Slip Op. 06–90

UNITED STATES, Plaintiff, v. NATIONAL SEMICONDUCTOR CORPORATION, Defendant.

Before: MUSGRAVE, JUDGE
Court No. 03–00223

[Compensatory interest awarded to the plaintiff and "interest only" penalty of $10,000.00 adjudged against the defendant.]

Decided: June 16, 2006

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Stephen C. Tosini, Elizabeth A. Holt*), and Office of the Chief Counsel, U.S. Customs and Border Protection (*Martha Toy Wong*), of counsel, for the plaintiff.

Horton, Whiteley & Cooper (*Robert Scott Whiteley* and *Michael J. Horton*), for the defendant.

OPINION

As briefly described in a previous opinion on this matter, *United States v. National Semiconductor Corp.*, Slip Op. 05–9 (USCIT Jan. 26, 2005), familiarity with which is presumed, the defendant NSC conducted an extensive customs compliance review and discovered two groups of integrated circuit assemblies, microassemblies and parts thereof that had been imported under cover of numerous erroneous customs entries declaring incorrect classifications, inaccurately stated values for certain U.S.-origin components, and improper declarations with respect to certain asserts that should have been included as additions to the transaction value of the importations.

The first group of erroneous entries pertained to importations between January 29, 1993 and September 30, 1998 through various ports. *See* P.'s Ex. 1. The errors were discovered as part of a broader program NSC undertook to review the company's customs compliance, with the assistance of an outside consultant hired for the pur-

pose, in light of a change in NSC's customs director. *See id*.; Tr. at 77–85, 97. The second group of erroneous entries pertained to importations between March 3, 1995 and May 28, 2000 through the port of San Francisco, California. *See* P.'s Ex. 3. These errors were discovered by an NSC employee as a result of his own investigation into a question posed by one of NSC's customs brokers as to whether the value of all assists had been included in the value of the commercial invoices. *See id*; Tr. at 84–85.

None of the entries resulted in loss of duties to the United States but did result in underpayment of merchandise processing fees ("MPFs"). NSC voluntarily disclosed each matter to the U.S. Customs and Border Protection ("Customs" or "USCBP") by letters dated November 13, 1998 and March 3, 2000, respectively, and ultimately tendered the underpaid MPFs as calculated by Customs. *See* P.'s Exs. 1–5. Customs accepted each tender, but deemed that negligent violations of section 1592(a) were involved with each entry. Had Customs itself discovered the entry irregularities, the maximum penalty might have been the lesser of the domestic value of the merchandise or twice the loss of "fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3).[1] *See* 19 U.S.C. § 1592(a); 19 C.F.R. § 162.73(a)(3). As it happened, because disclosure had been voluntary, the maximum statutory penalty that Customs could pursue was the interest, from the date of liquidation, on the amount of the fees of which the United States had been deprived. *See* 19 U.S.C. § 1592(c)(4); 19 C.F.R. § 162.73(b)(2).

Customs therefore issued penalty notices to NSC on February 15, 2001 and assessed the maximum amount of interest allowed by law that had accrued on each entry since the date of liquidation to the dates of its earlier pre-penalty notices. *See* 19 U.S.C. § 1592(c)(4). NSC objected, taking the position that it should not be assessed a "maximum" penalty for acting responsibly by voluntarily reporting the problems that it had discovered on its own initiative. The government then brought suit for violations of 19 U.S.C. § 1592(a). NSC's answer averred that its conduct had been ordinary negligence and denied that it should have to pay a "maximum" penalty, if any. NSC further pointed out that the statute of limitations, once operable, would have cut off any action by Customs as to relevant entries. After the parties' cross-motions for summary judgment were denied in Slip Op. 05–9, the parties arranged for trial in San Francisco beginning January 10, 2006, and completion of post-trial briefing on March 3, 2006.

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[1] It is also an open question whether under such circumstances Customs would have considered the matter deserving of a customs duty penalty. *Cf. Carnival Cruise Lines*, 404 F.3d 1312 (Fed. Cir. 2005) ($322,311 in underpayments of MPFs discovered as a result of a Customs audit for period April 1, 1987, and December 31, 1991; no indication that matter resulted in penalty).

The government continues to argue that full award of the maximum amount of interest is necessary because NSC has had the theoretical equivalent of an "interest-free loan" from the government during the period in question and has therefor obtained a theoretical advantage over competitors who did not make unlawful, negligent customs entries, and it also argues that the circumstances before the Court are not extraordinary and do not justify mitigation. NSC continues to oppose imposition of any penalty, let alone the maximum penalty.

The Court concludes, after trial in San Francisco and after consideration of such factors as appeared relevant to the instant situation, that a lesser penalty for the harm inflicted of $10,000.00 of interest, calculated in accordance with subsection 1592(c)(4) from the original date of liquidation to the date of demand by Customs from NSC, is appropriate punishment for NSC's negligence. The Court reaches these conclusions for the following reasons.

The factors previously identified as relevant to a determination of the appropriate amount of penalty for a violation of section 1592(a) are the following: (1) the defendant's good faith effort to comply with the statute; (2) the degree of culpability involved; (3) the 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) the defendant's ability to pay; (8) the appropriateness of the size of the penalty vis-a-vis the defendant's business and the effect of the penalty on the defendant's ability to continue doing business; (9) the economic benefit gained by the defendant through the violation; (10) whether the party sought to be protected by the statute is elsewhere adequately compensated for the harm; (11) the degree of harm to the public; (12) the value of vindicating agency authority; (13) whether the penalty shocks the conscience of the court; and (14) such other matters as justice may require. *See United States v. Complex Mach. Works Co.*, 23 CIT 942, 83 F. Supp. 2d 1307 (1999); *United States v. Modes, Inc.*, 17 CIT 627, 635, 826 F.Supp. 504, 512 (1993); *see also United States v. ITT Industries, Inc.*, 343 F. Supp. 2d 1322 (CIT 2004), *aff'd without opinion* No. 05–1210 2006 WL 380112 (Fed. Cir., Feb. 10, 2006) (concluding that it is appropriate to consider such factors in the context of a voluntary disclosure for a negligent violation of section 1592(a) and that in determining the amount of the penalty consideration of such factors is proper at trial and not on a motion for summary judgment). Since deterrence is the primary motivation for imposing a customs duty penalty, such factors are typically accorded greater weight, in proportion to their relevance, in determining the size of the penalty. *See, e.g., Complex Machine*, 23 CIT at 950, 83 F. Supp. 2d at 1316.

In this matter, with regard to the first factor above, absent indicia of motive to preempt Customs' own discovery of a violation, a volun-

tary disclosure by definition speaks highly of a defendant's good faith effort to comply with the statute, as the government agrees. The government argues, however, that the interest-only penalty invoked under the voluntary disclosure statute takes this into account, and that the interest-only penalty is a form of "mitigation" in its own right. *E.g.*, P.'s Mem. in Supp. of Mot. for Summ J. at 14 (interest-only penalties are already a significant financial incentive and no further mitigation is unnecessary to encourage disclosure). That appears to be so, but such "mitigation" is to be distinguished from the Court's discretion on the appropriate amount of customs duty penalty to impose after consideration of all relevant circumstances.

Regarding the degree of culpability involved, NSC averred that its conduct amounted to ordinary negligence at worst. The government does not contest this characterization. Negligence amounts to the lowest degree of section 1592(c) culpability and is without *scienter*. That level of culpability having been agreed, further consideration of this factor is entwined with the nature and circumstances of the violations at issue, discussed below.

Regarding the third factor, NSC was the subject of one prior penalty action pursuant to 19 U.S.C. § 1592(a), which alleged gross negligence with respect to certain entries between June 1, 1979 and March 1, 1985, and resulted in Customs' acceptance of an offer in compromise pursuant to 19 U.S.C. § 1617 in the amount of $2,500,000 in full settlement of the matter in July 2001. *See* D.'s Mot for Summ J. at 11–12. Since 1999, NSC has made five prior voluntary disclosures. No determination or admission of culpability resulted from the one penalty action, and of the five prior disclosures, only two resulted in penalty demands, which are the subject of this action. The evidence suggests that the five disclosures by NSC all grew out of the same customs compliance review process. Constant review of one's customs compliance is to be encouraged, but at the same time the disclosures are indicative that serious lapses in proper customs reporting had been occurring over a considerable period of time. That is lamentable, not commendable, and if considered in isolation on balance this factor would not appear to support mitigation or at best would appear to support only nominal mitigation. But, it is the consideration of the factors as a whole, and not in isolation, that is dispositive.

Regarding the nature of the public interest in ensuring compliance with the applicable law, it is arguable whether this factor is to be viewed as supporting the imposition of a maximum penalty and without mitigation, since it would always appear to be in the public interest to ensure compliance with applicable customs law. But, such a viewpoint rather reflects the viewer's views on punishment. In this Court's view, to ensure compliance with applicable law, voluntary disclosure is to be encouraged, not discouraged. Therefore, insofar as

voluntary disclosure is concerned, this factor would support finding mitigation, if circumstances permit.

Regarding the nature and circumstances of the violations at issue, NSC did not contest that they resulted from a lack of oversight during an unfortunate period of time. In mitigation, NSC offered that it files between 3000 and 4000 entries with Customs per year, sometimes as many as 10,000, and that it has a long history of working proactively in the area of customs compliance. Tr. at 89; Lawall Dep. at 36, 79. NSC created an internal customs and export branch in the late 1970s or early 1980s with a mission to centralize and educate NSC employees about customs compliance, but in 1994 its customs director was diagnosed with cancer and was on protracted periods of medical leave of absence until passing in 1997. *See* Lawall Dep. at 23, 84. During much of this time, no one was apparently directing NSC's customs compliance program: the position had been occupied by the same person for "so long it was just kind of running on its own steam." Tr. at 11 (quoting Lawall Dep. at 84). *See also id.* at 98–99.

NSC's apparent loyalty to its employee(s) is admirable, but it does not excuse or completely explain the negligent reporting errors during the period(s) in question. The first successor to direct NSC's customs compliance program was appointed in 1996. *Cf.* Tr. at 13; D's Mot. for Summ J. at 4. This person eventually, in 1997, contracted an outside consultant to undertake a through review of NSC's customs compliance efforts, but some reporting problems apparently continued to as late as September 30, 1998. *Cf.* Compl. at ¶¶ 4, 18; Ans. at ¶¶ 4, 18. A more robust customs compliance program might have prevented the problems in the first place, before they occurred, or at least should have motivated speedier correction. But, in the end, the Court is persuaded NSC's voluntary disclosures are evidence of "doing the right thing" and not of, or solely of, self-interest, *cf.*, *e.g.*, Tr. at 78–79, 83–85, especially since the statute of limitations for bringing a customs penalty action was soon to begin to run with respect to the earliest reported entries, and it is questionable whether Customs would have discovered the matters on its own before such time. On balance, the circumstances of NSC's voluntary disclosures support at least partial mitigation on this factor.

Regarding the degree of harm to the public, any violation of the customs laws results in public harm. One measure of harm is the magnitude of the underpaid fees, which in this instance, at over one million dollars, were not insubstantial. This factor does not support mitigation.

Regarding a defendant's ability to pay, NSC does not dispute its ability to pay an interest-only penalty, and this factor does not support mitigation.

Regarding the appropriateness of the penalty to the size of the defendant's business and the effect of the penalty on the defendant's

ability to continue in business, in addition to Plaintiff's Exhibits 14–23, the Court takes judicial notice of NSC's quarterly report for the period ended February 26, 2006, as filed with the Securities and Exchange Commission on form 10–Q, and concludes that this factor does not support mitigation.

Regarding the economic benefit to NSC of the violations, which is the ninth factor, the Court finds that the underpayments were the equivalent of unauthorized interest-free loans to NSC. Consideration of this factor is therefore tied to consideration of the tenth factor.

The tenth factor is whether the party sought to be protected by the statute is elsewhere adequately compensated for the harm. In the Court's opinion, given the instant circumstances, this factor deserves the heaviest weighting. The government at several points raises the argument that even were the maximum penalty to be imposed, it would still fail to compensate the public treasury fully because the customs penalty statute imposes interest from the date of liquidation, leaving the (theoretical) interest on the period between the date of entry (or deposit of estimated duties) and the date of liquidation in the hands of NSC. *See, e.g.*, P.'s Mem. in Supp. of Mot. for Summ J. at 14–15 ("[t]he statute does not provide the Government any interest recovery from the date of entry through liquidation[; t]herefore, importers in prior disclosure cases are essentially receiving an interest-free Government loan on money that should have been paid immediately upon entry") (referencing 19 U.S.C. §§ 1504(a), 1592(c)(4)). Compensation is not the purpose of the customs penalty statute. *See United States v. DeBellas Enterprises, Inc.*, 23 CIT 600 (1999). However, in view of the government's concerns, the Court finds that NSCs voluntary disclosures and payment of the fees alone do not provide a full measure of recompense for the amount of "lost" interest that resulted from NSC's underpayments. The Court further finds that adequate compensation to the treasury for the interest on the underpayments is the primary objective of this penalty action. The Court therefore finds, as a matter of fact, that compensatory interest would make the government whole, and that the government is entitled to it in accordance with 19 U.S.C. § 1505(c). That provision requires interest to be assessed on underpayments or overpayments from the date of entry to the date of "liquidation or reliquidation."

As a general matter, liquidation is the final reckoning of the importer's liability on a specific entry, including regular and special duties. It is defined by regulation as "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1. The importer has 90 days to protest aspects of Customs liquidation findings. Within that period, Customs may also voluntarily reliquidate the merchandise. 19 U.S.C. § 1501. When the

time for protesting a liquidation or voluntarily reliquidating has passed, liquidation is said to be final and conclusive as against all claims including those of the government. *See* 19 U.S.C. § 1514(a) ("decisions of the Customs Service, including the legality of all orders and findings entering into the same" as to the appraised value of the merchandise "shall be final and conclusive upon all persons [ ] including the United States" unless a protest is filed, etc.). This codification of finality in the statutory protest mechanism is not an absolute concept, however. One exception, by statute, is that reliquidation of an entry may occur within one year in order to correct "a clerical error, mistake of fact, or other inadvertence[.]" 19 U.S.C. § 1520(c)(1). Another is that section 1514 finality cannot attach to a liquidation in violation of a court-ordered injunction. *See Allegheny Bradford Corp. v. United States*, ___ CIT ___ , 342 F.Supp.2d 1162 (CIT 2004); *AK Steel Corporation v. United States*, 281 F.Supp.2d 1318 (CIT 2003). And, before its repeal in 1993, section 521 of the Tariff Act of 1930 ("Act"), formerly 19 U.S.C. § 1521, provided for reliquidation of entry on Customs' initiative if fraud was discovered within two years of entry, which in turn was a protestable event. *See* Pub. L. 91–271, 84 Stat. 287 (June 2, 1970); *see also United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 355, 821 F.Supp. 1514, 1520 (1993) (citations omitted).

The reason for this latter exception to the principle of finality should be obvious: import fraud does not involve a valid entry. That being the case, equitable limitations on fraud are involved, not the finality associated with the section 1514 protest mechanism. *See, e.g., F. Vitelli & Son v. United States*, 250 U.S. 355, 39 S.Ct. 544 (1919) (liquidation in the absence of fraud becomes final); *United States v. Sherman & Sons Co.*, 237 U.S. 146, 35 S.Ct. 520 (1915) (same); *Bend v. Hoyt*, 38 U.S. 263, 268, 13 Pet. 263 (1839) (unverified and unathenticated invoices "are declared to be deemed to be suspected, and liable to be treated in the same manner as fraudulent invoices"). Although Section 521 of the Act was repealed in 1993 by the North American Free Trade Agreement Implementation Act, Pub. L. 103–182 § 618, 107 Stat 2057, 2180 (Dec. 8, 1993), its equitable underpinnings still stand: a further disposition necessitated to correct, *e.g.*, fraud (or negligence) in the original entry amounts to a reliquidation of the entry as a matter of law. *Cf.* 19 U.S.C. § 1520(c)(1) (reliquidation permitted within one year in order to correct clerical error, mistake of fact, or other inadvertence and is protestable event); 19 C.F.R. 174.11(e) (matters subject to protest include "liquidation or reliquidation of an entry, or any modification thereof"). Taking the government's loan analogy a step further, Customs' acceptance of amounts tendered by NSC as repayment of the underpaid MPFs was akin to the repayment of principal on such

loan. Such acceptance, based upon a determination of a violation of section 1592(a), therefore amounted to reliquidation of entries due to a change in the amount of MPFs claimed with respect thereto.

28 U.S.C. § 2643 authorizes this Court to enter monetary judgment for the United States in any civil penalty action commenced under 28 U.S.C. § 1582. Pursuant to that authority, the Court finds that the public treasury is entitled to compensation for the amount of "lost" interest on NSC's underpayments in accordance with 19 U.S.C. § 1505(c), which is not penalty interest, from the relevant dates of entry to the relevant dates of reliquidation, and further that such mechanism is adequate to provide full compensation to the government for same. The Court therefore finds that this tenth factor supports mitigation. *Cf. United States v. Menard*, 64 F.3d 678, 682 (Fed. Cir. 1995) (unable to distinguish lower court judgment as award of damages plus penalty). The only question is, when did "reliquidation" occur? On this, the government's loan analogy is apt, since the theoretical interest that the government argues is due from NSC would continue to accrue, in theory, over the many months that elapsed between issuance of the pre-penalty and penalty notices,[2] and yet Customs' pre-penalty and penalty notices demanded identical amounts of interest. *Cf.* Compl. at ¶¶ 9, 10 *with* Ans. at ¶¶ 9, 10 (no change in interest demanded). Customs therefore implicitly reliquidated upon issuance of the pre-penalty notice.

The remaining factors to be considered in this matter tend, on the whole, to support mitigation. As a general principle, any violation of 19 U.S.C. § 1592(a), however minor, may result in a penalty finding. *Cf.* 19 U.S.C. § 1592(b)(2) ("[i]f the Customs Service determines that there was a violation, it *shall* issue a written penalty notice to" the alleged violator) (italics added). In this instance, the circumstances of the passing of NSC's customs director, the transition to a new customs director, and the process of conducting a thorough review of its customs compliance program do not excuse the negligent entry errors that occurred in the first place during the period(s) in question. Nonetheless, remediation or attempted remediation of misfeasance or nonfeasance may support a finding of full or partial mitigation of the penalty. *See, e.g.*, P.'s Ex. 12 at 7 (*The ABC's of Prior Disclosure* at 1 (USCBP, ed., rev. May 2001)) ("[i]n some cases the penalty may be reduced to zero"); P.'s Ex. 13, Ch. FRD, at 12–13 (*Fines, Penalties and Forfeitures Handbook*, HB 4400–01, Ch. FRD at 5–6 (USCBP, ed., 1986)) (listing mitigating factors to consider including the viola-

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[2] For example, section 1505(c) compensatory interest, which is not penalty interest, apparently continues to accrue until paid, subject to section 1505(d) delinquency interest. But be that as it may, satisfaction of the judgment hereto shall be executed in accordance with Customs' usual demand for payment of interest on underpayments in accordance with 19 C.F.R. §§24.3, 24.3a, and any other relevant regulation implicated thereby.

tor's degree of cooperation, immediate remedial action, inexperience in importing, prior good record, and other extraordinary factors); D.'s Ex. A (19 C.F.R., App. B to Part 171, *Customs Regulations, Guidelines for the Imposition and Mitigation of Penalties for Violations of 19 C.F.R. 1592*) (Electronic Code of Federal Regulations, as of Dec. 28, 2005). Voluntary disclosure is a significant step towards remedying the degree of harm to the public. By its actions, in addition to making full payment of fees owed, NSC has saved Customs the expense and time of investigation, an important consideration. Further worth considering is that valuation for purposes of assessing customs duties and fees is not necessarily a straightforward matter,[3] that reasonable minds may differ over proper cost accounting methodology, and that appropriate transfer pricing, which appears to have been largely the reason for the problem pertaining to the underpayments at issue, is not an exact science, as evident in the apparently endless process of developing and updating internal manuals to address, *inter alia*, customs compliance, corporate policies thereon, and instruction therefor. *See, e.g.*, Tr. at 78–85, 90–92; D.'s Ex. D (NSC's internal *U.S. Customs & Border Patrol* [*sic*] *(CBP) Customs Compliance Manual* (rev. Jan. 23, 2004)). In light of NSC's ongoing customs compliance efforts and the circumstances of the voluntary disclosures at bar, the Court is unpersuaded that a "maximum" civil penalty, in addition to payment of interest compensating the government, would not further the policy of deterrence behind the imposition of customs penalties. NSC appears to have already made thorough customs compliance one of its top priorities, regardless of the outcome of this matter. Thus, after considering all relevant factors, the Court finds, under the circumstances, that partial mitigation is appropriate, and that the agency's authority will be vindicated by an "interest-only" penalty amounting to $10,000.00, as calculated in accordance with subsection 1592(c)(4)from the original date of liquidation to the date of demand by Customs issued to NSC. Such a penalty can hardly be said to shock the Court's conscience and is appropriate to address NSC's misfeasance.

Lastly, the Court is unaware of "such other matters as justice may require," except to note that pre- and post-judgment interest, if any, shall accrue as provided by law.

Judgment will enter accordingly.

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[3] *See, e.g., Carnival Cruise Lines, supra*, 404 F.3d at 1313, in which "[t]he two issues that formed the basis for the asserted underpayment were (1) Carnival's failure to make HMT payments based on passengers' boarding or disembarking during layover stops in the course of cruises, and (2) Carnival's deduction of travel agents' commissions from the price of the cruise tickets that Carnival used to calculate the amount of HMT that was due."

ERRATA

Please make the following changes to *United States v. National Semiconductor Corp.*, Court No. 03–00223, Slip Op. 06–90 (Ct. Int.'l Trade June 16, 2006):

- Page 2, line 1: replace "asserts" with "assists".
- Page 7, line 15: replace "through" with "thorough".
- Page 10, line 17: replace "unathenticated" with "unauthenticated".
- Page 13, line 10: delete "not".

June 21, 2006.

Slip Op. 06–91

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FORMER EMPLOYEES OF GALE GROUP, INC. Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 04–00374

ORDER

On June 2, 2006, the United States Court of Appeals for the Federal Circuit ("CAFC") remanded the case at bar to this Court for the limited purpose of remanding this matter back to the United States Department of Labor ("Labor") to re-examine certification for trade adjustment assistance ("TAA") benefits.

On February 23, 2004, a petition for TAA benefits was filed on behalf of the Former Employees of Gale Group, a subsidiary of Thompson Corporation ("Plaintiffs"). On May 20, 2004, the United States Department of Labor ("Labor") issued a negative determination regarding Plaintiffs' eligibility for TAA benefits. *See Notice of Determination Regarding Eligibility to Apply for Worker Adjustment Assistance*, ("*Negative Determination*") (June 9, 2004) *published at* 69 Fed. Reg. 33,940, 33,941 (June 17, 2004). The *Negative Determination* was issued because Labor found that the Plaintiffs did not produce an article within the meaning of Section 222 of the Trade Act of 1974, as amended 19 U.S.C. § 2272 ("The Trade Act")(Supp. III 2003). *See Notice of Negative Determination on Remand*, ("*Remand Determination*") TA–W–54,434 (Jan. 27, 2005) *published at* 70 Fed. Reg. 6,732 (Feb. 8, 2005). "The determination was based on the investigation's finding that the workers at the subject facility performed electronic indexing services, including converting paper peri-

odicals into an electronic format, assigning relevant index terms and occasionally writing abstracts of articles. . . ." *Id.* On June 16, 2004, Plaintiffs filed a request for administrative reconsideration with Labor. A negative determination on reconsideration was then issued by Labor on July 13, 2004. *See Dismissal of Application for Reconsideration*, TA–W–54,434 (July 16, 2004) *published at* 69 Fed. Reg. 44,064 (July 23, 2004). On July 23, 2004, the Plaintiffs requested judicial review by this Court. On October 19, 2004, Labor filed a motion for voluntary remand. The Court granted Labor's consent motion for voluntary remand on October 25, 2004. Labor reaffirmed its negative determination when it published its *Remand Determination* on February 8, 2005. *Remand Determination* TA–W–54,434 (Jan. 27, 2005) *published at* 70 Fed. Reg. 6,732 (Feb. 8, 2005).

In its *Remand Determination*, Labor stated that "it is clearly established that the workers of the subject [Gale Group] facility did not produce an article, nor did they support, either directly or through an appropriate subdivision, the production of an article within the meaning of the Trade Act." *Remand Determination*, 70 Fed. Reg. at 6,733. Labor, therefore, affirmed its original denial of certification for TAA benefits. This Court affirmed Labor's determination on November 18, 2005. *See Former Employees of Gale Group, Inc. v. United States Sec'y of Labor*, 29 CIT ___ , 403 F. Supp. 2d 1299 (2005). On January 12, 2006, Plaintiffs appealed this Court's judgment to the CAFC. Labor later published a revision of its policy in its *Notice of Revised Determination on Remand for Computer Sciences Corporation, Financial Services Group, East Hartford, Connecticut*, TA–W–53,209, (March 24, 2006) *published at* 71 Fed. Reg. 18,355 (April 11, 2006).[1]

Upon consideration of Labor's consent motion for a voluntary remand, and other papers and proceedings filed herein; it is hereby

ORDERED that this case shall be remanded to Labor to reexamine its determination in light of its recent policy change.

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[1] Labor's policy revision followed the issuance of this Court's decision in *Former Employees of Computer Sciences Corp. v. United States Sec'y of Labor*, 29 CIT ____ , 366 F. Supp. 2d 1365 (2005), a case which this Court finds to be easily distinguishable from *Former Employees of Gale Group, Inc.*, 29 CIT ____ , 403 F. Supp. 2d 1299.

Slip Op. 06–92

FORMER EMPLOYEES OF IBM CORPORATION, GLOBAL SERVICES DIVISION; JAMES FUSCO; BARBARA L. PINEAU; DICK YOUNG; JOHN F. LAKE; and on behalf of ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. ELAINE L. CHAO, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and ALBERTO R. GONZALES, ATTORNEY GENERAL OF THE UNITED STATES, Defendants.

Before: Judith M. Barzilay, Judge
Court No. 03–00656

MEMORANDUM ORDER

Plaintiffs in this case have moved for class certification under Rule 23 of this Court. Plaintiffs challenge the United States Department of Labor's ("Labor") failure to certify as eligible for trade readjustment allowance ("TRA") software workers who have become unemployed due to shifts in production and increased imports of competitive software products. *See* Pls.' Mot. 4. They therefore seek to certify three classes that consist of (1) "all software workers who have applied for TRA and have been denied certification by Labor under the reasoning that software is not an article," (2) software workers who have applied for TRA and have not yet received a determination, and who are otherwise eligible notwithstanding the issue of whether the software they produced in their former employment is an article, but who reasonably expect to be denied TRA on the same basis as class (1), and (3) software workers who have not applied for TRA, and who are otherwise eligible, but who have a reasonable expectation of being denied TRA on the same basis as class (1). Pls.' Mot. 4–6.

I. Requirements for Class Certification

As explained by Rule 23 of this Court, to obtain class certification, the following requirements, among others, must be met:

> (1) the class [must be] so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

USCIT R. 23(a). In addition, the action must fulfill one of the prerequisites listed in subsection (b). *See* USCIT R. 23(b). In this case, Plaintiffs rely on subsection (b)(2), which states that " 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.' " Pls.' Mot. 6 (quoting USCIT R. 23(b)(2)).

II. Discussion

Plaintiffs have not met the criteria for class certification. They claim that "tens of thousands of software workers" fall within the proposed class, but fail to recognize that Labor does not categorically exclude all software workers from TRA certification. Consequently, apart from perfunctorily claiming that the proposed class satisfies the numerosity requirement, Plaintiffs offer no valid estimates of the number of individuals in the class. Similarly, by throwing its net so wide as to include all software workers, Plaintiffs' proposed class encompass workers facing drastically varying questions of law and fact. *See, e.g.*, *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance* in: *Ericsson, Inc., Messaging Group, Woodbury, N.Y.*, 68 Fed. Reg. 8619–01, 8621 (TA–W–50,446) (Dep't of Labor Feb. 24, 2003) (granting TRA certification to software workers who produced trade-impacted article); *Computer Sciences Corporation, at Dupont Corporation*, 67. Fed. Reg. 10,767–04 (TA–W–39,535) (Dep't of Labor Mar. 8, 2002) (same). That Labor has repeatedly certified certain groups of software workers for TRA demonstrates that Plaintiffs have not met their burdens under Rule 23(a)(2) or (b)(2).

Perhaps most fatally, Plaintiffs include among the named parties in the proposed class several individuals who did not exhaust their administrative remedies and so cannot invoke this Court's jurisdiction.[1] *See Former Employees of IBM Corp., Global Servs. Div. v. U.S. Sec'y of Labor*, 29 CIT ___ , ___ , 387 F. Supp. 2d 1346, 1349 (2005). Because the Court has no subject matter jurisdiction over these Plaintiffs' claims, the court may not entertain their claims by granting them class certification. *See NuFarm Am.'s, Inc. v. United States*, 29 CIT ___ , ___ , 398 F. Supp. 2d 1338, 1353 (2005); *cf. M.G. Maher & Co. v. United States*, 26 CIT 1040, 1041 (2002) (not reported in F. Supp.).

III. Conclusion

Upon consideration of Plaintiffs' and Defendants' briefs and other filings, upon due deliberation, and for the reasons stated above, it is hereby ORDERED that Plaintiff's motion is DENIED.

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[1] These individuals include Barbara L. Pineau, Dick Young, and John F. Lake.

Slip Op. 06–93

FORMER EMPLOYEES OF IBM CORPORATION, GLOBAL SERVICES DIVISION, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendants.

Before: Judith M. Barzilay, Judge
Court No. 03–00656

JUDGMENT

On November 13, 2002, and December 16, 2002, Former Employees of IBM Corporation, Global Services Division ("Plaintiffs"), in Piscataway and Middleton, N.J., respectively filed petitions with the Department of Labor ("Labor" or "Defendant") for trade adjustment assistance ("TAA") benefits. Labor denied Plaintiffs' petition on March 23, 2003, because the facilities where Plaintiffs worked did not produce "an article" within the meaning of 19 U.S.C. § 2272(a) (2000). *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 68 Fed. Reg. 16,833–01 (Dep't of Labor Apr. 7, 2003). In the subsequent administrative redetermination initiated by Plaintiffs, Labor affirmed its decision. *See IBM Corporation, Global Services Division, Piscataway, N.J., and IBM Corporation, Global Services Division, Middletown, N.J.; Notice of Negative Determination Regarding Application for Reconsideration*, 68 Fed. Reg. 41,845–02 (Dep't of Labor July 15, 2003) ("*Reconsideration Determination*"). Defendant concluded that "software and associated information technology services are not listed in the HTSUS" and that the products Plaintiffs produced "are not the type of employment work products that Customs officials inspect and that the TAA program was generally designed to address," as software and information system development and testing constituted services rather than production of an article. *Id.* at 41,845–46. Plaintiffs then brought their case before this Court.

On August 1, 2005, the court found Labor's *Reconsideration Determination* "not supported by substantial evidence" and remanded it for further review. *Former Employees of IBM Corp., Global Serv. Div. v. U.S. Sec'y of Labor*, 29 CIT ___ , ___ , 387 F. Supp. 2d 1346, 1348 (2005). Specifically, the court ordered Labor to supplement its inadequate record "by further investigating the nature of the software produced by Plaintiffs" and to "explain the differences between the activities performed by Plaintiffs in this case and the activities performed by other petitioners involved in developing computer software who received TAA benefits in the past." *Id.* at 1353. On remand, Labor again denied Plaintiffs certification because Plaintiffs'

work product did not constitute "an article" since it did not consist of a "tangible commodity." *IBM Corporation, Global Services Division, Piscataway, N.J.; IBM Corporation, Global Services Division, Middletown, N.J.; Notice of Negative Determination on Remand*, 70 Fed. Reg. 75,837–02, 75,839 (Dep't of Labor Dec. 21, 2005).

Soon after Plaintiffs filed their remand comments, this court granted Labor a voluntary remand so that Labor could reconcile its decision with recent changes in its TAA policy. In its revised remand results, Labor "determined that . . . [Plaintiffs] produce[d] an article (computer software)" and that "a significant portion of workers" at both New Jersey facilities in question lost their employment because "production shifted to an affiliated facility located in Canada." *IBM Corporation, Global Services Division, Piscataway, N.J.; Middletown, N.J.; Notice of Revised Determination on Remand*, 71 Fed. Reg. 29,183–01, 29,183 (Dep't of Labor May 15, 2006). Consequently, Labor certified Plaintiffs as eligible for trade adjustment assistance. *See id.*

Upon consideration of Labor's May 15, 2006, remand determination, the court's prior opinion in this case, and other papers, it is hereby

ORDERED that Labor's decision to certify Plaintiffs[1] to receive TAA benefits is supported by substantial evidence and is otherwise in accordance with law; and it is further

ORDERED that Labor's May 15, 2006, *Notice of Revised Determination on Remand* is AFFIRMED in its entirety.

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[1] Plaintiffs in this case do not include Barbara L. Pineau, Dick Young, or John F. Lake, as these parties were earlier dismissed for lack of subject matter jurisdiction because they had not exhausted their administrative remedies prior to bringing suit in this Court. *See Former Employees of IBM Corp., Global Serv. Div.*, 387 F. Supp. 2d at 1349.

Slip Op. 06–94

POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, *et al.*, Plaintiffs and Defendant-Intervenors, GLOPACK, INC., *et al.*, Plaintiffs and Defendant-Intervenors, GUANGDONG ESQUEL TEXTILES CO., Plaintiff-Intervenor, v. UNITED STATES, Defendant, HANG LUNG PLASTIC MANUFACTORY, LTD., Defendant-Intervenor, NANTONG HUASHENG PLASTIC PRODUCTS CO., Defendant-Intervenor.

Before: Judge Judith M. Barzilay
Consol. Ct. No. 04–00319

[The United States Department of Commerce's Remand Results are Sustained.]

Decided: June 21, 2006

King & Spalding, (*Stephen A. Jones*), (*Joseph W. Dorn*), *Jeffrey B. Denning*, for the plaintiffs *Polyethylene Retail Carrier Bag Committee, et al.*

Garvey Schubert Barer, William E. Perry, Ronald M. Wisla, for the plaintiffs and defendant-intervenors *Glopack, Inc., et al.* and *Hang Lung Plastic Manufactory Ltd.*

DeKieffer & Horgan, Gregory Stephen Menegaz, for the plaintiff-intervenor *Guangdong Esquel Textiles Co.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Patricia M. McCarthy*), Assistant Director; Civil Division, Commercial Litigation Branch, U.S. Department of Justice *Stefan Shaibani*, (*Sameer Yerawadekar*); *Marisa Beth Goldstein, Peter J. Kaldes*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

White & Case, LLP, Adams Chi-Peng Lee, Frank H. Morgan, Kelly Alice Slater, Walter J. Spak, for the defendant-intervenor *Nantong Hausheng Plastic Products Co.*

OPINION

BARZILAY, JUDGE: This consolidated case concerns a challenge by the plaintiffs to the U.S. Department of Commerce's ("Commerce") determination in the antidumping investigation *Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 34,125 (June 18, 2004), *amended*, 69 Fed. Reg. 42,419 (July 15, 2004). The court remanded Commerce's determination on one issue concerning the electricity used by one of the companies under review. Commerce has now issued its remand determination.

THE REMAND RESULTS

The court remanded Commerce's calculation of electricity usage for Hang Lung Plastic Manufactury Ltd. ("Hang Lung"), a Chinese manufacturer and exporter to the United States of polyethylene retail carrier bags ("PRCBs") and a mandatory respondent in the underlying investigation, because the court found that Commerce's explanation of its calculation was unclear. *See Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT ___ , Slip Op. 05–157 at

8–10 (Dec. 13, 2005) (hereinafter "*PRCB I*").[1] Commerce was instructed to explain its calculation and reconcile seeming inconsistencies between its *Analysis for the Final Determination of PRCBs from the People's Republic of China: Hang Lung*, June 9, 2004, ("*Final Analysis Memorandum*") and the information contained in Commerce's September 13, 2005, *Motion for Leave to Clarify Commerce's Electricity Calculation for Hang Lung* ("*Motion to Clarify*"). On February 13, 2006, Commerce issued its *Results of Redetermination on Remand* ("*Remand Determination*"). Plaintiffs Polyethylene Retail Carrier Bag Committee and its individual members, Vanguard Plastics, Inc., Hilex Poly Co., LLC, and Superbag Corp. (collectively "PRCB Committee Plaintiffs"), filed *Comments Regarding Commerce's Determination on Remand* ("Pls.' Comments"). Commerce then asked that the court allow it to respond to those comments, and the court granted that request.

In its *Remand Determination*, Commerce addressed two questions: 1) how it allocated electricity and 2) the seeming inconsistency between the *Final Analysis Memorandum* and the *Motion to Clarify*. Commerce explained that it chose the total electricity used by Hang Lung in production of *all* plastic bags, regardless of destination, as the amount of electricity in kilowatt-hours (kwh) used during the period of investigation. *See Remand Determination* at 4. Commerce then "applied that total electricity to only Hang Lung's U.S. sales by allocating the total kwh electricity used over the total extruded resin by the weight and concentrate Hang Lung used to produce the bags it sold to the United States." *Id.* Because it did not know the total weight of extruded resin and concentrate used in Hang Lung's U.S. sales, Commerce merged Hang Lung's factors-of-production database with its U.S. sales database. As stated in its *Final Analysis Memorandum*, Commerce allocated total printing electricity usage only to printed bags sold in the United States because only those bags would incur electricity usage for printing. *Id.* at 5.

Regarding the court's query that Commerce appeared to have presented two inconsistent positions between the *Motion to Clarify* and the *Final Analysis Memorandum*, Commerce responded that "[the] *Motion to Clarify* explains *how* [it] *arrived at the total kwh of electricity to be allocated* . . . rather than the general methodology [it] used to allocate that figure to Hang Lung's U.S. sales." *Remand Determination* at 6. The *Final Analysis Memorandum* describes how Commerce applied the total kwh of electricity to individual U.S. sales using the U.S. factors-of-production database, which Commerce "created by merging Hang Lung's U.S. sales database with its factors of production database." *Remand Determination* at 6. Therefore, Commerce explained, the two positions are not inconsistent.

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[1] Familiarity with *PRCB I* is presumed.

In their comments on the *Remand Determination*, PRCB Committee Plaintiffs present three key arguments: 1) that Commerce's electricity calculation is not supported by record evidence; 2) that "even assuming, *arguendo*, that Commerce's interpretation is supported by the record, the electricity calculation is still not adverse to Hang Lung because it simply reallocates the same amount of electricity that Hang Lung would have allocated had it cooperated with the investigation"; and 3) that Commerce should not have used Hang Lung's Verification Exhibit 11 (C.R. 164) as it is unreliable. For these reasons, they desire that the court again remand the case as not supported by substantial evidence and otherwise contrary to law. Pls.' Comments at 3, 9.

JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000). In accordance with 19 U.S.C. § 1516a(b)(1)(B), the court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)) (quotations omitted). "[T]he court affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). The court may not re-weigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB v. United States*, 13 CIT 471, 474–75, 716 F. Supp. 17, 21 (1989).

DISCUSSION

When Commerce "determines that it is unable to verify the respondent's submission, it may substitute for the information submitted by the respondents, facts otherwise available." *Chia Far Indus. Factory Co. v. United States*, 28 CIT ___, ___, 343 F. Supp. 2d 1344, 1362 (2004) (citing 19 U.S.C. § 1677e(a)(2)(A), (D)). The relevant statute provides:

> If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Com-

> mission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, *may use an inference that is adverse* to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from –
> (1) the petition,
> (2) a final determination in the investigation under this subtitle,
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
> (4) any other information placed on the record.

19 U.S.C. § 1677e(b) (emphasis added). Thus, Commerce is authorized to adopt an adverse inference when selecting facts otherwise available, *see Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383–84 (Fed. Cir. 2003), and it is within Commerce's discretion to choose which adverse facts to apply, as long as such facts do not lead to "punitive, aberrational, or uncorroborated margins." *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); *see Shangahai Taoen Int'l Trading Co. v. United States*, 29 CIT ___ , ___ , 360 F. Supp. 2d 1339, 1346 (2005).

The parties concur with Commerce's decision that Hang Lung was uncooperative and that Commerce may apply partial adverse facts available to determine Hang Lung's per unit electricity consumption rates. Following the remand, Plaintiffs claim that Commerce's calculation of total electricity consumption for Hang Lung is not supported by substantial evidence primarily because Commerce relied on the data provided in Hang Lung's Verification Exhibit 11 as the basis for its calculation. Pls.' Comments at 4. They argue that it is unclear what Exhibit 11 represents and that Commerce's explanation is based on its interpretation of the exhibit and not its face value. Specifically, for example, Plaintiffs assert that "[t]he second page of the exhibit appears to be a worksheet for the data relating to the month of December, but . . . contains no information indicating that this data relates to the production of all bags." Pls.' Comments at 5. In addition, Plaintiffs maintain that Commerce's explanation, even if consistent and substantiated by the record, is not adverse and is therefore not in accordance with law. *See* Pls.' Comments at 6. Plaintiffs claim that the electricity amounts provided in Exhibit 11 are the amounts Hang Lung originally reported. Pls.' Comments at 6.

1. Commerce's Methodology

Commerce in this case chose to apply adverse facts available and stated that it allocated Hang Lung's total verified electricity usage to Hang Lung's reported U.S. sales. *See Issues and Decision Mem. for the Investigation of PRCBs from the People's Republic of China*

(Dep't of Comm. June 9, 2004) at 64. Commerce verifiers considered the worksheets Hang Lung presented to demonstrate how it attributed electricity usage to each product. *Hang Lung's Verification Report* at 7. The verifiers were able to "tie[ ] the electricity usage for each department from the worksheets to meter readings that Hang Lung kept in the ordinary course of business." *Hang Lung's Verification Report* at 7. "[F]or some printed products, [however], . . . Hang Lung did not include the printing electricity factor." *Hang Lung's Verification Report* at 8. Based on these data and other information collected during Hang Lung's factory tour, the verifiers found that they "were unable to tie the electricity usage from the consumption charts to the [factors of production] database." *Hang Lung's Verification Report* at 8. They did, however, find that the total electricity consumption numbers in Exhibit 11 matched the numbers from Hang Lung's worksheets, which do not segregate input consumption by product destination. *See Hang Lung's Verification Report* at 7–8.

After reviewing Commerce's explanation regarding its calculation of the total electricity consumed during the period of review and its allocation, the court finds the methodology employed sufficiently adverse. Plaintiffs' challenge to Commerce's specific calculation, while not entirely amiss, does not overcome the deference this Court grants to Commerce's methodology. *See, e.g., Olympia Indus.*, 22 CIT at 389, 7 F. Supp. 2d at 1000.

2. Commerce's Verification

"Congress has afforded Commerce a degree of latitude in implementing its verification procedures." *PPG Indus., Inc. v. United States*, 15 CIT 615, 620, 781 F. Supp. 781, 787 (1991) (citing *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 344, 362, 739 F. Supp. 613, 628 (1990)); *see* 19 C.F.R. § 351.307(b) (requiring Commerce to verify factual information upon which the Secretary relies). The selection of a particular verification methodology is within Commerce's sound discretion, and if supported by substantial evidence on the record, it will be sustained by the court. *PPG Indus.*, 15 CIT at 620, 781 F. Supp. at 787 (citing *Hercules, Inc. v. United States*, 11 CIT 710, 726, 673 F. Supp. 454, 469 (1987)). In their comments, Plaintiffs challenge Commerce's calculation as based on unverified electricity data. They claim that while Commerce stated that it allocated the total electricity rate used by Hang Lung in production of all bags, regardless of destination, these data "are not the gross amounts of electricity taken directly from the meters in each department. Rather, they are net figures derived by Hang Lung by deducting amounts for electricity usage for factory overhead items such as lighting and fans." *See* Pls.' Comments at 9. In a related argument, Plaintiffs claim that Commerce's reliance on the data provided in Hang Lung's Verification Exhibit 11 was unfounded. Aside from

these claims, Plaintiffs do not point to any record evidence showing that Commerce verifiers did not consider and evaluate all available data.

Plaintiffs' argument that Commerce's explanation relies solely on its interpretation of the exhibit and not on information provided on the face of the exhibit itself requires second-guessing the work of Commerce verifiers under their regulatory mandate. *See PPG Indus.*, 15 CIT at 620, 781 F. Supp. at 787. Otherwise, Plaintiffs present no evidence that Hang Lung's Verification Exhibit 11 should be discredited for any reason. *Cf. Tung Fong Indus. Co. v. United States*, 28 CIT ___, ___, 318 F. Supp. 2d 1321, 1334–36 (2004) (finding that evidence did not support Commerce's finding that manufacturer withheld cost allocation information and concluding that Commerce verifiers "offered no justification or other explanation for their reliance on already discredited . . . data as a basis for attempting to discredit other data."). Without any showing that the worksheets provided by Hang Lung are somehow inaccurate or otherwise unacceptable, Plaintiffs fail to show that Commerce's verification process was not supported by substantial evidence.

CONCLUSION

Commerce's remand determination with respect to its calculation of Hang Lung's electricity usage is AFFIRMED.