U.S. Customs and Border Protection

Slip Op. 09–105

UNION STEEL, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION and NUCOR CORPORATION, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 08–00101

[Affirming in part a final determination of the U.S. Department of Commerce and granting defendant's request for a partial voluntary remand]

Dated: September 28, 2009

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OPINION AND ORDER

Stanceu, Judge:

I.
Introduction

Plaintiff Union Steel ("Union") contests the final determination ("Final Results") issued by the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), in a periodic administrative review of an antidumping duty order on imports of certain corrosion-resistant carbon steel flat products (the "subject merchandise") from the Republic of Korea ("Korea"). *See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Admin.*

Review, 73 Fed. Reg. 14,220 (Mar. 17, 2008) ("*Final Results*"). Union, a producer and exporter of subject merchandise and a respondent in the review, brings two claims. Union challenges Commerce's "model match" methodology, by which Commerce compared Union's U.S. sales of painted corrosion-resistant carbon steel flat products to Union's home market sales, which included not only painted products but also "laminated" products, *i.e.*, products that are coated with a plastic film rather than paint. Second, plaintiff challenges Commerce's construction of 19 U.S.C. § 1677(35) (2006), according to which Commerce concluded that it was permissible to apply "zeroing," *i.e.*, the deeming of the sales a respondent makes in the United States at prices above normal value to have individual dumping margins of zero rather than negative margins.

Without confessing error, defendant requests that the court order a partial voluntary remand to allow Commerce to reconsider its denial, made during the review, of plaintiff's request to revise the model match methodology. Plaintiff responds that a remand on this issue is required but submits that the court, in issuing a remand order, should consider plaintiff's substantive arguments, make certain findings with respect to Commerce's model match determination, and issue specific instructions governing the scope and substance of the remand redetermination. Defendant-intervenors Nucor Corporation ("Nucor") and United States Steel Corporation ("U.S. Steel") argue that the Department's model match methodology is supported by substantial evidence and otherwise consistent with law and, in the alternative, oppose the specific remand instructions sought by Union. For the reasons discussed herein, the court grants defendant's request for voluntary remand and declines to issue a remand order in the form that plaintiff advocates.

Based on applicable precedent, the court affirms the Department's use of zeroing in the Final Results. Accordingly, the court denies relief on plaintiff's second claim.

II.
Background

In September 2006, Commerce initiated the thirteenth administrative review of an antidumping duty order on certain corrosion-resistant carbon steel flat products from Korea for the period of August 1, 2005, through July 31, 2006 (the "period of review"). *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 71 Fed. Reg. 57,465 (Sept. 29, 2006). In conducting the review, Commerce sent Union and other respondents a questionnaire detailing twelve model-match criteria, the first of which was termed "TYPE." *Letter from U.S. Dep't of Commerce to Union Steel Manufacturing Co.,*

Ltd. (Sept. 13, 2006) (Admin. R. Doc. No. 7); *Letter from U.S. Dep't of Commerce to Dongbu Steel Co., Ltd.*, App. IV at 1 (Sept. 13, 2006) (Admin. R. Doc. No. 9); Br. in Supp. of the Mot. of Pl. Union Steel for J. upon the Agency R. 2–3 ("Pl.'s Br."). The questionnaire listed four possible types of corrosion-resistant carbon steel flat products: (1) "Clad (metals bonded by the hot-rolling process), less than 3/16″ in thickness"; (2) "Coated/plated with metal: Painted, or coated with organic silicate, Polyvinylidene Flouride (PVDF)"; (3) "Coated/plated with metal: Painted, or coated with organic silicate, All Other (*i.e.*, other than PVDF)"; and (4) "Not painted, and not coated with organic silicate." Pl.'s Br. 3; *Letter from U.S. Dep't of Commerce to Dongbu Steel Co., Ltd.* at B–7 (Sept. 13, 2006); *Letter from U.S. Dep't of Commerce to Union Steel Manufacturing Co., Ltd.* (Sept. 13, 2006). Respondents were asked to classify their sales of subject merchandise made during the period of review into one of these four types. Pl.'s Br. 3; *Letter from U.S. Dep't of Commerce to Dongbu Steel Co., Ltd.* at B–7 (Sept. 13, 2006); *Letter from U.S. Dep't of Commerce to Union Steel Manufacturing Co., Ltd.* (Sept. 13, 2006).

During the period of review, Union did not have sales of subject merchandise that consisted of clad products but had sales in the United States and in Korea of unpainted products, products painted with PVDF, and products in the "All Other" painted category. Pl.'s Br. 3. In addition, Union made sales in Korea of corrosion-resistant steel flat products that were laminated with a plastic film but had no sales of laminated products in the United States during the period of review. *Id.* at 3–4. In responding to Commerce's questionnaire, Union reported its sales based on the four types Commerce had described but also proposed, and reported sales based on, a product type not specified in the questionnaire: "Coated/plated with metal: Laminated with film." *See Letter from Kaye Scholer LLP to Sec'y of Commerce*, Attach. 1 at 5–6 (Nov. 20, 2006) (Admin. R. Doc. No. 52) ("*Union's Section B Resp.*"); *see also Letter from Kaye Scholer LLP to Sec'y of Commerce*, Attach. 1 at 20-21 (Feb. 2, 2007) (Admin. R. Doc. No. 99) ("*Union's Supplemental Resp.*"). Union advocated that Commerce recognize this proposed new type category by explaining that its laminated products underwent a different production process than its painted products, were physically different from its painted products because they were coated with plastic film and not with paint, and were costlier than its painted products. *See Union's Section B Resp.* 6; *see also Union's Supplemental Resp.* 20–21.

In calculating Union's antidumping duty margin for the preliminary results of the administrative review, Commerce rejected Union's

proposed new type category and grouped within the type category of "All Other" painted products the home market sales of products Union had categorized as laminated. Pl.'s Br. 5; *see also Mem. from Case Analysts, AD/CVD Operations, Office 3, to The File* 4 (Aug. 31, 2007) (Admin. R. Doc. No. 230). Using Union's information grouped according to Commerce's type categories, Commerce assigned Union a preliminary antidumping duty margin of 4.35%. *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Prelim. Results and Partial Rescission of Antidumping Duty Admin. Review*, 72 Fed. Reg. 51,584, 51,588 (Sept. 10, 2007).

Commerce issued the Final Results of the thirteenth administrative review on March 17, 2008. *Final Results*, 73 Fed. Reg. 14,220. As explained in the Issues and Decision Memorandum ("Decision Memorandum") that was incorporated into the Final Results, Commerce once again classified as "All Other" painted products the sales of laminated subject merchandise that Union had proposed for a separate type category. *See Issues and Decisions for the Final Results of the Thirteenth Admin. Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2005–2006) (Final Results)* 14–15 (March 10, 2008) ("*Decision Mem.*"); *Final Results*, 73 Fed. Reg. at 14,221 (adopting the *Decision Mem.*). Commerce also rejected an argument, made by Union and by other respondents, that Commerce should cease "zeroing" in its administrative reviews, including the current review. *Decision Mem.* 3–5. Based on these decisions, Commerce assigned Union a final antidumping duty margin of 4.35%. *Final Results*, 73 Fed. Reg. at 14,221.

In the instant action, Union advances two claims against the United States, Compl. ¶¶ 7–16, and moves for judgment upon the agency record pursuant to USCIT Rule 56.2. Pl. Union Steel's Mot. for J. upon the Agency R.; *see also* Pl.'s Br. Union's first claim is that Commerce failed to explain how the model match criteria utilized by the agency could be reasonable or supported by substantial evidence. Compl. ¶¶ 15–16; *see also* Pl.'s Br. 13. Plaintiff's second claim is that Commerce's construction of 19 U.S.C. § 1677(35) to allow zeroing, as applied in the subject review, is contrary to law. Compl. ¶¶ 7–14; Pl.'s Br. 29–39. Pursuant to plaintiff's motion, the court held oral argument on April 24, 2009. Mot. for Oral Argument 1.

III.
Discussion

The court exercises jurisdiction under 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under 19 U.S.C. § 1516a (2006), including an action contesting the final results of an

administrative review that Commerce issues under 19 U.S.C. § 1675(a) (2006). 28 U.S.C. § 1581(c) (2006). The court will uphold the Department's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

A. A Voluntary Remand Is Appropriate to Allow Commerce to Review and Reconsider the Model Match Methodology It Applied to Union's Sales

In support of its first claim, plaintiff argues that laminated corrosion-resistant carbon steel flat products are distinct from painted (both PVDF painted and "All Other" painted) corrosion-resistant carbon steel flat products with respect to cost, price, commercial identity, and use. *See* Pl.'s Br. 3–4, 16–29. Union points to record evidence that its laminated products have physical properties that cannot be achieved by painting, such as the unrestricted expression of various patterns, superior durability, and the use of environmentally-friendly material. *Id.* at 3. Citing these claimed distinctions, plaintiff argues that Commerce's classifying of the laminated products as "All Other" painted products is unsupported by substantial evidence of record. *Id.* at 14–29. According to Union, Commerce improperly relied on its analysis from the previous (twelfth) administrative review to justify grouping within the same type category two distinctly different classes of products and failed to provide an adequate explanation for its decision. *Id.* at 13, 20–23. As relief on its first claim, plaintiff proposed a remand to Commerce with instructions that the agency revise the model match criteria to classify laminated corrosion-resistant carbon steel flat products as a separate product type. *Id.* at 40.

Nucor and U.S. Steel responded to plaintiff's brief by arguing that the court should uphold the model match methodology the Department applied in the thirteenth administrative review. Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. Filed by Def.-Intervenor United States Steel Corporation 14–27 ("U.S. Steel Resp."); Resp. Br. of Nucor Corp. 7–17 ("Nucor Resp."). Defendant, however, acknowledges that Commerce relied on the analysis applied in the twelfth administrative review, rather than on data on the record of the subject thirteenth administrative review, to justify use of its model match methodology. Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. 10 ("Def.'s Resp."). Defendant requests a partial remand "[t]o permit Commerce to consider Union Steel's reported data during this administrative review and to determine whether this reported data would justify a revision in the model match methodology." *Id.*

While favoring a partial remand to allow Commerce to reconsider its earlier decision not to change its model match criteria, Union also requests that the court "first consider Union's arguments prior to remanding the case" and "instruct Commerce as to the appropriate criteria to consider and apply on remand." Reply Br. of Pl. Union Steel in Supp. of its Mot. for J. upon the Agency R. 1–2 ("Pl.'s Reply"). Plaintiff maintains that doing so "will reduce the likelihood of the need for multiple remands." *Id.* at 2. Union also requests that the court first consider Union's arguments prior to remanding the case because "Union has already expended substantial resources in briefing the model-match issue." *Id.* at 1. In a submission filed after oral argument,[1] Union explained that while it "agrees with Defendant that a remand is necessary in this case, Union believes that the Court should not grant Defendant's request for voluntary remand without also making specific findings as to the legal errors in the original determination and providing instructions as to the scope and substance of the analysis to be conducted on remand."[2] Post-Oral Argument Submission Addressing Proposed Voluntary Remand Order 1–2 ("Pl.'s Post-Oral Argument Submission"). Plaintiff proposes that the court reach two conclusions identifying legal errors in the Final Results. First, plaintiff would have the court conclude that the De-

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[1] At oral argument, plaintiff requested the opportunity to clarify the relief it seeks in this case by submitting a revised draft remand order and an explanation of its contents. Oral Argument Tr. 10, Apr. 24, 2009. Defendant did not oppose plaintiff's request but sought the opportunity to file a response. *Id.* at 39. Defendant-intervenors also sought the opportunity to respond to plaintiff's clarification. *Id.* at 54–55, 127. At oral argument, the court granted plaintiff's request and invited the other parties to respond to plaintiff's proposal. *Id.* at 127.

[2] Plaintiff proposes the following three remand instructions:

> 1. "Commerce shall determine the appropriate classification of laminated CORE within the 'Type' category in its model match hierarchy. In particular, Commerce shall determine whether laminated CORE is appropriately classified as a separate 'Type' category or whether laminated CORE should be classified together with 'other painted' CORE within a single 'Type' category."
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> . . . .
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> 2. "If Commerce determines to classify laminated CORE within the same 'Type' category as 'other painted' CORE, it must support that determination with substantial evidence and persuasively explain why such a determination is reasonable in view of the record evidence that laminated CORE is coated with plastic whereas 'other painted' CORE is coated with paint; cost and price differences exist between laminated and painted CORE; and Commerce's model match hierarchy separately breaks out PVDF painted products from 'other painted' products."
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> . . . .
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> 3. "If Commerce cannot present substantial evidence to support including laminated CORE in the same 'Type' category in its model match hierarchy as 'other painted' products, it shall assign laminated CORE its own 'Type' category and recalculate Plaintiff's dumping margin using this revised model match hierarchy."

Post-Oral Argument Submission Addressing Proposed Voluntary Remand Order 4–5.

partment's decision "to classify Plaintiff's laminated corrosion-resistant carbon steel flat products ("CORE") as painted CORE is unsupported by substantial evidence." *Id.* at 2–3. Second, plaintiff urges the court to hold that the model match criteria applied by Commerce in the Final Results "are not reflective of the subject merchandise because they fail to address the appropriate classification of laminated CORE." *Id.* at 3 (quotation marks omitted).

Defendant opposes Union's proposed remand instructions. Def.'s Resp. to Pl.'s Post-Oral Argument Submission Addressing Its Proposed Voluntary Remand Order 1 ("Def.'s Post-Oral Argument Submission"). Defendant proposes that the court instead issue an order stating that "Commerce's determination regarding plaintiff's request to revise the model match methodology is remanded to Commerce for further consideration." *Id.* at Attach. 1. Nucor and U.S. Steel also object to Union's proposed remand instructions; in addition, U.S. Steel submits that it does not believe a remand is necessary in this case. Def.-Intervenor's Resp. to Pl.'s Proposed Voluntary Remand Order; Resp. of Def.-Intervenor United States Steel Corporation to Union Steel's Proposed Remand Order and Comments 1–5 ("U.S. Steel's Post-Oral Argument Submission").

The court considers defendant's request for a voluntary remand under the framework established by the Court of Appeals in *SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–30 (Fed. Cir. 2001), which addresses the various types of voluntary remand situations that may arise. One such situation occurs when there are no "intervening events," *i.e.*, legal decisions that would affect the outcome of the agency's determination, but when the agency nonetheless requests "a remand (without confessing error) in order to reconsider its previous position." *Id.* at 1029. The Court of Appeals opined that, under these circumstances, a reviewing court has discretion over whether to grant a voluntary remand and that remand is generally appropriate "if the agency's concern is substantial and legitimate" but may be refused "if the agency's request is frivolous or in bad faith." *Id.*

The court is aware that both defendant-intervenors, at varying times during this litigation, have opposed the issuance of a remand order on the model match issue. *See* U.S. Steel's Post-Oral Argument Submission 1 (stating that "U.S. Steel does not believe that remand is warranted in this case"); U.S. Steel Resp. 14–26 (arguing that Commerce properly denied Union's request to revise the established model-match criteria); Nucor Resp. 24 (arguing that Commerce should affirm the portions of the Final Results challenged by plaintiff). The court, however, will not overlook the salient point that defendant itself has called into question an aspect of the Final Re-

sults, *i.e.*, the Department's basing its model match decision on an analysis applied in the prior review and not on a consideration of the body of evidence on the record of this review.

The court rejects the proposed conclusions and remand instructions urged by plaintiff. Such a remand could not be described as a "voluntary" remand, and Union essentially requests that the court, prior to issuing a remand order, review the Department's model match determination on the merits. *See* Pl.'s Reply 1–2, 15; Oral Argument Tr. 17–18, April 24, 2009; Pl.'s Post-Oral Argument Submission 1–2 (stating that the court "should not grant Defendant's request for a voluntary remand without also making specific findings as to the legal errors in the original determination and providing instructions as to the scope and substance of the analysis to be conducted on remand"). The court, in its discretion, declines to review on the merits a determination that defendant has described at oral argument as "at best confusing," Oral Arg. Tr. 42, and with respect to which defendant indicated that it could not "tell [the court] why it's reasonable in this administrative review . . . and that is the reason why we asked for the remand." *Id.* at 47. Defendant acknowledges that "Commerce's final decision lacks any analysis of the record evidence of the thirteenth administrative review and lacks any analysis of the model match issue, except to refer to the final decision in the twelfth administrative review." Def.'s Post-Oral Argument Submission 4. Defendant thus raises the question as to whether Commerce acted properly in relying on data from a previous review, rather than the current review, for its decision to deny Union's request to change the model match methodology. *See id.* at 2 (explaining that Commerce is requesting remand to "reconsider Union's request to revise the model match methodology during the thirteenth administrative review" because the Final Results "failed to address record information regarding Union's proposed classification of laminated CORE in a separate category from painted CORE"). Defendant's reason for requesting a remand is "substantial and legitimate." *See SKF USA Inc.*, 254 F.3d at 1029. Under these circumstances, judicial review of the model match decision in the Final Results would not serve the goal of judicial economy.

Contrary to Union's arguments, the court is not in a position to presume that an additional remand will be necessary. It is axiomatic that the remand redetermination the Department files with the court must stem from a good faith reconsideration of the model match decision. It must be supported by findings of fact grounded in substantial evidence on the record of this review, and it must adhere to statutory requirements, including the requirement that the Depart-

ment achieve accurate dumping margins through lawful comparisons of the sales of subject merchandise with home market sales of foreign like products. A conclusion by Commerce that the model matches made during the thirteenth review were not lawful necessarily would require redetermination of Union's margin upon remand. Although the court does not adopt plaintiff's proposed remand instructions and exercises its discretion to grant defendant's request for a voluntary remand, the court, in adopting the substance of defendant's proposed remand language, effects certain modifications appropriate to the circumstances of this case.

B. Commerce's Use of Zeroing in the Final Results Was Lawful

Plaintiff's second claim challenges the method Commerce used to calculate Union's weighted-average dumping margin. To calculate a weighted-average dumping margin in an administrative review, Commerce first must determine, for each entry of subject merchandise falling within the period of review, the normal value and the export price (or the constructed export price if the export price cannot be determined). 19 U.S.C. § 1675(a)(2)(A)(i). Commerce then determines a margin for each entry according to the amount by which the normal value exceeds the export price or constructed export price. 19 U.S.C. §§ 1675(a)(2)(A)(ii), 1677(35)(A) (2006); *Decision Mem.* 4. If the export price or constructed export price on a particular entry is higher than normal value, Commerce, in calculating a weighted-average margin, assigns a margin of zero, not a negative margin, to the entry. *See Decision Mem.* 4. Finally, Commerce aggregates these individual margins in determining a weighted-average dumping margin. 19 U.S.C. § 1677(35)(B).

Plaintiff argues that Commerce's construction of 19 U.S.C. § 1677(35), pursuant to which Commerce engaged in zeroing in this administrative review, *see Decision Mem.* 4, is unreasonable and therefore not in accordance with law. Pl.'s Br. 3–39. Union acknowledges that the Court of Appeals and the Court of International Trade consistently have upheld Commerce's practice of zeroing in administrative reviews. *Id.* at 29. Union argues, however, that a determination Commerce issued under Section 123 of the Uruguay Round Agreements Act, 19 U.S.C. § 3533(g) (2006), to implement recommendations of the World Trade Organization Dispute Settlement Body ("Section 123 Determination") has adopted a new interpretation of § 1677(35) that "justifies a fresh review of this issue by this Court." *Id.* at 30 (citing *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Fi-*

nal Modification, 71 Fed. Reg. 77,722 (Dec. 27, 2006) ("*Section 123 Determination*")). According to Union's argument, in issuing the Section 123 Determination "Commerce for the first time has interpreted [19 U.S.C. § 1677(35)] to mean one thing with respect to antidumping investigations (that weighted average dumping margins should be calculated without zeroing negative dumping margins), and to mean the exact opposite with respect to antidumping administrative reviews (that weighted average dumping margins should be calculated by zeroing negative dumping margins)." *Id.* at 30. Referring to the second step of the Supreme Court's analysis in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), Union submits that "[t]o the best of our knowledge, no court has yet considered the question of whether Commerce's new statutory interpretation—that [19 U.S.C. § 1677(35)] provides for zeroing in reviews but not in investigations—is reasonable within the meaning of step two of *Chevron*." *Id.* at 30–31 (footnote omitted). Union argues that Commerce's construction of 19 U.S.C. § 1677(35) is not reasonable.

According to Union, the upholding of zeroing by the Court of Appeals in *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), and *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) ("*Corus I*"), "was expressly premised on the fact that *the same statutory provision* governed the weight-averaging element of [Commerce's] dumping margin methodology and that [Commerce] was applying that provision consistently in both types of proceedings." Pl.'s Reply 12–13. According to Union, the Section 123 Determination removed this underlying premise of the holdings of the Court of Appeals affirming the use of zeroing, and for this reason the court should conduct a new *Chevron* step-two analysis of Commerce's current statutory interpretation to determine whether those prior holdings are still valid. *Id.* at 13–14. Union argues that an "interpretation of the identical statutory provision to have two diametrically opposite meanings is unreasonable and directly contrary to the previous holding of the Federal Circuit in *Corus I*, 395 F.3d at 1347, and *Timken*, 354 F.3d 1334, 1341–42." *Id.* at 11.

Relying on *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) ("*Corus II*"), defendant responds that the Court of Appeals has held unequivocally that Commerce's decision to discontinue zeroing in investigations did not affect administrative reviews. Def.'s Resp. 11–12. Defendant also argues that *Corus I* and *Timken* do not require Commerce to interpret 19 U.S.C. § 1677(35) consistently in antidumping investigations and administrative reviews, *id.* at 13, and that Commerce may interpret a statutory provision differently in

different contexts. *Id.* at 16–17. Defendant-intervenors, relying on 19 U.S.C. § 1677f-1(d) (2006), contend that zeroing is required by statute in all antidumping proceedings. U.S. Steel Resp. 27–33; Nucor Resp. 17–19. In the alternative, defendant-intervenors argue that zeroing is permissible under the statute. U.S. Steel Resp. 33–39; Nucor Resp. 19–23.

Ruling on Union's claim challenging the use of zeroing in the thirteenth administrative review requires the court to decide, initially, whether one or more of the Court of Appeals decisions that address the question of zeroing are controlling in this case. Only if no such decision is controlling is the court free to conduct what is, in Union's formulation, "a fresh review of this issue." *See* Pl.'s Br. 30. In other words, Union's argument is, first, that the question of statutory construction presented by this case is one of first impression and, second, that the court must conclude that Commerce's statutory construction was unreasonable.

Commerce discussed its construction of 19 U.S.C. § 1677(35) in the Decision Memorandum:

> Section 771(35)(A) of the Act [19 U.S.C. § 1677(35)(A)] defines "dumping margin" as the "amount by which the normal value *exceeds* the export price or the constructed export price of the subject merchandise." (Emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value (NV) is greater than export or constructed export price (CEP). As no dumping margins exist with respect to sales where NV is equal to or less than export or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales.

Decision Mem. 4. As the quoted language indicates, Commerce applied in this administrative review a construction of § 1677(35)(A) that it applies generally but that it does not apply in the specific situation in which it conducts an average-to-average comparison in an antidumping investigation. The exception Commerce makes for average-to-average comparisons in investigations stems from U.S. action to implement certain decisions of the World Trade Organization ("WTO") concluding that zeroing as applied in various U.S. antidumping investigations was inconsistent with U.S. international obligations under Article 2.4.2 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade. It was for this purpose that Commerce issued the Section 123 Determi-

nation on December 27, 2006, announcing that "the Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons." *Section 123 Determination*, 71 Fed. Reg. at 77,722. In the Section 123 Determination, Commerce stated that it was declining to adopt in any other segment of an antidumping proceeding the change it announced to its procedure for average-to-average comparisons in investigations. *Id.* at 77,724. Commerce set an effective date of February 22, 2007 for that change.[3]

In *Corus II*, the Court of Appeals upheld as reasonable Commerce's use of zeroing in the second administrative review of an antidumping duty order on hot-rolled steel from the Netherlands. *See Corus II*, 502 F.3d at 1372. The plaintiff in *Corus II* argued that a number of events subsequent to Commerce's issuing final results in the second administrative review "demonstrate that Commerce had abandoned the policy of zeroing." *Id.* at 1373. Those events included Commerce's action to implement instructions from the U.S. Trade Representative, issued April 23, 2007 under Section 129 of the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (2006), in response to a WTO decision with respect to eleven specific antidumping investigations. *Corus II*, 502 F.3d at 1374; *Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 (May 4, 2007). In rejecting the argument made by the plaintiff in *Corus II*, the Court of Appeals also discussed the relevance of the Section 123 Determination to that plaintiff's claim:

> When Commerce announced the elimination of zeroing in conjunction with the use of average-to-average comparisons to calculate dumping margins in antidumping investigations, it stated that the new policy did not apply to any other proceedings, including administrative reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77772, 77722–24 (Dec. 27, 2006). Thus, Commerce's new policy has no bearing on the present appeal, just as it had no effect on the final determination of Corus's fourth administrative review.

[3] Although the Section 123 Determination announced an effective date of January 16, 2007, Commerce later announced a delay in the effective date to February 22, 2007. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Jan. 26, 2007).

Id. at 1374. The Court of Appeals addressed the effect of the Section 123 Determination and the related developments by stating that "[t]o the extent recent developments have changed the current scheme, Commerce has made it clear that those changes do not apply retroactively to administrative reviews. Thus, our previous determination [in *Corus I*, 395 F.3d at 1349] that Commerce's policy of zeroing is permissible under the statute applies to the challenged administrative review." *Id.* at 1375. In this way, the Court of Appeals in *Corus II* made it amply clear that it did not consider Commerce's decision to discontinue zeroing when performing average-to-average comparisons in antidumping investigations while continuing zeroing in administrative reviews to be a sufficient basis to disturb its precedents, under which it had held zeroing to be permissible in administrative reviews based on the reasonableness of the Department's construction of 19 U.S.C. § 1677(35). Because the holding of the Court of Appeals in *Corus II* is controlling on the question presented by Union's zeroing claim, the court must uphold as reasonable the construction of 19 U.S.C. § 1677(35) that Commerce set forth in the Decision Memorandum. Union's argument that the Section 123 Determination marked the first time that Commerce has interpreted 19 U.S.C. § 1677(35) "to mean one thing with respect to antidumping investigations . . . and to mean the exact opposite with respect to antidumping administrative reviews," Pl.'s Br. 30, does not suffice to distinguish the zeroing claim it makes in this case from the precedent established by *Corus II*.

In *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007), the Court of Appeals followed an approach similar to that of *Corus II*, rejecting the argument that it should hold Commerce's use of zeroing unlawful based on a decision of the WTO Dispute Settlement Body and on statements by the United States indicating that the United States would comply with that decision. *NSK*, 510 F.3d at 1379–80. The Court of Appeals explained that

> until Commerce abandons zeroing in administrative reviews such as this one, a remand in this case would be unavailing. Therefore, because Commerce's zeroing practice is in accordance with our well-established precedent, *until Commerce officially abandons the practice pursuant to the specified statutory scheme, we affirm its continued use in this case*.

Id. at 1380 (emphasis added).

Union argues that *Corus II*and *NSK* are distinguishable from this case because the administrative reviews in those prior cases had been

completed prior to the publication of the Section 123 Determination. Pl.'s Reply 11; Oral Argument Tr. 100. This argument is unconvincing. In *Corus II*, the Court of Appeals reasoned that the Section 123 Determination did not bear on the question of the reasonableness of Commerce's construction of 19 U.S.C. § 1677(35) to allow zeroing in administrative reviews, noting that the Section 123 Determination, by its language, did not apply to administrative reviews. *See Corus II*, 502 F.3d at 1374–75. Because of the breadth of the holding in *Corus II* and the reasoning on which that holding is based, the fact that the subject administrative review was completed on March 17, 2008, a date that was after the issuance of the Section 123 Determination and the February 22, 2007 effective date thereof, does not place this case outside of the precedent that *Corus II* establishes.

Nor does the court find merit in Union's argument that the upholding of zeroing by the Court of Appeals in *Timken*and *Corus I*, "was expressly premised on the fact that *the same statutory provision*governed the weight-averaging element of [Commerce's] dumping margin methodology and that [Commerce] was applying that provision consistently in both types of proceedings." *See* Pl.'s Reply 13. Plaintiff's interpretation of the holdings in *Timken* and *Corus I* does not withstand scrutiny when considered according to the holdings in *Corus II* and *NSK*, with which plaintiff's interpretation is plainly inconsistent.

The court's conclusion on Union's zeroing claim is in accord with the decision in *Corus Staal BV v. United State*s, 32 CIT __, 593 F. Supp. 2d 1373 (2008) ("*Corus III*"), in which the Court of International Trade also considered the issue of whether it is permissible for Commerce to interpret 19 U.S.C. § 1677(35) to allow zeroing in reviews despite the discontinuation of zeroing in average-to-average comparisons in investigations. The plaintiff in *Corus III* argued that "Federal Circuit decisions upholding the use of zeroing are not binding because Commerce's interpretation of § 1677(35)(A)–(B) — which prohibits zeroing in investigations, but not in administrative reviews — is inconsistent and, therefore, unreasonable." *Corus III*, 32 CIT at __, 593 F. Supp.2d at 1383. The Court of International Trade applied a *Chevron* step-two analysis to conclude that Commerce's interpretation of 19 U.S.C. § 1677(35) is reasonable and in accordance with law, emphasizing that "[t]he Federal Circuit has repeatedly found Commerce's use of zeroing in administrative reviews to be reasonable." *Id.* at __, 593 F. Supp.2d at 1384.

IV.
Conclusion And Order

With respect to the model match issue, the court concludes that granting defendant's request for voluntary remand is appropriate in the circumstances of this case. Also, the court concludes that the Final Results must be affirmed with respect to the Department's use of zeroing based on precedent of the Court of Appeals. Therefore, upon consideration of all proceedings and submissions herein, and upon due deliberation, it is hereby

ORDERED that defendant's request for a partial voluntary remand of *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Administrative Review* 73 Fed. Reg. 14,220 (Mar. 17, 2008) ("Final Results") be, and hereby is, GRANTED with modifications to defendant's proposed remand instructions as set forth herein; it is further

ORDERED that Commerce, upon remand, shall review and reconsider its "model match" methodology, including its decision in the Final Results to deny Union Steel's request for a revision of that model match methodology, by which Commerce compared the types of subject merchandise in plaintiff's U.S. sales with the types of foreign like products in plaintiff's sales in its home market; it is further

ORDERED that Plaintiff's Motion for Judgment upon the Agency Record, as filed on August 21, 2008, be, and hereby is, GRANTED only to the extent that a remand is hereby ordered under which Commerce is directed to review and reconsider its model match methodology, DENIED to the extent that plaintiff's motion requests a remand detailing the specific findings and instructions contained in plaintiff's Post-Oral Argument Submission Addressing Proposed Voluntary Remand Order, and DENIED to the extent that such motion seeks to have set aside the Department's Final Results with respect to the zeroing methodology used therein; it is further

ORDERED that the requests of defendant-intervenors Nucor and U.S. Steel that the Final Results be affirmed with respect to the model match methodology used therein be, and hereby are, DENIED; it is further

ORDERED that the Department shall issue upon remand a redetermination that responds to Union Steel's request that Commerce revise the model match methodology and that such redetermination shall comply with this Opinion and Order, be supported by substantial record evidence, and be in all respects in accordance with law; it is further

ORDERED that the Department shall have ninety (90) days from the date of this Opinion and Order to file its redetermination upon remand in this proceeding, that plaintiff and defendant-intervenors shall have thirty (30) days from the filing of the redetermination upon

remand to file comments thereon with the court, and that defendant shall have fifteen (15) days thereafter to file any reply to such comments; and it is further

ORDERED that the Final Results be, and hereby are, affirmed with respect to the Department's use of zeroing methodology therein.

Dated: September 28, 2009
New York, New York

/*s*/ *Timothy C. Stanceu*
TIMOTHY C. STANCEU
Judge

Slip Op. 09–106

AMANDA FOODS (VIETNAM) LTD., ET AL., Plaintiffs, v. UNITED STATES, ET AL., Defendants.

Before: Pogue, Judge
Consol. Ct. No. 08–00301

[Remand to Department of Commerce for further consideration of surrogate country selection and appropriate separate rates for non-individually investigated respondents.]

Dated: September 29, 2009

Mayer Brown LLP (*Matthew J. McConkey* and *Jeffery C. Lowe*) for Plaintiff Amanda Foods (Vietnam) Ltd.

Picard Kentz & Rowe LLP (*Andrew W. Kentz* and *Nathaniel M. Rickard*) for Consolidated Plaintiff and Defendant-Intervenor AdHoc Shrimp Trade Action Committee.

Thompson Hine LLP (*Matthew R. Nicely* and *Christopher M. Rassi*) and *Winston & Strawn LLP* (*Valerie S. Ellis* and *William H. Barringer*) for Consolidated Plaintiffs Ca Mau Seafood Joint Stock Company; Cadovimex Seafood Import-Export and Processing Joint-Stock Company; Cafatex Fishery Joint Stock Corporation; Can Tho Agricultural and Animal Products Import Export Company; Coastal Fisheries Development Corporation; C.P. Vietnam Livestock Co., Ltd.; Cuulong Seaproducts Company; Danang Seaproducts Import Export Corporation; Investment Commerce Fisheries Corporation; Minh Hai Export Frozen Seafood Processing Joint-Stock Company; Minh Hai Joint-Stock Seafoods Processing Company; Ngoc Sinh Private Enterprise; Nha Trang Fisheries Joint Stock Company; Nha Trang Seaproduct Company; Phu Cuong Seafood Processing & Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Company; Soc Trang Aquatic Products and General Import-Export Company; Thuan Phuoc Seafoods and Trading Corporation; UTXI Aquatic Products Processing Company; Viet Foods Co., Ltd.; Kim Anh Co., Ltd.; Phuong Nam Co., Ltd.

Tony West, Assitant Attorney General; *Jeanne E. Davidson*, Director; *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), and, of counsel, *Jonathan Zielinski*, Office of Chief Counsel for Import Administration, Department of Commerce for Defendant United States.

Thompson Hine LLP (*Matthew R. Nicely* and *Christopher M. Rassi*) for Defendant-Intervenors Camau Frozen Seafood Processing Import Export Corporation; Grobest & I-Mei Industrial (Vietnam) Co., Ltd.; Minh Phu Seafood Corporation; Minh Qui Seafood Co., Ltd.; Minh Phat Seafood Co., Ltd.

OPINION AND ORDER

Pogue, Judge:

Introduction

In this consolidated action, Plaintiffs seek review of the *Final Results* issued by the Department of Commerce ("the Department" or "Commerce") in the second administrative review ("Second Review") of the antidumping ("AD") order covering warmwater shrimp from the Socialist Republic of Vietnam. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 73 Fed. Reg. 52,273 (Dep't Commerce Sept. 9, 2008) (final results and final partial rescission of antidumping duty administrative review) ("*Final Results*"),[1] and accompanying Issues & Decision Memorandum, A-552-802, 2d AR 02/01/06–01/31/07 (Sept. 2, 2008), Admin. R. Pub. Doc. 231, *available at* http://ia.ita.doc.gov/frn/summary/vietnam/E8-20927-1.pdf (last visited Sept. 23, 2009) ("*Issues & Decision Mem.*").[2]

Three questions are before the court. First, whether Commerce's selection of Bangladesh as the surrogate country[3] for the Second Review was supported by substantial evidence on the record[4]; second, whether Commere's decision to value raw shrimp based on the surrogate value data contained in an intergovernmental agency study, Network of Aquaculture Centres in Asia-Pacific, *Evaluation of the Impact of the Indian Ocean Tsunami and the US Anti-Dumping Duties on the Shrimp Farming Sector of South and South-East Asia:*

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[1] The *Final Results* cover entries of the subject merchandise made from February 1, 2006 through January 31, 2007, the period of review ("POR").

[2] The *Issues & Decision Mem.* was adopted by and incorporated into the *Final Results*. *Final Results*, 73 Fed. Reg. at 52,273.

[3] Vietnam has a non-market economy ("NME"). Generally, in an NME, because of limitations on the availability of data, Commerce may not be able to determine the normal or fair market value of products as it would in a market economy ("ME"). Consequently, Commerce derives the normal value of such products by aggregating the "best available" information with respect to factors utilized to produce the merchandise in "a market economy country or countries considered to be appropriate by [the Department]," *i.e.*, a "surrogate" country. Tariff Act of 1930 § 773(c)(1), as amended, 19 U.S.C. § 1677b(c)(1).

[4] *See Dorbest Ltd. v. United States*, 30 CIT 1671, 1676462 F. Supp. 2d 1262, 1268 (2006) ("If the question is whether Commerce may use a particular piece of data, whether Commerce may use a factor in weighing the choice between two data sources, or what weight Commerce may attach to such a factor, the question is legal. . . . If the question is whether Commerce *should* have used a particular piece of data, when viewed among alternative available data, or what weight Commerce *should* attach to a price or data, the question is factual." (emphasis in original) (citations omitted)).

Case Studies in Vietnam, Indonesia and Bangladesh (2006), http://library.enaca.org/shrimp/publications/NACAStudy.pdf ("NACA Study"), is supported by substantial evidence on the record; and, third, whether Commerce's assignment — as reasonable for Plaintiffs — of a separate or "all others" rate of either 4.30% or 4.57% was supported by substantial evidence on the record.

After specifying the controlling standard of review and summarizing the background of this dispute, the court will discuss each issue in turn.

Standard of Review

When it reviews the agency's final determinations in an administrative review of an AD duty order, the court will uphold all agency determinations, findings, or conclusions, except those not supported by substantial evidence on the record or otherwise not in accordance with law. Tariff Act of 1930 § 516A(b)(1)(B)(i), as amended, 19 U.S.C. § 1516a(b)(1)(B)(i)(2006).[5]

In reviewing whether Commerce's decisions are unsupported by substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence," *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citation omitted), the "substantiality of evidence must [also] take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Gerald Metals, Inc. v United States*, 132 F.3d 716, 720 (Fed. Cir. 1997) (explaining that the substantial evidence standard requires that contradictory record evidence be taken into account).

Background

At the request of Plaintiff Ad Hoc Shrimp Trade Action Committee ("AHSTAC") and twenty-two individual exporters, Commerce, in April 2007, initiated the Second Review. *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam and the People's Republic of China*, 72 Fed. Reg. 17,095, 17,096 (Dep't Commerce Apr. 6, 2007) (notice of initiation of administrative reviews of antidumping orders).

[5] Further citation to the Tariff Act of 1930 is to Title 19 of the U.S. Code, 2006 edition.

For this POR, eighteen of the twenty-three respondent Plaintiffs now before us requested review, while representatives of the domestic industry requested review for all twenty-three respondent Plaintiffs plus several other respondents. Rather than reviewing all respondents, Commerce limited the "mandatory respondents" for the Second Review to two companies — Camimex and Minh Phu Group.[6] Selection of Respondents Memorandum, A–552–802, 2d AR 02/01/06–01/31/07 (July 18, 2007), Admin. R. Pub. Doc. 102, at 7. These two companies were both mandatory respondents in the original investigation, but neither had been reviewed in the first administrative review.

As part of its review, because Vietnam is an NME, Commerce sent interested parties a letter asking for comments on surrogate country selection and information relating to the valuation of factors of production. Letter to Interested Parties, A–552–802, 2d AR 02/01/06–01/31/07 (Aug. 3, 2007), Admin. R. Pub. Doc. 110 ("*Letter to Interested Parties*"). This memorandum identified five countries from a surrogate country list that Commerce deemed to be equally economically comparable to Vietnam for administrative review purposes: Bangladesh, Pakistan, India, Sri Lanka, and Indonesia. *Id.* Attach. I at 2. Because Commerce's regulations specify that it will normally value all factors of production, except for labor, by using data from a single surrogate country, 19 C.F.R. § 351.408(c)(2),[7] Commerce's letter was preliminary to its choice from the list of five.

Responding to Commerce's letter, Camimex and Minh Phu Group submitted comments in favor of selecting Bangladesh and offered certain surrogate value data, including the NACA Study data from Bangladesh.[8] Minh Phu & Camimex's Surrogate Country & Value

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[6] *See* 19 U.S.C. § 1677f–1(c)(2) ("If it is not practicable to make individual weighted average dumping margin determinations. . . because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to —

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.")

[7] In relevant part, 19 C.F.R. § 351.408(c) reads:

(c) *Valuation of factors of production*. For purposes of valuing the factors of production ... under section 773(c)(1) of the Act the following rules will apply:...

(2) *Valuation in a single country*. Except for labor, as provided in paragraph (d)(3) of this section, the Secretary normally will value all factors in a single surrogate country.

Submission, A–552–802, 2d AR 02/01/06–01/31/07 (Oct. 26, 2007), Admin. R. Pub. Doc. 147. Petitioners, in turn, requested that India serve as the surrogate country, and also offered certain publicly available surrogate value data from India. Letter from Pet'rs, A–552–802, 2d AR 02/01/06–01/31/07 (Oct. 26, 2007), Admin. R. Pub. Doc. 149.

In the *Preliminary Results* of the review, Commerce chose Bangladesh as the surrogate country, and used data from the NACA Study to value Bangladeshi raw shrimp. *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 73 Fed. Reg. 12,127, 12,133–34 (Dep't Commerce Mar. 6, 2008) (preliminary results, preliminary partial rescission and final partial rescission of the second antidumping duty administrative review) ("*Preliminary Results*").

To respond to the *Preliminary Results*, Plaintiff AHSTAC filed a case brief addressing, among other issues, the use of Bangladesh as a surrogate country and the use of the NACA Study data to value Bangladeshi raw shrimp. Pet'rs' Br., A–552–802, 2d AR 02/01/06—01/31/07 (May 7, 2008), Admin. R. Pub. Doc. 215, at 3, 6–8. Rejecting AHSTAC's claim, Commerce continued with its decision to use Bangladesh as the surrogate country and to use data from the NACA Study to provide surrogate values. *Issues & Decision Mem.* at 4–5; *see also Final Results*, 73 Fed. Reg. at 52,273 (listing no change from Preliminary Results in this regard).

Also in its *Preliminary Results*, Commerce calculated *de minimis* dumping margins for mandatory respondents Camimex and Minh Phu Group and granted all Plaintiffs separate rate status.[9] *Preliminary Results*, 73 Fed. Reg. at 12,135. At this time, Commerce assigned all separate rate companies the average of Camimex and Minh Phu Group's margins — a *de minimis* rate. *Id.*

In its *Final Results*, Commerce maintained *de minimis* rates for Camimex and Min Phu Group, but, rather than averaging the two mandatory respondents' rates and using the resulting average for the separate rate companies, Commerce assigned to the separate rate companies the most recent rate that each had received in a prior proceeding. Specifically, the Department applied the rate that the separate rate companies had received in the original investigation, based on sales made prior to the imposition of the dumping order,

[8] Commerce had used Bangladesh as the surrogate country in the original, underlying, investigation, in the first administrative review, and in a new shipper review under this AD order.

[9] *See Decca Hospitality Furnishings, LLC v. United States*, 29 CIT 920, 921, 391 F. Supp. 2d 1298, 1300 (2005) ("While Commerce presumes that all companies [operating in an NME] are under state-control, a company may rebut this presumption, and therefore qualify for an antidumping duty rate separate from the PRC-wide rate, if it demonstrates *de jure* and *de facto* independence from government control."). Companies qualifying for such a "separate" rate are referred to as having "separate rate status."

except that separate rate companies that had been examined in the First Administrative Review, and which received a different rate in that review, were assigned the rate they received in the First Review. *Final Results* at 52,275–76. This resulted in Vietnam Fish-One Company, Limited ("Fish One") and Grobest being assigned a zero rate (the rate received by these companies in the First Review); Minh Hai Joint-Stock Seafoods Processing Company being assigned a 4.30% rate (the rate received by this company in the original investigation, based on its own data); while all other Plaintiffs were assigned a rate of 4.57% (the rate received by these companies in the original investigation).

Discussion

I. *Selection of Surrogate Country*

The first issue before the court is Commerce's choice of Bangladesh as a surrogate ME country. As noted above, the selection of surrogate ME countries in the valuation of NME factors of production is regulated by 19 U.S.C. § 1677b(c)(1), which requires that the valuation be based on "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority." With regard to the choice of an "appropriate" country, the statute specifies two criteria that Commerce must use in its analysis. Specifically:

> [Commerce] shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy country that are —
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4).

For purposes of determining whether a surrogate country is at a comparable level of economic development, Commerce's regulations specify that per capita income is to be given prominence. *See* 19 C.F.R. § 351.408(b) ("*Economic Comparability*. In determining whether a country is at a level of economic development comparable to the nonmarket economy [country] . . ., the Secretary will place primary

emphasis on *per capita* GDP as the measure of economic comparability.").[10]

Procedurally, in selecting a surrogate country, Commerce, as a matter of policy, follows a four-step process. First, Commerce compiles a list of countries that are at a level of economic development "comparable" to the country being investigated. Secondly, Commerce ascertains which, if any, of those countries produce comparable merchandise. Third, from the resulting list of countries, Commerce then determines which, if any, of the countries are significant producers of the comparable merchandise. Finally, Commerce evaluates the reliability and availability of the data from the countries that are significant producers. *See Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* (Dep't Commerce Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04-1.html (last visited Sept. 23, 2009) ("Policy Bulletin").

Following this process in the Second Review, Commerce, as noted above, prepared a list of five possible surrogate countries and then stated that, for purposes of the review, Commerce would consider all five to be "equally economically comparable" to Vietnam. This list included Pakistan, India, Sri Lanka, and Indonesia, in addition to Bangladesh, the country eventually chosen as the surrogate country. *See Letter to Interested Parties*, Admin. R. Pub. Doc. 110, Attach. I at 2; *Issues & Decision Mem.* 4.

AHSTAC challenges this determination, noting that the countries on Commerce's list do not have equal *per capita* GDP; nor are they equally distant from Vietnam by this measure. In particular, India, the potential surrogate country favored by AHSTAC, appears to be closer to, and thus more "comparable" to Vietnam in this ragard than is Bangladesh. *See Letter to Interested Parties*, Admin. R. Pub. Doc. 110, Attach. I at 2.

In response, Commerce and Defendant-Intervenors argue, correctly, that Commerce is not required to select more than one surrogate country, 19 C.F.R. § 351.408(c)(2), and that Commerce may give significant weight to data quality in determining an appropriate surrogate country. *See Globe Metallurgical, Inc. v. United States*, Slip Op. 08–105, 2008 Ct. Intl. Trade LEXIS 105, at *10–11 (CIT Oct. 1, 2008) (concluding that Commerce acted reasonably in selecting a surrogate country based on its superior quality of available data relative to other comparable market economies). However, this response provides no support for Commerce's determination of eco-

[10] No party challenges Commerce's use of per capita Gross National Income ("GNI") as a proxy for per capita GDP.

nomic comparability. Even assuming, *arguendo*, that Commerce has provided evidence of data superiority that could, if accepted by the court,[11] support the selection of Bangladesh as the surrogate country over India, this is not a basis for assuming that Bangladesh and India are equally comparable to Vietnam in terms of *per capita* GDP.

Nor has Commerce explained why the difference between Bangladesh and Vietnam, in *per capita* GDP, is not relevant in this case or why the difference in economic similarity to Vietnam is outweighed by the differences in quality of data between Bangladesh and India. Rather, without explanation, Commerce has adopted a policy of treating all countries on the surrogate country list as being equally comparable to Vietnam. As Commerce's chosen designation has not been supported by any justification or evidence at all, it is not supported by substantial evidence. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys, Inc.*, 419 U.S. 281, 285 (1975) (explaining that, even under the narrower arbitrary and capricious standard of review, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made" (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).[12]

Finally, Commerce's designation of equal economic comparability prevents the court from determining whether the selection of Bangladesh, as opposed to India, on the basis of the purportedly better data, is reasonable considering the record as a whole.

The Department argues that this court's decision in *Fujian Lianfu Forestry Co. v. United States*, Slip Op. 09–81, 2009 WL 2461012 (CIT Aug. 10, 2009), rejected "an identical challenge to Commerce's surrogate country selection methodology to that raised by Ad Hoc." (Def.'s Notice of Subsequent Authority 2.) But *Fujian Lianfu Forestry* is distinguishable, as a comparison of the level of explanation provided by Commerce in each case indicates.

In *Fujian Lianfu Forestry*, the court upheld, as supported by substantial evidence, Commerce's treatment of all potential surrogate countries on its surrogate country list as equally economically comparable to the NME at issue in that case, despite the "parties' argu-

[11] Whether this evidence is sufficient and should be accepted by the court is a substantial part of the second question before the court. For now, however, we will assume a positive answer to this question.

[12] Moreover, a reviewing court should not attempt itself to make up for such deficiencies; "we may not supply a reasoned basis for the agency's action that the agency itself has not given." *Bowman*, 419 U.S. at 285–86 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (plurality) ("[T]he agency must set forth clearly the grounds on which it acted.").

ments that India [the chosen surrogate country]'s GNI (USD 620) was too disparate from China [the NME]'s (USD 1290) for India to be considered 'economically comparable.'" *Fujian Lianfu Forestry*, 2009 WL 2461012, at *16–17. In support of its determination in that case, Commerce had offered the following explanation:

> While the Department's regulations at 19 CFR 351.408 instruct the Department to consider per capita income when determining economic comparability, neither the statute nor the Department's regulations define the term 'economic comparability.' As such, the Department does not have a set range within which a country's GNI per capita could be considered economically comparable. In the context of the World Development Report, which contains approximately 180 countries and territories, the difference in GNI per capita between India and the PRC is minimal. As previously stated in the Surrogate Country Selection Memo, 'while the difference between the PRC's USD1290 per capita GNI and India's USD 620 per capita GNI in 2004 seems large in nominal terms, seen in the context of the spectrum of economic development across the world, the two countries are at a fairly similar stage of development.' For example, in the World Development Report the four countries immediately higher than China in per capita GNI were Egypt (which was on the list of potential surrogate countries), Morocco, Columbia [sic], and Bosnia. Their per capita GNIs were higher than China's by USD20, USD230, USD710, and USD750, respectively. India's GNI per capita was only USD 670 lower than China's. Therefore, the Department disagrees with the contention that India is no longer ecomoically comparable to the PRC.

Id. (quoting Issues & Decision Mem. for 2004–2005 Admin. Rev. of Wooden Bedroom Furniture from the People's Republic of China, A–570–890, AR 06/24/04–12/31/05 (Aug. 8, 2007), *available at* http://ia.ita.doc.gov/frn/summary/prc/E7-16584-1.pdf (last visited Sept. 23, 2009)).

Here, in contrast to *Fujian Lianfu Forestry*, Commerce has failed to provide more than conclusory reasoning for why the GNI discrepancy between Vietnam and the countries on the Surrogate Country List did not affect the Department's comparability determination. Rather, as noted above, Commerce devised its Surrogate Country List without explanation and, again without explanation, adopted a policy of treating all countries on this list as being equally comparable to

Vietnam.[13] Significantly, the Department's Policy Bulletin states that each Surrogate Country Memorandum must explain how the chosen country satisfies each element of the statutory criteria. In accordance with the Department's own policy, therefore, the Surrogate Country Memorandum must explain why its chosen surrogate country is at a level of economic development comparable to Vietnam. *See* 19 U.S.C. § 1677b(c)(4)(A). The memorandum in this case does not do so. *See Second Antidumping Duty Administrative Review of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Selection of a Surrogate Country*, A–552–802, 2d AR 02/01/06–01/31/07 (Feb. 28, 2008), Admin. R. Pub. Doc. 186, at 6–7. Accordingly, the court cannot find on this record that Commerce's surrogate country selection is supported by substantial evidence.

For these reasons the court must remand this issue to Commerce so that it may: 1) explain why it is justified in treating all the countries on the surrogate country list as equally comparable to Vietnam, despite their differences in *per capita* GDP, or 2) explain why the difference in comparability to Vietnam in *per capita* GDP between India and Bangladesh is small enough that it may be outweighed by superior quality of the Bangladeshi data, providing a reasoned basis for the determination of such superiority, or 3) otherwise reconsider its determination in accordance with this opinion.

II. *Use of NACA Study*

The second issue before the court is whether Commerce's decision to value raw shrimp based on the surrogate value data contained in the NACA Study, *supra*, is supported by substantial evidence on the record.[14] In making this selection, Commerce rejected data submitted by the petitioners, specifically a price quote for Indian shrimp submitted by affidavit and a public list of ranged shrimp prices from an Indian shrimp processor. Plaintiffs claim that the Bangladeshi data is inferior to the Indian data, and that Commerce should have, therefore, used the Indian data in the valuation of raw shrimp.

In considering the validity of proposed surrogate values, Commerce seeks to weigh the specificity, the accuracy, and the contemporaneity of the proposed data. *See Preliminary Results*, 73 Fed. Reg. at 12,134. In making such evaluations Commerce considers (1) whether the surrogate value is product-specific; (2) whether the surrogate value is

[13] As the court's opinion in *Fujian Lianfu Forestry* was not issued until August 10, 2009, we will not assume that Plaintiff was on notice of the Department's position at the time of the administrative proceeding here.

[14] Commerce's selection of the NACA study was, to some degree, based on its selection of Bangladesh as the surrogatecountry. *See supra*.

representative of a range of prices within the POR; (3) whether a surrogate value is a non-export value; and (4) whether the surrogate value is tax exclusive. *See, e.g.*, *Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 34,125 (Dep't Commerce June 18, 2004) (final determination of sales at less than fair value), and accompanying Issues & Decision Memorandum, A–570–886 (June 18, 2004), *available at* http://ia.ita.doc.gov/frn/summary/prc/04-13815-1.pdf (last visited Sept. 23, 2009) 44; *Manganese Metal from the People's Republic of China*, 60 Fed. Reg. 31,282, 31,284 (Dep't Commerce June 14, 1995) (preliminary determination of sales at less than fair value); *accord Dorbest*, 30 CIT at 1686, 462 F. Supp. 2d at 1276.

As noted above, in making its selection, Commerce is required to select "the best available information regarding the values of such factors in a market economy country or countries." 19 U.S.C. § 1677b(c)(1). Because "best available information" is not defined in the statute, Commerce has significant discretion in making this determination. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). Nonetheless, for Commerce's conclusion to be supported by substantial evidence, the court must be satisfied that, viewing the record as a whole, a reasonable mind could conclude that Commerce chose the best available information. *See Dorbest*, 30 CIT at 1676–77, 462 F. Supp. 2d at 1269.

For the court to conclude that a reasonable mind would support Commerce's selection of the NACA Study as the best available information, Commerce needed to justify its selection. *See Olympia Indus., Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998) ("Commerce has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable."). In doing so, Commerce must "conduct a fair comparison of the data sets on the record" with regard to its announced method or criteria. *Allied Pac. Food (Dalian) Co. v. United States*, 30 CIT 736, 757, 435 F. Supp. 2d 1295, 1313–14 (2006) (emphasis added).

The court cannot now determine, however, whether Commerce has conducted the required analysis because, as noted above, one aspect of Commerce's evaluation of proposed surrogate values is that the agency "normally will value all factors in a single surrogate country." 19 C.F.R. § 351.408(c)(2). While the word "normally" leaves the agency some flexibility, the "single country" aspect of the agency's regulation still has the potential to affect its data choices. Thus, if on remand Commerce chooses another surrogate country, it will need to re-visit its analysis of its data choices for valuing raw shrimp. The

court, therefore, will defer further consideration of this issue until the remand determination is complete.

III. *Separate Rate Determination*

As noted above, in order for the court to uphold, as supported by substantial evidence on the record, Commerce's application of a dumping margin as reasonable for the Plaintiffs, the margin must be based on "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita*, 750 F.2d at 933 (quoting *Universal Camera*, 340 U.S. at 477). To allow the court to so conclude, Commerce must articulate a "rational connection between the facts found and the choice made," *Burlington Truck Lines*, 371 U.S. at 168, explaining why the rate chosen "is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Workers, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). For the reasons given below, based on the record here, Commerce's decision to assign dumping margins to Plaintiffs based only on the rates they were assigned in prior proceedings does not meet this standard.

To determine the dumping margin for non-mandatory respondents in NME cases (that is, to determine the "separate rates" margin), Commerce normally relies on the "all others rate" provision of 19 U.S.C. § 1673d(c)(5). *See Issues & Decision Mem.* 18–19. This subsection provides a general rule and an exception for determining such rates. The general rule states that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e [determinations on the basis of facts available]." 19 U.S.C. § 1673d(c)(5)(A).

The exception found in 19 U.S.C. § 1673d(c)(5)(B) applies in cases where, as here, the dumping margins established for all individually investigated exporters or producers are zero or *de minimis*. In such cases, the agency "may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, *including* averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." 19 U.S.C. § 1673d(c)(5)(B) (emphasis added). Commerce therefore is not precluded from following the method that it used in the *Preliminary Results*, where it assigned the weighted average of the mandatory respondents' rates to the Plaintiffs, result-

ing in their being assessed a *de minimis* rate. *See Preliminary Results*, 73 Fed. Reg. at 12,135. Rather, as a legal matter, Commerce may choose to include or to exclude the mandatory respondents' zero or *de minimis* margins in calculating a separate rate. *See* 19 U.S.C. § 1673d(c)(5)(B).

All parties agree that the mandatory respondents are presumed to be representative of the respondents as a whole; consequently, the average of the mandatory respondents' rates may be relevant to the determination of a reasonable rate for the separate rate respondents. More particularly, that the mandatory respondents in the current review were found not to be engaged in dumping was evidence indicating that the responding separate rate Plaintiffs may also no longer be engaged in dumping.

This conclusion is bolstered by other recent investigations of shrimp producers and exporters from Vietnam. In the First Administrative Review of the underlying dumping order, for example, respondents Fish One and Grobest each received zero rates. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 72 Fed. Reg. 52,052, 52,054 (Dep't Commerce Sept. 12, 2007) (final results of first antidumping duty administrative review and first new shipper review). Thus there is at least some evidence to suggest that Vietnamese shrimp producers changed their pricing behavior so as to comply with the antidumping order, as is the intention of such orders. Whether or not this evidence alone is sufficient to compel a conclusion that only a *de minimis* rate could reasonably be applied to the separate rate Plaintiffs, it is evidence on the record in support of the reasonableness of such application.

That Commerce has, in the past, awarded separate rate respondents the weighted average of the mandatory respondent rates, even when all of the mandatory respondent rates are *de minimis*, supports this conclusion. *See Brake Rotors From the People's Republic of China*, 73 Fed. Reg. 32,678 (Dep't Commerce June 10, 2008) (final results of 2006–2007 administrative and new shipper review and partial rescission of 2006–2007 administrative review), and accompanying Issues and Decision Memorandum, A–570–846, AR & NSR 04/01/06-03/31/07 (June 10, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8-13001-1.pdf (last visited Sept. 23, 2009); *Honey from Argentina*, 72 Fed. Reg. 73,763 (Dep't Commerce Dec. 28, 2007) (preliminary results of antidumping duty administrative review and intent not to revoke in part) & 73 Fed. Reg. 24,220, 24, 221 (Dep't Commerce May 2, 2008) (final results of antidumping duty adminis-

trative review and determination not to revoke in part) (leaving separate rate determination unchanged).[15]

Nonetheless, when the weighted average of all exporters and producers individually investigated is zero or *de minimis*, Commerce is not required to use such weighted average as the separate or all-others rate, provided that it uses another "reasonable method to establish the estimated all-others rate." 19 U.S.C. § 1673d(c)(5)(B). The question before the court, therefore, is whether there is substantial evidence to support Commerce's choice to assign to Plaintiffs a rate from the original underlying investigation, or from the First Review — *i.e.*, whether that determination was reasonable based on the record before us.[16] Because Commerce's choice must be reasonable given the record as a whole, *Nippon Steel*, 458 F.3d at 1351, such choice requires evidence which a reasonable mind could find sufficient to offset the evidence supporting Commerce's assignment of *de minimis* rates to the cooperative uninvestigated respondents in the preliminary investigation results.

Commerce, however, has not provided us with sufficient evidence on the record which could justify ignoring the evidence in favor of assigning a *de minimis* rate to Plaintiffs and which would support as reasonable the alternative rate chosen. Nor has Commerce articulated a clear justification for choosing the dumping margins that it assigned. While relying on 19 U.S.C. § 1673d(c)(5)(B), *see Issues & Decision Mem.* at 19, "Commerce abandoned the methodology [involving] weight-averaging the estimated dumping margins of the Fully-Investigated Respondents[] even though that method is specifically provided for in . . . 19 U.S.C. § 1673d(c)(5)(B)[]." *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 487 (2003) (citation omitted). The sole reasoning that the Department provided for this decision was

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[15] Commerce seeks to distinguish these decisions, arguing that the companies concerned therein were "fairly homogenous" and that no rates in those cases were determined on the basis of total or adverse facts available. (Def.'s Resp. to Pls.' Mots. for J. Upon Admin. R. 26 ("Def.'s Resp.").) But Commerce ignores its own decision here, as in these prior decisions, to select mandatory respondents to represent the practice in the industry.

[16] In its briefing of this issue, Commerce relies on the decision of the court in *Longkou Haimeng Mach. Co. v. United States*, __CIT__, 581 F. Supp. 2d 1344 (2008). (Def.'s Resp. 18.) In *Longkou*, the court affirmed Commerce's choice to exclude from the separate rate determination any zero or *de minimis* rates, in light of the statute's clear grant of permission for such a choice. *Longkou*, __ CIT at __, 581 F. Supp. 2d at 1357–60. The issue here, however, is not the exclusion of zero or *de minimis* rates, but whether there is evidence to support Commerce's selected rate as reasonable considering the record as a whole. Importantly, in Longkou, in determining the rate to be applied to the non-selected respondents, Commerce assigned the non-selected, cooperative respondents a weighted-average percentage margin based on the calculated margins of the other mandatory respondents. *Longkou*, 581 F. Supp. at 1354, 1358.

that thirty-five companies received margins based on AFA and that "the circumstances of this review are similar to those of the preceding review," *Final Results*, 73 Fed. Reg. at 52,275; *Issues & Decision Mem.* at 19, thereby explaining the use of margins established during the First Review for Fish One and Grobest and those established during the initial investigation for all other respondents.

But the Department's reference to the existence of thirty-five additional, non-cooperating companies named in the Second Review — who did not submit separate rate applications or file any other papers and were therefore assigned rates based on adverse facts available[17] — fails to justify its choice of dumping margin for the cooperative uninvestigated respondents. As this court indicated in *Yantai*, there is no basis in the statute for penalizing cooperative uninvestigated respondents due solely to the presence of non-cooperative uninvestigated respondents who receive a margin based on AFA. *See Yantai*, 27 CIT at 487. While under the "facts available" section of the antidumping statute, 19 U.S.C. § 1677e(b)(2),(3), Commerce may assign, to non-cooperating companies, dumping margins that are based on prior investigations, this section is only applicable when a party, "(A) withholds information that has been requested by the administering authority," "(B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested", or "(C) significantly impedes a proceeding under this title." 19 U.S.C. § 1677e(a). None of these factors apply in this case, and Commerce has not stated that any of the Plaintiffs were non-cooperative. *See Final Results*, 73 Fed. Reg. at 52,274. Therefore, 19 U.S.C. § 1677e does not provide a basis for the Department's use of results from a prior determination with respect to the cooperating companies in the present case.

With respect to the second ground offered in support of Commerce's chosen methodology — that "the circumstances of this review are similar to those of the preceding review," *Final Results*, 73 Fed. Reg. at 52,275; *Issues & Decision Mem.* at 19 — the court notes that at oral argument, the Government observed that there were two mandatory respondents in the First Review who chose not to participate and who received AFA rates as a result. *See also Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 72 Fed. Reg. 10,689, 10,691–93 (Dep't Commerce Mar. 9, 2007) (preliminary results of first antidumping duty administrative review and new shipper review).

[17] *See* 19 U.S.C. § 1677e(b) ("If the [agency] finds that aninterested party has failed to cooperate . . . [the agency] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."). As noted by Plaintiffs, there is some reason to doubt that these non-cooperating companies, if they exist at all, export to the United States to any substantial degree. We may leave that aside for now.

While the court takes no position as to the weight of this evidence, we note that, as mandatory respondents are selected to be representative of the industry, there is thus some evidence in the record that, at least during the POR in the First Review, could support an inference that dumping of the subject merchandise from Vietnam was continuing.

Nevertheless, nowhere in the record does Commerce provide sufficient reasoning linking the evidence to its conclusion that margins established for past periods of review, and especially those established during the period of investigation, prior to the imposition of the antidumping duty order, are "based on the best available information and establish[] [the relevant] antidumping margins as accurately as possible." *Shakeproof*, 268 F.3d at 1–82. As noted above, in *Chenery*, 332 U.S. at 196, the Supreme Court stressed the "simple but fundamental rule of administrative law" that:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id. Further, "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable[;] [i]t will not do for a court to be compelled to guess at the theory underlying the agency's action." *Id.* at 196–97. On the record before us, no adequate explanation is presented and, accordingly, the court declines to read into the record a justification which Commerce itself did not provide.

On remand, therefore, Commerce must either assign to Plaintiffs the weighted average rate of the mandatory respondents, or else must provide justification, based on substantial evidence on the record, for using another rate.

Conclusion

Accordingly, this matter is remanded to the agency for further consideration in accordance with this opinion. Commerce shall have until December 29, 2009 to complete and file its remand redetermination. Plaintiffs shall have until January 29, 2010 to file comments. Defendant and Defendant-Intervenors shall have until February 15, 2010 to file any reply.

It is **SO ORDERED**.

Dated: September 29, 2009
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

Slip Op. 09–107

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and ST. GOBAIN ABRASIVES, INC., EHWA DIAMOND INDUSTRIAL CO., LTD., AND SHINHAN DIAMOND INDUSTRIAL CO., LTD., Defendant-Intervenors.

Before: Musgrave, Senior Judge
Court No. 06–00247

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and SAINT-GOBAIN ABRASIVES, INC., HEBEI JIKAI INDUSTRIAL GROUP CO., LTD., HUSQVARNA CONSTRUCTION PRODUCTS NORTH AMERICA, INC., EHWA DIAMOND INDUSTRIAL CO., LTD., and BOSUN TOOLS GROUP CO., LTD., Defendant-Intervenors.

Court No. 09–00110

[Granting application for a writ of mandamus as to the U.S. Department of Commerce and denying as moot the mandamus action as to the U.S. International Trade Commission, this decision combines two separate matters, more specifically identified in the foregoing captions, due to their having similar and interrelated questions of law. While it may appear inconsistent that the court herein reaches two different conclusions as to the two separate writs of mandamus requested, this apparent anomaly is dictated by different aspects of the law.]

Dated: Dated: September 30, 2009

Wiley, Rein & Fielding LLP (*Daniel B. Pickard*), for the plaintiff.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, Office of the General Council, U.S. International Trade Commission (*Charles A. St. Charles*), for the defendant U.S. International Trade Commission.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Mark B. Lehnardt*), Of Counsel, for the defendant U.S. Department of Commerce.

Akin Gump Strauss Hauer & Feld LLP (*Spencer S. Griffith, J. David Park, Jarrod M. Goldfeder, Lisa W. Ross*, and *Valerie A. Slater*), for the defendant-intervenors Ehwa Diamond Industrial Co., Ltd. and Shinhan Diamond Industrial Co., Ltd.

Fischer Fox Global PLLC (*Lynn M. Fischer Fox*), for the defendant-intervenor Saint-Gobain Abrasives, Inc.

Alston & Bird, LLP (*Kenneth G. Weigel* and *Elizabeth M. Hein*), for the defendant-intervenors Hebei Jikai Industrial Group Co., Ltd., and Husqvarna Construction Products North America, Inc.

deKeiffer & Horgan (*Gregory S. Menegaz*), for the defendant-intervenor Bosun Tools Group Co., Ltd.

OPINION AND ORDER

Musgrave, Senior Judge:

I.
Introduction

Before the court are two applications for relief in the nature of writs of mandamus instituted by the plaintiff Diamond Sawblades Manufacturers Coalition ("DSMC"), one of which (Court No. 06–00247) seeks to compel the United States International Trade Commission ("ITC" or the "Commission") to publish notice of its affirmative remand determination in the *Federal Register* as a legal consequence of this court's judgment in *Diamond Sawblades Mfr's Coalition v. United States*, Slip Op. 09–5, 2009 WL 289606 (CIT Jan. 13, 2009) ("Slip Op. 09–5") (sustaining the ITC's affirmative remand determination), and the other (Court. No. 09–00110) seeking to compel the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") to issue antidumping duty orders and order the collection of cash deposits. Both matters concern the question of whether, absent a stay, the ITC and Commerce are legally obligated to effectuate the decisions of this Court if the case has been appealed. For the reasons set forth below, the court concludes that they must. The court will grant the plaintiff's requested relief as to Commerce, but will deny the request, on the ground of mootness, as to the ITC.

II.
Background

A. Statement of Facts

Some familiarity with Court No. 06–00247 is presumed. In July 2006, the ITC published its final determination that a domestic industry was not materially injured, or threatened with material injury, by reason of imports of diamond sawblades from China and Korea. *Diamond Sawblades and Parts Thereof From China and Korea*, 71 Fed. Reg. 39,128 (ITC) (July 11, 2006) ("Original Determination"). DSMC, a domestic industry coalition of diamond-sawblade manufacturers, challenged the ITC's final negative injury determination in this Court.[1] In reviewing the determination, the court found that the

[1] In an antidumping duty investigation, Commerce determines whether a product is being sold in the United States at less than fair value (*i.e.*, "dumped"), and the U.S. International Trade Commission ("ITC") determines whether an industry in the United States is materially injured or threatened with material injury. 19 U.S.C. § 1673. Pursuant to the

ITC had failed to provide an adequate explanation or substantial evidentiary support for certain findings. The court remanded the matter to the ITC and instructed the Commission to reconsider and explain more fully its negative-injury determination in light of the court's opinion. *Diamond Sawblades Mfr's Coalition v. United States*, Slip Op. 08–18 2008 WL 576988 (Feb. 6, 2008). On remand, the Commission considered the court's instructions and reopened the record for the purpose of collecting additional information. It then considered the new information it gathered and issued a new decision on May 14, 2008. In that decision, the Commission again found that the domestic industry was not materially injured by reason of subject imports but reversed its position on the issue of threat-of-material-injury. *Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final) (Remand), USITC Pub. 4007 (May 2008) ("Remand Determination"). The court sustained the Remand Determination on January 13, 2009. *Diamond Sawblades*, Slip Op. 09–5.

On January 22, 2009, the ITC notified Commerce that this court had issued a final decision sustaining the ITC's affirmative Remand Determination and that the court's decision was "'not in harmony with' the Commission's original negative injury determination." Pub. Doc. No. 3 at 1 (Court No. 09–110). As directed by 19 U.S.C. § 1516a(c)(1) and *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990), Commerce published notice of the court's decision in the *Federal Register* on February 10, 2009. *See Diamond Sawblades and Parts Thereof from the People's Republic of China and the People's*

applicable statutory provisions, if the ITC makes an affirmative preliminary injury determination, Commerce then issues its preliminary and final dumping determinations. If Commerce makes a preliminary determination that merchandise is being dumped, Commerce must suspend liquidation pending completion of the investigation. 19 U.S.C. § 1671b(d)(2). In these instances, Customs will not know the exact amount to assess, as antidumping duty, at the time when the goods are actually entered, because the duty is necessarily determined after the goods enter the United States. *See* 19 C.F.R. § 351.213(a). Accordingly, to secure payment of antidumping duties, an importer must make cash deposits of the estimated duties at the time of entry. 19 U.S.C. §§ 1673b(d)(1)(B), 1671 d(c)(1)(B)(ii), 1671 e(a)(3). At liquidation Customs collects any additional fees due or refunds excess moneys deposited, together with interest. 19 U.S.C. § 1505(b).

If Commerce finds that dumping has occurred in its final determination, the ITC must make a final determination as to whether the domestic industry has been materially injured or threatened with material injury as a result of the dumped imports. *See* 19 U.S.C. §§ 1673, 1673b, 1673d. If the ITC's final determination is affirmative, Commerce must publish an antidumping duty order "[w]ithin 7 days after being notified by the Commission of an affirmative determination under section 1673d(b)." 19 U.S.C. § 1673e(a). If the ITC's final determination is negative, however, the investigation terminates, and Commerce is required to terminate the suspension of liquidation of entries, release bonds and securities, and refund cash deposits. 19 U.S.C. § 1673d(c)(2).

Republic of Korea: Notice of Court Decision Not In Harmony With Final Determination of the Antidumping Duty Investigations (Commerce Dept.) 74 Fed. Reg. 6570 (Feb. 10, 2009) ("*Timken Notice*"). In the *Timken Notice*, Commerce stated that liquidation of subject import entries would be suspended within ten days of that notice, and that an antidumping duty order would be issued if notified by the ITC that Slip Op. 09–5 "is not appealed or is affirmed on appeal." *Id.*

Shortly after publication of the *Timken Notice*, DSMC submitted a letter to Commerce suggesting that, in addition to suspension of liquidation, Commerce should order the collection of cash deposits. Pub. Doc. 2 (Court No. 09–110). The Department responded that it would not order the collection of cash deposits until issuance of a final and conclusive court decision and that "[t]he Department interprets *Timken* to require suspension of liquidation, but not to direct the Department to require cash deposits on or after the date of the notice." Department of Commerce ("DOC") Mem. at 4.

In a similar correspondence with the ITC, DSMC requested that the Commission publish notice of the affirmative Remand Determination in the *Federal Register*. DSMC noted that although the ITC had, in a similar case, delayed notice publication until all appeals had been exhausted, delay was not appropriate in the current matter. DSMC asserted that 19 U.S.C. § 1673(d) "requires the Commission to also publish a notice in the Federal Register regarding the remand determination[; therefore] . . . we ask that the Commission publish such a notice in order to dispel serious confusion that has arisen with respect to the relief due to the domestic industry in this case . . . ." *DSMC Letter*, ITC Mem. at Attach. B.

On March 13, 2009, the defendant-intervenors Ehwa Diamond Industrial Co., Ltd., and Saint-Gobain Abrasives, Inc., filed notices of appeal in the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). The ITC did not appeal. As promised in the *Timken Notice*, Commerce did not publish an antidumping duty order and did not direct the collection of cash deposits. Further, in a letter dated April 9, 2009, the Commission informed DSMC that, *inter alia*, it disagreed with DSMC's interpretation of section 1673d(d) and that it would not publish notice of its Remand Determination at that point in time. ITC Mem. at Attach D. Thereafter, DSMC filed in this court a petition for a writ of mandamus (Court No. 09–00110) to compel the Department of Commerce to issue antidumping duty orders and to require the collection of cash deposits in the respective investigations. One week later DSMC filed in this court a second application for a writ of mandamus (Court No. 06–00247) to compel the ITC to publish notice of the affirmative Remand Determination in the *Federal Register*.

B. Arguments of the Parties

1. *ITC Action (Court No. 06–00247)*

Before the court DSMC argues that it is clearly and indisputably entitled to the relief it seeks because "[t]he Tariff Act of 1930 states that whenever the ITC makes a final threat of material injury determination under [section] 1673d(b), it 'shall publish notice of its determination in the *Federal Register*.'" DSMC (No. 06–00247) Mem. at 3–4 (quoting 19 U.S.C. § 1673d(d)). DSMC contends that it has no other means to obtain relief because publication of notice of the affirmative determination is "necessary to effectuate this court's judgment." *Id.* at 1. This is so, DSMC contends (and the defendant-intervenors concur), because 19 U.S.C. § 1673e(b)(2) specifies that when the ITC's determination is affirmative for threat-of-material-injury only, antidumping duties may not be assessed for any time period prior to the date of publication. Under this scheme, argues DSMC, the ITC's refusal to publish notice of the affirmative Remand Determination until after all appeals have been decided (which may take almost two years) fundamentally diminishes the relief to which it is legally entitled.

The ITC presents two central arguments as to why it does not have a current duty to publish notice of the Remand Determination. First, the ITC contends that delaying publication of remand determinations is consistent with the requirements of the statutory scheme. According to the Commission, "two separate sets of statutory provisions govern the publication of Commission and Commerce determinations, depending on whether the determinations were issued during an antidumping investigation or a court action." ITC Mem. at 9. The Commission maintains that section 1673d, which provides many of the procedural requirements governing investigations at the administrative level (*e.g.*, time limits, consequences of preliminary and final determinations), *only* governs procedures in the context of the original investigation. Accordingly, says the ITC, the publication requirement provided in section 1673d is, likewise, a procedure that applies *only* to the original final determination that resulted from the administrative-level investigation. ITC Mem. at 11.

On the other hand, the ITC explains, publication in the context of judicial review is governed by sections 1516a(c) and (e). Those provisions "specify" that when the ITC issues a remand determination adverse to the original determination that is subsequently affirmed by the Court of International Trade ("CIT"), the only publication required at that point is governed by section 1516a(c)(1). Consequently, notes the ITC, section 1516a(c)(1) provides that Commerce,

not the ITC, must publish notice of a court decision "not in harmony" with the original determination. ITC Mem. at 12.

Second, the ITC argues that DSMC is simply not entitled to the relief it seeks because the type of publication it requests is tantamount to treating the court's decision as "final and conclusive"[2] and that, contrary to DSMC's allegations, "the Federal Circuit has consistently stated that a remand determination . . . is not to be given full and final effect until the end of [] all appellate proceedings, even if the Court of International Trade has affirmed the determination." ITC Mem. at 14–15 (citing *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). The Commission argues further that section 1516a(c)(3) states expressly that the agencies (involved) may not take action to effectuate an adverse court decision until the matter has been remanded to the agency pursuant to a final and conclusive court decision. According to the ITC, section 1516a(c)(3) provides "that the courts may only remand the matter to the Commission for 'disposition consistent with the final disposition of the court' only *after* there has been a '*final disposition* of {the} action . . . {that} is not in harmony with the published {original} determination of . . . the Commission.'" ITC Mem. at 13 (quoting 19 U.S.C. § 1516a(c)(3)) (ITC's alterations). In other words, the ITC maintains that because the court's decision in Slip Op. 09–5 is pending appeal before the Federal Circuit, the ITC has no duty to effectuate that decision (by publishing notice of the affirmative Remand Determination) until the matter has been remanded pursuant to a final and conclusive decision on the appeal.

Finally, the ITC argues that, even if this court disagrees with the ITC's interpretation of the statutory scheme, the court must defer to that interpretation because it is reasonable. The Commission notes that, pursuant to the doctrine set forth in *Chevron*, "a reviewing court must accord substantial weight to the Commission's reasonable interpretation of the statute it administers." ITC Mem. at 19 (referencing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *see also* Def.-Int.'s (Court No. 06–00247) Joint Opp. at 13.

2. *Commerce Action (Court No. 09–00110)*

DSMC asserts that, pursuant to 19 U.S.C. §§ 1673d(c)(2) and 1673e(a), Commerce's obligation to issue and publish antidumping duty orders and collect cash deposits was triggered when it received

[2] Throughout this opinion, the court will use the phrase "final and conclusive" to describe the type of finality that occurs when a court decision is no longer subject to appeal, as opposed to the type of finality that simply "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *St. Louis I.M. & S.R. Co. v. Southern Express Co.*, 108 U.S. 24, 28 (1883)).

the ITC's notice that this court had issued a final decision sustaining the affirmative Remand Determination. DSMC No. 09–00110 Mem. at 5–6. *See* 19 U.S.C. § 1673d(c)(2) (requiring Commerce to issue an antidumping duty order if the ITC and Commerce both issue affirmative final determinations) and 1673e(a) (requiring Commerce to publish an antidumping duty order "[w]ithin seven days after being notified by the Commission of an affirmative determination under 1673d(b)"). DSMC contends further that in *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357, 427 F. Supp. 2d 1249 (2006), the Court established that a remand determination legally replaces the original determination, and that Commerce is obligated to take action in accordance with a final determination regardless of whether it was issued in the original investigation or pursuant to a court-ordered remand. DSMC thus asserts that the Department's failure to issue antidumping duty orders and collect cash deposits contravenes its statutory obligation under § 1673e(a), fails to give full effect to the judgment of this court, "and denies [DSMC] relief to which it has an indisputable right." DSMC No. 09–00110 Mem. at 3.

Commerce argues that it presently has no authority to publish antidumping duty orders or to require the posting of cash deposits in this case. Commerce asserts that it "derives its statutory authority to publish an antidumping duty order from its receipt of notice from the ITC of its final affirmative injury determination," and that, although it had received the ITC's notice that the affirmative Remand Determination had been sustained by a final court decision, that notice was issued for the "sole purpose" of enabling Commerce to publish the *Timken Notice*. DOC Mem. at 10. "Nowhere in the letter," states Commerce, "does the ITC state that the Remand Determination constitutes a section 1673d(b) 'final determination' of affirmative injury, as required by section 1673e(a) before Commerce may publish an order." *Id.*

Commerce further notes that, other than *Decca*, DSMC is unable to provide any support for its position that the Department has a duty to instruct the collection of cash deposits prior to a conclusive court decision. DOC Mem. at 11. The Department contends that "the holding in *Decca* — that Commerce was required to adjust the cash deposit rate to the rate determined in an involuntary remand determination relating to a case that had been appealed to the Federal Circuit — was erroneously based upon a misreading of *Timken*" and should be disregarded. It asserts further that, contrary to DSMC's arguments and the "aberrant" *Decca* opinion, "[t]he *Timken* court explicitly stated" that when a CIT decision that is "adverse" to the

original agency determination is appealed, the sole effect of the CIT's decision is the suspension of liquidation. DOC Mem. at 13 (citations omitted). Commerce claims to be

> [un]aware of any case in which any court has held that Commerce has a clear duty to treat a decision of this Court as a "final" and "conclusive" decision during the pendency of an appeal to the Federal Circuit. As *Timken* made clear, a decision of this Court not in harmony with the agency determination merely removes the agency's presumption of correctness.

Id.

Finally, Commerce asserts that denying the writ of mandamus would be "the right outcome because suspension of liquidation preserves the *status quo* and parties' substantive rights to the eventual outcome while the agency's determination is no longer presumed correct and the conclusive outcome is uncertain." DOC Mem. at 21.

For the most part, the defendant-intervenors echo the arguments set forth by the Commission and Commerce, adding that DSMC does not have a clear and indisputable right to the relief it seeks from either agency because the ITC's Remand Determination is not a "final decision." The defendant-intervenors further echo that DSMC's arguments are essentially unsupported because they are premised upon the "aberrant *Decca* case." Def.-Int's (Court No. 06–00247) Joint Opp. at 15–16. They assert that the Federal Circuit's decisions in *Timken and Hosiden Corp. v. Advanced Display Manufacturers of America*, 85 F.3d 589 (Fed. Cir. 1996) clearly establish that *Decca* was based upon a misreading of *Timken* and that, contrary to the observations set forth in that opinion, "the Commission's remand determination does not replace the original determination until the end of all appellate proceedings." Def.-Int's (Court No. 09–00110) Joint Resp. at 16.

III.
Jurisdiction and Standard of Review

This court has "exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930." 28 U.S.C. § 1581(c). Because the court has jurisdiction to determine the effect of, and enforce its own judgments, the court retains jurisdiction over the action to decide the current mandamus actions. Without the power to enforce its judgments, "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended." *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825).

This court possesses all the powers in law and equity of, or as conferred by statute upon, a district court of the United States. 28 U.S.C. § 1585. The powers conferred by statute upon the district

courts include supplemental jurisdiction provided in 28 U.S.C. § 1367(a) and mandamus jurisdiction set forth in 28 U.S.C. § 1361 (providing that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."). Section 1367 further provides that in any civil action where district courts have original jurisdiction, those courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within its original jurisdiction that they form part of the same case or controversy. 28 U.S.C. § 1367(a).

IV.
Discussion

The common-law writ of mandamus, as codified in 28 U.S.C. §§ 1361, 1651(a) (2006), is a drastic remedy, "to be invoked only in extraordinary situations." *Kerr v. U. S. Dist. Ct. N.D. Cal.*, 426 U.S. 394, 402 (1976). Because a writ of mandamus is "one of the most potent weapons in the judicial arsenal," *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380 (2004), three conditions must be met before the court may issue a writ. First, the petitioner must demonstrate a clear and indisputable right to the writ. Second, the petitioner must demonstrate that he or she lacks adequate alternative means to obtain the desired relief. And third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380–81.

A. DSMC's Clear and Indisputable Right to the Writ

The defendants contend that DSMC does not have a "clear and indisputable" right to the writs because neither the ITC nor Commerce has a duty to perform the actions that DSMC seeks. The defendants assert that, except for suspension of liquidation, the decisions of this court are to be given no effect if the case has been appealed to the Federal Circuit. For the reasons set forth below, this proposition must be rejected.

1. *Disposition of Judicial Decisions Pending Appeal*

"We begin with the basic proposition that all orders and judgments of courts must be complied with promptly." *Maness v. Meyers*, 419 U.S. 449, 458 (1975). If a litigant believes the judgment is incorrect, "the remedy is to appeal, but, *absent a stay*, he must comply promptly with the order pending appeal." *Id.* (emphasis added). The principle that all orders and judgments of courts must be complied with promptly is fundamental to the expeditious and efficient administra-

tion of justice by the courts. *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). *See also Smith Corona v. United States*, 915 F.2d 683, 688 (Fed. Cir. 1990). In enacting the Customs Courts Act of 1980, Congress confirmed the status of this Court as one "established under Article III of the Constitution of the United States," and empowered the Court with the same plenary powers in law and equity as those possessed by the United States district courts. 28 U.S.C. §§ 251, 1585, 2643(c)(1).

It is without debate that liquidation must await a final and conclusive decision on the matter, and that, as a result, the filing of an appeal essentially stays the effect of the court's decision as far as *liquidation* is concerned. But the defendants here advocate that the relevant statutes and caselaw should be interpreted to expand this "stay" to encompass all other legal consequences of the court's final decision. The practical effect of this interpretation (which defendants do not dispute) would mean that the filing of an appeal by any party essentially nullifies the judgments of this Court to the status of advisory opinions rendered for the purpose of nondeferential Federal Circuit review. On its face, such an interpretation appears contrary to the express intent of Congress to expand the powers of this Court and to provide expeditious judicial review in antidumping cases. In the absence of clear and express statutory language, it cannot be accepted that Congress intended that appealed decisions of this Court would not demand the same fundamental compliance that is to be accorded decisions rendered by the district courts. *Accord Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (holding that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

2. *19 U.S.C. § 1516a(c) & (e): Effects of Judicial Review*

The defendants' arguments focus primarily on 19 U.S.C. §§ 1516a(c) and (e), which provide, in pertinent part:

> **(c) Liquidation of entries.**
>
> **(1) Liquidation in accordance with determination.**
>
> Unless such liquidation is enjoined by the court under paragraph (2) of this subsection, entries of merchandise of the character covered by a determination of the Secretary, the administering authority, or the Commission contested under subsection (a) shall be liquidated in accordance with the determination of the Secretary, the administering authority, or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the Secretary or the administering authority of a notice of a decision of the United States Court of

International Trade, or of the United States Court of Appeals for the Federal Circuit, not in harmony with that determination. Such notice of a decision shall be published within ten days from the date of the issuance of the court decision.

(2) Injunctive relief.

In the case of a determination described in paragraph (2) of subsection (a) by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

(3) Remand for final disposition.

If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

* * *

(e) Liquidation in accordance with final decision.

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

19 U.S.C. §§ 1516a(c), (e).

The Commission asserts that it owes no duty to the plaintiff because "the Federal Circuit has consistently stated that, under [sections] 1516a(c) [and] (e), a remand determination is not to be given final and conclusive effect until the end of the entire appellate process, even if the Court of International Trade has sustained that determination." ITC Mem. at 22. The Commission's assertions are beside the point, however, because contrary to the implications of this

argument, requiring prompt compliance with the court's judgment is not synonymous with "treatment of that judgment as final and conclusive." As noted above, it is well established that under section 1516a(e), liquidation must await a final and conclusive decision on the matter. The defendants, however, and with little support, intentionally conflate liquidation with any and all other effects that flow as a consequence of the court's decision.

The fact that liquidation must await a final and conclusive court decision does not imply that all other legal obligations resulting from the court's decision must likewise await a conclusive decision. Liquidation for customs duty purposes is the "final computation or ascertainment of duties . . . accruing upon entry" of goods from abroad into the United States. 19 U.S.C. § 1500(d). *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1351 (Fed. Cir. 2006). Final liquidation occurs only once for each entry of goods, and as a general principle may not be subsequently undone.[3] *See Cambridge Lee Indus. v. United States*, 916 F.2d at 1579 (Fed. Cir. 1990) (holding that "[o]nce an entry has been liquidated, the duties paid cannot be recovered even if the payor subsequently prevails in its challenge to the antidumping order."); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). Liquidation is not the same as the collection of cash deposits, nor is it the same as issuance of an antidumping duty order, and has little to do with the publication notice of an affirmative-injury determination. The statutes refer to each concept distinctly. *Compare* 19 U.S.C. §§ 1673b(d), 1673d(c)(1)(B)(ii), 1673e(a), 1673e(c)(3), 1675, 1673f(b)(2) *and* 1677g (referring to cash deposits) *with* 19 U.S.C. §§ 1500, 1504, 1505, 1514, 1516a *and* 1520 (referring to liquidations) *and* 1673 (referring to antidumping duty orders) *and* 1673d(b) (referring to publication). Accordingly, it is inappropriate to presume that Congress used the term "liquidation" in 19 U.S.C. § 1516a to refer to cash deposits or issuance of an antidumping duty order. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1381 (Fed. Cir. 2001) (noting that "where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission."). Accordingly, the fact that liquidation must await a final and conclusive court decision has no bearing on Commerce's duty to issue antidumping duty orders or instruct the

[3] Consequently, several statutes under Title 19 of the United States Code provide for the suspension of liquidation, which require expressly, or have been interpreted to require, that suspension of liquidation continues until the matter has been finally and conclusively decided. *See, e.g.*, 19 U.S.C. §§ 1514; 1516(c)(2).

collection of cash deposits, or on the ITC's obligations to publish notice of an affirmative determination.

3. *Precedential Interpretation of 19 U.S.C. § 1516a*

The most detailed analysis of sections 1516a(c)(1) and (e) is set forth in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), to which all parties reference as supportive of their positions. In *Timken*, this Court, after having previously issued a final decision sustaining the Department's remand determination, ordered Commerce to publish (under § 1516a(c)(1)) notice of a court decision "not in harmony" with the original determination. Prior to the mandamus action, Commerce had refused to publish the notice because it had interpreted section 1516a(c)(1) publication to require a final and conclusive decision, and the CIT decision — which was pending appeal — was not. Hence, when the mandamus order was appealed, the only question to be resolved by the Federal Circuit was when (or whether) Commerce was required to publish a *Federal Register* notice of an adverse court decision, regardless of the fact that the case had been appealed. The Federal Circuit affirmed the CIT's issuance of mandamus and noted its disagreement with Commerce's interpretation, stating:

> Unless the agency is required to publish notice of a CIT decision not in harmony within 10 days of the issuance of the decision (regardless of the time for appeal or of whether an appeal is taken), § 1516a(c)(1) would require that the agency's determination continue to govern entries even after the CIT's decision. However, the House Committee report, in discussing § 1516 (a), states that the agency's determination will govern only that merchandise which is "entered prior to the *first decision of a court* which is adverse" to that determination.

Timken, 893 F.2d at 340.

The Federal Circuit's analysis of the term "final" as it is used in section 1516a(c)(1) and (e) was central to its holding in *Timken*. The Court distinguished between the finality that occurs when the district court "is done with the matter," and issues final judgment, and the finality that is achieved when the appellate process has run its course and the decision is no longer subject to appeal or collateral attack (*i.e.*, for purposes of this opinion, "final and conclusive," *see* note 2). *See* 893 F.2d at 339. Although Commerce in that case had taken the position that the latter definition applied to its duty to publish notice of a court decision not in harmony with an agency

determination under the judicial review provisions of 19 U.S.C. §§ 1516a(c)(1) and (e), the Federal Circuit concluded otherwise:

> [T]he terms "decision" and "court decision" are used in § 1516a(c)(1) and (e) to denote a decision which is final as far as the rendering court is concerned, even though that decision may be subject to appeal. In support of this interpretation, we merely point to the last sentence of § 1516a(c)(1), which states: "Such notice of a decision shall be published within ten days from the date of the issuance of the court decision." It is nonsensical to say that a court decision *issues* only when the time for appeal expires; a decision issues when judgment is entered. Nor do we find it credible to say that a CIT decision does not exist until the time for appeal expires; such an interpretation is contrary to both the common meaning of the term and its use in statutes such as 28 U.S.C. § 1295(a)(5) and 28 U.S.C. § 2645.[FN]6
>
> [FN]6. We do, however, agree that a decision must be "final" in the sense that the CIT has entered final judgment in order to require publication of notice under § 1516a(c)(1) and (e). This is the strict holding of *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924 (Fed. Cir.1984) . . . .

Timken, 893 F.2d at 340.

In sum, the *Timken* Court determined that, although the section1516a(e) liquidation directive required a *final and conclusive* court decision, the publication directed by section 1516a(c)(1) did not: Publication was required if the CIT had issued a final judgment on the matter — *regardless of whether that judgment had been appealed*. This case gave rise to the term "*Timken Notice*," because it established the parameters of section 1516a(c)(1) notice-publication. *See Timken*, 893 F. 2d at 340.

However, other than a footnote in *Timken* that is arguably *dictum*, the Federal Circuit has never addressed directly the question of whether filing of an appeal suspends any other legal consequence of a CIT decision sustaining a remand determination, such as those at issue here. That footnote, which discusses cash deposits, appears to be the only clear indication of the Federal Circuit's position on the matter:

> The timing of publication of notice is of great importance to the parties. Under section 1516a(c), unless liquidation is enjoined by the CIT, liquidation continues under the original Commerce determination until publication of a CIT or Federal Circuit decision not in harmony with Commerce's determination. Thus, in

> the present case, liquidation of CMEC's entries is currently taking place without assessment of antidumping duties, but would be suspended *and made subject to collection of estimated antidumping duties of 4.69% upon publication of notice of the March 22, 1989 CIT decision*.

Id. (emphasis added). Even if *dictum*, the above-quoted passage is persuasive evidence that the Federal Circuit, at least in the context of *Timken*, assumed that (1) the collection of cash deposits would commence upon publication of the *Timken Notice* and that (2) publication was of "great importance" to the litigants precisely because of its effect on cash deposits. At a minimum, this passage significantly undermines the defendants' contention that *Timken* "forbids" the collection of cash deposits (or any other action beyond suspension of liquidation) prior to a conclusive court decision.[4]

The ITC also points to *Hosiden Corp. v. Advanced Display Manufacturers of America*, 85 F.3d 589 (Fed. Cir. 1996) as support for its position; the defendant-intervenors echo this assertion with force, asserting that the *Hosiden* Court "ruled explicitly on the issue of cash deposits and found that a change in cash deposits is not required as a result of a decision of this Court that is not yet 'conclusive.'" Def.-Int's No. 09–00110 Resp. at 18.

The court is unable to agree that *Hosiden* stands for the proposition the defendants advocate. This Court has never interpreted *Hosiden* to be more than a reaffirmation of the proposition that, regardless of the circumstances, this Court may not order liquidation of any of the affected merchandise prior to a final and conclusive court decision. It is worth noting that the CIT action on appeal in *Hosiden* was a writ of mandamus that contained five separate decretal paragraphs, and that the majority of these paragraphs contained more than one specific order. Hence, the Court's directive ordering Commerce to modify cash deposits and revoke the existing antidumping duty order, and the Court's directive ordering Commerce to revoke the suspension of liquidation and return previously collected cash deposits, were only two orders among many; however, only the latter order was discussed in the opinion. *See Hosiden Corp. v. United States*, 861 F. Supp. 115, 120–21 (1994). While it is true that the Federal Circuit subsequently

[4] It also appears that the Federal Circuit has indicated an *assumption* that antidumping duty orders are modified pursuant to judgments of this Court regardless of whether an appeal has been filed. *See Atlantic Sugar Ltd., v. United States*, 744 F.2d 556, 564 (Fed. Cir. 1984) (reversing this Court's finding of insubstantial evidence, reinstating the original ITC determination, and ordering reinstatement of the antidumping duty order— indicating an assumption that the antidumping order had been revoked pursuant to the CIT decision).

vacated the writ of mandamus as contrary to law, the sole focus of that rather brief opinion was that section 1516a(e) and relevant precedent precluded this Court from ordering *liquidation* prior to the issuance of the final decision on appeal. Specifically, the Court stated:

> Statute and precedent are clear that the decision of the Court of International Trade is not a "final court decision" when appeal has been taken to the Federal Circuit. The Court of International Trade does not have discretion to require liquidation before the final decision on appeal. 19 U.S.C. § 1516a(e) requires that liquidation, once enjoined, remains suspended until there is a "conclusive court decision which decides the matter, so that subsequent entries can be liquidated in accordance with that conclusive decision."

Hosiden, 85 F.3d 591 (Fed. Cir. 1996) (quoting *Timken*, 893 F. 2d at 342). Although *Hosiden* contains the very broad language quoted by the defendants (in the first sentence of the passage quoted above), the sentence that follows limits the holding to matters regarding liquidation and section 1516a(e). At best, *Hosiden* might be construed to prohibit the return of previously collected cash deposits (which may only be returned upon liquidation, *see* 19 U.S.C. § 1505), but defendant-intervenors assertion that the *Hosiden* Court "ruled explicitly on the issue of cash deposits," is simply not credible.

4. *Chevron Deference and 19 U.S.C. § 1516a*

Before addressing further the ITC's interpretation of section 1516a, the court must clarify that the ITC's interpretation of that statute is not entitled to *Chevron* deference. The familiar two-part analysis set forth in *Chevron* guides the court's analysis when determining the lawfulness of an agency's construction of a statute it administers, and in the first part of the analysis, the court must look to "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the court finds that Congress has clearly spoken to the question at issue, the analysis is at an end, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. However, if the court finds the statute to be silent or ambiguous, it reaches the second step of the analysis, where it must determine whether the agency's interpretation is reasonable; the court must defer to that interpretation if it "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' express intent." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

Implicit in the first step of the *Chevron* analysis, however, is a third question, which must be answered in the affirmative before proceeding: Has Congress truly delegated to the agency the task of administering the statute in question? That is, if there is an interpretive "gap" in the statute, is it reasonable to conclude that the "gap" is one that Congress expected the agency to fill? The Supreme Court touched upon the issue in *Smiley v. Citibank (S.D.), N.A*, explaining:

> We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute *meant for implementation by an agency*, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Smiley, 517 U.S. 735, 740–741 (1996) (italics added).

In brief, the two-step *Chevron* analysis is warranted only when (a) Congress appears to have delegated authority to the agency; and (b) the agency interpretation in question "was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). *See also Gonzales v. Oregon*, 546 U.S. 243, 255–256 (2006); *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000). The particular statue the ITC would interpret, however, is unlike the provision accorded interpretive deference in *Chevron* (the definition of "point source") or *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) (interpreting a particular exemption in HTSUS), and a multitude of other cases. Here, the ITC and the defendant-intervenors contend that the court should accord deference to the ITC's interpretation of section 1516a of Title 19 of the United States Code, which the ITC itself describes as governing "[j]udicial review in countervailing duty and antidumping duty proceedings." In other words, the ITC contends it is entitled to deference on its interpretation of the very statutes governing aspects of the judicial proceedings to which it is a party. Such a proposition is patently unreasonable and must be rejected. *See Marbury v. Madison*, 1 U.S. (1 Cranch) 137 (1803). Accordingly, the court affords no deference to the ITC's interpretation of section 1516a.[5]

[5] The court expresses no opinion on whether deference should be accorded to the Commission's interpretation of 19 U.S.C. § 1673.

5. *19 U.S.C. § 1516a(c)(3): Remand for Final Disposition*

In proceedings before this Court, references to section 1516a(c)(3) have been used almost universally as support for the Court's ability to issue remands. *See, e.g., United States Steel Group v. United States*, 24 CIT 1326, 1332, 123 F. Supp. 2d 1365, 1372 (2000); *Nippon Steel Corp. v. United States*, 19 CIT 827 (1995). However, the ITC proposes that section 1516a(c)(3) means something entirely different. The Commission asserts that, based upon the analysis set forth in *Timken*, the term "final" used in section 1516a(c)(3) clearly means "final and conclusive." Hence, says the Commission, section 1516a(c)(3) is, in reality a provision that "instructs that the courts may *only* remand the matter to the Commission for disposition consistent with the final disposition of the court" *after* there has been a "*final disposition* of {the} action . . .{that} is not in harmony with the {original} published determination . . . of the Commission." ITC Mem. at 13 (ITC's alterations). In other words, the Commission states that it has no duty to take action "consistent with the final disposition of the court" unless the matter has been remanded pursuant to a final and conclusive decision, which has not yet occurred in this case.

As noted above, the ITC's interpretation of section 1516a(c)(3) is derived, in part, from the *Timken* Court's conclusion that the term "final" in section 1516a(e) referred to a final and conclusive decision. Specifically, where that Court notes:

> Most persuasive is the fact that the term "final court decision" must be read together with the words that follow, specifically, "in the action." An "action" does not end when one court renders a decision, but continues through the appeal process. Thus, an appealed CIT decision is not the *final* court decision *in the action*. In this context, the word "final" is used as it is used in 28 U.S.C. § 2645(c), *i.e.*, to mean "conclusive." Thus, § 1516a(e) does not require liquidation in accordance with an appealed CIT decision, since that section requires that liquidation take place in accordance with the final court decision in the action.

Timken, 839 F.2d at 339–40. According to the ITC, the above analysis combines with the "canons of statutory construction" to demonstrate that the term "final" as it is used in section 1516a(c)(3) must likewise refer only to a final and conclusive court decision:

> Congress used the word "final" to describe court action only in these two subsections of section 1516a. The canons of statutory construction instruct that use of an identical term within various provisions of a statute should normally be given the same meaning. By using the term "final" to refer to court action in

> subsection 19 U.S.C. § 1516a(c)(3) and 19 U.S.C. § 1516a(e), while omitting that modifier in other sections, Congress made clear that these sections were intended to cover only "final" appellate action. . . . As a result, the references in 19 U.S.C. § 1516a(c)(3) to the "final disposition of an action" and "the final disposition of the court" refer to the court decision that finally and conclusively disposes of the action.

ITC Mem. at 21–22, n.21 (citations omitted). Thus, the Commission argues essentially that the *Timken* Court's conclusion as to the meaning of the term "final" in section 1516a(e) must also be applied to that term as it is used in section 1516a(c)(3).[6]

The court finds this analysis flawed in several respects. First, the analysis ignores that it is also a basic canon of statutory construction that the words of a statute "must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). The *Timken* court's conclusion that the term "final" as it is used in section 1516(e) means "final and conclusive" was not simply the result of applying a single canon of statutory construction. On the contrary, that conclusion resulted from an observation as to the plain meaning of the text, an analysis as to whether that meaning was consistent with the statutory scheme, and confirmation that the proposed meaning of the term was supported by legislative history and could be harmonized with existing caselaw. *See Timken*, 839 F.2d at 339–40.

Second, the ITC focuses on the term "final" at the expense of ignoring the rest of the statute—particularly the term "remand." Unlike the term "final," the definition of a remand is rarely subject to ambiguity or debate. A remand is a type of court order; it means "[t]o send (a case or claim) back to the court or tribunal from which it came for some further action." *Black's Law Dictionary* 1407 (9th ed. 2009). *See Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 374 (1939) (noting that a remand "means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law."). A remand order is generally considered to be "an

[6] Section 1516a(c)(3) provides

(3) Remand for final disposition.

> If the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, the matter shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court.

interlocutory order that does not divest a court of jurisdiction." *Avery v. Secretary of Health and Human Services*, 762 F.2d 158 (1st Cir. 1985).

However, when combined with the ITC's definition of "finality," the ordering of a remand makes no sense. Under the ITC's interpretation, the conclusive finality of a judgment — and the alleged duty to issue a remand—ripens at a point in time when "remand" (as the term is used in American jurisprudence) is no longer possible. That is, once a case has achieved the "conclusive" finality that the ITC asserts is a prerequisite for a 1516a(c)(3) remand, no further action may be taken on that case. Although a court may enforce its judgments, that is not the same as a remand. A court remands a matter for action *on the case*, which cannot occur subsequent to a final and conclusive decision.[7] The ITC's interpretation of section 1516a(c)(3) would require the court, *inter alia*, to expand the definition of a thoroughly-understood term to mean something entirely different. This the court is unwilling to do.

It is perhaps worth noting that the Commission's proposed interpretation attempts to fashion section 1516a(c)(3) in the likeness section 1514(a). Section 1514(a) provides that "[w]hen a judgment or order of the United States Court of International Trade has become final, the papers transmitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly." 19 U.S.C. § 1514(a). In this provision, Congress expressly provided that the U.S. Customs and Border Protection ("CBP")—directly, and without remand—is to effectuate the Court's decision upon receipt of a judgment or order that "has become final." Because a judgment of this Court is final and appealable on the date it is issued, a judgment can only "become final" in the sense that it is no longer subject to appeal or collateral attack, *i.e.*, final and conclusive. *See Heraeus Amersil v. United States*, 10 CIT 438, 638 F. Supp. 342 (1986). Accordingly, the existence of such a clear statutory directive demonstrates that when Congress intended to delay the enforcement of this Court's decisions, it did so explicitly.[8]

In any event, the court is not persuaded that the *Timken* Court's interpretation of "the final court decision in the action" as it is used in section 1516a(e) may be so readily applied to section 1516a(c)(3), because the language of that latter provision is slightly different. The *Timken* Court focused on the phrase "in the action" as persuasive

[7] And does not occur. The court is unable to find any record of any court issuing a 1516a(c)(3) "remand" of the nature proposed by the ITC.

[8] Because section 1514(a) applies only to CBP entry decisions, the only practical result of the section 1514(a) "stay" is to suspend liquidation pending appeal.

evidence that "the final court decision *in the actio*n" referred to a final and conclusive court decision, as opposed to the finality that occurs from this Court's entry of judgment. By contrast, section 1516a(c)(3) refers to "the final disposition of *an action brought under this section*," which, arguably, means something entirely different. The phrase "an action brought under this section" (or "this subsection" or "paragraph") is used several times in section 1516a simply to describe which causes of action are governed by the particular provision. Moreover, the Commission overlooks that a "final disposition" is not necessarily the same as a "final court decision." Under CIT Rule 16, a matter is submitted "for final disposition" when the deadline for the submission of pleadings or evidence has passed and the matter is submitted to the Court so that it may render a decision. *See* CIT Rule 16(e); *see also* CIT Rules 16(a)(4), 16(e), 16(b)(3)(B)(v), 30(f)(1), 84(h).[9] Hence, under the Court's Rules (which were adopted in the Customs Courts Act of 1980, shortly after the Trade Agreements Act of 1979), a "final disposition" would include not only judgments that are "final and appealable," but interlocutory decisions as well, such as a remand.

Moreover, as noted above, the vast majority of judicial references to section 1516a(c)(3) do not support the ITC's interpretation. In one of the few (perhaps only) judicial discussions of that specific provision, the Federal Circuit interpreted section 1516a(c)(3) as curtailing this Court's ability to reverse or modify the agency decision, stating:

> Section 1516a limits the Court of International Trade to affirmances and remand orders; an outright reversal without a remand does not appear to be contemplated by the statute: "If the [Court of International Trade's] final disposition of an action brought under this section is not in harmony with the published

[9] Another potential problem with the ITC's interpretation surrounds its characterization of the section (c)(3) reference to "the published determination" as necessarily or only referring to the agency's original determination. In fact, the standard canons of statutory construction would seem to indicate otherwise, because the "determination" at issue is referred to as "the published determination" only in sections (c)(3) and (e), whereas sections (c)(1) and (c)(2) refer to "a determination . . . contested under subsection (a) of this section" and "a determination described in paragraph (2) of subsection (a) of this section." Unfortunately, the term "published determination" in itself is problematic, because not all of the "determinations" reviewable under 1516a are published. As shown in sections 1516a(a)(1) and (a)(2)(A), final determinations such as the one at issue here require only "publication of notice" of the decision. At the risk, perhaps, of certain impropriety in this assumption, this designation is probably an oversight: historically speaking, most of what is now section 1516a was previously found in section 1516. *See* 19 U.S.C. § 1516(g) (1977). Section 1516 required (and still does require) publication of the decision as a part of the protest procedure at the administrative level. Moreover, previous versions of the bill that eventually became the Tariff Agreements Act of 1979 required publication of the actual decision. It is therefore more reasonable to conclude that "published decision" in section (c)(3) refers to the original agency decision.

> determination [of] the Commission, the matter shall be remanded to . . . the Commission, as appropriate, for disposition consistent with the final disposition of the [Court of International Trade]."

Altx v. United States, 370 F.3d at 1108, 1111 n.2 (Fed. Cir. 2004) (quoting 1516a(c)(3)) (alterations in original).[10] By contrast, the ITC's interpretation implies that the Court is not so restricted. Case law suggests that, prior to the enactment of the Trade Agreements Act of 1979, the powers of the Court were viewed in a manner that might charitably be described as the exact opposite of how they are viewed today. During that time, this Court's predecessor voided the agency decision and ordered liquidation in accordance with its own opinion, eschewing remands in all but the most unusual circumstances. *See, e.g., AS Industries, Inc. v. United States*, 82 Cust. Ct. 101, 149-52, 467 F. Supp. 1200, 123–41 (1979).

Finally, the court cannot agree with the ITC's assertion that its interpretation is supported by legislative history. The "support" to which the Commission refers is a single comment found in the Senate Finance Committee Report on H.R. 4537 (signed into law as the Trade Agreements Act of 1979). That comment describes the new section 1516a(c)(3) as providing "that if the final disposition of an action instituted under the section is not in harmony with the challenged decision, the matter shall be remanded to the decision-maker for disposition consistent with the court's decision." *S. Rep.*No. 96–249, 96th Cong., 1st Sess. at 249. The court finds this statement profoundly unilluminating as to the issue here; this comment simply repeats the language of the statute with no indication of a deliberate effort to interpret it. However, three pages later the same Senate Report contains the following statement:

> It is . . . unclear under the current law whether the Customs Court can or should remand a matter to an administrative agency when it holds that the agency's decision is erroneous. Section [1516a] will make it clear that the court has the power to remand the matter to the agency.

Id. at 252. This statement is clearly inconsistent with the interpretation advocated by the ITC, and, unlike the previous comment, it

[10] The Court's authority to remand matters to the appropriate agency appears to stretch beyond the "if-then" mandate of section 1516a(c)(3), *see* 28 U.S.C. § 2643(c)(1) and *Borlem S.a.-empreedimentos Industriais v. United States*, 913 F.2d 933 (Fed. Cir. 1990) (holding that Court had power to remand ITC decision for reconsideration where Commerce remand decision may have an effect on the ITC's material injury finding).

reflects a deliberate effort to interpret the provision. In *toto*, the Senate Report comments are, at best, in equipoise; though more accurately, the Senate Report appears to contravene the ITC's position.[11]

6. *Consequences of An Affirmative Determination*

Commerce takes the position that because it has not received "formal" notice of an affirmative ITC decision issued under section 1673d(b), it therefore cannot lawfully issue antidumping duty orders or collect cash deposits. *See, e.g.*, DOC Mem. at 9–10. More specifically, Commerce argues:

> Although the January 22 letter briefly recounts the history of *DSMC Slip Op. 09–5*, and includes a copy of the administrative remand determination, the letter does not provide notice "of an affirmative determination under section 1673d(b)." The sole purpose of the January 22, 2009 letter was "to inform [Commerce] of the final decision of the U.S. Court of International Trade . . . regarding the Commission's [original negative injury] determinations." The letter explains that the ITC made an affirmative determination upon remand, and that this Court's opinion in DSMC Slip Op. 09–5 affirming that remand constitutes a decision not in harmony. . . . Nowhere in the letter does the ITC state that the remand determination constitutes a sec-

[11] The court is likewise unable to find support for the ITC's interpretation anywhere in the legislative history associated with the Act at issue, Public Law 96–39, 93 Stat 144 (1979) or the previous versions thereof. On the other hand, there seems to be ample support for the view that the provision referred to remands issued by this Court. Every previous version of the eventually-codified bill contained a provision similar to section 1516a(c)(3) that clearly referred to remands issued by this Court. *See* Title VI of S. 2857, § 516(g)(2) *Congressional Record* – Senate (Apr. 7, 1978) at 9196 (providing that "upon the filing of an action for judicial review under subsection (1) of this subsection, the Customs Court shall review the record of the decision of the Secretary or the United States International Trade Commission . . . [t]he Court may affirm the decision or order that the entire matter be returned for further consideration, but the Court may not modify the decision"); Title I of S. 223 (providing that "if the court determines in favor of the petitioning party as to actions commenced under paragraph (3) or (4) of this subsection, it shall remand the matter to the Secretary or the Commission, whichever is appropriate, for action, not inconsistent with the court's determination"); *Congressional Record* – Senate (Jan. 25, 1979) at 1143 ("[r]eview is not expanded to the extent that reversing an[] administrative determination would be so easy as to maintain a considerable degree of uncertainty in the marketplace following the completion of agency action[; r]ather, the greater review ability should induce the administrative agencies to be more careful in applying the law consistently to the facts, and induce greater disclosure of the issues decided and the reasons for those decisions"). Hence, although some legislative history is ambiguous, most would appear to be in contravention of the ITC's position.

> tion 1673d(b) "final determination" of affirmative injury, as required by section 1673e(a) before Commerce may publish an order.

DOC Mem. at 10 (citations omitted) (DOC's alterations).

Under Commerce's logic, the ITC's Remand Determination was reached o*nly* pursuant to 19 U.S.C. § 1516a. A remand determination is not so insulated. The third branch of government does not "take over" an antidumping matter from the executive branch; the role of the Court is statutorily confined to deciding whether or not there is substantial evidence on the record to support the executive determination reached. Further, section 1516a(c)(3) provides that "[i]f the final disposition of an action brought under this section is not in harmony with the published determination of the Secretary, the administering authority, or the Commission, *the matter* shall be remanded to the Secretary, the administering authority, or the Commission, as appropriate, for disposition consistent with the final disposition of the court." The *matter* in this instance was, of course, the ITC's final negative determination that it made pursuant to 19 U.S.C. § 1673d, *see* 19 U.S.C. § 1516a(2)(B)(ii), which this court found "unlawful" in accordance with 1516a(b)(1)(B)(i).

The ITC does not comment directly on the legal implications of its notice to the Department. Instead, it argues that section 1673 publication does not apply to determinations that result from judicial review. The ITC contends that separate statutory provisions govern the publication of agency determinations "depending on whether the determinations were issued during an antidumping investigation or a court action" (ITC Mem. at 9), a contention that is apparently based only on an observation of the overall statutory scheme. More specifically, the ITC reasons that because the provisions contained in section 1673d govern procedure undertaken "within the specific time frames during an investigation specified in sections 1673d(b)(2) & (3), it is clear that the publication requirement in section 1673d(d) is . . . directly applicable only to final determinations issued by the Commission during the course of an injury investigation." *Id.* at 10. Conversely, says the ITC, section 1516a governs publication during judicial review and section 1516a(e) supports the Commission's practice of not publishing notice of a remand determination until a final and conclusive decision in the matter. *Id.* at 17.

The main problem with the ITC's argument, of course, is that nowhere in the text of section 1673d(d) or the related subsections is there any indication that those provisions do not apply to determinations issued pursuant to a court-ordered remand. Further, even if the court were to accept such a premise, ITC's interpretation is not

entirely consistent with its own argument. That is, because a final and conclusive decision is, by definition, still a product of judicial review, it would still not constitute the section 1673d(b) determination that Commerce argues is strictly required, and, seemingly, would not trigger the section 1673d(d) notice-publication requirement.

7. *Legal Replacement of the Original Determination*

In *Decca Hospitality Furnishings, LLC v. United States*, the court observed that "Commerce's own remand determination, as a matter of law, replaces Commerce's original, final determination." 30 CIT 357, 363, 427 F. Supp. 2d 1249, 1255 n.11 (2006). The defendants roundly attack that proposition as "unsupported," but, ironically, provide no support to the contrary. Whatever the reasons for this lack of support, the court is compelled to agree with *Decca*.

That a remand determination replaces the original determination is a notion so basic to administrative law that few courts have found the need to articulate it expressly. If the remand determination did not legally replace the original determination (which the court has, by definition deemed unlawful or inadequate), orders of remand would be pointless; the court would have no reason (and likely no jurisdiction) to review remand determinations. Furthermore, because a judicial holding that an agency decision is unlawful essentially constitutes a *vacatur* of that decision, a new determination is logically necessary to fill the void. *See* 5 U.S.C. § 706(2) (providing that the reviewing court shall "hold unlawful and set aside" agency actions unsupported by substantial evidence); *Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (holding that an agency's "failure to provide the necessary clarity for judicial review requires that the action be vacated") (quoting *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973); *Sugar Cane Growers Co-op of Fla. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002) (stating that "[n]ormally, when an agency so clearly violates the APA we would vacate its action . . . and simply remand for the agency to start again."). Even without *vacatur*, the entire purpose of a remand is to allow the lower tribunal to rectify or replace a decision that a court has found to be deficient.[12]

Although the practical effect of the Federal Circuit's decision in *Melamine Chemicals* essentially operates to stay the legal effects of the *vacatur* until the Court's issuance of judgment (which may only occur when the court sustains a (remand) determination), that fact is

[12] *See* Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 Ariz. St. L.J. 599, 612–17 (2004) (noting that ordering remand without *vacatur* allows the challenged agency action to stand during remand proceedings).

irrelevant here because the court has rendered the requisite final decision and issued the judgment necessary to give that decision legal effect. *Tembec, Inc. v. United States*, 31 CIT __, 475 F. Supp. 2d 1393, n.2 (2007) (noting that "judgment is the legal pronouncement of [the] decision and the act that gives the decision legal effect."). Accordingly, the contention that the original vacated or unlawful determination continues to "govern" after issuance of judgment is simply a legal impossibility. *Cf. Co-Steel Raritan, Inc. v. International Trade Commission*, 357 F. 3d 1294,1319 (Fed. Cir. 2004) (dissent) (observing that "[i]ndeed, once the Commission issued its remand determination, the negative preliminary determination ceased to exist and the current posture of the case was that the Commission had issued an affirmative preliminary determination, with continuing administrative proceedings to come").

The process of judicial review reveals no distinction between original determinations and remand determinations and lends no support to the inference that remand determinations do not have the same legal status as the original determination. The court's review of agency determinations issued pursuant to a court-ordered remand is governed by the same standard of review used in reviewing the original determination. The statutory "presumption of correctness" afforded to agency decisions contains no distinction between determinations issued within the context of an original investigation and those issued as a result of a remand from this court. *See* 28 U.S.C. §§ 2639(a)(1), 2640.

Likewise, the Federal Circuit's review of CIT decisions does not turn on whether the agency determination being reviewed was the original determination or a determination issued on remand. *See Altx*, 370 F.3d 1108, 1117 (Fed. Cir. 2004) (holding that appellate review "encompasses the entirety of the proceedings before the Court of International Trade, including intermediate remand orders that would not, independently be appealable" although court remand orders are generally reviewed under the more lax "abuse of discretion" standard). Moreover, reversals of this Court's decisions frequently necessitate orders to "reinstate" the original determination or a previous remand determination. *See Nippon Steel Corp. v. United States Intern. Trade Comm'n*, 494 F.3d 1371 (Fed. Cir. 2007); Viraj Group v. United States, 476 F.3d 1349, 1359 (Fed. Cir. 2007); *Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006); *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1386 (Fed. Cir. 2005).

While the court can agree that requiring immediate publication of every remand determination would present grave logistical complications (not least because it is not unusual to find cases resulting in

two, three, or even four remand determinations), the court need not determine the precise legal posture of a remand determination as it exists on the date of issuance, because the Federal Circuit's holding in *Timken*, as well as the text of section 1516a(c)(1), establish that *except* for liquidation, which is governed by section 1516a(e), a remand determination becomes legally operative on the date that this Court issues a final decision sustaining it. Hence, if an agency's refusal to publish notice of such a determination alters that scheme (such as the potential delay under section 1673e discussed below) the withholding of publication would be contrary to law. However, in this case the ITC need not publish notice of its affirmative determination because, consistent with *Timken* and the ITC's own arguments, publication of notice of the court's decision also serves to give notice of the affirmative remand determination that it sustained. Simply stated, in the context of judicial review, Commerce's publication of the *Timken Notice* under section 1516a(c)(1) effectively stands in the place of 1673d(d) notice publication. Such a conclusion flows logically from the *Timken* holding and reflects the related doctrine that court decisions adjudicating the lawfulness of lower-tribunal determinations essentially replace (or encompass) the determination(s) on review. *See Disabled American Veterans v. Gober*, 234 F.3d 682, 693 (Fed. Cir. 2000) (holding that "[i]f a superior court, such as the Court of Appeals for Veterans Claims, affirms the determination of the Board on a particular issue, that Board decision is replaced by the Court of Appeals for Veterans Claims decision on that issue."); *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Group Corp. v. United States*, No. 2008–1106, 2009 U.S. App. LEXIS 16179 (Fed. Cir. July 23, 2009) (unpublished) (holding that "[a]lthough the trial court's 2004 judgment was final, that final judgment was reversed on appeal and remanded to the trial court[; t]here is thus no longer any final judgment in this case as to which a Rule 60(b) motion could properly be filed"). Accordingly, because the ITC's affirmative determination has been published, DSMC's request for a writ of mandamus as it applies to the ITC will be denied as moot.

8. *Presumption of Correctness*

Finally, the defendant-intervenors contend, *inter alia* and nonetheless, that the question of the legal effectiveness of CIT decisions on appeal was resolved when the *Timken* Court "stated that an agency's determination is 'presumed correct' and that, if the Court or Federal Circuit renders a decision which is contrary to that determination, the presumption of correctness disappears . . . until there is a *conclusive* court decision which decides the matter." Def.-Int's No.

09–00110 Resp. at 10.[13] The arguments in this regard are, in the very least, misguided. The presumption of correctness has no bearing on this matter. Several cases issued subsequent to *Timken* established that the presumption of correctness is "a procedural device" that allocates the burdens of proof/production between the two litigating parties, and "is analytically distinct from the deference afforded to [an agency] decision, which is instead governed by standards of review." *Universal Elecs. v. United States*, 112 F.3d 488, 493 (Fed. Cir. 1997); *Anhydrides & Chemicals, Inc., v. United States*, 130 F.3d 1481, 1486 (Fed. Cir. 1997) (holding that "when there is no factual dispute the presumption of correctness under § 2639(a)(1) is irrelevant"); *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) (finding that "[b]ecause there was no factual dispute between the parties, the presumption of correctness is not relevant").

B. DSMC Lacks Adequate Means to Obtain the Desired Relief

The defendants argue that the current suspension of liquidation is an adequate alternative remedy to the relief DSMC is seeking because suspension of liquidation preserves DSMC's rights if Slip Op. 09–5 is affirmed on appeal. DOC Mem. at 17–18; ITC Mem. at 26. In this regard, the ITC points out that Commerce suspended liquidation on imports of subject merchandise entered after January 23, 2009, and that, less certainly, "all appropriate antidumping duties will be collected fully and accurately, on these entries of subject merchandise" if the decision is affirmed on appeal. ITC Mem. at 26.

The court finds these arguments inadequate. First, Commerce and the Commission fail to address whether section 1673e(b)(2) may effectively deprive the plaintiff of relief. That section provides:

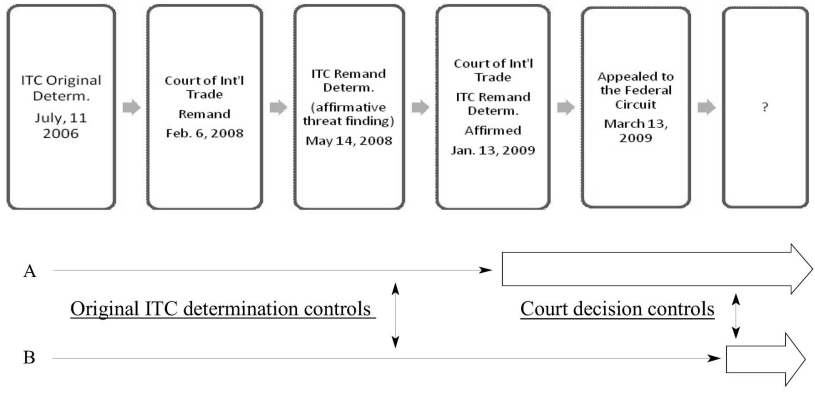
> **(b) Imposition of duty.**
>
> * * *
>
> (2) Special rule. If the Commission, in its final determination under [19 U.S.C. § 1673d(b)], finds threat of material injury, other than threat of material injury described in paragraph (1), or material retardation of the establishment of an industry in the United States, then subject merchandise which is entered, or withdrawn from warehouse, for consumption *on or after the date of publication of notice of an affirmative determination of*

[13] Counsel for the defendant-intervenors must be cautioned that a more scrupulous attention to detail may be warranted when quoting language from Court decisions. Omission of language within quotations that results in a substantive change may be seen as a deliberate attempt to mislead the court. *See Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346 (2003).

> *the Commission under* [19 U.S.C. § 1673d(b)] shall be subject to the assessment of antidumping duties under section [19 U.S.C. § 1673], and the administering authority shall release any bond or other security, and refund any cash deposit made, to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption before that date.

19 U.S.C. § 1673e(b)(2) (emphasis added).

The plain meaning of this provision implies that where the Commission's final determination is affirmative for *threat of material injury only*, any delay in publication of the affirmative decision literally pushes forward the date that duties will be assessed: duties will be assessed *only* on subject merchandise entered "on or after the date of publication of notice of an affirmative determination of the Commission . . . ." 19 U.S.C. § 1673e(b)(2). And, in accordance with the plain meaning of 19 U.S.C. § 1516a(c)(1), once the decision becomes final and conclusive, the suspension of liquidation is removed, and all subject merchandise entered *after* the *Timken Notice* (that is required as a consequence of the first "adverse" court decision) is liquidated in accordance with the adverse court decision (or, more accurately, in accordance with the remand determination that the court sustained). This plain timeline is illustrated below as line "A," while the interpretation the ITC effectively contemplates in this matter is demarcated as line "B":



The Commission's interpretation is inaccurate, because section 1516a(c)(1) contemplates that adversity towards the administrative determination is *established* at the point in time when the first "final" adverse judicial decision is issued, which is *not* the same point in time at which such decision becomes "final and conclusive." The Commission's interpretation does not impact the ultimate relief to which a

plaintiff is entitled in the "ordinary" instance of a judicial decision adverse to a final negative Commission determination on the issue of *material injury* (because subject merchandise entered *after* the adverse judicial decision— or, more accurately, after publication of notice of that decision, and provided liquidation is enjoined—is to be liquidated in accordance with such adverse judicial decision and not in accordance with the agency's original negative determination), but plainly that is not so in the instance of an adverse judicial decision on a final negative Commission determination on *threat* of material injury. If the Commission delays "notice of publication" until all appeals have been exhausted, then the plain operation of section 1673e(b)(2), in the context of section 1516a(c)(1), necessarily results in the elimination of a substantial portion of the relief to which the plaintiff is legally entitled. As observed above, that interpretation is not in accordance with *Timken*, and it is difficult to comprehend the government's assertion that DSMC's rights are "preserved" by the suspension of liquidation: even if the Court of Appeals for the Federal Circuit were to affirm this court's decision, section 1673e(b)(2) would prevent the retroactive assessment of duties upon entries of subject merchandise until "notice of publication" (in accordance with the Commission's interpretation) and *regardless* of the "suspension of liquidation" existent to such point in time.

Second, even without the operation of section 1673e(b)(2), the court cannot agree that the future collection of cash deposits (or, as the case may be, the collection of retroactive duties, with interest) provides the same benefit to the plaintiff as would immediate issuance of an order and the collection of cash deposits.[14] The antidumping laws were intended to protect United States industries against the domestic sale of foreign manufactured goods at prices below the fair market value of those goods in the foreign country, *Aimcor v. United States*, 141 F.3d 1098, 1101 (Fed. Cir. 1998), and Congress has long recognized that, unlike traditional customs cases, antidumping and countervailing duty cases demand expeditious resolution. *See* S. Rep. No. 96–249, 96th Cong., 1st Sess. 37 (1979). That is, in traditional customs-valuation cases, the only consequences of the Court's decision was "whether an overpayment of duty would eventually be refunded, [and] the enforceability of the lower court's judgment was normally not a pressing matter." *American Grape Growers Alliance for Free Trade v. United States*, 9 CIT 568, 569, 622 F. Supp. 295, 297 (1985). In this case however, the Commission's affirmative determination, albeit on remand, constitutes a finding that the domestic

[14] Indeed, there would be no contest here today if the parties all agreed that future payments and current cash deposits were essentially the same.

industry is *imminently* threatened with material injury by reason of dumped subject imports. 19 U.S.C. §1677(7)(F)(ii). Accordingly, the defendants' assertion that the postponement of the relief to which the plaintiff is entitled and that is designed to alleviate or prevent such injury (postponed, as it were, by the defendant-intervenors appeal) is adequately compensated, they claim, by the "fact" that interest will accrue on the duties when they are finally collected is not credible.

C. The Writ is Appropriate Under the Circumstances

Commerce asserts that the court should deny relief in the nature of a writ of mandamus "because suspension of liquidation preserves the *status quo* and parties' substantive rights to the eventual outcome . . . ." DOC Mem. at 21. What Commerce means by the term "the *status quo*" is, in reality, the condition of having the original determination govern imports of subject merchandise entered subsequent to the issuance of a court decision "not in harmony" with the original determination. Not only is this contention inconsistent with section 1516a(c)(1), as discussed above, it is inconsistent with "the basic proposition that all orders and judgments of courts must be complied with promptly." *Manness*, 419 U.S. at 458. This court's entry of judgment changed the legal relationship of the parties. If a litigant wishes to stay the effect of the court's judgment, it may motion requesting a stay under Rule 62 of the Court's Rules, "but, absent a stay, [a litigant] must comply promptly with the order pending appeal . . . [p]ersons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." *Id.* A judgment of this Court that is adverse to an agency determination has the immediate effect of altering the administrative status quo and changes the legal relationship between the litigants, and Congress considered that suspending liquidation pending the final conclusive judicial decision was the means by which parties would be protected. Accordingly, the court finds issuance of the writ appropriate under the circumstances of this case. The court has not only the power "but also a duty to enforce [its] prior mandate to prevent evasion," *Iowa Utilities Bd. v. F.C.C.*, 135 F.3d 535, 541 (8th Cir. 1998), *vacated on other grounds*, 525 U.S. 1133 (1999),[15] and failure to enforce judgments would "reward bureaucratic misconduct and encourage [administrative] anarchy." *Id. See, e.g., United States v. Hanover Ins. Co.*, 82 F.3d 1052 (Fed. Cir. 1996) (CIT has "inherent power to determine the effect of its prior judgments").

[15] *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 1133 (1999).

V.
Conclusion

With respect to Court No. 06–00247, DSMC's requested writ of mandamus to compel the ITC to publish notice of the Remand Determination is hereby denied as moot in light of *de facto* publication of that determination, by implication, in Commerce's *Timken Notice*.

With respect to Court No. 09–00110, the court concludes that DSMC's requested writ of mandamus shall be granted. Therefore, in accordance with this opinion and in accordance with the Notice of January 22, 2009 from the ITC to Commerce, the Department of Commerce and Secretary Gary Locke, together with his successors in office, delegates, officers, agents, servants and employees, will be ordered to issue and publish antidumping duty orders and require the collection of cash deposits on subject merchandise.

SO ORDERED.

Dated: September 30, 2009
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 09–108

UNITED STATES, Plaintiff, v. RONALD RODRIGUE and LEROY RODRIGUE, Defendants.

Court No. 08–00177

[Denying Plaintiff's motions seeking enlargement of 120-day period for service of process as well as leave to serve by publication, and dismissing action]

Dated: October 1, 2009

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OPINION

RIDGWAY, Judge:

I.
Introduction

In this action, the Government seeks to collect civil penalties, plus interest and costs, imposed on the Defendants for allegedly transacting customs business without a valid broker's license.

Pending before the Court is Plaintiff's Motion for an Extension of Time, which the Government filed *nunc pro tunc*. *See* Plaintiff's Motion for Leave to File *Nunc Pro Tunc* Plaintiff's Motion for an Extension of Time; Plaintiff's Motion for an Extension of Time ("Pl.'s Motion for Extension of Time").[1] In its Motion for an Extension of Time, the Government seeks a 90-day enlargement of the 120-day period for service of process established in USCIT Rule 4(l), to extend from September 18, 2008 to December 17, 2008 the Government's deadline for effecting service on the two Defendants.

Also pending is Plaintiff's Motion for Leave to Serve by Publication and Motion for an Extension of Time, in which the Government requests a second 90-day extension of the deadline for service of process (*i.e.*, an extension through March 17, 2009), and, moreover, seeks leave to make constructive service via publication in a Florida newspaper. *See* Plaintiff's Motion for Leave to Serve by Publication and Motion for an Extension of Time ("Pl.'s Motion for Service by Publication").

Subject matter jurisdiction lies under 28 U.S.C. § 1582 (2000). For the reasons detailed below, the Government's motions must be denied, and this action dismissed.

II.
Background

According to the Complaint, father and son Defendants Ronald and Leroy Rodrigue operated a freight forwarding company in Miami, Florida, and transacted customs business without a valid broker's

[1] According to Plaintiff's Motion for Leave to File *Nunc Pro Tunc*, on the day before the 120-day period for service of process expired, the Government sought a 90-day extension of time. *See* Plaintiff's Motion for Leave to File *Nunc Pro Tunc* Plaintiff's Motion for an Extension of Time. However, the Government's motion never reached the court; and some 54 days elapsed before the Government resubmitted its motion *nunc pro tunc*. *Id.* The Motion for Leave to File Nunc Pro Tunc Plaintiff's Motion for an Extension of Time was granted. *See* Order (June 26, 2009). Plaintiff's Motion for an Extension of Time thus is now properly before the Court.

license. *See* Complaint ¶¶ 3–4. Multiple pre-penalty and penalty notices were issued to the two Defendants, advising them that the U.S. Bureau of Customs and Border Protection was assessing civil penalties of $10,000 each "for transacting customs business, other than solely on behalf of themselves, without a valid brokers license." *See* Complaint ¶ 12. The Complaint further alleges that, although Customs has repeatedly billed both Defendants, the penalties remain unpaid. *See* Complaint ¶¶ 14, 16–17.

Seeking to collect the civil penalties, plus interest and costs, the Government filed this action on May 21, 2008 — the very day on which the five-year statute of limitations would have expired. *See* Complaint; Audio Recording of Hearing at 00:40:25–00:40:53 (noting that statute of limitations would have expired May 21, 2008); 19 U.S.C. § 1641(d)(4) (2000) (statute of limitations).[2] The Government was on notice that, pursuant to USCIT Rule 4(l), it had 120 days from the filing of the Complaint — that is, until September 18, 2008 — to effect service on Ronald and Leroy Rodrigue. *See* USCIT R. 4(l).[3] The Government was also on notice that the stakes were high, and that it had zero margin for error or delay. *See* Audio Recording of Hearing at 03:27:25–03:27:38. Because the Government had run down the clock on the statute of limitations, the Government would be time-barred from refiling if failure to effect service within the 120-day period resulted in the dismissal of this action.

The same day that it commenced this action, May 21, 2008, the Government mailed copies of the summons, Complaint, and waiver of service form to the two Defendants. The documents addressed to Leroy Rodrigue were sent via first class mail to 8618 SW 156th Place, Miami, Florida 33193, while Ronald Rodrigue's copies were mailed to 458 Buffalo Way, North Fort Myers, Florida. *See* Complaint, at Certificate of Service.[4] According to the certificate of service, the zip code used for the mailing to Ronald Rodrigue was 33197. The correct zip code, however, is 33917. *See* Audio Recording of Hearing at 00:44:49–00:45:21, 00:49:34–00:50:47, 01:02:22–01:02:38 (noting that

[2] Neither Defendant has appeared in this action.

[3] In the course of the hearing on the pending motions, the Government stated that the 120-day period for service of process ended on September 28, 2008. *See* Audio Recording of Hearing at 00:41:12–00:44:06. However, that statement was inaccurate. As the Government correctly noted in its Motion for an Extension of Time, the deadline was actually September 18, 2008. *See* Pl.'s Motion for Extension of Time at 1 (stating that "[t]he deadline for service . . . is September 18, 2008").

[4] In its Motion for Service by Publication, the Government states that, on May 21, 2008, it mailed the summons, Complaint, and waiver of service form to Ronald Rodrigue at an address on Bamboo Palm Way. *See* Pl.'s Motion for Service by Publication at 4. That statement is incorrect.

33917 is correct zip code); Complaint, at Certificate of Service (indicating that mailing was sent to zip code 33197).[5]

Months before the Complaint was filed, the Florida Department of Highway Safety & Motor Vehicles had advised Customs that its most recent address-of-record for Leroy Rodrigue was the address on 156th Place. *See* Carpio Declaration (Pl.'s Motion for Service by Publication, App. A) ¶ 7.[6] At the same time, the same Florida agency also advised that its most recent address-of-record for Ronald Rodrigue was 712 Bamboo Palm Way, Oviedo, Florida 32765, and that the Buffalo Way address was Ronald Rodrigue's prior address. *See* Carpio Declaration ¶¶ 8–9.[7] Customs provided all that information to the Department of

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[5] Although counsel for the Government acknowledged in the course of the hearing in this matter that the proper zip code is 33917, the sole record evidence – the Certificate of Service for the Complaint – indicates that the mailing to Ronald Rodrigue was erroneously addressed to zip code 33197. *See* Audio Recording of Hearing at 00:44:49–00:45:21, 00:49:34–00:50:47, 01:02:22–01:02:38 (noting that 33917 is correct zip code); Complaint, at Certificate of Service (indicating that mailing was addressed to zip code 33197).

[6] The Carpio Declaration states that the Florida Department of Highway Safety & Motor Vehicles advised Customs that the address on 156th Place was the Florida agency's most recent address-of-record for Leroy Rodrigue. But the Declaration does not state when the Florida agency provided Customs with that information. *See* Carpio Declaration ¶¶ 6–7. (Indeed, the Carpio Declaration suffers from a distressing lack of specificity, particularly as to dates. *See generally* Carpio Declaration ¶¶ 4–9.) At the hearing on the pending motions, however, the Government stated that the report from the Florida Department of Highway Safety & Motor Vehicles is dated January 22, 2008. *See* Audio Recording of Hearing at 00:19:55–00:20:10, 02:47:20–02:48:05. The information from the Florida Department of Highway Safety & Motor Vehicles was forwarded to the Department of Justice as part of Customs' "litigation report" dated February 13, 2008. *See* Carpio Declaration ¶ 8.

It also appears that Leroy Rodrigue used the address on 156th Place as his return address on correspondence with Customs as late as mid-August 2007, and that certified mail addressed to him was delivered to that address on some unspecified date(s). *See* Audio Recording of Hearing at 00:18:35–00:19:45, 02:45:22–02:46:29, 02:55:20–02:55:45 (stating that, on August 27, 2007, Customs received letter from Leroy Rodrigue dated August 14, 2007, bearing return address of 156th Place); *see also* Carpio Declaration ¶ 4 (stating that Leroy Rodrigue used 156th Place address on correspondence with Customs, and also received certified mail at that address; however, Declaration does not indicate timeframe); Complaint ¶ 14 (stating that Customs billed Leroy Rodrigue in June 2007, July 2007, and August 2007, but silent as to mailing address and mode of transmission used by Customs, as well as any response from Leroy Rodrigue).

The ages of the addresses are critical. Addresses obviously become less reliable with the passage of time.

[7] In the course of the hearing on the pending motions, the Government stated that the Florida Department of Highway Safety & Motor Vehicles reported the Buffalo Way address as the most recent address-of-record for Ronald Rodrigue. *See* Audio Recording of Hearing at 02:49:40–02:49:41. However, the Government did not have a copy of the Florida Department of Highway Safety & Motor Vehicles report on Ronald Rodrigue at the hearing; and the Government's statement was apparently in error. *See* Audio Recording of Hearing at 02:50:13–02:51:24. The sole record evidence on point – the Carpio Declaration – states that the Florida Department of Highway Safety & Motor Vehicles advised Customs that the

Justice as part of its "litigation report" dated February 13, 2008; and Customs apparently had the information in its possession for some weeks before that. *See* Carpio Declaration ¶¶ 6–9; Audio Recording of Hearing at 00:19:55–00:20:10, 02:47:20–02:48:05 (stating that report from Florida Department of Highway Safety & Motor Vehicles was dated January 22, 2008).[8] Notwithstanding the more up-to-date address on Bamboo Palm Way that was provided by the Florida authorities, the Government mistakenly directed its May 21, 2008 mailing to Ronald Rodrigue at his old address on Buffalo Way.

On June 6, 2008, the Government's May 21, 2008 mailing to Ronald Rodrigue was returned to the Government. *See* Audio Recording of Hearing at 00:51:23–00:51:47.[9] The envelope, which was labeled "Return to Sender," indicated that it had first been forwarded to the

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address on Bamboo Palm Way was the Florida agency's most recent address-of-record for Ronald Rodrigue, although the Declaration does not state when the Florida agency provided that information to Customs. *See* Carpio Declaration ¶¶ 6, 8. It seems likely that the Florida Department of Highway Safety & Motor Vehicles information on Ronald Rodrigue was obtained at the same time as the information on Leroy Rodrigue, on January 22, 2008. *See* Audio Recording of Hearing at 2:48:14–2:50:53. In any event, the Carpio Declaration indicates that the information from the Florida Department of Highway Safety & Motor Vehicles was forwarded to the Department of Justice as part of Customs' February 13, 2008 litigation report. *See* Carpio Declaration ¶ 8. Thus, Customs obviously received the information from the Florida agency at some point before that time.

It further appears that Ronald Rodrigue had used the address on Buffalo Way as his return address on correspondence with Customs in the past, and that certified mail addressed to him was delivered to that address on some unspecified date(s). *See* Carpio Declaration ¶ 5 (stating that Ronald Rodrigue used Buffalo Way address as return address on correspondence with Customs, and also received certified mail at that address; however, Declaration does not indicate timeframe); Complaint ¶ 14 (stating that Customs billed Ronald Rodrigue in June 2007, July 2007, and August 2007, but silent as to mailing address and mode of transmission used by Customs, as well as whether Customs received any response); *see also* Audio Recording of Hearing at 02:51:25–02:51:41.

The bottom line is that the Carpio Declaration states unequivocally that the Florida Department of Highway Safety & Motor Vehicles advised Customs that the Buffalo Way address was a prior address for Ronald Rodrigue, superseded by the more recent Bamboo Palm Way address, and that Customs communicated that fact to the Department of Justice in the February 13, 2008 litigation report — well before the filing of the Complaint on May 21, 2008. *See* Carpio Declaration ¶¶ 6, 8–9.

[8] On July 2, 2008, Customs once again provided the Department of Justice with the same information — the most recent addresses-of-record as provided by the Florida Department of Highway Safety & Motor Vehicles for both Ronald and Leroy Rodrigue, as well as the Florida agency's history of all prior addresses-of-record for both men. *See* Carpio Declaration ¶¶ 6–9.

[9] In the course of the hearing on the pending motions, the Government indicated that it first learned of the Bamboo Palm Way address on June 6, 2008, when its May 21, 2008 mailing to Ronald Rodrigue was returned (with a label indicating that the mailing had been forwarded to the Bamboo Palm Way address from the Buffalo Way address). *See* Audio Recording of Hearing at 01:08:00–01:08:27, 03:24:08–03:24:19, 3:57:23–3:57:35. As the Carpio Declaration states, however, the information from the Florida Department of

Bamboo Palm Way address. *See* Audio Recording of Hearing at 00:44:31–00:44:49, 00:45:35–00:45:44, 00:46:16–00:47:39, 01:12:30–01:13:03, 03:24:30–03:24:37. The mailing to Leroy Rodrigue was not returned. *See* Audio Recording of Hearing at 01:43:46–01:43:53 (stating that May 21, 2008 mailing addressed to Ronald Rodrigue was only mailing ever returned to Government).

On July 2, 2008, almost a month after the mailing to Ronald Rodrigue had been returned to the Government (and 42 days after the filing of the Complaint) — with no executed waiver of service in hand from either of the two Defendants — the Government again mailed copies of the summons, Complaint, and waiver of service form to the Rodrigues. *See* Pl.'s Motion for Extension of Time; Audio Recording of Hearing at 00:21:15–00:21:26, 00:52:26–00:52:36, 02:57:21–02:57:47.[10] For Leroy Rodrigue, the Government used the same address on 156th Place in Miami. *See* Audio Recording of Hearing at 00:52:38–00:52:51, 02:57:48–02:57:57, 02:58:23–02:58:33. For Ronald Rodrigue, the Government sent the mailing to the Bamboo Palm Way address — the address that the Florida authorities had previously provided, but which the Government had failed to use for its May 21, 2008 mailing. *See* Carpio Declaration ¶¶ 6, 8; Audio Recording of Hearing at 00:52:38–00:52:57.[11] Neither mailing was

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Highway Safety & Motor Vehicles — which Customs provided to the Department of Justice in mid-February 2008 — listed the Bamboo Palm Way address as Ronald Rodrigue's most recent address-of-record, with the Buffalo Way address noted as a prior address. *See* Carpio Declaration ¶¶ 6, 8–9.

[10] As note 6 above explains, addresses obviously become less reliable with the passage of time. *See* n.6, *supra*. Nevertheless, in preparation for its July 2, 2008 mailing, the Government apparently did not seek updated address-of-record information for either Defendant, whether from the Florida Department of Highway Safety & Motor Vehicles or from any other source. Instead, the Government relied on the same information that the Florida Department of Highway Safety & Motor Vehicles had provided at some point prior to mid-February 2008. *See* Carpio Declaration ¶¶ 8–9 (indicating that address information from Florida Department of Highway Safety & Motor Vehicles was forwarded to Department of Justice for a second time, via email on July 2, 2008).

[11] The Government erroneously indicated in its papers that the July 2, 2008 mailing was triggered because the Government had "learn[ed] that *Leroy* Rodrigue had a new address." *See* Pl.'s Motion for Extension of Time (emphasis added). In the course of the hearing, however, the Government advised that it actually meant to refer to *Ronald* Rodrigue and the Bamboo Palm Way address. See Audio Recording of Hearing at 00:21:35–00:21:51, 02:57:58–02:58:14.

As explained above, however, the Bamboo Palm Way in fact was not a "new" address that the Government had just identified. In its February 13, 2008 litigation report, Customs had provided the Bamboo Palm Way address to the Department of Justice as the most recent address-of-record for Ronald Rodrigue provided by the Florida Department of Highway Safety & Motor Vehicles. *See* Carpio Declaration ¶¶ 6, 8. That same litigation report had advised the Justice Department that the Buffalo Way address was a prior address. *See* Carpio Declaration ¶¶ 6, 8–9.

returned to the Government. *See* Audio Recording of Hearing at 00:53:28–00:53:33, 01:43:30–01:43:33, 02:58:38–02:58:41.

The Government took no further action in the 57 days that followed. *See* Audio Recording of Hearing at 00:55:41–00:56:00, 02:59:37–02:59:41. Finally, on August 29, 2008 — a mere 21 days before the 120-day period for service of process expired, and with the statute of limitations long gone — the Government engaged a professional process service firm, Capitol Process Services. *See* Pl.'s Motion for Extension of Time; Affidavit of Non-Service; Audio Recording of Hearing at 00:54:48–00:55:40, 02:58:42–02:59:34.

Rather than attempting to serve Ronald Rodrigue at the Bamboo Palm Way address, the Government instead instructed the process server to attempt service at 458 Buffalo Way in North Fort Myers — the address to which the summons, Complaint, and waiver of service form originally had been mailed on May 21, 2008 (before being forwarded to Bamboo Palm Way), and the address which the Florida Department of Highway Safety & Motor Vehicles had clearly indicated was *a prior address* for Ronald Rodrigue. *See* Pl.'s Motion for Extension of Time; Affidavit of Non-Service; Audio Recording of Hearing at 01:28:31–01:29:30; Carpio Declaration ¶¶ 6, 8–9.

The Government instructed the process servers to attempt to serve Leroy Rodrigue not at the address on 156th Place in Miami (to which the two mailings had been sent), but, instead, at 15652 SW 85th Terrace, Miami, Florida 33193 — purportedly a former address of Leroy Rodrigue, which was the subject of an alleged tip to Customs. *See* Pl.'s Motion for Extension of Time; Affidavit of Diligent Search and Inquiry; Audio Recording of Hearing at 00:22:30–00:23:30, 03:00:00–03:01:00, 04:16:04–04:16:22.[12]

According to the Affidavit of Diligent Search and Inquiry executed by the process server who sought to serve Leroy Rodrigue, an individual named Luis Martinez resides at the 85th Terrace address. *See* Affidavit of Diligent Search and Inquiry. Mr. Martinez advised the process server that he "[has] never heard of Leroy Rodrigue," and that "he [Mr. Martinez] rents from the brother of the owner Ronald Hodgkins, who [had] recently passed away." *Id.* The affidavit — dated September 15, 2008 — states nothing more of substance. The Government elected not to have the process server attempt service on Leroy Rodrigue at the address on 156th Place in Miami,[13] or at any

[12] There is no indication in the record as to whether the information provided to Customs by the Florida Department of Highway Safety & Motor Vehicles included this 85th Terrace address as a prior address-of-record for Leroy Rodrigue. *See* Carpio Declaration ¶ 9 (stating that the information provided by the Florida agency "included all prior addresses-of-record for both Ronald Rodrigue and Leroy Rodrigue").

other address. The Government made no additional inquiries and took no further action to locate or serve Leroy Rodrigue in the three days remaining before the 120-day period for service of process ended on September 18, 2008.

It is no surprise that the process server who sought to serve Ronald Rodrigue at the address on Buffalo Way — the address that the Florida authorities had identified as Ronald Rodrigue's *prior address* – was no more successful. According to the Affidavit of Non-Service that he filed, the process server made seven attempts at that address between September 1 and September 13, 2008, and then "discontinued attempting service of the Summons and Complaint." *See* Affidavit of Non-Service.[14] The Government elected not to send the process server to the Bamboo Palm Way address — the address that the Florida Department of Highway Safety & Motor Vehicles had identified as Ronald Rodrigue's most recent address-of-record, and the address to which the U.S. Postal Service had forwarded the Government's May 21, 2008 mailing.[15] Nor did the Government attempt service at any other address. The Government made no additional inquiries and took no further action to locate or serve Ronald Rodrigue in the five days remaining before the 120-day period for service of process ended on September 18, 2008.

Indeed, the Government made no additional inquiries and took no further action to locate or serve either of the two Defendants until late January 2009, after the Court had scheduled a hearing on the pending motions. *See* Audio Recording of Hearing at 01:14:05–01:49:05, 01:51:23–01:52:04, 02:38:10–02:38:47, 03:07:35–03:07:45, 03:08:00–03:08:13, 03:08:38–03:08:57. In light of the impending hearing on the pending motions, the Government

[13] The 156th Place address is not only the address to which the Government twice mailed the summons, Complaint, and waiver of service form, but is also the address at which the Government served the two pending motions. *See* Motion for Extension of Time, at Certificate of Service; Motion for Service by Publication, at Certificate of Service.

[14] Specifically, the Affidavit of Non-Service states (entirely in upper case letters):

> Attempted at 9–1–08 at 4:50 PM no one there. Attempted 9–3–08 at 5:48 PM no one there. Attempted 9–5–08 at 11:00 AM no one there. Neighbor states they do not know if anyone lives there. Attempted 9–8–08 at 9:28 AM no one there. Spoke to other neighbor who states they think the renter moved out but his name was not Ronald. Attempted 9–10–08 at 8:41 PM no one there. Attempted 9–11–08 10:00 AM no one there. Attempted Saturday 9–13–08 at 5 PM no one there.

Affidavit of Non-Service.

[15] The Bamboo Palm Way address is also the address to which the Government mailed the summons, Complaint, and waiver of service form on July 2, 2008, as well as the address at which the Government served the two pending motions. *See* Motion for Extension of Time, at Certificate of Service; Motion for Service by Publication, at Certificate of Service.

decided to attempt service again. *See* Audio Recording of Hearing at 01:02:42–01:02:53, 01:52:26–01:52:42, 02:11:37–02:12:25, 02:14:28–02:14:49, 02:26:28–02:26:45.[16]

At the April 6, 2009 hearing, the Court learned for the first time that, at 8:30 a.m. on February 25, 2009 – more than nine months after the statute of limitations expired, and more than five months after the end of the 120-day period for effecting service of process – a professional process server had successfully served Ronald Rodrigue at the Bamboo Palm Way address (the address that the Florida Department of Highway Safety & Motor Vehicles had provided to the Government more than a year earlier, and a different address than the process server had used in September 2008). *See* Audio Recording of Hearing at 00:06:54–00:06:59, 01:01:35–01:02:19, 01:03:38–01:04:27, 01:06:19–01:06:25, 02:29:24–02:29:34, 02:30:00–02:30:59.[17] The Government offered no explanation for its failure to timely notify the Court that service had been effected. *See* Audio Recording of Hearing at 00:06:54–00:07:02, 02:32:23–02:32:47. And no proof of service was filed with the court – either before the hearing, or since. *See* USCIT R. 4(k) (requiring that proof of service be filed with court, except where service has been waived).[18]

A professional process server reportedly also made an attempt to serve Leroy Rodrigue, at 11:13 a.m. on February 27, 2009, at the address on 156th Place — again, a different address than the process

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[16] Pressed repeatedly by the Court in the course of the hearing, the Government was unable to give a satisfactory explanation of the bases for its decisions to attempt to serve the Defendants at the addresses that it chose. Nor was the Government able to explain why it did not attempt service at *multiple* addresses, and instead felt compelled to try only one address at a time for each Defendant. *See, e.g.*, Audio Recording of Hearing at 01:07:16–01:10:15, 01:11:06–01:15:32, 01:30:18–01:30:44, 01:36:10–01:39:35, 01:41:22–01:41:47, 02:14:49–02:16:44, 02:18:16–02:20:08, 02:20:39–02:20:44, 02:23:40–02:23:48, 03:01:15–03:01:28, 03:28:25–03:28:58.

[17] At the hearing, the Government was necessarily on notice that, if its requests for extensions of time were denied, this action could be subject to dismissal for failure to effect service on Defendants within the 120-day period for service of process. *See, e.g.*, Audio Recording of Hearing at 00:03:41–00:05:42, 03:25:06–03:25:31. The hearing afforded the Government ample opportunity to show good cause for its failure to effect service, or to otherwise make a case for an enlargement of time — which is the purpose of the rule requiring that a court give a plaintiff prior notice of its intent to dismiss an action *sua sponte* for failure to effect service. *See, e.g., Braxton v. United States*, 817 F.2d 238, 241 (3d Cir. 1987) (explaining that "[t]he requirement of notice provides the delinquent party with an opportunity to demonstrate good cause . . . . The rule thus offers the serving party a means to avoid an unexpected and perhaps unjustified dismissal."); *Thompson v. Maldonado*, 309 F.3d 107, 109–10 (2d Cir. 2002); *Brengettcy v. Horton*, 423 F.3d 674, 683 (7th Cir. 2005); *see also Brown v. District of Columbia*, 514 F.3d 1279, 1286–87 (D.C. Cir. 2008).

[18] *See also* Audio Recording of Hearing at 00:06:59–00:07:01, 02:32:30–02:32:47, 03:59:12–03:59:33, 04:10:32–04:10:47, 04:11:20–04:11:37;

server had used in September 2008.[19] However, that attempt was not successful. *See* Audio Recording of Hearing at 02:42:47–02:44:07, 02:44:53–02:45:08. Since that time, the Government has made no further efforts to locate or serve Leroy Rodrigue. *See* Audio Recording of Hearing at 03:40:56–03:41:28. And the Government failed to ask Ronald Rodrigue about the whereabouts of his son. *See* Audio Recording of Hearing at 03:41:30–03:44:27. To date, Leroy Rodrigue still has not been served.

III.
Analysis

Proper service of process "is not some mindless technicality," but — rather — "a critical part of a lawsuit." *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir. 1987); *Troxell v. Fedders of North America, Inc.*, 160 F.3d 381, 382 (7th Cir. 1998). "[U]nless the procedural requirements for effective service of process are satisfied, a court lacks authority to exercise personal jurisdiction over [a] defendant." *Candido v. District of Columbia*, 242 F.R.D. 151, 160 (D.D.C. 2007) (citations omitted). In its Motion for an Extension of Time, the Government seeks a 90-day enlargement of the 120-day period for service of process, to extend from September 18, 2008 to December 17, 2008 the Government's deadline for effecting service on the two Defendants. *See* Plaintiff's Motion for an Extension of Time ("Pl.'s Motion for Extension of Time"). In its later-filed Motion for Leave to Serve by Publication and Motion for an Extension of Time, the Government requests a further 90-day extension of the deadline for service of process (*i.e.*, an extension through March 17, 2009), and, moreover, seeks leave to effect constructive service via publication in a Florida newspaper. *See* Plaintiff's Motion for Leave to Serve by Publication and Motion for an Extension of Time ("Pl.'s Motion for Service by Publication").

The Government's motions for extensions of time and for leave to serve by publication are analyzed below, in turn. As discussed there,

[19] At the hearing on the pending motions, the Government intimated that the process server may have "staked out" the address on 156th Place. *See* Audio Recording of Hearing at 00:26:45–00:26:59. There is, however, no evidence to support that assertion. And it strains credulity even to suggest that a process server who had spent hours "staking out" a location would then state the date and time of the attempted service with such pinpoint precision — February 27, 2009, *at 11:13 a.m*. *See* Audio Recording of Hearing at 02:42:47–02:44:07, 02:44:53–02:45:08.

Again, as note 6 above explains, addresses obviously become less reliable with the passage of time. *See* n.6, *supra*. Nevertheless, in preparation for its February 2009 attempts to effect personal service on the Defendants, the Government apparently did not seek updated address-of-record information for either Defendant, whether from the Florida Department of Highway Safety & Motor Vehicles or from any other source, relying instead on information provided to it more than a year before.

the Government has failed to show good cause for its failure to serve the two Defendants within the 120-day period for effecting service of process. Further, although the Government failed to argue that an extension of time would be warranted even in the absence of good cause, a review of the relevant factors counsels against a discretionary extension. The requested extensions of time must therefore be denied. Moreover, the denial of the requested extensions of time moots the motion for leave to serve by publication. However, as set forth below, even if the extensions of time were granted, the Government has failed to comply with the requirements of the relevant Florida statute. Accordingly, even if the motion for leave to serve by publication were evaluated on its merits, the motion nevertheless would be denied.

A. *The Government's Motions to Extend the Time for Service of Process*

The time limits for service of process in this action are governed by Rule 4(l) of the Rules of the Court, which provides, in relevant part:

> If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

USCIT R. 4(l); *see also* Fed.R.Civ.P. 4(m).[20] Thus, "[a] court *must* grant additional time to complete service if plaintiff demonstrates good cause for failing to serve defendant within the 120-day period."

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[20] The text of USCIT Rule 4(l) is identical to that of Rule 4(m) of the Federal Rules of Civil Procedure, except for conforming changes required by differences in the numbering of the two sets of rules.

Significantly, as the text of the rule indicates, the required showing is good cause for failure to effect service within the 120-day period, *not* good cause for an extension of time. Thus, as discussed in greater detail below, the principal focus of the "good cause" inquiry is on the diligence (or lack thereof) on the part of the plaintiff — not on the consequences of the denial of a requested extension.

Accordingly, as a matter of logic, courts generally have held that a "good cause" determination takes no account of factors such as whether an action will be time-barred if an extension is not granted (except perhaps to note that such a fact would be expected to enhance a plaintiff's diligence in attempting to effect timely service). On the other hand, the expiration of the statute of limitations, as well as any attempts by defendant to evade service, are factors to be considered in determining whether to grant an extension *as a matter of discretion*. *See, e.g.*, Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments (stating that, even absent showing of good cause, "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service").

1 Moore's Federal Practice § 4.82[1] (Matthew Bender 3d ed.) (emphasis added). In addition, the court *may* grant an extension even absent good cause, as a matter of the court's discretion. *See id.* at § 4.83.

As discussed below, the Government in this case could hardly have done less to effect service of process on the Defendants within the 120-day period established for that purpose. Under the circumstances, extending the time for service here would set a dangerous precedent, and would grant the Government (and, indeed, all parties) virtual *carte blanche* in future cases.

1. *Extension of Time for "Good Cause"*

In the case at bar, the Government asserts broadly that there is "good cause" for its failure to serve Defendants within the 120-day period following the filing of the Complaint. *See* Pl.'s Motion for Extension of Time at 1; Pl.'s Motion for Service by Publication at 1. But the facts belie the Government's claim.[21]

As one leading treatise explains the concept of "good cause":

> "[G]ood cause is likely (but not always) to be found when the plaintiff's failure to complete service in timely fashion is a result of the conduct of a third person, typically the process server, the defendant has evaded service of process or engaged in misleading conduct, *the plaintiff has acted diligently in trying to effect service* or there are understandable mitigating circumstances, or the plaintiff is proceeding *pro se or in forma pauperis*. *Pro se* status or any of the other listed explanations for a failure to make timely service, however, is not automatically enough to constitute good cause for purposes of [Federal Rule of Civil Procedure] 4(m) [or USCIT Rule 4(l)].

4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1137 (3d ed. 2002) (emphasis added). On the other hand, the treatise explains:

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[21] The plaintiff bears the burden of establishing good cause for its failure to effect service within the 120-day period. Wright & Miller, Federal Practice and Procedure § 1137; Moore's Federal Practice § 4.82[1]. That burden is a heavy one to bear. *See, e.g.*, Beauvoir v. U.S. Secret Service, 234 F.R.D. 55, 56 (E.D.N.Y. 2006) (stating that "[a] party seeking a good cause extension bears a heavy burden of proof") (quotation omitted).

In the instant case, both the Government's Motion for an Extension of Time and its Motion for Service by Publication offer little concerning the specific facts and details of the Government's attempts to locate and effect service of process on the two Defendants (never mind virtually barren of law). *See* Pl.'s Motion for Extension of Time; Pl.'s Motion for Service by Publication. In any event, as discussed herein, even if counsel's numerous unsworn and undocumented factual representations made orally in the course of the hearing in this matter are considered, the Government still has not carried its burden.

> [F]ederal courts have held that good cause has not been shown in a large number of cases and have rejected excuses based on a failure to receive a waiver of formal service, ignorance of the rule [on service of process], the absence of prejudice to the defendant, office moves or personal problems, the belief that the time requirement was only technical, the filing of an amended complaint, inadvertence of counsel, or the expenditure of efforts that fall short of *real diligence by the serving party*.

Wright & Miller, Federal Practice and Procedure § 1137 (emphasis added).[22] Although the courts have articulated varying formulations of the standard for "good cause," they are in accord on the requirement of a showing of "real diligence by the serving party." [23]

In a case such as this, "good cause" requires that a plaintiff exert "such efforts at service as are consistent with a recognition that 120

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[22] *See, e.g., In re Kirkland*, 86 F.3d 172, 176 (10th Cir. 1996) (stating that "inadvertence or negligence alone do not constitute 'good cause,'" "[m]istake of counsel or ignorance of the rules . . . usually do not suffice" as good cause, "[u]nexplained assertions of miscalculation [of deadlines] do not constitute 'good cause,'" and "absence of prejudice alone does not constitute good cause"); *Braxton*, 817 F.2d at 241 (holding that attorney's inadvertence does not constitute good cause); *Lopez v. United States*, 129 F. Supp. 2d 1284, 1295 (D. N.M. 2000), *aff'd*, 21 Fed Appx. 879 (10th Cir. 2001) (explaining that "[t]he 'good cause' standard, as interpreted by the courts, is quite restrictive. Inadvertence, negligence, ignorance of the service requirements, and reliance on a process server have all been determined not to constitute good cause. . . . Similarly, the fact that a defendant may have had actual notice of the suit, and has suffered no prejudice, does not constitute good cause."); *Jonas v. Citibank, N.A.*, 414 F. Supp. 2d 411, 416 (S.D.N.Y. 2006) (stating that "a mistaken belief that service was proper does not constitute good cause," and that "neglect and inadvertence do not suffice to support good cause"); *Beauvoir*, 234 F.R.D. at 56 ("'[a]n attorney's inadvertence, neglect, mistake or misplaced reliance does not constitute good cause'") (quotation omitted).

[23] *See also, e.g., Habib v. General Motors Corp.*, 15 F.3d 72, 74 (6th Cir. 1994) (noting that "[t]o demonstrate good cause, other courts have held that a plaintiff may . . . show that he/she made a reasonable and diligent effort to effect service"); *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1022 (5th Cir. 1995) (stating that, "in short, one is required to be diligent in serving process, as well as pure of heart, before good cause will be found"); *Shuster v. Conley*, 107 F.R.D. 755, 757 (W.D. Pa. 1985) (stating that "[a] court will not grant an extension [for the service of process] where the plaintiff has not demonstrated a reasonable effort to effect service prior to the running of the 120 day period").

Indeed, a number of courts have gone so far as to hold that good cause exists only where the failure to effect service within the 120-day period is attributable to external causes, beyond the plaintiff's control. *See, e.g., Lepone-Dempsey v. Carroll County Commissioners*, 476 F.3d 1277, 1281 (11th Cir. 2007) (explaining that "[g]ood cause exists 'only when some outside factor[,] such as reliance on faulty advice, rather than inadvertence or negligence, prevented service'") (quotation omitted); *Beauvoir*, 234 F.R.D. at 56 (noting that "[g]ood cause is 'generally found only in exceptional circumstances where the plaintiff's failure to serve process in a timely manner was the result of circumstances beyond its control'") (quotation omitted).

days may otherwise mark the death of the action." *United States v. Gen'l Int'l Mktg. Group*, 14 CIT 545, 548, 742 F. Supp. 1173, 1176 (1990) (*quoted with approval in United States v. World Commodities Equipment Corp.*, 32 CIT _____, _____, 2008 WL 748677 * 2 (2008)); *see also Tuke v. United States*, 76 F.3d 155, 156 (7th Cir. 1996) (Easterbrook, J.) (affirming dismissal of action, noting that "[a]n attorney who files suit when the statute of limitations is about to

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Although the plaintiff's diligence is the critical factor in evaluating the existence of "good cause" for a failure to effect service within the 120-day period, other factors that some courts have considered include: whether the defendant had actual notice of the complaint (*see In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001)); whether the defendant would be prejudiced by the extension of time (*see In re Sheehan*, 253 F.3d at 512; *Feingold v. Hankin*, 269 F. Supp. 2d 268, 276 (S.D.N.Y. 2003); *Goodstein v. Bombardier Capital, Inc.*, 167 F.R.D. 662, 666 (D. Vt. 1996)); whether the plaintiff would be severely prejudiced if the complaint were dismissed (*see In re Sheehan*, 253 F.3d at 512); the length of time taken to effect service (*see Jonas*, 414 F. Supp. 2d at 416); and whether the plaintiff sought a timely extension of time (*see id.*). Each of these factors is analyzed in detail — in the context of the facts of this case — in section II.A.2 below, in considering whether a discretionary extension of time is justified.

Here, for purposes of analyzing the presence or absence of "good cause," it suffices to note that the weight of the authority holds that even a defendant's actual notice of the complaint does not constitute "good cause" for failure to effect service within the 120-day period established for that purpose. *See, e.g., West v. Terry Bicycles, Inc.*, 230 F.3d 1382, 2000 WL 152805 * 2 (Fed. Cir. 2000) (*per curiam*) (unpublished) (observing that "a defendant's knowledge of the pendency of a lawsuit against it does not cure the plaintiff's insufficient service under Rule 4"); *LSJ Investment Co. v. O.L.D., Inc.*, 167 F.3d 320, 322, 324 (6th Cir. 1999) (refusing to substitute actual knowledge of action for proper service under Fed.R-.Civ.P. 4); Tuke v. United States, 76 F.3d 155, 157 (7th Cir. 1996) (*citing Gabriel v. United States*, 30 F.3d 75 (7th Cir. 1994), for the proposition that "the plaintiff must serve the United States in the way Rule 4 requires; actual notice is insufficient"); *Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 1439 (10th Cir. 1994) (stating that actual notice does not constitute good cause); *Feingold v. Hankin*, 269 F. Supp. 2d at 276 (noting that "actual notice is not considered sufficient to satisfy the standards [for good cause]"); Candido, 242 F.R.D. at 162 (observing, *inter alia*, that "simply being on notice of a lawsuit 'cannot cure an otherwise defective service'").

Similarly, in evaluating good cause for failure to effect service of process within the 120-day period, courts generally decline to consider "the absence of prejudice to the defendant." *See* Wright & Miller, Federal Practice and Procedure § 1137; *see also Despain*, 13 F.3d at 1439 (stating that absence of prejudice to defendant alone does not constitute good cause); *MCI Telecomm. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995) (same).

Most courts have also held that, although the fact that a re-filed action would be time-barred may be considered in determining whether to grant an extension of time as a matter of discretion, it is not a factor to be weighed in determining "good cause." *See, e.g., Petrucelli v. Bohringer and Ratzinger, GmBH*, 46 F.3d 1298, 1305–06 (3d Cir. 1995) (holding that "a district court may not consider the fact that the statute of limitations has run until *after* it has conducted an examination of good cause") (emphasis added); *Mann v. American Airlines*, 324 F.3d 1088, 1090–91 (9th Cir. 2003) (explaining that, if plaintiff has not demonstrated good cause for extension of time, the court may consider the fact that the statute of limitations would bar refiling as a factor in deciding whether to grant extension of time as a matter of court's discretion); Despain, 13 F.3d at 1439 (stating that severe prejudice to

expire must take special care to achieve timely service of process, because a slip-up is fatal"). The plaintiff who seeks to rely on the good cause provision [of the rule governing the timing of service of process] must show *meticulous efforts* to comply with the rule." *In re Kirkland*, 86 F.3d 172, 176 (10th Cir. 1996) (emphasis added). "[H]alf-hearted efforts" at service simply do not suffice. *Petrucelli v. Bohringer and Ratzinger, GmBH*, 46 F.3d 1298, 1307 (3d Cir. 1995) (*quoting Lovelace v. Acme Market, Inc.*, 820 F.2d 81, 84 (3d Cir. 1987)). In short, "[t]he lesson to the federal plaintiff's lawyer is not to take any chances. *Treat the 120 days with the respect reserved for a time bomb*." Petrucelli, 46 F.3d at 1307 (*quoting Braxton v. United States*, 817 F.2d 238, 241 (3d Cir. 1987), *quoting* Siegel, Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions, 96 F.R.D. 88, 109 (1983)) (emphasis added); *see also Cox v. Sandia Corp.*, 941 F.2d 1124, 1126 (10th Cir. 1991) (same quotation).

Here, the Government's efforts to effect service within the 120-day period fell well short of "meticulous." Nothing about the Government's actions could be described as reflecting "a recognition that 120 days may otherwise mark the death of the action," or a sense that the 120-day period was a ticking "time bomb."

The Government's approach to service in this case was simply too cavalier. "It is . . . clear that relying on [reaching defendants via mail] cannot ordinarily be considered a reasonable attempt to accomplish service within 120 days and cannot be viewed as a recognition of the

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plaintiffs due to expiration of statute of limitations does not constitute good cause); *Lau v. Klinger*, 46 F. Supp. 2d 1377, 1381 (S.D. Ga. 1999) (noting that "courts have . . . held that the court must first determine the issue of good cause before proceeding to the issue of the statute of limitations"); *Madison v. BP Oil Co.*, 928 F. Supp. 1132, 1138 (D. Ala. 1996) (noting that expiration of statute of limitations does not figure into good cause determination); *see also United States v. Gen'l Int'l Mktg. Group*, 14 CIT 545, 549, 742 F. Supp. 1173, 1177 (1990) (in evaluating good cause for failure to make service within 120-day period, declining to consider "the fact that the government cannot renew this action").

Similarly, courts have generally ruled that a plaintiff's ultimate success in serving his complaint does not constitute good cause for failure to effect service within the 120-day period. *See, e.g., Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 83, 85 (3d Cir. 1987) (affirming dismissal based on lack of good cause, even though defendant had been served 55 days after 120-day period expired); *United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 549, 742 F. Supp. at 1177 (in evaluating good cause for failure to make service within 120-day period, declining to consider fact that "the [government] ultimately succeeded in making personal service after the 120 day deadline").

Finally, although a handful of cases cite the filing of a timely request for an extension of time as a factor in determining good cause, they are few and far between. As noted above, the principal factor in determining "good cause" for the failure to effect service of process within the 120-day period is the diligence of plaintiff's attempts during that period.

existence of a real deadline." *United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 549, 742 F. Supp. at 1176. "When twenty days have passed after mailing without return of the acknowledgment that the mail was received [or here, for example, when a certain amount of time has passed without the return of an executed waiver of service form], the diligent plaintiff should recognize that other means of service will have to be used within the approximately 100 days which remain." *Id.*, 14 CIT at 549, 742 F. Supp. at 1176; *see also Petrucelli*, 46 F.3d at 1307 (affirming denial of extension of time, stating that "[a] prudent attorney exercising reasonable care and diligence would have inquired further into the matter when it was obvious that the acknowledgment form [included with plaintiff's attempted service of complaint] was not forthcoming").[24] In the instant case, when the

[24] One leading treatise foresees and expressly warns against exactly what the Government did in this case:

> Under amended Rule 4, utilization of the waiver procedure of [Fed.R.Civ.P.] 4(d) [USCIT Rule 4(c)] has become as common as traditional personal service. There should not be a great amount of conflict between [Fed.R.Civ.P.] Rule 4(m) [USCIT Rule 4(l)] and the request-for-waiver provision, although *plaintiffs will have to be wary of consuming too much of the 120 days pursuing a waiver of formal service*. Should the plaintiff's attempt to use the waiver procedure prove unsuccessful and cause the plaintiff to miss the [Fed.R.Civ.P.] Rule 4(m) [USCIT Rule 4(l)] deadline, the diligence with which the plaintiff has been pursuing service should determine whether the court will grant a good-cause extension. *As long as plaintiffs keep the 120-day deadline in sight, problems of tardy service can be avoided*.

Wright & Miller, Federal Practice and Procedure § 1137 (emphases added).

The U.S. Court of Appeals for the Seventh Circuit has sounded a similar note of caution about plaintiffs' over-reliance on waiver of service:

> [Rule 4's provisions] for inexpensive notification of a lawsuit accompanied by a waiver of service offer a useful alternative . . . . In the final analysis, however, the rule does not abolish a defendant's right to proper service of process. *Perhaps this case will serve as a warning to lawyers to watch the time that has elapsed after they mail out a waiver form and to act promptly thereafter if the defendant proves uncooperative.*

Troxell, 160 F.3d at 383 (Wood, J.) (emphasis added); *id.* (underscoring that a defendant is entitled to "stand on its right to receive formal service," and that "[n]othing in Rule 4 obliges a defendant to execute a waiver of service"; "a defendant . . . that wants to stand on formalities, for whatever reason, is entitled to do so, as long as it is willing to pay for the privilege [by paying the costs of service]. [Plaintiff's] effort . . . somehow to blame [the defendant] for [the plaintiff's] problems because [the defendant] refused to return the waiver form fundamentally misunderstands the system established by Rule 4.").

See also, e.g., West v. Terry Bicycles, 230 F.3d 1382, 2000 WL 152805 * 2 (*per curiam*) (unpublished) (observing that "[u]nless the addressee consents to a request for waiver of formal service, receipt of a complaint by mail does not give rise to any obligation to answer the lawsuit"); *Lepone-Dempsey*, 476 F.3d at 1281-82 (emphasizing that "the defendant is not required to waive formal service," and that "if the defendant fails to respond to service by mail, the plaintiff must effect personal service"; "While the plaintiffs may have had good reason to think that they could rely on [the defendant's] assertion that he would sign and return the waiver forms, the plaintiffs were responsible for formally serving the defendants

Government's first mailing failed to yield executed waivers of service from the two Defendants, the Government simply made another mailing, rather than taking more active steps to accomplish service of process. *See* Pl.'s Motion for Extension of Time; Audio Recording of Hearing at 00:21:15–00:21:26, 00:52:26–00:52:36, 02:57:21–02:57:47.

Moreover, to the extent that the Government sought to use the U.S. mail to contact the Defendants and seek waivers of service, its attempts were sloppy and haphazard to say the least. Four months before the Complaint was filed, the Florida Department of Highway Safety & Motor Vehicles had provided the Government with Ronald Rodrigue's most recent address-of-record — the Bamboo Palm Way address, where he was eventually served earlier this year. At the same time, the Florida authorities had advised the Government that the Buffalo Way address was Ronald Rodrigue's *prior* address. *See* Carpio Declaration ¶¶ 6, 8–9. Inexplicably, the Government nevertheless sent its first mailing to Ronald Rodrigue at the out-of-date Buffalo Way address. *See* Complaint, at Certificate of Service. And it appears that, even as to that out-of-date Buffalo Way address, the Government got the zip code wrong. *See* Audio Recording of Hearing at 00:44:49–00:45:21, 00:49:34–00:50:47, 01:02:22–01:02:38 (noting that 33917 is correct zip code); Complaint, at Certificate of Service (indicating that mailing was sent to zip code 33197).

Under circumstances such as these, the Government's attempts to contact the Defendants through the use of mail not only do not constitute evidence of diligence in attempting to effect service within the 120-day period — quite to the contrary, such careless mistakes affirmatively refute any suggestion that the Government's efforts to effect timely service were "meticulous," as required to establish the existence of "good cause."

The Government's tardiness in retaining a professional process service firm similarly weighs heavily against a finding of "good cause." *See, e.g., United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 549, 742 F. Supp. at 1176 (finding no good cause in light of, *inter alia*, "the long period of time which [e]lapsed between the failure of mail service and the day when personal service was first attempted"); *Cox v. Sandia Corp.*, 941 F.2d at 1126 (affirming dismissal for failure to

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when the waiver forms were not returned."); *Lau v. Klinger*, 46 F. Supp. 2d at 1380–81 (holding that defendant's refusal to return acknowledgment of mail service of process does not constitute bad faith on the part of defendant, and does not constitute good cause; "Mail service is an option for defendants, it is not mandatory, nor is it a 'duty,' and plaintiffs cannot cast their burden of service onto the defendants by unfounded accusations of bad faith. . . . When a defendant chooses not to respond to mail service, the plaintiff must effect service by other lawful means. . . . A [defendant's] mere refusal to elect the mail alternative is not a showing of bad faith.").

effect timely service, noting that "[h]ad [plaintiff's] counsel promptly sent process to the server, he might well have avoided the instant problem"); *McIsaac v. Ford*, 193 F. Supp. 2d 382, 384 (D. Mass. 2002) (finding no good cause where, *inter alia*, plaintiff "[did] nothing until the last minute" to retain a professional process server).[25] Here, the Government failed to engage a professional process service firm until only 21 days of the 120-day period remained.

In addition, rather than dispatching professional process servers to attempt service at multiple addresses, the Government attempted service at only a single address for each of the Defendants. The Government sent a professional process server to attempt service on Leroy Rodrigue at an address on 85th Terrace, where the resident had no knowledge of the Defendant. *See* Affidavit of Diligent Search and Inquiry. For whatever reason, the Government elected not to send a process server to the address on 156th Place in Miami — the address that the Florida Department of Highway Safety & Motor Vehicles had identified as Leroy Rodrigue's most recent address-of-record. *See* Carpio Declaration ¶ 7. Nor did the Government attempt personal service on Leroy Rodrigue at any other address. The Government made no additional inquiries and took no further action to locate or serve Leroy Rodrigue in the three days remaining before the 120-day period for service of process ended on September 18, 2008. *See United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 549, 742 F. Supp. at 1176 (finding no good cause in light of, *inter alia*, "the lack of any further attempt in the eleven days remaining" in the 120-day period, following a brief failed attempt by professional process server).

The Government's efforts to deploy a professional process server to serve Ronald Rodrigue were, if anything, even more unimpressive. As with Leroy Rodrigue, rather than instructing the professional process server to try multiple addresses in the Government's possession, the Government instead directed the process server to attempt to serve Ronald Rodrigue at only one address. That address was the address on Buffalo Way, which the Florida Department of Highway Safety & Motor Vehicles had clearly identified as Ronald Rodrigue's *prior address*. *See* Carpio Declaration ¶ 8.

Moreover, as with Leroy Rodrigue, after attempts to serve Ronald Rodrigue at the indicated address failed, the Government simply sat on its hands for the remainder of the 120-day period, as the sand continued to trickle through the hourglass. Incredibly, for whatever

[25] *See also, e.g., United States v. Britt*, 170 F.R.D. 8, 9 (D. Md. 1996) (holding that plaintiff's inaction over period of more than 90 days, during which time defendant failed to respond to request for waiver of service, did not support finding of good cause warranting extension of time to effect service; nor was discretionary extension of time appropriate).

reason, the Government elected not to send a process server to the address on Bamboo Palm Way — the address that the Florida Department of Highway Safety & Motor Vehicles had identified as Ronald Rodrigue's most recent address-of-record, and, in fact, the address at which Ronald Rodrigue was eventually served, in late February of this year. *See* Carpio Declaration ¶ 8; Audio Recording of Hearing at 00:06:54–00:06:59, 01:01:35–01:02:19, 01:03:38–01:04:27, 01:06:19–01:06:25, 02:29:24–02:29:34, 02:30:00–02:30:59.[26] Nor did the Government attempt personal service on Ronald Rodrigue at any other address. The Government made no additional inquiries and took no further action to locate or serve Ronald Rodrigue in the five days remaining before the 120-day period for service of process ended on September 18, 2008. *See United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 549, 742 F. Supp. at 1176 (cited above).

It is no excuse to say — as the Government suggested at the hearing on the pending motions — that the Government was ambivalent about and lacked confidence in the addresses that it had for the two Defendants. *See, e.g.*, Audio Recording of Hearing at 1:07:59–1:08:15, 3:57:54–3:57:59, 04:24:54–04:24:56. In such a situation, a diligent plaintiff exerting "meticulous efforts" to accomplish proper service within the 120-day period would have dispatched professional process servers to all known potential addresses in its possession, and, further, would have updated its research and undertaken additional research to identify any other potential addresses, to locate the missing defendants.

In contrast, here (as discussed above) the Government contented itself with sending professional process servers to a single address for each of the Defendants — and in neither case was it the address that the Florida Department of Highway Safety & Motor Vehicles had identified as the respective Defendant's most recent address-of-record. *See* Affidavit of Diligent Search and Inquiry; Affidavit of Non-Service; Carpio Declaration ¶¶ 7–8. Moreover, the Government never sought updated contact information from that Florida agency, and instead continued to rely on addresses that the agency had provided some eight months before the September 18, 2008 deadline for service of process. *See* Audio Recording of Hearing at 00:19:55–00:20:10, 02:47:20–02:48:05 (stating that report of Florida

[26] Had the Government made reasonable attempts to serve Ronald Rodrigue at the Bamboo Palm Way address in September 2008 (prior to the expiration of the 120-day period), there is no reason to believe that proper service could not have been achieved. And, if the Government had asked Ronald Rodrigue about the whereabouts of his son, it might well have been possible for the Government to effect timely service on Leroy Rodrigue as well. *See generally* n.59, *infra* (cataloguing cases concerning contacting relatives to locate absentee defendants).

Department of Highway Safety & Motor Vehicles is dated January 22, 2008). Finally, the Government failed to undertake any additional research to use other sources to identify other potential addresses for the Defendants.[27] And for at least the last three days of the 120-day period, the Government did absolutely nothing — *nothing whatsoever* — to locate or effect service on the two Defendants.

The record of action — and inaction — outlined above does not portray the Government as a plaintiff intent on diligently seeking to effect proper service of process on the Defendants in order to ensure the viability of its case, ever-mindful that the 120-day period for service of process was a ticking "time bomb" with the potential to "mark the death of the action." *See Braxton*, 817 F.2d at 241 (quotation omitted); *United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 548, 742 F. Supp. at 1176.[28] The Government simply has not shown "good cause" for its failure to serve the Defendants within the 120-day period following the filing of its Complaint in this matter. Nor can it do so. The Government therefore is not entitled to an extension of time to effect service of process.

2. *Extension of Time Absent Good Cause, As a Matter of Discretion*

Under USCIT Rule 4(l)—like Rule 4(m) of the Federal Rules of Civil Procedure — a court may, in its discretion, grant an extension of time to effect service even in the absence of good cause. *See Henderson v. United States*, 517 U.S. 654, 662–63 (1996) (*citing* Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments). However, the Govern-

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[27] *See, e.g., United States v. Tobins*, 483 F. Supp. 2d 68, 78–79 (D. Mass. 2007) (emphasizing that "in hindsight, other efforts could have been made," but identifying as "reasonable efforts" exerted to locate and serve defendant: (1) contact with defendant's counsel to obtain defendant's address; (2) confirming that address "using a postal tracer"; (3) "speaking directly with [defendant's] wife"; and (4) "various attempts to identify an updated address for [defendant], which included Postal Service tracers, searches of Department of Motor Vehicles records, and searches for wage reports").

See also Shuster v. Conley, 107 F.R.D. at 757 (in considering motion to serve by publication, suggesting as "examples of a good faith effort to locate a defendant: 1) inquiries of postal authorities, 2) inquiries of relatives, neighbors, friends, and employers of the defendant, and 3) examinations of local telephone directories, voter registration records, [and] local tax records"); nn.52–115, *infra* (identifying wide range of sources and methods required by courts and/or used by diligent plaintiffs in other cases to locate and serve process on absentee defendants).

[28] *See also McIsaac v. Ford*, 193 F. Supp. 2d at 384 (denying extension of time to effect service, explaining that "[t]he risk of [what was in effect] a dismissal with prejudice is one that [plaintiff] assumed by waiting until two days before the expiration of the statute of limitations to file his Complaint and then doing nothing until the last minute to have it served").

ment failed to seek such an extension here. *See* Pl.'s Motion for Extension of Time (arguing only that Government has shown "good cause" for failure to serve within 120-day period; making no argument that, in the alternative, extension should be granted as a matter of court's discretion); Pl.'s Motion for Service by Publication (same).[29]

In any event, even had the Government argued that it should be granted a discretionary extension in this case, that request would have been denied. Factors that courts have considered in determining whether to extend the time for service of process even in the absence of a showing of good cause include whether "the statute of limitations would bar the refiled action";[30] whether "the defendant is evading service or conceal[ed] a defect in attempted service";[31] whether the defendant had actual notice of the complaint;[32] whether the

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[29] *Compare, e.g., United States v. World Commodities*, 32 CIT at ____, 2008 WL 748677 * 3 (where Customs argued that "even if no good cause exists, the court should exercise its discretion to grant an extension of time for service"); *Zapata v. City of New York*, 502 F.3d 192, 197 (2d Cir. 2007) (where plaintiff "argued to the district court both that he had shown good cause and that the time-bar justified an extension even in the absence of good cause"); *United States v. Tobins*, 483 F. Supp. 2d at 77 (where government argued that an extension of time was warranted "because it has shown good cause for any delay," and, further, that "even if [the] court finds no good cause for a delay. . . , . . . [the] court should exercise its discretion and grant an extension of time to perfect service of process").

See also Thompson v. Brown, 91 F.3d 20, 21–22 (5th Cir. 1996) (holding that district court was not obligated to address its discretionary power to grant extension of time for service of process where plaintiff failed to argue that it should be granted an extension even absent a showing of good cause).

[30] *See* Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments (stating that, even absent showing of good cause, "[r]elief may be justified, for example, if the applicable statute of limitations would bar the refiled action"); *see also, e.g., Zapata*, 502 F.3d at 197–98; *Lepone-Dempsey*, 476 F.3d at 1282; *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132–33 (11th Cir. 2005); *Mann v. American Airlines*, 324 F.3d at 1090–91; *Troxell*, 160 F.3d at 383; *Petrucelli*, 46 F.3d at 1305–08; *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 2, 4; *United States v. Tobins*, 483 F. Supp. 2d at 79–80; *Beauvoir*, 234 F.R.D. at 58; *Feingold v. Hankin*, 269 F. Supp. 2d at 277; *McIsaac v. Ford*, 193 F. Supp. 2d at 384; Goodstein, 167 F.R.D. at 666.

[31] *See* Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments (stating that, even absent showing of good cause, "[r]elief may be justified, for example, . . . if the defendant is evading service or conceals a defect in attempted service"); *see also, e.g., Lepone-Dempsey*, 476 F.3d at 1282; *Horenkamp*, 402 F.3d at 1132–33; *Petrucelli*, 46 F.3d at 1305–06; *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 2, 4; *Beauvoir*, 234 F.R.D. at 58; *Feingold v. Hankin*, 269 F. Supp. 2d at 277; *Goodstein*, 167 F.R.D. at 666.

[32] *See, e.g., Zapata*, 502 F.3d at 198-99; *Horenkamp*, 402 F.3d at 1133; *Troxell*, 160 F.3d at 383; *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 4; *United States v. Tobins*, 483 F. Supp. 2d at 79–80; *Beauvoir*, 234 F.R.D. at 58–59; *Lane v. Lucent Techs., Inc.*, 388 F. Supp. 2d 590, 597 (M.D. N.C. 2005); *Feingold v. Hankin*, 269 F. Supp. 2d at 277.

defendant would be prejudiced by the extension of time;[33] whether service of process was eventually achieved, and, if so, when;[34] and whether the plaintiff sought a timely extension of time.[35] As outlined below, none of these factors militates in favor of an extension of time in this case.

The relevant Advisory Committee Note expressly identifies two factors that may justify the grant of an extension of time for service of process notwithstanding the absence of good cause:

> Relief may be justified, for example, if *the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service*.

Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments (emphases added).

[33] *See, e.g., Zapata*, 502 F.3d at 197–99; *Troxell*, 160 F.3d at 383; *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 3–4 (noting defendant's claim that plaintiff "would suffer no prejudice from the delay" in service, but observing that, *inter alia*, "there is no clear indication that the defendant had actual notice of the claim" within the 120-day period); *United States v. Tobins*, 483 F. Supp. 2d at 79–80; *Beauvoir*, 234 F.R.D. at 58–59; *Feingold v. Hankin*, 269 F. Supp. 2d at 277; *Goodstein*, 167 F.R.D. at 666.

[34] *See, e.g., Zapata*, 502 F.3d at 194, 198–99 (service four days late, discussed in context of prejudice to defendant); *Horenkamp*, 402 F.3d at 1130, 1133 (service 29 days late); *Lane v. Lucent Techs.*, 388 F. Supp. 2d at 597 (service three days late); *see also Troxell*, 160 F.3d at 383; *Goodstein*, 167 F.R.D. at 666; *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 1, 3 (although court notes plaintiff's argument that service was less than one month late, that argument is not directly addressed); *United States v. Tobins*, 483 F. Supp. 2d at 70, 81 (although court notes that service has been effected, court does not directly discuss the factor); Jonas, 414 F. Supp. 2d at 416; *McIsaac v. Ford*, 193 F. Supp. 2d at 382 (court notes that three defendants were served only two or three days late, but does not directly address the factor).

[35] *See, e.g., Zapata*, 502 F.3d at 199 (motion for extension of time filed *nunc pro tunc*); *United States v. Tobins*, 483 F. Supp. 2d at 81 (failure to seek extension of time); *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 1, 4 (although court notes that motion for extension of time was filed out-of-time, court does not directly address the factor); *McIsaac v. Ford*, 193 F. Supp. 2d at 384 (court holds that, absent timely motion for extension of time, court will not entertain request for discretionary extension of time for service of process, even where statute of limitations will bar refiling).

In addition, in considering requests for discretionary extensions of time, some courts have acknowledged the potential significance of certain other factors that are not relevant here — such as whether the plaintiff is acting *pro se*, and whether the method of service at issue is unusual or particularly complicated. *See, e.g., United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 4 (noting that plaintiff is not *pro se*, and "the rules of service are no more complex than any other customs case"); *Lane v. Lucent Techs.*, 388 F. Supp. 2d at 597 (noting that plaintiff is *pro se*); *see also McIsaac v. Ford*, 193 F. Supp. 2d at 384 (holding that, except where plaintiff is *pro se* and "can show confusion on his part, either because of his unfamiliarity with the rules, or because of his reliance on the misleading advice of others," court will not entertain request for discretionary extension of time for service of process, even where statute of limitations will bar refiling).

In the instant case, because the statute of limitations expired with the filing of the Complaint, denying the requested extensions of time will severely prejudice the Government, because the statute of limitations will bar the Government from refiling. But the Government has no one but itself to blame for that fact.

The Government has not argued, and there is nothing in the record to suggest, that anything prevented the Government from commencing this action well before the eleventh hour and fifty-ninth minute. And, by filing its Complaint at the last possible moment, the Government — in essence — "assumed the risk" of entirely forfeiting its cause of action if it failed to effect proper service of process within 120 days. *See, e.g., United States v. Gen'l Int'l Mktg. Group*, 14 CIT at 548, 742 F. Supp. at 1176 (noting that, especially where statute of limitations has expired, plaintiff must exert "such efforts at service as are consistent with a recognition that 120 days may otherwise mark the death of the action"); *Tuke v. United States*, 76 F.3d at 156 (Easterbrook, J.) (warning that "[a]n attorney who files suit when the statute of limitations is about to expire must take special care to achieve timely service of process, because a slip-up is fatal").

Faced with that reality, one reasonably would have expected the Government to demonstrate uber-diligence in attempting timely service of process on the two Defendants. Instead, the Government's actions here were careless, dilatory, and half-hearted. As the Second Circuit Court of Appeals emphasized in its seminal opinion in *Zapata*:

> It is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action, especially if the defendant had no actual notice of the existence of the complaint until the service period had expired; and *it is equally obvious that any plaintiff would suffer by having the complaint dismissed with prejudice on technical grounds — this is no less true where the technical default was the result of pure neglect on the plaintiff's part. But . . . no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff's neglect*.

Zapata v. City of New York, 502 F.3d 192, 198 (2d Cir. 2007) (emphasis added).

Moreover, the Government's neglect in this case has extended well beyond the 120-day period. The Government did not effect service of process on Ronald Rodrigue until February 25, 2009 — more than *five months* after the 120-day period had ended. And Leroy Rodrigue *still* has not been served, *one full year* after the end of the 120-day period. It is also telling that, from at least September 15, 2008 (three days

before the end of the 120-day period) until sometime in late January 2009, the Government made no additional inquiries and took no further action to locate or serve either of the Defendants. In other words, for a period of more than four months, the Government did absolutely nothing in this matter, other than file the pending motions. In addition, even after the Government made the decision in late January 2009 to engage professional process servers to again attempt personal service on the Defendants, those attempts were inexplicably delayed until late February 2009. Moreover, the Government made no further efforts to locate or serve Leroy Rodrigue after February 27, 2009 — either before the April 6, 2009 hearing in this matter, or since. Indeed, although the Government served Ronald Rodrigue, it never even asked him about the whereabouts of his son.

Under these circumstances, the fact that the statute of limitations would bar the Government from refiling would not weigh in favor of a discretionary extension of time in this action. *See, e.g., Lepone-Dempsey v. Carroll County Commissioners*, 476 F.3d 1277, 1282 (11th Cir. 2007) (emphasizing that "the running of the statute of limitations . . . does not require that the district court extend the time for service of process"); *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1133 (11th Cir. 2005) (stating that "the running of the statute of limitations does not require that a district court extend the time for service of process"); *Coleman v. Milwaukee Bd. of School Directors*, 290 F.3d 932, 934 (7th Cir. 2002) (Posner, J.) (noting that "the cases make clear that the fact that the balance of hardships favors the plaintiff does not *require* the . . . judge to excuse the plaintiff's failure to serve the complaint and summons within the 120 days provided by the rule");[36] *Petrucelli*, 46 F.3d at 1306 ("We emphasize that the running of the statute of limitations does not require the district court to extend [the] time for service of process.").

As a second possible factor justifying a discretionary extension of time (in addition to the first possible factor, the fact that the statute of limitations would bar the refiling of an action), the Advisory Committee Note cites the defendant's evasion of service or concealment of a defect in service. *See* Fed.R.Civ.P. 4(m), Advisory Committee Note, 1993 Amendments (discretionary extension may be justified "if the defendant is evading service or conceals a defect in attempted service"). In the instant case, the Government said nothing about eva-

[36] *Coleman*, for example, affirmed the dismissal of plaintiff's action even though "the defendant [did] not show any actual harm to its ability to defend the suit as a consequence of the delay in service, . . . it is quite likely that the defendant received actual notice of the suit [during the 120-day period] within a short time after the attempted service, and . . . moreover dismissal without prejudice has the effect of dismissal with prejudice because the statute of limitations has run." *Coleman*, 290 F.3d at 934.

sion or concealment in its motion papers. *See* Pl.'s Motion for Extension of Time; Pl.'s Motion for Service by Publication. But, at the hearing on the motions, the Government made several vague allusions to evasion. When pressed, however, the Government was unable to cite facts to substantiate that intimation, and the Government quickly backed down. *See* Audio Recording of Hearing at 2:28:21–2:28:28 (Government notes that it is not representing that Rodrigues are evading service), 4:24:43–4:24:53 (conceding that Government has "no legal basis" for claiming evasion); *see generally id.* at 00:26:58–00:27:08, 02:28:02–02:28:28, 03:24:57–03:25:06, 04:24:34–04:25:05.

The mere fact that a plaintiff experiences difficulty in effecting service of process does not mean that the defendant is guilty of evasion. The record here is devoid of any indication that Leroy Rodrigue is affirmatively evading service. Moreover, earlier this year the Government actually served Ronald Rodrigue at the very address that the Florida Department of Highway Safety & Motor Vehicles had provided to Customs as Ronald Rodrigue's most recent address-of-record in early 2008 — an address at which the Government had not previously attempted personal service. And, as noted elsewhere, there is no reason to believe that Ronald Rodrigue could not have been timely served at that same address in September 2008 (or even earlier) if the Government had sent a professional process server to the address (rather than directing the process server to Ronald Rodrigue's *prior* address).

In short, there is simply no evidence whatsoever to suggest that either of the two Defendants has engaged in any improper action to evade service of process. *See, e.g., Bedgood v. Garcia*, 2009 WL 1664131 * 4 (M.D. Ala. 2009) (emphasizing that "the fact that serving a defendant has proven to be a difficult and onerous task does not equate with a finding that a defendant is avoiding service"); *id.* at * 3 (observing that "[i]t could well be that plaintiffs are looking in the wrong places for [the defendant] or that he has left the area for reasons unrelated to the plaintiffs' suit. Absent some evidence of culpability, the court will not presume that [the defendant] is avoiding service simply because the plaintiffs have not located him.") (quotation omitted); *id.* (noting that return of certified mail as "unclaimed" does not constitute evasion) (quotation omitted); *Shuster v. Conley*, 107 F.R.D. at 757 (noting that "[t]he fact that the defendant moved without leaving a forwarding address alone does not evidence an effort to conceal his whereabouts," and does not constitute evasion of service); *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 2, 4 (examining assertions of evasion in context of "good

cause" analysis, and holding that "Customs' vague allegations as to a single address change and difficulty in serving other pleadings . . . cannot reasonably be viewed as evasion of service"). This factor thus would not weigh in favor of a discretionary extension of time in this case.

The third factor that some courts have considered in evaluating a request for a discretionary extension of time to effect service of process is whether the defendant had actual notice of the complaint within the 120-day period. In the case at bar, there is no evidence that either of the two Defendants had actual notice of the Complaint within that timeframe. Nor has the Government argued that either Defendant was on actual notice. The mere fact that mailings were not returned to the Government does not establish that those mailings ever reached the Defendants, or — even if they did — that the mailings were opened and read by the Defendants. *Cf. United States v. Thorson*, 806 F.2d 1061, 1065 (Fed. Cir. 1986) (observing that "[m]isdelivery, delayed delivery, or nondelivery of mail unfortunately sometimes happens"). Further, there is no evidence that the one mailing that was returned to the Government had been opened, much less read by either of the Defendants. Accordingly, this factor too would weigh against a discretionary extension of time in this case.

The next factor — prejudice to the defendant — is the "flip side" of the first factor (discussed above), and is generally accorded great weight by the courts. While a defendant may not suffer prejudice if the time for service is extended where the statute of limitations has not yet run, the situation is very different in a case such as this. The Complaint here was filed on the day that the statute of limitations expired; and, 120 days later, the Defendants still had not been served with the Complaint. When the statute of limitations has expired and the defendant has no notice of the pendency of an action, the doctrine of repose counsels against extending the 120-day period for service of process, particularly where (as here) the plaintiff has been (to put it mildly) less than diligent in attempting to effect service within that timeframe. *Cf. Petrucelli*, 46 F.3d at 1306 n.7 (emphasizing that rule governing extensions of time should not be interpreted so as to "defeat the purpose and bar of statutes of repose"). As *Zapata* explained:

> *It is obvious that any defendant would be harmed by a generous extension of the service period beyond the limitations period for the action, especially if the defendant had no actual notice of the existence of the complaint until the service period had expired*; and it is equally obvious that any plaintiff would suffer by having the complaint dismissed with prejudice on technical grounds — this is no less true where the technical default was

> the result of pure neglect on the plaintiff's part. But . . . *no weighing of the prejudices between the two parties can ignore that the situation is the result of the plaintiff's neglect*.

Zapata, 502 F.3d at 198 (emphases added) (underscoring "the prejudice to the defendant that arises from the necessity of defending an action after both the original service period and the statute of limitations have passed before service"). In light of all the facts and circumstances, this factor weighs heavily against a discretionary extension of time here.

As to the length of time taken to actually effect service of process, this is most definitely not a case where service was effected within a matter of days, or even weeks, after the end of the 120-day period. *Compare, e.g., Zapata*, 502 F.3d at 194, 198-99 (affirming dismissal for failure to effect timely service, where service was made only four days after 120-day period ended); *United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 1, 3 (dismissing action, even though service was effected less than one month after 120-day period ended); *McIsaac v. Ford*, 193 F. Supp. 2d at 382 (dismissing action, even though defendants were served mere two or three days after 120-day period ended). The Government did not effect service of process on Ronald Rodrigue until more than five months after the 120-day period had ended. And, a full year after the end of the 120-day period, Leroy Rodrigue still has not been served. In light of these facts, and other compelling evidence of the Government's procrastination and lack of diligence, this factor also would weigh heavily against a discretionary extension of time.

Finally, although the Government asserts that it timely sought an extension of the 120-day period for service of process, the Government concedes that it did not seek to file that request until the last day before the 120-day period expired, and that it took no action to confirm that its motion had been docketed until late October or early November 2008, when it discovered that no motion had been received by the court. *See* n.1, *supra*; Pl.'s Motion for Extension of Time (dated Sept. 17, 2008; not received until filed *nunc pro tunc*); Audio Recording of Hearing at 00:31:54–00:39:29, 03:30:31–03:32:11, 03:32:54–03:33:04, 03:35:00–03:35:29. And, even after the Government made that discovery, the Government did not take immediate action to cure the problem. *See* Audio Recording of Hearing at 03:32:40–03:32:50, 03:34:18–03:34:40, 03:35:29–03:40:14. Under such circumstances, the Government cannot claim much credit for assertedly being *timely* in seeking an extension of the 120-day period for service of process.

In short, the Government here asserted only that it had shown "good cause" justifying an extension of the 120-day period for service of process, and failed to argue (either in its brief or at the hearing) that — even absent good cause — an extension of time would be warranted, as a matter of the court's discretion. It makes little difference. For all the reasons outlined above, any such request would not have been granted.

B. *The Government's Motion for Service of Process by Publication*

In addition to its request for two extensions of the 120-day period to effect service of process, the Government also seeks leave to effect service of process by publication. *See generally* Pl.'s Motion for Service by Publication.[37] Because the Government failed to seek leave to serve by publication until the penultimate day of the 120-day period for service of process, the denial of the requested extensions of time effectively moots the Government's motion for service by publication. See section II.A, supra (denying motions for extensions of time). As discussed below, however, even if the extensions of time were granted, the Government nevertheless would not be entitled to serve by publication, both because the sworn statement(s) that the Government submitted in support of its request are not legally sufficient under Florida law, and — even more fundamentally — because the Government failed to conduct the requisite "diligent search and inquiry" to attempt to determine the whereabouts of the Defendants, before resorting to service by publication.[38]

1. *The Facial Sufficiency of the Motion for Service of Process by Publication*

The Government invokes USCIT Rule 4(d), which permits service upon an individual "pursuant to the law of the state in which service is effected, for the service of a summons in an action brought in the courts of general jurisdiction of the state," by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where service is made." USCIT R. 4(d)(1).[39] The Government notes that the Florida statutes for constructive service of

[37] The Government has never formally withdrawn its Motion for Service by Publication as to Ronald Rodrigue. As the Government noted in the course of the hearing, however, the motion was effected mooted as to Ronald Rodrigue on February 25, 2008, when he was personally served. *See* Audio Recording of Hearing at 04:00:07–04:00:16.

[38] Although the Government reportedly effected personal service on Ronald Rodrigue in late February of this year, the Government has not formally withdrawn its Motion for Service by Publication as to him.

[39] USCIT Rule 4(d)(1) parallels Rule 4(e)(1) of the Federal Rules of Civil Procedure.

process provide for service by publication "[t]o enforce any . . . debt owing by any party on whom process can be served within [the] state." *See* Fla. Stat. §§ 49.011, 49.021 (2008).

The Government further acknowledges that Florida law requires — as a condition precedent to service by publication — that a plaintiff file a verified or sworn statement attesting, *inter alia*, "that the residence of the person [to be served] is[] either: (a) [u]nknown to the affiant; or (b) [i]n some state or country other than [Florida] . . . ; or (c) [i]n the state, but that he or she has been absent from the state for more than 60 days . . . , or conceals himself or herself so that process cannot be personally served." *See* Pl.'s Motion for Service by Publication at 3; Fla. Stat. § 49.041 (2008). However, none of the papers filed in support of the Government's Motion for Service by Publication – the Carpio Declaration, the Affidavit of Diligent Search and Inquiry (executed by Ross Frew), or the Affidavit of Non-Service (executed by Brian S. Johns) — fulfills the requirement of Florida law quoted immediately above. *Compare* Fla. Stat. § 49.041(3) *with* Carpio Declaration; Affidavit of Diligent Search and Inquiry; and Affidavit of Non-Service. The Government's papers are thus legally insufficient on their face.

As the Florida courts have consistently held, "because the lack of personal service implicates due process concerns, a plaintiff must strictly comply with the statutory requirements" for service of process by publication. *Redfield Investments, A.V.V. v. Village of Pinecrest*, 990 So. 2d 1135, 1138–40 (Fla. Dist. Ct. App. 2008) (holding affidavit legally insufficient on its face); *see also, e.g., Levenson v. McCarty*, 877 So. 2d 818, 820 (Fla. Dist. Ct. App. 2004) (stating that "[c]onstructive service statutes are strictly construed against a plaintiff who seeks to obtain service of process under them"); *Godsell v. United Guaranty Residential Ins.*, 923 So. 2d 1209, 1213, 1215 (Fla. Dist. Ct. App. 2006) (same; also holding affidavit legally insufficient on its face); *Gans v. Heathgate-Sunflower Homeowners Ass'n, Inc.*, 593 So. 2d 549, 552–53 (Fla. Dist. Ct. App. 1992) (same; also holding affidavit legally insufficient on its face). The Florida courts have not hesitated to set aside judgments obtained through service by publication where the supporting affidavit did not strictly comply with the requirements of the statute.

In *Godsell*, for example, the court found that an affidavit had "a number of facial defects," where the affidavit failed to state "whether the person [to be served] is over or under eighteen, [and] whether the address is unknown to the affiant," and where the affidavit "omit[ted] any reference to the important fact of defendant's Canadian resi-

dence." *See Godsell*, 923 So. 2d at 1215. The court therefore concluded that, "although the 'diligent search and inquiry' claim was contained in the affidavit, [the affidavit] was otherwise not in compliance with the statute." *Id.*

Similarly, in *Redfield Investments*, the court found the affidavit legally insufficient on its face because many of the averments stated that an inquiry of a source had not "*yet* revealed an accurate or current forwarding address for the Defendant." *See Redfield Investments*, 990 So. 2d at 1139–40. The court held that, "[b]ecause constructive service by publication may not be utilized where personal service can be had, the use of such qualifying terminology, at a minimum, leaves open to question whether . . . [the averments in the affidavit] are sufficient to constitute strict compliance with the service by publication statute." *Id.* at 1140 (internal citation omitted).

To the same effect is *Gans*, 593 So. 2d at 552–53. In *Gans*, the court underscored that "[i]t is a fundamental principle of law that a plaintiff must strictly comply with a service of process by publication statute," and stated that "[a]n order of publication based on a sworn statement which does not comply with the statute fails to confer jurisdiction." *Id.* at 552. The *Gans* court concluded that the affidavit in that case was defective, because it did not comply with the part of § 49.041 "which requires that the sworn statement set forth the residence of the defendant as particularly as is known to the affiant." *Id.* at 552–53.

In the case at bar, the papers filed by the Government describe the measures taken to attempt to effect service of process on the Defendants as a "diligent search and inquiry," and state that Ronald and Leroy Rodrigue are both over the age of 18. *See* Carpio Declaration; Affidavit of Diligent Search and Inquiry; Affidavit of Non-Service. The Government's papers therefore satisfy the first two parts of section 49.041 of the Florida statutes. *See* Fla. Stat. § 49.041(1) & (2). However, the Government has failed to satisfy the requirements of section 49.041(3), which mandate that service by publication be supported by a sworn statement indicating "that the residence of [the person to be served] is, either:"

(a) Unknown to the affiant; or

(b) In some state or country other than [Florida], stating said residence if known; or

(c) In the state [of Florida], but that he or she has been absent from the state for more than 60 days next preceding the making of the sworn statement, or conceals himself or herself so that process cannot be personally served, and that affiant believes

> that there is no person in the state upon whom service of process would bind said absent or concealed defendant.

Fla. Stat. § 49.041(3). The absence of such a statement would be fatal to the Government's Motion for Service by Publication, if that motion were not already moot. *See Godsell*, 923 So. 2d at 1215 (holding service by publication void where, *inter alia*, affidavit failed to state "whether the address [of the person to be served] is unknown to the affiant"); *see also, e.g., Redfield Investments*, 990 So. 2d at 1139–40; Gans, 593 So. 2d at 552–53; *cf. Demars v. Village of Sandalwood Lakes Homeowners Ass'n, Inc.*, 625 So. 2d 1219, 1220–23 (Fla. Dist. Ct. App. 1993) (where "bare bones" affidavit stated, *inter alia*, that "a diligent search and inquiry" had been made and that "Defendant's place of residence is unknown," holding that sworn statement in support of service by publication need only "parrot" or "track" the language of the statute; unnecessary for affiant to include specific facts demonstrating that a diligent search was undertaken).[40]

2. *The Substantive Merits of the Motion for Service of Process by Publication*

Even assuming that the Government's Motion for Service by Publication were not moot, and further assuming that the Government's papers in support of that motion were not legally insufficient on their face (as set forth in section II.B.1 above), the Government's Motion for Service by Publication nevertheless would have to be denied, because the Government failed to undertake the requisite "diligent search and inquiry" to attempt to locate and personally serve the Defendants, before resorting to service of process by publication.[41]

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[40] Although the *Demars* court held that a plaintiff is not required to include in its affidavit the specific facts of its "diligent search and inquiry," the court also noted that "the better practice is to file an affidavit . . . which contains all the details of the search," to "simplif[y] review of constructive service for the court." *See Demars*, 625 So. 2d at 1223–24 & n3.

[41] The Supreme Court has emphasized that "[n]otice by publication is a poor and sometimes a hopeless substitute for actual service of notice," conceding that "[i]ts justification is difficult at best." *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953) (*quoted in Schroeder v. City of New York*, 371 U.S. 208, 213 (1962)). One court has poetically observed that "[t]he process of constructive service through publication is a concession of the law to the hard circumstances of necessity." *Empire of America, FFA v. Brown*, 1986 WL 3034 * 1 (N.D. Ill. 1986) (*quoting Graham v. O'Connor*, 350 Ill. 36, 40 (1932)). "The law makes this concession grudgingly." *Id.*

Service by publication is thus strictly a measure of "last resort." *See, e.g.*, Wright & Miller, Federal Practice and Procedure § 1115; MATSCO v. Brighton Family Dental, P.C., 597 F. Supp. 2d 158, 163 (D. Me. 2009) (quotation omitted); *Duarte v. Freeland*, 2008 WL 683427 * 1 (N.D. Cal. 2008) (quotation omitted); *Thrivent Financial for Lutherans v. Savercool*, 2008 WL 5412095 * 3 (M.D. Pa. 2008). Indeed, one leading treatise states flatly that

"[P]ersonal service of process on a defendant is the usual and preferred method of serving a defendant with notice of an action." Redfield Investments, 990 So. 2d at 1138. Thus, service by publication is permitted only in exceptional cases, "when the plaintiff cannot effect personal service. . . . The determining factor is whether personal service 'cannot be had.'" Gans, 593 So. 2d at 551 (citation omitted); *see also* Godsell, 923 So. 2d at 1213; Dor Cha, Inc. v. Hollingsworth, 876 So. 2d 678, 680 (Fla. Dist. Ct. App. 2004) (stating that "[a] party seeking to utilize service by publication must be able to show that personal service could not be made"); McDaniel v. McElvy, 108 So. 820, 830–31 (Fla. 1926) (underscoring that "resort to constructive service by publication is predicated upon necessity, and, if personal service could be effected by the exercise of reasonable diligence, substituted service is unauthorized").[42]

As such, "court-ordered service by publication is appropriate only after the plaintiff has demonstrated . . . that all of the statutory modes of service have been diligently exhausted without successful service and that all reasonable efforts to locate the defendant have failed." *Prudential Ins. Co. of Am. v. Holladay*, 2008 WL 1925293 * 3 (D.N.J. 2008).[43] Accordingly, even if the Government's papers here

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"[service by publication] ordinarily is not a proper means of service in actions based on in personam jurisdiction." Wright & Miller, Federal Practice and Procedure § 1074. It is, to say the very least, "disfavored." *See Booth v. Martinez*, 2007 WL 2086659 * 1 (W.D. Tex. 2007); *Prudential Ins. Co. of Am. v. Holladay*, 2008 WL 1925293 * 3 (D.N.J. 2008). Other courts have emphasized that it is "an extraordinary measure," *see Furin v. Reese Teleservices, Inc.*, 2008 WL 5068955 * 2 (W.D. Pa. 2008) (quotation omitted), and "the exception, not the rule," *see Thrivent Financial*, 2008 WL 5412095 * 3 (quotation omitted).

[42] "Where personal service of process cannot be had, then service of process by publication may be had upon the filing of an affidavit on plaintiff's behalf stating the residence of the person to be served as particularly as is known after 'diligent search and inquiry.'" *Gmaz v. King*, 238 So. 2d 511, 514 (Fla. Dist. Ct. App. 1970) (quotation omitted).

In the instant case, the Government's sworn submissions are conspicuously short on the specific facts and details of the Government's attempts to locate and effect service of process on the two Defendants. *See* Carpio Declaration; Affidavit of Diligent Search and Inquiry; Affidavit of Non-Service. Even if counsel's numerous unsworn and undocumented factual representations made orally in the course of the hearing in this matter were considered, however, the Government still would not meet its burden.

[43] Florida law on service of process by publication generally parallels that of other states which authorize such service only in those cases where a plaintiff can demonstrate that, despite its diligent efforts, it cannot locate and/or serve a defendant. The law of such other jurisdictions is thus instructive here. *See generally* Wright & Miller, Federal Practice and Procedure § 1074 n.21; *see also, e.g.*, MATSCO, 597 F. Supp. 2d at 160 (quoting Maine law, which authorizes service by publication only where plaintiff demonstrates inability to serve defendant notwithstanding "due diligence"); *Zaritsky v. Crawford*, 2008 WL 2705488 * 1 (D. Nev. 2008) (quoting Nevada rule permitting service by publication where defendant "[c]annot, after due diligence, be found"); *Prudential Ins. Co.*, 2008 WL 1925293 * 2 & n.1 (noting that Alabama law and New Jersey law on service by publication are "practically identical," and require plaintiff to demonstrate inability to personally serve defendant despite "due

had been determined to be sufficient on their face (which they were not), the court also would be obligated to determine whether the Government in fact actually conducted an adequate search. *See Redfield Investments*, 990 So. 2d at 1138; *Shepheard v. Deutsche Bank Trust Co. Americas*, 922 So. 2d 340, 343 (Fla. Dist. Ct. App. 2006); *Southeast and Associates, Inc. v. Fox Run Homeowners Ass'n*, 704 So. 2d 694, 696 (Fla. Dist. Ct. App. 1997); *Demars*, 625 So. 2d at 1224.[44]

As the plaintiff and the party invoking the court's jurisdiction, the Government bears the burden of establishing the legal sufficiency of its search before recourse to service of process by publication may be had. *See Shepheard*, 922 So. 2d at 343; *Demars*, 625 So. 2d at 1224.[45] Specifically, before it may resort to service by publication, the Government must demonstrate that it "reasonably employed the knowledge at [its] command, made diligent inquiry and exerted an honest and conscientious effort appropriate to the circumstances to acquire the information necessary to effect personal service on the defendant," but — in the end — was unable to do so. *Wolfe v. Stevens*, 965 So. 2d 1257, 1259 (Fla. Dist. Ct. App. 2007) (*quoting McDaniel v. McElvy*, 108 So. at 831).[46]

In other words, the Government must demonstrate that, under the circumstances of the case, personal service of process is essentially impossible. *See, e.g., Godsell*, 923 So.2d at 1213 (emphasizing that "[s]ervice by publication may be used only when alternative service

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diligence"); *Duarte*, 2008 WL 683427 * 1 (quoting California statute providing for service by publication where plaintiff establishes that defendant "cannot with reasonable diligence be served" personally); *Booth v. Martinez*, 2007 WL 2086659 * 1 (stating that, under Texas law, service by publication is permitted only after plaintiff has exercised "due diligence," but has "been unable to locate the whereabouts of [the] defendant"); *Empire of America*, 1986 WL 3034 * 1 (quoting Illinois statute authorizing service by publication only where, *inter alia*, "the defendant's place of residence cannot by diligent inquiry be ascertained").

[44] *See also Mayo v. Mayo*, 344 So. 2d 933, 934 n.1 (Fla. Dist. Ct. App. 1977) (criticizing trial court for making "no serious attempt" to ascertain whether the plaintiff in that case had "[made] diligent search and inquiry required to validly obtain constructive service").

[45] "[B]ecause the lack of personal service implicates due process concerns, a plaintiff must strictly comply with the statutory requirements" governing service of process by publication. *Redfield Investments*, 990 So. 2d at 1138; *accord, Godsell*, 923 So. 2d at 1213; *Shepheard*, 922 So. 2d at 343; *Gans*, 593 So. 2d at 552. The burden is on the plaintiff "to show strict compliance." *Robinson v. Cornelius*, 377 So. 2d 776, 778 (Fla. Dist. Ct. App. 1979). Moreover, "[c]onstructive service statutes are strictly construed against a plaintiff who seeks to obtain service of process under them." *Levenson v. McCarty*, 877 So. 2d at 820; *accord, Shepheard*, 922 So. 2d at 343; *Mayo*, 344 So. 2d at 935. And it is the plaintiff who must "present[] facts which clearly justify [the] applicability" of such a statute. *Robinson v. Cornelius*, 377 So. 2d at 778.

[46] *See also Godsell*, 923 So. 2d at 1215; *Shepheard*, 922 So. 2d at 343–44 (*quoting Demars*, 625 So. 2d at 1224); *Southeast and Associates, Inc.*, 704 So. 2d at 696; *Grammer v. Grammer*, 80 So. 2d 457, 460–61 (Fla. 1955).

[i.e., service by any other means] cannot be effected"); *Levenson v. McCarty*, 877 So.2d at 820 (explaining that Florida law "is consistent with the common law in permitting service by publication only where personal service cannot be made"); *Dor Cha*, 876 So.2d at 680 (stating that "[a] party seeking to utilize service by publication must be able to show that personal service could not be made").[47]

As one court recently put it: "In determining whether a plaintiff has exercised 'reasonable diligence' [so as to justify resort to service by publication,] . . . a court must . . . see whether the plaintiff 'took those steps a reasonable person who truly desired to give notice would have taken under the circumstances.'" *Duarte v. Freeland*, 2008 WL 683427 * 1 (N.D. Cal. 2008) (quotation omitted); *see also Redfield Investments*, 990 So.2d at 1139 ("'Reasonable diligence [in a search to locate defendant for personal service, as a prerequisite for making service by publication] . . . is an honest effort, and one appropriate to the circumstances, to ascertain whether actual notice [i.e., personal service] may be given, and, if so, to give it.'") (*quoting Levenson v. McCarty*, 877 So. 2d at 820); *McDaniel v. McElvy*, 108 So. at 832.[48] The Government's efforts here fail this stringent test.[49]

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[47] The Supreme Court has emphasized that, in giving notice, the means that a party employs "must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (*quoted in Jones v. Flowers*, 547 U.S. 220, 229 (2006)). To paraphrase *Mullane*, so too the search and inquiry required of a plaintiff in circumstances such as these "must be such as one desirous of actually [locating] the absentee might reasonably adopt to accomplish it."

[48] As the court observed in *Mayo*: "A legion of Florida cases are instructive on the proposition that one who relies on service by publication should demonstrate that he has made diligent inquiry, and executed an honest and conscientious effort appropriate to the circumstances to acquire the information necessary to enable him to effect personal service on the defendant." *Mayo*, 344 So.2d at 934 n.1).

[49] In the course of the hearing, the Government noted that the Government recently was granted an extension of time and leave to serve by publication in *United States v. Prety Fashion & Apparel, Inc. See United States v. Prety Fashion & Apparel, Inc.*, No. 08–00167 (Ct. Int'l Trade filed May 9, 2008). The facts of that case are readily distinguishable from the facts of the case at bar, however. In that case, by the time the Government sought an extension of time and leave to serve the corporate defendant by publication, the Government had already effected timely personal service upon the individual defendant, who is the former president and chief executive of the corporate defendant. *See* Plaintiff's Motion for Leave to Serve Defendant by Constructive Service and Motion for an Extension of Time Out of Time, *United States v. Prety Fashion & Apparel, Inc*., No. 08–00167 (Ct. Int'l Trade filed Nov. 26, 2008) at 2. Thus, the corporate defendant was on timely, actual notice of the action, and the court thus concluded that an extension of time to effect proper service on the corporation was warranted. It is also significant that the constructive service at issue in that case was service upon the California Secretary of State. *Id.* at 2–3. That case therefore does not stand as an endorsement of service by publication — much less an example of service by publication upon an individual defendant.

Little more than a recitation of the bare facts is needed to establish the Government's lack of diligence in seeking to effect service of process in this case. As detailed in section I above, in late January 2008, the Government obtained information on the most recent addresses-of-record for the two Defendants from the Florida Department of Highway Safety & Motor Vehicles — an address on 156th Place for Leroy Rodrigue, and an address on Bamboo Palm Way for Ronald Rodrigue. At the same time, the Government also received information on all prior addresses-of-record for both men.

On May 21, 2008, the Government filed its Complaint, and sent copies of the Complaint and the waiver of service form to Leroy Rodrigue at the address on 156th Place, his most recent address-of-record. Inexplicably, however, the Government mailed the documents to Ronald Rodrigue at an address on Buffalo Way — one of Ronald Rodrigue's prior addresses. The Government apparently compounded its error by using the wrong zip code for the Buffalo Way address. Neither of the Defendants executed and returned a waiver of service.

The Government took no further action to locate or serve the Defendants for the next 42 days. On July 2, 2008, the Government again mailed copies of the summons, Complaint, and waiver of service form to the two men — to Leroy Rodrigue at the 156th Place address, and to Ronald Rodrigue at the address on Bamboo Palm Way. However, the Government took no further action to locate or serve the two Defendants in the 57 days that followed. Again, neither of the Defendants executed and returned a waiver of service.

On August 29, 2008, with only 21 days remaining until the end of the 120-day period for service of process, the Government finally engaged a professional process service firm. However, rather than attempting service at the most recent addresses-of-record that the Government had obtained from the Florida Department of Highway Safety & Motor Vehicles (or even attempting service at multiple addresses), the Government instead instructed the process servers to attempt service on Ronald Rodrigue at one of his prior addresses (the address on Buffalo Way), and to attempt service on Leroy Rodrigue at an address on 85th Terrace (a putative former address-of-record, as to which the Government purportedly had obtained a "tip"). Those attempts were not successful. Nevertheless, the Government took no further action to locate or serve the Defendants before the 120-day period for service of process ended on September 18, 2008. Indeed, the

Government took no further action to locate or serve the Defendants in the four-plus months that followed.[50]

Eventually, in late January 2009, the Government decided to engage professional process servers to attempt to effect service on the two Defendants at the most recent addresses-of-record as provided by the Florida Department of Highway Safety & Motor Vehicles the year before. For reasons unexplained, service was not actually attempted till late February 2009. An attempt was made to serve Leroy Rodrigue at the address on 156th Place on February 27, 2009. But that attempt was not successful, and the record is silent as to whether any additional attempts were made. Ronald Rodrigue was successfully served at the address on Bamboo Palm Way — an address that the Government had had in its possession for at least one full year. However, the Government did not ask Ronald Rodrigue about the whereabouts of his son, Leroy Rodrigue. And, to date, more than a year after the end of the 120-day period for service of process, Leroy Rodrigue still has not been served.

The Government's lack of diligence was evident from the start, beginning with the Government's unexplained (apparently careless) failure to use the most recent address-of-record for its May 21, 2008 mailing to Ronald Rodrigue, which was exacerbated by the Government's use of an incorrect zip code on that mailing. Such errors are not indicative of the "diligent search and inquiry" required for recourse to service of process by publication. *See, e.g., Dor Cha*, 876 So. 2d at 680 (finding that plaintiff failed to conduct "diligent search and inquiry" where, *inter alia*, "[t]he plaintiff was not careful in his search, crucially misspelling [defendant's] name in the inquiry that he made of the driver's license department").

Even more damning is the Government's delay in engaging professional process servers — an error compounded by the Government's failure to send the process servers to the Defendants' most recent addresses-of-record as provided by the Florida Department of Highway Safety & Motor Vehicles (or, alternatively, to send the process servers to multiple addresses). As noted above, Ronald Rodrigue was successfully served at that address-of-record (on Bamboo Palm Way) in late February 2009, and presumably could have been served at that address well before the 120-day period for service of process ended on September 18, 2008, if only the Government had exercised

[50]There is a strong argument that the measure of the Government's diligence should be confined to the 120-day period for service of process which ended on September 18, 2008. As outlined here, however, the Government's dilatory behavior continued even after that date. Accordingly, even if all of the Government's efforts to locate and serve the Defendants were considered, the Government still could not show that it made the requisite "diligent search and inquiry."

diligence. Further, to this very day the record is devoid of any indication as to who in fact actually resides at the address on 156th Place (the most recent address-of-record that the Florida Department of Highway Safety & Motor Vehicles provided for Leroy Rodrigue). The fact that, even now, the Government still has not established whether Leroy Rodrigue — or someone else — lives at that address is further testament to the Government's lack of diligence in this matter.

Similarly troublesome is the absence of any evidence to indicate that the Government made repeated attempts to serve Leroy Rodrigue at the 156th Place address, beginning in late February 2009. Diligent plaintiffs recognize that it is often necessary to make multiple attempts, at all hours of the day and night, on different days of the week, over an extended period of time, in order to effect personal service on a defendant. *See, e.g., Southeast and Associates, Inc.*, 704 So. 2d at 695 (finding that plaintiff made "diligent search and inquiry" where, *inter alia*, professional process server made repeated attempts to serve defendants "over a thirty-day period, at different times of day"); *see also* Audio Recording of Hearing at 02:28:42–02:29:01 (Government conceding that, in light of limited period during which personal service was attempted here, process servers would not have found Rodrigues at their homes if they were, for example, on vacation).

The Government's failure to seek updated information on the addresses of the two Defendants is also telling. The report from the Florida Department of Highway Safety & Motor Vehicles providing the most recent and prior addresses-of-record for the Rodrigues was dated January 22, 2008. That information was thus four months old by the time the Government sought to use it for the first time on May 21, 2008. Moreover, there is no indication in the record that the Government ever requested updated information on the two Defendants. Diligent plaintiffs are sensitive to the problem of "stale" information. *See, e.g., Gans*, 593 So.2d at 551–52 (finding that plaintiff failed to conduct "diligent search and inquiry" where, *inter alia*, process server concluded that residence was unoccupied, even though Florida Department of Motor Vehicles printout obtained by plaintiff indicated that defendant had re-registered her car at that same address a mere three weeks earlier; noting that, "[a]lthough [defendant] might have moved during the three week period, it was unlikely"); *Duarte*, 2008 WL 683427 * 3 (indicating that, in light of the passage of time, "the Court believes that a further and more current search for [defendant] is appropriate before resorting to the last resort of service by publication").

The Government's inaction for protracted periods of time is additional compelling evidence of its inattention and lack of diligence in effecting service of process. Quite apart from the periods of inaction that preceded the end of the 120-day period for service of process on September 18, 2008, the Government's lack of activity between that date and late February 2009, and between late February 2009 and the April 6, 2009 hearing, reflects an indifference that is fundamentally inconsistent with the Government's obligation to conduct a "diligent search and inquiry" to locate and effect service of process on the Defendants personally.[51]

Yet another grave and glaring flaw in the Government's approach to service of process in this case was its reliance on a single source of information. Particularly if the Government had reservations about the accuracy of the information provided by the Florida Department of Highway Safety & Motor Vehicles (as it indicated in the course of the April 6, 2009 hearing), it was incumbent upon the Government to consult other sources in order to locate and serve the Defendants. *See, e.g.*, Audio Recording of Hearing at 1:07:59–1:08:15, 3:57:54–3:57:59, 04:24:54–04:24:56 (Government expressing uncertainty as to validity of addresses).

A casual survey of several dozen cases discloses a very wide range of means that other plaintiffs have employed to locate and/or contact missing defendants in order to effect service of process — including retaining a private investigator;[52] "background checks";[53] "skip traces";[54] reviewing criminal history records;[55] running credit checks;[56] conferring with the defendant's current or former legal

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[51] This is to say nothing of the Government's apparent inactivity in the nearly six months since the April 6, 2009 hearing.

[52] *See, e.g., Dolezal v. Fritch*, 2008 WL 5215335 * 2 (D. Ariz. 2008); *Posey v. Searcy,*2008 WL 5382692 * 2–3 (E.D. Pa. 2008); *Thrivent Financial*, 2008 WL 5412095 * 2; *Booth v. Martinez*, 2007 WL 2086659 * 1; *Levin v. Richter*, 1991 WL 13991 * 1 (E.D. Pa. 1991); *see also BP Prods. North America, Inc. v. Dagra*, 236 F.R.D. 270, 272–73 (E.D. Va. 2006) (foreign defendant); *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1013 (9th Cir. 2002) (foreign defendant).

[53] *See, e.g., Prudential Ins. Co.*, 2008 WL 1925293 * 1, 3.

[54] *See, e.g., Godsell*, 923 So. 2d at 1210–11, 1215; *Southeast and Associates, Inc.*, 704 So. 2d at 695–96.

[55] *See, e.g., Prudential Ins. Co.*, 2008 WL 1925293 * 3.

[56] *See, e.g., Prudential Ins. Co.*, 2008 WL 1925293 * 3; *US Bank, NA v. Matthews*, 2005 WL 2709295 * 1 (N.D. Ill. 2005).

counsel;[57] contacting co-defendants;[58] consulting the defendant's relatives, friends, and neighbors;[59] talking to tenants or parties in possession of the property at the defendant's putative address(es);[60] contacting the defendant's employer and former employers,[61] as well as co-workers and former co-workers (including employees);[62] visiting the defendant's business premises;[63]searching Social Security Administration databases;[64] reviewing Internal Revenue Service records;[65] reviewing wage reports;[66] reviewing utility company

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[57] *See, e.g., Redfield Investments*, 990 So. 2d at 1138; *Godsell*, 923 So. 2d at 1213; *Levenson v. McCarty*, 877 So. 2d at 819–20; *Dor Cha*, 876 So. 2d at 680; *Demars*, 625 So. 2d at 1221; *Sananikone v. United States*, 2009 WL 796544 * 1, 3–4 (E.D. Cal. 2009) (*citing Donel, Inc. v. Badalian*, 150 Cal. Rptr. 855 (Cal. Ct. App. 1978); *Kott v. Superior Court*, 53 Cal. Rptr. 2d 215, 221 (Cal. Ct. App.1996); *Vorburg v. Vorburg*, 117 P.2d 875 (Cal. 1941)); *Dolezal*, 2008 WL 5215335 * 2; *United States v. Tobins*, 483 F. Supp. 2d at 70, 78; *Empire of America*, 1986 WL 3034 * 1 (*citing First Fed. Sav. & Loan Ass'n v. Brown*, 393 N.E.2d 574 (Ill. App. Ct. 1979)).

[58] *See, e.g., Robinson v. Cornelius*, 377 So.2d at 777; *Sananikone*, 2009 WL 796544 * 3–4 (*citing Kott v. Superior Court*, 53 Cal. Rptr. 2d at 221); *Prudential Ins. Co.*, 2008 WL 1925293 * 1.

[59] *See, e.g., Godsell*, 923 So. 2d at 1211–13; *Floyd v. Federal Nat'l Mortgage Ass'n*, 704 So. 2d 1110, 1112 (Fla. Dist. Ct. App. 5th Dist. 1998); *Southeast and Associates, Inc.*, 704 So. 2d at 695–96; *Gans*, 593 So. 2d at 551; *Mayo*, 344 So. 2d at 935–36; *Sananikone*, 2009 WL 796544 * 4; *Thrivent Financial*, 2008 WL 5412095 * 2–3; *Duarte*, 2008 WL 683427 * 2, 4 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 162-63); *Posey v. Searcy*, 2008 WL 5382692 * 3; *Prudential Ins. Co.*, 2008 WL 1925293 * 3–4; *Dolezal*, 2008 WL 5215335 * 2–3; *United States v. Tobins*, 483 F. Supp. 2d at 71–72, 78; *US Bank, NA*, 2005 WL 2709295 * 1; *Levin v. Richter*, 1991 WL 13991 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2–3 (E.D. Pa. 1989); *Empire of America*, 1986 WL 3034 * 1 (*citing Bell Federal Sav. & Loan Ass'n v. Horton*, 376 N.E.2d 1029 (Ill. App. Ct. 1978)); *Cooper v. Commonwealth Title of Arizona*, 489 P.2d 1262, 1266 (Ariz. Ct. App. 1971) (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[60] *See, e.g., Floyd*, 704 So. 2d at 1112; *Demars*, 625 So. 2d at 1221; *Sananikone*, 2009 WL 796544 * 1; *Prudential Ins. Co.*, 2008 WL 1925293 * 3. and former employers,

[61] *See, e.g., Sananikone*, 2009 WL 796544 * 1; *Duarte*, 2008 WL 683427 * 2 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 162–63); *Posey v. Searcy*, 2008 WL 5382692 * 3; *Booth v. Martinez*, 2007 WL 2086659 * 1; *Levin v. Richter*, 1991 WL 13991 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2–3; Empire of America, 1986 WL 3034 * 1 (*citing First Fed. Sav. & Loan*, 393 N.E.2d 574).

[62] *See, e.g., Duarte*, 2008 WL 683427 * 2 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 162–63).

[63] *See, e.g., Southeast and Associates, Inc.*, 704 So. 2d at 695-96 (visit); *Posey v. Searcy*, 2008 WL 5382692 * 2–3 (mail); *Penn v. Raynor*, 1989 WL 126282 * 3.

[64] *See, e.g., Godsell*, 923 So. 2d at 1210–11, 1215; Floyd, 704 So. 2d at 1112; *Southeast and Associates, Inc.*, 704 So. 2d at 695; *Booth v. Martinez*, 2007 WL 2086659 * 1; *US Bank, NA*, 2005 WL 2709295 * 1.

[65] *See, e.g., Sananikone*, 2009 WL 796544 * 1.

[66] *See, e.g., United States v. Tobins*, 483 F. Supp. 2d at 72, 78.

records in general;[67] searching water and sewer records;[68] searching electric utility records;[69] reviewing telephone company records;[70] searching telephone directories;[71] contacting directory assistance;[72] reviewing city directories;[73] contacting the U.S. Postal Service;[74] inquiring about a "forwarding address";[75] requesting a "postal tracer";[76] "check[ing] for an address listing";[77] searching Department of Motor Vehicles records (including vehicle title registrations, as well as drivers licenses),[78] and driving records;[79] reviewing voter registra-

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[67] *See, e.g., MATSCO*, 597 F. Supp. 2d at 162; *Cooper*, 489 P.2d at 1266 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[68] *See, e.g., Redfield Investments*, 990 So. 2d at 1138.

[69] *See, e.g., Redfield Investments*, 990 So. 2d at 1138; *Demars*, 625 So. 2d at 1221.

[70] *See, e.g., Redfield Investments*, 990 So. 2d at 1138; *Penn v. Raynor*, 1989 WL 126282 * 1, 3.

[71] *See, e.g., Hobe Sound Indus. Park, Inc. v. First Union Nat'l Bank of Florida*, 594 So. 2d 334 (Fla. Dist. Ct. App. 1992); *Robinson v. Cornelius*, 377 So.2d at 778; *Sananikone*, 2009 WL 796544 * 3 (*citing Donel*, 87 Cal. App. 3d 327; *Vorburg*, 117 P.2d at 876); *Prudential Ins. Co.*, 2008 WL 1925293 * 3; *Duarte*, 2008 WL 683427 * 2–4 (*citing Watts v. Crawford*, 896 P.2d 807 (Cal. 1995)) (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163); *Posey v. Searcy*, 2008 WL 5382692 * 3; *US Bank, NA*, 2005 WL 2709295 * 1; *Beasley v. United States*, 162 F.R.D. 700, 701–02 (M.D. Ala. 1995); *Levin v. Richter*, 1991 WL 13991 * 1; *Penn v. Raynor*, 1989 WL 126282 * 1–3; Cooper, 489 P.2d at 1266 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[72] *See, e.g., Redfield Investments*, 990 So. 2d at 1137; *Godsell*, 923 So. 2d at 1211; *Gans*, 593 So.2d at 552; *Bedgood*, 2009 WL 1664131 * 1.

[73] *See, e.g., Sananikone*, 2009 WL 796544 * 3 (*citing Donel*, 150 Cal. Rptr. 855; *Vorburg*, 117 P.2d at 876); *Duarte*, 2008 WL 683427 * 2–4 (*citing Watts v. Crawford*, 896 P.2d 807) (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163); *Beasley*, 162 F.R.D. at 701–02; *Cooper*, 489 P.2d at 1266 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[74] *See, e.g., Redfield Investments*, 990 So. 2d at 1137 (FOIA request); *Gaeth v. Deacon*, 964 A.2d 621, 623 (Me. 2009) (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 160–62); *Posey v. Searcy*, 2008 WL 5382692 * 1, 3 (including FOIA request); *Prudential Ins. Co.*, 2008 WL 1925293 * 3 n.4 (citation omitted); *US Bank, NA*, 2005 WL 2709295 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2 (FOIA request).

[75] *See, e.g., Godsell*, 923 So. 2d at 1210–11, 1215; *MATSCO*, 597 F. Supp. 2d at 162–63; *Prudential Ins. Co.*, 2008 WL 1925293 * 1, 3; *Levin v. Richter*, 1991 WL 13991 * 1; *Cooper*, 489 P.2d at 1266 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[76] *See, e.g., United States v. Tobins*, 483 F. Supp. 2d at 70, 72–74, 78.

[77] *See, e.g., Penn v. Raynor*, 1989 WL 126282 * 1, 3.

[78] *See, e.g., Godsell*, 923 So. 2d at 1210–11; *Dor Cha*, 876 So. 2d at 679–80; *Southeast and Associates, Inc.*, 704 So. 2d at 695; *Gans*, 593 So. 2d at 550; *Robinson v. Cornelius*, 377 So. 2d at 777; *Bedgood*, 2009 WL 1664131 * 1; *Thrivent Financial*, 2008 WL 5412095 * 2–3; *Posey v. Searcy*, 2008 WL 5382692 * 3; *United States v. Tobins*, 483 F. Supp. 2d at 72, 78; *US Bank, NA*, 2005 WL 2709295 * 1; *Levin v. Richter*, 1991 WL 13991 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2–3.

[79] *See, e.g., Prudential Ins. Co.*, 2008 WL 1925293 * 3.

tion rolls;[80] searching Vital Statistics records (including records of births, deaths, marriages, and divorces);[81] contacting the office of local district attorney/prosecutor;[82] reviewing local court records (including judgments and bankruptcy records);[83] searching probate records;[84] reviewing the records of business licensing or professional licensing agencies;[85] searching corporate registrations;[86] reviewing the records of educational institutions that the defendant attended;[87] contacting churches;[88] consulting embassies and consulates;[89] reviewing the records of condominium owners' associations;[90] contacting the defendant's insurance agent;[91] reviewing mortgage records;[92] searching property records;[93] contacting the county recorder's office;[94] reviewing the records of the county assessor;[95] searching real property tax records;[96] reviewing tax lien records;[97] contacting the

[80] *See, e.g., Duarte*, 2008 WL 683427 * 2–3 (*citing Watts v. Crawford*, 896 P.2d 807) (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163); *Posey v. Searcy*, 2008 WL 5382692 * 3; *Prudential Ins. Co.*, 2008 WL 1925293 * 3; *US Bank, NA*, 2005 WL 2709295 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2–3; *Cooper*, 489 P.2d at 1266 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[81] *See, e.g., Floyd*, 704 So. 2d at 1112; *Prudential Ins. Co.*, 2008 WL 1925293 * 3.

[82] *See, e.g., Sananikone*, 2009 WL 796544 * 3 (*citing Vorburg*, 117 P.2d at 876); *Prudential Ins. Co.*, 2008 WL 1925293 * 3 n.4.

[83] *See, e.g., Hobe Sound Indus. Park*, 594 So. 2d 334; *Sananikone*, 2009 WL 796544 * 1; *US Bank, NA*, 2005 WL 2709295 * 1.

[84] *See, e.g., Floyd*, 704 So. 2d at 1112.

[85] *See, e.g., MATSCO*, 597 F. Supp. 2d at 162; *Booth v. Martinez*, 2007 WL 2086659 * 1.

[86] *See, e.g., Family Tree Farms, LLC v. Alfa Quality Produce, Inc.*, 2009 WL 565568 * 2 (E.D. Cal. 2009).

[87] *See, e.g., MATSCO*, 597 F. Supp. 2d at 162; *Duarte*, 2008 WL 683427 * 4 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163); *Gaeth v. Deacon*, 964 A.2d at 623–24, 630 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 160–62).

[88] *See, e.g., Thrivent Financial*, 2008 WL 5412095 * 1–2.

[89] *See, e.g., Redfield Investments*, 990 So. 2d at 1138–39; *MATSCO*, 597 F. Supp. 2d at 162.

[90] *See, e.g., Demars*, 625 So. 2d at 1221.

[91] *See, e.g., Godsell*, 923 So. 2d at 1212; *Thrivent Financial*, 2008 WL 5412095 * 2.

[92] *See, e.g., Godsell*, 923 So. 2d at 1212; *Shepheard*, 922 So. 2d at 344; *Demars*, 625 So. 2d at 1221.

[93] *See, e.g., Redfield Investments*, 990 So. 2d at 1137; *Demars*, 625 So. 2d at 1221; *Thrivent Financial*, 2008 WL 5412095 * 3; *US Bank, NA*, 2005 WL 2709295 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2 (*citing Deer Park Lumber, Inc. v. Major*, 559 A.2d 941 (Pa. Super. 1989)); *Empire of America*, 1986 WL 3034 * 1 (*citing Bell Federal Sav. & Loan*, 376 N.E.2d 1029).

[94] *See, e.g., Redfield Investments*, 990 So. 2d at 1138.

[95] *See, e.g., Penn v. Raynor*, 1989 WL 126282 * 2 (*citing Deer Park Lumber*, 559 A.2d 941); *Cooper*, 489 P.2d at 1266 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[96] *See, e.g., Gans*, 593 So. 2d at 550–51.

[97] *See, e.g., US Bank, NA*, 2005 WL 2709295 * 1.

county tax collector's research department;[98] reviewing tax records in general;[99] searching local tax records;[100] reviewing "taxpayer's lists";[101] database research in general;[102] inspection of other available public records;[103] using internet searches/search engines in general;[104] searching westlaw.com public record databases;[105] searching accurint.com (a Lexis-Nexis-run web service providing records for searches on individuals);[106] searching Peoplefinders;[107] conducting a search using google.com;[108] conducting a phone number search on msn.com;[109] searching autotrackxp.com (a professional investigative search engine operated by ChoicePoint);[110] placing telephone calls;[111] using regular mail;[112] using registered or certified mail;[113] sending a

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[98] *See, e.g., Redfield Investments*, 990 So. 2d at 1138.

[99] *See, e.g., Sananikone*, 2009 WL 796544 * 3 (*citing Donel*, 150 Cal. Rptr. 855); *Prudential Ins. Co.*, 2008 WL 1925293 * 3; *Posey v. Searcy*, 2008 WL 5382692 * 3.

[100] *See, e.g., Levin v. Richter*, 1991 WL 13991 * 1; *Penn v. Raynor*, 1989 WL 126282 * 2–3.

[101] *See, e.g., Penn v. Raynor*, 1989 WL 126282 * 2 (*citing Deer Park Lumber*, 559 A.2d 941).

[102] *See, e.g., Prudential Ins. Co.*, 2008 WL 1925293 * 3.

[103] *See, e.g., Sananikone*, 2009 WL 796544 * 4.

[104] *See, e.g., Godsell*, 923 So.2d at 1211; *Dor Cha*, 876 So. 2d at 679; *Prudential Ins. Co.*, 2008 WL 1925293 * 3; *Duarte*, 2008 WL 683427 * 2–4 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163); *Thrivent Financial*, 2008 WL 5412095 * 1–2.

[105] *See, e.g., Sananikone*, 2009 WL 796544 * 1, 3.

[106] *See, e.g., Bedgood*, 2009 WL 1664131 * 1.

[107] *See, e.g., Bedgood*, 2009 WL 1664131 * 1.

[108] *See, e.g., Sananikone*, 2009 WL 796544 * 1, 3.

[109] *See, e.g., Gaeth v. Deacon*, 964 A.2d at 623 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 160–62).

[110] *See, e.g., Gaeth v. Deacon*, 964 A.2d at 623 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 160–62).

[111] *See, e.g., Levenson v. McCarty*, 877 So. 2d at 819–20; *Gans*, 593 So. 2d at 551; *Bedgood*, 2009 WL 1664131 * 1; *Duarte*, 2008 WL 683427 * 4 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163).

[112] *See, e.g., Shepheard*, 922 So. 2d at 342; *Gans*, 593 So. 2d at 550–52; *MATSCO*, 597 F. Supp. 2d at 162; *Duarte*, 2008 WL 683427 * 2–4 (quoted with approval in *MATSCO*, 597 F. Supp. 2d at 163); *Dolezal*, 2008 WL 5215335 * 2; *Posey v. Searcy*, 2008 WL 5382692 * 2–4; *see also Jones v. Flowers*, 547 U.S. at 222 (explaining that "[c]ertified mail makes actual notice more likely only if someone is there to sign for the letter or tell the mail carrier that the address is incorrect. Regular mail can be left until the person returns home, and might increase the chances of actual notice.").

[113] *See, e.g., Southeast and Associates, Inc.*, 704 So. 2d at 695, 697; *Gans*, 593 So. 2d at 550–52; *Bedgood*, 2009 WL 1664131 * 1, 3; *Dolezal*, 2008 WL 5215335 *2; *Furin*, 2008 WL 5068955 * 1; *Posey v. Searcy*, 2008 WL 5382692 * 2–4; *Penn v. Raynor*, 1989 WL 126282 * 1, 3; *see also* Jones v. Flowers, 547 U.S. at 222 (discussing advantages of using regular U.S. mail vs. certified mail).

package via UPS;[114] and using e-mail to contact the defendant.[115]

At the hearing on the pending motions, the Government rhetorically asked what more it could have been expected to do to locate and serve the Defendants, citing *Grammer v. Grammer* for the proposition that "[e]xtraordinary steps to ascertain the whereabouts of [a] party are not required." *See Grammer v. Grammer*, 80 So.2d 457, 461 (Fla. 1955); Audio Recording of Hearing at 04:07:50–04:07:58; *see also id.* at 00:26:37–00:26:43, 03:56:41–03:56:54, 03:58:11–03:58:31, 03:59:00–03:59:05, 03:59:45–03:59:57, 04:05:30–04:07:05, 04:12:41–04:12:58, 04:18:58-04:19:05. As the cases cited above amply demonstrate, there was much that was not "extraordinary" that the Government could — and should — have done, in furtherance of the "diligent search and inquiry" that it was obligated to undertake.[116]

To be sure, the Government was by no means required to pursue all of the potential sources and courses of action enumerated above. But, clearly, the Government's obligation of "diligent search and inquiry" required it to do something more than it did. *See, e.g., Prudential Ins. Co.*, 2008 WL 1925293 * 3 (listing various potential sources of information that plaintiff could have explored, and noting that "[w]hile this is not an exhaustive list of the steps the plaintiff might have taken to determine the defendant's current address, nor would the completion of each necessarily equate to diligence, these avenues of inquiry may reveal his whereabouts or identify individuals who may know his whereabouts"); *Cooper v. Commonwealth Title of Arizona*, 489 P.2d 1262, 1266 (Ariz. Ct. App. 1971) (identifying range of potential sources of information that plaintiff could have considered, and observing that "[w]hile it may not be necessary to indicate in the affidavit that all of these sources were checked," the actions that

[114] *See, e.g., Furin*, 2008 WL 5068955 * 1.

[115] *See, e.g., Sananikone*, 2009 WL 796544 * 1; *Modan v. Modan*, 742 A.2d 611, 613–14 (N.J. Super. Ct. App. Div. 2000) (cited with approval in *Prudential Ins. Co*., 2008 WL 1925293 * 2); *see also Rio Properties, Inc.*, 284 F.3d at 1017–19 (foreign defendant).

[116] The sole case that the Government cited in its Motion for Service by Publication is readily distinguished. *See* Motion for Service by Publication (*citing United States v. JRG Medical Equipment, Inc.*, No. 07–203050 (S.D. Fla. filed Feb. 2, 2007) (docket sheet)). In that case, where (significantly) the defendant was a corporation, the efforts made by the Government before resorting to service by publication were significantly more extensive. In addition to obtaining the current drivers' license address for the corporate representative, the Government made repeated attempts at personal service at that address (until the process servers were told by someone that the corporate representative had never lived at that address), attempted to contact the corporate representative through his wife, confirmed that the address in question was the current mailing address for the corporate representative, attempted to locate the corporate representative at a different business address, and searched a number of databases in an attempt to identify additional addresses where the corporate representative might be located. *See, e.g.*, Audio Recording of Hearing at 04:35:21–04:39:17.

plaintiff had already taken "[fell] far short of probative facts which support a finding of due diligence").

Perhaps the single most clear-cut illustration of the Government's failure to conduct a "diligent search and inquiry" is its failure to ask Ronald Rodrigue about the whereabouts of his son, Leroy Rodrigue. As emphasized in *Grammer v. Grammer* (the Florida Supreme Court case that the Government itself cited in the course of the hearing on the motions at issue here), "the effort [to ascertain the whereabouts of a defendant] should usually extend to inquiry of persons likely or presumed to know the facts sought." *Grammer v. Grammer*, 80 So. 2d at 460–61 (*quoting McDaniel v. McElvy*, 108 So. at 831–32);[117] *see also* nn.58–59, *supra* (citing cases addressing efforts to locate and serve defendants through contacts with co-defendants and relatives, respectively). That failure alone would doom the Government's Motion for Service by Publication. *See, e.g., Redfield Investments*, 990 So. 2d at 1139 (reversing trial court's denial of motion to quash service of process by publication, based on "the apparent failure of [the plaintiff] to inquire of the most likely source of potential information concerning the whereabouts of [the defendant]"); *Shepheard*, 922 So. 2d at 344–45 (reversing trial court's denial of plaintiff wife's motion to set aside default judgment based on service of process by publication, explaining that "[b]ecause [the plaintiff] declined to ask for [the defendant's] address from the party most likely to possess the information, its conduct led directly to its alleged unawareness of [the defendant's] address. . . . As such, [the plaintiff] did not comply with the statutory requirements for constructive service because it did not conduct a diligent search.") (citation omitted).

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[117] The obligation to make "inquiry of persons likely or presumed to know the facts sought" is a recurring theme, well-established in the Florida caselaw on service of process by publication. *See, e.g., Redfield Investments*, 990 So. 2d at 1139 (stating that "effort should usually extend to inquiry of persons likely or presumed to know the facts sought") (emphasis omitted) (*quoting Levenson v. McCarty*, 877 So.2d at 820); *Godsell*, 923 So. 2d at 1215 (explaining that "'[i]t is basic that to constitute diligent search and inquiry to discover the whereabouts of a party, that inquiry should be made of persons likely or presumed to know such whereabouts'") (quotation omitted); *Shepheard*, 922 So. 2d at 344 (noting that "[a] diligent search for a defendant's whereabouts requires inquiry of persons likely or presumed to know the defendant's location"); *Dor Cha*, 876 So. 2d at 680 (identifying as "the general rule for a diligent search": "'It is basic that to constitute diligent search and inquiry to discover the whereabouts of a party, that inquiry should be made of persons likely or presumed to know such whereabouts.'") (quotation omitted); *Mayo*, 344 So. 2d at 936 (observing that "the test of whether the party who seeks to employ constructive service has made the requisite diligent search and inquiry to whether 'the complaint reasonably employed knowledge at his command in making the appropriate effort' to acquire the information necessary to comply with the statute. It is basic that to constitute diligent search and inquiry to discover the whereabouts of a party, that inquiry should be made of persons likely or presumed to know such whereabouts.") (quotation omitted).

In sum, the Government here has failed to demonstrate that it conducted the "diligent search and inquiry" required as a predicate for service of process by publication.[118] Thus, even if the Government's Motion for Service by Publication were not moot and even if the Government's papers in support of that motion were not legally insufficient on their face, the Government's Motion for Service by Publication nevertheless would have to be denied.

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[118] Moreover, the Government here has not even attempted to show that its proposal to publish notice in the *Daily Business Review* is reasonably calculated to give the remaining unserved Defendant, Leroy Rodrigue, notice of the pendency of this action. *See* Pl.'s Motion for Service by Publication & attached draft Notice of Action (apparently patterned on a Notice used by the U.S. Attorney's Office in Miami in another case, and erroneously stating that the instant action is for "statutory damages and civil penalties resulting from the submission of false claims to the Medicare program, in violation of the federal False Claims Act"); Audio Recording of Hearing at 04:54:46–04:54:56 (Government conceding errors in draft Notice of Action); *see also Gaeth v. Deacon*, 964 A.2d at 627 (explaining that "[t]he ultimate question when due process and the adequacy of notice of suit are at issue is whether the notice or attempted notice was reasonably calculated to give a defendant notice of the pendency of the action, not whether the technical requirements of a rule governing service of process were met") (*citing Schroeder v. City of New York*, 371 U.S. at 212–13).

The Government has proffered no information whatsoever on relevant matters such as the nature, readership, and circulation of the *Daily Business Review*, or its geographic distribution vis-a-vis the residence of Leroy Rodrigue. *Compare, e.g., Family Tree Farms*, 2009 WL 565568 * 3 (explaining that, in support of application for service by publication, plaintiff submitted declaration attesting, *inter alia*, that the two newspapers at issue were newspapers of general circulation, and that "publication of the summons in the newspapers was likely to give actual notice to Defendants because the Defendants' business addresses had been within the city and county in which the newspapers were published"); *Zaritsky*, 2008 WL 2705488 * 3 (denying motion for leave to serve by publication, and directing that any renewed motion detail, *inter alia*, "the newspaper(s) in which plaintiff plans to publish notice" and "why plaintiff reasonably believes that these particular newspaper(s) will provide effective notice"); *Furin*, 2008 WL 5068955 * 2 (granting motion to serve by publication where plaintiff's affidavit established, *inter alia*, that *The Washington Lawyer* and *Washington Post* are "widely circulated publications in the Washington, D.C. area" and would be appropriate vehicles for publication of notice).

This failure on the part of the Government would independently warrant denial of its Motion for Service by Publication. *See, e.g., MATSCO*, 597 F. Supp. 2d at 162 (denying motion for service by publication, ruling, *inter alia*, that "[p]ublication in a newspaper in Portland, Maine, where the defendant apparently no longer resides, cannot be said to be reasonably calculated to give him actual notice"); *Thrivent Financial*, 2008 WL 5412095 * 3 (setting aside default judgment based on plaintiff's service by publication, stating that plaintiff "should have published notification in the newspapers of . . . the counties that border [the county of defendant's last known address]," rather than in newspapers in counties "not . . . the closest geographically" to the county of defendant's last known residence); *Prudential Ins. Co.*, 2008 WL 1925293 * 4 (denying motion for service by publication, concluding, *inter alia*, that "service of the defendant [whose last known address was in Alabama] by publication in a New Jersey newspaper would not comport with due process"); *Gaeth v. Deacon*, 964 A.2d at 627 (holding that plaintiff's service by publication in *Lincoln County News* did not satisfy requirements of due process, where that weekly newspaper in Maine "would be highly unlikely to give [the defendant, a Massachusetts resident] actual notice of the lawsuit").

C. *The Dismissal of This Action*

USCIT Rule 4(l) directs that an action must be dismissed, without prejudice, where the plaintiff fails to effect service of process within the 120-day period, absent an extension of time. Accordingly, the denial of the Government's Motion for an Extension of Time (*see* section II.A, above) leads inexorably to the dismissal of this action without prejudice. As other courts have noted, however, "without prejudice" does not necessarily mean "without consequence."

Where — as here — the statute of limitations has already run, such that any refiled action would be time-barred, the dismissal is (in effect) one with prejudice. *See, e.g., Tuke v. United States*, 76 F.3d at 156 (Easterbrook, J.) (explaining that "[d]ismissal was without prejudice, but 'without prejudice' does not mean 'without consequence.' If the case is dismissed and filed anew, the fresh suit must satisfy the statute of limitations. . . . A new suit would be untimely, so the dismissal is final . . . .") (internal quotations and citation omitted); *Mendez v. Elliott*, 45 F.3d 75, 78 (4th Cir. 1995) (observing that, although Rule 4's provision for dismissal "without prejudice" provision "permits a plaintiff to refile the complaint as if it had never been filed," the rule does not give a plaintiff "a right to refile without the consequence of time defenses, such as the statute of limitations").[119]

IV.
Conclusion

The U.S. Court of Appeals for the Seventh Circuit has noted that (like the rules of this Court) the Federal Rules of Civil Procedure, in effect, "give plaintiffs who sue under federal law the full period of limitations, plus 120 days, in which to achieve service." *Tuke v. United States*, 76 F.3d at 157 (Easterbrook, J.) (citation omitted). "Four months should be ample" — at least in the vast majority of cases. *Id.* ; *accord*, *Cox v. Sandia Corp.*, 941 F.2d at 1126 (emphasizing that "Rule 4 provides ample time to effect service").

"The requirements of the rules," including those governing service of process, "apply equally to the government and to private litigants." *United States v. Britt*, 170 F.R.D. 8, 9–10 (D. Md. 1996). For all the reasons set forth above, Plaintiff's motions to extend the time for service of process and for leave to serve by publication must be denied, and this action is hereby dismissed. *See* USCIT R. 4(1).

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[119] *See also United States v. World Commodities*, 32 CIT at _____, 2008 WL 748677 * 4 (noting that "[a]lthough the court's dismissal is technically without prejudice to refiling, the expiration of the statute of limitations essentially ends the action as to [the defendant] because [plaintiff] Customs appears to be time-barred by the statute of limitations from refiling the claim").

So ordered.
Dated: October 1, 2009
New York, New York

/s/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE

Slip Op. 09–109

FUNAI ELECTRIC CO., LTD. AND FUNAI CORPORATION, INC., PLAINTIFFS, v. UNITED STATES AND UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION, DEFENDANTS.

Court No. 09–00374

[Defendants' motion to dismiss for lack of subject-matter jurisdiction over this action for relief from U.S. Customs and Border Protection ruling of admissibility of DTVs alleged to be within purview of an exclusion order of the U.S. International Trade Commission granted.]

Dated: October 6, 2009

Morrison & Foerster LLP (*Karl J. Kramer, G. Brian Busey* and *Teresa M. Summers*) and *Grunfeld, Desiderio, Lebowitz, Silverman* and *Klestadt LLP* (*Harold M. Grunfeld, Robert B. Silverman* and *Frances P. Hadfield*) for the plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Antonia R. Soares*); and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Michael W. Heydrich*), of counsel, for the defendants.

Jones Day (*Eric S. Namrow, Thomas V. Heyman* and *Cecilia R. Dickson*) for proposed intervenor-defendants Vizio, Inc., AmTran Technology Co., Ltd. and AmTran Logistics, Inc.

O'Melveny & Myers LLP (*Mark A. Samuels* and *Jonathan D. Hacker*) for proposed intervenor-defendants TPV Technology, Ltd., TPV International (USA), Inc., Top Victory Electronics (Taiwan) Co., Ltd. and Envision Peripherals, Inc.

Bingham McCutchen LLP (*James Hamilton, Robert C. Bertin, Warren A. Fitch* and *Diane C. Hertz*) for proposed intervenor-defendant Tatung Co.

OPINION & ORDER

AQUILINO, Senior Judge:

I

Immediately upon the filing of plaintiffs' summons and complaint and applications for a temporary restraining order and preliminary injunction, the defendants and then would-be intervenor-defendants

contested the Court of International Trade's subject-matter jurisdiction, supported by the filing of formal motions to dismiss this action for lack thereof. Hearings have been held, and the record developed and papers presented on all sides reveal the following:

II

Funai Corporation, Inc. is a wholly-owned U.S. subsidiary of Funai Electric Co., Ltd., a Japanese corporation that manufactures and markets consumer electronic products, including digital televisions ("DTVs") under such trade names as *Sylvania, Emerson, Magnavox, Philips, and Symphonic*. Effective September 30, 2007, all rights in U.S. Patent No. 5,329,369 (July 12, 1994), entitled "Asymmetric Picture Conversion", and U.S. Patent No. 6,115,074 (Sept. 5, 2000) ("System for Forming and Processing Program Map Information Suitable for Terrestrial, Cable and Satellite Broadcast") were assigned to Funai Electric Co., which then filed a complaint with the U.S. International Trade Commission ("ITC"), alleging violations of those patents within the meaning of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. §1337. The Commission responded by publishing a formal notice of investigation, No. 337–TA–617, *sub nom. In the Matter of Certain Digital Televisions and Certain Products Containing Same and Methods of Using Same*, 72 Fed. Reg. 64,240,–241 (Nov. 15, 2007), as to

> whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain digital televisions and certain products containing same and methods of using same by reason of infringement of one or more of claims 1, 4, 5, 8, 9, and 23 of U.S. Patent No. 6,115,074 and claims 1–3, 5, 7, 10-13, 15, and 19–29 of U.S. Patent No.5,329,369, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

Named as respondents were Vizio, Inc., AmTran Technology Co., Ltd., Polaroid Corporation, Petters Group Worldwide, LLC, Syntax-Brillian Corporation, Taiwan Kolin Co., Ltd., Proview International Holdings, Ltd., Proview Technology (Shenzhen) Co., Ltd., Proview Technology, Ltd., TPV Technology, Ltd., TPV International (USA), Inc., Top Victory Electronics (Taiwan) Co., Ltd., Envision Peripherals, Inc., and International Reliance Corp., which enterprises paragraph 5 of plaintiffs' instant complaint groups as follows: (1) Vizio and AmTran; (2) TPV Technology, TPV International, Top Victory, and

Envision; (3) the Proview firms; (4) Polaroid and Petters; (5) Syntax-Brillian and Taiwan Kolin; and (6) International Reliance[1].

Proceedings before an administrative law judge of the ITC resulted in publication of his Initial Determination that

> a violation of section 337 . . . has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain digital televisions and certain products containing same and methods of using same by reason of infringement of claims 1, 5, and 23 of . . . Patent No. 6,115,074. It is further found that no violation of section 337 has occurred in connection with claim 1, 3, 7, 19, or 21 of . . . Patent No. 5,329,369.

Plaintiffs' Complaint, Exhibit 1, first page. This was followed by the judge's Recommended Determination on Remedy and Bonding [id., Exhibit 2] that suggested, among other things, that a limited exclusion order issue that covers each asserted patent found by the Commission to be infringed and that cease-and-desist orders issue as to the domestic respondents. Plaintiffs' complaint proceeds to aver:

> 9. On April 10, 2009, the Commission . . . affirmed the ALJ's determination with respect to the three claims found to be infringed.
>
> 10 Consistent with the ALJ's definition of the universe of accused products, the Commission determined that the DTVs at issue include *all* digital televisions made or imported by the Respondents that "process information received in the ATSC-compliant broadcast signal." *See* . . . Comm'n Op. at 4 . . . (Exhibit 3).
>
> 11. The Commission held that all of the Respondents accused products infringe all asserted claims of the '074 Patent.
>
> 12. On April 10, 2009, the Commission . . . issued a Limited Exclusion Order (the "Exclusion Order"), directing Customs to exclude all products that infringe the '074 Patent from entry into the United States, as well as Cease and Desist Orders, which are enforced by the Commission rather than Customs and are not at issue here. *See* . . . Notice of Commission Final Determination . . . (Exhibit 4).

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[1] Footnote 1 to plaintiffs' paragraph 5 reports ITC termination of its investigation of International Reliance Corp.and also with regard to Polaroid and Petters, although "Polaroid — branded televisions manufactured and sold by Proview are covered bythe remedial orders issued in this Investigation."

13. The Commission's Exclusion Order states in relevant part:

> Digital televisions and products containing same (known as "combination" or "combo" units) that are covered by one or more of claims 1,5, and 23 of the '074 patent and that are manufactured abroad by or on behalf of[,] or are[] imported by or on behalf of[,] Vizio, AmTran, SBC, Taiwan Kolin, Proview International, Proview Shenzhen, Proview Technology, TPV Technology, TPV USA, Top Victory[,] and Envision or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law.

14. The meaning of the phrase "covered by one or more of claims 1, 5, and 23 of the '074 patent" is clearly set forth in the Commission Opinion and the ALJ's Initial Determination, which the Commission adopted insignificant part.

15. Consistent with the ALJ's definition of the universe of accused products, the Commission determined that the DTVs at issue include *all* digital televisions made or imported by the Respondents that "process information received in the ATSC-compliant broadcast signal." *See* . . . Comm'n Op. at 4 . . . (Exhibit 3).

16. By its plain terms, and also as intended upon the findings and analysis of the Commission, the Exclusion Order is not limited to any particular models of Respondents' DTVs.

17. The Exclusion Order covers all of Respondents' DTVs that conform to the Advanced Television Systems Committee ("ATSC") Standard, mandated by the Federal Communications Commission, to which the '074 Patent pertains. Because all digital televisions are required to process ATSC-compliant signals in the U.S., the products covered by the Commission's Exclusion Order include all digital televisions made or imported by the Respondents. In issuing its broadly-worded Exclusion Order, the Commission determined that the '074 Patent had been designated as essential to practice the ATSC standard, with which all televisions sold in the United States must be compliant by law. *See* . . . Comm'n Op. at 8–9. . . . The Commission also found that the Respondents "market their DTVs for the specific purpose of receiving ATSC compliant signals." *Id.*

> 18. Respondents raised the issue of whether they could import certain redesigned DTVs during the Investigation, but the Commission did not grant such permission. The Commission adopted the ALJ's findings that both their so-called "work around" products as well as their older "legacy" products infringe the asserted claims of the '074 patent. *See* . . . Comm'n Op. at 8.. . . Thus, the Commission issued its broadly-worded Exclusion Order that "all" of Respondents' products "that infringe" must be excluded.

Underscoring in original.

To read further the complaint, paragraph 25 alleges that Vizio, Inc. and its manufacturer AmTran, as well as TPV and its affiliate Envision, "and perhaps others" requested *ex parte* a ruling from U.S. Customs and Border Protection ("CBP") pursuant to 19 C.F.R. §177 that current models of DTV's, which incorporate certain ATSC-compliant chipsets, are not covered by the ITC's exclusion order. Pursuant thereto, the CBP Intellectual Property Rights & Restricted Merchandise Branch issued HQ H067500 (Aug. 5, 2009), holding that

> three semiconductor chip samples submitted by or on behalf of Amtran Logistics, Inc., TPV International (USA), Inc., and Envision Peripherals, Inc., are not subject to Exclusion Order 337–TA–617. Therefore, DTVs that contain the . . . three semiconductor chips identified as Model BCM35243 (Broadcom), Model MT5382PTR (MediaTek), Model ZR39775HGCF-B(Zoran), and all functional equivalents of the aforementioned models, maybe entered for consumption into the United States.

Plaintiffs' Complaint, Exhibit 8, Part C, p. 16. Whereupon the plaintiffs plead that questions regarding the scope and coverage of an ITC exclusion order are the sole authority of the Commission[2], that it retains the authority to make a dispositive ruling on infringement[3], and that CBP has *no authority* to change or fail to enforce a duly-issued ITC order of exclusion[4]. Hence, CBP's unilateral interpretation of the scope of that order is *quo warrento* and *ultra vires*[5], and

> [p]ublicly available information indicates that, since the Commission's Exclusion Order became fully enforceable on July 29, 2009, Respondents have continued to import the redesigned DTVs and sell them to customers. . . .

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[2] Complaint, para. 37.

[3] *Id.*, para. 41.

[4] *Id.* , para. 42 (emphasis in original).

[5] *Id.*, para. 46.

45. If Customs permits Amtran, TPV and Envision to import the redesigned product, Funai will be irreparably harmed in a manner for which Funai will have no redress in a court of law.[6]

III

Before this particular court of law, the plaintiffs pray for judgment:

A. . . . declar[ing] that Customs' Ruling HQ H067500. . . that the alleged redesigned digital television products of Amtran Logistics, . . . TPV International (USA), Inc. . . . and Envision Peripherals, Inc. . . . that contain the . . . three semiconductor chips identified as Model BCM35243 (Broadcom), Model MT5382PTR (MediaTek), Model ZR39775HGCF-B (Zoran), and all functional equivalents of the aforementioned models, maybe entered for consumption into the United States . . .is null and void and that the . . . Defendants[], together with their officers, agents and employees, . . . be . . . enjoined from enforcing [the] . . . Ruling . . .;

B. [] declar[ing] that Customs' enforcement position as to the redesigned DTVs is arbitrary, capricious and an abuse discretion;

C. . . . setting aside Customs' enforcement position as to the redesigned DTVs;

D. [] order[ing] that Customs communicate with the Commission as to the proper interpretation and scope of the exclusion order;

E. [] order[ing] that Customs [] exclude (under 19 U.S.C. § 1337(d)(1)) or seize where appropriate (under 19 U.S.C. § 1337(i)) the redesigned DTVs and not allow admission of redesigned DTVs unless a determination of non-infringement is made by the Commission;

F. [] declar[ing] that the redesigned DTVs are subject to the Commission Exclusion Order unless or until a determination of non-infringement is made by the Commission[;]

G. [] order[ing] that Customs seek redelivery immediately of all unliquidated entries of redesigned DTVs that have been admitted into the customs territory of the United States since July 29, 2009;

[6] *Id.*, paras. 44 and 45 and 73 and 74.

> H. [] order[ing] that Customs issue explicit instructions to the ports, to Amtran, TPV and Envision stating that any redesigned DTVs are not entitled to admission into the United States unless a determination of non-infringement is made by the Commission; [and]
>
> I. If this Court permits Customs to use Rule 177 to determine whether redesigned DTVs are within the scope of the Exclusion Order, [] order[ing] that Customs provide Funai fair access to information exchanged and an opportunity to comment and be heard[.] . . .[7]

A

The plaintiffs posit jurisdiction for such relief under subsections (h) and (i) of 28 U.S.C. §1581. They provide in pertinent part:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to suchimportation.
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsection . . . (h) of this section . . ., the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsection . . . (h) of this section. . . .

These provisions emanate from the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727, and, as indicated at the hearing on

[7] *Id.*, pp. 17–18.

September 3, 2009, the undersigned has not doubted the intent of its framers that an action like this be subject to the jurisdiction of the Court of International Trade. *See generally* H.R. Rep. No. 96–1235 (Aug. 20, 1980). Indeed, when another holder of a U.S. patent, which had sought its enforcement via proceedings pursuant to 19 U.S.C. §1337 before the ITC, came to believe that the resultant exclusion order was not being properly enforced by CBP and commenced an action, CIT No. 05–00487, preliminary injunctive relief was granted therein based, in part, upon reading of *Vivitar Corp. v. United States*, 761 F.2d 1552, 1557–60 (Fed.Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986), and *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348 (Fed.Cir. 2005). *See Eaton Corp. v. United States*, 29 CIT 1149, 395 F.Supp.2d 1314 (2005).

But subsequent reading does not lead this court to conclude that the current state of the law supports plaintiffs' position herein. In *Eaton Corp.*, the court opined that it did not have subject-matter jurisdiction under section 1581(h), *supra*. *See* 29 CIT at 1161, 395 F.Supp.2d at 1324–25. Nor has a review of cases properly brought thereunder revealed a party plaintiff in Funai's current circumstance. *See, e.g., Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48, 628 F.Supp. 978 (1986); *American Frozen Food Inst., Inc. v. United States*, 18 CIT 565, 855 F.Supp. 388 (1994); *Ross Cosmetics Distrib. Ctrs., Inc. v. United States*, 18 CIT 979 (1994); *CPC Int'l v. United States*, 19 CIT 978, 896 F.Supp. 1240 (1995), *rev'd on other grounds sub nom. Bestfoods v. United States*, 260 F.3d 1320 (Fed.Cir. 2001); *Holford USA Ltd. v. United States*, 19 CIT 1486, 912 F.Supp. 555 (1995); *Heartland By-Prods., Inc. v. United States*, 23 CIT 754, 74 F.Supp.2d 1324 (1999); *Boltex Mfg. Co. v. United States*, 24 CIT 972, 140 F.Supp.2d 1339 (2000); *Pacific Cigar, Co. v. United States*, 28 CIT 1931, 350 F.Supp.2d 1248 (2004).

Moreover, plaintiffs' position herein does not entail any of the elements set forth in subsection 1581(i)(1) or (i)(2), *supra*. As for subsection (i)(3), neither an embargo nor quantitative restriction is at bar. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176 (1988). Which leaves subsection (i)(4), but that provision conjoins subsections (1)–(3) with subsection 1581(h), each of which is not apposite in this matter.

The plaintiffs rely on *Conoco, Inc., v. U.S. Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed.Cir. 1994), to the effect that 28 U.S.C. §1581(i) gives the Court of International Trade "broad residual authority over civil actions arising out of federal statutes governing import transactions". That it does. The court of appeals has subsequently reaffirmed, however, that the

> Court of International Trade, like all federal courts, is a court of limited jurisdiction. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed.Cir. 2006). It possesses only that power authorized by the Constitution and federal statutes, which is not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 . . . (1994). In *Conoco*, we did not hold that the appellants were entitled to "non-statutory, judicially-granted" review. Instead, starting from the presumption that agency action is subject to judicial review, we analyzed various federal statutes in order to determine which statute provided jurisdiction over the appellants' case and, thus, where jurisdiction was proper (*i.e.*, in the Court of International Trade or in the appropriate district court). *Conoco*, 18 F.3d at 1585–1590. *Conoco* provides no support for Sakar's concept of "non-statutory, judicially-granted" review.

Sakar Int'l, Inc. v. United States, 516 F.3d 1340, 1349 (Fed.Cir. 2008). As was true when plaintiffs Conoco, Inc. and Citgo Petroleum Corp. appeared before the Court of International Trade, the "restrictive statutory scheme of §1581(a)–(h) and its relationship to §1581(i) should be re-examined"[8], but that process remains the province of higher authority.

IV

All that is clearly within the jurisdiction of this court *nisi prius* in view of the foregoing is to grant defendants' motion to dismiss plaintiffs' complaint.[9] Judgment will enter accordingly.

So ordered.

Dated: October 6, 2009
New York, New York

/s/ Thomas J. Aquilino, Jr.
SENIOR JUDGE

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[8] *Conoco Inc. v. U.S. Foreign-Trade Zones Bd.*, 16 CIT 231,243, 790 F.Supp. 279, 289 (1992).

[9] The court did not grant a temporary restraining order as aresult of the hearing on September 3, 2009. Given the required final disposition now, plaintiffs' application for a preliminary injunction must be, and it hereby is, denied. Moreover, the pending motions of Vizio, Inc., AmTran Technology Co., Ltd., AmTran Logistics, Inc., TPV Technology, Ltd., TPV International (USA), Inc., Top Victory Electronics (Taiwan) Co., Ltd., Envision Peripherals, Inc., and Tatung Co. for leave to intervene as party defendants, as well as plaintiffs' motion for leave to file a sur-reply to some of them, can be, and each hereby is, dismissed.

Also, Defendant's Motion to Strike Portions of Plaintiffs' September 22, 2009 Filing can be, and it hereby is, dismissed.