrected on June 9, 1992. As corrected, the instructions ordered Customs to liquidate bearing entries using the "all others" rate if the bearings were exported by original equipment manufacturers ("OEMs") to a related affiliate in the United States and the OEMs had not requested administrative review, but only if the bearings were originally produced by a manufacturer listed in the June 25, 1991 instructions. *Id.* para. 32. The instructions further noted that if the exporter was not an OEM, but the other conditions existed, Customs should continue to suspend all bearing entries. *Id.* The second set of instructions, dated June 10, 1992, repeated the June 25, 1991 and June 9, 1992 instructions, but applied to bearing entries during the period May 1, 1990 through April 30, 1991. *See id.* para. 39.[11] Jabsco subsequently remitted the customs duties on December 18, 1992, but informed Customs that it disagreed with the amount of antidumping duties assessed. *Id.* paras. 51–52.

A year later, on December 22, 1993, Customs informed Jabsco that it had negligently " 'failed to exercise due care in ascertaining or recording the truth of the facts or in ascertaining [its] obligations under Customs laws.' " *Id.* para. 53 (quoting Demand for Duty Statement, Pl.'s Ex. 5 at 3 (Dec. 22, 1993)).[12] Customs further demanded that Jabsco owed $619,515.33 in antidumping duties under 19 U.S.C. § 1592(d),[13] and issued a prepenalty notice in the amount of $217,874.16, the interest on the antidumping duties owed by Jabsco from the dates the bearings entered the United States to the date of the notice. Jt. Stat., Def.'s Ex. 1 paras. 54–55. Jabsco unsuccessfully appealed Customs' calculation of the antidumping duties a month later. *Id.* paras. 56, 58.

Customs subsequently informed Jabsco on August 9, 1996 that it was required to remit the full amount of antidumping duties within fourteen days for Jabsco to perfect its prior disclosure; the letter also stated that Customs would issue a penalty if full payment of those

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[11] The June 25, 1991 and June 9, 1992 instructions applied to bearing entries from Germany, France and Italy. *See* Jt. Stat., Def.'s Ex. 1 paras. 31–32. The June 10, 1992 instructions, however, were formulated into two separate instructions; one instruction, message number 216115 applied only to bearing entries from Germany, while the second, message number 2162114, applied only to bearing entries from France and Italy. *Id.* para. 39. The Court notes that collectively, these three instructions are hereinafter referred to as "Commerce's liquidation instructions," except where otherwise specified.

[12] Jabsco does not dispute its negligence in this case. *E.g.*, Def.'s Mem. at 30 (stating that "Jabsco was no more 'negligent' than Customs").

[13] For the full text of 19 U.S.C. § 1592(d) see *infra* note 19.

duties was not received. Jt. Stat., Def.'s Ex. 1 para. 59. Eleven days later, Jabsco tendered the full amount of antidumping duties owed. *Id*. para. 60.

In January 1997, Customs confirmed that Jabsco had perfected it prior disclosure. *Id*. para. 61. Seven months later, on July 21, 1997, Customs issued a Notice of Penalty to Jabsco in the amount of $109,418.81, the interest on the antidumping duties from the dates the entries were filed to the date of Jabsco's prior disclosure on October 30, 1991. *Id*. para. 62. Jabsco's refusal to pay the penalty assessed sparked this lengthy litigation.

Standard of Review

Pursuant to USCIT Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and 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 judgment as a matter of law." USCIT Rule 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. at 322. "[A] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.' " *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation omitted). The Court credits the nonmovant's evidence and draws all justifiable inferences from that evidence in the nonmovant's favor. *Netscape Communications Corp. v. Konrad*, 295 F.3d 1315, 1319 (Fed. Cir. 2002) (citing *Anderson*, 477 U.S. at 255). The nonmovant's burden to produce specific facts, however, is only triggered after the movant has met its initial burden of making a prima facie showing that the nonmovant cannot prevail at trial. *See Celotex Corp.*, 477 U.S. at 323.

The Court reviews the parties' motions for summary judgment *de novo*, as the instant action was brought under the penalty provisions codified at 19 U.S.C. § 1592. 19 U.S.C. § 1592(e)(1); *see also United States v. Golden Ship Trading Co.*, slip. op. 01–07, at 5 (CIT Jan. 24, 2001) (same); *United States v. Snuggles, Inc.*, 20 CIT 1057, 1058, 937 F. Supp. 923, 925 (1996) (same) (internal citations omitted).

Issues Presented

The Court must decide whether Customs properly calculated Jabsco's civil penalty in the amount of $109,418.81. The Court's determination necessarily turns on whether Customs properly calculated the actual loss of antidumping duties Jabsco owed. The Court will identify the parties' arguments first before addressing the issues presented.

Parties' Arguments

Plaintiff argues that Customs properly calculated the amount of antidumping duties of which the United States was deprived as a result of Jabsco's negligent violation of 19 U.S.C. § 1592(a). Pl.'s Mem. at 13, 24. Plaintiff makes two alternative arguments in support of that contention. First, Plaintiff contends that the "all others" cash deposit rate was the applicable rate because Jabsco and Jabsco UK were OEMs at the time Jabsco entered the bearings, and as such, would have been required by Commerce's liquidation instructions to pay that rate on the bearing entries if entered properly. *See* Pl.'s Mem. at 19–20. Jabsco argues in response that while Jabsco UK and Jabsco could be considered OEMs of products such as marine and other liquid pumps, they do not manufacture antifriction bearings, and therefore, cannot be considered OEMs. Def.'s Resp. Mem. to Pl.'s Mot. Summ. J. at 9 ("Def.'s Resp."). Moreover, Jabsco argues that Plaintiff has failed to clearly specify its definition of an OEM as it applies to this case. *Id.*

Second, assuming Jabsco and Jabsco UK are not OEMs, Plaintiff contends that the "all others" cash deposit rate still would have applied to Jabsco's entries of bearings under Commerce's liquidation instructions because Jabsco failed to participate in Commerce's administrative review proceedings and SKF did not include those entries in any administrative review. *See* Pl.'s Mem. at 13–14, 23 (citing *J.S. Stone, Inc. v. United States*, 27 CIT at ___, 297 F. Supp. 2d at 1333); Pl.'s Mem. Resp. to Questions Raised by the CIT During July 2, 2002 Teleconference at 6–9 & n.3[14] ("Pl.'s Teleconf. Mem.")).[15]

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[14] Customs cites to several other liquidation instructions issued by Commerce between December 1996 and November 1999 to support its contention. Pl.'s Teleconf. Mem. at 7–9 & n.3 (citing E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof From Germany by SKF Germany (A–428–201, 203, 205)* (Dec. 6, 1996) (on file with the Court); E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for AFBS From Germany Produced by SKF Germany (A–427–201, 203, 205)* (May 12, 1998) (on file with the Court); E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for AFBS and Parts Thereof From Germany For the Period 11/9/88 Through 4/30/90 (A–428–201, 203, 205)* (Aug. 4, 1998) (on file with the Court); E-mail from Dir., Trade Enforcement & Control, Commerce, to Dirs. of Field Operations and Port Dirs., Customs, *Liquidation Instructions for AFBS, Other Than Tapered Roller Bearings, and Parts Thereof From Germany (A–428–201, 203, 205)* (Nov. 4, 1999) (on file with the Court)). In particular, on December 6, 1996, Commerce issued confidential liquidation instructions covering cylindrical bearings and ball bearings, among other types of antifriction bearings, from Germany for the period November 9, 1988 to April 30, 1990. E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof From Germany by SKF Germany (A–428–201, 203, 205)* (Dec. 6, 1996) (on file with the Court). Those instructions directed Customs to only liquidate antifriction bearing entries manufactured *and* imported by SKF companies (and other named companies not relevant here). *Id.*; *see also* E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof*

(Footnote 14 Continued)
From France Produced by SKF France (A–427–201, A–427–205) (Dec. 6, 1996) (on file with the Court) (applying the same instructions to antifriction bearings from France for the same period); E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for Antifriction Bearings (Other Than Tapered Roller Bearings) & Parts Thereof From Italy By SKF Italy (A–475–201, 203)* (Dec. 6, 1996) (on file with the Court) (applying the same instructions to antifriction bearings from Italy for the same period). The instructions did not specifically mention Jabsco or Jabsco UK.

Over seventeen months later, Commerce again issued confidential liquidation instructions covering cylindrical bearings and ball bearings, among other types of antifriction bearings, from Germany for the period May 1, 1990 to April 30, 1991. E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for AFBS From Germany Produced by SKF Germany (A–427–201, 203, 205)* (May 12, 1998) (on file with the Court). Those instructions also only applied to antifriction bearings manufactured *and* imported by SKF companies (and other specifically named exporters or importers not relevant here). *Id.*; *see also* E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for AFBS From France Produced by SKF France (A–427–201–012)* (May 12, 1998) (on file with the Court) (applying the same instructions to antifriction bearings from France for the same period); E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for AFBS From Italy Produced by SKF Industries S.P.A. (SKF Italy) (A–475–201, 203)* (May 12, 1998) (on file with the Court) (applying the same instructions to antifriction bearings from Italy for the same period). The instructions again did not specifically mention Jabsco or Jabsco UK.

In August 1998, Commerce directed Customs to liquidate any suspended entries of antifriction bearings from Germany not covered by any previous instructions for the period November 9, 1988 through April 30, 1990 at the deposit rate required at the time of entry. E-mail from Dir., Imp. Operations, Commerce, to CMC Dirs. and Port Dirs., Customs, *Liquidation Instructions for AFBS and Parts Thereof From Germany For the Period 11/9/88 Through 4/30/90 (A–428–201, 203, 205)* (Aug. 4, 1998) (on file with the Court). On November 4, 1999, Commerce issued the same instructions for suspended bearings entries for the period May 1, 1990 to April 30, 1991. E-mail from Dir., Trade Enforcement & Control, Commerce, to Dirs. of Field Operations and Port Dirs., Customs, *Liquidation Instructions for AFBS, Other Than Tapered Roller Bearings, and Parts Thereof From Germany (A–428–201, 203, 205)* (November 4, 1999) (on file with the Court).

Jabsco contends that all of the liquidation instructions upon which Plaintiff relies, including those discussed immediately above, are inapplicable because Jabsco's entries were liquidated and consequently final. Def.'s Mem. at 11. Jabsco argues that the entries were therefore out of the reach of Commerce's ability to assess antidumping duties. *Id.* Jabsco, however, is wrong. The instructions dated prior to Customs' assessment of the antidumping duties on December 22, 1993 are probative of the decisions Commerce would have made but-for Jabsco's violation of § 1592(a), and "Commerce, not Customs, calculates antidumping duties." *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994); *see* 19 U.S.C. § 1675(a)(2).

The later instructions described immediately above, however, hold no probative value because those instructions came after December 22, 1993, the date Customs' assessed the antidumping duties Jabsco owed, and after August 9, 1996, the date Customs confirmed on that the amount assessed was properly calculated. In other words, these later instructions did not exist at the time Customs determined how Commerce would have assessed the antidumping duties but-for Jabsco's negligent violation of § 1592(a). Customs' reliance on the later instructions is therefore misplaced. Consequently, the Court will not consider the instructions described immediately above in support of Customs' motion for summary judgment.

[15] Plaintiff's Response Memorandum to Defendant's Motion for Summary Judgment incorporates by reference all arguments contained in a previously submitted memorandum entitled Plaintiff's Memorandum in Response to Questions Raised by the Court of International Trade, per the Honorable Donald C. Pogue, Judge, During the July 2, 2002, Teleconference, filed on July 22, 2002. Pl.'s Resp. at 8 n.3.

Jabsco responds that the rate determined in the administrative reviews for its manufacturer, SKF, applies because SKF was aware that the bearings sold to Jabsco UK were destined for the United States. *See* Def.'s Resp. at 4 (citing Gill Aff., Def.'s Ex. 2;[16] *Assessment Notice*, 68 Fed. Reg. at 23,954). Jabsco claims that, because SKF possessed such knowledge, Commerce would have concluded that SKF was the source of the dumping activity and applied that company's rates against Jabsco's entries. *Id.* at 5–6 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 56 Fed. Reg. 31,692, 31,747 (Dep't Commerce July 11, 1991) (final results of antidumping duty administrative review) ("*First Review Determ.*")).

In response to Jabsco's arguments, Customs contends Jabsco has failed to present any evidence demonstrating that the SKF companies possessed such knowledge for two reasons. First, the Court should disregard the Gill affidavit because the affiant attests to facts beyond his personal knowledge in violation of USCIT R. 56(e), thereby rendering the affidavit inadmissible. *See* Pl.'s Resp. at 4–6.[17] Second, Commerce previously concluded in the administrative reviews that SKF did not know that its sales to Jabsco UK were used other than for home market consumption during the relevant periods of review and therefore did not include such sales in those reviews. *See id.* at 10–12 (citing *First Review Determ.*, 56 Fed. Reg. at 31,741).

In its motion for summary judgment, Jabsco argues that SFK's cash deposit rates are the applicable rates for assessing the actual loss of antidumping duties. Jabsco contends it was Commerce's policy at the time the bearings entered the United States to apply the manufacturer's cash deposit rates to any reseller importing such merchandise regardless of the importer's participation in the review, even though that policy was unclear, inconsistent, and confusing. *See* Def.'s Mem. at 18–21 (citing *Consol. Bearings Co.*, 348 F.3d at 1005–06; *ABC Int'l Traders, Inc. v. United States*, 19 CIT 787, 790 (1995); *Nissei Sangyo Am., Ltd. v. United States*, slip. op. 03–105 (CIT Aug. 18, 2003); *Renesas Tech. Am., Inc. v. United States*, slip. op. 03–106 (CIT Aug. 18, 2003); *Assessment Notice*, 68 Fed. Reg. at 23,955).[18]

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[16] Jabsco submitted the affidavit of Michael Gill ("Gill affidavit"), Managing Director of Jabsco UK, in support of its knowledge contention.

[17] The Court will not reach Customs's contention that the Court should also disregard Jabsco's exhibit 3, containing an affidavit of Larry K. Dart, because Jabsco does not specifically rely on or cite to that evidence for support of any of its contentions.

[18] Jabsco sets forth a second argument in support of its contention that the rates determined in the administrative reviews for SKF should apply in this case. Because SKF's annual administrative review rates are more accurate than the cash deposit rates, *see* Def.'s Mem. at 26, because Customs held the "sole responsibility" for properly classifying the bearings at the time of entry, *id.* at 28, and because bearings were commonly misidentified as "pump parts" between November 1988 and April 1990, *id.* at 13 (citing Riedl Aff., Def.'s Ex.

With respect to the penalty assessed, Plaintiff argues that Customs calculated an appropriate penalty under 19 U.S.C. § 1592(c)(4)(B). *See* Pl.'s Mem. at 25. Plaintiff claims that the penalty here consists of the amount of interest accrued from the dates of liquidation of Jabsco's entries to the date of Jabsco's disclosure letter on October 30, 1991, rather than, as statutorily permissible, the date Jabsco actually tendered the antidumping duties on August 6, 1996. *Id.* at 26. Moreover, Plaintiff claims that no penalty was assessed on the customs duties which Jabsco remitted in 1993. For these reasons, Plaintiff contends the amount of penalty assessed here was "substantially less than the actual maximum penalty afforded under § 1592(c)(4)(B)." *Id.* at 27.

In response, although Jabsco contends that the penalty amount is the maximum penalty statutorily permitted, Jabsco also asserts that Customs failed to consider the numerous factors set forth in *United States v. Yuchius Morality Co.*, slip. op. 02–124, at 23 (CIT Oct. 18, 2002) (citing *United States v. Complex Mach. Works, Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999)) in assessing the penalty, and therefore, the penalty amount is inappropriate. *See* Def.'s Resp. at 10, 13. Jabsco further argues that Customs did not extend any special treatment to it in calculating the penalty amount, but rather, assessed the penalty consistent with its prior disclosure practice. *See*

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4), Jabsco urges the Court to apply its equity powers and calculate the antidumping duties under SKF's first and second administrative review rates. *Id.* at 29–30; *see also* Def.'s Reply to Pl.'s Resp. to Mot. Summ. J. at 2, 11. The Court does not reach this argument, because an equitable determination of what rate should apply requires the Court to weigh the factual circumstances presented and make credibility determinations. The court simply cannot perform that analysis on summary judgment. *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1110 (D.C. Cir. 2001) ("[T]he role of the court at summary judgment is not to resolve the issue, but to determine whether the available evidence creates a genuine issue of fact for trial.") (internal citation omitted); *Gallo v. Prudential Residential Servs., Ltd.*, 22 F.3d 1219, 1224 (2d Cir. 1994) (noting that a trial court's role on a motion for summary judgment "in short, is confined . . . to issue-finding; it does not extend to issue-resolution"). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whe[n] he is ruling on a motion for summary judgment. . . ." *Anderson*, 477 U.S. at 255; *see also Beachcombers, Int'l, Inc. v. Wildewood Creative Prods., Inc.*, 31 F.3d 1154, 1160 (Fed. Cir. 1994) (explaining that the jury's function is to weigh the evidence before it and make credibility determinations therefrom, and that the court cannot usurp this role). At the summary judgment stage, the court's function is to determine whether there is sufficient evidence for a reasonable fact finder to return a verdict in the nonmovant's favor and warrant a trial. *See Anderson*, 477 U.S. at 249 (internal citation omitted). Because the Court does not reach Jabsco's argument, it also need not discuss Plaintiff's responses.

The issue is also not appropriate for trial because the penalty statute mandates the imposition of duties that would have been assessed but-for the § 1592 violation; the Court simply has no discretion where, as here, the amount of lawful antidumping duties which should have been collected is determined as a matter of law. *See infra* pp. 23–24; *see Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (stating that a federal court's equitable jurisdiction is only limited when a "clear and valid legislative command" exists, and that "[u]nless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied") (internal citation omitted).

id. at 12–13 (citing Customs Mem. from Charles D. Ressin, Chief, Penalties Branch, to Office of Fines, Penalties and Forfeitures, Customs, *Jabsco Products: Los Angeles Port Case No. 94–2704–20283*, Def.'s Resp. Ex. 1 para. 2 (July 18, 1996)).

Discussion

A. Calculation of Antidumping Duties

Neither party disputes that, in accordance with 19 C.F.R. § 162.74(a), Jabsco voluntarily disclosed the circumstances of its negligent violation of 19 U.S.C. § 1592(a) to Customs on October 30, 1991. Jt. Stat., Def.'s Ex. 1 para. 46. Subsection 1592(a) states, among other things, that no person may negligently enter merchandise into the United States and deprive the United States of any lawful duty thereon. *See* 19 U.S.C. § 1592(a); *see also United States v. Blum*, 858 F.2d 1566, 1568 (Fed. Cir. 1988). Specifically, 19 U.S.C. § 1592(a) provides, in pertinent part:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby no person, by . . . negligence —
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of —
>
> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material . . . .

19 U.S.C. § 1592(a). Once Customs determines that a violation of § 1592(a) has occurred, it must restore all lost lawful duties resulting from such violation of subsection (a) and issue a written penalty claim. 19 U.S.C. § 1592(b)(2), (d).[19] The Federal Circuit has defined the phrase "lawful duties" as including "those [duties] that would have been collected by the United States but[-]for the violation of [§ 1592(a)]." *United States v. Blum*, 858 F.2d at 1569. Thus, Customs must restore all lost duties which would have been collected but-for the party's negligent entry of merchandise. 19 U.S.C. § 1592(a), (d); *see also Pentax Corp. v. Robison*, 125 F.3d 1457, 1463 (Fed. Cir. 1997) (stating that § 1592(d) requires "nothing less than but-for causation"); *Blum*, 858 F.2d at 1570 ("Subsection (d) allows the United

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[19] Subsection (b) describes the procedures Customs follows in pursuing a claim for a monetary penalty resulting from a violation of subsection (a). 19 U.S.C. § 1592(b). Subsection (d) states in part:

> [I]f the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.

19 U.S.C. § 1592(d).

States to recover duties that would have been paid but-for conduct that violates subsection (a)."); *United States v. Menard, Inc.*, 16 CIT 410, 416, 795 F. Supp. 1182, 1187 (1992) ("[T]he purpose of § 1592(d) is to make the government whole for revenue lost as a result of submission of false statements to Customs.").

At the time of entry, the parties agree that the bearings should have been subject to antidumping duties.[20] Because Jabsco negligently misidentified the bearings, Customs did not collect any antidumping duties. But-for Jabsco's negligent misidentification, Customs would have collected antidumping duties at the cash deposit rates in effect at the time Jabsco made the bearings entries. The parties do not dispute these points; instead, the parties dispute the applicable rates at which the entries would have been liquidated after the completion of the administrative reviews.

Neither the penalty nor the antidumping statutory provisions explain how Customs should calculate the lost antidumping duties in this case. Rather, but-for Jabsco's negligent violation of § 1592(a), Commerce, as statutorily mandated, would have determined the applicable duty rates during the first and second administrative review proceedings. *See* 19 U.S.C. § 1675(a)(2); *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994) ("Commerce, not Customs, calculates antidumping duties."); *J.S. Stone, Inc. v. United States*, 27 CIT at ___ , 297 F. Supp. 2d at 1338 ("Customs' role in liquidating antidumping duties is ministerial. Customs has no authority to modify Commerce's determination and may liquidate entries only at the rate set by Commerce.") (citing *Royal Business Machs., Inc. v. United States*, 1 CIT 80, 87 & n.18, 507 F. Supp. 1007, 1014 & n.18 (1980)). Over the course of such review proceedings, Commerce would have examined data related to the manufacturer and any third-party resellers exporting the subject merchandise to the United States and rendered final results identifying the applicable antidumping duties. Subsequently, Commerce would have issued liquidation instructions implementing those final results to Customs.

In the instant case, Customs argues that, but-for Jabsco's violation of § 1592(a), the "all others" cash deposit rate would have been assessed against the bearing entries for two independent reasons. First, Plaintiff argues that the "all others" cash deposit rate applies because Commerce's liquidation instructions direct the application of that rate against OEMs like Jabsco and Jabsco UK. To support that contention, Customs points to Jabsco's concession that it was an

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[20] The parties also agree that the bearings were subject to customs duties. Jt. Stat., Def.'s Ex. 1 para. 51. Jabsco has not presented any legal objections to the assessment of those duties.

OEM,[21] and Commerce's characterizations of OEMs in both the Preamble to the *1997 Rule* and an e-mail transmitted after the first and second administrative reviews from Commerce to Customs. Pl.'s Teleconf. Mem. at 2–4 (quoting *1997 Rule*, 62 Fed. Reg. at 27,303; E-mail from Dir., Imp. Specialist Div., Commerce, to Reg'l Dirs., Commercial Operations Dist., Area and Port Dirs. of Customs, Customs, *Bond and Cash Deposit Rates to be Used for Exporters/ Manufacturers of Antifriction Bearings Subject to Antidumping*, Pl.'s Orig'l Ex. 5d para. 2 (Feb. 3, 1993) ("Feb. 3 Instruction")). Jabsco, in response, denies that it was an OEM in its purchase transactions of bearings because neither Jabsco nor Jabsco UK manufacture antifriction bearings. It does however concede that it may be an OEM with respect to its transactions of marine and other liquid pumps. Jabsco further argues that Customs has failed to clearly define what constitutes an OEM for purposes of this litigation.

Commerce's liquidation instructions, as conceded by Customs, do not define what constitutes an OEM.[22] The Preamble describes OEMs as "nonproducing exporters." Pl.'s Teleconf. Mem. at 3 (quoting *1997 Rule*, 62 Fed. Reg. at 27,303). Commerce's e-mail describes an OEM as a "related party transaction in which either party produces goods for sale to unrelated concerns." Pl.'s Teleconf. Mem. at 4 (quoting Feb. 3 Instruction, Pl.'s Orig'l Ex. 5d para. 2). The message goes further to state that "[w]hile both parent and subsidiary may jointly produce an end product, the normal configuration is for the parent to manufacture the article and the subsidiary to either sell and/or service those products. It is not necessary for the domestic importer to be the manufacturing operation." *Id.*

In this case, Jabsco UK served as the exporter of the bearings to Jabsco. Jabsco UK did not produce those bearings. Accordingly, the record supports Customs' contention that Jabsco UK is an OEM under the Preamble's description. Jabsco and Jabsco UK are related parties and both produce marine and other liquid pumps for sale to unrelated parties. Neither party, however, produces the bearings at issue here. Although the e-mail's description does not limit the manufacturing requirement to the subject merchandise of the review, it seems inconsistent for Plaintiff to argue that Jabsco UK constitutes an OEM under the Preamble's characterization of that term because Jabsco UK does not produce the subject merchandise, antifriction bearings, and in turn, contend that the e-mail description is satisfied because both Jabsco and Jabsco UK produce "goods," i.e., marine and other liquid pumps, but not antifriction bearings.

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[21] As both parties concede, the Court has previously indicated that it does not view Plaintiff's statement as an admission for litigation purposes. Def.'s Mem. at 14 n.2; Pl.'s Teleconf. Mem. at 2. Accordingly, Jabsco's statement does not support Plaintiff's claim.

[22] The Court notes that Commerce's descriptions of OEMs, upon which Plaintiff relies, do not appear to fit the plain meaning of the term OEMs itself.

Under a plain reading of the two descriptions, it seems that the "goods" produced should be the same in each description in order that the descriptions may be interpreted consistently. Consequently, without further evidence to support its claim that Jabsco and Jabsco UK constitute OEMs, the Court cannot find that Customs has adequately supported that claim on the record here. As Customs has failed to produce evidence sufficient to establish the existence of an essential element to its case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."); *Celotex Corp. v. Catrett*, 477 U.S. at 322–23, the Court finds Customs has failed to shoulder its initial burden demonstrating prima facie entitlement to summary judgment with regard to its claim that the "all others" cash deposit rate should have applied to Jabsco or Jabsco UK as an OEM.

Alternatively, Plaintiff argues that the "all others" cash deposit rate still applies because Jabsco did not participate in the administrative reviews and because SKF did not include those entries in either administrative review. Jabsco responds that the rate determined in the administrative reviews for its manufacturer, SKF, applies because SKF was aware that the bearings sold to Jabsco UK were destined for the United States. Jabsco claims that because SKF possessed such knowledge, Commerce would have concluded that SKF was the source of the dumping activity and applied that company's cash deposit rates against Jabsco's entries. Customs makes two arguments in response: first, the Court should disregard the Gill affidavit because that evidence contains statements beyond the personal knowledge of the affiant, and second, Commerce determined in the administrative reviews that SKF did not possess such knowledge.[23] Therefore, Plaintiff contends that Jabsco has failed to present any evidence demonstrating that the SKF companies knew the bearings in question here were destined for the United States; consequently, those entries were excluded from the administrative review proceedings. The Court first will discuss Customs' contention that because Jabsco did not participate in the administrative reviews, the "all others" cash deposit rate would have applied, as this contention is well established in the law.

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[23] Customs also cites to a comment response that Commerce issued during the first administrative review to demonstrate both that Jabsco cannot prove SKF knew the subject bearings were destined for the United States and also that the bearings were not included within the administrative reviews. Pl.'s Resp. at 10–12 (citing *First Review Determ.*, 56 Fed. Reg. at 31,741). Because that comment focuses on sales transactions by respondents like SKF to OEMs in the home market, and Customs has failed to present sufficient evidence supporting its claim that either Jabsco UK or Jabsco were OEMs, *supra* pp. 27–28, the Court concludes Commerce's response also cannot support Customs' contention.

Section 1675 sets forth the framework for administrative reviews of antidumping duty orders. Under 19 U.S.C. § 1675(a)(2), the final results of an administrative review are "the basis for the assessment of antidumping duties on entries of merchandise included within the determination and for deposits of estimated duties." *Id.* This subsection, however, explicitly limits the application of the final results of an administrative review to those entries covered by the review. "If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review." *Consol. Bearings Co.*, 348 F.3d at 1005–06. Put simply, the "entries" must be "covered by the determination" for the importer to gain statutory entitlement to the review's results as the "basis for the assessment" of duties. *Id.* at 1006 (internal citation omitted).

While Commerce is statutorily required to apply the final results to those transactions covered in the administrative review, subsection 1675(a)(2) does not compel or prevent Commerce from applying the results to entries outside the review. *See Consol. Bearings Co.*, 348 F.3d at 1006. Commerce's regulations, however, state that if the agency does not receive a timely request for an administrative review, Commerce will assess the subject merchandise at the cash deposit rates of estimated antidumping duties required at the time of entry. 19 C.F.R. § 353.53a(d)(1). Often referred to as the "automatic assessment regulation," it reads:

> [I]f [Commerce] does not receive a timely request [for an administrative review], [Commerce] . . . will instruct [Customs] to assess antidumping duties on the merchandise . . . at rates equal to the cash deposit of (or bond for) estimated antidumping duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption. . . .

19 C.F.R. § 353.53a(d)(1); *see also Mitsubishi Elecs. Am., Inc.*, 44 F.3d at 976–77 ("[A]n interested party [wanting] Commerce to assess duties at the actual, rather than the estimated, rate of dumping . . . may request administrative review of the duties. . . . If no party makes such a request, Commerce instructs Customs automatically to assess duties at the estimated rate."); *see generally Floral Trade Council v. United States*, 17 CIT 392, 394– 98, 822 F. Supp. 766, 768–71 (1993). Thus, regardless of the structure of a sales transaction, at the time in question here, Commerce applied the "all others" cash deposit rate to importers who failed to participate in a review, provided the importer was not assigned an individual rate in an earlier proceeding. *See* 19 C.F.R. § 353.53a(d)(1); *Antidumping Duties*, 54 Fed. Reg. 12,742, 12,757 (Dep't Commerce Mar. 28, 1989) (final rule) (stating that "when no interested party requests an administrative review, [Commerce] will instruct Customs to liquidate the entries for that review period at the rate deposited at the time of

entry"); *see 1997 Rule*, 62 Fed. Reg. at 27,313–14 (Commerce "has decided to continue its current practice with respect to automatic assessment; *i.e.*, if an entry is not subject to a request for a review, [Commerce] will instruct [Customs] to liquidate that entry and assess duties at the rate in effect at the time of entry.") (emphasis supplied);[24] *see Assessment Notice*, 68 Fed. Reg. at 23,959 ("Based on [Commerce's] prior practice, when an entity has not been assigned a rate from a previously completed segment of a proceeding and that entity does not participate in a current review, that entity is subject to the all-others rate and its imports of subject merchandise are assessed at that rate.");[25] *see also Consol. Bearings Co.*, 348 F.3d at 1006–07 (finding that the importer who purchased the merchandise through a reseller and did not participate in the manufacturer's administrative review was not statutorily entitled to that manufacturer's dumping rates over the cash deposit rates, but remanding the matter to determine whether Commerce's actions were consistent with its practice in effect during the years 1997–1998); *J.S. Stone, Inc.*, 27 CIT at ____ , 297 F. Supp. 2d at 1345 (affirming Commerce's application of the "all others" cash deposit rate to an importer whose manufacturer failed to identify its sales in the administrative review where the importer did not participate in that review proceeding).[26,27]

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[24] During the promulgation of the *1997 Rule*, Commerce considered changing the automatic assessment regulation to assess duties on entries for which there was no review request at the rates determined in the most recent review. *1997 Rule*, 62 Fed. Reg. at 27,313. "In light of the comments received," Commerce declined to make such a change and declared that it would continue its practice of applying automatic assessment to unreviewed entries. *Id.* at 27,313–14.

[25] Recently, Commerce finalized the *Assessment Notice*, which clarified its automatic assessment regulation, 19 C.F.R. § 351.212(c), regarding automatic liquidation where a reseller exports the subject merchandise. *Assessment Notice*, 68 Fed. Reg. at 23,954. According to that notice, Commerce will not automatically liquidate merchandise imported from a reseller and produced by a manufacturer covered by an administrative review at the existing cash deposit rates. *Id.* Instead, Commerce will determine whether the manufacturer had knowledge that the merchandise sold to the reseller was destined for the United States. *Id.* If the manufacturer possessed such knowledge, Commerce will apply the manufacturer's rate to the importer in question. *Id.* On the other hand, if the manufacturer did not possess such knowledge, Commerce will apply the "all others" rate. This pronouncement applies to all administrative reviews as of May 1, 2003. *Id.* at 23,956. Contrary to Jabsco's contention, and as argued by Customs, the *Assessment Notice* does not support Jabsco's arguments for summary judgment. Because Commerce conducted the first and second administrative reviews in 1990 and 1991 respectively, the notice does not apply to the instant case. *Consol. Bearings Co.*, 348 F.3d at 1006–07 (finding the Assessment Notice inapplicable for determining Commerce's practice at the time of that case). "At most, Commerce's recent policy statements . . . help identify Commerce's consistent past-practice." *See id.* at 1007.

[26] Even though Jabsco argues that Plaintiff's reliance on *J.S. Stone, Inc.*, 27 CIT at ____ , 297 F. Supp. 2d at 1333, is misplaced because that case did not involve a reseller transaction, and is therefore, factually distinguishable, Def.'s Resp. at 8, the Court finds that factual distinction insignificant. *J.S. Stone, Inc.* stands for the legal proposition that a party must seek administrative review of its merchandise to avoid Commerce's application of the automatic assessment regulation or the "all others" cash deposit rate. *See* 27 CIT at

In the instant case, Jabsco imported the bearings from its reseller, Jabsco UK. The bearings were entered, classified, and liquidated as "pump parts" or "needle roller bearings." But-for Jabsco's negligent misidentification of the bearings, i.e., its violation of § 1592(a), those entries would have been suspended at the time of entry and Jabsco would have been required to make cash deposits of estimated antidumping duties. Because neither Jabsco UK nor Jabsco participated in the administrative reviews, Jabsco UK's exports were not covered by the two administrative review proceedings, and more importantly, Jabsco's imports were not included within the scope of the administrative reviews. *Consol. Bearings Co.*, 348 F.3d at 1005–06. In other words, Jabsco simply has no entitlement under subsection 1675(a)(2) to the manufacturer-specific antidumping rates assessed in the review proceedings as opposed to the "all others" cash deposit rates. *Id.* at 1006. Moreover, Commerce's automatic assessment regulation, that regulation's history and case law support Plaintiff's contention that Jabsco's failure to participate in the administrative review proceedings would have led to the application of the "all others" cash deposit rate as a matter of law.

____ , 297 F. Supp. 2d at 1345. Consequently, that case legally supports Customs' argument here that a party must participate in a review proceeding to gain entitlement to the manufacturer's specific cash deposit rate.

[27] Commerce has on occasion ignored its regulation and instructed Customs to liquidate an importer's entries of merchandise at the manufacturer's rate established in an administrative review where two factors, neither applicable here, existed. First, the entries were made by an importer who purchased the merchandise from an unrelated reseller and the importer did not participate in the administrative review. Second, Commerce did not assess in the review proceeding any rates other than the manufacturer's specific rate; put differently, Commerce did not assess an "all others" cash deposit rate. *See e.g., ABC Int'l Traders, Inc. v. United States*, 19 CIT 787, 790 (1995) (finding Commerce's application of the manufacturer's rate to the plaintiff-importer appropriate because the importer should have known that the manufacturer's rate, the only existing rate, would be assessed against it, and Commerce was "compelled" in that instance to apply the manufacturer's cash deposit rate "because no reseller rates exist[ed]"); *see Nissei Sangyo Am., Ltd. v. United States*, slip. op. 03–105, at 5, 9–10, 15 (CIT Aug. 18, 2003) (holding Commerce's liquidation instructions directing Customs to assess antidumping duties at the manufacturer's cash deposit rate arbitrary and capricious because those instructions contradicted prior instructions directing Customs to assess the duties at the rate determined in the administrative review for the importer's manufacturer and no other rate was assessed in the review proceedings); *see Renesas Tech. Am., Inc. v. United States*, slip. op. 03–106, at 5, 9–10, 15 (CIT Aug. 18, 2003) (same).

Commerce's *Assessment Notice* also identifies two other instances in which it has applied the manufacturer's rates calculated in the administrative review over the importer-specific assessment rates. *Assessment Notice*, 68 Fed. Reg. at 23,958–59. Those instances include circumstances in which the reviewed manufacturer failed to produce any information from which Commerce could analyze its sales, leading Commerce to apply adverse facts available to the entries, or lengthy litigation caused significant time to pass and, in the interest of avoiding additional delay or possible errors, Commerce applied the weighted-average margins of the final results. *Id.* (internal citations omitted). Because neither party suggests that either circumstance exists in the instant case, the Court makes no express holding relating thereto.

Jabsco, however, claims that actual participation in the administrative proceedings here was not necessary for the application of its manufacturer's cash deposit rates, because SKF knew that the bearings sold to Jabsco UK were destined for the United States. Jabsco relies on the affidavit of Michael Gill, Jabsco UK's Managing Director, to support its contention. Customs objects to the admissibility of that evidence.[28]

Gill attests that Jabsco UK purchases bearings from various SKF companies without a "preference as to where . . . SKF manufactures particular [bearing] models." Gill Aff., Def.'s Ex. 2. He asserts that SKF's sales representative visited Jabsco UK's office regularly between the years 1988 and 1991, and that the representative was fully aware of Jabsco and Jabsco UK's sales arrangement, which sales caused SKF bearings to enter the United States. *Id.* In particular, Gill states:

> Jabsco's practice of consolidating orders for the United Kingdom and the United States has always been well known to the SKF representative who has been fully aware of the practice of consolidation and the reasons for it. Thus, SKF has long been well aware that a large portion of the merchandise which Jabsco UK purchases from SKF is destined for the United States and was so aware during the period 1989–1991. SKF is also fully aware that we do this as an accommodation for our United States sister business and not to make a profit. Thus, SKF is aware that we resell their bearings to the United States at cost, effectively at the prices which SKF charges.

Id.

While Gill is presumed to have personal knowledge of the acts of his corporation, Jabsco UK, *see FDIC v. Patel*, 46 F.3d 482, 484 (5th Cir. 1995) (finding that a former bank employee and bank loan officer had sufficient personal knowledge of bank procedures and computer record keeping information that their affidavits were admissible under the business records exception and admissible as proper summary judgment evidence); 11 Moore et. al., *Moore's Federal Practice* § 56.14(1)(c) (stating that "corporate officers are presumed to

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[28] Although Customs has not filed a formal motion to strike the affidavit, it has clearly, succinctly, and timely presented its USCIT R. 56(e) objections to the affidavit in its Response Memorandum to Defendant's Motion for Summary Judgment. As such, Customs has not waived its objections. 11 James Wm. Moore et. al., *Moore's Federal Practice* § 56.14(4)(a) (3d ed. 2004) ("A party is not required to make a formal motion to strike exhibits that do not conform to Rule 56(e) in order to remove documents from a court's consideration of a summary judgment motion."). Consequently, the Court must determine whether Jabsco's affidavit presents admissible evidence at trial in order for the Court to consider it here. *See* id.

have personal knowledge of acts of their corporation"), that presumption does not extend to the acts and knowledge of another company, SFK. *See id.* Jabsco's affidavit therefore contains testimony that goes beyond the personal knowledge of the affiant. As such evidence is inadmissible at trial, the Court must disregard it here as well. USCIT R. 56(e) ("Supporting . . . affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence . . . ."); *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply, Inc.*, 45 F.3d 1550, 1561 n.5 (Fed. Cir. 1995) (same); 11 Moore et. al., *Moore's Federal Practice* § 56.14(1)(d) ("[A]n affidavit that only contains . . . statements made without personal knowledge should not be admitted at the summary judgment stage.") (footnote citations omitted).

As the nonmovant, Jabsco bears the burden of demonstrating with specific facts that a genuine issue of material fact exists, and that trial is warranted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Although the Court views the evidence in the light most favorable to Jabsco, Jabsco nonetheless must come forward with "significant probative evidence" to supports its claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249 (internal citation omitted). Jabsco does not present any other evidence supporting its contention that SKF knew the subject bearings were destined for the United States, an essential element to its claim that Commerce would have applied the rate determined in the administrative reviews for SKF. Accordingly, Customs has satisfactorily demonstrated the absence of evidence on the record to support Jabsco's contention. *Conroy v. Reebok Int'l, Ltd.*, 14 F.3d 1570, 1575 (Fed. Cir. 1994) ("The moving party . . . need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing the district court that there is an absence of evidence to support the nonmoving party's case.") (citing *Copelands' Enters., Inc. v. CNV, Inc.*, 945 F.2d 1563, 1565 (Fed. Cir. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. at 325)).[29] With respect to its alternative argument, Customs has met its burden of production.

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[29] Jabsco also cites the *Assessment Notice* to support its contention that because SKF knew the subject bearings were destined for the United States, Commerce would have applied SKF's rates in the instant case. That claim cannot stand for two reasons. First, as previously determined above, in light of the effective dates of the *Assessment Notice*, that notice's pronouncement of Commerce's *current* reseller policy provides no evidentiary support for Jabsco's contentions on summary judgment. Second, as Plaintiff points out, because Jabsco has failed to present any evidence showing that SKF possessed such knowledge, Commerce's *current* reseller policy, as described in the *Assessment Notice*, indicates that the agency would have applied the "all others" rate. Pl.'s Resp. at 13; *Assessment Notice*, 68 Fed. Reg. at 23,954 (stating that if Commerce determined during the review that the producer did not know the merchandise it sold to the reseller was destined for the United States and the reseller did not participate in that review, the reseller's entries of merchandise shall be liquidated at the "all others" rate).

Jabsco, however, vehemently argues in its motion that it was Commerce's policy at the time the bearings entered the United States to apply the manufacturer's cash deposit rates to any reseller importing such merchandise regardless of the importer's participation in the review, even though that policy was confusing, unclear, and inconsistent. Jabsco relies on *Consol. Bearings Co., ABC Int'l Traders, Inc. v. United States, Nissei Sangyo Am., Ltd. v. United States*, *Renesas Tech. Am., Inc. v. United States*, and the *Assessment Notice* to evidence Commerce's policy. The Court will discuss each citation reference in turn.

In *Consol. Bearings Co.*, the Federal Circuit Court of Appeals was asked to determine whether Commerce's liquidation instructions, ordering Customs to assess antidumping duties at the cash deposit rates against an importer who purchased the merchandise through a reseller where that importer did not participate in the administrative review, were inconsistent with Commerce's past practice, and therefore, arbitrary and capricious. 348 F.3d at 1006. While *Consol. Bearings Co.* presents an issue somewhat similar to that at bar, the court there did not find Commerce's actions inconsistent. Rather, the circuit court remanded the matter for further consideration. 348 F.3d at 1007. Moreover, the actions of Commerce in question there took place over six years after Jabsco entered its bearings, lending little support to what Commerce would have done at the time in question here. *Cf. id.* (indicating that Commerce issued the liquidation instructions in question there during the years 1997 and 1998), *with supra* p. 6 (indicating that Jabsco entered the bearings between the years 1988 and 1991). Accordingly, that case does not support Jabsco's contention.

Jabsco has also failed to demonstrate how the circumstances presented are similar to *ABC Int'l Traders, Inc. v. United States, Nissei Sangyo Am., Ltd. v. United States* and *Renesas Tech. Am., Inc. v. United States* as a matter of law. Unlike these three cases, *supra* note 27, Commerce did indeed assess an "all others" cash deposit rate in the administrative review proceedings here. More importantly, dissimilar from the importers' there, Jabsco misidentified the bearings; it simply could not have expected that its entries would be liquidated at any other rates than those which applied to "pump parts" or "needle roller bearings." Accordingly, Jabsco could not have expected its bearings to receive the rates assessed for SKF in the administrative review proceedings. Those three cases therefore fail to support Jabsco's contention.

Finally, Jabsco's reliance on the *Assessment Notice* is also misplaced. Commerce's notice unequivocally states its policy involving reseller transactions; Commerce assessed antidumping duties against importers who did not participate in the review at the "all others" rate.

> Based on [Commerce's] prior practice, when an entity has not been assigned a rate from a previously completed segment of a proceeding and that entity does not participate in a current review, that entity is subject to the all-others rate and its imports of subject merchandise are assessed at that rate.

Assessment Notice, 68 Fed. Reg. at 23,959. Although the Court acknowledges that the words "prior practice" do not clearly identify the time frame in which Commerce endorsed such a practice, Commerce's statement directly contradicts Jabsco's contention that Commerce's policy was unclear and inconsistent. *Id*. Despite the fact that Commerce recognized its reseller policy generally has "generated confusion" among importers, *id*. at 23,958, 23,954–55 ("In various proceedings parties have claimed that entries should be liquidated at many different rates in cases where entries involving resellers have not been reviewed. Parties have claimed . . . that the results of [Commerce's] review of the producer should apply, that the rate in effect at the time of entry should apply, or, even, that the all-others rate should apply."), nothing in the *Assessment Notice* indicates that Commerce applied that policy arbitrarily or inconsistently *at the time the bearings here entered the United States*. The *Assessment Notice* simply does not support Jabsco's contention that it was Commerce's policy *at the time Jabsco entered the bearings* to assess the manufacturer's rate to reseller transactions. Instead, the notice suggests Commerce would have directed Customs to assess the "all others" rate against Jabsco's entries. Therefore, the *Assessment Notice* fails to support Jabsco's contention.

Jabsco again fails to present any evidence supporting its contention that it was Commerce's policy to apply the manufacturer's rate to any reseller importing such merchandise at the time the bearings entered the United States. Because Jabsco bears the burden of demonstrating Commerce's policy, the Court finds Jabsco has failed to establish entitlement to summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the [movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for th[at party]."); *Celotex Corp. v. Catrett*, 477 U.S. at 322–23. Customs has however adequately supported its contention that because Jabsco failed to participate in the administrative reviews, or to present any affirmative evidence indicating SKF knew that its sales of bearings were destined for the United States, but-for Jabsco's violation of 1592(a), Commerce would have directed the application of the "all others" cash deposit rate as a matter of law. Jabsco produces no evidence to the contrary. The Court therefore concludes that Customs properly calculated the actual loss of antidumping duties Jabsco owed using the "all others" cash deposit rates in effect at the time Jabsco made its entries of bearings. Summary judgment is proper in Customs favor on this issue.

B. Penalty Assessment

Customs argues that it properly assessed an appropriate penalty amount pursuant to 19 U.S.C. § 1592(c)(4)(B). Plaintiff claims that the penalty here consists of the amount of interest accrued from the dates of liquidation of Jabsco's entries to the date of Jabsco's disclosure letter on October 30, 1991, rather than, as statutorily permissible, the date Jabsco actually tendered the antidumping duties, August 6, 1996. Moreover, Customs claims that no penalty was assessed on the customs duties which Jabsco remitted in 1993. For these reasons, Plaintiff contends the amount of penalty assessed here was "substantially less than the actual maximum penalty afforded under § 1592(c)(4)(B)." Pl.'s Mem. at 27.

In response, although Jabsco contends that the penalty amount is the maximum penalty statutorily permitted, Jabsco also asserts that Customs did not consider the numerous factors set forth in *United States v. Yuchius Morality Co.*, slip. op. 02–124, at 23 (citing *United States v. Complex Mach. Works Co.*, 23 CIT at 949–50, 83 F. Supp. 2d at 1315) in calculating the penalty, and therefore, the amount assessed is not appropriate. Jabsco further argues that Customs did not extend any special treatment to it in calculating the penalty, but rather, assessed the penalty consistent with its prior disclosure practice.

Congress set forth the maximum penalty amount for negligent violations of § 1592(a) in 19 U.S.C. § 1592(c)(3).[30] Parties who voluntarily disclose violations of subsection (a), however, are assessed penalties in accordance with 19 U.S.C. § 1592(c)(4), which states that the maximum monetary penalty assessed shall not exceed the interest, computed from the date of liquidation, on the amount of lawful duties of which the United States is deprived.[31] 19 U.S.C. § 1592(c)(4); *see also United States v. Yuchius Morality Co.*, slip. op.

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[30] Title 19 U.S.C. § 1592(c)(3) provides:

> A negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed —
>
> (A) the lesser of —
> (i) the domestic value of the merchandise, or
> (ii) two times the lawful duties of which the United States is or may be deprived, or
>
> (B) if the violation did not affect the assessment of duties, [twenty] percent of the dutiable value of the merchandise.

19 U.S.C § 1592(c)(3).

[31] Title 19 U.S.C. § 1592(c)(4) provides in relevant part:

> If the person concerned discloses the circumstances of a violation of subsection (a) of this section before, or without knowledge of, the commencement of a formal investigation of such violation, . . . any monetary penalty to be assessed under subsection (c) . . . shall not exceed —
> . . .

02–124, at 22 ("Congress has chosen to adopt only maximums, as opposed to prescribing precise penalties, for proven violations under 19 U.S.C. § 1592 . . . ."). These provisions were enacted as part of the Customs Procedure Reform and Simplification Act of 1978, and for the first time, granted judicial review to this Court to determine the "appropriate[ ] . . . penalty amount." S. Rep. No. 95–778, pt. 10. at 20 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2211, 2231; *United States v. Menard, Inc.*, 17 CIT 1229, 1229, 838 F. Supp. 615, 616 (1993) ("The penalty statute provides for a trial *de novo* on all issues, leaving the amount of the penalty to the sound discretion of the [C]ourt.") (citing *United States v. Valley Steel Prods. Co.*, 14 CIT 14, 17, 729 F. Supp. 1356, 1359 (1990)), *aff'd in part, vacated and remanded in part on other grounds*, 64 F.3d 678 (Fed. Cir. 1995); *United States v. Modes, Inc.*, 17 CIT 627, 636, 826 F. Supp. 504, 512 (1993) ("It is settled . . . that the [C]ourt possesses the discretion to determine a penalty within the parameters set by the statute.") (internal citation omitted). In other words, the law requires "the [C]ourt to begin its reasoning on a clean slate. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight." *United States v. Menard, Inc.*, 17 CIT at 1229, 838 F. Supp. at 616 (internal citation omitted). ____ In *Complex Mach. Works Co.*, the Court identified the following fourteen factors relevant to its penalty determination: (1) defendant's good faith effort to comply with the statute; (2) defendant's degree of culpability; (3) defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the applicable law; (5) the nature and circumstances of the violation; (6) the gravity of the violation; (7) defendant's ability to pay; (8) the appropriateness of the sizeof the penalty vis-a-vis defendant's business; (9) whether the penalty shocks the conscience of the court; (10) the economic benefit gained by defendant as a result of the violation; (11) the degree of harm to the public; (12) the value of vindicating agency authority; (13) whether the party sought to be protected by the statute has been adequately compensated for the harm; and (14) such other matters as justice may require. *Complex Mach. Works Co.*, 23 CIT at 949–50, 83 F. Supp. 2d at 1314–15 (stating that the Court will now apply these factors to analyze cases arising under § 1592(c)); *see also United States v. New-Form Mfg. Co.*, 27 CIT ___ , ___ , 277 F.

(B) if such violation resulted from negligence . . . the interest (computed from the date of liquidation at the prevailing rate of interest applied under section 6621 of title 26) on the amount of lawful duties of which the United States is or may be deprived so long as such person tenders the unpaid amount of the lawful duties at the time of disclosure or within [thirty] days, or such longer period as . . . [C]ustoms . . . may provide, after notice by the appropriate customs officer of his calculation of such unpaid amount.

19 U.S.C. § 1592(c)(4).

Supp. 2d 1313, 1327–32 (2003) (applying the factors) *Yuchius Morality Co.*, slip. op. 02–124, at 23–25 (stating that the factors "might apply in a given case," yet considering them in assessing the appropriate penalty). Moreover, here the Court must also determine the weight to be given to the imposition of antidumping duties, the self-inflicted consequence of Jabsco's negligence.

The Court cannot undertake this analysis on summary judgment. Because the Court has discretion to determine the appropriate penalty amount, and is cognizant of the fourteen *Complex Mach. Works Co.* factors, in making that determination, the Court is required to weigh evidence, make credibility determinations, and draw inferences from the facts, functions strictly delegated to a fact-finder or jury. *Supra* note 18. As the Court cannot properly perform these functions on summary judgment, the Court must deny the parties' motions on this particular issue and order a trial.

Conclusion

For the foregoing reasons, the Court grants Customs' motion for summary judgment with respect to the antidumping duties assessed. The Court denies, however, Customs' motion for summary judgment with respect to the penalty assessed. The Court also denies Jabsco's motion for summary judgment in full. Trial is ordered on the penalty issue. The parties are directed to prepare a proposed order governing preparation for trial and to file said proposed order by August 1, 2004.

Slip Op. 04–82

BESTFOODS, PLAINTIFF, v. THE UNITED STATES, DEFENDANT.

Court No. 98–12–03230

[Upon cross-motions as to classification of REDUCED FAT SKIPPY®], summary judgment for the defendant.]

Decided: July 9, 2004

Neville Peterson LLP (*John M. Peterson*, *George W. Thompson* and *Maria E. Celis*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Yelena Slepak*), of counsel, for the defendant.

Opinion

AQUILINO, Judge: Notwithstanding provision for peanut butter and paste *eo nomine* by a subheading (2008.11.02 *et seq.* (1997)) of the Harmonized Tariff Schedule of the United States ("HTSUS") and *dictum* in *Bestfoods v. United States*, 260 F.3d 1320, 1322 (Fed.Cir. 2001), that "[p]eanut slurry and peanut butter are classified under the same tariff classification, HTSUS 2008.11[ ]", comes the plaintiff in this action with a motion for summary judgment, praying that its merchandise which it describes as "Skippy® brand reduced fat peanut butter spread, a peanut-flavored food preparation imported from Canada"[1], be classified as a nut puree or paste under HTSUS subheading 2007.99.65 or, alternatively, as a condiment per subheading 2103.90.90.

I

Plaintiff's motion, which is made pursuant to USCIT Rule 56, is accompanied by a requisite Statement of Material Facts As To Which No Genuine Issue Exists, to wit:

1. The subject merchandise in its condition as imported is Skippy® reduced fat peanut butter spread, a peanut-flavored food preparation imported from Canada. . . .
2. The United States Food and Drug Administration (FDA) regulations, 21 C.F.R. § 164.150, provide the standard of identity for "peanut butter", and require that, to be labeled and marketed as peanut butter, a product must have no more than 10% other ingredients in addition to its peanut material.
3. The peanut spread contains approximately 40% additional ingredients, including hydrogenated vegetable oil, corn syrup solids, salt, sugar, and a protein/vitamins/mineral mix. This product is not "peanut butter" according to the FDA standard of identity, 21 C.F.R. § 164.150.
4. The FDA permits Bestfoods to market and label the subject merchandise as a "reduced fat peanut butter spread."
5. . . . [E]ntry number 551–5501565–8 . . . was liquidated on April 10, 1998, and Customs classified the subject spread under . . . HTS[ ] subheading 2008.11.05 as peanut butter.
6. Plaintiff timely protested the classification of the subject merchandise, asserting that it was classified under HTS

[1] Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment [hereinafter cited as "Plaintiff's Memorandum"], p. 2.

subheading 2106.90.–99, as other food preparations. Upon denial of its protest, plaintiff timely filed this action.

7. Plaintiff[ ] subsequently amended its claim, adding HTS subheading 2007.99.65[2], which provides for nut purees and pastes, as an appropriate heading for the classification of the subject spread.

In its response to this statement, the defendant admits paragraphs 4–6 and paragraph 7, save the "validity of the amended claim." As for the first three averments, the defendant:

1. Admits that the subject merchandise is Skippy® reduced fat peanut butter spread. Denies that the subject merchandise is a peanut-flavored food preparation. Avers that the subject merchandise is peanut butter or paste. . . .

2. Admits that the . . . FDA[ ] regulations, 21 C.F.R. § 164.150, provide the standard of identity for "peanut butter." Denies that the regulation requires that, "to be labeled and marketed as peanut butter, a product must have no more than 10% other ingredients in addition to its peanut material." Avers that the regulation provides that "seasoning and stabilizing ingredients do not in the aggregate exceed 10 percent of the weight of the finished food." Avers further that 21 C.F.R. § 130.10(a) permits the use of a name of a standardized food to label a substitute food that does not comply with the standard of identity for the standardized food. Avers further that Customs does not have to follow the FDA regulations for purposes of classifying the imported merchandise under the HTSUS.

3. Admits, except denies that the product contains approximately 40% of additional ingredients. Avers that the peanut butter spread contains approximately 34–40% of additional ingredients. . . . Avers further that the subject merchandise qualifies and may be labeled as a substitute peanut butter.

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[2] In its motion for leave to amend its complaint to add this alternative claim, the plaintiff cited *Jarvis Clark Co. v. United States*, 733 F.2d 873, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984), to the effect that

> this Court has "the duty to find the correct answer by appropriate means" concerning the classification of merchandise, even though the arguably correct classification had not been raised before the trial court. Thus, the Court has the ability to consider plaintiff's proffered alternative in any event. other,

Presumably, this rule of law is the basis for suggesting the other, alternative classification (under HTSUS subheading 2103.90.90) in plaintiff's instant summary judgment motion.

This response has been served and filed in conjunction with a cross-motion by the defendant for summary judgment that contains its own Statement Of Additional Material Facts As To Which There Are No Genuine Issues To Be Tried, namely:

1. The imported product was invoiced as Skippy Reduced Fat Peanut Butter.
2. The imported product is a peanut paste made primarily of peanuts with the addition of some other ingredients.
3. The imported product looks, tastes and has the consistency of peanut butter.
4. The imported product is advertised, marketed, sold, intended for use and used in the same manner as peanut butter.
5. Dictionary definitions of the term "peanut butter" do not require that it contain more than 90 percent peanuts by weight. Peanut butter is defined in the *Oxford English Dictionary* (Second Edition) . . . as "paste made with ground roasted peanuts," and in the *Random House Dictionary for the English Language*, (the Unabridged Edition 1969), p. 1060, "smooth paste made from finely ground roasted peanuts, used as a spread or in cookery." Peanut butter is also described in the *Encyclopedia of Food Technology* at 683 . . . (1974)[ ] as "a cohesive, comminuted food product prepared by dry roasted, clean, sound, mature peanuts from which the seed coat and 'hearts' are removed, and to which salt, hydrogenated fat and (optional) sugars, antioxidants and flavors are added."
6. The imported product is peanut butter pursuant to the common meaning of that term found in dictionaries.
7. Peanuts (also known as ground-nuts) are legumes.
8. Peanuts are not nuts botanically.
9. The imported product is not made of nuts.
10. The imported product is not a nut puree, nor a nut paste.
11. The imported product is not a condiment.

The plaintiff denies defendant's foregoing paragraphs 6 and 9–11. As for the others, it responds as follows:

1. Admits that the imported product was invoiced as "reduced fat peanut butter." However, avers that the product is labeled "reduced fat peanut butter spread" and cannot be sold in the United States as "peanut butter." Further avers that

the entry for which the invoice was prepared was a related party transaction designed solely to invoke this Court's protest jurisdiction, and thus did not reflect the usual commercial practice.

2. Admits that the importe[d] product is a peanut paste made primarily from peanuts. Avers that the imported product also may be classified as a puree under the H[TSUS]. Further avers[ ] that approximately 60% of the imported product is made from peanuts and that the remaining 40% of the product consists of hydrogenated vegetable oil, corn syrup, salt, sugar, and other sweeteners.

3. Admits that the imported product resembles peanut butter. Avers that even though the imported product looks like peanut butter, it may not be sold in the United States as peanut butter.

4. Denies. Avers that the subject merchandise is marketed and labeled as a "reduced fat peanut butter spread."

5. Admits that the dictionary terms of peanut butter do not require that peanut butter contain more than 90 percent peanuts by weight. Avers that the peanut butter industry is required to label products "peanut butter" only if they contain 90 percent or more of peanuts pursuant to the F[DA] standard of identity for peanut butter.

* * *

7. Admits. Avers that even though peanuts are legumes in their botanical definition they are considered nuts in the United States.

8. Admits. Avers that even though peanuts are not nuts in their botanical definition they are considered nuts in the United States.

Despite the foregoing differences between the parties over the facts, each side is of the view that summary judgment on its behalf would be appropriate as no genuine issue that requires a trial is joined. *See, e.g.*, Defendant's Cross-Motion for Summary Judgment, p. 1; Plaintiff's Reply Memorandum, p. 4. Having reviewed and considered all their motion papers and exhibits, and as discussed hereinafter, the court concurs that trial is not necessary. The dispositive issues at bar are matters of law.

II

Jurisdiction over this action is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). It stems from rulings requested and received from the U.S.

Customs Service by plaintiff's corporate predecessor, in particular HQ 959816 (Feb. 25, 1997), holding that plaintiff's product

> is classified . . . in subheading 2008.11.0500, HTSUS, if imported in quantities that fall within the limits described in additional U.S. note 5 to chapter 20, and dutiable at the 1996 general rate of duty of 1.3 cents per kilogram. If the quantitative limits of additional U.S. note 5 to chapter 20 have been reached, the product will be classified in subheading 2008.11.1500, HTSUS, and dutiable at the 1996 general rate of 147 percent ad valorem. In addition, products classified in subheading 2008.11.1500, HTSUS, will be subject to additional duties based on their value, as described in subheadings 9904.20.01–9904.20.10, HTSUS (1996).

Defendant's Exhibit A, p. 5.

The core of the controversy then as now is that the product "may not meet the standard of identity of the . . . FDA[ ] for peanut butter". *Id.* at 2. To summarize plaintiff's argument renewed at bar, it is that the merchandise is not "peanut butter" in the commercial sense of that term. That foodstuff fails to meet the FDA's standard of identity for peanut butter and cannot be labelled or marketed as such in the United States. The foregoing pre-entry ruling letter of Customs overlooked the question of commercial designation and thus lacks persuasiveness on this central issue. Plaintiff's Memorandum, pp. 6–7. In short, for

> lack of thoroughness, failure to address commercial designation, inconsistency with prior rulings, and absence of valid reasoning[,] *Ruling 959816* deserves no deference by this Court.

Id. at 16.

What the plaintiff is obviously seeking to undermine is that a Customs ruling like the foregoing "is eligible to claim respect according to its persuasiveness", *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), based on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. This attempt by the plaintiff, however artful, does not achieve its goal in this court's opinion.

A

HQ 959816 appreciates that one of the purposes of FDA standards of identity "is to promote honesty and fair dealing in the interest of consumers by truthful and informative labeling of food products"[3]

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[3] Defendant's Exhibit A, p. 4.

and also that such standards are "helpful in defining a product but . . . not controlling in determining [its] classification . . . under the H[TSUS]."[4] *See, e.g., Nestle Refrigerated Food Co. v. United States*, 18 CIT 661, 666 (1994)("FDA standards of identity are not controlling for tariff classification purposes"), citing *Charles Jacquin et Cie v. United States*, 14 CIT 803 (1990); *Alexandria Int'l, Inc. v. United States*, 13 CIT 689 (1989); *Joseph F. Hendrix v. United States*, 82 Cust.Ct. 264, C.D. 4809 (1979). *Cf. United States v. Mercantil Distribuidora, S.A.*, 43 CCPA 111, 116–17, C.A.D. 617 (USDA regulation interpreting meaning of "cured beef" not binding for tariff purposes); *Amersham Corp. v. United States*, 5 CIT 49, 56, 564 F.Supp. 813, 817 (1983), *aff'd*, 728 F.2d 1453 (Fed.Cir. 1984)(rules and regulations to protect public safety not determinative of tariff classification disputes). Indeed, as pointed out at the beginning hereof, the HTSUS subheading under review provides for peanut butter and paste *eo nomine*, which kind of provision has long been understood to encompass all forms of the substance within that nomenclature.

In addition to the red-faced REDUCED FAT SKIPPY® on the front label of plaintiff's 18-oz. jar, defendant's exhibit E, that exhorts would-be purchasers *cum* consumers to "SPREAD THE FUN!" a-top a depiction of swirls of the sticky stuff, that label emblazons "CREAMY Peanut Butter Spread" above "60% peanuts". Customs reacted to this presentment in its ruling letter by pointing out that the FDA has a definition for "peanut spread" found in 21 C.F.R. § 102.23 to the effect that the common or usual name of a spreadable peanut product with more than ten percent nonpeanut ingredients "shall consist of the term 'peanut spread' . . .".[5] Furthermore:

> . . . [A] peanut spread . . . and . . . peanut butter . . . both consist of roasted ground peanuts and both are spreadable by the consumer on bread, crackers, and biscuits. We do not see a difference in calling a product peanut butter, peanut butter and paste, or a peanut butter spread for purposes of subheadings 2008.–11.02 and 2008.11.05, HTSUS. The question is whether the product is classifiable under the tariff schedule as peanut butter and paste. Counsel does not claim that the instant product is covered by the standard of identity for peanut spread. This standard does not permit the product to be labeled as "Peanut Butter" or as a "Peanut Butter Spread". The standard permits the product to be labeled as a "Peanut Spread", not as a Peanut Butter Spread. Counsel does claim that the instant product does not meet the standard of identity for peanut butter in 21 CFR 164.150. Yet, counsel states that his client has an agreement with FDA authorizing the labeling of the instant

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[4] *Id.*

[5] *Id.*, quoting 21 C.F.R. § 102.23.

> product as a "Peanut Butter Spread". This is further evidence that the instant product is a modified form of peanut butter. It is a contradiction to label a product as peanut butter, albeit, with the added word of spread, and contend that the product is not peanut butter.[6]

B

Of course, as this agency reasoning recognizes, the enacted language of the subheading at issue includes the words "and paste", signifying something in addition to, or other than, the "butter" of the legume in question. There is no indication of the intent of the legislature with regard to that addition and also no prescribed definition thereof. Whereupon the court must determine its common meaning and "may consult dictionaries, lexicons, scientific authorities, and other such reliable sources"[7] in doing so. Opening Funk & Wagnalls Standard Dictionary of the English Language (Int'l ed. 1963) to page 923 reveals definition of the noun paste as, among others,

> [a]ny doughy or moist plastic substance; anything of the consistency of paste, as for consumption or application: usually with a qualifying word: fish *paste*; almond *paste*.

Italics in original. Definition 1d of that noun in Webster's Third New International Dictionary of the English Language Unabridged, p. 1652 (1981) is "a smooth food product made by evaporation or grinding <almond ~> <tomato ~> <sardine ~> ". *Cf.* Plaintiff's Memorandum, pp. 18–19. There is no mention of butter[8] or peanut in any of the paste definitions in the two lexicons just quoted. And, unlike the "butter" of peanuts, the record before the court does not refer to any particular standard peanut content to be a paste thereof. Suffice it to thus state that this court is unable to conclude that the 60-or-more-percent peanut content of plaintiff's product herein[9] is insufficient to constitute peanut paste within the meaning of HTSUS subheading 2008.11.02 *et seq. Cf.* Plaintiff's Response To Defendant's Statement Of Material Facts As To Which No Genuine Issue Exists, para. 2, *supra* ("Admits that the importe[d] product is a peanut paste made primarily from peanuts").

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[6] *Ibid.*

[7] *Lonza, Inc. v. United States*, 46 F.3d 1098, 1106 (Fed.Cir. 1995), citing *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 133–34, 673 F.2d 1268, 1271 (1982).

[8] Of course, the primary definition of this term is the fat of milk solidified via churning, although there is secondary reference to "butterlike" products made by grinding nuts, stewing fruits, etc. *See, e.g.*, Webster's New Collegiate Dictionary, p. 113 (1961).

[9] *Cf.* Affirmation of Stephan P. Lypinski, Jr., Plaintiff's Memorandum, Exhibit A, para. 9; Affirmation of Richard Wilkes, Plaintiff's Memorandum, Exhibit D, para. 6.

III

In deciding herein that Customs classified correctly plaintiff's merchandise, the court can confirm that it has considered able counsel's proposed alternative classification(s), namely, a nut puree or paste under HTSUS subheading 2007.99.65 or a condiment per subheading 2103.90.90, and has come to conclude that neither argument merits much response. With respect to the first proposed alternative, while the creator of the HTSUS has subdivided its chapter 20 into headings numbered, among others, 2007 and 2008, which are encaptioned, respectively, "Jams, fruit jellies, marmalades, fruit or nut pureé and fruit or nut pastes . . ." and "Fruit, nuts and other edible parts of plants . . . not elsewhere specified or included: Nuts, peanuts (ground-nuts) and other seeds . . ." and the prevailing concept of Nature's universe puts *Arachis hypogaea*, Latin for the primary plantstuff at bar, with a bean-pod or pea-pod[10], on its face the HTSUS does not. That is, the court can find that *Arachis hypogaea* is not genuinely a "nut"[11], but the HTSUS, heading 2008, not 2007, makes it the same as one for purposes of classification.

As for plaintiff's other proposed alternative, counsel adopt the definition of condiment in *United States v. Schoenfeld & Sons, Inc.*, 44 CCPA 179, 181, C.A.D. 657 (1957), to wit:

> "Something used to give relish to food, and to gratify the taste; usually a pungent and appetizing substance as pepper or mustard; seasoning[,]"

quoting Webster's New International Dictionary of the English Language Second Edition Unabridged. Whereupon they argue that plaintiff's REDUCED FAT SKIPPY®

> gives flavor to all foods on which it is spread, particularly on breads, crackers, toast, etc., and it is a suspension of peanuts, oils, corn syrup, salt, and sweetener. Generally, consumers purchase the subject spread to make peanut butter sandwiches or to spread on crackers to create a flavorful snack or in some cases, a meal. Further, the peanut spread may be found in condiment aisles in the supermarket. In numerous East Asian cultures, the reduced fat peanut spread may even be used (as a healthier substitute for peanut butter) as a spice or flavorful addition to a chicken or fish, in a "satay" dish.

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[10] *See, e.g.*, The Standard Cyclopedia of Horticulture, vol. III, p. 2505 (1935); Webster's New International Dictionary of the English Language Second Edition Unabridged, p. 1799 (1945).

[11] *See, e.g.*, Defendant's Statement of Additional Material Facts As To Which There Are No Genuine Issues To Be Tried, paras. 7, 8, *supra*; Plaintiff's Response To Defendant's Statement Of Material Facts As To Which No Genuine Issue Exists, paras. 7, 8, *supra*.

Plaintiff's Memorandum, pp. 22–23, citing Gassenheimer, *Mahi-mahi makes flavorful peanut satay*, Sodsook, *Grilled Chicken Satay With Curried Peanut Sauce*, and Veggies Unite!, *Peanut Burgers with Satay Sauce*, together plaintiff's exhibit E thereto. *See also* Jimtown Store, *Jimtown Fresh Condiments*, Plaintiff's Reply Memorandum, Exhibit C. All this representation may well be true, but it cannot and therefore does not trump the very first general rule of interpretation ("GRI") of the HTSUS that, "for legal purposes, classification shall be determined according to the terms of the headings". Can it realistically be said that heading 2103, encompassing

> Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard[,]

is the one which provides a more specific description of plaintiff's product within the meaning of the GRI than HTSUS heading 2008, *supra*? Obviously not.

IV

In view of the foregoing, plaintiff's motion for summary judgment must be denied, with defendant's cross-motion granted. Summary judgment will enter accordingly.

Slip Op. 04–83

FORMER EMPLOYEES OF QUALITY FABRICATING, INC., PLAINTIFFS, v. UNITED STATES, DEFENDANT.

Before: WALLACH, Judge
Court No.: 02–00522

[Defendant's Motion for Reconsideration is DENIED.]

Decided: July 12, 2004

Collier Shannon Scott, (*Adam Gordon* and *John Brew*) for Plaintiffs.
Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director, *Stephen C. Tosini*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant.

OPINION

I
Introduction

On July 1, 2004, the court held an in court status conference on Defendant's Revised Motion for Reconsideration of the Court's

Evidentiary Ruling or for Leave to Amend Defendant's Answer ("Defendant's Motion") and Plaintiffs' Opposition thereto. ("Plaintiffs' Opposition"). Defendant requested in its Motion that pursuant to USCIT R. 7, 12(a)(1), and 15(a) the court "reconsider its oral finding that Defendant admitted to a fact that is clearly contradicted by the administrative record of this case, the record of proceedings in this Court, and plaintiffs' own statements throughout the course of this litigation. Transcript of Oral Argument held April 13, 2004 ("TR.") at 12:21–13:10." Defendant's Motion at 1. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(d). For the following reasons Defendant's Motion is denied.

II
Background

On June 28, 2001, Plaintiffs filed a petition seeking North American Free Trade Agreement Transition Adjustment Assistance ("NAFTA TAA") benefits in accordance with 19 U.S.C. § 2331 (1999).[1] On May 17, 2001, the Department of Labor ("Labor") denied Plaintiffs' petition for certification of eligibility to receive trade adjustment assistance. *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 35,140, 35,142 (May 17, 2002). Plaintiffs sought judicial review of Labor's decision denying their eligibility for "TAA" benefits. Plaintiffs' First Amended Complaint ("Plaintiffs' Complaint") at ¶ 1.

The parties have filed a number of motions in this matter. On March 14, 2003, the court denied Defendant's first Motion to Dismiss in *Former Employees of Quality Fabricating, Inc. v. United States*, 259 F. Supp. 2d 1282 (CIT 2003) ("*FEO Quality I*"). On July 1, 2003, Plaintiffs filed a 56.1 Motion for Judgment on the Agency Record. Defendant did not respond to this motion, however, on August 1, 2003, Defendant filed a Motion for Voluntary Remand in order to "conduct a further investigation and to make a determination as to whether petitioners are eligible for certification for worker adjustment assistance benefits." Defendant's Motion For Voluntary Remand at 1. Plaintiffs opposed the voluntary remand and filed an Opposition to the Motion on August 11, 2003. Defendant then submitted a Reply in Support of Its Motion for Voluntary Remand ("Defendant's Reply") on August 22, 2003. As a result of the variance among the issues the court ordered supplemental briefing to ascertain the parties' precise claims on August 27, 2003. On August 28, 2003, Plaintiff filed a Motion to Strike Defendant's Reply claiming that a reply was not permitted under the rules of this court and that the Defendant had failed to ask for leave to file its Reply brief.

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[1] Labor registered the petition on July 5, 2001, and designated it Petition #5051.

The court scheduled oral argument on these three motions for October 30, 2003. Before oral argument was held, however, on October 20, 2003, Defendant filed its second Motion to Dismiss in this matter. In its motion, Defendant claimed that, pursuant to USCIT R. 12(b)(5), the court must dismiss this action because Plaintiffs had failed to state a claim upon which relief can be granted and that the court lacked jurisdiction. *See Former Employees of Quality Fabricating, Inc. v. United States*, Slip Op. 2004–48 at 5–6, 2004 Ct. Intl. Trade LEXIS 48 (May 11, 2004) (*FEO Quality II*"). Alternately, Defendant argued that, assuming this court did possesses jurisdiction, no justiciable issue existed because Plaintiffs received the relief they requested; thus, rendering the case moot. Defendant also claimed that Plaintiffs abandoned their original claim when they opposed Defendant's Motion for Voluntary Remand.

The court cancelled the oral argument set for October 30, 2003, in order to permit the Plaintiffs adequate time to respond to Defendant's new Motion to Dismiss. After briefing on the issue concluded, the court ordered oral argument on Defendant's Motion to Dismiss on April 13, 2004. The Plaintiffs opposed dismissal claiming that their Complaint and First Amended Complaint provided proper notice of issues raised in this appeal of Labor's negative determination and that this court has jurisdiction over all claims raised. At the conclusion of oral argument on this matter the court stated that "the defendant's motion is going to be denied. We'll get a decision out fairly quickly doing that." Transcript of Oral Argument held on April 13, 2004 at 32 (lines 23–25). Subsequently, on May 11, 2004, the court issued a written opinion denying Defendant's Motion to Dismiss on the grounds that it had failed to prove that no set of facts remained which would entitle Plaintiff to relief. The court held that the Plaintiffs had given the Defendant fair notice of what their claims were and the grounds upon which they rest and that accordingly, the standards for dismissal under the court's rules had not been met.

Prior to the issuance of the court's opinion, on April 20, 2004, Defendant filed a Motion for Reconsideration, which Plaintiff's opposed. On June 2, 2004, the court ordered that the parties re-file their briefs and add citations from the transcript from oral argument held on April 13, 2004. *See Former Employees of Quality Fabricating, Inc. v. United States*, Court No. 02–00522 (order dated June 2, 2004). The parties timely re-filed their briefs in accordance with the court's Order.

III
Arguments

Defendant claims that the Court made a finding that it admitted to a fact that is "clearly contradicted by the administrative record of this case, the record of proceedings in this Court, and plaintiffs' own statements throughout the course of this litigation. Transcript of

Oral Argument held April 13, 2004 ("TR.") at 12:21–13:10" and that this finding should be reconsidered. Defendant's Motion at 1. Alternatively, Defendant argues that should the court not reconsider its "finding," the Court should allow it to amend paragraph nine of its Amended Answer "to avoid any ambiguity and to conform to the undisputed facts of the record." *Id*.

Plaintiffs oppose Defendant's Motion and argue that Labor has mistakenly characterized the court's comments during oral argument regarding paragraph nine and Defendant's admission as an evidentiary holding. It argues that, in effect, Labor is suggesting that "the Court somehow ruled, notwithstanding the record evidence, that Labor issued a negative determination of certification as a secondarily-affected worker group." Plaintiffs' Opposition at 3. It claims that the Defendant's assertion is contrary to the Court's comments and discussion at the April 13, 2004, oral argument and should not be accepted.

Plaintiffs also claim that they have never argued that Labor issued a negative determination of eligibility as a group of secondarily affected workers and that "[g]iven the nature and scope of the discussion that transpired, reconsideration is neither required nor warranted." Plaintiffs' Opposition at 4–5. Alternately, Plaintiffs argue that the Defendant has failed to demonstrate that justice requires that its Amended Answer be amended and that as written, and that the undue delay in moving to amend, coupled with the futility of the Defendant's Motion and resulting prejudice to the Plaintiffs, supports its denial.

IV
Applicable Legal Standards

A
Motion for Reconsideration

The decision to grant or deny a motion for reconsideration or rehearing lies within the sound discretion of the Court. *See Union Camp Corp. v. United States*, 21 CIT 371, 372 (1997); *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990). "Reconsideration or rehearing of a case is proper when 'a significant flaw in the conduct of the original proceeding [exists],' *Kerr-McGee*, 14 CIT at 583, such as '(1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case, and must be addressed by the Court.' " *United States v. Inn Foods, Inc.*, 276 F. Supp. 2d 1359, 1360–61 (CIT 2003) (citations omitted). In ruling on a motion for reconsideration,

the Court's previous decision will not be disturbed unless it is "manifestly erroneous." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337 (1984).

B
Amendment of a Pleading

The court has the discretion to grant or deny a motion for leave to amend a pleading under Rule 15(a). Pleadings include complaints, answers, replies to counterclaims, and answers to cross-claims. USCIT R. 7(a); *Dal-Tile Corp. v. United States*, 23 CIT 631, 636 (1999). Pursuant to USCIT R. 15(a),[2] once responsive pleadings have been served, a party may amend its pleadings "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." *See Dal-Tile Corp.*, 23 CIT at 636. The Supreme Court has stated that leave to amend should be "freely given," absent any "apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, *undue prejudice to the opposing party by virtue of allowance of the amendment*, futility of amendment, etc. . . ." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (emphasis added).

V
Discussion

A
Defendant's Motion For Reconsideration

Defendant requests that the court reconsider what it characterizes as an "evidentiary holding." Specifically at issue are comments made by the court concerning Plaintiffs' Opposition to Defendant's Motion to Dismiss, Plaintiffs' Complaint at paragraph nine, and Defendant's Answer to First Amended Complaint ("Defendant's Answer").

Plaintiffs' Complaint at 3 states that:

> 9. On or about May 9, 2002, the DOL issued a negative determination regarding eligibility in response to the above petition,

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[2] USCIT R.15(a) regarding amended and supplemental pleadings states that:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been noticed for trial, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

> denying the Plaintiffs eligibility for trade adjustment assistance under Section 223 of the Trade Act of 1974, 19 U.S.C. § 2273. The determination was published in the Federal Register on May 17, 2001. *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 35,140, 35,142 (May 17, 2002).

The Defendant's Answer at 2 regarding paragraph nine simply states:

> 9. Admits.

Defendant claimed in its brief that it is asking the court to reconsider what it characterizes as a finding that Defendant "admitted to a fact that is clearly contradicted by the administrative record of this case, the record of proceedings in this Court, and plaintiffs' own statements throughout the course of this litigation. Transcript of Oral Argument held April 13, 2004 ("TR.") at 12:21–13:10." Defendant's Motion at 1. Defendant claims that "[a]t the oral argument held on April 12, 2004, the Court indicated that our answer to paragraph nine of the amended complaint operated as an admission that Labor had denied plaintiffs' petition for adjustment assistance benefits as: (1) primarily affected workers pursuant to 19 U.S.C. § 2273; *and* (2) secondarily affected workers pursuant to WIA."[3] Defendant's Motion at 5. The portion of the oral argument that Defendant cites to in its Motion for Reconsideration is quoted from the Transcript of

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[3] As the court explained in *FEO Quality II*, the Joint Training Partnership Act ("JTPA"), 29 U.S.C. §§ 1662 et seq. (1994 & Supp. IV 1998), was repealed effective July 1, 2000, by the Workforce Investment Act of 1998 ("WIA"), Pub. L. No. 105–220, § 199(b)(2), 112 Stat. 1059–60. Slip Op. 2004–48 at 12 n.5. Neither the repeal nor the provisions of the Workforce Investment Act ("WIA") are at issue in this litigation. The court explained in *FEO Quality II* that the provisions of the JTPA as the progenitor of the WIA contained provisions that were fundamentally different from the Trade Act of 1974 from which this litigation arises. Rather the JTPA provides the source for funding of secondary affected worker groups. The court explained that:

> The provisions relating to the JTPA did not deal with any of the substantive aspects for requirements relating to petitions, worker eligibility, or notice. Rather, the JTPA focused on funding benefits once eligibility is determined. This is in direct contrast to the Trade Act of 1974, which explains the substantive analysis that Labor is required to make when certifying secondarily-affected workers. *See* Plaintiff's Response at 5–6, Exhibits 2A. Title 19 contains specific substantive elements such as petition requirements, pursuant to 19 U.S.C. § 2271; group eligibility requirements, pursuant to 19 U.S.C. § 2272; determinations by the Secretary of Labor, pursuant to 19 U.S.C. § 2273; and program benefits, pursuant to 19 U.S.C. §§ 2291. *See* Plaintiff's Response at 6, Exhibits 2A, 2B. There are no references to the source of funding for secondarily-affected workers within these provisions, and they cannot be construed as containing a source of funding. As noted above, the JTPA did not provide information regarding petition requirements, certification, notice and eligibility for benefits for secondarily-affected workers. The JTPA, accordingly, could not be construed as the source for an entitlement of benefits.

Id. (footnote omitted).

Oral Argument below. The court, quoting from the Plaintiffs' brief states:

> Plaintiff says in its opposition on Page 4 that it alleged in—they alleged in their first amended complaint at Paragraph 9 at Pages 2 to 3 that on or about May 9, 2002 the Department of Labor issued a negative determination regarding eligibility in response a petition denying the plaintiff's eligibility for adjustment assistance under Section 223 of the Trade Act of 1974. The determination was published in the Federal Register on May 17, 2001. Plaintiff says "These paragraphs describe the filing of the petition which sought both primary and secondary certification and publication of the notice that the petition as a whole had been denied."
>
> *Plaintiff then says "Defendant admitted these factual contentions are true" in his answer to the defendant's first amended complaint Paragraph 6 and 9, and I looked at 6 and 9 and indeed you do admit them.*
>
> *Does defendant now seek to withdraw any portion of its answer?*
>
> *Mr. Tosini: To the extent that our answer could be construed as admitting that the plaintiffs were denied benefits as secondarily affected workers, yes, we withdraw that admission.*
>
> *The Court: You can't withdraw it, Mr. Tosini. You can make a motion to withdraw it.*
>
> Mr. Tosini: We make an oral motion to withdraw, or if the Court would prefer we may make a written motion as well.
>
> The Court: Let me ask Mr. Gordon. Hang on a second.
> Mr. Gordon, when the Government makes a motion to withdraw the admission in its answer, do you intend to oppose that motion?
>
> Mr. Gordon: Yes, Your Honor, I think it's safe to say we would vigorously oppose that motion and any type of motion similar to that that seeks to fundamentally renovate the entire case to date.

Transcript of Oral Argument held April 13, 2004 at 12 (lines 15–25)–13 (lines 1–22) (emphasis added).

Defendant asked that the court reconsider its "evidentiary holding." The court, however, made no evidentiary holding. The court ruled from the bench that it would not permit the Defendant to orally withdraw paragraph nine of its Amended Answer. Defendant apparently believes that the court made a finding by quoting from the Plaintiffs' brief, the Plaintiffs' Complaint at paragraph nine and the Defendant's Answer to the First Amended Complaint at paragraph nine. The court's sole question to Defendant was whether the

Defendant wished to withdraw a portion of its answer, to which the Defendant replied that "[t]o the extent that our answer could be construed as admitting that the plaintiffs were denied benefits as secondarily affected workers, yes, we withdraw that admission." Transcript of Oral Argument at 13 (lines 7–10). The court then instructed counsel that it could not unilaterally withdraw a portion of its Answer and would need to file a motion if it intended to withdraw as Plaintiffs' opposed the withdrawal.

The Court orally denied Defendant's Motion to Dismiss and informed the parties that it would explain its reasoning in a written opinion, *FEO Quality II*. The court declines to reconsider its Opinion.

B
Defendant's Motion to Amend its Amended Answer

Defendant alternately requested that the court permit it to amend paragraph nine of its Answer in order to avoid any ambiguity and to "reflect facts clearly contained in the record of the challenged determination and admitted by plaintiffs' counsel." Defendant's Motion at 9.

Leave to amend a pleading before this court is "freely given when justice so requires." USCIT R. 15(a). However, it is incumbent upon the movant to provide adequate reasons for its delay and the requested amendment. *See Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 948 F.2d 1258, 1263 (Fed. Cir. 1991). The Supreme Court in *Foman*, 371 U.S. at 182, explained that before a district court grants or denies a motion to amend the pleadings, the court should examine any "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of [the] amendment, etc. . . ." Accordingly, the court examines the *Foman* balancing factors in reaching its decision.

1
Undue Delay

Defendant bears the burden of justifying its requested amendment. *See Te-Moak*, 948 F.2d at 1263. Its request to amend its Answer at this point in the litigation is problematic. A recitation of its filings to date before the court illustrates the confusion and delay the Defendant's erroneous filings or failure to file have caused in this matter. Initially, Defendant filed a Motion to Dismiss on October 3, 2002, claiming that the statute of limitations barred Plaintiffs from seeking relief. After Plaintiffs' counsel responded, Defendant failed to file a timely Reply on its own motion. Realizing its error days before oral argument it filed its Reply brief out of time which did not

reach the court in time for the oral argument set on its Motion to Dismiss. The court, however, permitted Defendant to orally Reply and denied its Motion for Leave to file its reply brief out of time as moot. *See FEO Quality I*, 259 F. Supp. 2d at 1288 n. 11; *FEO Quality Fabricating, Inc. v. United States*, Court No. 02–00522 (Order signed on February 19, 2003). Subsequently, Plaintiffs filed a 56.1 Motion for Judgment on the Agency Record on July 1, 2003. Defendant failed to respond to the Motion, its response was due on July 31, 2003, thus, leaving Plaintiffs Motion unopposed. The day after its Response to Plaintiffs 56.1 Motion was due, on August 1, 2004, Defendant filed a Motion for Voluntary Remand, which Plaintiffs opposed on August 11, 2003. Defendant then filed a Reply brief to its Motion for Voluntary Remand, on August 22, 2003, which because it was a non-dispositive motion, was not permitted under the court's rules. Plaintiffs, therefore, filed a Motion to Strike Defendant's Reply on August 28, 2003. Because of the confusion in claims, issues, and filings, the court ordered supplemental briefs to clarify what precisely was at issue in this case. After the supplemental briefs were filed, the court set oral argument on Plaintiffs' 56.1 Motion, Defendant's Motion for Voluntary Remand and Plaintiffs' Motion to Strike. Ten days before oral argument on these three motions, however, Defendant filed a second Motion to Dismiss requiring that the court cancel oral argument in order to permit Plaintiffs' sufficient time to respond to the Defendant's second Motion to Dismiss. Now in its Motion for Reconsideration it requests that it be permitted to amend its Answer.

At some point in the course of litigation the court must acknowledge that an unjustifiable delay preceding a motion to amend "goes beyond excusable neglect, even when there is no evidence of bad faith or dilatory motive." *See Te-Moak*, 948 F.2d at 1262–63 (quoting *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir. 1981)). In this case, the Court finds that Defendant's delay in bringing its proposed amendment is inexcusable. Defendant has been less than conscientious in its filings before this court and its actions or lack thereof have impeded the progress of this case. When delay occurs, the court places the burden to justify the request for an amendment on the movant. *See Te-Moak*, 948 F.2d at 1263. As the court in *FEO Quality II* explained, Plaintiffs gave Defendant sufficient notice of the challenged determination. Plaintiffs' Amended Complaint is concise and put the Defendant on notice of its claims. Defendant failed to respond to Plaintiffs 56.1 Motion for Judgment on the Agency Record. Had the Defendant any legitimate questions about the scope of Plaintiffs' Amended Complaint, that issue could have been resolved at any time in the past year by a Motion for a More Definite Statement. While there is no indication of bad faith on the part of the Defendant, nonetheless the filings to date bear the hallmarks of tactics of delay.

Defendant further states in its motion that "amendment will not cause undue delay because the parties are pursuing this case upon the premise that Labor certified the plaintiffs as eligible to apply for adjustment assistance as adversely affected secondary workers." Defendant's Motion at 9. The Defendant's proposed amendment states:

> Admits the allegations contained in paragraph nine of plaintiffs' first amended complaint to the extent established by the administrative record, which is the best evidence of its contents. Avers that the Secretary of Labor determined that the plaintiffs are eligible to apply for adjustment assistance as an adversely affected secondary worker group and that review of this adversely affected seworker group is not subject to the Court's jurisdiction.

Defendant's Motion at 2.

The court in *FEO Quality II*, determined that this court has jurisdiction over secondarily affected worker group claims. Pursuant to the law of the case doctrine, when a court decides upon a rule of law, that decision continues to govern the same issues in subsequent phases of the case, *see Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983), the Defendant's proposed emendation relating to jurisdiction has been decided. If Defendant had wished to challenge that finding, a motion for reconsideration would have been the appropriate motion.

Furthermore, Defendant's claims that the parties are pursuing this case upon the premise that Labor certified the plaintiffs as eligible to apply for adjustment assistance belies the fact that the claims the parties made in their filings before this court were so disparate the court ordered supplemental briefing in order to determine precisely what was at issue.[4] Plaintiffs point out that they have requested proper notice of certification for secondary benefits and all benefits to which they would have been entitled had proper notice issued. They argue that as more time passes it will be "increasingly difficult to determine the benefits that should flow to each plaintiff, and it becomes increasingly likely that other problems will arise similar to those in *Former Employees of Tyco Electronics Fiber Optics Division v. United States*, Slip Op. 2004–34, 2004 Ct. Int'l Trade LEXIS 33 (April 14, 2004)." Plaintiffs' Opposition at 12–13 (explaining that even though the plaintiffs were certified by Labor for benefits, the Plaintiffs in *Tyco* were informed by the state agency responsible for administering the NAFTA-TAA benefits that Plaintiffs would not receive basic trade readjustment allowances because the

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[4] On August 27, 2003, the court ordered that, because it required additional information to resolve issues raised in Plaintiff's Opposition to Defendant's Motion for Voluntary Remand, it required Plaintiffs and Defendant to file supplemental briefs addressing the disparity in their claims.

statutory 104-week eligibility period for those allowances had expired during the pendency of this litigation before the CIT). The court is mindful that there has been too much delay in this case already.

2
Undue Prejudice

Defendant says that its proposed amendment would "aid the Court in reaching a decision upon the merits of this case." Defendant's Motion at 9. Plaintiffs claim that they would be unduly prejudiced by amendment to Defendant's Answer. They claim that during the eight months between the time the issue of the court's jurisdiction arose and when Labor sought to amend its answer Labor treated the court's jurisdiction as central to its legal defense and it has been extensively briefed. Furthermore, Plaintiffs claim that "the QFI workers were certified as a group of secondarily affected workers, and that instead of properly notifying the workers, Labor instead published a notice in the *Federal Register* that incorrectly informed the public that the Petition as a whole had been denied." Plaintiffs' Opposition at 5. During the in court status conference held on this motion, Defendant agreed with this characterization of the case.

The matter before the court is ripe and ready for determination and any additional time consumed by adjudication of this motion materially prejudices the Plaintiffs by further delaying and complicating their receipt of benefits. As the party opposing the motion, Plaintiffs may show undue prejudice through an unfairly disadvantaged or deprived of opportunity to present facts or evidence which it would have offered had the amendment been timely. *See Dal-Tile Corp*, 23 CIT at 638; *see also Ford Motor Co. v. United States*, 19 CIT 946, 955–56 (1995). Plaintiffs may also show undue prejudice as a result of the fact that the amendments that the movant proposes substantially change the theory of the case or would make trial far more complicated and lengthy for the plaintiff, and that the added time and expense that would have to be incurred countering those new claims could be considered an appropriate prejudicial basis for denying a motion to amend. *Dal-Tile Corp.*, 23 CIT at 639.

The Plaintiffs should not have to expend time and resources to rebrief their case on what is currently an unopposed motion. The expenditures and the potential alteration of Plaintiffs' theory of the case at this point in litigation can only be viewed as prejudicial to the Plaintiffs.

Because the Court finds undue delay and undue prejudice sufficient grounds on which to deny Defendant's Motion for Reconsideration of the Court's Evidentiary Ruling or for Leave to Amend Defendant's Answer, the Court does not address the futility of Defendant's proposed emendation, an amendment that would contradict the

court's finding in *FEO Qaulity II*, that the court had jurisdiction over secondary worker group determinations made by Labor.

VI
Conclusion

For the foregoing reasons, Defendant's Motion is Denied.

Slip Op. 04–85

CANADIAN REYNOLDS METALS COMPANY, c/o REYNOLDS METALS COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 00–00444

[Defendant's motion to dismiss denied.]

Decided: July 14, 2004

LeBoeuf, Lamb, Greene & MacRae, LLP (*Gary P. Connelly, Melvin S. Schwechter*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney-in-Charge, International Trade Field Office, *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Canadian Reynolds Metals Company ("CRMC" or "Plaintiff") seeks to invoke this Court's jurisdiction pursuant to subsection (a) of 28 U.S.C. § 1581 (2000) to challenge the denial of its administrative protest filed pursuant to 19 U.S.C. § 1514 (2000).[1] That protest sought to challenge Defendant's imposition of certain Merchandise Processing Fees ("MPF") on Plaintiff's imports.

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[1] Because Plaintiff filed its summons in 2000, Summons of CRMC at 2, the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred. The Court notes that subsection (c) of 28 U.S.C. § 1491, *see infra* note 25, was redesignated from subsection (b) to subsection (c) in 1996. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320 § 12, 110 Stat. 3870, 3874 (codified as amended at 28 U.S.C. § 1491 (2000)).

Defendant United States Bureau of Customs and Border Protection[2] ("Customs" or "Defendant") moves for dismissal claiming lack of subject matter jurisdiction because Plaintiff failed to properly and timely file its protest. The Court also inquires into whether the instant action was timely filed with the Court.

Because Plaintiff's protest was timely filed, and because Plaintiff's case was timely filed, Defendant's motion to dismiss is denied[3]

I. Background

Plaintiff's administrative protest has a ten-year history, a review of which is necessary background for the motion at issue here. On December 15, 1992, CRMC made a voluntary disclosure to Customs under 19 U.S.C. § 1592(c)(4), admitting that it had failed to pay certain MPF on unwrought aluminum products imported into the United States between 1990 and the date of disclosure. Def.'s Mem. Supp. Mot. Dismiss at 1–2 ("Def.'s Mot."); Pl.'s Opp'n to Mot. Dismiss at 1 ("Pl.'s Opp'n"). To perfect its voluntary disclosure, Customs requested that CRMC tender $54,487.69, which CRMC paid on October 6, 1994. *See* Letter from John Barry Donohue, Jr., Assoc. Gen. Counsel, Reynolds Metals Co., to William D. Dietzel, Dist. Dir., Customs, Pl.'s Ex. A at 1,[4] 3 (Oct. 6, 1994) ("October 6 Letter").[5]

Along with its payment, CRMC submitted a letter in which it advised Customs of its intent to appeal the MPF determination, as it considered its entries exempt from the MPF rate demanded by Customs. *Id*. at 1. CRMC argued that the unwrought aluminum products were of Canadian origin, and thus qualified for special treatment pursuant to the United States-Canada Free Trade Agreement ("USCFTA"). Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D at 4, 4–5 (Feb. 1, 1995)

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[2] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[3] In *Canadian Reynolds Metals Co. v. United States*, slip. op. 04–39 (CIT Apr. 23, 2004), the Court granted Defendant's motion. However, pursuant to USCIT R. 59(a) (stating that a "rehearing may be granted . . . in an action finally determined"), the Court, on June 8, 2004, ordered reconsideration of its April 23 opinion, and now, hereby, vacates the judgment granted therein and the opinion on which it was based.

[4] Documents appended to Pl.'s Opp'n are referred to as "Pl.'s Ex." followed by the corresponding letter. Documents appended to Plaintiff's supplemental letter brief are referred to as "Pl.'s Supp. Ex." followed by the corresponding letter.

[5] The record shows that all correspondence and documentation referred to in this decision was either addressed to or sent by Reynolds Metals Company, in its capacity as owner of Canadian Reynolds Metals Company. Reynolds Metals Company also owns Aluminerie Becancour, Inc., which is the Plaintiff in a companion case before this Court. *Aluminerie Becancour, Inc. v. United States*, Court No. 00–00445, slip op. _____ (CIT July 14, 2004) (pending).

("February 1 Letter").[6] Customs, on the other hand, had previously concluded that due to a non-Canadian additive, CRMC's entries failed to qualify for the reduced MPF rate provided by the USCFTA. *Id.* at 5. CRMC, in turn, argued that pursuant to the doctrine of *de minimis non curat lex*, the foreign additive in the Canadian entries should be disregarded for country of origin purposes. *Id.* CRMC informed Customs in its payment tender letter that it expected a full refund of the tender amount along with accrued interest in the event that subsequent litigation was successful. October 6 Letter, Pl.'s Ex. A at 1.

Customs responded in a letter dated November 8, 1994, stating that it had received CRMC's tender of MPF, but rejected all conditions imposed by CRMC in connection to this payment. Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., Customs, to John Barry Donohue, Reynolds Metals Co., Pl.'s Ex. B at 1 (Nov. 8, 1994) ("November 8 Letter"). Subsequently, Customs and CRMC concluded an escrow agreement on December 20, 1994, in which they agreed to let the decision in a designated test case[7] control whether a full refund of CRMC's MPF payment was appropriate. Agreement between Canadian Reynolds Metals Company and U.S. Customs Service, Pl.'s Ex. C at 1 (Dec. 20, 1994) ("Escrow Agreement"). In the event that the test case decision was favorable to CRMC, Customs further agreed to refund the full tendered amount "together with such interest as may be required by law." *Id.* at 1–2.

On February 6, 1995, CRMC filed an administrative protest. *See* Letter from Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D. at 1 (Feb. 6, 1995) ("February 6 Letter"); Protest No. 0712–95–100131, Pl.'s Ex. D at 3 (Feb. 6, 1995) ("Protest Form").[8] In its protest, Plaintiff appeared to make

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[6] Barnes, Richardson & Colburn was Plaintiff's legal representative at the time. *See* February 1 Letter, Pl.'s Ex. D at 4.

[7] In subsequent amendments to the escrow agreement, concluded on October 28, 1996, and July 13, 1998, the parties identified the designated test case as *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), originally referred to as St. Albans Protest No. 0201–93–100281 (HQ 955367) and subsequently appealed to the Federal Circuit Court of Appeals. Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 3, 4 (Oct. 30, 1996); Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 5, 6 (July 13, 1998); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

[8] The "protest package" provided as Exhibit D by Plaintiff contains copies of two letters along with a copy of a completed Customs Form 19 (Protest No. 0712–95–100131); the first letter is dated February 1, 1995, and the second letter is dated February 6, 1995. *See* Pl.'s Ex. D. Accordingly, it appears as though Plaintiff first attempted to forward a protest to Customs on February 1, 1995, but that for reasons unclear to the Court, the protest was not filed until February 6, 1995, the date Customs received and stamped the protest form. Protest Form, Pl.'s Ex. D at 3. The implementing regulation for filing of protests confirms that

three objections to Customs' actions. First, Plaintiff stated that it objected to the assessment and payment of MPF. February 1 Letter, Pl.'s Ex. D at 4. Second, it protested "contingencies not anticipated in the [escrow] [a]greement[,] or unanticipated frustration" of the same. *Id.* at 5–6. Plaintiff then appears to have made a third objection, referring to Customs' acceptance of payment. *Id.* at 4. In support of this third objection, Plaintiff noted that a copy of Customs' letter dated November 8, 1994, as well as a receipt of payment made out by Customs on November 7, 1994, was enclosed with the protest. *Id.*; *see also* Collection Receipt from U.S. Bureau of Customs & Border Prot., to Canadian Reynolds Metals Co., Pl.'s Ex. A at 5 (Nov. 7, 1994) ("Receipt"). Plaintiff clarified in its protest that it did not expect Customs to act in response to its objections until final judgment was rendered in the pending test case. February 1 Letter, Pl.'s Ex. D at 6.

On January 5, 1999, the Federal Circuit Court of Appeals issued its decision in the test case, *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999). The *Alcan Aluminum Corp.* Court held that the foreign additive in question was subject to the principle of *de minimis non curat lex*, and therefore, the entries were considered of Canadian origin. 165 F.3d at 902. The *Alcan Aluminum Corp.* decision became final on April 5, 1999. Pl.'s Opp'n at 4.

Because CRMC's entries qualified for preferential trade status under the USCFTA as a result of the favorable decision in *Alcan Aluminum Corp.*, Customs refunded to CRMC the deposited MPF amount in full "[o]n or about" February 7, 2000.[9] Compl. of CRMC at 3.

Customs, however, failed to tender interest pursuant to the escrow agreement when it made the refund to CRMC. Def.'s Mot. at 2; Pl.'s Opp'n at 4. CRMC then sent, on February 10, 2000, a request for accelerated disposition of its protest. *See* Pl.'s Opp'n at 4; Letter from F. D. "Rick" Van Arnam, Jr., Barnes, Richardson, & Colburn, to Port Dir., Customs, Pl.'s Supp. Ex. A (Feb. 9, 2000); Certified Mail Receipt, Pl.'s Supp. Ex. B. (Feb. 10, 2000) Following what CRMC considered a denial of the original protest by operation of law, it filed a summons with the Court on September 7, 2000. Summons of CRMC at 2. Plaintiff subsequently, on September 30, 2002, filed its complaint seeking relief. Compl. of CRMC at 6. The thrust of Plaintiff's

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a protest is considered filed on the date it is received by Customs. 19 C.F.R. § 174.12(f) ("The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed."). Additionally, both parties agree that the protest was filed on February 6, 1995. *See* Def.'s Mot. at 2; Pl.'s Opp'n at 3. As the February 6 Letter merely serves as a complement to the original protest attempt on February 1, 1995, however, the Court will treat the letter dated February 1, 1995, as part of the protest filed on February 6, 1995. *See* February 6 Letter, Pl.'s Ex. D at 1 ("[W]e forwarded protests, dated February 1, 1995, in which CRMC . . . protested the assessment and payment of Merchandise Processing Fee ('MPF').").

[9] No supporting exhibit was provided, but Defendant does not deny this statement. *See* Def.'s Mem. at 2.

complaint is that Customs failed to pay interest on the refunded MPF. *Id.* at 3–4. As noted above, Defendant Customs moves to dismiss for lack of subject matter jurisdiction.

II. Standard of Review

Because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction. *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27 CIT ___ , ___ , 273 F. Supp. 2d 1336, 1338 (2003) (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, because Defendant's motion to dismiss challenges the sufficiency of Plaintiff's pleadings (as opposed to the factual basis underlying the pleadings), the Court will accept all facts alleged in Plaintiff's pleading as true. *Corrpro Cos. v. United States*, slip. op. 03–59, at 4 (CIT June 4, 2003).

III. Discussion

Defendant moves to dismiss, alleging that because CRMC failed to timely protest any Customs decision, subject matter jurisdiction under 28 U.S.C. § 1581(a) is lacking. *See* Def.'s Mot at 3–4. Furthermore, even in the event that the CRMC timely protested a Customs decision, this Court can only exercise subject matter jurisdiction if the case was timely filed with the Court. *See* 28 U.S.C. § 2636(a); USCIT R. 3(a). The Court will therefore discuss each of these timing issues in turn.

A. Plaintiff Timely Protested a Customs Decision

Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a), which provides for the review of the denial of aprotest made under section 515 of the Tariff Act of 1930, as amended at 19 U.S.C. § 1515.. Compl. of CRMC at 1; 28 U.S.C. § 1581(a). Subsection (a) of § 1515 authorizes Customs "to review and deny or allow a protest as long as it is filed in accordance with 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). A suit attempting to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a) must therefore be based on a protest which complies with the requirements of § 1514.

Title 19 U.S.C. § 1514 governs the timing of protests. 19 U.S.C. § 1514. Section 1514 specifically provides that, where no notice of liquidation is involved, a protest must be filed no more than ninety days after the protested decision.[10] Both parties to this action agree

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[10] Title 19 U.S.C. § 1514(c)(3) provides as follows:

A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—

(A) notice of liquidation or reliquidation, or

there is no notice of liquidation in this matter; therefore, it is necessary to determine whether Plaintiff's protest challenged any Customs decision made within ninety days prior to the protest's filing. *See* Def.'s Mot. at 3; Pl.'s Opp'n at 5.

In its protest, Plaintiff appears to make three objections. *See* February 1 Letter, Pl.'s Ex. D at 4–6. First, Plaintiff protests the assessment and payment of MPF. *Id.* at 4. The MPF tender, however, occurred on October 6, 1994, October 6 Letter, Pl.'s Ex. A at 3, while Plaintiff filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. Because a time period of more than ninety days elapsed between those two events, Plaintiff's protest fails to present a timely challenge to the assessment and payment of MPF.

Second, Plaintiff protests unanticipated frustration of, and contingencies not foreseen in, the escrow agreement. February 1 Letter, Pl.'s Ex. D at 5–6. Title 19 U.S.C. § 1514(c)(3) states, however, that parties must file protests "within ninety days after *but not before* . . . the date of the decision as to which protest is made." *Id.* (emphasis added). The decision the protesting party objects to must therefore occur prior to the filing of the protest. As previously stated, CRMC filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. To the extent that Plaintiff objects to the unanticipated event of Customs' decision to refund MPF without interest in February 2000, that event had not yet occurred at the time the protest was filed.[11] Accordingly, under a plain reading of 19 U.S.C. § 1514(c)(3), Plaintiff's protective protest was untimely and invalid. *See A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988) (holding that a protest was invalid either because it was filed the day before Customs denied a previous claim for relief or barred by the provision allowing only one protest per entry of merchandise).

Third, Plaintiff appears to object to Customs' acceptance of its MPF tender. *See* February 1 Letter, Pl.'s Ex. D at 4. In its protest, Plaintiff alleges that Customs accepted its payment on November 8, 1994, and specifies that the protest was filed within ninety days of

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(B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3).

[11] Plaintiff claims that Customs made the decision not to pay interest as early as November 8, 1994, the day it sent the November 8 Letter. *See* Pl.'s Opp'n at 6. However, the parties subsequently signed the escrow agreement, where Customs agreed to refund the MPF amount and "interest as may be required by law" if related litigation was successful. Escrow Agreement, Pl.'s Ex. C at 1–2. Thus, even presuming that Customs made the decision to deprive CRMC of interest at such an early stage, that decision was later vitiated by the terms of the escrow agreement before the filing of the protest. Moreover, even if the escrow agreement did not vitiate Customs' original rejection of any conditions on the payment of MPF, the language of the protest — objecting to unanticipated frustration of the escrow agreement — clearly refers to decisions which had not yet been made, and not to the November 8 Letter.

that date. *Id.* Plaintiff's February 1 Letter further states that Plaintiff attached a copy of the November 8 Letter to the protest, as well as a copy of the receipt from Customs. *Id.* The receipt, however, shows that Customs received Plaintiff's MPF payment on November 7, 1994. Receipt, Pl.'s Ex. A at 5. The November 8 Letter, on the other hand, indicates that Customs acknowledged the MPF tender, and that Customs intended not to accept the tender's contingencies. November 8 Letter, Pl.'s Ex. B at 1. Consequently, the Court cannot conclude that Customs' acceptance of Plaintiff's tender took place on November 8, 1994. Rather, acceptance occurred a day prior, when Customs received payment and made out the receipt. Customs therefore, on November 7, 1994, made the decision Plaintiff attempted to protest; November 7 was ninety-one days prior to the filing of the protest in question here. However, February 5, 1995, the ninetieth day from November 7, 1994, fell on a Sunday. Under USCIT R. 6(a), when this Court computes any period of time prescribed by statute, and where the last day falls on a Saturday, Sunday or holiday, the last day of the period shall not be included in the computation, but the allowable time period shall run to the next business day. *See* USCIT R. 6(a). Therefore, Plaintiff's protest was timely filed on February 6, 1995.[12]

B. The Case Was Timely Filed With the Court

The timeliness of the protest does not itself mean that jurisdiction is proper in this case. Having found that the protest itself was timely filed, the Court turns to the question of whether the instant case was timely filed with the Court. A case arising from the denial of a properly filed protest must be commenced within 180 days of mailing of the denial of the protest, or within 180 days of denial of the protest by operation of law. *See* 28 U.S.C. § 2636(a). A case arising under 19 U.S.C. § 1581(a) is considered commenced when the summons is filed. *See* USCIT R. 3(a)(1). The summons in this case was filed on September 7, 2000. *See* Summons of CRMC at 2. All that remains in order to know whether that summons was timely, is to discover whether denial occurred, and if so, whether the filing of the case meets the requirements of 28 U.S.C. § 2636(a).

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[12] The Court's opinion here does not reach the question of whether Plaintiff's protest is susceptible of the relief desired by Plaintiff. Defendant has argued that by failing to directly challenge the nonpayment of interest, Plaintiff has failed to make a protest that can result in the desired relief. *See* Def.'s Mot at 4–5. Plaintiff argues that Customs' failure to pay interest is in violation of 19 U.S.C. § 1505(c), Pl.'s Opp'n at 11, which in pertinent part holds,"[i]nterest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest." 19 U.S.C. § 1505(c). This statute might allow the protest of acceptance of tender to properly result in repayment of interest. However, in this opinion, the Court limits itself to discussion of the timeliness of Plaintiff's protest and case.

Protests may be denied either by an affirmative act or, where a request for accelerated disposition has been sent by certified mail, by operation of law. *See* 28 U.S.C. § 2636(a), 19 U.S.C. § 1515(b). Title 19 U.S.C. § 1515(b) provides that where a request for accelerated disposition has not been allowed or denied within thirty days of its certified mailing, it will be denied by operation of law:

> [a] request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail . . . any time after ninety days following the filing of such protest. . . . [A] protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

19 U.S.C. § 1515(b).[13] CRMC mailed by certified mail a request for accelerated disposition of its protest to Customs on February 10, 2000. *See* Certified Mail Receipt, Pl.'s Supp. Ex B.[14] CMRC's protest was denied by operation of law, then, on March 11, 2000, the thirtieth day from the mailing of the request. That day, however, was a Saturday, so under USCIT R. 6(a), March 13, 2000, the following Monday, is officially the day upon which the protest was denied by operation of law. Fewer than 180 days elapsed between March 13, 2000 and September 7, 2000, the day the summons was filed. Therefore, this action was timely commenced with this Court.

The protest upon which this case was timely filed, as was the case itself. Accordingly, Customs' motion to dismiss is hereby denied.

So ordered.

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[13] Title 19 U.S.C. § 1515(a) states that "within two years from the date a protest was filed in accordance with section 1514 of this title, [Customs] shall review the protest and shall allow or deny such protest in whole or in part." 19 U.S.C. § 1515(a). The section does not state that protests not allowed or denied within two years are denied by operation of law. However, when read in context with 28 U.S.C. § 2636(a), it appears that section 1515(b) provides the means by which a protest may be denied by operation of law. *See* U.S.C. § 1515(b); *see also Knickerbocker Liquors Corp. v. United States*, 78 Cust. Ct. 192, 193–95, 432 F. Supp. 1347, 1349–50 (1977).

[14] The Domestic Return Receipt provided by CMRC indicates that the request for accelerated disposition of protest was received by Customs on February 14, 2000. *See* Domestic Return Receipt, Pl.'s Supp. Ex. B (Feb. 14, 2000).

Slip Op. 04–86

ALUMINERIE BECANCOUR, INC., c/o REYNOLDS METALS COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 00–00445

[Defendant's motion to dismiss denied.]

Decided: July 14, 2004

LeBoeuf, Lamb, Greene & MacRae, LLP (*Gary P. Connelly*, *Melvin S. Schwechter*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney-in-Charge, International Trade Field Office, *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Aluminerie Becancour, Inc. ("Aluminerie" or "Plaintiff") seeks to invoke this Court's jurisdiction pursuant to subsection (a) of 28 U.S.C. § 1581 (2000) to challenge the denial of its administrative protest filed pursuant to 19 U.S.C. § 1514 (2000).[1] That protest sought to challenge Defendant's imposition of certain Merchandise Processing Fees ("MPF") on Plaintiff's imports.

Defendant United States Bureau of Customs and Border Protection[2] ("Customs" or "Defendant") moves for dismissal claiming lack of subject matter jurisdiction because Plaintiff failed to timely file its protest. The Court also inquires into whether the instant action was timely filed with the Court.

Because Plaintiff's protest was timely filed, and because Plaintiff's case was timely filed, Defendant's motion to dismiss is denied.[3]

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[1] Because Plaintiff filed its summons in 2000, Summons of Aluminerie at 2, the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred. The Court notes that subsection (c) of 28 U.S.C. § 1491, *see infra* note 27, was redesignated from subsection (b) to subsection (c) in 1996. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320 § 12, 110 Stat. 3870, 3874 (codified as amended at 28 U.S.C. § 1491 (2000)).

[2] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[3] In *Aluminerie Becancour, Inc. v. United States*, slip. op. 04–40 (CIT Apr. 23, 2004), the Court granted Defendant's motion. However, pursuant to USCIT R. 59(a) (stating that a "rehearing may be granted . . . in an action finally determined"), the Court, on June 8, 2004,

I. Background

Plaintiff's administrative protest has a ten-year history, a review of which is necessary background for the motion at issue here. On December 15, 1992, Aluminerie made a voluntary disclosure to Customs under 19 U.S.C. § 1592(c)(4), admitting that it had failed to pay MPF on unwrought aluminum products imported into the United States between 1990 and the date of disclosure. Def.'s Mem. Supp. Mot. Dismiss at 1–2 ("Def.'s Mot."); Pl.'s Opp'n to Mot. Dismiss at 1 ("Pl.'s Opp'n"). To perfect its voluntary disclosure, Customs requested that Aluminerie tender $88,542.87, which Aluminerie paid on October 6, 1994. *See* Letter from John Barry Donohue, Jr., Assoc. Gen. Counsel, Reynolds Metals Co., to William D. Dietzel, Dist. Dir., Customs, Pl.'s Ex. A at 1,[4] 4 (Oct. 6, 1994) ("October 6 Letter").[5]

Along with its payment, Aluminerie submitted a letter in which it advised Customs of its intent to appeal the MPF determination, as it considered its entries exempt from the MPF rate demanded by Customs. *Id.* at 1. Aluminerie argued that the unwrought aluminum products were of Canadian origin, and thus qualified for special treatment pursuant to the United States-Canada Free Trade Agreement ("USCFTA"). Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D at 4, 4–5 (Feb. 1, 1995) ("February 1 Letter").[6] Customs, on the other hand, had previously concluded that due to a non-Canadian additive, Aluminerie's entries failed to qualify for the reduced MPF rate provided by the USCFTA. *Id.* at 5. Aluminerie, in turn, argued that pursuant to the doctrine of *de minimis non curat lex*, the foreign additive in the Canadian entries should be disregarded for country of origin purposes. *Id.* Aluminerie informed Customs in its payment tender letter that it expected a full refund of the tender amount along with accrued interest in the event that subsequent litigation was successful. October 6 Letter, Pl.'s Ex. A at 1.

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ordered reconsideration of its April 23 opinion and now, hereby, vacates the judgment granted therein and the opinion on which it was based.

[4] Documents appended to Pl.'s Opp'n are referred to as "Pl.'s Ex." followed by the corresponding letter. The document appended to Plaintiff's motion for leave to amend its memorandum of opposition is referred to as "Pl.'s Attach." Documents appended to Plaintiff's supplemental letter brief are referred to as "Pl.'s Supp. Ex." followed by the corresponding letter.

[5] The record shows that all correspondence and documentation referred to in this decision was either addressed to or sent by Reynolds Metals Company, in its capacity as owner of Aluminerie Becancour, Inc. Reynolds Metals Company also owns Canadian Reynolds Metals Company, which is the Plaintiff in a companion case before this Court. *Canadian Reynolds Metals Co. v. United States*, Court No. 00–00444, slip op. _____ (CIT July 14, 2004) (pending).

[6] Barnes, Richardson & Colburn was Plaintiff's legal representative at the time. *See* February 1 Letter, Pl.'s Ex. D at 4.

Customs responded in a letter dated November 8, 1994, stating that it had received Aluminerie's tender of MPF, but rejected all conditions imposed by Aluminerie in connection to this payment. Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., Customs, to John Barry Donohue, Reynolds Metals Co., Pl.'s Ex. B at 1 (Nov. 8, 1994) ("November 8 Letter"). Subsequently, Customs and Aluminerie concluded an escrow agreement on December 20, 1994, in which they agreed to let the decision in a designated test case[7] control whether a full refund of Aluminerie's MPF payment was appropriate. Agreement between Reynolds Metals Company and U.S. Customs Service, Pl.'s Mot. for Leave to Amend Pl.'s Opp'n, Pl.'s Attach. at 1 (Dec. 20, 1994) ("Escrow Agreement").[8] In the event that the test case decision was favorable to Aluminerie, Customs further agreed to refund the full tendered amount "together with such interest as may be required by law." *Id*. at 1–2.

On February 6, 1995, Aluminerie filed an administrative protest. *See* Letter from Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D at 1 (Feb. 6, 1995) ("February 6 Letter"); Protest No. 0712–95–100130, Pl.'s Ex. D at 3 (Feb. 6, 1995) ("Protest Form").[9] In its protest, Plaintiff appeared to make three objections to Customs' actions. First, Plaintiff stated that it objected to the assessment and payment of MPF. February 1 Letter,

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[7] In subsequent amendments to the escrow agreement, concluded on October 28, 1996, and July 13, 1998, the parties identified the designated test case as *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), originally referred to as St. Albans Protest No. 0201–93–100281 (HQ 955367) and subsequently appealed to the Federal Circuit Court of Appeals. Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 3, 4 (Oct. 30, 1996); Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 5, 6 (July 13, 1998); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

[8] Reynolds Metals Company concluded the agreement with Customs on behalf of Plaintiff. *See* Escrow Agreement, Pl.'s Attach. at 1.

[9] The "protest package" provided as Exhibit D by Plaintiff contains copies of two letters along with a copy of a completed Customs Form 19 (Protest No. 0712–95–100130); the first letter is dated February 1, 1995, and the second letter is dated February 6, 1995. *See* Pl.'s Ex. D. Accordingly, it appears as though Plaintiff first attempted to forward a protest to Customs on February 1, 1995, but that for reasons unclear to the Court, the protest was not filed until February 6, 1995, the date Customs received and stamped the protest form. Protest Form, Pl.'s Ex. D at 3. The implementing regulation for filing of protests confirms that a protest is considered filed on the date it is received by Customs. 19 C.F.R. § 174.12(f) ("The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed."). Additionally, both parties agree that the protest was filed on February 6, 1995. *See* Def.'s Mot. at 2; Pl.'s Opp'n at 3. As the February 6 Letter merely serves as a complement to the original protest attempt on February 1, 1995, however, the Court will treat the letter dated February 1, 1995, as part of the protest filed on February 6, 1995. *See* February 6 Letter, Pl.'s Ex. D at 1 ("[W]e forwarded protests, dated February 1, 1995, in which [Aluminerie] protested the assessment and payment of Merchandise Processing Fee ('MPF').").

Pl.'s Ex. D at 4. Second, it protested "contingencies not anticipated in the [escrow] [a]greement[,] or unanticipated frustration" of the same. *Id.* at 5–6. Plaintiff then appears to have made a third objection, referring to Customs' acceptance of payment. *Id.* at 4. In support of this third objection, Plaintiff noted that a copy of Customs' letter dated November 8, 1994, as well as a receipt of payment made out by Customs on November 7, 1994, was enclosed with the protest. *Id.*; *see also* Collection Receipt from U.S. Bureau of Customs & Border Prot., to Aluminerie Becancour, Pl.'s Ex. A at 6 (Nov. 7, 1994) ("Receipt"). Plaintiff clarified in its protest that it did not expect Customs to act in response to its objections until final judgment was rendered in the pending test case. February 1 Letter, Pl.'s Ex. D at 6.

On January 5, 1999, the Federal Circuit Court of Appeals issued its decision in the test case, *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999). The *Alcan Aluminum Corp.* Court held that the foreign additive in question was subject to the principle of *de minimis non curat lex*, and therefore, the entries were considered of Canadian origin. 165 F.3d at 902. The *Alcan Aluminum Corp.* decision became final on April 5, 1999. Pl.'s Opp'n at 4.

Because Aluminerie's entries qualified for preferential trade status under the USCFTA as a result of the favorable decision in *Alcan Aluminum Corp.*, Customs refunded to Aluminerie the deposited MPF amount in full "[o]n or about" February 7, 2000.[10] Compl. of Aluminerie at 3.

Customs, however, failed to tender interest pursuant to the escrow agreement when it made the refund to Aluminerie. Def.'s Mot. at 2; Pl.'s Opp'n at 4. Aluminerie then sent, on February 10, 2000, a request for accelerated disposition of its protest. *See* Pl.'s Opp'n at 4–5; Letter from F. D. "Rick" Van Arnam, Jr., Barnes, Richardson, & Colburn, to Port Dir., Customs, Pl.'s Supp. Ex. A (Feb. 9, 2000); Certified Mail Receipt, Pl.'s Supp. Ex. B (Feb. 10, 2000). Following what Aluminerie considered a denial of the original protest by operation of law, it filed a summons with the Court on September 7, 2000. Summons of Aluminerie at 2. Plaintiff subsequently, on September 30, 2002, filed its complaint seeking relief. Compl. of Aluminerie at 6. The thrust of Plaintiff's complaint is that Customs failed to pay interest on the refunded MPF. *Id.* at 3–4. As noted above, Defendant Customs moves to dismiss for lack of subject matter jurisdiction.

II. Standard of Review

Because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction. *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27

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[10] No supporting exhibit was provided, but Defendant does not deny this statement. *See* Def.'s Mem. at 2.

CIT ___ , ___ , 273 F. Supp. 2d 1336, 1338 (2003) (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, because Defendant's motion to dismiss challenges the sufficiency of Plaintiff's pleadings (as opposed to the factual basis underlying the pleadings), the Court will accept all facts alleged in Plaintiff's pleading as true. *Corrpro Cos. v. United States*, slip. op. 03–59, at 4 (CIT June 4, 2003).

III. Discussion

Defendant moves to dismiss, alleging that because Aluminerie failed to timely protest any Customs decision, subject matter jurisdiction is lacking. *See* Def.'s Mot at 3–4. Furthermore, even in the event that the Aluminerie timely protested a Customs decision, this Court can only exercise subject matter jurisdiction if the case was timely filed with the Court. *See* 28 U.S.C. § 2636(a); USCIT R. 3(a). The Court will therefore discuss each of these timing issues in turn.

A. Plaintiff Timely Protested a Customs Decision

Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a), which provides for the review of the denial of aprotest made under section 515 of the Tariff Act of 1930, as amended at 19 U.S.C. § 1515. Compl. of Aluminerie at 1; 28 U.S.C. § 1581(a). Subsection (a) of § 1515 authorizes Customs "to review and deny or allow a protest as long as it is filed in accordance with 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). A suit attempting to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a) must therefore be based on a protest which complies with the requirements of § 1514.

Title 19 U.S.C. § 1514 governs the timing of protests. 19 U.S.C. § 1514. Section 1514 specifically provides that, where no notice of liquidation is involved, a protest must be filed no more than ninety days after the protested decision.[11] Both parties to this action agree that there is no notice of liquidation in this matter; therefore, it is necessary to determine whether Plaintiff's protest challenged any Customs decision made within ninety days prior to the protest's filing. *See* Def.'s Mot. at 3; Pl.'s Opp'n at 5.

In its protest, Plaintiff appears to make three objections. *See* February 1 Letter, Pl.'s Ex. D at 4–6. First, Plaintiff protests the assessment and payment of MPF. *Id.* at 4. The MPF tender, however, oc-

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[11] Title 19 U.S.C. § 1514(c)(3) provides as follows:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3).

curred on October 6, 1994, October 6 Letter, Pl.'s Ex. A at 4, while Plaintiff filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. Because a time period of more than ninety days elapsed between those two events, Plaintiff's protest fails to present a timely challenge to the assessment and payment of MPF.

Second, Plaintiff protests unanticipated frustration of, and contingencies not foreseen in, the escrow agreement. February 1 Letter, Pl.'s Ex. D at 5–6. Title 19 U.S.C. § 1514(c)(3) states, however, that parties must file protests "within ninety days after *but not before* . . . the date of the decision as to which protest is made." *Id.* (emphasis added). The decision the protesting party objects to must therefore occur prior to the filing of the protest. As previously stated, Aluminerie filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. To the extent that Plaintiff objects to the unanticipated event of Customs' decision to refund MPF without interest in February 2000, that event had not yet occurred at the time the protest was filed.[12] Accordingly, under a plain reading of 19 U.S.C. § 1514(c)(3), Plaintiff's protective protest was untimely and invalid. *See A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988) (holding that a protest was invalid either because it was filed the day before Customs denied a previous claim for relief or barred by the provision allowing only one protest per entry of merchandise).

Third, Plaintiff appears to object to Customs' acceptance of its MPF tender. *See* February 1 Letter, Pl.'s Ex. D at 4. In its protest, Plaintiff alleges that Customs accepted its payment on November 8, 1994, and specifies that the protest was filed within ninety days of that date. *Id.* Plaintiff's February 1 Letter further states that Plaintiff attached a copy of the November 8 Letter to the protest, as well as a copy of the receipt from Customs. *Id.* The receipt, however, shows that Customs received Plaintiff's MPF payment on November 7, 1994. Receipt, Pl.'s Ex. A at 6. The November 8 Letter, on the other hand, indicates that Customs acknowledged the MPF tender, and that Customs intended not to accept the tender's contingencies. November 8 Letter, Pl.'s Ex. B at 1. Consequently, the Court cannot conclude that Customs' acceptance of Plaintiff's tender took place on November 8, 1994. Rather, acceptance occurred a day prior, when

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[12] Plaintiff claims that Customs made the decision not to pay interest as early as November 8, 1994, the day it sent the November 8 Letter. *See* Pl.'s Opp'n at 6. However, the parties subsequently signed the escrow agreement, where Customs agreed to refund the MPF amount and "interest as may be required by law" if related litigation was successful. Escrow Agreement, Pl.'s Attach. at 1–2. Thus, even presuming that Customs made the decision to deprive Aluminerie of interest at such an early stage, that decision was later vitiated by the terms of the escrow agreement before the filing of the protest. Moreover, even if the escrow agreement did not vitiate Customs' original rejection of any conditions on the payment of MPF, the language of the protest — objecting to unanticipated frustration of the escrow agreement — clearly refers to decisions which had not yet been made, and not to the November 8 Letter.

Customs received payment and made out the receipt. Customs therefore, on November 7, 1994, made the decision Plaintiff attempted to protest; November 7 was ninety-one days prior to the filing of the protest in question here. However, February 5, 1995, the ninetieth day from November 7, 1994, fell on a Sunday. Under USCIT R. 6(a), when this Court computes any period of time prescribed by statute, and where the last day falls on a Saturday, Sunday or holiday, the last day of the period shall not be included in the computation, but the allowable time period shall run to the next business day. *See* USCIT R. 6(a). Therefore, Plaintiff's protest was timely filed on February 6, 1995.[13]

B. The Case Was Timely Filed With the Court

The timeliness of the protest does not itself mean that jurisdiction is proper in this case. Having found that the protest itself was timely filed, the Court turns to the question of whether the instant case was timely filed with the Court. A case arising from the denial of a properly filed protest must be commenced within 180 days after the date of mailing of the denial of the protest, or within 180 days of denial of the protest by operation of law. *See* 28 U.S.C. § 2636(a). A case arising under 19 U.S.C. § 1581(a) is considered commenced when the summons is filed. *See* USCIT R. 3(a)(1). The summons in this case was filed on September 7, 2000. *See* Summons of Aluminerie at 2. All that remains in order to know whether that summons was timely, is to discover whether denial occurred, and if so, whether the filing of the case meets the requirements of 28 U.S.C. § 2636(a).

Protests may be denied either by an affirmative act or, where a request for accelerated disposition has been sent by certified mail, by operation of law. *See* 28 U.S.C. § 2636(a), 19 U.S.C. § 1515(b). Title 19 U.S.C. § 1515(b) provides that where a request for accelerated disposition has not been allowed or denied within thirty days of its certified mailing, it will be denied by operation of law:

> [a] request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail . . . any time after ninety days following the filing of such protest. . . . [A] protest which has not been allowed or denied in whole or in part within thirty days following

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[13] The Court's opinion here does not reach the question of whether Plaintiff's protest is susceptible of the relief desired by Plaintiff. Defendant has argued that by failing to directly challenge the nonpayment of interest, Plaintiff has failed to make a protest that can result in the desired relief. *See* Def.'s Mot at 4–5. Plaintiff argues that Customs' failure to pay interest is in violation of 19 U.S.C. § 1505(c), Pl.'s Opp'n at 11, which in pertinent part holds,"[i]nterest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest." 19 U.S.C. § 1505(c). This statute might allow the protest of acceptance of tender to properly result in repayment of interest. However, in this opinion, the Court limits itself to discussion of the timeliness of Plaintiff's protest and case.

> the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

19 U.S.C. § 1515(b).[14] Aluminerie mailed by certified mail a request for accelerated disposition of its protest to Customs on February 10, 2000. *See* Certified Mail Receipt, Pl.'s Supp. Ex. B.[15] Aluminerie's protest was denied by operation of law, then, on March 11, 2000, the thirtieth day from the mailing of the request. That day, however, was a Saturday, so under USCIT R. 6(a), March 13, 2000, the following Monday, is officially the day upon which the protest was denied by operation of law. Fewer than 180 days elapsed between March 13, 2000 and September 7, 2000, the day the summons was filed. Therefore, this action was timely commenced with this Court.

The protest upon which this case was timely filed, as was the case itself. Accordingly, Customs' motion to dismiss is hereby denied.

So ordered.

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[14] Title 19 U.S.C. § 1515(a) states that "within two years from the date a protest was filed in accordance with section 1514 of this title, [Customs] shall review the protest and shall allow or deny such protest in whole or in part." 19 U.S.C. § 1515(a). The section does not state that protests not allowed or denied within two years are denied by operation of law. However, when read in context with 28 U.S.C. § 2636(a), it appears that section 1515(b) provides the means by which a protest may be denied by operation of law. *See* U.S.C. § 1515(b); *see also Knickerbocker Liquors Corp. v. United States*, 78 Cust. Ct. 192, 193–95, 432 F. Supp. 1347, 1349–50 (1977).

[15] The Domestic Return Receipt provided by Aluminerie indicates that the request for accelerated disposition of protest was received by Customs on February 14, 2000. *See* Domestic Return Receipt, Pl.'s Supp. Ex. B (Feb. 14, 2000).