U.S. Customs and Border Protection

Slip Op. 09–122

WALGREEN CO. OF DEERFIELD, IL, Plaintiff, v. UNITED STATES, Defendant, and SEAMAN PAPER COMPANY OF MASSACHUSETTS, INC., Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Court No. 08–00372

[Plaintiff's Motion for Judgment on the Agency Record is denied.]

Dated: October 28, 2009

Bryan Cave LLP (*Joseph H. Heckendorn*), for the Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*L. Misha Preheim*); *Scott McBride*, Senior Attorney, U.S. Department of Commerce, for the Defendant.

OPINION

Barzilay, Judge:

I.
Introduction

Plaintiff Walgreen Company of Deerfield, IL ("Walgreen" or "Plaintiff") moves pursuant to USCIT Rule 56.2 for judgment on the agency record, challenging the U.S. Department of Commerce's ("Department" or "Commerce") September 19, 2008 scope ruling, which found that the tissue paper within Walgreen's gift bag sets falls within the scope of the antidumping duty order covering certain tissue paper products from the People's Republic of China ("PRC").[1] *See Final Scope Ruling: Antidumping Duty Order on Certain Tissue Paper from the People's Republic of China*, A–570–894, Def. Br. App. Ex. 1 (Dep't Commerce Sept. 19, 2008) ("*Scope Ruling*"); *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 16,223 (Dep't Commerce Mar. 30, 2005)

[1] Defendant-Intervenor withdrew from this action on July 16, 2009.

("*Amended Final Order*"). Specifically, Walgreen contests the Department's finding that the tissue paper within the gift bag sets unambiguously falls within the scope of the *Amended Final Order* and the Department's consequent decision not to employ the criteria listed in 19 C.F.R. § 351.225(k)(2) in its analysis. *See* Pl. Br. 2. Because the tissue paper component of Plaintiff's gift bag sets falls unambiguously within the scope of the *Amended Final Order*, Plaintiff's motion is denied.

II.
Background

On February 17, 2004, domestic manufacturers of tissue paper products filed an antidumping petition with respect to, *inter alia*, certain tissue paper products from the PRC with Commerce and the U.S. International Trade Commission ("ITC"). *See Notice of Initiation of Antidumping Duty Investigations: Certain Tissue Paper Products and Certain Crepe Paper Products from the People's Republic of China*, 69 Fed. Reg. 12,128, 12,128 (Dep't Commerce Mar. 15, 2004) ("*Notice of Investigations Initiation*"). Commerce commenced its investigation nearly one month later and thereafter published its preliminary determination that certain tissue paper products from the PRC were being, or likely to be, sold in the United States at less than fair value. *Id.*; *Certain Tissue Paper Products and Certain Crepe Paper Products from the People's Republic of China: Notice of Preliminary Determinations of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination for Certain Tissue Paper Products*, 69 Fed. Reg. 56,407 (Dep't Commerce Sept. 21, 2004) ("*Preliminary Determination*"). It finalized that determination almost five months later. *Notice of Final Determination of Sales at Less Than Fair Value: Certain Tissue Paper Products from the People's Republic of China*, 70 Fed. Reg. 7475 (Dep't Commerce Feb. 14, 2005) ("*Final Determination*"). The Department amended the Final Determination on March 30, 2005. *Amended Final Order*, 70 Fed. Reg. 16,223.

On February 5, 2008, Plaintiff requested a scope ruling pursuant to § 351.225(c) on whether the tissue paper in its gift bag sets falls within the scope of the *Amended Final Order*. *See Letter from Katten Muchin Rosenman LLP to Sec'y of Commerce*, Pl. Br. App. Tab 1 at 1–11 (Feb. 5, 2008). In its petition, Plaintiff described its gift bag sets as follows:

> **Item No. 647151, (Exhibit A), which is comprised of:**
> – 1 Petite Gift Bag with Gift Card, (4.375″ X 2.5″ X 5.75″), 76% of total cost.
> – 1 Crinkle Bow, 17% of total cost.

– 1 Sheet of Colored Tissue Paper, (20″ X 24″), 14 Grams per Sq. Meter, 7% of total cost.

Item No. 588150, (Exhibit B), which is comprised of:
– 1 Wine Tote Gift Bag with Gift Card, (5.25″ X 4.25″ X 13.625″), 73% of total cost.
– 1 Crinkle Bow, 21% of total cost.
– 2 Sheets of Colored Tissue Paper, (20″ X 24″), 14 Grams per Sq. Meter, 6% of total cost.

Item No. 647152, (Exhibit C), which is comprised of:
– 1 Cub Gift Bag with Gift Card, (7.5″ X 4.5″ X 9.875″), 71% of total cost.
– 1 Crinkle Bow, 21% of total cost.
– 3 Sheets of Colored Tissue Paper, (20″ X 24″), 14 Grams per Sq. Meter, 8% of total cost.

Item No. 647153, (Exhibit D), which is comprised of:
– 1 Large Gift Bag with Gift Card, (10″ X 4.5″ X 12.75″), 73% of total cost.
– 1 Crinkle Bow, 18% of total cost.
– 4 Sheets of Colored Tissue Paper, (20″ X 24″), 14 Grams per Sq. Meter, 9% of total cost.

Item No. 591166, (Exhibit E), which is comprised of:
– 1 Jumbo Gift Bag with Gift Card, (12.75″ X 7″ X 16″), 74% of total cost.
– 1 Crinkle Bow, 15% of total cost.
– 6 Sheets of Colored Tissue Paper, (20″ X 24″), 14 Grams per Sq. Meter, 11% of total cost. Pl. Br. App. Tab 1 at 2.

Plaintiff reasoned that the tissue paper in its gift bag sets does not fall within the scope of the *Amended Final Order* because the tissue paper forms a minor component of the sets. *See Scope Ruling* at 10. On September 19, 2008, the Department issued its ruling and found that, pursuant to § 351.225(k)(1), the scope of the *Amended Final Order* encompasses the tissue paper in the gift bag sets. *Id.* Specifically, Commerce determined that the gift bag sets are not "unique item[s] composed of different component pieces," but merely consist of subject and non-subject merchandise packaged together for sale. *Id.* at 11. Further, because the *Preliminary Determination* and the issues and decision memorandum accompanying the *Final Determination* state that tissue paper remains subject to the *Amended Final Order* when packaged with non-subject merchandise, the Department concluded that Plaintiff's tissue paper unambiguously lies within the order's scope. *See id.; Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Tissue Paper Products from the People's Republic of China*, A–570–894 (Dep't Commerce Feb. 3,

2005) ("*Issues and Decision Memorandum*"), at 5–6, *available at* http://ia.ita.doc.gov/frn/summary/prc/E5–595–1.pdf. Plaintiff now contests these findings.[2]

III.
Jurisdiction & Standard of Review

Plaintiff brings this action pursuant to 19 U.S.C. § 1516a(a)(2)(B)(vi), and the Court has jurisdiction pursuant to 28 U.S.C. § 1581(c). This Court grants "significant deference" to Commerce's scope rulings, *Toys "R" Us, Inc. v. United States*, Slip. Op. 08–79, 2008 WL 2764982, at *2 (CIT July 16, 2008) (quotation marks omitted), and will uphold a ruling unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i). Substantial evidence on the record constitutes "less than a preponderance, but more than a scintilla." *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (quotation marks & citation omitted), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" in light of the entire record, including "whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (quotation marks omitted); *see Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007). That the court may draw two inconsistent conclusions from the evidence does not preclude Commerce's ruling from being supported by substantial evidence. *Novosteel* SA, 25 CIT at 12, 128 F. Supp. 2d at 730. Likewise, the court will find a scope ruling not in accordance with law if the ruling "changes the scope of an order or interprets an order in a manner contrary to the order's terms." *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 842, 342 F. Supp. 2d 1172, 1183 (2004).

IV.
Discussion

A. Applicable Law

Because the Department necessarily must couch the descriptions of merchandise subject to its antidumping determinations in general terms, the Court employs interpretive rules to resolve disputes over a

[2] In its briefs, Plaintiff asserts that Commerce found that its gift bag sets fall in the scope of the antidumping duty order. *See, e.g.*, Pl. Br. 1–2. The record, however, clearly demonstrates that only the tissue paper within the sets lies within the order's scope. *Scope Ruling* at 1. This means no antidumping duties should be imposed on the value of the components other than tissue paper. *See* Def. Br. 13.

determination's scope. *Id.* at 842–43, 342 F. Supp. 2d at 1183–84; *see* § 351.225(a). First, the court examines "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." § 351.225(k)(1). Among these documents, however, the language in the antidumping order remains paramount. *See Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002); *Toys "R" Us, Inc.*, 2008 WL 2764982, at *4; *Allegheny Bradford Corp.*, 28 CIT at 843, 342 F. Supp. 2d at 1184 ("The language of an order is the 'cornerstone' of a court's analysis of an order's scope."). If these criteria are not dispositive, the court then turns to the factors listed in § 351.225(k)(2): "(i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." § 352.225(k)(2); *accord Crawfish Processors Alliance*, 483 F.3d at 1362. These factors permit the court to determine whether a product is "sufficiently similar as merchandise unambiguously within the scope of an order as to conclude the two are merchandise of the same class or kind." *Novosteel* SA, 25 CIT at 15, 128 F. Supp. 2d at 732 (quotation marks & citation omitted).

The initial petition referred to the subject merchandise as:

> The tissue paper products subject to this investigation are produced from paper having a basis weight less than 29 grams per square meter. Tissue paper products subject to this investigation may or may not be bleached, dye-colored, surface-colored, glazed, surface decorated or printed, sequined, crinkled, embossed, and/or die-cut. The tissue paper subject to this investigation is in the form of cut-to-length sheets of tissue paper with a width equal to or greater than one-half (0.5) inch and a length not exceeding 25 feet. Subject tissue paper may be rolled, flat or folded, and may be packaged by banding or wrapping with paper or film, by placing in plastic or film bags, and/or by placing in boxes for distribution and use by the ultimate consumer. Packages of tissue paper subject to this investigation may consist solely of tissue paper of one color and/or style, or may contain multiple colors and/or styles.
>
> * * *
>
> Excluded from the scope of this investigation are the following tissue paper products: (1) tissue paper products that are coated in wax, paraffin, or polymers for use in floral and food service applications; (2) tissue paper products that have been perfo-

> rated, embossed, or die-cut to the shape of a toilet seat, i.e., disposable sanitary covers for toilet seats; (3) toilet or facial tissue stock, towel, or napkin paper stock, paper of a kind used for household sanitary purposes, cellulose wadding, and webs of cellulose fibers....

Pl. Br. 7–8 (*citing Antidumping Duty Petition, Certain Tissue Paper Products and Crepe Paper Products from the People's Republic of China* (Dep't Commerce Feb. 17, 2004), at 6–7 (ellipses in original)). The scope in the *Notice of Investigations Initiation, Preliminary Determination, Final Determination*, and *Amended Final Order* remained identical, except for the omission of "and a length not exceeding 25 feet" and "rolled" in the description — changes immaterial to the present action. *Notice of Investigations Initiation*, 69 Fed. Reg. at 12,129; *Preliminary Determination*, 69 Fed. Reg. at 56,410; *Final Determination*, 70 Fed. Reg. at 7476; *Amended Final Order*, 70 Fed. Reg. at 16,223–24. In addition, the *Preliminary Determination* noted that "[p]ackaging the subject merchandise with non-subject merchandise does not transform the subject merchandise into merchandise outside the scope of the investigation."[3] 69 Fed. Reg. at 56,415. In the *Issues and Decision Memorandum*, Commerce also stated that "all subject merchandise — cut-to-length tissue paper — is subject to this proceeding, whether or not it is sold or shipped with non-subject merchandise." *Issues and Decision Memorandum* at 5.

B. The Parties' Contentions

Plaintiff claims that the *Amended Final Order* does not account for "tissue paper incorporated into mixed media sets" or "imports of tissue paper packages in sets with unrelated merchandise," rendering the order's scope ambiguous with respect to tissue paper in gift bag sets.[4] Pl. Br. 7, 9. Plaintiff dismisses the explicit language of the

[3] The Department inserted this language in response to inquires by a PRC company that sold merchandise packages in the United States containing mulberry paper, mylar film, iridescent film, oriented polypropylene, and crepe paper along with tissue paper. *See Preliminary Determination*, 69 Fed. Reg. at 56,415.

[4] Plaintiff suggests that a scope clarification request by the petitioners which sought to clarify that the *Amended Final Order* applies to imported tissue paper within kits or sets demonstrates the ambiguity of the order's scope as applied to Plaintiff's gift bag sets. *See* Pl. Br. 9–10. This argument has no merit. When performing its analysis, Commerce examines only "the petition, the initial investigation, and the determinations of [Commerce]." § 351.225(k)(1). Scope clarification requests have no bearing on the inquiry. In any event, in seeking clarification, Plaintiff explicitly argued, *inter alia*, that the descriptions of the subject merchandise contained in the petition, the initial investigation, and the determinations of the Department and of the ITC are dispositive of this scope clarification request. *See* Pl. Br. App. Tab 1 Ex. H at 2. The court agrees.

Preliminary Determination and *Issues and Decision Memorandum*, which states that tissue paper remains under the scope of the order irrespective of whether it is packaged, shipped, or sold with non-subject merchandise, as non-dispositive because its tissue paper forms a "minor or insignificant component" of a "unique mixed media set[]," *i.e.* the gift bag set. Pl. Br. 13. In other words, Plaintiff avers that the particular combination of its tissue paper with the non-subject merchandise is so unique that the subject tissue paper does not fall within the scope of the order. Pl. Br. 10–13. Plaintiff argues that the Department consequently should have turned to § 351.225(k)(2) in the *Scope Ruling*. *See* Pl. Br. 9.

To bolster its argument, Plaintiff relies upon a string of Commerce scope determinations concerning certain cased pencils from the PRC. For example, in one such scope determination, the Department found that otherwise unambiguously subject pencils, once placed in an art kit with other art supplies, did not fall unambiguously within the order's scope because the order did not address "mixed media" sets. *Final Scope Ruling — Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) — Request by Target Corporation*, A–570–827 (Dep't Commerce Mar. 4, 2005), Pl. Br. App. Tab 1 Ex. K at 4. The Department proceeded to apply the § 351.225(k)(2) criteria and found the pencils in the art kit to fall outside of the order's scope. *Id.* at 4–9. Commerce adhered to similar reasoning when it found that pencils sold as components of compasses did not fall unambiguously within the scope of the antidumping order. *See generally Final Scope Ruling — Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China (PRC) — Request by Fiskars Brands, Inc.*, A–570–827 (Dep't Commerce June 3, 2005), Pl. Br. App. Tab 1 Ex. L. Plaintiff believes that the Department should have provided the tissue paper in its gift bag sets with the same treatment.

By contrast, in the *Scope Ruling*, Commerce found — and now reasserts — that the *Pencils* determinations are inapplicable to the present case. It maintains that Plaintiff's gift bag sets do not constitute "unique item[s] composed of different component pieces," but rather a grouping of independent items used in the same manner together as when sold separately. Def. Br. 13. Thus, Commerce believes that the tissue paper in gift bag sets more closely parallels the fact pattern in *Recommendation Memo — Final Scope Ruling on the Request by Texsport for Clarification of the Scope of the Antidumping Duty Order on Porcelain-on-Steel Cooking Ware from the People's*

Republic of China, Def. Br. App. Tab 2 Ex. J ("*Texsport Memo*"). *Scope Ruling* at 11. In that ruling, Commerce determined that subject porcelain-on-steel cookware sold in camping sets with non-subject porcelain-on-steel merchandise remained under the order's scope. *Texsport Memo* at 4. Likewise, the Department reasoned that, although the items within the camping sets were sold together, the non-subject merchandise was "a fundamentally different class or kind of merchandise from the items addressed in the investigation" and so should not fall under the order's purview. *Id.* Commerce believes that the subject tissue paper and non-subject crinkle bow and gift bag sold together in a set in the present case have a similar relationship. *See* Def. Br. 13.

C. Analysis

Both parties' arguments miss the point. The salient issue before the court is not whether the Department should have characterized the gift bag sets as compilations of subject and non-subject merchandise or mixed media sets; it is whether substantial evidence in the record supports the *Scope Ruling's* conclusion. *See Atl. Sugar, Ltd.*, 744 F.2d at 1562; *Crawfish Processors Alliance*, 483 F.3d at 1361; *see also Novosteel* SA, 25 CIT at 12, 128 F. Supp. 2d at 730. In light of the language of the *Amended Final Order* and other relevant Department publications, Commerce reasonably determined that the tissue paper in Plaintiff's gift bag sets falls within the order's scope. Plaintiff's tissue paper has all of the characteristics of tissue paper set forth in the *Amended Final Order*, *see* Pl. Br. App. Tab 1 at 2–3, Exs. A–D, and does not fall within the order's enumerated exceptions. *See Duferco Steel, Inc.*, 296 F.3d at 1089 ("Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.").

Moreover, the *Preliminary Determination* and *Issues and Decision Memorandum* explicitly note that tissue paper remains within the AD order's scope even if accompanied by non-subject merchandise. *See Preliminary Determination*, 69 Fed. Reg. at 56,415; *Issues and Decision Memorandum* at 5. The *Scope Ruling* merely reiterated this consistent position: "[T]he Department determines that tissue paper packaged together with other gift bags and gift wrap items is not a component of a unique set but merely subject merchandise packaged with non-subject merchandise." *Scope Ruling* at 11. Although Plaintiff believes that its tissue paper more closely resembles the merchandise described in the noted pencil determinations, Commerce reason-

ably concluded from the record that its prior scope ruling on porcelain-on-steel cookware from the PRC provides the best guidance as to whether the *Amended Final Order* applies to Plaintiff's tissue paper. From its own examination of the record, the court recognizes that parallels between the tissue paper and pencils undoubtedly exist. However, substantial evidence on the record supports the Department's finding of equal, or even greater, parallels between the tissue paper and porcelain-on-steel cookware. The Department found that, like the camp sets discussed previously, the components of the gift bag sets "could be used independently of one another and at different times" and that the "tissue paper was a separate dutiable component, not a piece of an otherwise unique set." *Id.* Commerce, therefore, has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation marks & citation omitted); *accord Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136, 787 F. Supp. 224, 227 (1992). Given the applicable standard of review, the court could not re-weigh this record evidence even if it so desired. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) ("[A] court is not to substitute its judgment for that of the agency . . . .") (quotation marks & internal citation omitted); *Novosteel SA*, 25 CIT at 12, 128 F. Supp. 2d at 730. Rather, it must sustain any determination supported by "such relevant evidence as a reasonable mind might accept as adequate to support *a* conclusion," and the Department has met that requirement.[5] *Atl. Sugar, Ltd.*, 744 F.2d at 1562 (emphasis added); *see also Novosteel* SA, 25 CIT at 12, 128 F. Supp. 2d at 730 (noting that administrative determination is supported by substantial evidence even if court could draw inconsistent conclusions from record).

V.
Conclusion

Because the court finds the Department's *Scope Ruling* supported by substantial evidence and otherwise in accordance with law, Plaintiff's motion for judgment on the agency record is denied.

Dated: October 28, 2009
New York, NY

/s/ Judith M. Barzilay
JUDGE

[5] Because the court finds the § 351.225(k)(1) factors dispositive of whether Plaintiff's tissue paper lies within the scope of the *Amended Final Order*, the court need not address the § 351.225(k)(2) factors. *See* § 351.225(k).

Slip Op. 09–123

ARTHUR C. SCHICK, III, and SCHICK INTERNATIONAL FORWARDING, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 06–00279

[Denying plaintiffs' motion to transfer and dismissing action for lack of subject matter jurisdiction]

Dated: October 28, 2009

Neville Peterson LLP (*John M. Peterson* and *Michael T. Cone*) for plaintiffs.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Mikki Cottet*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Benjamin B. Hamlow*, Office of Associate Chief Counsel, United States Customs and Border Protection, of counsel, for defendant.

OPINION

Stanceu, Judge:

I.
Introduction

Plaintiffs Arthur C. Schick III ("Schick") and Schick International Forwarding, Inc. ("Schick International") ("plaintiffs") brought this action to contest the revocation of Schick's customs broker's license for failure to file a timely status report ("triennial report") with Customs and Border Protection, United States Department of Homeland Security ("Customs" or the "Agency") as required by Section 641(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(g) (2006). In an opinion dated December 18, 2007, the court dismissed plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. *Schick v. United States*, 31 CIT __, 533 F. Supp. 2d 1276 (2007) ("*Schick I*").

Plaintiffs appealed the decision to the Court of Appeals for the Federal Circuit ("Court of Appeals"), which, upon ruling that the Court of International Trade lacked jurisdiction to consider any of plaintiffs' claims, remanded with instructions that the complaint again be dismissed and also directed the court to consider whether the matter should be transferred, pursuant to 28 U.S.C. § 1631 (2006), to a court with appropriate jurisdiction. *Schick v. United*

States, 554 F.3d 992, 995–96 (Fed. Cir. 2009) ("*Schick II*"). Schick now moves to transfer this action to the District Court for the District of Columbia. Pl.'s Mot. Pursuant to 28 U.S.C. § 1631, for Transfer to Fed. Dist. Ct. 1 ("Pl.'s Mot.").

Pursuant to the decision in *Schick II*, the court lacks subject matter jurisdiction to hear plaintiffs' claims and must either dismiss or transfer the action. *Schick II*, 554 F.3d at 996. If a court finds that there is a want of jurisdiction, it is to transfer the action before it to any other such court in which the action could have originally been brought if doing so is in the interest of justice. 28 U.S.C. § 1631. Because the court concludes that transfer would not be in the interest of justice, the court will deny plaintiffs' motion for transfer and dismiss this action.

II.
Background

Background information pertaining to the revocation of Schick's customs broker's license and the court's initial ruling are set forth in *Schick I*, 31 CIT at __, 533 F. Supp. 2d at 1280–81, and summarized herein. Below, the court supplements that background with a summary of subsequent events.

In June 2006, Customs informed plaintiffs that Schick's customs broker's license had been revoked as a result of Schick's failure to file a timely triennial report with Customs as required by 19 U.S.C. § 1641(g)(1). *Schick I*, 31 CIT at __, 533 F. Supp. 2d at 1280–81. On August 18, 2006, plaintiffs brought this action in the Court of International Trade, asserting four claims. Plaintiffs claimed, first, that the revocation of Schick's customs broker's license by Customs was conducted without the observance of specific procedures, including a hearing, pursuant to 19 U.S.C. § 1641(d). Compl. ¶¶ 15–20. Second, they claimed that the revocation of Schick's license deprived Schick of due process of law in violation of the Administrative Procedure Act ("APA") and the Fifth Amendment. *Id.* ¶¶ 21–31. Third, they claimed that the revocation of Schick's license constituted an excessive fine or sanction in violation of the Eight Amendment. *Id.* ¶¶ 32–36. Their fourth claim was that the proposed revocation of Schick International's corporate customhouse brokerage license and permit on the basis

of the individual license revocation would be contrary to law.[1] *Id.* ¶¶ 37–40. Defendant moved to dismiss plaintiffs' claims for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *Schick I*, 31 CIT at __, 533 F. Supp. 2d at 1280–81.

In *Schick I*, the court held that it lacked jurisdiction over those of plaintiffs' claims invoking the APA and the Fifth and Eighth Amendments but did establish jurisdiction under 28 U.S.C. § 1581(i)(4) for the claim that plaintiffs based on 19 U.S.C. § 1641(d). *Id.* at __, __, 533 F. Supp. 2d at 1282, 1286–89. The court then concluded that "no relief can be granted on plaintiffs' first claim because the claim is based on an argument that is contrary to the plain language of 19 U.S.C. § 1641." *Id.* at __, 533 F. Supp. 2d at 1282. The court further concluded that Customs provided Schick due process as required by § 1641(g)(2) before revoking his license, *id.* at __, 533 F. Supp. 2d at 1286, and explained that the notice and hearing provisions of § 1641(d)(2)(B) did not apply to a revocation under § 1641(g)(2). *Id.*

On appeal, the Court of Appeals held that the Court of International Trade did not have jurisdiction over plaintiffs' claims, holding that a challenge to any revocation for failure to timely file a triennial report under 19 U.S.C. § 1641(g) does not fall within the court's jurisdiction under 28 U.S.C. § 1581. *Schick II*, 554 F.3d at 994–95. Relying on its decision in *Retamal v. U. S. Customs & Border Protection*, 439 F.3d 1372 (Fed. Cir. 2006), the Court of Appeals held that the revocation of Schick's license was not reviewable in the Court of International Trade under either 28 U.S.C. § 1581(g) or under the residual jurisdiction provision in 28 U.S.C. § 1581(i). *Schick II*, 554 F.3d at 994–95. The Court of Appeals remanded the matter with instructions to dismiss for lack of subject matter jurisdiction. *Id.* at 995. *Citing Butler v. United States*, 30 CIT 832, 442 F. Supp. 2d 1311 (2006), the Court of Appeals also instructed the court to consider transfer under 28 U.S.C. § 1631. *Schick II*, 554 F.3d at 996.

Upon remand, plaintiffs moved to have the case transferred to the District Court for the District of Columbia, a transfer that defendant opposes. Pl.'s Mot. 1; Def.'s Opp'n to Pl.'s Mot. Pursuant to 28 U.S.C. § 1631, for Transfer to Fed. Dist. Ct. ("Def.'s Opp'n").

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[1] Plaintiffs' fourth claim, which related to Schick International, became moot when Schick International informed Customs that it had appointed a licensed customs broker with a valid permit to conduct business in the Los Angeles District. *Schick v. United States*, 31 CIT __, __, __, 533 F. Supp. 2d 1276, 1279–80, 89 (2007). Therefore, the only remaining claims in this case are the three claims pertaining to the revocation of Schick's individual customhouse broker's license.

III.
Discussion

In fulfilling the mandate of the Court of Appeals, the court must decide whether to transfer this action or dismiss for lack of subject matter jurisdiction. *See* 28 U.S.C. § 1631. In 28 U.S.C. § 1631, Congress provided, in pertinent part, that

> [w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed . . . and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred.

Id. The transfer plaintiffs seek is warranted only "if it is in the interest of justice" and if the District Court for the District of Columbia is the appropriate forum. *See id.* "The phrase 'if it is in the interest of justice' relates to claims which are nonfrivolous and as such should be decided on the merits." *Galloway Farms, Inc. v. United States*, 834 F.2d 998, 1000 (Fed. Cir. 1987). Frivolous claims involve "'legal points not arguable on their merits,' or those whose disposition is obvious." *Id.* (citations omitted). The court concludes that all three of plaintiffs' claims are frivolous.[2]

A. Plaintiffs' Claim that a Hearing Was Required by § 1641(d)(2) Is Frivolous

Plaintiffs' first claim, which is identified in the complaint as "COUNT I: Violation of 19 U.S.C. § 1641(d)," is that Customs acted contrary to § 1641(d)(2) in revoking Schick's customs broker's license without following the notice and hearing procedures set forth in that provision and thereby failed to afford Schick due process of law. Compl. ¶¶ 15–20. Section 1641(d)(2)(B) provides for revocation of a customs broker's license for cause subsequent to disciplinary proceedings. *See* 19 U.S.C. § 1641(d). It had no applicability to Schick's revocation, which was not a revocation for cause but occurred instead

[2] Defendant also objects to transfer on the ground that plaintiffs are dilatory in seeking it. Def.'s Opp'n to Pl.'s Mot. Pursuant to 28 U.S.C. § 1631, for Transfer to Fed. Dist. Ct. 14–16. Defendant argues that plaintiffs waived their right to transfer when the court, during oral argument on the motion to dismiss, asked whether plaintiffs sought transfer in the event the court should conclude that it lacked subject matter jurisdiction. *Id.* The court does not have a valid basis on which to conclude that plaintiffs, in then indicating at that time that they did not request transfer and instead would appeal if the court concluded that it lacked jurisdiction, waived any right to seek transfer at a later stage of the proceedings.

according to 19 U.S.C. § 1641(g) for failure to comply with the statutory requirement to file a triennial report. As the court concluded in *Schick I*, the revocation procedures specified in subsection (d)(2)(B) and those specified in subsection (g)(2) of § 1641 are separate and exclusive. 31 CIT at __, 533 F. Supp. 2d at 1282. The Court of Appeals agreed with this analysis in ruling on the jurisdiction issue, concluding that "[t]he 'disciplinary proceedings' that are covered by section 1641(d) are treated separately from the proceedings relating to the failure to file a triennial report, which are addressed in section 1641(g)." *Schick II*, 554 F.3d at 995. The statutory language providing for the separate revocation procedures is clear and unambiguous. Because plaintiffs' proffered construction of the statute to require a hearing under § 1641(d) for revocation under § 1641(g) is implausible, the claim based on this construction is frivolous.

B. Plaintiffs' Claim that the APA Required an Adjudicative Hearing Is Frivolous

Plaintiff's second claim is identified in the complaint as "COUNT II — Violations of the Administrative Procedure Act." *See* Compl. ¶¶ 21–31. Plaintiffs argue that the APA, in 5 U.S.C. §§ 554, 556, and 557 (2006), required Customs to conduct a hearing at which Schick would be provided "the opportunity to submit facts, arguments, offers of settlement, or proposals of adjustment with respect to the revocation of his Customhouse broker's license," Compl. ¶ 28, and that the Agency's failure to do so violated the APA and denied Schick due process of law in violation of the Fifth Amendment. *Id.* ¶¶ 27–29.

The court is unable to discern a nonfrivolous argument under which the APA provisions on which plaintiffs rely could apply to a license revocation under 19 U.S.C. § 1641(g). Congress made § 554 applicable (with certain exceptions not here relevant) "in every case of adjudication *required by statute* to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (emphasis added). Although plaintiffs cite 19 U.S.C. § 1641(d) in support of their APA claim, Compl. ¶ 26, the claim that § 1641(d) requires Customs to conduct an adjudicative hearing upon suspension or revocation for failure to file a triennial report is frivolous for the reasons discussed previously in this Opinion. Subsection (g) of § 1641 — pursuant to which Schick's license was revoked, and to which plaintiffs do not cite specifically in this count of their complaint, *see* Compl. ¶¶ 21–31 — makes no mention of an opportunity for a hearing and does not suggest, even remotely, that a license suspension or revocation there-

under is an adjudication of the type described by 5 U.S.C. § 554. *See* 19 U.S.C. § 1641(g)(2).[3] Sections 556 and 557 are also inapposite, as they set forth procedures for the hearings that are required under § 554. *See* 5 U.S.C. §§ 556, 557.

In stating their APA claim, plaintiffs assert in paragraph 29 of the complaint that "Customs' failure to accord Arthur C. Schick a hearing in accordance with the APA constituted a violation of that statute, and deprived him of due process of law, in violation of the Fifth Amendment to the United States Constitution." Compl. ¶ 29. Although this Fifth Amendment claim, when construed apart from the claim that the APA required an adjudicative hearing, is only vaguely stated, the court nevertheless construes it broadly in conjunction with paragraph 28 of the complaint, in which plaintiffs claim that Schick "was not given the opportunity to submit facts, arguments, offers of settlement, or proposals of adjustment with respect to the revocation of his Customhouse broker's license." Compl. ¶ 28. The court construes the claim to be that Customs violated the Fifth Amendment guarantee of due process in failing to conduct an adjudicative hearing at which facts material to suspension and revocation of Schick's license would be determined and alternatives to revocation would be considered.

Even so broadly construed, plaintiffs' APA and Fifth Amendment claim is frivolous. Although § 1641 does not prohibit Customs from conducting an adjudicative hearing to ascertain facts material to a revocation under subsection (g), plaintiffs could not have benefitted from such a hearing on the facts as asserted in their complaint. The only "fact" that § 1641(g) permitted Customs to ascertain prior to notifying Schick that his license was suspended was Schick's failure to accomplish a timely filing of the report. 19 U.S.C. § 1641(g)(2). Plaintiffs admit such a failure in their complaint. Compl. ¶ 9 ("As the result of illness, plaintiff Arthur C. Schick, III, did not timely file his required triennial status report on or before February 1, 2006."). The statute required Customs to provide notice of the suspension, but plaintiffs also admit that Schick received such notice and make no

[3] Section 1641(g)(2) provides as follows:

> If a person licensed under subsection (b) of this section fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked subject to the following procedures:
>
> (A) The Secretary shall transmit written notice of suspension to the licensee no later than March 31 of the reporting year.
>
> (B) If the licensee files the required report within 60 days of receipt of the Secretary's notice, the license shall be reinstated.
>
> (C) In the event the required report is not filed within the 60-day period, the license shall be revoked without prejudice to the filing of an application for a new license.

19 U.S.C. § 1641(g)(2) (2006).

claim that the notice was deficient. *See* Compl. ¶ 10 (stating that "[b]y letter dated on or about March 5, 2006 . . . , the Port Director of Customs . . . notified Mr. Schick that, as a result of his failure to file the required triennial report by the February 1, 2006 deadline, Customs had suspended his license"); *cf. Butler*, 30 CIT at 835–41, 442 F. Supp. 2d at 1315–21 (holding that transfer was appropriate where plaintiff claimed that the regulation setting forth the revocation procedures was inconsistent with the statute with respect to the date that triggered the sixty-day period and thereby violated § 1641(g)(2)(B) and the due process requirement). According to the statute, the only fact material to revocation of a suspended license is whether the licensee failed to make the required remedial filing within the sixty-day statutory period following receipt of the notice of suspension. *See* 19 U.S.C. § 1641(g)(2)(C) (providing in that event that "the license *shall be revoked* without prejudice to the filing of an application for a new license" (emphasis added)). Plaintiffs admit in the complaint that "by reason of illness, Mr. Schick failed to file the form within the 60 day period specified by Customs." Compl. ¶ 10. In summary, plaintiffs admit in the complaint a set of facts upon which Customs was required by the statute to revoke Schick's license. They fail to allege that any of these facts were ever in dispute. The court considers frivolous a claim that due process required Customs to conduct an adjudicative hearing to determine facts that plaintiffs, upon commencing the action, admit. Plaintiffs' implied claim that due process required Customs to offer Schick a hearing at which Schick could have established any other facts or mitigating circumstances, or proposed a settlement, is frivolous as well. The statute on its face, in § 1641(g), plainly foreclosed any inquiry into such facts or circumstances. Customs lacked discretion to consider the reasons why Schick, once notified of the suspension, may have failed to remedy within the sixty-day period his earlier failure to file. The court concludes, however, that plaintiffs' complaint fails to state any claim that § 1641(g) violates the Fifth Amendment. Because the court, for the reasons stated below, reaches this conclusion based on its reading of the complaint, the court does not decide the question of whether such a claim, had it been made, would have been nonfrivolous.

In their motion seeking transfer, plaintiffs appear to characterize their APA claim as containing a claim that § 1641(g) is unconstitutional as applied, arguing that this is an issue never before decided by any federal court. Pl.'s Mot. 5. The motion states that "[s]pecifically, plaintiff asserts that, to the extent 19 U.S.C. § 1641(g) is interpreted as allowing the revocation of broker licenses without prior hearing, it violates constitutional guarantees of due process" and that "[p]lain-

tiff's action raises substantial and serious questions regarding the constitutionality of Section 1641(g) as currently administered by Customs." *Id.* The flaw in this characterization is that the constitutional claim plaintiffs appear to describe in their motion to transfer appears nowhere in their complaint. The only paragraphs in the complaint that conceivably could be construed together to suggest such a claim are the aforementioned paragraphs 28 and 29. Paragraph 28 states no claim by itself and merely alleges as a fact that Schick "was not given the opportunity to submit facts, arguments, offers of settlement, or proposals of adjustment with respect to the revocation of his customhouse broker's license." Compl. ¶ 28. Although paragraph 29 states a claim, that claim in its entirety is that "Customs' failure to accord Arthur C. Schick a hearing in accordance with the APA constituted a violation of that statute, and deprived him of due process of law, in violation of the Fifth Amendment to the United States Constitution." Compl. ¶ 29. Even construed liberally, this paragraph does not make out a facial or an as-applied claim that 19 U.S.C. § 1641(g) violates the Fifth Amendment. There is no reference in either paragraph to § 1641(g), or even to § 1641 in general. The paragraph does not materially expand upon plaintiffs' contentions, to which much of the remainder of the complaint is directed, that both § 1641 and the APA required an adjudicative hearing in connection with the license revocation.[4] In conclusion, paragraphs 28 and 29 of the complaint do not state a claim that § 1641(g), on its face or as applied, violates the Fifth Amendment, and plaintiffs did not seek to amend their complaint to add such a claim.

C. Plaintiffs' Eighth Amendment Claim is Frivolous

Plaintiffs third claim is identified in the complaint as "COUNT III — Violation of Eighth Amendment 'Excessive Fines' Clause." *See* Compl. ¶¶ 32–36. Plaintiffs state that

> [t]o the extent that Customs revoked and forfeited the Customhouse broker license of plaintiff Arthur C. Schick III as a fine or sanction for his failure to timely file the informational report

[4] Although the court reaches its conclusion that plaintiffs made no constitutional claim based on its construction of the complaint, the court observes that plaintiffs, in opposing defendant's motion to dismiss, generally characterized their claims as claims that are *other than* facial or as-applied challenges to the constitutionality of 19 U.S.C. § 1641(g). Plaintiffs argued that defendant's argument, made in support of dismissal, that subsections (d) and (g) create separate revocation procedures is an impermissible construction of § 1641 for various reasons, including the reason that defendant's construction of the statute would lead to absurd and unconstitutional results. *See* Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss 28 ("In plaintiff's view, 19 U.S.C. § 1641(g) provides a *ground* for possible revocation of a license, but does not excuse Customs from following the notice and hearing procedures of 19 U.S.C. § 1641(d) before revoking a license on that ground.").

> prescribed in 19 U.S.C. § 1641(g)(1), the sanction constitutes an excessive fine in violation of the Eighth Amendment to the United States Constitution, and must be set aside as unlawful.

Compl. ¶ 36. This claim is frivolous because it is based on a false premise. Customs did not revoke Schick's license as a fine or sanction and could not lawfully have done so. Because Schick failed to file the report during the sixty-day period following his receipt of notice that his license had been suspended for his earlier failure to comply with the reporting requirement, Customs acted exactly as the statute directed it to do, revoking the license without prejudice to the filing of an application for a new license. On the uncontested facts of this case, Customs lacked any authority to impose, or consider imposing, a fine or sanction, just as it lacked authority to do anything other than to proceed to revocation once Schick allowed the sixty-day period to come to a close without making the required remedial filing. In advancing their third claim, plaintiffs do not state or imply that they are challenging the constitutionality of 19 U.S.C. § 1641(g) on Eighth Amendment grounds. Therefore, they are left with an untenable claim that challenges as an impermissible "sanction" an action that Customs was required by statute to take. Because any court's disposition of plaintiffs' Eighth Amendment claim would be obvious, the claim must be regarded as frivolous.

Plaintiffs cited *United States v. Bajakajian*, 524 U.S. 321 (1998), in support of their Eighth Amendment claim, Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss 25, but citation to this authority does nothing to bolster their claim so as to render it nonfrivolous. *Bajakajian* held that the United States violated the Excessive Fines Clause of the Eighth Amendment in seeking the forfeiture of the entire amount of $357,144 of which Bajakajian was found guilty of failing to report to Customs upon exiting the United States. *Bajakajian*, 524 U.S. at 324. The facts upon which plaintiffs base their Eighth Amendment claim are not analogous to those upon which the Supreme Court reached its decision in *Bajakajian*.

IV.
Conclusion

For the aforestated reasons, the court concludes that each of plaintiffs' three claims is frivolous. It would be contrary to the sound administration of justice for defendant and another federal court to be burdened by any litigation commenced on these claims. Therefore, the court concludes that the transfer of this action to a court of

competent jurisdiction would not be in the interest of justice.[5] Accordingly, the court does not consider the question of an appropriate forum for transfer. The court lacks jurisdiction over plaintiffs' fourth claim, which the court earlier held to be moot. Judgment will be entered denying plaintiffs' motion to transfer and dismissing this action for lack of jurisdiction.

Dated: October 28, 2009
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 09–124

MAZAK CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 06–00393

[Plaintiff's partial motion for summary judgment is granted. Defendant's cross-motion for summary judgment is granted in partwith regard to its jurisdictional objections and denied in part. Customs shall reliquidate the entries subject to this action.]

Dated: October 29, 2009

Pepper Hamilton, LLP (*Gregory Carroll Dorris*) for Plaintiff Mazak Corporation.

Michael F. Hertz, Deputy Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; *Saul Davis*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Of Counsel; *Deborah R. King*, Attorney-International, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

OPINION

GOLDBERG, Senior Judge:

I.
Introduction

Plaintiff Mazak Corporation ("Mazak") is contesting the denials of Protest Nos. 3001–06–100270 and 3001–06–100272 by the United States Customs and Border Protection ("Customs"). During the ad-

[5] The court notes that under 28 U.S.C. § 2401(a) (2006), a civil action commenced against the United States is subject to a six-year statute of limitations. Thus, if any nonfrivolous claim possibly could arise out of Schick's license revocation, it appears that Schick would not be precluded from pursuing it in an appropriate forum.

ministrative review period from May 1, 2003 to April 30, 2004, Mazak imported antifriction bearings into the United States that fell within the scope of the antidumping duty order, *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan* (A–588–804), 54 Fed. Reg. 20,904 (Dep't Commerce May 15, 1989). Upon importation, Mazak paid the antidumping duty cash deposit rate required by Customs. *See* 19 U.S.C. § 1505(a) (2006). Mazak's entries were filed using the antidumping duty case number for Nippon Seiko K. K. ("NSK"), a Japanese company. At the conclusion of the administrative review period, the U.S. Department of Commerce, International Trade Administration ("Commerce") published an opportunity to request an administrative review of this antidumping duty order in the Federal Register pursuant to 19 C.F.R. § 351.213(b) (2002). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 69 Fed. Reg. 24,117 (Dep't Commerce May 3, 2004). Pursuant to the requests received, Commerce initiated a review of several companies. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 Fed. Reg. 39,409 (Dep't Commerce June 30, 2004) ("*Notice of Initiation of Review*").

Commerce instructed Customs to suspend all entries for companies under review until further notice. Pursuant to these instructions, Customs suspended liquidation for entries identified as NSK merchandise, which included Mazak's entries. Commerce published its final results of the administrative review on September 16, 2005. *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711 (Dep't Commerce Sept. 16, 2005) ("*Final Results*"). On October 21, 2005, Commerce published an amendment to the *Final Results*. *Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof from Japan*, 70 Fed. Reg. 61,252 (Dep't Commerce Oct. 21, 2005) ("*Amended Results*"). Commerce issued a correction to the *Amended Results* on November 15, 2005. *Notice of Correction to Amended Final Results of Antidumping Duty Administrative Review: Ball Bearings and Parts Thereof from Japan*, 70 Fed. Reg. 69,316 (Dep't Commerce Nov. 15, 2005).

Upon conclusion of the review, Commerce instructed Customs to liquidate entries at the assessed rates calculated during the administrative review. *See* 19 C.F.R. § 351.212(b)(1) (2009). On March 31, 2006 and April 7, 2006, Customs liquidated Mazak's entries at the higher "all-others" antidumping duty rate in accordance with the

instructions issued by Commerce; Mazak paid the amounts requested. It filed the protests in question in this case on June 30, 2006. Customs denied both protests and Mazak proceeded to commence action in this Court. Following discovery, Mazak filed a motion for partial summary judgment. The Defendant filed a cross-motion for summary judgment.

Once a statutory or court-ordered suspension is removed, Customs must liquidate any entries within six months "after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry." 19 U.S.C. § 1504(d) (2006). Any entry not liquidated within the requisite six-month period shall be deemed liquidated at the amount originally asserted by the importer at the time of entry. *Id.* The issue at bar is exactly what event constituted the "notice of the removal" by Commerce triggering the six-month liquidation time clock to commence. Mazak states that no review was specifically requested of it or of its parent company Yamazaki Mazak Trading Company ("Yamazaki Mazak"), the reseller from which Mazak imported the antifriction bearings. Because of this fact, Mazak contends that the review did not pertain to it and Customs should have liquidated Mazak's entries within six months of the publication of the *Notice of Initiation of Review*; that is by December 30, 2004. In the alternative, Mazak argues that the publication date of Commerce's *Final Results*, and not that of the *Amended Results*, began the ticking of the six-month clock. According to this argument, the entries should have been liquidated by March 16, 2006. The entries were actually liquidated on March 31, 2006 and April 7, 2006, outside of this proposed six-month window. The Defendant (or "the Government") claims that the six-month liquidation period may not begin until the issuance of the *Amended Results*, which occurred on October 21, 2005 and would extend the six-month period until April 21, 2006.

Because of the reasons articulated below, this court finds that the publication date of the *Final Results*, and not that of the *Amended Results*, dictated the commencement of the statutory six-month liquidation period. The liquidation period in this case concluded on March 16, 2006. Mazak's entries were thus liquidated too late and are deemed liquidated by operation of law at the cash deposit rate.

The Defendant filed a cross-motion for summary judgment arguing a jurisdictional defect as to certain entries included in Protest No. 3001–06–100270. The Defendant argues that the protest was not timely filed. As discussed further below, the timeliness of both protests creates a jurisdictional bar as to any entry liquidated on March

31, 2006. With respect to those entries, the Court severs and dismisses the claims for lack of jurisdiction.

II.
Jurisdiction And Standard Of Review

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(a) (2006) for the contest of the denial of protests filed under Section 515 of the Tariff Act of 1930.

Summary judgment is appropriate if no genuine issues of material fact exist. USCIT R. 56(c). The moving party bears the burden of demonstrating the absence of any issues of material fact. *Celotex Corp. v. Cattret*, 477 U.S. 317, 323 (1986). The non-moving party is "entitled to have both the evidence viewed in the light most favorable to it and all doubts resolved in its favor." *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991). To successfully oppose a motion for summary judgment, the non-movant must raise a genuine issue of material fact. *Heng Ngai Jewelry, Inc. v. United States*, 28 CIT 423, 426, 318 F. Supp. 2d 1291, 1294 (2004). "A fact is material if it tends to resolve any of the issues that have been properly raised by the parties." *Allied International v. United States*, 16 CIT 545, 548, 795 F.Supp. 449, 451 (1992) (quoting 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2725 at 93–95 (2d ed.1983)).

III.
Discussion

A. *Jurisdictional Claims*

This court must first resolve any jurisdictional issues before addressing the substantive claims of the parties. This case involves 20 entries made through the port of Tacoma, Washington between May 30, 2003 and April 25, 2004, and 10 entries made through the port of Seattle, Washington between May 13, 2003 and January 8, 2004.[1] The entries were liquidated on March 31, 2006 and April 7, 2006. According to the handwritten "Date Received" on Protest Nos. 3001–06–100270 (port of Tacoma) and 3001–06–100272 (port of Seattle), the protests in question were filed on June 30, 2006.

[1] The entries included in Protest No. 3001–06–100270 from the port of Tacoma are: 004–9170247–8, 004–9177980–7, 004–9194805–5, 004–9200641–6, 004–9231831–6, 004–9261606–5, 004–9296072–9, 004–9302418–6, 004–9315014–8, 004–9336432–7,004–9359708–2, 004–9368734–7, 004–9375832–0, 004–9380446–2, 004–9385790–8,004–9411823–5, 004–9421209–5, 004–9421800–1, 004–9435415–2, and 004–9436728–7. The entries included in Protest No. 3001–06–100272 from the port of Seattle are: 004–9151860–1, 004–9168563–2, 004–9184066–6, 004–9224728–3, 004–9238211–4, 004–9249490–1, 004–9288467–1, 004–9325386–8, 004–9339815–0, and 004–9360307–0.

In its cross-motion for summary judgment, the Defendant argues that Protest No. 3001–06–100270 with respect to entries liquidated on March 31, 2006 was not timely filed because it was received outside the 90-day deadline. *See* 19 U.S.C. § 1514(c)(3) (2000).[2] On this point, the court agrees. Any protest for the entries liquidated on March 31, 2006 should have been filed by June 29, 2006, making the filing of Protest No. 3001–06–100270 one day late with respect to these entries.

In its motion, the Defendant stated its withdrawal of any jurisdictional objection as to Entry Nos. 004–9168563–2, 004–9184066–6, 004–9224728–3, 004–9249490–1, 004–9288467–1, 004–9325386–8, and 004–9360307–0. These are the entries included in Protest No. 3001–06–100272 from the port of Seattle liquidated on March 31, 2006. Because of the Defendant's withdrawal of its jurisdictional objection to these entries, Mazak requests that the court include these entries in any relief granted in its favor.

It is unclear to the court why the Defendant finds no jurisdictional issue with regard to the entries included in Protest No. 3001–06–100272 liquidated on March 31, 2006, but retains its objection to those entries included in Protest No. 3001–06–100270 also liquidated on March 31, 2006. Based on the record evidence, the two protests were filed on the same day, June 30, 2006. The terms by which the United States consents to be sued define a court's jurisdiction over a particular suit. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). "[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Id.* at 161 (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)).

The Plaintiff has the burden of establishing jurisdiction when it is challenged. *Rollerblade, Inc. v. United States*, 20 CIT 117, 118 n.5, 968 F.Supp. 726, 728 n.5 (1996). Mazak has brought forth no legal or factual reason to establish jurisdiction with regards to those entries liquidated on March 31, 2006 included in Protest No. 3001–06–100272. There is no reason why only one set of entries liquidated on March 31, 2006 would be jurisdictionally barred, and the other would not. Thus, with respect to any entry liquidated on March 31, 2006, this Court does not have jurisdiction. The Defendant's withdrawal of its jurisdictional objection as to certain entries

[2] Congress amended 19 U.S.C. § 1514(c)(3) in 2004 lengthening the protestperiod to 180 days. Miscellaneous Trade and Technical Corrections Act of2004, Pub. L. No. 108–429, § 2103(2)(B), 118 Stat. 2434, 2597–98 (2004). The amendment to § 1514(c)(3) applies to merchandise entered on or after December18, 2004. *Id.* at § 2108. Because Mazak's entries occurred on and prior toApril 25, 2004, the 90-day protest period remains applicable to the entriesin question.

does not change this fact. Therefore, the claims with regard to Entry Nos. 004–9168563–2, 004–9184066–6, 004–9224728–3, 004–9249490–1, 004–9288467–1,004–9325386–8, 004–9360307–0, 004–9170247–8, 004–9177980–7, 004–9194805–5, 004–9200641–6, 004–9231831–6, 004–9296072–9, 004–9359708–2, 004–9368734–7, 004–9375832–0, 004–9380446–2, 004–9385790–8, 004–9421800–1, 004–9435415–2, and 004–9436728–7 are severed and dismissed for lack of jurisdiction. The claims with regard to the remaining entries liquidated on April 7, 2006 may proceed as timely filed.

B. *The Appropriate Trigger For The Six-Month Liquidation Timeline Under 19 U.S.C. § 1504(d)*

"[W]hen a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry…within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry." 19 U.S.C. § 1504(d) (2006). Any entry not liquidated within six months is "treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record." *Id.* At issue in this case is exactly what action is considered "notice of the removal" triggering the six-month liquidation period. Mazak contends that Customs did not liquidate its entries within the statutory six-month period, and therefore, the automatic duty amount is the cash deposit rate it provided upon the original entry.

i. *The Six-Month Liquidation Period Was Not Triggered by the Notice of Initiation of Review*

Mazak first argues that, for its purposes, Commerce's *Notice of Initiation of Review*, 69 Fed. Reg. 39,409, published in the Federal Register on June 30, 2004 should have triggered the six-month period, thus requiring liquidation by December 30, 2004.

An antidumping administrative review may be requested by an interested party, an exporter or producer covered by the antidumping order, or an importer of the subject merchandise. 19 C.F.R. § 351.213(b)(1)–(3). Liquidation of entries that could be affected by the review may be suspended pending the results of the review. If no review is requested, automatic assessment occurs. 19 C.F.R. § 351.212(c). With respect to "resellers,"[3] Commerce has maintained, and clarified, a slightly different policy. *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed.

[3] The term "reseller" applies to "any intermediary that could be an interested party as defined in section 771(9)(A) of the Tariff Act of 1930, as amended." *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954, 23,954 (Dep't Commerce May 6, 2003)."Interested party" as codified from the Tariff Act of

Reg. 23,954 (Dep't Commerce May 6, 2003) ("Reseller Policy"). Automatic liquidation does not apply to a reseller's merchandise if an administrative review has been requested of the reseller "or of any producer of merchandise the reseller exported to the United States." *Id.* at 23,954. Liquidation is suspended pending the review. *Id.* Should it be determined that the producer knew, or should have known, that its merchandise was destined for the United States via the reseller, the producer's assessment rate is applied to the reseller. *Id.* If the producer did not know, the reseller's merchandise is assessed at the all-others rate, if there was no specific review of the reseller for that review period. *Id.*

During the administrative review period, Mazak imported antifriction bearings from its parent company Yamazaki Mazak. At the end of the review period, Commerce published an opportunity to request an administrative review of the applicable antidumping order. 69 Fed. Reg. 24,117. Since no review was specifically requested of either Mazak, as the importer, or its parent company Yamazaki Mazak, as the exporter, Mazak contends that it was exempt from the review initiated on June 30, 2004. The commencement of the review thus, according to Mazak, constituted a "notice of the removal" of suspension as to its entries under 19 U.S.C. § 1504(d), and started the six-month liquidation clock ticking. However, simply because no review was specifically requested of Mazak or Yamazaki Mazak does not end the inquiry into whether the administrative review pertained to the Plaintiff.

Upon importation, Mazak provided NSK's antidumping duty case number, identifying its merchandise as NSK products, and entered the subject bearings at NSK's cash deposit rate. This rate was lower than the all-others rate at which the entries were eventually liquidated. A review was requested of NSK "and all other affiliated companies selling subject merchandise in Japan and/or to or in the United States." Letter from Stewart and Stewart, Counsel for Timken US Corporation to James J. Jochum, Assistant Secretary for Import Administration, International Trade Administration, U.S. Department of Commerce, "Timken US Corporation's Request for An Administrative Review" (May 28, 2004). Pursuant to the requested review, Commerce's instructions to Customs stated that firms for which Customs should suspend liquidation "can be manufacturers/producers, exporters, or manufacturers/producer/exporter combinations." Letter from Director, Special Enforcement to Directors of Field Operations

1930 includes, amongothers, "a foreign manufacturer, producer, or exporter, or the United-Statesimporter, of subject merchandise or a trade or business association amajority of the members of which are producers, exporters, or importers ofsuch merchandise." 19 U.S.C. § 1677(9)(A).

Port Directors, "Auto. Liq. Instruct. for Ball Bearings + Parts Thereof-Japan(A–588–201), Except Asahi Seiko, Koyo Seiko, Nachi-Fujikoshi, Nankai Seiko, Nippon Pillow, NSK, NTN, etc.," Message No. 4231204 (Aug. 18, 2004). Customs was directed to "[c]ontinue to suspend liquidation of all entries of merchandise exported or produced by" NSK, among others. *Id.*

Liquidation of Mazak's entries was appropriately suspended at this time because of its identification with NSK. Liquidation of Mazak's entries upon the *Notice of Initiation of Review* would have been impossible; without the completion of an administrative review by Commerce, Customs could not have known the appropriate antidumping duty rate to apply. Prior to an investigation, there would be no way of discerning whether NSK was or was not aware that merchandise sold to Yamazaki Mazak, and imported by Mazak, was destined for the United States, pursuant to the Reseller Policy. *See* Reseller Policy, 68 Fed. Reg. at 23,954.

Mazak argues, without citing to any authoritative support, that the Reseller Policy does not apply to it because there is a distinction between a review requested for a "producer" of merchandise and that of an "exporter" of merchandise. According to Mazak, the language of Timken's petition for review— requesting review of "NSK," among others, and "all other affiliated companies selling subject merchandise in Japan and/or to or in the United States"—indicated that this was an exporter review, as opposed to a producer review. The distinction, states Mazak, is that the review does not cover all merchandise *produced* by NSK, which is what Mazak was importing, but rather only certain affiliated companies that *export* NSK merchandise, which does not include Mazak or Yamazaki Mazak because they are not affiliates of NSK. Support for this argument purportedly stems from the distinction made between producers and exporters in the Reseller Policy. Mazak emphasizes that the Reseller Policy repeatedly refers to resellers (exporters) or producers, or to producers alone.[4]

However, there is no statutory or regulatory differentiation between reseller/exporter and producer reviews. *See* 19 C.F.R. § 351.221. The Reseller Policy specifically states that "[t]here need not be nor will there be any special provisions for administrative reviews

[4] Examples cited by Mazak include, "[A]utomatic liquidation at the cash-deposit rate required at the time of entry can only apply to a reseller which doesnot have its own rate if no administrative review has been requested, eitherof the reseller or of any producer of merchandise the reseller exported to the United States." Reseller Policy, 68 Fed. Reg. at 23,954. And, "[I]f the producer has no knowledge of a reseller's U.S. transactions, use of the producer's rate for final duty assessment, where a review of the producer has been requested, is not appropriate because it does not reflect the reseller's pricing practices." *Id.* at 23,961.

of resellers." Reseller Policy, 68 Fed. Reg. at 23,960. In addition, Commerce's Office Director of AD/CVD Enforcement 5 confirmed that Commerce makes no distinction between producer reviews and exporter reviews, and reviews a company's sales to the United States regardless of whether the company is a producer or exporter. Laurie Parkhill Declaration at ¶ 13. Mazak seems to hinge its distinction on unimportant semantics.

In this argument, Mazak also fails to note that there was more than one request for review. NSK specifically requested its own review of "ball bearings manufactured by or for NSK Ltd. in Japan and exported to the United States for the 2003–2004 period of review." Letter from Crowell Moring, Counsel for NSK Ltd., NSK Corporation and NSK Precision America, Inc. to James J. Jochum, Assistant Secretary for Import Administration, International Trade Administration, U.S. Department of Commerce, "Ball Bearings and Parts Thereof from Japan: Request for 2003–2004 Administrative Review on Behalf of NSK Ltd., NSK Corporation and NSK Precision America, Inc." (May 25, 2004). NSK's request directly implicates the merchandise imported by Mazak because it was "manufactured by or for NSK Ltd."

It is illogical for Mazak to have identified its merchandise through NSK case numbers, taken advantage of its lower cash deposit rate, and then argue that a review of NSK merchandise is inapplicable to it. NSK's merchandise was reviewed in this administrative review; Mazak indicated that it sold NSK merchandise. Mazak's entries were thus subject to this administrative review. The *Notice of Initiation of Review* did not trigger the six-month liquidation clock for Customs. On this point, Mazak's argument fails.

ii. *Commerce's Final Results, and Not the Amended Results, are the Appropriate Six-Month Trigger*

Because the court finds that Mazak's entries were covered by the administrative review, this court must now determine what serves as the appropriate "notice of the removal" triggering the six-month liquidation period. *See* 19 U.S.C. § 1504(d). It is undisputed that the Federal Circuit previously determined that Commerce's publication of the final results of an administrative review, and not Commerce's liquidation instructions to Customs, serves as a notice of removal to Customs and begin the six-month liquidation period. *Int'l Trading Co. v. United States*, 412 F.3d 1303 (Fed. Cir. 2005) ("*International Trading II*"); *Int'l Trading Co. v. United States*, 281 F.3d 1268 (Fed. Cir.

2002) ("*International Trading I*"). However, the Defendant contends that when applicable amended results are published, that publication date resets the six-month clock.

In this case, Commerce published the *Final Results* on September 16, 2005. 70 Fed. Reg. 54,711. The *Amended Results* were published on October 21, 2005. 70 Fed. Reg. 61,252. Commerce published a Notice of Correction to the Amended Results on November 15, 2005. 70 Fed. Reg. 69,316. Because the antidumping duty rate for NSK was revised in the *Amended Results*, and Mazak entered their goods under the NSK antidumping duty order case number, the Defendant contends that the *Amended Results* impact Mazak. The Defendant argues that the *Amended Results*, therefore, should dictate the beginning of the six-month liquidation period, which ended on April 21, 2006. Should this date be determinative, the liquidations of Mazak's entries that occurred on March 31, 2006 and April 7, 2006 would fall within the statutory six-month period.

Before 19 U.S.C. § 1504 was enacted in 1978, there were no statutory restrictions on the length of time for liquidation of an entry by Customs. *International Trading I*, 281 F.3d at 1272; *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993). "Customs could delay liquidation as long as it pleased, with or without giving notice." *Int'l Cargo & Surety Ins. Co. v. United States*, 15 CIT 541, 543, 779 F.Supp. 174, 177 (1991). Congress' purpose in adding the time restriction was to "increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction." S. Rep. No. 95–778, at 32, *as reprinted in*, 1978 U.S.C.C.A.N. 2211, 2243. In 1993, the time period for liquidation was revised to six months. H.R. Rep. No. 103–361, pt. 1, at 139 (1993).

The Defendant is correct that *International Trading I* and *International Trading II* did not address the exact issue at bar. In those cases, the Federal Circuit dismissed the idea that the removal of suspension would only occur upon Commerce's issuance of liquidation instructions to Customs. *International Trading II*, 412 F.3d at 1313; *International Trading I*, 281 F.3d at 1274. The Court held that it was the publication of Commerce's final results of an administrative review that served as the notice of removal of suspension and began the six-month liquidation period. *International Trading II*, 412 F.3d at 1313; *International Trading I*, 281 F.3d at 1274. These cases did not discuss the distinction between the final results and any issued amended results in initiating the six-month liquidation period.

However, in choosing the final results rather than Commerce's

instructions to Customs as the initiation point, the Court in *International Trading I* emphasized that the principal objective of the statutory time limit on liquidation is to avoid "giving the government the unilateral ability to extend the time for liquidating entries indefinitely." *Id.* at 1273. Allowing Commerce the unfettered ability to issue its instructions to Customs at will would have undermined this very principle. *Id.* The Federal Circuit was also conscious of providing "an unambiguous and public starting point for the six-month liquidation period." *Id.* at 1275.

Here, the Defendant claims that the *Amended Results* must dictate the beginning of the liquidation period because Customs would not be able to calculate what duty to assess Mazak until the *Amended Results* were issued. This argument falls flat. In this case, the applicable antidumping duty rate was determined for Mazak by the issuance of the *Final Results* and did not change under the *Amended Results*. Therefore, designating the publication date of the *Final Results* as the beginning of the six-month liquidation period provides the interested parties with an appropriate and unambiguous start date because here the *Amended Results* did not impact Mazak.

As dictated by Commerce's Reseller Policy, the reseller's merchandise is either assessed at the producer's rate or at the all-others rate. Reseller Policy, 68 Fed. Reg. at 23,954. The producer's rate is used if Commerce determines that "the producer knew, or should have known that the merchandise it sold to the reseller was destined for the United States." *Id.* If it is determined that the producer did not know, then the all-others rate is applied to the reseller. *Id.*

By the conclusion of the *Final Results*, Commerce had determined that the all-others rate applied to Mazak. *See Final Results* 70 Fed. Reg. at 54,713. Pursuant to the Reseller Policy, Commerce assigns the appropriate rate—the producer's rate or the all-others rate—based on information revealed "in the course of the administrative review." Reseller Policy, 68 Fed. Reg. at 23,954. Information pertaining to any amended results would not modify the analysis of whether a producer was or was not aware of the destination of the particular merchandise in question because amended results generally only resolve ministerial errors.[5] *See DuPont Teijin Films USA, LP v. U.S.*, 28 CIT 896, 900–01 n.8 (2004); 19 C.F.R. § 351.224(e). Ministerial errors are solely "error[s] in addition, subtraction, or other arithmetic function, clerical error[s] resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary

[5] There are two other very narrow circumstances in which amended results maybe issued. *See DuPont Teijin Films USA, LP v. U.S.*, 28 CIT 896, 900–01 n.8(2004). Neither party argues that those circumstances apply in this case.

considers ministerial." 19 C.F.R. § 351.224(f). Therefore, the *Amended Results* could not have reevaluated which rate, NSK's rate or the all-others rate, was to be assigned to Mazak, as the Defendant argues; it could only mathematically adjust a particular rate. In fact, in the *Amended Results*, Commerce rejected a particular allegation brought by another company explaining that it was "not ministerial in nature as defined by 19 CFR § 351.225(f)." *Amended Results*, 70 Fed. Reg. at 61,252.

Regarding NSK's rate, the *Amended Results* corrected an error regarding NSK's level of trade for certain home-market sales, and the rate was recalculated accordingly.[6] *Id.* Mazak was assigned the all-others rate, which was neither discussed nor changed in the *Amended Results*. *See id.* The Defendant's argument that the *Amended Results* impacted Mazak's antidumping duty rate is thus ill directed, as the all-others rate remained unaltered.

Because the *Amended Results* did not change the Plaintiff's rate, commencing the statutory six-month liquidation period on the publication date of the *Final Results* provides a clear and unequivocal framework for Customs and the importer. When the *Amended Results* do not impact the entries in question, relying on the date of the *Amended Results* would permit Commerce the ability to "reset" the commencement of the six-month liquidation period arbitrarily. This would indicate that any issued amended results could potentially reset the six-month liquidation period for any producer, exporter, or importer covered by the review regardless of its impact on that particular producer, exporter, or importer. Comparatively, initiating the liquidation period on the *Final Results* publication date provides interested parties with the necessary certainty and unambiguity emphasized by Congress and the Federal Circuit.

The *Final Results* were published on September 16, 2005. The six-month liquidation period therefore ended on March 16, 2006. The liquidation of Mazak's merchandise encompassed in Protest Nos. 3001–06–100270 and 3001–06–100272 occurred on March 31, 2006 and April 7, 2006, after the end of the six-month liquidation period. Therefore, those entries liquidated on April 7, 2006, *i.e.*, those this Court may exercise jurisdiction over, are deemed liquidated at the cash deposit rate pursuant to 19 U.S.C. § 1504(d).

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[6] The *Amended Results* also acknowledged and corrected a ministerial error forthe rate of another company, Nippon Pillow Block Co., Ltd. *Amended Results*, 70 Fed. Reg. at 61,252. Two other companies also alleged ministerial errors. *Id.* One allegation was rejected by Commerce and the other was found to beaccurate, but did not affect the rate calculation. *Id.*

IV.
Conclusion

Because Mazak's protests were untimely filed with respect to those entries liquidated on March 31, 2006, this Court does not have jurisdiction over these claims. With respect to Entry Nos. 004–9170247–8, 004–9177980–7, 004–9194805–5, 004–9200641–6, 004–9231831–6, 004–9296072–9, 004–9359708–2, 004–9368734–7, 004–9375832–0, 004–9380446–2, 004–9385790–8, 004–9421800–1, 004–9435415–2, and 004–9436728–7 included in Protest No. 3001–06–100270, and Entry Nos. 004–9168563–2, 004–9184066–6, 004–9224728–3, 004–9249490–1, 004–9288467–1, 004–9325386–8, and 004–9360307–0 included in Protest No. 3001–06–100272, Defendant's cross-motion for summary judgment is granted in part and the claims are severed and dismissed as to these entries for lack of jurisdiction.

As to the remaining entries, those liquidated on April 7, 2006, Entry Nos. 004–9261606–5, 004–9302418–6, 004–9315014–8, 004–9336432–7, 004–9411823–5, and 004–9421209–5 included in Protest No. 3001–06–100270, and Entry Nos. 004–9151860–1, 004–9238211–4, and 004–9339815–0 included in Protest No 3001–06–100272, the court finds that they were not liquidated within the statutorily required six-month liquidation period and are deemed liquidated at the importer's cash deposit rate. With respect to these entries, Plaintiff's partial motion for summary judgment is granted. Pursuant to the judgment in this case, Customs shall reliquidate the relevant entries.

Dated: October 29, 2009
New York, NY

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG SENIOR JUDGE

Slip Op. 09 – 125

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 for leave to refile its briefs and for refiling of the court's dispositive slip opinion denied.]

Dated: October 29, 2009

Michael F. Hertz, Deputy 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 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.

MEMORANDUM & ORDER

AQUILINO, Senior Judge:

I.
Introduction

The court having granted defendants' motion to dismiss plaintiffs' complaint for lack of subject-matter jurisdiction per its slip opinion 09–109, 33 CIT , 2009 WL 3182495, F.Supp.2d (Oct. 6, 2009), familiarly with which is presumed, come now the above-named counsel for the defendants with a motion seeking

> leave to refile [their] briefs so as to replace the name of the Assistant Attorney General of the Civil Division with that of the Deputy Assistant Attorney General of the Civil Division, in light of the Assistant Attorney General's recusal from this matter; and . . . that this Court refile its October 6, 2009 Opinion and Order to reflect such changes.

It proceeds to explain that, during

> the expedited proceedings in this matter, [the] briefs included the name of Tony West, the Assistant Attorney General of the Civil Division. Mr. West was a former partner with the San Francisco Office of Morrison & Foerster LLP, one of the law firms representing plaintiffs in this matter. Upon assuming the position of Assistant Attorney General for the Civil Division, Mr. West recused himself from any case involving Morrison & Foerster LLP, and has had no involvement in this case. In light of Mr. West's recusal, his name should not have appeared on our briefs. As a result of the expedited nature of these proceedings, we inadvertently overlooked the need to omit his name from our briefs. Accordingly, we seek leave to refile our briefs in this matter so as to remove Mr. West's name.

The plaintiffs have not responded to this motion, no doubt for good reason. The record is devoid of even a hint of impropriety, or of any arguable appearance thereof. That the government has formally noticed the "inadverten[ce]" is to be commended, as the record now

stands corrected by dint of the filing of the motion and attached exhibits themselves. Hence, it does not necessarily follow that this motion need be, or even should be, actually granted, most notably because, as cited above, slip opinion 09–109 has already been set in print by *Westlaw* and also by 43 Cust. B. & Dec. No. 43, page 129 *et seq*. (Oct. 22, 2009), and Court No. 09–00374 Page 3 its refiling sans even the *pro forma* reference to the new Assistant U.S. Attorney General would simply add to the clutter that purports to be law in America.

Now therefore, in view of the foregoing, and after due deliberation, defendants' aforesaid motion can be, and it hereby is, denied.*

So ordered.

Dated: October 29, 2009
New York, New York

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

* This is to instruct the Clerk of Court, nevertheless, to maintain defendants' instant filing as a part of this action's complete, public record.