Slip Op. 08–7

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

RUTH DEN HOED, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No.: 06–00446

[Plaintiff's motion to supplement the record is denied. Defendant's motion to dismiss is granted. The case is dismissed.]

Skadden, Arps, Slate, Meagher & Flom LLP (*Jeffrey D. Gerrish*; *Neena G. Shenai*) for Ruth Den Hoed, plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Devin A. Wolak*); of counsel: *Jeffrey Kahn*, Office of the General Counsel, United States Department of Agriculture, for the United States Secretary of Agriculture, defendant.

January 16, 2008

OPINION

TSOUCALAS, Senior Judge: Defendant United States Secretary of Agriculture ("Defendant" or "Secretary") moves pursuant to USCIT R. 12(b)(5) to dismiss this action for failure to state a claim upon which relief may be granted. Plaintiff Ruth Den Hoed ("Plaintiff") opposes the motion and moves pursuant to USCIT R. 7 to supplement the administrative record. Plaintiff contends that the record is inadequate and argues that Defendant's denial of trade adjustment assistance ("TAA") benefits to Plaintiff is not supported by substantial evidence. Plaintiff also seeks a protective order with respect to the information with which she seeks to supplement the administrative record. The Secretary opposes Plaintiff's motion to supplement the administrative record on the ground that the administrative record is complete and sufficient.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395.

STANDARD OF REVIEW

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Halperin Shipping Co., Inc. v. United States*, 13 CIT 465, 466 (1989). Moreover, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the non-moving party. *See United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (citing *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). A pleading that sets forth a claim for relief must contain "a short and plain statement" of the grounds upon which jurisdiction depends and "of the claim showing that the pleader is entitled to relief." USCIT R. 8(a). "To determine the sufficiency of a claim, consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993). Accordingly, the Court must decide whether plaintiff is entitled to offer evidence in support of its claim, and not whether plaintiff will prevail in its claim. *See Halperin*, 13 CIT at 466.

BACKGROUND

On June 9, 2006, Plaintiff filed her application for TAA benefits for crop year 2004. *See* Confidential Administrative Record ("Admin. R.") at 1. Plaintiff's application reflected that her husband reported a net farm loss of $291.00 in 2003, *see id.* at 2, and a net farm loss of $140.00 in 2004, *see id.* at 3.

In November 2006, the Secretary denied Plaintiff's application on the ground that Plaintiff "did not provide acceptable documentation of net farm or fishing income . . . to show that [her] net income declined from that reported during the petition's pre-adjustment tax year." *Id.* at 38–40. Thereafter, Plaintiff timely sought review of Secretary's decision by filing a letter complaint.

On March 2, 2007, Defendant filed its motion to dismiss the action for failure to state a claim for which a relief may be granted. On October 26, 2007, Plaintiff filed (1) an opposition to Defendant's motion to dismiss, (2) a motion to supplement the administrative record, and (3) a motion for a protective order with respect to documents designated as confidential or business confidential. On November 16, 2007, Defendant filed its responses to Plaintiff's motion to supplement the administrative record and to Plaintiff's motion for a

protective order. On November 20, 2007, Defendant filed a reply brief in support of its motion to dismiss.

DISCUSSION

I. Plaintiff Failed To State A Claim For Which A Relief May Be Granted

To receive TAA benefits, 19 U.S.C. § 2401e(a)(1)(C) requires that "[t]he producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part." Pursuant to 7 C.F.R. § 1580.301(e)(6), the producer must

> "provide either – (i) [s]upporting documentation from a certified public accountant or attorney, or (ii) [r]elevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency."

In its motion to dismiss, the Secretary argues that Plaintiff failed to plead an essential element of her claim because the complaint fails to state that her farm income decreased between 2003 and 2004. *See* Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mem.") at 5–7. Citing *Wooten v. United States* ("*Wooten II*"), 30 CIT ___ , 441 F. Supp. 2d 1253 (2006), the Secretary contends that an applicant who is unable to demonstrate a decrease in her income based on the administrative record has failed to state a claim for which a relief may be granted. *See* Def.'s Mem. at 7. The Secretary notes that Plaintiff's income actually increased between 2003 and 2004 based on the IRS Schedule F forms, and therefore argues that the complaint must be dismissed. *See id.* at 6.

Plaintiff does not claim that she successfully plead the required elements to establish her entitlement to TAA benefits, but instead argues that Defendant's motion should be denied because the Secretary acted improperly in denying Plaintiff's TAA benefits. *See* Mem. Opp'n Def.'s Mot. Dimiss ("Pl.'s Opp'n") at 5–6. Plaintiff states that the Secretary failed to conduct an investigation of her application that met the threshold of reasonableness, and as a result, failed to find that Plaintiff's net income declined from 2003 to 2004. *See id.* at 6–11. In addition, Plaintiff complains that the Secretary may not rely solely on tax returns to determine net income. *See id.* at 8.

The Court agrees with Defendant and finds *Wooten II* controlling. In *Wooten II*, the court found that an applicant who reported a net loss of $86,470 in 2002 and a net loss of $125,671 in 2001 had an actual increase in income of $39,201 during the two years although he reported losses in both years. *See* 30 CIT at ___ , 441 F. Supp. 2d at

1256. Finding that the applicant had failed to demonstrate a decrease in his income based on the administrative record, the court in *Wooten II* dismissed the case for failure to state a claim upon which relief may be granted. *See* 30 CIT at ___ , 441 F. Supp. 2d at 1259.

Accepting all well-pleaded facts as true and viewed in the light most favorable to the plaintiff, the Court finds that Plaintiff has failed to state a claim for which a relief may be granted. *See Conley v. Gibson*, 355 U.S. at 45–46. Nowhere in the letter complaint does the Plaintiff allege that her net income decreased between 2003 and 2004, an essential element of her claim. Indeed, like the plaintiff in *Wooten II*, the letter complaint states that Plaintiff should receive TAA benefits if she reported losses in both 2003 and 2004. *See* letter complaint dated December 7, 2006. Moreover, the administrative record contains only one form of documentation demonstrating Plaintiff's net income, and that document indicates that Plaintiff reported an actual increase in income during the relevant period. Thus, the Court finds that Plaintiff has failed to allege facts sufficient to demonstrate that she is entitled to receive TAA benefits. Because Plaintiff has not stated a claim upon which relief may be granted, this case must be dismissed, unless Plaintiff establishes that she is entitled to supplement the administrative record.

II. Plaintiff Is Not Entitled To Supplement The Administrative Record

The Court must sustain the Secretary's decision as long as it is "reasonable and supported by the record as a whole." *Lady Kim T. Inc. v. United States Sec'y of Agric.* ("*Lady Kim I*"), 30 CIT ___ , ___ , 469 F. Supp. 2d 1262, 1266 (2006) (quoting *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488 (1951)). The Secretary, in examining the documents submitted in connection with individual applications for TAA benefits, must meet "a threshold requirement of reasonable inquiry." *See, e.g.*, *Van Trinh v. United States Sec'y of Agric.*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1259, 1268 (2005) ("While the Department has considerable discretion in conducting its investigation of TAA claims, there exists a threshold requirement of reasonable inquiry.")(citation, internal quotation marks and alterations omitted); *see also Anderson v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 429 F. Supp. 2d 1352, 1355 (2006) ("The Department of Agriculture's discretion in conducting its investigations of TAA claims is prefaced by the existence of a threshold requirement of reasonable inquiry.")(citation and internal quotation marks omitted). The Court "cannot uphold a determination based upon manifest inaccuracy or incompleteness of record when relevant to a determination of fact." *Anderson*, 30 CIT at ___ , 429 F. Supp. 2d at 1355 (quoting *Former Employees of Pittsburgh Logistics Sys. Inc. v. United States Sec'y of Labor*, 27 CIT 339 (2003)); *see also Wooten v. United States Sec'y of Agric.* ("*Wooten I*"), 30 CIT ___ , 414 F. Supp.

2d 1313 (2006). "If the court determines that Defendant did not meet the threshold requirement of a reasonable inquiry, it may, for good cause shown, remand the case to Agriculture to take further action." *Anderson*, 30 CIT at ___ , 429 F. Supp. 2d at 1355 (citing 19 U.S.C. § 2395(b)). Good cause exists if the Secretary's finding is arbitrary or not based on substantial evidence. *See id.* (citing *Former Employees of Galey & Lord Indus. v. Chao*, 26 CIT 806, 809, 219 F. Supp. 2d 1283, 1286 (2002)).

Plaintiff argues that the Secretary failed to conduct a reasonable inquiry of her application for TAA benefits as required by law. *See* Pl.'s Mot. Supplement R. ("Pl.'s Mot.") at 1–3; Pl.'s Opp'n at 6–11. As a result, Plaintiff contends that Defendant's denial of her application for TAA benefits was based on an inadequate record, and thus, unsupported by substantial evidence. *See* Pl.'s Mot. at 1–2; Pl.'s Opp'n at 11. In addition, Plaintiff claims that it was improper for the Secretary to rely upon her tax returns as the sole basis for determining net income. *See* Pl.'s Mot. at 2; Pl.'s Opp'n at 10. Plaintiff therefore seeks to supplement the records with "evidence that should have been and would have been record evidence had the Secretary conducted a 'reasonable inquiry' of Plaintiff's TAA claim." Pl.'s Mot. at 3.

The Secretary responds that the administrative record was complete and sufficient to make an informed decision upon Plaintiff's application. *See* Def.'s Resp. Pl.'s Mot. Supplement R. ("Def.'s Resp.") at 1. According to the Secretary, Plaintiff completed and submitted all the necessary forms and supporting documents required under the statute and regulations including documents evidencing her net farm income. *See id.* at 5–6. In addition, the Secretary notes that Plaintiff did not submit any documents concerning her net farm income (other than her husband's tax returns) or make any attempt to supplement her application with additional documents. *See id.* at 7. Since the documents with which Plaintiff attempts to supplement the record were not timely submitted and Plaintiff offers no excuse for such failure, the Secretary contends that Plaintiff improperly seeks to introduce extra-record evidence. *See id.* at 10–11.

The Court finds that Defendant here did not fail to meet the threshold of reasonable inquiry in examining Plaintiff's application. The Secretary did not ask for additional information from Plaintiff because nothing in the application as reviewed by the Secretary indicated any deficiency. Plaintiff does not dispute that her application, which included all necessary forms and supporting documents, appeared to be complete. Since the Secretary could not have known that Plaintiff possessed other documents relevant to determination of her net income, the Secretary could not be expected to request them or to notify Plaintiff of any deficiency. Indeed, the Secretary is

entitled to "rely only on the information submitted to it by the producer." *See Lady Kim T. Inc. v. United States Sec'y of Agric.* ("*Lady Kim II*"), 31 CIT ___ , 491 F. Supp. 2d 1366, 1371 n. 6 (2007).

The cases relied upon by Plaintiff are factually distinguishable because they each involve a situation where the agency knew or should have known that the application at hand was deficient in some fashion. In such instances, the Court has found that the Secretary failed to meet the threshold requirement of reasonable inquiry by failing to notify the applicant of the deficiencies. *See, e.g.*, *Wooten I*, 30 CIT at ___ , 414 F. Supp. 2d at 1316 (holding that the Secretary should have made a reasonable inquiry about the obviously missing tax returns); *Van Trinh*, 29 CIT at ___ , 395 F. Supp. 2d at 1269 (finding that significant discrepancies and conflicting information in the applicant's file should have at least suggested to the Secretary that documentation was missing or lost from the record).

Here, Plaintiff proffers no evidence whatsoever that the Secretary knew or should have been aware of the fact that Plaintiff possessed additional information regarding her net farm income. Nothing was obviously missing from Plaintiff's application. Plaintiff does not allege that her application contained discrepancies or conflicting information that should have indicated to the Secretary a need to notify the applicant of any missing information regarding her net farm income.

In addition, the Court finds no merit to Plaintiff's argument that the Secretary acted improperly by relying only on tax return information in determining net income when the applicant chose to evidence it by submitting nothing more than her husband's tax returns. Plaintiff chose to do so even though applicants are permitted to submit various forms of documents to demonstrate their net income. *See* 7 C.F.R. § 1580.301(e)(6). Although *Steen v. United States*, 468 F.3d 1357 (Fed. Cir. 2006), requires the Secretary to consider all materials submitted by applicants evidencing net income, in addition to any tax forms, it cannot be read to bar the Secretary from relying solely on tax forms if no other information is available.

Accordingly, the Court finds that Defendant met the threshold requirement of reasonable inquiry, and the Secretary's denial of Plaintiff's application was not arbitrary and was supported by substantial evidence. Plaintiff is therefore not entitled to supplement the administrative record. Plaintiff's motion is denied.[1]

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[1] Plaintiff's motion for a protective order is denied as moot in light of the Court's ruling on Plaintiff's motion to supplement the administrative record.

CONCLUSION

For the reasons stated above, Plaintiff's motion to supplement the record is denied, Plaintiff's motion for a protective order is denied as moot, and Defendant's motion to dismiss is granted. Case is dismissed.

Slip Op. 08–8

AMES TRUE TEMPER, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 05–00581

[United States Department of Commerce's final results of redetermination sustained]

Dated: January 18, 2008

Wiley Rein, LLP (*Timothy C. Brightbill* and *Charles O. Verrill, Jr.*), for plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Courtney E. Sheehan*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Nithya Nagarajan*), of counsel, for defendant.

OPINION

Eaton, Judge: In *Ames True Temper v. United States*, 31 CIT ___ , Slip Op. 07–133 (Aug. 31, 2007) (not reported in the Federal Supplement) ("*Ames*"), this court sustained, in part, and remanded in part the United States Department of Commerce's ("Commerce") final results of the thirteenth administrative review of the four antidumping duty orders covering imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC") made between February 1, 2003, and January 30, 2004 ("POR"). *See* HFHTs, Finished or Unfinished, With or Without Handles, from the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005). The lone issue remanded related to respondent Shandong Huarong Machinery Co., Ltd.'s ("Huarong") production of metal pallets. *Id.* at ___ , Slip Op. 07–133 at 20–24. Specifically, the court directed Commerce "to reopen the record and obtain additional evidence regarding Huarong's production of metal pallets" in light of plaintiff's showing that Commerce did not consider any input used by Huarong to hold its pallets together. *See id.* at ___ , Slip Op. 07–133 at 23–24.

On remand, Commerce determined that welding wire should have been reported by Huarong as a factor of production and included it as such. *See* Final Results of Redetermination Pursuant to *Ames True Temper v. United States*, Consol. Court No. 05–00581, Slip Op. 07–133 (August 31, 2007), Court No. 05–00581 (Dep't of Commerce Nov. 28, 2007) ("Remand Results"). Accordingly, Commerce recalculated Huarong's antidumping duty margin for its sales of axes/adzes to be 175.04%, a slight increase from 174.58%. *See* Remand Results at 2, 5. Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons, Commerce's Remand Results are sustained.[1]

When reviewing a final antidumping determination from Commerce, the 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)). To determine whether substantial evidence exists, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

On remand, Commerce was obligated to "adhere closely to the court's outstanding order[ ]. Failure to do so unnecessarily absorbs the time of counsel and the court, does not promote respect for the rule of law, and may result in sanctions in unfortunate cases." *Vertex Int'l, Inc. v. United States*, 30 CIT ___ , Slip Op. 06–35 at 1 (Mar. 8, 2006) (not reported in the Federal Supplement). Here, Commerce's actions on remand comported with the court's opinion in *Ames*.

Commerce re-opened the record and issued supplemental questionnaires on September 19, 2007, and October 19, 2007. *See* Remand Results at 2; *see also* 9/19/07 Letter from Commerce to Counsel for Huarong, Administrative Record ("AR") 1; 10/19/07 Letter from Commerce to Counsel for Huarong, AR 5 (each enclosing a questionnaire). These questionnaires each sought detailed information from Huarong about the factors of production used in producing its steel pallets, and the supplemental questionnaire specifically inquired about Huarong's use of welding wire. *See* Remand Results at 3–4. In response to Commerce's inquiries

> . . . Huarong reported that it used welding wire in producing pallets, a previously unreported FOP [factor of production].

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[1] For a review of the factual background of this matter, *see generally Ames*, 31 CIT ____ , Slip Op. 07–133 (Aug. 31, 2007) (not reported in the Federal Supplement).

> Huarong reported the amount of welding wire used per kilogram of subject merchandise. Huarong explained that it did not report welding wire as an FOP during the administrative review because it treated welding wire as an overhead expense because it is mainly used for factory repairs and only a small amount of the overall POR [period of review] consumption of welding wire is used for pallet making.

Remand Results at 3 (citations omitted).

With this information in its possession, Commerce noted that it is its "normal practice to apply a weighted-average freight distance, capped by the distance to the nearest port, for FOPs used in the calculation of NV [normal value]." *Id.* at 3. Here, however, because Huarong reported the freight distance from its factory as opposed to from its suppliers, Commerce "used a single average of the suppliers' distances to account for freight costs associated with purchasing welding wire."[2] *Id.* at 4–5. In accordance with this methodology, Commerce included welding wire in recalculating Huarong's normal value and concluded that Huarong's antidumping duty margin for its sale of axes/adzes increased from 174.58% to 175.04%. *See id.* at 4–5 (noting also that Commerce "valued welding wire using publicly available Indian import statistics for February 2003 – January 2004 from the *World Trade Atlas*").

There is nothing to indicate that Commerce did not fully comply with the court's instructions in *Ames*. When reviewing the Department's treatment of various factors in calculating normal value, "the proper role of this court, . . . is to determine whether the methodology used by the [agency] is in accordance with law . . . ." *Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1368, 947 F. Supp. 525, 532 (1996) (internal quotation marks & citations omitted; ellipses & alteration in original). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Id.* at 1368, 947 F. Supp. at 532 (internal quotation marks & citations omitted). Here, the methodology employed in calculating Huarong's normal value was reasonable in light of available information and the conclusion reached was supported by substantial evidence in the record, i.e., Huarong's detailed questionnaire responses. It is worth noting that no party commented on Commerce's draft results and that plaintiff chose not to submit comments concerning the Remand Results to the court. *See* Remand

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[2] Huarong established to Commerce's satisfaction that it did not maintain records demonstrating a weighted average supplier distance. Remand Results at 4.

Results at 2; 1/10/08 Letter from Plaintiff's Counsel to Court (confirming plaintiff's intention not to file comments).

Accordingly, for the reasons stated, Commerce's Remand Results are sustained.

Slip Op. 08–9

SEAFOOD EXPORTERS ASSOCIATION OF INDIA, GOURMET FUSION FOODS INC., and INTERNATIONAL CREATIVE FOODS, INC., Plaintiffs, **v. UNITED STATES OF AMERICA, ROBERT C. BONNER, COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION, AND UNITED STATES CUSTOMS AND BORDER PROTECTION**, Defendants.

Before: Timothy C. Stanceu, Judge
Court No. 05–00347

[Granting in part, and denying in part, defendants' motion for reconsideration and modifying the March 13, 2007 and June 19, 2007 orders addressing the filing of the administrative record]

Dated: January 18, 2008

Troutman Sanders LLP (*Julie C. Mendoza, Donald B. Cameron, R. Will Planert, Jeffrey S. Grimson* and *Brady W. Mills*) for plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Chi S. Choy*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, Bureau of Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendants.

OPINION AND ORDER

Stanceu, Judge: Before the court is defendants' motion for reconsideration pursuant to USCIT Rule 59(a) and (e). In their motion, defendants request that the court reconsider, in part, the court's order of March 13, 2007 (Docket Entry No. 32) (the "Order"). Defendants seek reconsideration of the directive in the Order that defendants include in their filing of the administrative record for this case the public documents associated with a notice issued by defendant United States Customs and Border Protection ("Customs"), *Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements*, 71 Fed. Reg. 62,276 (Oct. 24, 2006) (the "Notice"). Defendants argue that the public documents associated with the Notice should not be included in the administrative record because the Notice was issued after plaintiffs, on May 23,

2005, filed their first amended complaint and plaintiffs have not alleged in their amended complaint that the Notice harmed them.

For the reasons discussed herein, the court grants defendants' motion in part and denies it in part. The court amends the Order to allow defendants to refrain from filing, at this time, the public documents associated with the Notice. The court reserves decision on the question of whether those documents will be necessary for the resolution of this case and therefore will be required to be filed at a later date.

I. BACKGROUND

On March 13, 2007, the court denied defendants' motion to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *Seafood Exps. Ass'n of India v. United States*, 31 CIT ___ , 479 F. Supp. 2d 1367 (2007). On the same day, the court issued the Order. Order of Mar. 13, 2007 (Docket Entry No. 32). Familiarity with the court's opinion in *Seafood Exporters Association of India* (the "Opinion") is presumed.

The Order required defendants to file the public administrative record for the case and provided defendants with thirty days to complete such filing. *Id.* at 2. The Order stated in relevant part that the public administrative record for the case:

> shall include, but not be limited to, public documents pertaining to the promulgation and application of the Bond Directive and all modifications thereto, including the *Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements*, 71 Fed. Reg. 62,276 (Oct. 24, 2006) . . . .

Id. In response to the Order, defendants filed, on April 11, 2007, a set of documents that did not include the public documents associated with the Notice. Defendants filed their motion for reconsideration on April 9, 2007, requesting that the court reconsider its requirement for filing of the public documents associated with the Notice because the Notice was not contested by plaintiffs in this case. *See* Mot. for Recons. 1 ("Defs.' Mot. for Recons."). Plaintiffs filed their opposition to defendants' motion for reconsideration on April 26, 2007. Pls.' Opp. to Defs.' Mot. for Recons. of this Ct.'s Mar. 13, 2007 Order.

II. DISCUSSION

Defendants argue that the records pertaining to the Notice are not part of the record of the decision being challenged, that there is no case or controversy concerning the Notice, and that any claims relating to the Notice would not be ripe for judicial review because plaintiffs have not exhausted their administrative remedies with respect to any determinations of bond sufficiency made pursuant to the No-

tice. *See* Defs.' Mot. for Recons. 5–10. In opposing defendants' motion, plaintiffs contend that the court took into consideration the scope of the claims contained in their amended complaint when drafting the Order, and as such the court intended defendants to file the public documents associated with the Notice. Pls.' Opp. to Defs.' Mot. for Recons. of this Ct.'s Mar. 13, 2007 Order ¶ 5. Plaintiffs point to language in the Opinion in which the court, in discussing the changes to the "procedures and polices underlying the various issuances comprising the Bond Directive," notes that "[t]hese policies appear to have changed after issuance of the Amendment on July 9, 2004, and in particular upon publication of the Notice in October 2006, which occurred after plaintiffs brought this action." *Id.* ¶ 6 (quoting *Seafood Exps. Ass'n of India*, 31 CIT at ___ , 479 F. Supp. 2d at 1377). Plaintiffs argue that defendants' repeated attempts to delay the filing of the administrative record have hampered plaintiffs' ability to move forward with this litigation. *Id.* ¶ 1. In the event that the court grants the reconsideration motion and agrees to exclude documents related to the Notice in the filing of the administrative record, plaintiffs request leave to amend their complaint to incorporate claims related to the Notice. *Id.* ¶ 7.

Granting a motion for reconsideration under USCIT Rule 59(a) is within the sound discretion of the court. *Union Camp Corp. v. United States*, 23 CIT 264, 270, 53 F. Supp. 2d 1310, 1317 (1999). The purpose of such a motion is "to rectify a significant flaw in the conduct of the original proceedings[,]" such as "when a movant demonstrate[s] that the judgment is based on manifest errors of law or fact." *Id.* (internal citations and quotation marks omitted). The court concludes that defendants' arguments do not identify a flaw in the conduct of the proceedings satisfying the "manifestly erroneous" standard and that those arguments rest on an overly narrow construction of plaintiffs' claims.

In its opinion denying the motion to dismiss, the court discussed the Notice, which announced changes to the guidelines and formulas by which Customs determines limits of liability on continuous entry bonds issued to importers of certain categories of merchandise subject to antidumping duty orders. *Seafood Exps. Ass'n of India*, 31 CIT at ___ , 479 F. Supp. 2d at 1374–75. The process affected by the Notice previously was set forth in amended Bond Directive 99–3510–004 (the "Bond Directive"), which Customs amended on July 9, 2004 and subsequently clarified. *See Monetary Guidelines for Setting Bond Amounts*, Customs Directive 3510–04 (July 23, 1991), *available at* http://cbp.gov/linkhandler/cgov/toolbox/legal/ directives/3510-004.ctt/3510-004.txt; *Amendment to Bond Directive 99–3510–004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases* (July 9, 2004), *available at* http://www.cbp.gov/xp/cgov/import/cargo_summary/bonds/07082004.xml; *Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special*

Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases (Aug. 10, 2005), *available at* http://www.cbp.gov/xp/cgov/import/cargo_summary/bonds/07082004.xml.

Defendants are correct in arguing that the administrative record pertaining to the Bond Directive, as it existed on July 9, 2004, does not contain documents that were created after that date. However, plaintiffs' amended complaint challenges as unlawful not only the Bond Directive, but also the application of the Bond Directive to the determinations that Customs made to establish their individual bonding requirements. *See* First Am. Compl. 14, ¶ i. Because the court was unable to conclude that documents related to the Notice will be unnecessary to the adjudication of plaintiff's claims, the court ordered inclusion of these documents in the administrative record. The court continues to be unable to so conclude, not only because plaintiffs' claims are broader than a challenge to the Bond Directive *per se*, but also because plaintiffs seek declaratory and also equitable relief, praying for a permanent injunction against the application of the "Bond Directive" to their future imports. *See* id. at 14, ¶¶ ii–iii. Plaintiffs, in their amended complaint, specifically reference "Current Bond Formulas" that Customs posted on its website on January 24, 2005, and into which, according to plaintiffs, "the Bond Directive was incorporated."[1] *Id.* ¶ 12. The exact scope and content of the "Bond Directive," as it possibly could be applied to future imports, appears to be changing over time and is a matter that might be resolved only as the litigation progresses. At this stage of the proceedings, the nature of any relief to which plaintiffs may be entitled, whether as a matter of law or equity, can only be a matter of speculation. For these reasons, the court disagrees with defendants' argument that there is no case or controversy concerning the Notice. The court also disagrees with defendants' argument pertaining to ripeness and exhaustion of administrative remedies. The amended complaint indicates that plaintiffs have been participants in proceedings to determine limits of liability on continuous entry bonds. *See id.* ¶¶ 19–20, 22. The court finds no basis to conclude, at this stage of the litigation, that the documents in question could be related only to a potential future claim of plaintiffs that would be dismissed for lack of ripeness or for failure to exhaust administrative remedies.

Nevertheless, the court also notes that since it issued the Order, defendants have filed confidential records for a number of individual bond determinations, and also notes that the question of whether a specific need for the documents related to the Notice will arise later

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[1] In addition to the Notice, Customs issued other public documents affecting the subject matter of the Bond Directive. *See Seafood Exps. Ass'n of India*, 31 CIT ____ , ____ , 479 F. Supp. 2d 1367, 1372–73 (describing issuance of "Current Bond Formulas" on January 24, 2005 and issuance of a "Clarification" to the Bond Directive on August 10, 2005).

in the course of this litigation is also a matter of speculation. *See* Docket Entry No. 45 (entered Apr. 30, 2007). Therefore, the court will exercise its discretion to modify the Order such that defendants will not be burdened with the obligation to file the public documents related to the Notice at this time. However, the court declines to rule in response to defendants' motion for reconsideration that the public documents associated with the Notice will not in the future be necessary to the adjudication of plaintiff's claims. The court will consider the need to supplement the administrative record by the filing of these documents if circumstances and the interest of justice so require.

Finally, the court turns to plaintiffs' request to amend their complaint to incorporate claims relating to the Notice, in the event that the court grants the reconsideration motion and agrees to exclude documents related to the Notice in the filing of the administrative record. Pls.' Opp. to Defs.' Mot. for Recons. of this Ct.'s Mar. 13, 2007 Order ¶ 7. In considering leave to amend a complaint, the court is to apply the standard set forth in USCIT Rule 15, which provides that "leave shall be freely given when justice so requires." *See* USCIT R. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (providing that absent dilatory motive, undue cause for delay, repeated failure to cure deficiencies by amendments, futility of amendment, or undue prejudice to the opposing party, leave to amend should be liberally given). The request in plaintiffs' opposition papers for leave to amend the complaint is insufficient to allow the court to decide the question of whether leave to amend is warranted under the standard of Rule 15. Plaintiffs have once amended their complaint as of right and an answer has been filed; any further amendment may be granted only by leave of court or by written consent of the adverse party. USCIT R. 15(a). Unless plaintiffs obtain such consent, the court will consider whether to grant leave to amend the complaint upon the filing of a motion under USCIT Rule 15(a) for leave to amend and a proposed amended complaint. Absent a showing of good cause as required by USCIT Rule 16(b), such a motion should be filed before the final date for amending the pleadings that is specified in a scheduling order entered under USCIT Rule 16(b)(1). *See* USCIT R. 16(b). In amending the Order, the court also is ordering the parties to confer and submit a proposed scheduling order.

III. ORDER

Upon consideration of defendants' motion to reconsider, plaintiff's response thereto, and all other submissions and proceedings herein, it is

ORDERED that defendants' motion for reconsideration is GRANTED in part and DENIED in part; it is further

ORDERED that the court's March 13, 2007 order, Docket Entry No. 32, is hereby modified to provide that defendants need not file,

at this stage of the litigation, the public documents associated with *Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements*, 71 Fed. Reg. 62,276 (Oct. 24, 2006); it is further

ORDERED that the court's June 19, 2007 order, Docket Entry No. 48, is modified to provide that the administrative record for this case is deemed filed, subject to a possible future order supplementing the administrative record with additional materials; and it is further

ORDERED that the parties confer and file a proposed scheduling order by February 8, 2008.

Slip Op. 08–10

SV BLOCK II, v. Plaintiff, UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard K. Eaton, Judge
Court No. 06–00455

[Defendant's motion to dismiss plaintiff's action for failure toprosecute pursuant to USCIT Rule 41(b)(3) granted. Case dismissed, without prejudice.]

Dated: January 23, 2008

SV Block II, plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg*), for defendant; Office of the General Counsel, International Affairs & Commodity Programs Division, United States Department of Agriculture (*Jeffrey Kahn*), of counsel, for defendant.

MEMORANDUM OPINION

Eaton, Judge: This matter is before the court on the United States' motion on behalf of defendant the United States Secretary of Agriculture ("defendant" or the "Department") to dismiss plaintiff SV Block II's ("plaintiff") action challenging the Department's denial of plaintiff's application for trade Court No. 06–0455 Page 2 adjustment assistance ("TAA") benefits for failure to prosecute pursuant to USCIT Rule 41(b)(3). *See* Def.'s Mot. Dismiss at 1; *see also* 19 U.S.C. § 2401e (2002). Jurisdiction lies under 19 U.S.C. § 2395(c). For the following reasons, defendant's motion is granted, and plaintiff's case is dismissed, without prejudice.

BACKGROUND

On May 3, 2006, Andrew Schmitt applied for TAA benefits based on his production of Washington Concord juice grapes. Application for Trade Adjustment Assistance (TAA) for Individual Producers, Admin. R. ("AR") at 1. On November 6, 2006, the Department denied Mr. Schmitt's application because he failed to "provide acceptable documentation of net farm . . . income by the certification deadline" in order to demonstrate the requisite decline in net income needed to qualify for benefits. Letter from Robert H. Curtis, Dir., Imp. Policies & Program Div., to Plaintiff (Nov. 6, 2006), AR at 30–31. The Department's denial letter informed Mr. Schmitt that he could seek judicial review of the determination in this Court. *See id.*

On December 15, 2006, Mr. Schmitt mailed to the Court a letter stating his reasons for believing that the Department had erroneously denied his application. *See* Letter from Andrew Schmitt to United States Court of International Trade (Dec. 15, 2006). That letter served to commence this action. *See* Letter from Office of the Clerk, Donald C. Kaliebe, Case Management Supervisor, to Andrew Schmitt ("Kaliebe Letter") (Dec. 27, 2006) at 1 ("The Office of the Clerk has reviewed your correspondence, and has accepted it as fulfilling in principle the requirements of the summons and complaint for the commencement of a civil action . . . ."). This letter included the following language:

> It is strongly suggested that you try toobtain legal counsel as soon as possible. When you obtain counsel, please ask him or her to file a Notice of Appearance with the Court. If you are unable to afford or obtain counsel and wish the Court to assist you in this, please call me for the forms necessary to make an appropriate motion to the Court.

Kaliebe Letter at 2.

Thereafter, on December 15, 2007, defendant filed a motion requesting that the court re-caption this matter "SV Block II v. United States Secretary of Agriculture," substituting the partnership, SV Block II, for then plaintiff, Mr. Schmitt. *See* Def.'s Mot. Re-Caption 1. Defendant simultaneously filed a motion for an extension of time to respond to plaintiff's complaint, because, assuming that defendant's motion to re-caption was granted, plaintiff would be required to obtain counsel under USCIT Rule 75(b). *See* USCIT Rule 75(b) (providing that "[e]xcept for an individual (not a corporation, partnership, organization or other legal entity) appearing *pro se*, each party and any *amicus curiae* must appear through an attorney authorized to practice before the court"); *see also* Def.'s Mot. Enlarge 1.

On March 30, 2007, this case was assigned to these Chambers. *See Andrew Schmitt v. United States Secretary of Agriculture*, Court No. 06–455 (Mar. 30, 2007) (order assigning case). Thereafter, on April

18, 2007, because its motion to re-caption was still pending, defendant filed a second motion for an extension of time to respond to plaintiff's complaint. *See* Def.'s Second Mot. Re-caption 1–2.

On May 15, 2007, the court granted defendant's motion for an extension of time, up through and including June 4, 2007, for defendant to respond to plaintiff's complaint. *See Andrew Schmitt v. United States Secretary of Agriculture*, Court No. 06–455 (May 15, 2007) (order granting extension). Also on May 15, 2007, the Office of the Clerk sent a second letter to plaintiff, this time enclosing the forms required for the Court's appointment of counsel. *See* Letter from Office of the Clerk, Donald C. Kaliebe, Case Management Supervisor, to Andrew Schmitt (May 15, 2007) ("Second Kaliebe Letter"). This letter again advised plaintiff:

> It is strongly suggested that you try to obtain legal counsel as soon as possible. If you are unable to afford or obtain counsel and wish the Court to assist you in this, please refer to the enclosed forms, which need to be completed in order to make a motion to the Court.

Id.

On May 16, 2007, the court granted defendant's motion to re-caption this case and ordered that this matter be re-captioned "SV Block II v. United States Secretary of Agriculture," substituting the partnership, SV Block II, for plaintiff, Mr. Schmitt. *See Andrew Schmitt v. United States Secretary of Agriculture*, Court No. 06–455 (May 16, 2007) (order re-captioning case).

Subsequently, because plaintiff had not yet appeared through counsel, defendant filed an additional motion for an extension of time to respond to plaintiff's complaint. *See* Def.'s Third Mot. Enlarge 1. The court granted defendant's motion, extending defendant's time to respond until August 3, 2007 and ordering that the parties file a proposed scheduling order on or before August 10, 2007. *SV Block II v. United States Secretary of Agriculture*, Court No. 06–455 (June 27, 2007) (order).

On July 31, 2006, defendant filed a motion to dismiss plaintiff's action for failure to prosecute. The motion was served on plaintiff by First-Class Mail. *See* Certificate of Service of Michael J. Dierberg (July 31, 2007). In consideration of defendant's motion, on October 9, 2007, this court ordered plaintiff to show cause as to why this case should not be dismissed pursuant to USCIT Rule 41(b)(3) by November 9, 2007. *SV Block II v. United States Secretary of Agriculture*, Court No. 06–455 (June 27, 2007) (order to show cause). To date, no response has been provided by plaintiff nor has any counsel filed a Notice of Appearance on plaintiff's behalf. For the following reasons, the court grants defendant's motion and dismisses this case, without prejudice.

STANDARD OF REVIEW

The decision to dismiss an action based on plaintiff's failure to prosecute a claim rests soundly in the court's discretion. *See United States v. Rubinstein*, 23 CIT 534, 537, 62 F. Supp. 2d 1139, 1142 (1999); *see also ILWU Local 142 v. Donovan*, 15 CIT 584, 585 (1991) (not reported in the Federal Supplement) (" 'Every court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution. The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination.' ") (alteration omitted) (quoting *United States v. Chas. Kurz Co.*, 55 C.C.P.A. 107, 110, 396 F.2d 1013, 1016 (1968)). "The primary rationale underlying such a dismissal is the failure of a plaintiff to live up to its duty to pursue its case diligently." *A. Hirsh, Inc. v. United States*, 12 CIT 721, 723 (1988) (not reported in the Federal Supplement). The Court generally refrains from taking such action unless there is evidence of "a clear pattern of delay, contumacious conduct, or failure to comply with orders of the Court." *Id.* (internal quotation marks and citation omitted). Nonetheless, absent justifiable circumstances, the court may exercise its discretion to dismiss when faced with a plaintiff's substantial delay in prosecuting its case. *See ILWU Local 142*, 15 CIT at 586 (dismissing plaintiff's action, in part, because plaintiff failed to cite an acceptable reason for its delay and further stating that "[u]nder circumstances in which three years have elapsed, the court finds plaintiff consciously decided not to diligently proceed."); *see also Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980) ("In this case the last pleading . . . was filed . . . 22 months before the dismissal . . . . In light of the significant inactivity of the plaintiff, we cannot say the district court abused its discretion in dismissing the complaint.") (emphasis omitted).

DISCUSSION

The court finds that plaintiff has failed to prosecute diligently its action and thus grants defendant's motion to dismiss pursuant to USCIT Rule 41(b)(3). *See* USCIT R. 41(b)(3) ("Whenever it appears that there is a failure of the plaintiff to prosecute, the court may upon its own initiative after notice, or upon motion of a defendant, order the action or any claim dismissed for lack of prosecution."). Since the commencement of plaintiff's action on December 21, 2006, the Office of the Clerk endeavored on two separate occasions to communicate with plaintiff in order to determine if it intended to pursue its case. The court likewise issued an order to show cause to alert plaintiff that it must take action in order to avoid dismissal of its case. Despite two letters and the court's order to show cause, for more than one year dating back to the commencement of its action, nothing has been heard from plaintiff.

When faced with similar facts, this Court found:

> Since the outset, the plaintiff might have availed herself of the proffered assistance of the clerk's office to obtain legal representation in forma pauperis (concerning which, it should be noted, the clerk's office expended considerable time and effort for her benefit since receipt of her [summons and complaint] letter), however she has failed, to date, to respond properly. The Court therefore considers it appropriate to dismiss her case, but without prejudice, for failure to prosecute pursuant to USCIT R.41(b)(3).

Burton v. United States Sec'y of Agric., 29 CIT ___ , ___ , Slip Op. 05–125, 2005 WL 2249859, at 3 (Sept. 14, 2005) (not reported in the Federal Supplement); *see also Luu v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1362, 1365 (2006); *Ebert v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 425 F. Supp. 2d 1320 (2006); *Grunert v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , Slip Op. 06–37, 2006 WL 626070, at 1 (Mar. 13, 2006) (not reported in the Federal Supplement). Likewise, the court here finds that plaintiff's failure to take any action with respect to the case despite the several efforts undertaken by the court warrants the dismissal of plaintiff's action, but without prejudice.

CONCLUSION

Based on the foregoing, the court grants defendant's motion to dismiss plaintiff's case for failure to prosecute pursuant to USCIT Rule 41(b)(3) and dismisses the case, without prejudice. Judgment shall be entered accordingly.