U.S. Court of International Trade

Slip Op. 17–133

SeAH Steel Vina Corporation, Plaintiff, v. United States, Defendant, and Maverick Tube Corporation, United States Steel Corporation, Boomerang Tube LLC, Energex Tube (A Division of JMC Steel Group), Tejas Tubular Products, TMK IPSCO, Vallourec Star, L.P., and Welded Tube USA Inc., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Consolidated Court No. 14–00224
PUBLIC VERSION

[The court remands the final results of the redetermination.]

Dated: September 28, 2017

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Goldberg, Senior Judge:

This case concerns challenges to the antidumping duty determination of the U.S. Department of Commerce ("Commerce" or "the Department") for oil country tubular goods ("OCTG") from the Socialist Republic of Vietnam ("Vietnam"). *See Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam*, 79 Fed. Reg. 41,973 (Dep't Commerce July 18, 2014) (final determ.) ("*Final Determination*") and accompanying Issues & Decision Mem. ("I&D Mem."), as

amended by *Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam*, 79 Fed. Reg. 53,691 (Dep't Commerce Sept. 10, 2014) (amended final determ.).

Both Plaintiff, SeAH Steel VINA Corporation ("SSV"), and Defendant-Intervenor, United States Steel Corporation ("U.S. Steel") moved for judgment on the agency record under USCIT Rule 56.2. SSV challenged five aspects of the *Final Determination*. Pl.'s Mot. for J. on Agency R. 4–11, ECF No. 54 ("SSV Br."). U.S. Steel challenged four aspects of the *Final Determination*. Def.-Intervenor's Mot. for J. on Agency R. 6–8, ECF No. 56 ("U.S. Steel Br."). On August 31, 2016, the court resolved these motions by remanding for reconsideration all but one of the challenges to Commerce's *Final Determination*. *SeAH Steel VINA Corp. v. United States*, 40 CIT _, 182 F. Supp. 3d 1316 (2016). On May 1, 2017, Commerce issued its Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 131–1.

Both SSV and U.S. Steel now challenge aspects of the Remand Results. For the reasons below, the court remands in part and sustains in part.

GENERAL BACKGROUND

The court assumes familiarity with the facts and law as discussed in its prior opinion. Nevertheless, the court summarizes the relevant details in its discussion of each challenge to the Remand Results.

U.S. Steel challenges two aspects of the Remand Results. Comments of U.S. Steel Corp. on the Final Results of Redetermination Pursuant to Court Remand ("U.S. Steel Comments"), ECF No. 137. First, U.S. Steel challenges Commerce's selection of surrogate values for SSV's hot rolled coil ("HRC"). U.S. Steel Comments 1–14. Second, U.S. Steel challenges Commerce's calculation of yield loss. U.S. Steel Comments 22–29. The court remands Commerce's determination concerning the first challenge, and sustains Commerce's determination concerning the second challenge.

SSV raises four main challenges to the Remand Results. Comments of Pl. on Commerce's Redeterminations ("SSV Comments"), ECF No. 138. First, SSV argues that Commerce erred when it used the financial statements of Bhushan Steel Ltd. as a source of surrogate values. SSV Comments 10–23. Second, SSV argues that Commerce (1) erred in its finding that SSV purchased domestic inland insurance and (2) erred in its valuation of the alleged domestic inland insurance. SSV Comments 2–10. Third, SSV argues that Commerce "improperly included 'document preparation' costs in the calculation of export and

import brokerage and handling costs." SSV Comments 23–27. Fourth, SSV argues that Commerce improperly allocated its brokerage and handlings costs. SSV Comments 27–33. The court remands Commerce's determinations concerning the second and fourth challenges, but sustains Commerce's determinations concerning the first and third challenges.

JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain Commerce's determination unless the court concludes that the determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence amounts to "more than a mere scintilla" of evidence. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. (citation omitted). In other words, "substantial evidence" "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

DISCUSSION

I. Substantial Evidence Supports Commerce's Selection of a Surrogate Value for high-chromium J55 Hot-Rolled Coil, but the Court Remands for Further Explanation or Reconsideration of Commerce's Selection of a Surrogate Value for J55 Hot-Rolled Coil Containing a Higher Carbon Content.

Although U.S. Steel supports Commerce's decision on remand to separately value the three variations of J55 HRC, U.S. Steel argues that Commerce erred in selecting surrogate values for the high-chromium J55 HRC and the upgradeable J55 HRC containing a higher carbon content ("J55-H"). U.S. Steel Comments 4–14. Substantial evidence supports Commerce's surrogate value selection for high-chromium J55 HRC but not J55-H HRC.

A. Background

When companies from a nonmarket economy ("NME") country export merchandise, Commerce typically "determine[s] the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise . . . ." 19 U.S.C. § 1677b(c)(1)(B). This "valuation of the factors of production

shall be based on the best available information regarding the values of such factors in a market economy [("ME")] country . . . ." *Id.*

To accomplish this valuation, Commerce asked SSV to disclose "each type and grade of material used in the production process" of OCTG. Commerce Questionnaire to SSV at D-8, PD 56–59 (Aug. 23, 2013), ECF No. 92. SSV disclosed three types of J55 HRC. First, reported that it consumed regular J55. SSV Resp. to Sections C&D Questionnaire app. D-4-C ("C&D Resp."), PD 87–91 (Oct. 30, 2013), ECF No. 60. SSV explained that [[ ]] of its J55 came from ME suppliers and [[ ]] came from NME suppliers. C&D Resp. app. D-6, CD 21–28 (Oct. 30, 2013), ECF No. 60. Second, SSV reported that it consumed high-chromium J55. SSV Resp. to Suppl. Section D Questionnaire ("Suppl. D Resp.") app. SD-10, CD 36–39 (Jan. 13, 2014), ECF No. 60. Third, SSV reported that it used J55 containing a higher carbon content ("J55-H") than regular J55. SSV Resp. to Suppl. Section D Questionnaire ("Suppl. D Resp.") app. SD-10, CD 36–39 (Jan. 13, 2014), ECF No. 60; *see also* Pl.'s Resp. to Def.-Intervenor's Mot. for J. on Agency R. 10, ECF No. 66. SSV purchased [[ ]] of its J55-H HRC from ME suppliers. U.S. Steel Comments 4.

On remand, Commerce decided to assign a separate surrogate value to each of the three variations of J55 HRC. Remand Results 9. Commerce explained that "valuing the three types of J55 using values specific to each input would be consistent with [Commerce's] normal practice." Remand Results 9. Moreover, Commerce reasoned that "a calculation that takes into account physical differences between inputs will result in a valuation that is more specific to the input which is likely, in turn, to lead to a more accurate calculation of normal value." Remand Results 9. Commerce then explained its process for selecting surrogate values:

> The Department's practice when selecting factors of production, in accordance with section 773(c)(1) of the Tariff Act, is to use, to the extent practicable, surrogate values which are publicly available, product-specific, representative of a broad market average, tax-exclusive, and contemporaneous with the POI. The Department's practice at the time of . . . [the investigation] underlying this remand redetermination was to value an input using the actual price paid by the respondent where the respondent sourced an input from a ME supplier in meaningful quantities (*i.e.*, 33 percent or more of total purchases of the input) and paid in an ME currency . . . .

Remand Results 9 (citations omitted).

Commerce began its valuation of the regular J55 by explaining that "the record shows that SSV purchased more than 33 percent of its regular J55 HRC from ME sources during the POI . . . ." Remand Results 10. For that reason, Commerce found it "appropriate to value SSV's regular J55 using [the above-explained] standard methodology for valuing ME-sourced inputs." Remand Results 10. Thus, Commerce valued the regular J55 using SSV's ME purchases of regular J55. U.S. Steel does not challenge this decision.

With regard to J55-H, Commerce decided to use Indian import price data for the HTS number under which SSV imported the J55-H, "HTS 7208.37.00 (non-alloy steel with a width greater than 600 mm)." Remand Results 10. U.S. Steel argues that Commerce should have instead used SSV's ME purchases of J55-H, even though these purchases occurred roughly six months before the POI. U.S. Steel Comments 6.

With regard to high-chromium J55, Commerce used "Indian import price data for the HTS number under which [SSV] imported the" high-chromium J55, "HTS 7225.30.90 (alloy steel with width greater than 600 mm)." Remand Results 10. U.S. Steel argues that the Indian import data is aberrational and, therefore, Commerce should select alternative surrogate values for high-chromium J55. U.S. Steel Comments 11–14.

B. The Court Remands for Further Explanation or Reconsideration of Commerce's Valuation of J55-H HRC.

As stated above, Commerce valued SSV's J55-H HRC using the Indian import data instead of the J55-H HRC that SSV actually purchased from ME sources with ME currency. Commerce stated that "SSV reported that it had no purchases of [J55-H] . . . during the POI." Remand Results 10. It also stated that, when SSV imported J55-H to Vietnam, it did so under HTS 7208.37.00, which is the same HTS category of the Indian import data selected as a surrogate value. Remand Results 10. Commerce ultimately chose the Indian import data over SSV's actual ME purchases of J55-H "because, in addition to being publicly available, representative of a broad market average, tax-exclusive, and contemporaneous with the POI, the [Indian import] data are the most product-specific because they represent the same HTS category under which SSV actually imported the input . . . ." Remand Results 10.

U.S. Steel contends that Commerce erred in using the Indian import data to value J55-H. U.S. Steel maintains that "Commerce's standard methodology for valuing inputs in a [NME]" is to "value an

input using the actual price paid by the respondent where the respondent sourced an input from an ME supplier and paid for the input in an ME currency."[1] U.S. Steel Comments 4 (citing *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Requests for Comments*, 71 Fed. Reg. 61,716, 61,717–18 (Dep't Commerce Oct. 19, 2006)). U.S. Steel asserts that SSV "purchased [[ ]] the upgradable [J55-H] . . . from ME sources [[ ]]." U.S. Steel Comments 4. U.S. Steel concludes that, "consistent with its standard methodology, Commerce should have valued [SSV's] upgradable J55-H hot-rolled coil using the price that [SSV] paid to its ME suppliers." U.S. Steel Comments 4. For this reason, U.S. Steel requests a remand.

Nonetheless, U.S. Steel next posits that, regardless of the above methodology and its application, "the contemporaneity of the data cannot be the sole decisive factor in Commerce's selection among alternative surrogate value data."[2] U.S. Steel Comments 5. Instead, U.S. Steel maintains, "Commerce must consider all of the factors and evidence that are relevant to selecting the most appropriate surrogate value data."[3] U.S. Steel Comments 5. Further, although "Commerce may invoke contemporaneity as a tie-breaking factor when choosing between equally reliable datasets," "contemporaneity alone is an insufficient reason for dismissing alternative surrogates when Commerce's own surrogate appears flawed." U.S. Steel Comments 5–6 (quoting *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT _, _, 949 F. Supp. 2d 1311, 1331 (2013)).

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[1] In Defendant's Response to Comments Regarding Remand Redetermination ("Gov't Comments"), ECF No. 148, the Government argues that this "market-economy-purchase rule" is inapplicable to SSV's ME purchases of J55-H. Gov't Comments 32. As the Government explains, the rule includes an additional requirement. The rule applies—and Commerce will normally use the actual ME purchases of an input—when the ME purchases occurred "during the period of investigation or review . . . ." *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Requests for Comments*, 71 Fed. Reg. 61,716, 61,717–18 (Dep't Commerce Oct. 19, 2006)). SSV's ME purchases of J55-H were outside the POI. Thus, the "market-economypurchase rule" does not here create a rebuttable presumption that Commerce will use SSV's ME purchases. Yet this realization fails to resolve U.S. Steel's challenge to Commerce's selection of a surrogate value. Even if no rebuttable presumption exists that Commerce will use SSV's ME purchase to value J55-H, Commerce is still free to use SSV's ME purchases and substantial evidence must still support Commerce's rejection of the ME purchases.

[2] For this proposition, U.S. Steel cites *Golden Dragon Precise Copper Tube Group, Inc. v. United States*, Slip-Op 16–80, 2016 WL 4442163, at *5 (CIT Aug. 23, 2016) ("While the Artemivskyy statement may be more contemporaneous than the Furukawa statement, the selection of a financial statement requires balancing of several factors, of which more overlap with the POR is one.")

[3] For this, U.S. Steel cites *Dorbest Ltd. v. United States*, 30 CIT 1671, 1695 n.14, 462 F. Supp. 2d 1262, 1284 n.14 (2006) (announcing that "contemporaneity, in and of itself should not be viewed as the sole reason to discard data; rather the quality of the data needs to be viewed in its totality.").

Here, the Indian import data that Commerce used are not necessarily specific to the J55H input being valued, as the HTS Code 7208.37.00 of the Indian data includes more than solely J55-H HRC. U.S. Steel Comments 7. As a result, U.S. Steel concludes that Commerce erred because (1) "Commerce discarded [SSV's] ME purchases of upgradable J55-H hot-rolled coil for the sole reason that they were not contemporaneous with the POI," and (2) "instead selected flawed import data that," unlike SSV's ME purchases of J55-H, (3) "are not specific to the input being valued." U.S. Steel Comments 6. On this basis, U.S. Steel requests a remand.

In response, Commerce offered little insight into its preference for contemporaneity over specificity. It stated in summary fashion:

> While we agree that [Commerce] normally values an input with a respondent's ME purchase prices when appropriate ME prices relating to purchases made during the POI are available, we note that in this case, SSV's ME purchases of J55-H coil were made prior to the POI. It is not [Commerce's] practice to value inputs using ME prices derived from a period prior to the POI, and Petitioner has cited to no cases in which [Commerce] has done so.

Remand Results 47. Commerce then concluded that, "[d]espite Petitioner's argument that the HTS category used to value J55-H coil may contain types of coil other than J55-H, we continue to find that the data within this HTS category is the most specific to the input being valued and is, therefore, the best information on the record for valuing this input." Remand Results 48.

Commerce's explanation is not enough to overcome U.S. Steel's challenges. As a preliminary matter, it seems unmistakably incorrect to proclaim, as Commerce did, that the Indian import data are "the most specific to the" J55-H. Remand Results 48. The Indian import data concerning HTS category 7208.37.00 cover more than J55-H HRC, whereas data concerning SSV's own ME purchases of J55-H HRC cover only J55-H HRC. By definition, that renders data of SSV's ME purchases of J55-H, and not the Indian import data, "the most specific to the" J55-H.

Further, the court is unable to understand from Commerce's scant explanation why Commerce prioritized contemporaneity over specificity. As stated above, Commerce decided to optimize accuracy by using surrogate values specific to the three variations of J55 HRC. For J55-H, Commerce had two options: it could choose a more specific surrogate value lacking contemporaneity, or it could choose a less specific, albeit contemporaneous, surrogate value. Commerce dis-

carded the more specific surrogate value—SSV's actual ME purchases—because the sales occurred about six months before the POI. It chose the Indian import data, which lack specificity, because the Indian import data were contemporaneous. When "Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable." *CS Wind Vietnam, Co. v. United States*, Slip Op. 14–128, 2014 WL 5510084 (CIT Nov. 3, 2014) (citation omitted). The court cannot yet say that Commerce's decision was reasonable. Commerce did not explain its prioritization decision and it appears that Commerce improperly deemed "contemporaneity, in and of itself," as the "sole reason to discard" SSV's ME purchases of J55H in favor of a flawed alternative. *Dorbest Ltd. v. United States*, 30 CIT 1671, 1695 n.14, 462 F. Supp. 2d 1262, 1284 n.14; *see also Blue Field (Sichuan) Food Indus. Co.*, 37 CIT at _, 949 F. Supp. 2d at 1331 (explaining that, while "Commerce may invoke contemporaneity as a tie-breaking factor when choosing between equally reliable datasets," "contemporaneity alone is an insufficient reason for dismissing alternative surrogates when Commerce's own surrogate appears flawed." (citation omitted)). So the court cannot now say whether it was reasonable to prioritize contemporaneity over specificity. Accordingly, the court remands for Commerce to either provide a more exhaustive explanation of its preference or, alternatively, to change its preference.

C. Substantial Evidence Supports Commerce's Selection of a Surrogate Value for the High-Chromium J55 HRC.

Commerce used Indian import price data for HTS number 7225.30.90 (alloy steel with a width greater than 600 mm) to value SSV's use of high-chromium J55. Remand Results 10. This is the same HTS number under which SSV imported the high-chromium J55. Remand Results 10. Further, "this HTS category represents the same type and width of HRC that the record indicates was used by SSV." Remand Results 11.

U.S. Steel argues that the Indian import data are aberrational and, therefore, Commerce should select alternative surrogate values for high-chromium J55. U.S. Steel Comment 11–14. U.S. Steel correctly explains that Commerce's well-established practice is to reject import price data that are aberrational. U.S. Steel Comments 11. According to U.S. Steel, the Indian import data are "aberrational when compared to other benchmark prices for alloy hot-rolled coil that are on the record." U.S. Steel Comments 11. The Indian import data for HTS 7225.30.90 yielded a value of [[ ]] U.S. Steel Comments 12. To illus-

trate the ostensibly aberrational nature of this value, U.S. Steel cites the values for alloy hot-rolled coil with a width greater than 600 mm from five other countries: Indonesia ($888.07/MT), Korea ($864.58/MT), Mexico ($940.87/MT), Thailand ($755.31/MT), and the Philippines ($1,377.59/MT). U.S. Steel Comments 12–13.

U.S Steel concedes that four of the above benchmarks represent prices in countries that Commerce has not deemed economically comparable to Vietnam. U.S. Steel Comments 13. However, U.S. Steel insists that this is unproblematic, as "Commerce has relied on benchmark prices from countries that are not economically comparable to the subject country in prior proceedings." U.S. Steel Comments 13 (citing *Olympia Indus., Inc. v. United States*, 23 CIT 80, 83, 36 F. Supp. 2d 414, 416 (1999)). In addition, U.S. Steel acknowledges that, for the one economically comparable country, the Philippines, the data are not contemporaneous with the POI. U.S. Steel Comments 13–14. U.S. Steel then appears to argue that, because Commerce offered no record evidence showing that the non-contemporaneous price in the Philippines is *not* reflective of price during the POI, the Philippines data are reflective of price during the POI and can be used as a benchmark. U.S. Steel Comments 14.

Commerce rejected U.S. Steel's arguments, and the court finds that substantial evidence supports Commerce's decision. As stated above, Commerce chose the Indian import data because it determined that the data "represent[] the same type and width of HRC that the record indicates was used by SSV." Remand Results 11. In addition, Commerce chose the Indian import data because the HTS number is the same HTS number under which SSV imported the high-chromium J55. Remand Results 10. In other words, Commerce ultimately concluded that the "Indian import data under HTS 7225.30.90 [is] the best information available on the record for valuing [high-chromium J55] because it is contemporaneous, specific to the input, publicly available, tax and duty-free, and representative of a broad market average." Remand Results 13–14. This was reasonable.

But Commerce provided more. It gave two reasons for rejecting U.S. Steel's argument that the Indian import data are aberrational. The court will consider each in turn.

First, "with respect to [U.S. Steel's] argument that Indian imports under HTS 7225.30.90 are aberrational based on prices for imports of HTS 7225.30.90 into Indonesia, Korea, Mexico, the Philippines, and Thailand, [Commerce] note[d] that of the countries listed, only the Philippines is at a level of economic comparability equal to that of Vietnam." Remand Results 13. Commerce stressed that U.S. Steel

"cite[d] only one . . . instance, *i.e., Olympia*," 23 CIT, of Commerce using "countries not economically comparable to the country at issue in making 'aberrational' determinations." Remand Results 48. And according to Commerce, *Olympia* is inapplicable:

> [I]n the proceeding underlying *Olympia*, the Department reached its [aberration] determination based on analysis of data from two countries, one of which was economically comparable, and one of which was economically non-comparable. Thus, *Olympia* differs from the instant case in that here, the record contains no evidence from any economically comparable country that the data at issue are aberrational, other than the data from the Philippines, which post-date the POI.

Remand Results 48–49. Commerce then explained that, "in cases more recent than *Olympia*, the Department has stated that it does not make determinations regarding aberrational data using data from countries not economically comparable to the country being analyzed." Remand Results 49. As support, Commerce cited *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) (final determ.) and accompanying Issues & Decision Mem. at cmt. 16-A, in which Commerce stated: "the Department's practice for determining whether an SV is aberrational is to compare it with the data for the input at issue from the other countries found by the Department to be equally economically comparable to" the subject country. Remand Results 49. Consequently, Commerce concluded that it has no practice requiring the use of non-comparable country data to make an "aberrational determination." Remand Results 49. This is reasonable, particularly in light of the statutory preference for surrogate values from countries "at a level of economic development comparable to that of the nonmarket economy country . . . ." 19 U.S.C. § 1677b(c)(4)(A). Therefore, Commerce did not err in refusing to deem the Indian import data "aberrational" based on the prices in countries not economically comparable to Vietnam.

Second, Commerce refused to use the Philippines data to make an "aberrational determination," even though this data reflected prices in an economically comparable country. Remand Results 49. Commerce explained that "the data for the Philippines that [U.S. Steel] provided post-dates the POI." Remand Results 13. And Commerce maintained that U.S. Steel "provide[d] no argument to support its assertion" that the Philippines data, which "post-date the POI by six months," are not "irrelevant or unusable as benchmarks." Remand Results 49. Commerce then stated that, because it "must use the best

available information pursuant to Section 773(c)(1) of the Act," it prefers "to use contemporaneous data in selecting a surrogate value." Remand Results 49; *see also Certain Hot-Rolled Carbon Steel Flat Prods. from Romania*, 70 Fed. Reg. 34,448 (Dep't Commerce June 14, 2005) (admin. review) and accompanying Issues & Decision Mem. at cmt. 2 ("To test the reliability of the surrogate values alleged to be aberrational, we compared the selected surrogate value for each [factor of production] to the [average unit values] calculated *for the same period* . . . ." (emphasis added)). This led Commerce to use the Indian import data, as it is contemporaneous, and ignore the Philippine data, as it is outside the POI.[4] Remand Results 49.

In the end, Commerce reasonably concluded that, "because these five countries are either not economically comparable to Vietnam or not contemporaneous with the POI, none of these countries compel the conclusion that the import data for India (which is economically comparable to Vietnam) for this HTS are aberrational." Remand Results 13.

After a review of the record evidence, the court finds that substantial evidence supports Commerce's well-reasoned explanation of its selection of the Indian import data to value the high-chromium J55. The Indian import data is contemporaneous, input-specific, and from an economically comparable country. Although U.S. Steel insists that the data is aberrational and, therefore, unsuitable for valuing high-chromium J55, U.S. Steel failed to prove any aberration, as there is no benchmark data with which Commerce can reasonably compare the Indian import data to ascertain whether the data is aberrational.[5]

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[4] This decision is reasonable. Plus, without more data points from economically comparable countries, it seems just as likely that the Philippines import data is aberrationally high as it does that the Indian import data is, as U.S. Steel argues, aberrationally low. Thus, it is impossible to reasonably infer that the Indian import data is aberrational.

[5] SSV also challenges Commerce's valuation of high-chromium J55, arguing that Commerce should not calculate a separate surrogate value for high-chromium J55. SSV Comments 34–36. SSV speculates that:

> [T]he evidence in this case demonstrates that SSV would not have paid a higher market-economy price for steel coils with higher-Chromium content if it had purchased its coils from a market-economy supplier, because the extra Chromium content conveyed no value to SSV. The extra Chromium content was included in the coils solely for the benefit of the Chinese suppliers, to allow them to take advantage of export tax rebates that would not have been allowed for exports of coils without the extra Chromium.

SSV Comments 35. By extension, SSV opines that, "[i]f Commerce disregards the actual prices SSV paid to its Chinese suppliers because Chinese-supplier prices do not reflect normal market practices, then it must also disregard the adulterations SSV's Chinese suppliers made to the coils they supplied to SSV, because those adulterations also do not reflect normal market practices." SSV Comments 35–36. For this reason, SSV claims, Commerce should ignore the elevated chromium content and treat SSV's purchases of high-chromium J55 as regular J55. SSV Comments 35–36.

SSV cites no authority for this unconventional practice, which would have required Commerce to "engage in [a] motivational inquiry" of SSV's reasons for buying certain

II. The Court Sustains the Decision of Commerce to Use the Financial Statements of Bhushan Steel Ltd.

SSV argues that Commerce erred in selecting the financial statements of Bhushan Steel Ltd. ("Bhushan"). U.S. Steel argues that Commerce acted properly. After careful review, the court sustains Commerce's determination.

A. Background

"When Commerce is constructing the normal value for a respondent in a [NME] country, Commerce must also take into account those costs that are not covered by the factors of production (the physical inputs and the wages of the workers directly involved in the manufacturing process)." *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1137, 502 F. Supp. 2d 1295, 1310 (2007); s*ee also* 19 U.S.C. § 1677b(c)(1). In other words, "[b]ecause firms have general expenses and profits not traceable to a specific product, in order to capture these expenses and profits, Commerce must factor [into the normal value calculation] (1) factory overhead ('overhead'), (2) selling, general and administrative expenses ('SG&A'), and (3) profit . . . ." *Mittal Steel*, 31 CIT at 1137–38, 502 F. Supp. 2d at 1310 (citation and internal quotation marks omitted).

To calculate and incorporate these costs, "Commerce relies upon financial statements from one or more [surrogate] companies based in the primary surrogate country . . . ." *Id.* With these financial statements, Commerce creates "financial ratios that [it] then applies to its factors for production data in order to recreate the full expenses of the respondent." *Id.*

Commerce selects the financial statements of producers based on "the quality, specificity, and contemporaneity of the available financial statements." *Dorbest Ltd.*, 30 CIT at 1716, 462 F. Supp. 2d at 1301. Additionally, in selecting surrogate producers, "Commerce may also consider the 'representativeness of the production experience of the surrogate producers in relation to the respondent's own experience.'" *Id.* at 1301 (citation omitted). Above all, Commerce must base surrogate values "on the best available information regarding the values of such factors in a market economy country . . . ." 19 U.S.C. § 1677b(c)(1)(B).

inputs. Gov't Comments 37. As discussed in both *SeAH Steel VINA Corp. v. United States*, 40 CIT __, __, 182 F. Supp. 3d 1316, 1328–29 (2016) and the Remand Results 8–9, 50, Commerce has a practice of valuing a "factor using surrogate values that most closely match the composition" of the factor. Remand Results 8. And so under Commerce's practice, the high-chromium J55 should be valued separately, because it has a distinct composition. SSV cites nothing to support its own proposed novel practice or to refute the applicability of Commerce's established practice. As a result, its argument is unpersuasive.

In its *Final Determination*, Commerce used the financial statements of a single company, Welspun Corporation Limited ("Welspun"), for calculating the overhead, SG&A, and profit. Before selecting Welspun, Commerce stated its established preference for using "the financial statements of producers of identical merchandise." I&D Mem. 18. Commerce then asserted that, consistent with its practice, "there is no need to consider using a company that makes only comparable merchandise when there are usable financial statements on the record from companies that produce identical merchandise." I&D Mem. 17–18 (quoting *Certain Steel Nails from the People's Republic of China*, 79 Fed. Reg. 19,316 (Dep't Commerce Apr. 8, 2014) (final results) and accompanying Issues and Decision Mem. at cmt. 2 ("*Steel Nails from China*")). Next, Commerce explained that its "preference for using the financial statements of producers of identical merchandise is especially strong here because of the unique nature of OCTG among the wide range of pipe products. Specifically," Commerce explained, "it is among the most expensive and profitable of all types of pipe products." I&D Mem. 18. In light of these considerations, Commerce settled on Welspun because it "is a producer of OCTG, and its financial statement is contemporaneous, publicly available, and evidences no receipt of countervailable subsidies." I&D Mem. 19.

In their motions for judgment on the agency record, U.S. Steel and SSV both argued that Commerce should use additional companies. Rule 56.2 SSV Br. 33–46, ECF No. 54; Rule 56.2 U.S. Steel Br. 33–37, ECF No. 56. After all briefing and oral argument before this court, SSV filed a motion for leave to submit supplemental information. SSV Mot. for Leave, ECF No. 104. The supplemental information suggested that, contrary to Commerce's finding in this proceeding, Welspun is not a producer of OCTG. SSV Mot. For Leave 5, ECF No. 104. In response, the Government requested a voluntary remand, Def.'s Resp. to SSV Mot. for Leave, ECF No. 105, and this court granted SSV leave to submit supplemental information. Order, ECF No. 106. The court granted the request for a voluntary remand.

In its Remand Results, Commerce explained that, "[i]n determining the suitability of surrogate values, the Department considers the available evidence with respect to the particular facts of each case and evaluates the suitability of each source on a case-by-case basis." Remand Results 20. Put differently, "when examining the merits of financial statements on the record, the Department does not have an established hierarchy that automatically gives certain characteristics more weight than others." Remand Results 20–21. Instead, Com-

merce "must weigh available information" to "make a product and case-specific decision as to what constitutes the 'best' available information." Remand Results 21.

Commerce next reiterated its practice of using, "whenever possible, the financial statement of a producer of identical merchandise, rather than of comparable merchandise." Remand Results 21 (citing *Steel Nails from China*; *Persulfates from the People's Republic of China*, 70 Fed. Reg. 6,836 (Dep't Commerce Feb. 9, 2005) (final results) and accompanying Issues and Decision Mem. at cmt. 1). On this basis, Commerce rejected the Welspun statements, finding that there exists "insufficient evidence to conclude that Welspun is actually a producer of" OCTG. Remand Results 21. Instead, Commerce chose the Bhushan statements for the same reason it initially chose the Welspun statements. In other words, it chose Bhushan because the company "is a producer of identical merchandise, and the Department has a preference for using the financial statement[s] of a producer of identical merchandise." Remand Results 23. Commerce also selected Bhushan because the "financial statements are publicly available and contemporaneous with the POI." Remand Results 23.

B. Discussion

SSV insists that Commerce erred in relying on the Bhushan statements. SSV alleges two main problems with Commerce's selection. The court considers each in turn.

First, SSV correctly notes that "Bhushan is a fully integrated producer," whereas SSV "is a semi-integrated producer." Remand Results 22; *see also* SSV Comments 11–12. Thus, Bhushan is incompatible with one of Commerce's preferences, *i.e.*, its preference for producers with similar production experiences. Remand Results 22–23. That said, SSV acknowledges that Bhushan is compatible with another of Commerce's preferences, *i.e.*, its preference for producers of identical merchandise. SSV Comments 11–12. SSV argues that Commerce failed to explain why it prioritized a company that, though producing identical products, had dissimilarly integrated operations. This risks distorting the values for manufacturing overheard and SG&A expenses. SSV Comments 17. As a result, SSV insists, "Commerce effectively assumed that there is a fixed hierarchy that treats production of the subject merchandise as the most important characteristic for choosing a source for surrogate financial ratios—despite Commerce's express statement that there is no such hierarchy." SSV Comments 12.

For its part, Commerce stated that it finds "affirmative precedence to support utilizing surrogate financial statements of companies with differing integration levels when no superior option was available on the record." Remand Results 22–23 (citing *Certain Oil Country Tubular Goods from the People's Republic of China*, 75 Fed. Reg. 20,335 (Dep't Commerce Apr. 19, 2010) and accompanying Issues and Decision Mem. at cmt. 13).

"Where Commerce is confronted with two alternatives (both of which have their good and bad qualities), and Commerce has a preferred alternative, the court will not second-guess Commerce's choice." *Mittal Steel Galati S.A.*, 31 CIT at 1141; *see also Dorbest Ltd.*, 30 CIT at 1687, 462 F. Supp. 2d at 1277 (explaining that when "Commerce is faced with a choice between two imperfect options, it is within Commerce's discretion to determine which choice represents the best available information"); *FMC Corp. v. United States*, 27 CIT 240, 251 (2002) ("When Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly." (citation omitted)). Moreover, Commerce has "wide discretion in the valuation of factors of production . . . ." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (citation omitted).

Here, Commerce faced imperfect options, and "no superior option[s]." Remand Results 22–23. And Commerce mentioned earlier that, given the "unique nature" of OCTG, it was particularly important to use financial statements from a producer of identical merchandise. I&D Mem. 18. It was reasonable for Commerce to prioritize a company that produces OCTG, even if the company is integrated at a different level. The court will not second-guess Commerce's reasonable exercise of its "wide discretion" to choose from among "imperfect options."[6]

Second, SSV disputes Commerce's conclusion that Bhushan produces OCTG and APL Apollo Tubes Limited ("Apollo"), via its subsidiary, Lloyds, does not produce OCTG. SSV Comments 13–17. It is

[6] Related to this, SSV also argues that the rationale for preferring producers of identical merchandise is inapplicable here. SSV cites the ratios of non-integrated companies on the record to argue that Bhushan's status as an integrated producer distorts the valuation of overheard and SG&A expenses. SSV Comments 17–23. SSV also argues that OCTG sales constitute an extremely small portion of Bhushan's overall sales, making "the profit figure in Bhushan's financial statements" unrepresentative of the profit figure of an OCTG producer. SSV Comments 19–21. SSV is correct that Bhushan's statements are imperfect. But the alternatives are also imperfect. And SSV offers no reason that the imperfections in Bhushan's statements produce greater inaccuracy than the imperfections in other record statements. Accordingly, for the reasons described above, the court sees no justification for second-guessing Commerce's selection from among imperfect alternatives.

unclear if SSV is arguing that Bhushan produces no OCTG or, instead, that Apollo produces OCTG.

If SSV is arguing that Bhushan produces no OCTG, the court finds that SSV failed to exhaust its administrative remedies on this argument. This court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). The court has "generally taken a strict view of the need for parties to exhaust their remedies by raising all arguments in a timely fashion so that they may be appropriately addressed by the agency." *Nakornthai Strip Mill Pub. Co. v. United States*, 32 CIT 553, 564, 558 F. Supp. 2d 1319, 1329 (2008) (citation omitted); *see also United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). SSV had a "full and fair opportunity to raise" this issue before Commerce on remand. *Qingdao Taifa Group Co. v. United States*, 33 CIT 1090, 1093, 637 F. Supp. 2d 1231, 1236 (2009). It did not. And the court will not allow it do so now.[7]

If SSV is arguing that Apollo's statements reflect the production of OCTG and should be used instead of, or alongside, Bhushan's statements, the court finds this argument unavailing. Commerce explained its rationale for rejecting the financial statements of Apollo:

> We previously found in the LFTV investigation that Apollo itself does not produce OCTG. The record contains evidence that its subsidiary, Lloyds, is 5CT certified, and, therefore, capable of producing OCTG. However, similar to the facts related to Welspun's financial statements, Apollo's consolidated financial statements do not affirmatively indicate that its subsidiary, Lloyds, produced OCTG during the POI.[8]

Remand Results 22 (citations omitted). SSV offers no evidence that either Apollo or Lloyd's actually produced OCTG. Instead, SSV alleges that the same quality and quantity of evidence exists that

[7] No exhaustion exceptions apply here. This is not a pure question of law, there was no lack of access to the confidential record, there is no intervening legal decision, and it would not have been futile to raise this issue at the administrative level. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT 186, 193, 601 F. Supp. 2d 1370, 1377 (2009) (listing exhaustion exceptions).

[8] Commerce later repeated that "[w]ith respect to Apollo, there is no information on the record that indicates that Apollo produces, or has ever produced, OCTG. With respect to Lloyds, while the record reflects that Lloyds is certified to produce OCTG, there is no affirmative record evidence indicating that it actually produced OCTG during the POI." Remand Results 56 (citation omitted).

Lloyds produced OCTG as exists that Bhushan produced OCTG. To prove this, SSV lists all potential references in Bhushan's statements to OCTG, which SSV claims fail to "describe any actual OCTG production by Bhushan . . . ." SSV Comments 15–17. Without comparing the references in Bhushan's statements to content in Apollo's statements, SSV concludes:

> Both companies were licensed to produce OCTG meeting API 5CT standards. Both companies mentioned the ability to produce API 5CT products on their websites. But neither company's financial statements reported any actual production or sales of OCTG during the period. Consequently, Commerce's conclusion that Bhushan produced OCTG while Lloyds did not cannot be upheld.

SSV Comments 17. In short, SSV alleges that, if Commerce found sufficient evidence that Bhushan produced OCTG, it must likewise find sufficient evidence that Lloyds produced OCTG.

This argument is unconvincing. SSV did not actually contrast the Bhushan and Apollo/Lloyd statements, so SSV failed to establish that, in fact, "the evidence for Bhushan's production of OCTG is exactly the same as the evidence for Lloyd's OCTG production . . . ." SSV Comments 17. Indeed, the evidence on the record appears to prove the opposite—stronger evidence exists that Bhushan produced OCTG than that Apollo/Lloyds produced OCTG. *See* SSV Comments 16–17; U.S. Steel Comments 18 n.7. Therefore, Bhushan's financial statements fail to prove that Apollo/Lloyds produced OCTG.

Nevertheless, even if the court were to adopt SSV's argument, Commerce provided a weighty independent basis for rejecting the Apollo financial statements: "Our confidence . . . [in the Apollo/Lloyds financial statement] is further diminished by the fact that Apollo's consolidated financial statement does not include an auditor's opinion for Lloyd's financial statement, nor does it disclose the name of the entity that audited Lloyds' financial statement."[9] Remand Results 56. In contrast, "Bhushan included an audit opinion and provided the auditor's name with a registration number." Gov't Comments 16.

SSV insists that "[t]here is no evidence on the record concerning [the firm that audited Bhushan's statements] or its reliability as an auditor, and thus no basis for concluding that Bhushan's audited

[9] Commerce also explained that, "in [its] Final Determination from the LTFV investigation [it] found that not all of Lloyds' financial statements were separately included in the consolidated Apollo financial statements on the record, and because of the consolidated nature of those financial statements, we could not be certain that the Apollo financial statements contained financial ratios which were as representative of an actual Indian producer of OCTG . . . ." Remand Results 22.

financial statements were in any way more reliable than the consolidated" Apollo/Lloyds financial statements. SSV Comments 21. But Commerce need not audit the auditor. It can instead accept the independent auditor's report as reliable unless "compelling evidence" exists that the auditor is not in "good standing." *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan*, 71 Fed. Reg. 67,098 (Dep't Commerce Nov. 20, 2006) (final results) and accompanying Issues and Decision Mem. at cmt. 1. As a result, Commerce had reason to trust the reliability of Bhushan's statements and not Apollo/Lloyds' statements.

In the end, substantial evidence supports Commerce's decision to discard the Apollo/Lloyd statements and use the Bhushan statements.

III. The Court Sustains Commerce's Calculation of Yield Loss.

U.S. Steel challenges Commerce's recalculation of yield loss in the Remand Results. U.S. Steel Comments 22–29. Though SSV challenged the yield loss calculation in the *Final Determination*, it does not challenge the recalculation in the Remand Results. The court sustains the yield loss determination.

A. Background

In its *Final Determination*, Commerce adjusted the normal value of OCTG to account for yield loss. I&D Mem. 38. Documents obtained during verification formed the basis for the yield loss calculation. Sales Verification Report 11–12, CD 169 (May 30, 2014), ECF No. 58. These documents showed that before the period of investigation, SSV's U.S. affiliate rejected as defective [[ ]] percent of SSV's shipment of upgradeable OCTG (OCTG made with J55 coil containing elevated carbon levels). Final Analysis Mem. 1–2, CD 182 (July 10, 2014), ECF No. 73–3. From this information, Commerce increased SSV's usage rate of inputs by [[ ]] percent. Final Analysis Mem. 1–2, CD 182 (July 10, 2014), ECF No. 73–3.

SSV challenged the calculation. Among other claims, SSV claimed that a [[ ]] percent yield loss was inaccurate because Commerce calculated this loss using exclusively transactions of upgradeable OCTG exported before the period of investigation rather than all the transactions of OCTG. Rule 56.2 SSV Br. 47–48, ECF No. 54. The Government requested a voluntary remand to reconsider its calculation of yield loss. Gov't Resp. 46, ECF No. 65. The court granted a remand. *SeAH Steel VINA Corp.*, 40 CIT at _, 182 F. Supp. 3d at 1333–34.

On remand, Commerce recalculated SSV's yield loss. As stated above, Commerce initially calculated yield loss in the *Final Determination* by dividing the amount of upgradeable OCTG from SSV that the affiliate sold as scrap by the affiliate's total sales volume of upgradeable OCTG from SSV. Remand Results 26. In the Remand Results, Commerce changed the denominator. Remand Results 26. Thus, it calculated yield loss by dividing the amount of upgradeable OCTG from SSV that the affiliate sold as scrap by the affiliate's total sales volume of *all* subject merchandise from SSV during the POI. Remand Results 26–27. Rather than a yield loss of [[ ]] this new method of calculation resulted in a yield loss of [[ ]] percent. Remand Results 24. Commerce explained that it "base[d] this determination on the fact that there is no evidence that [the affiliate] had any sales of scrap other than the one sale to which [U.S. Steel] cites." Remand Results 26.

B. Discussion

U.S. Steel argues that "Commerce's original adjustment of [[ ]] percent was the most accurate adjustment based on the available record evidence." U.S. Steel Comments 29. According to U.S. Steel, Commerce "clearly erred in using the total quantity of [SSV's] U.S. sales of OCTG as the denominator in its calculations of the amount of unreported yield loss." U.S. Steel Comments 26. Doing so lacked the support of substantial evidence, U.S. Steel asserts. U.S. Steel Comments 29. Instead, U.S. Steel maintains that "the appropriate denominator to use in the calculation of the percentage of OCTG that was identified as defective scrap was the total quantity of upgradable merchandise that was sold." U.S Steel Comments 26.

To prove this, U.S. Steel cites record evidence pertaining to other inventory accounts and sales records, not included in Commerce's calculation, of scrap OCTG from SSV and its affiliate. U.S. Steel Comments 25–27. Allegedly, these accounts demonstrate that the [[ ]] percent yield loss was conservative, because evidence of additional SSV-sourced OCTG scrap existed, and this additional scrap ensures that the yield loss applicable to the upgradable OCTG was either the same as, or lower than, the yield loss applicable to remainder of the non-upgradable OCTG. U.S. Steel Comments 23–27. Thus, U.S. Steel asserts, using the [[ ]] percent ratio, which was calculated using the affiliate's upgradable OCTG sales as the denominator, produces an accurate estimate of overall yield loss.[10] U.S. Steel Comments 29.

[10] U.S. Steel also posits that, "because complete information is only available for upgradable OCTG, it is only possible to calculate an adjustment by using defective upgradable OCTG

But U.S. Steel's record citations offer no insight into SSV's yield loss, nor do they indicate that the [[ ]] percent figure is either conservative or inflated. As Commerce explained, each record citation suffers from at least one of three fatal defects.

One defect is that the [[ ]] Remand Results 26. In other words, although additional evidence of scrap OCTG exists, Commerce has no way of knowing that the scrap came from SSV. Accordingly, "there is no conclusive evidence that [the affiliate] had any SSV-sourced sales of scrap, other than the one sale of J55H [upgradable] OCTG scrap about which [Commerce] learned at verification." Remand Results 26–27. U.S. Steel does not dispute this. Commerce properly refused to assume that SSV-sourced scrap formed part of the cited accounts.

A second defect is that the record citations of accounts relate only to SSV's sales of upgradable OCTG, which account for a [[ ]] of all SSV's sales to the affiliate, and thus have no relation to potential yield loss on the remaining [[ ]] of SSV's OCTG sales. Remand Results 60. As Commerce correctly notes, applying the yield loss of upgradable OCTG to all OCTG risks an inaccurate and inequitable yield loss result that effectively amounts to an unwarranted adverse inference against SSV.[11] Remand Results 60–61.

in the numerator and total upgradable OCTG in the denominator of the ratio." U.S. Steel Comments 29. As proof, U.S. Steel theorizes that, "[w]hen estimating the ratio of defective OCTG to total OCTG, it is essential that both the numerator and the denominator of the ratio be on the same basis." U.S. Steel Comments 27. U.S. Steel contends that "the reason that the ratio must be calculated using only upgradable J55 OCTG is that this is the only type of OCTG for which [SSV] provided complete information regarding its sales of defective OCTG." U.S. Steel Comments 28. However, in response, the Government correctly explains that "the upgradable OCTG scrap is the known scrap sales for all relevant OCTG sales." Gov't Comments 41. Consequently, "upgradable OCTG scrap represents total OCTG scrap, making it appropriate to use total OCTG as the denominator." Gov't Comments 41.

[11] In essence, U.S. Steel's main argument is that Commerce "should not assume [[ ]]" U.S. Steel Comments 26. U.S. Steel insists that this argument does not amount to a request for an adverse inference. U.S. Steel Comments 28. However, it states that the incomplete record information as to the source of the other scrap "is the result of [SSV's] failure to disclose." U.S. Steel Comments 26. Nevertheless, U.S. Steel also reasons: "There is nothing adverse about [[[ ]]] ratio. It constitutes a conservative estimate based on the record evidence regarding the percentage of OCTG that [SSV] shipped to the United States that was ultimately found to be defective." U.S. Steel Comments 28.

The court rejects this argument. First, the only way to conclude that the estimate is "conservative" is to make assumptions about and rely on the above inventory accounts that U.S. Steel cites. For the above reasons, reliance on those accounts is unwarranted and the court cannot therefore deem the estimate "conservative." Second, as the Government stated, "it would be an adverse inference to assume that all the OCTG has a [[ ]] percent yield rate, simply because the [[ ]] percent of upgradable OCTG does." Gov't Comments 42. Thus, U.S. Steel is effectively asking for an adverse inference.

Even though U.S. Steel raised no affirmative argument that Commerce erred in failing to apply an adverse inference, Commerce explained that an adverse inference would be inappropriate. It stated: "the Department did not request such precise information about [the affiliate's] [[ ]] prior to the verification, and at verification [Commerce] officials

A third defect in the accounts cited by U.S. Steel is that they do not actually represent the final amount of scrap. Commerce explained that "[w]ith respect to the inventory records, [*i.e.*, the accounts cited by U.S. Steel, Commerce does] not find these data reliable for calculating a yield loss ratio because there is record evidence that SSV's [] affiliate sometimes repairs scrap OCTG and sells it as prime merchandise." Remand Results 60 (citation omitted). For that reason, even if the cited accounts showed scrap indicative of a yield loss greater than [[ ]] percent, this does not actually signify a final yield loss of, or greater than, [[ ]] percent.

The court finds that substantial evidence supports Commerce's determination. Commerce calculated the yield loss by dividing the only known scrap OCTG by the total sales of OCTG. This was reasonable. U.S. Steel contends that record evidence proves the existence of additional SSV-sourced OCTG scrap, which would mean the yield rate should be higher. But the inventory accounts and sales that U.S. Steel cites do not establish the existence of any additional SSV-sourced scrap because (1) they do not provide the source of the OCTG scrap, (2) they relate exclusively to upgradable sales and prove nothing about non-upgradable sales, and (3) they overstate scrap amounts by including product that will eventually be repaired and sold as prime subject merchandise. For this reason, Commerce reasonably discarded the information that U.S. Steel provided and calculated the yield loss based on the only known OCTG scrap. Doing otherwise—inferring a large amount of OCTG scrap as yield loss—"is not appropriate, and could potentially be highly inequitable." Remand Results 61.

IV. The Court Remands for Further Explanation or Reconsideration of Commerce's Selection of a Surrogate Value for Domestic Inland Insurance.

SSV argues that Commerce erred in finding the existence of an insurance contract that requires a separate surrogate value. SSV also argues that, even if such a contract exists and requires a separate surrogate value, Commerce erred in calculating the value. SSV Comments 2–10. After careful review, the court remands for Commerce to either provide more explanation of or to reconsider its selection of a surrogate value for domestic inland insurance.

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requested no such information from [the affiliate] . . . regarding its yield loss for any forms of OCTG." Remand Results 61. Thus, a prerequisite to the application of an adverse inference was unsatisfied. *See* 19 U.S.C. § 1677e(b).

A. Background

Under 19 U.S.C. § 1677a(c)(2)(A), Commerce must reduce the export price by "the amount, if any, . . . attributable to any additional costs, charges, or expenses . . . which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . . ." U.S. Steel believes that SSV purchased insurance from [[ ]] and that Commerce should have valued and deducted the cost of this insurance from the export price pursuant to 19 U.S.C. § 1677a(c)(2)(A). U.S. Steel Rule 56.2 Br. 28, ECF No. 56.

The contract between SSV and [[ ]] required [[ ]] to transport OCTG from SSV's plant to the port in Vietnam. SSV Suppl. Section A and C Resp. ("Suppl. A&C Resp.") app. SC-5, CD 31–35 (Jan. 9, 2014), ECF No. 60. The contract states that [[ ]] Suppl. A&C Resp. app. SC-5 at 2. The contract also includes the following provision:

[[

]]

Suppl. A&C Resp. app. SC-5 at 2. Additionally, the contract states that the price includes [[ ]] Suppl. A&C Resp. app. SC-5 at 3. The contract apparently does not limit [[ ]] liability to accidents or damage for which [[ ]] is responsible. U.S. Steel Rule 56.2 Br. 30, ECF No. 56.

In its motion for judgment on the agency record, U.S. Steel insisted that the above language establishes that [[ ]] charged SSV for both shipment and insurance of the OCTG. U.S. Steel Rule 56.2 Br. 28–29, ECF No. 56. U.S. Steel explained that Commerce has an established practice of separately valuing domestic inland insurance when the insurance is purchased "in conjunction with the provision of another service." U.S. Steel Rule 56.2 Br. 29, ECF No. 56. As a result, U.S. Steel maintained that "Commerce should have valued the cost of such insurance and deducted it as a movement expense from" the export price. U.S. Steel Rule 56.2 Br. 28, ECF No. 56. In its *Final Determination*, Commerce found otherwise:

> We disagree with [U.S. Steel] that the Department should deduct a surrogate value from SSV's U.S. price to represent domestic inland insurance. As SSV has noted, it is not uncommon for trucking companies to bear the risk of loss on the shipments

> they handle. We do not find that the bearing of such risk constitutes an "insurance contract" that would require a separate surrogate value.

I&D Mem. 41.

The court reviewed the above determination and ruled that Commerce provided an inadequate explanation of its determination. The court explained:

> Commerce provides scant insight into its decision. . . . Commerce provides no explanation for why it believes that trucking companies commonly carry the risk of loss. Nor does it give any reasons for its refusal to classify the language of the freight agreement as an insurance contract requiring a separate surrogate value. This is not enough.

SeAH Steel VINA Corp., 40 CIT at _, 182 F. Supp. 3d at 1331. The court concluded that it could not "properly review [Commerce's] conclusion based on its explanations and its citations to the data." *Id.* (quoting *Diamond Sawblades Mfrs. Coal. V. United States*, 612 F.3d 1348, 1358 (Fed. Cir. 2010)).

On remand, Commerce changed course. It found: "Upon review of the record of this proceeding, we have determined that the record does not substantiate the Department's finding that trucking companies commonly bear the risk of loss, or that SSV did not have an insurance contract with its trucking company." Remand Results 16. Based on this finding, Commerce also found that "the Service Contract between SSV and its freight forwarder includes language to insure SSV against 'any accidental or any damage to cargoes' for the full amount of the invoice." Remand Results 16 (citation omitted). Commerce explained: "Because [[ ]] of the freight contract refers to [[ ]] we find that this provision, as written, functions as an insurance contract." Remand Results 53. Accordingly, Commerce "reclassified SSV's freight contract as being inclusive of an insurance contract, and . . . included a surrogate value for domestic inland insurance . . . ." Remand Results 16.

In selecting a surrogate value, Commerce acknowledged that it seeks to use "to the extent practicable, surrogate values which are publicly available, product-specific, representative of a broad market average, tax-exclusive, and contemporaneous with the POI." Remand Results 16. It then explained that, "[i]n this investigation, the record contains one available surrogate value source with which to value SSV's domestic inland insurance: inland insurance information sub-

mitted by Argo Dutch Industries Limited [("Argo Dutch")] in the 2004–2005 administrative review of certain preserved mushrooms from India." Remand Results 17.

Commerce concedes that the Argo Dutch value is flawed. It states: "The record does not . . . establish whether [the Argo Dutch value] is tax exclusive, or indicate whether it is representative of a broad market average." Remand Results 17. But, it explains, the Argo Dutch value "is publicly available," "specific to inland insurance in the surrogate country," and capable of being made contemporaneous by "using an inflator." Remand Results 17. Commerce ultimately relies on the Argo Dutch data, because it "is the only source on the record for inland insurance, and meets certain criteria for selecting surrogate values . . . ." Remand Results 17.

B. Discussion

SSV insists that "the relevant provision of SSV's contract with the freight forwarder is not an agreement to obtain inland insurance." SSV Comments 3. Instead, the "provision describes the normal liability of a common carrier under English, U.S., and Indian law." SSV Comments 5. To corroborate this, SSV first lists cases from India, the United States, and the King's Bench to establish that it is a "principle of common law" that common carriers bear the risk of loss during transport. SSV Comments 5. It then reasons:

> In these circumstances, the obvious purpose of the relevant provision in SSV's agreement with the freight forwarder was to clarify that, notwithstanding what Vietnamese law might say, the risk of loss would be assigned in accordance with the normal legal rules that apply to freight contracts in market-economy countries like England, the United States, and India.

SSV Comments 6. Next, SSV states that the surrogate value for inland freight was based on the rates of Indian common carriers, which would mean the rates for inland freight included the cost to common carriers of assuming the risk of loss. Therefore, SSV claims, Commerce captured the cost of assigning this risk of loss, and a separate surrogate value was excessive. SSV Comments 7–8.

Commerce correctly rejected this argument. It concluded that insufficient record evidence exists that common carriers typically bear the risk of loss. Remand Results 52–53. Moreover, SSV cites no reasons why it is "obvious" that SSV and [[ ]] intended to adopt the alleged default risk of loss rules of India, the United States, and England. Thus, Commerce acted reasonably and with substantial evidence in finding that the plain language of the contract "insure[d]

SSV against 'any accidental or any damages to cargoes' for the full amount of the invoice," and that the contract therefore was "inclusive of an insurance contract." Remand Results 16; *see also* Remand Results 53.

As explained above, Commerce then chose data from Argo Dutch to value the domestic inland insurance. Commerce chose this data because (1) it "is the only source on the record for inland insurance," (2) "it is publicly available," (3) it is "specific to inland insurance in the surrogate country," and (4) it becomes contemporaneous "by using an inflator." Remand Results 17; *see also* Remand Results 54–55. Commerce admits that it does not know whether the Argo Dutch data is tax exclusive and representative of a broad market average. Remand Results 55.

However, substantial evidence does not support the selection of Argo Dutch as a surrogate value. As SSV explains, the Argo Dutch value is "not, in fact, an amount for inland insurance." SSV Comments 2. Instead, the Argo Dutch value appears to reflect the cost of *both* inland insurance and marine insurance. U.S. Steel Surrogate Value Data and Calculations Part III Tab J, Attach. 2, Ex. 9, ECF No. 73–1 ("Our insurance policy covers the product from our factory to the U.S. port. These insurance costs include inland and marine insurance . . . ."). What is more, SSV states that, "because mushrooms have a per-ton value that is roughly *ten times* higher than that of OCTG, and because insurance is assessed on the basis of the insured *value* of the merchandise, and not its weight, the cost of insurance per ton for mushrooms was incredibly inflated compared to the actual cost in India of insuring steel pipe shipments."[12] SSV Comments 2–3 (citation omitted).

As referenced above, Commerce acknowledged that it seeks to use "to the extent practicable, surrogate values which are publicly available, product-specific, representative of a broad market average, tax-exclusive, and contemporaneous with the POI." Remand Results 16. But without more explanation from Commerce, it appears that the chosen surrogate value from Argo Dutch is not specific to inland insurance. As a result, Commerce has chosen a surrogate value that may fulfill only two of the foregoing list of criteria—it is publicly available and it can be adjusted to make it contemporaneous. On these facts, this is not substantial evidence that the Argo Dutch surrogate value adequately represents SSV's inland insurance costs. On remand, Commerce has two options. First, it can more fully

[12] As evidence, SSV explains that the mushrooms insured in the Argo Dutch data were sold on average for $12,650 per metric ton. U.S. Steel SV Data and Calculations Part III Tab J, Attach. 2, Ex. 9, ECF No. 73–1. SSV asserts that OCTG had a substantially lower cost. SSV Comments 2 n.3.

explain why the Argo Dutch data, despite the above shortcomings, represents "the best available information and establishes antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc.*, 268 F.3d at 1382. Or second, Commerce can reconsider its decision to rely on the Argo Dutch surrogate value and, if necessary, use its discretion to reopen the record to gather additional evidence.[13]

V. Commerce Properly Valued SSV's Brokerage and Handling Costs.

SSV argues that "Commerce improperly included 'Document Preparation' costs in the calculation of export and import brokerage and handling [("B&H")] costs, even though the evidence confirmed that SSV did not pay its broker for such services." SSV Comments 23. The court sustains Commerce's calculation of B&H costs.

A. Background

SSV incurred B&H expenses when it shipped goods from Vietnam to the United States. Commerce's Resp. 28, CD 22 (Oct. 30, 2013), ECF No. 73–3. To determine a surrogate value for the B&H services, Commerce used the World Bank's report "Doing Business India: 2014" ("Doing Business Report"). I&D Mem. 6–7. This report provides

[13] SSV argues in the alternative that "Commerce did not provide SSV an adequate opportunity to provide surrogate value information for Vietnamese inland insurance." SSV Comments 8. For this reason, SSV argues that it should receive an "opportunity to supplement the record with information regarding the appropriate surrogate value for inland insurance." SSV Comments 9–10 (citations omitted). In opposition, the Government explains that "SSV did not even request to reopen the record . . . after U.S. Steel raised its inland insurance [argument] in its case brief. Nor did it seek to do so after the Court remanded the insurance issue and instructed Commerce that it could 'reclassify the contract provision' on remand." Gov't Comments 9 (citations omitted). Rather, the Government states, "SSV waited to request to reopen the record until after Commerce had already issued its draft remand, and had to comply with an impending deadline to submit the final remand redetermination to this Court." Gov't Comments 9.

The court finds that, contrary to SSV's claims, it received an opportunity to provide surrogate values for inland insurance. Remand Results 54. As both Commerce and SSV itself note, SSV missed the deadline to submit information. SSV Comments 8–9; Remand Results 54. SSV "could have chosen . . ., as did [U.S. Steel], to submit surrogate value information for domestic inland insurance." Remand Results 54. It did not. It also waited until an inopportune time to seek to supplement the record. In light of these facts, and because "[t]he decision to reopen the record is best left to" Commerce, the court will not order Commerce to open the record to allow SSV to provide additional surrogate values. *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012); *see also Shandong Rongxin Import & Export Co. v. United States*, 41 CIT __, __, 203 F. Supp. 3d 1327, 1338 (2017) (explaining that "this Court may not *order* an administrative agency to reopen the record on remand in the absence of extraordinary circumstances." (citation omitted)); *Changshan Peer Bearing Co. v. United States*, 38 CIT __, __, 953 F. Supp. 2d 1354, 1362 (2014) (stating that "the court views an order compelling an agency to reopen an administrative record on remand as the exception rather than the rule, consistent with the principle that courts, as a general matter, should allow agencies to exercise discretion as to whether to reopen an administrative record on remand." (citation omitted)).

a total cost for B&H services, and also breaks down this total cost into four subcategories: "[c]ustoms clearance and technical control" costs, "[p]orts and terminal handling" costs, "[i]nland transportation and handling" costs, and "[d]ocuments preparation" costs. Surrogate Value Sources Ex. IV at 2, PD 164 (Fed. 21, 2014), ECF No. 73–2. The report lists the following nine documents under the category of "Export Documents": (1) bill of lading, (2) certificate of origin, (3) commercial invoice, (4) foreign exchange control form, (5) inspection report, (6) packing list, (7) shipping bill (customs export declaration), (8) technical standard certificate, and (9) terminal handling receipts. Surrogate Value Sources Ex. IV at 2, PD 164 (Fed. 21, 2014), ECF No. 73–2. However, the report does not provide individual costs for these documents. Surrogate Value Sources Ex. IV at 2, PD 164 (Fed. 21, 2014), ECF No. 73–2.

The *Final Determination* included document preparation costs in the calculation of SSV's B&H costs. *See* Surrogate Values Mem. Ex. 9, PD 152 (Feb. 20, 2014), ECF No. 73–2. In declining to adjust the B&H value to exclude document preparation costs, Commerce explained the established practice governing its decision to adjust B&H surrogate values:

> [Commerce] will sometimes make an adjustment to surrogate value data to reflect an individual exporter's experience, including to B&H surrogate value data, but normally only when the item's amount is clearly identified in the 'Doing Business' report and the factors of production for self-preparation are accounted for.

I&D Mem. 7 (footnote omitted). No party disputed the relevance or validity of this practice. Consequently, to qualify for an adjustment to its B&H values, SSV had to satisfy two conditions. First, the Doing Business Report must have clearly identified the cost for the documents that SSV claims that it prepared without a broker. Commerce concluded that the Doing Business Report did not clearly identify the relevant costs. I&D Mem. 7. Second, Commerce must have otherwise accounted for the factors of production for any self-preparation of documents. Commerce never addressed the second condition. Nonetheless, because Commerce found that SSV failed to satisfy the first condition, it declined to adjust the B&H value. I&D Mem. 7.

In its motion for judgment on the agency record, SSV contended that, because it did not incur any "document preparation" costs, Commerce should adjust the B&H surrogate value by excluding the "document preparation" costs. Rule 56.2 Mot. for J. on Agency Record 11, 16, ECF No 54.

The court remanded the issue to Commerce, concluding that Commerce had not adequately explained why SSV failed to satisfy the first condition and it neglected to consider the second condition. *SeAH Steel VINA Corp.*, 40 CIT at _, 182 F. Supp. 3d at 1336–37. In the Remand Results, Commerce found that SSV failed to satisfy both conditions for an adjustment and provided a more detailed explanation for this finding.[14] Remand Results 31–34.

B. Discussion

To prove that it fulfilled the first condition for a B&H value adjustment, SSV insists that it did not pay a broker for any of the B&H documents. Again, the nine documents are (1) certificate of origin; (2) foreign exchange control form; (3) terminal handling receipts; (4) bill of lading; (5) commercial invoice; (6) inspection report; (7) packing list; (8) shipping bill (customs export declaration); and (9) technical standard certificate. SSV Case Br. Attach. 2, PD 197 (June 6, 2014), ECF No. 58. According to a chart that counsel for SSV prepared in response to verification requests, nobody prepared documents (1) and (3) because these documents were unnecessary for shipment of OCTG. SSV Verification Ex. 5, CD 84 (Apr. 14, 2014), ECF No. 58. The ocean shipping company covered document (4). SSV Verification Ex. 5, CD 84 (Apr. 14, 2014), ECF No. 58. And SSV itself prepared documents (5) through (9). SSV Verification Ex. 5, CD 84 (Apr. 14, 2014), ECF No. 58. SSV also claims that nobody prepared the foreign exchange control form (document (2)), but the above chart says noth-

[14] As stated above, SSV challenges Commerce's inclusion of "Document Preparation" costs as to both exports of OCTG *and* imports of HRC. Like B&H costs pertaining to exports, the Doing Business Report for imports provides a total B&H cost as well as subcategorized costs, which includes "[d]ocuments preparation" costs. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. Instead of nine documents, the "document preparation" category for imports includes eleven documents. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. The Doing Business Report includes a cost for the aggregated eleven documents, but does not particularize the costs of each individual document. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2.

At the administrative level, SSV argued that it did not incur "document preparation" costs on imports of HRC, but Commerce refused to apply an adjustment in its *Final Determination*. I&D Mem. 40. Commerce concluded that "SSV has presented no evidence that the B&H costs are included in the overhead reported on any of the financial statements on the record." I&D Mem. 40. The court remanded for further explanation. *SeAH Steel VINA Corp.*, 40 CIT at _, 182 F. Supp. 3d at 1341.

Here, SSV does not differentiate between arguments directed at B&H costs for exports and B&H costs for imports. Moreover, in the Remand Results, Commerce explained that it included "document preparation" costs on imports of HRC for the same reasons it included "document preparation" costs on exports of OCTG. Remand Results 38. Thus, the same rationale applied to both imports of HRC and exports of OCTG. On that basis, the court sustains Commerce's determination as to the "document preparation" costs of imports of HRC for the same reasons (discussed below) that it sustains the determination as to exports of OCTG.

ing about the source of the form.[15] SSV Verification Ex. 5, CD 84 (Apr. 14, 2014), ECF No. 58; SSV Comments 23.

Although the Doing Business Report lists no individual costs for any of the foregoing documents, the report lists a total cost for document preparation services, and the nine foregoing documents comprise this total cost. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2. As a result, SSV satisfies the first condition for an adjustment if its broker prepared none of the nine documents, because the total cost of the documents that SSV claims its broker did not prepare (whether because the documents were prepared by SSV, a third party, or no one at all) would be "clearly identified" in the report. Accordingly, SSV argues that, because its broker prepared none of the nine documents, the "item's amount"—the amount for the services that SSV did not receive from a broker, which here includes all the documents—is "clearly identified in the Doing Business [R]eport." Rule 56.2 Mot. for J. on Agency Record 14 (quoting I&D Mem. 7), ECF. 54 (citation omitted). As a result, SSV maintains that it satisfied the first of two conditions of Commerce's practice. SSV Comments 23–27.

Commerce disagreed. In its Remand Results, it found "that the first condition, that [the] Doing Business [Report] must clearly identify the cost for the documents that SSV claims that it prepared without a broker, has not been met for two reasons." Remand Results 31.

First, "with respect to one of the nine [documents] listed in [the] Doing Business [Report], specifically, the Foreign Exchange Control Form, SSV did not at any time during the course of the investigation, identify this document as one that it did not use." Remand Results 32. Commerce is correct that the above chart offers no insight into the source or existence of the foreign exchange control form. SSV responds that, in fact, there is proof that "it did not use a 'Foreign Export Control Form' in connection with its export sales or import purchases." SSV Comments 24. But the record evidence that SSV cites as proof is not determinative. *See* SSV Comments 24–25. At most, the evidence suggests that it is possible that the foreign exchange control form was not used. It is thus unclear if SSV used this form, and Commerce therefore correctly found that there exists insufficient evidence that a broker prepared none of the nine documents of the "document preparation" category. Therefore, the cost for the documents prepared without a broker is not "clearly identified" in the Doing Business Report and, by extension, the first of two necessary

[15] The foreign exchange control form is also one of the eleven documents listed in the "document preparation" category for imports. Surrogate Value Sources Ex. IV, PD 164 (Fed. 21, 2014), ECF No. 73–2

conditions for a B&H adjustment is unmet. This alone is sufficient to sustain Commerce's refusal to adjust the B&H calculation.

Nevertheless, Commerce provides a second reason that the first condition is unmet. Record evidence confirms "that the freight forwarding contract shows that a party outside of SSV is performing brokerage services." Remand Results 33. Commerce cites language from the contract between SSV and its freight forwarding company, [[ ]], in which [[

]] Suppl. A&C Resp. app. SC-5 at 2, CD 31–35 (Jan 9, 2014), ECF No. 60. The contract specifies that the fees for [[

]] Suppl. A&C Resp. app. SC-5 at 3, CD 31–35 (Jan 9, 2014), ECF No. 60. What is more, the contract with the freight forwarding company requires SSV to [[

]] Suppl. A&C Resp. app. SC-5 at 2, CD 31–35 (Jan 9, 2014), ECF No. 60. (emphasis added).

SSV claims that this contract is simply a "generic agreement" that proves nothing about whether the freight forwarding company actually provided B&H document preparation services. SSV Comments 25. SSV also explains that statements given and documents reviewed at verification indicate that the freight forwarding company did not provide document preparation services. SSV Comments 25–26.

The court disagrees. SSV may be able to point to evidence suggesting that the freight forwarding company provided no document preparation services. But Commerce has substantial evidence in the form of a contract whereby the freight forwarding company agrees to undertake at least some document preparation services. *See American Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001) ("Even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent Commerce's determination from being supported by substantial evidence." (citations omitted)). Consequently, the Doing Business Report does not clearly identify the price of the documents that SSV paid no broker to provide. And SSV is not entitled to an adjustment.

The above finding—that the first of two conditions required for a B&H surrogate value adjustment is unmet—obviates SSV's challenge to the Remand Results. Yet Commerce also analyzed the second condition, "that the Department must otherwise have accounted for the factors of production for any self-preparation of documents." Remand Results 34. Commerce explained:

> Such accounting is normally reflected in the Department's preliminary determination analysis memorandum, final determi-

> nation analysis memorandum, or amended final determination analysis memorandum and must clearly indicate the expenses to which the Department made adjustments in calculating U.S. price. None of these documents suggest that any adjustment was made for B&H document preparation fees other than through the B&H adjustment. Thus, the second condition is not met. Therefore, even if SSV did prepare all brokerage documentation internally, without the use of a broker, the Department would still need to select a surrogate value to represent B&H documentation fees.

Remand Results 34 (citations omitted). For its part, SSV argues that Commerce did otherwise account for the B&H costs. SSV maintains that the surrogate values for overhead, SG&A and interest expenses:

> [N]ecessarily capture the costs for purchasing department and administrative personnel (and the supplies they use), including the personnel who fill out forms like those required for brokerage and handling for import and export transactions. Thus, the figures for overhead and SG&A and interest used by Commerce already reflect[] the costs of administrative personnel that perform document preparation. Consequently, Commerce's separate adjustment for document preparation costs massively double-counted the actual costs.

SSV Comments 27. But as the Government states, "SSV cites no documentation from Bhushan (the company from which Commerce selected financial ratios) showing that Bhushan's internal personnel prepared export and import documentation." Gov't Comments 24. Thus, there is no evidence that financial ratios derived from Bhushan otherwise account for B&H costs.[16] Accordingly, Commerce acted with the support of substantial evidence in finding that the second necessary condition is also unfulfilled. This provides additional support, and an alternative basis, for Commerce's refusal to adjust SSV's B&H surrogate values.

VI. The Court Remands for Reconsideration or Further Explanation of Commerce's Allocation of Brokerage and Handling Costs.

SSV argues that "Commerce improperly allocated brokerage and handling costs based on the false assumption that the costs would

[16] To eliminate the risk that Bhushan's statements would cause double-counting, Commerce removed "selling and distribution" costs from Bhushan's statements. Remand Results 37.

increase with every 10 tons that SSV exported." SSV Comments 27. The court remands for either reconsideration or further explanation.

A. Background

As discussed, Commerce used the Doing Business Report to calculate surrogate values for B&H services on both exports of OCTG and imports of HRC. I&D Mem. 6–7, 40. The figures from the report assumed a sample shipment of goods weighing ten metric tons ("MT"). SSV Case Br. Attach. 2–3, PD 197 (June 6, 2014), ECF No. 58. For its *Final Determination*, Commerce calculated B&H surrogate values in dollars per metric ton "by dividing the total costs shown in the Doing Business [R]eport (for documents preparation, customs clearance and technical control, and ports and terminal handling) by 10—[because] the hypothetical container that was the focus of the Doing Business Report's estimates contained 10 tons of the hypothetical goods." SSV Br. 23. In other words, Commerce first divided by ten the total B&H costs (for documents preparation, customs clearance and technical control, and ports and terminal handling) given in the Doing Business Report on imports and exports. Doing this gave Commerce the B&H costs per metric ton of goods imported and exported. Commerce then multiplied the per metric ton B&H costs on imports by the total metric tons of HRC that SSV imported. Final Analysis Mem. Attach. 2, PD 217 (July 16, 2014), ECF No. 58. Commerce used the same approach to calculate the surrogate value for B&H costs on exports of OCTG. Surrogate Values Mem. Ex. 9, PD 152 (Feb. 20, 2014), ECF No. 73–2.

In doing so, Commerce "assumed that the [B&H] costs would increase proportionately with the weight of the products contained in each shipment." SSV Br. 23. In its motion for judgment on the agency record, SSV argued that this assumption was "flawed and contrary to law." SSV Br. 24. The court concluded that Commerce "point[ed] to no evidence or law justifying its conclusion that document preparation costs, customs clearance and technical control costs, and ports and terminal handlings costs should increase here based on the weight of the total shipment of goods." *SeAH Steel VINA Corp.*, 40 CIT at _, 182 F. Supp. 3d at 1344. "Accordingly, the court remand[ed] for further explanation or for a recalculation." *Id.*

On remand, Commerce continued to find that B&H costs increase proportionately with weight. Remand Results 41. Commerce explained that "the record of this proceeding contains evidence that SSV's B&H costs can increase proportionately with the weight of the shipment." Remand Results 41. Specifically, Commerce pointed to SSV's contract with its freight forwarder, which Commerce found to

include B&H services. Remand Results 41. The "contract prices are shown on both a [per-container] and a [per-ton] basis." Remand Results 41; *see also* Suppl. A&C Resp. app. SC-5, CD 31–35 (Jan 9, 2014), ECF No. 60; Suppl. C&D Resp. app. SSD-5, CD 55 (Feb. 5, 2014), ECF No. 72. Commerce reasoned that, because "the stated prices are available on a [per-ton] basis, . . . the B&H charges in the contract would also be applied on a [per-ton] basis. Thus, the information provided by SSV in this investigation shows that its B&H charges could increase proportionately with the weight of the shipment." Remand Results 41–42. For this reason, Commerce "continued calculating the surrogate value for B&H by dividing the charges listed in [the Doing Business Report] by the assumed container weight of 10 MT." Remand Results 42.

B. Discussion

SSV presents three reasons why Commerce erred in finding that the B&H charges are proportional to weight. SSV Comments 27–-33.

First, SSV claims that "Commerce's allocation provides aberrational results that are inconsistent with evidence regarding the actual per-unit brokerage and handling costs incurred by Indian exporters" of OCTG. SSV Comments 28. To prove this, SSV cites "information on the actual expenses reported by Indian producers of OCTG for export brokerage and handling services, as reported in their questionnaire responses in the concurrent investigation of OCTG from India." SSV Comments 28. SSV explains that these responses indicate that the B&H figures calculated by Commerce were "7 to 13 times greater than the actual per-ton brokerage and handling costs reported by" the cited Indian producers of OCTG. SSV Comments 29–30. From this, SSV opines that "[t]he only possible conclusion is that the allocation methodology used in the [Remand Results] is not accurate or reasonable, and must be revised." SSV Comments at 30.

Second, SSV asserts that "[t]he only evidence on the record concerning the manner in which market-economy suppliers charge for [B&H] services confirms that they charge for document preparation and customs clearance on a per-shipment basis and for other charges on a per-container basis." SSV Comments 30. SSV concedes that the Doing Business Report reflects Indian B&H expenses. SSV Comments 30–31. But it alleges that the only "information on the record regarding the *manner* in which *Indian* suppliers of [B&H] services set their fees" are "price lists from a company that performed [B&H] services at numerous Indian ports." SSV Comments 30–31 (emphasis added). SSV states that "the price lists showed that for document

preparation, there was a flat price per bill of lading that did not depend on the number of containers or the weight of the cargo." SSV Comments 30–31. SSV further states that the price lists showed that "for handling, . . . there were flat prices per container that depended on the size and type of container, but not on the weight of the cargo in each container." SSV Comments 30–31. From this, SSV reasons that the B&H costs in the cited price lists would not "have increased if the container held more than 10 tons, or decreased if the container held less than 10 tons." SSV Comments 31 (citation omitted). Therefore, SSV insists that "any calculation" using Indian surrogate values that assumes a proportional relationship between cost and weight "is necessarily contrary to the evidence on the record." SSV Comments 31.

Third, SSV contends that "Commerce's reliance on the price formula in SSV's contract with an NME freight forwarder is unreasonable." SSV Comments 32. SSV argues:

> The pricing practice on which [Commerce] relies . . . is not a market-economy transaction. The entire rationale underlying the NME methodology is that the NME suppliers do not act in accordance with market principles. Under the statute, then, Commerce is simply not permitted to assume that a market-economy-provider of brokerage and handling services would set prices in the same manner as a non-market economy provider. Commerce cannot, in good faith, rely on the fee structure used by SSV's Vietnamese supplier to identify how a market-economy supplier in India would have set its fees.

SSV Comments 32–33. Stated differently, SSV insists that, "if Commerce is going to hold that the forwarder's status as an NME supplier means that its charges are unreliable, then it must consider those charges to be unreliable for all purposes—including for purposes of determining how a market-economy service provider would set its fees." SSV Comments 33. As it stands, SSV views Commerce's methodology as "fundamentally illogical and contrary to the statute." SSV Comments 33.

In response to the above arguments from SSV, Commerce simply stated: "[W]ith respect to the price lists placed on the record by SSV pertaining to certain Indian suppliers, we find no evidence on the record supports the claim that SSV or other Vietnamese exporters charge document preparation and customs clearance by amount per transaction, and other associated B&H costs charged by amount per container." Remand Results 68 (citation omitted).

Commerce must say more. SSV argued that, even if SSV's freight forwarder charged B&H costs proportional to the weight of exports and imports, Commerce still erred. SSV insisted that it was improper to impute a NME price formula to a ME supplier of B&H services. SSV also cited evidence that Indian B&H providers do not charge on the basis of weight, possibly making it inappropriate to allocate an Indian B&H surrogate value on the basis of weight. Commerce never responded to these legitimate critiques, and the court cannot manufacture an answer for Commerce. *SEC v. Chenery*, 332 U.S. 194, 196 (1947) (explaining that courts must "judge the propriety of [Commerce's] action solely by the grounds invoked by the agency."). Until Commerce explains why, despite SSV's challenges, its decision is correct, the court cannot find that Commerce's decision was consistent with the law and supported by substantial evidence. And so the court remands for Commerce to either change the way it allocates B&H costs or to provide a more robust explanation of its decision to allocate B&H costs in accordance with weight.

CONCLUSION AND ORDER

For the reasons stated above, the court remands three issues to Commerce for reconsideration. Accordingly, after carefully reviewing all briefs and the administrative record, it is hereby:

ORDERED that the Remand Results are remanded to Commerce for redetermination in accordance with this Opinion and Order; it is further

ORDERED that Commerce issue a redetermination in accordance with this Opinion and Order that is in all respects supported by substantial evidence and in accordance with law; it is further

ORDERED that Commerce either (1) provide a comprehensive explanation of its decision to discard SSV's ME purchases of J55-H as a surrogate value for J55-H or (2) recalculate the surrogate value for J55-H; it is further

ORDERED that Commerce either (1) more fully explain why the Argo Dutch data, despite its shortcomings, represent the best available information or (2) modify its decision to rely on the Argo Dutch data as a surrogate value; it is further

ORDERED that Commerce either (1) respond to SSV's challenges to its allocation of B&H costs and provide an explanation that is consistent with the law and supported by substantial evidence or (2) change its allocation of B&H costs and provide an explanation for the change that is consistent with the law and supported by substantial evidence; it is further

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination, which shall comply with all directives in this Opinion and Order; that

the Plaintiff and Defendant-Intervenors shall have thirty (30) days from the filing of the redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff's and Defendant-Intervenors' comments to file comments.

Dated: September 28, 2017
New York, New York

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

Slip Op. 17–135

MID CONTINENT STEEL & WIRE, INC. ET AL., Plaintiff and Consolidated Plaintiffs, v. UNITED STATES, Defendant, and PT ENTERPRISE INC. ET AL., Defendant-Intervenors and Consolidated Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 15–00213
PUBLIC VERSION

[Sustaining the U.S. Department of Commerce's remand determination concerning the antidumping duty investigation covering certain steel nails from Taiwan.]

Dated: October 4, 2017

Adam Henry Gordon and *Ping Gong*, The Bristol Group PLLC, of Washington, DC, for plaintiff and consolidated defendant-intervenor Mid Continent Steel & Wire, Inc.

Ned Herman Marshak and *Andrew Thomas Schutz*, Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP, of New York, NY, and Washington, DC, for consolidated plaintiffs and defendant-intervenors PT Enterprise Inc., Pro-Team Coil Nail Enterprise Inc., Unicatch Industrial Co., Ltd., WTA International Co., Ltd., Zon Mon Co., Ltd., Hor Liang Industrial Corporation, President Industrial Inc., and Liang Chyuan Industrial Co., Ltd.

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Zachary Scott Simmons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

OPINION

Kelly, Judge:

Before the court for review is the U.S. Department of Commerce's ("Commerce" or "Department") remand determination in the antidumping duty ("ADD") investigation of certain steel nails from Taiwan, filed pursuant to the court's order in *Mid Continent Steel & Wire,*

Inc. v. United States, 41 CIT __, 219 F. Supp. 3d 1326 (2017). *See* Final Results of Redetermination Pursuant to Court Remand, June 21, 2017, ECF No. 95 ("Remand Results"); *see also Mid Continent Steel & Wire, Inc. v. United States*, 41 CIT __, __, 219 F. Supp. 3d 1326, 1351 (2017) ("*Mid Continent*").

The court remanded for Commerce to explain its cost allocation methodology and calculation of the general and administrative ("G&A") expense ratio for Pro-Team Coil Nail Enterprise Inc. ("Pro-Team"), an affiliate of mandatory respondent PT Enterprise, Inc. ("PT"). *Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1351; *see generally Certain Steel Nails From Taiwan*, 80 Fed. Reg. 28,959 (Dep't Commerce May 20, 2015) (final determination of sales at less than fair value) ("*Final Results*") and accompanying Issues and Decision Mem. for the Affirm. Final Determination in the Less Than Fair Value Investigation of Certain Nails from Taiwan, A-583–854, (May 13, 2015), ECF No. 17 ("Final Decision Memo"). For the reasons that follow, the Remand Results adequately address the concerns raised in the court's prior decision and Commerce's revised determination is supported by substantial evidence. Therefore, the Remand Results are sustained.

BACKGROUND

The court assumes familiarity with the facts of this case as set out in full in the previous opinion ordering remand to Commerce, *see Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1330–32, and here summarizes the facts relevant to its review of the Remand Results.

On March 23, 2017, the court sustained in part and remanded in part Commerce's final determination in this ADD investigation.[1] *See Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1351. The court determined that "Commerce fail[ed] to state or explain how its cost allocation methodology could result in allocating certain steam-related costs to G&A expenses, when [Commerce] claims to have allocated all those costs to COGS." *Id.,* 41 CIT at __, 219 F. Supp. 3d at 1345. Given the apparent discrepancy between Commerce's description of its cost allocation methodology and its actual methodol-

[1] Of the challenged issues from the final determination, the court sustained Commerce's determinations: (1) that Pro-Team is unaffiliated with the [[ ]] tollers in question, *see Mid Continent*, 41 CIT __, __, 219 F. Supp. 3d 1326, 1332–35 (2017); (2) to use the Cohen's d test within the differential pricing analysis to determine the existence of a pattern of significant price differences, *see id.*, 41 CIT at __, 219 F. Supp. 3d at 1337–40; (3) to use a simple average to calculate the pooled standard deviation in the Cohen's d test of the differential pricing analysis, *see id.*, 41 CIT at __, 219 F. Supp. 3d at 1340–43; (4) to not offset dumped sales with non-dumped sales in calculating the respondent's antidumping duty margin using the average-to-transaction methodology, *see id.*, 41 CIT at __, 219 F. Supp. 3d at 1343–44; and (5) to disregard transfer prices paid by Pro-Team to certain affiliated tollers in its calculation of normal value. *See id.*, 41 CIT at __, 219 F. Supp. 3d at 1349–51.

ogy for calculating the G&A expense ratio in this case, the court found Commerce's calculation of selling, general, and administrative expenses to be unsupported by substantial evidence. *See id.*, 41 CIT at __, 219 F. Supp. 3d at 1344–48. The court remanded for Commerce to "explain how it allocates different costs to the respective components [of the] G&A expense ratio and explain why its determination is supported by the record evidence or reconsider its determination." *Id.*, 41 CIT at __, 219 F. Supp. 3d at 1345. Pending such clarification, the court deferred deciding whether Commerce's decision to allow income from a subsidy to offset cost of goods sold ("COGS"), *i.e.*, the denominator of the G&A expense ratio, was reasonable and supported by the record. *Id.*, 41 CIT at __, 219 F. Supp. 3d at 1348.

Commerce filed the Remand Results on June 21, 2017. On remand, Commerce clarified that it treats costs and expenses related to Pro-Team's steam line of business consistently with how they are reported in Pro-Team's books and records (*i.e.*, its audited financial statements). *See* Remand Results 8–11, 14–15. Commerce explained that it assigns costs and expenses on a company-wide, and not product-specific, basis. *Id.* at 6–7, 14–15. Therefore, a given company-wide expense is assigned to either the numerator or denominator of the G&A expense ratio based on whether it is directly related to the manufacture of products during the period of investigation or review, and not based on whether the expense is itemized as either steam-related or nail-related. *See id.* at 6–7, 14–15. Commerce explained that it determines whether an expense directly relates to manufacturing based upon how Pro-Team classifies such costs in its books and records. *See id.* at 6–7, 10–11 (citing PT Enterprise Supp. Section D Resp. at Ex. SD-21, CD 79–84, bar codes 3237002–01–06 (Oct. 21, 2014) ("PT Supp. D Resp.")),[2] 14–15. As a result, Commerce clarifies that expenses allocated to G&A in Pro-Team's financial statements were not allocated to COGS in the G&A expense ratio calculation. *See id.* at 11, 14.

On remand Commerce reconsidered its determination to offset COGS expenses with subsidy income attributable to Pro-Team's steam business. Remand Results 15. Instead, on remand Commerce treated the subsidy income relating to Pro-Team's steam business as an offset to G&A expenses (*i.e.*, the numerator of the G&A expense

[2] On October 16, 2015, Defendant submitted indices to the public and confidential administrative records, which identify the documents that comprise the records to Commerce's final determination. These indices are located on the docket at ECF No. 17. All further references to documents from the administrative records of the final determination are identified by the numbers assigned by Commerce in these indices.

ratio). *Id.* Accordingly, Commerce recalculated the G&A expense ratio to reduce the ratio's numerator, resulting in a reduction of the G&A ratio and, consequently, a reduction of PT's selling, general, and administrative expenses. *See id.* at 16. This change in methodology resulted in a revised final margin of 2.16 percent for PT. *Id.* at 23–24. Commerce explained that, "[b]ecause the all others rate was based on PT's final margin," this change in methodology resulted in a revised all others rate of 2.16 percent. *Id.* at 24.

JURISDICTION AND STANDARD OF REVIEW

The Court continues to have jurisdiction pursuant to Section 516a(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[3] and 28 U.S.C. § 1581(c) (2012), which grant the court authority to review actions contesting the final determination in an investigation of an ADD order. *See* 19 U.S.C. § 1516a(a)(2)(B)(i); 28 U.S.C. § 1581(c) (2012). "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1259 (2014) (quoting *Nakornthai Strip Mill Public Co. v. United States*, 32 CIT 1272, 1274, 587 F. Supp. 2d 1303, 1306 (2008)).

DISCUSSION

I. Expense Allocation Methodology and Calculation

The court held that Commerce's calculation of the G&A expense ratio for PT was not supported by substantial evidence because Commerce failed to explain how it allocated specific costs associated with the steam business of PT's affiliate, Pro-Team, to the respective components of the G&A expense ratio.[4] *See Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1345–48. Specifically, the court observed that "Commerce fails to state or explain how its cost allocation methodology could result in allocating certain steam-related expenses to G&A

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[4] In *Mid Continent*, the court noted that Commerce stated that "'[t]he costs associated with the steam line of business were properly included in the denominator of the G&A expense ratio calculation (*i.e.*, COGS).'" *Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1347 (quoting Final Decision Memo at 55). Yet, the court noted that Commerce did not allocate all expenses attributable to steam to the COGS denominator, but rather allocated research and development and depreciation costs to G&A expenses and allocated other expenses attributable to steam to COGS. *Id.*, 41 CIT at __, 219 F. Supp. 3d at 1347.

expenses, when it claims to have allocated all those costs to COGS." *Id.* Therefore, the court remanded Commerce's G&A expense ratio calculation for further explanation of how the Department allocates costs to the respective components of a G&A expense ratio calculation and for further explanation as to why its cost allocation is supported by the record here or to reconsider its determination. *Id.*, 41 CIT at __, 219 F. Supp. 3d at 1351. For the reasons that follow, on remand Commerce has adequately explained its expense allocation methodology and its determination on remand is supported by substantial evidence.

Commerce calculates a respondent's dumping margin by determining "the amount by which the normal value exceeds the export price . . . of the subject merchandise." 19 U.S.C. § 1677(35)(A). Normal value typically is calculated based on "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). However, when Commerce determines that the respondent does not have viable home or third-country market sales, the statute directs that Commerce may use a constructed value ("CV") to calculate a normal value for respondent.[5] *See* 19 U.S.C. §§ 1677b(a)(1)(B)–(C), (a)(4); *see also* Decision Mem. for the Prelim. Determination in the [ADD] Investigation of Certain Steel Nails from Taiwan at 13, PD 225, bar code 3247845–01 (Dec. 17, 2014) (stating that Commerce used CV as the basis for normal value because PT did not have a viable comparison market).

In calculating CV, Commerce must include selling, general, and administrative expenses. *See* 19 U.S.C. §§ 1677b(e)(3)(1)–(3). The statute does not define selling, general, and administrative expenses. However, "G&A expenses are generally understood to mean expenses which relate to the activities of the company as a whole rather than to the production process." *Torrington Co. v. United States*, 25 CIT 395, 431, 146 F. Supp. 2d 845, 885 (2001) (internal quotations omit-

[5] The statute provides that CV of imported merchandise is equal to the sum of: (1) the cost of materials of fabrication or other processing of any kind in producing the merchandise; (2) some representation of the amounts incurred and realized for selling, general, and administrative expenses and for profits in connection with the production and sale of merchandise for consumption in the foreign country; and (3) packing and other expenses incidental to placing the subject merchandise in condition packed and ready for shipment to the United States. 19 U.S.C. §§ 1677b(e)(1)–(3). If actual data are not available for selling, general, and administrative expenses, then Commerce may calculate selling, general and administrative expenses based on: (1) the actual amounts incurred and realized by the specific exporter or producer for selling, general, and administrative expenses in connection with the production and sale, for consumption in the foreign country, of merchandise of the same general category of products as the subject merchandise; (2) the weighted-average of the actual amounts actually incurred and realized by other exporters or producers subject to the investigation; or (3) based on any other reasonable method. 19 U.S.C. §§ 1677b(e)(2)(B)(i)–(iii).

ted). The court affords Commerce significant deference in developing a methodology for determining this component of CV because it is a determination "involv[ing] complex economic and accounting decisions of a technical nature." *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). However, Commerce "must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48–49 (1983).

To compute the per-unit amount of selling, general, and administrative expenses, Commerce multiplies a G&A expense ratio by the total costs of manufacture for each product assigned a control number by Commerce. *See, e.g.*, Commerce Request for Information: [ADD] Investigation, PT Enterprise Inc., Taiwan, Certain Steel Nails at D-14, PD 63, bar code 3217476–02 (July 24, 2014). According to Commerce's stated practice, the numerator for the G&A expense ratio is the respondent's expenses attributable to general operations of the company and the denominator is the respondent's company-wide COGS. Remand Results 1 n.2, 6–7. Thus, the G&A expense ratio, expressed as an equation is as follows:

$$\textit{G\&A Expense Ratio} = \frac{\textit{G\&A Expenses (company wide)}}{\textit{COGS (company wide)}}$$

See id. at 6–7.

Here, Commerce clarifies that it allocated all company-wide costs, whether attributable to production of steam or nails, to the G&A (*i.e.*, numerator) portion of the G&A expense ratio where those expenses are not directly attributable to the manufacture of products. *See* Remand Results 6–7, 11, 14. Likewise, Commerce clarifies that it classified those company-wide expenses that are directly related to the manufacture of products, whether attributable to the production of steam or nails, to COGS (*i.e.*, the denominator portion of the expense ratio). *See id.* at 7, 11, 14. Thus, the costs were not allocated based on whether those costs are attributable to subject or non-subject merchandise, *see id.* at 11, 14, as the court understood Commerce's explanation of its practice in its final determination. Citing its practice of generally relying upon the classifications of expenses as recorded on a company's audited financial statements so long as those financial statements are prepared in accordance with generally accepted accounting principles ("GAAP") in the respondent's home country, Commerce clarified that it allocates non-production costs to G&A and production costs to COGS based upon how Pro-Team

treated those expenses in its financial statements. *Id.* at 10, 14. Here, Commerce explains that it allocated expenses attributable to steam production to G&A and COGS, respectively, by looking at how PT allocated such costs in its audited financial statements. *Id.* at 11, citing PT Enterprise Section A Response: [ADD] Investigation of Certain Steel Nails from Taiwan at Ex. A-12, at Pro Team Coil Nail Enterprise Inc. Financial Statements Independent Auditors' Report Dec. 31, 2013 and 2012, at 3, bar code 3224544–04 (Aug. 28, 2014) ("PT's Section A Resp. Audited Income Statement 2013 and 2012")), 14. Specifically, Commerce allocated non-manufacturing-related expenses, like research and development and depreciation, regardless of whether those costs relate to manufacture of subject merchandise or non-subject merchandise, to G&A. *See id.* at 10–11, 14–15. Commerce allocated manufacturing-related expenses, including expenses attributable to steam production, to COGS. *See id.* at 10–11, 14–15. Furthermore, Commerce explains that including expenses attributable to steam is consistent with Commerce's practice of calculating the G&A expense ratio on a company-wide basis, and not "based on a consolidated, divisional, or product-specific basis, because the G&A expenses relate to the general operations of the producing company as a whole, are associated with the period of time, and are not related to specific products." *Id.* at 9, 14–15.

No party continues to challenge on remand Commerce's methodology used to calculate the G&A expense ratio or to assert that Commerce's methodology reflects an unreasonable and unlawful application of the statute and regulations. *See* [PT and Pro-Team] Remand Comments, July 21, 2017, ECF No. 99; Comments of Pl./Consol. Def.Intervenor Mid Continent Steel & Wire, Inc. on Final Results of Redetermination Pursuant to Court Remand 1, July 21, 2017, ECF No. 98 ("Mid Continent Comments"). Commerce has provided further explanation of its expense allocation methodology, and Commerce's Remand Results therefore comply with the court's order. *See Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1351. Accordingly, the Remand Results are sustained with respect to Commerce's allocation of costs in the calculation of Pro-Team's G&A expense ratio.

II. Allocation of Steam-Related Income Offset

The court deferred consideration of Pro-Team's challenge to Commerce's allocation of income attributable to steam production until Commerce had clarified the apparent inconsistencies in Commerce's expense allocation methodology. *See Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1348. Mid Continent claims that Commerce lacks substantial evidence to apply the subsidy income as an offset to COGS

(*i.e.*, the denominator of the G&A expense ratio) because this determination is inconsistent with Pro-Team's explanation that the purpose of the subsidy was to reduce the production costs related to steam production products. Mid Continent Comments 2 (internal quotations omitted). For the reasons that follow, Commerce's allocation of subsidy income attributable to production of steam is supported by substantial evidence.

As discussed, Commerce is required to include selling, general, and administrative expenses in its CV calculation. *See* 19 U.S.C. §§ 1677b(e)(3)(1)–(3). However, the statute does not define selling, general, and administrative expenses. "G&A expenses are generally understood to mean expenses which relate to the activities of the company as a whole rather than to the production process." *Torrington Co.*, 25 CIT at 431, 146 F. Supp. 2d at 885 (internal quotations omitted); *see also* Remand Results 6–7. Neither the statute nor Commerce's regulation further define how expenses and income offsets are to be allocated in calculating the G&A expense ratio within Commerce's CV calculation.

On remand, Commerce reconsidered its prior decision and included the subsidy income attributable to Pro-Team's separate steam line of business in G&A expenses (*i.e.*, the numerator of the G&A expense ratio) instead of assigning the subsidy as an offset to the operating expenses (*i.e.*, non-manufacturing related expenses) for steam production products to COGS (*i.e.*, the denominator of the G&A expense ratio), as it had in its final determination.[6] Remand Results 15–16. Commerce explains that it revised its treatment of the subsidy income because Pro-Team's financial statements "indicate that the subsidy did not relate to operating expenses, but, rather, to general operations." *Id.* at 16. Commerce supports its determination by citing Pro-Team's audited financial statements and the revised cost allocation worksheet submitted by Pro-Team, which Commerce explains records the subsidy as part of "non-operating other income." *Id.* at 15. Commerce explains that both of these documents record the subsidy as part of ProTeam's non-operating other income and show that Pro-Team did not apply the subsidy as an offset to COGS of steam production products nor its operating costs. *Id.* (citing PT Supp. D Resp. at Exs. SD-21, SD-24; PT's Section A Resp. Audited Income Statement

[6] The court recognizes that Commerce, on remand, reconsidered how to treat the allocation of income attributable to the energy subsidy. *See* Remand Results 15; *see generally Final Results*. The court did not remand this issue; rather, the court deferred it pending clarification by Commerce of its cost allocation methodology. *See Mid Continent*, 41 CIT at __, 219 F. Supp. 3d at 1348. Although the issue was not remanded for reconsideration, the court will nevertheless review Commerce's redetermination on this issue. All parties had the opportunity to comment and did not object to Commerce proceeding in this manner. *See* Remand Results 16–23.

2013 and 2012). Commerce further explains its determination by referencing its normal practice of relying on the books and records of the exporter or producer, "if such records are kept in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the merchandise." *Id.* at 22.

Mid Continent Steel & Wire, Inc. ("Mid Continent") claims that the record does not support Commerce's decision to reallocate steam-related subsidy income to offset G&A expenses (*i.e.*, the numerator of the G&A expense ratio) because nothing on the record supports a change from Commerce's initial determination to offset COGS (*i.e.*, the denominator of the G&A expense ratio) by income attributable to the steam-related subsidy. Mid Continent Comments 2–3. However, Commerce's determination to reallocate the income attributable to the steam subsidy is based on Pro-Team's audited financial statements and revised financial documents. *See* Remand Results 15–16 (citing PT Supp. D Resp. at Exs. SD-21, SD-24; PT's Section A Resp. Audited Income Statement 2013 and 2012). Commerce references Pro-Team's treatment of the income attributable to the subsidy as part of "non-operating other income" in both its audited financial statements and the revised cost allocation worksheet, and Commerce notes that Pro-Team did not treat this income as an offset to COGS of steam production products or to the company's operating costs. *Id.* at 15, 23. Mid Continent concedes that Pro-Team's books and records did not indicate that the subsidy was applied as an offset to COGS. *See* Mid Continent Comments 3.

Mid Continent further argues that Commerce should treat the subsidy consistent with Pro-Team's explanation that the subsidy's purpose was to reduce the production costs related to steam production products, and consistent with Commerce's treatment in the final determination. Mid Continent Comments 3. Commerce notes that its initial determination to allocate this income as an offset to COGS was based upon Pro-Team's explanation "that the purpose of the subsidy was to reduce the production costs related to steam production products." Remand Results 15. Commerce indicates that the underlying support for Pro-Team's explanation was cost allocation worksheets created for the purposes of the investigation. *Id.*; *see* PT Supp. D Resp. at 11–12, Exs. SD-21, SD-24. Commerce explains that, although these cost allocation worksheets do "identif[y] certain costs and expenses related to steam production products separately, the company's audited financial statements . . . ma[k]e no such distinction." Remand Results 19. In fact, they are "reported in [Pro-Team's]

financial statements as period costs along with all other G&A expenses, indicating that they are general in nature and not product-specific." *Id.* at 22. Commerce's practice is to rely upon the books and records of an exporter if such records are in accordance with GAAP and reasonably reflect the costs of production, pursuant to the directive of 19 U.S.C. § 1677b(f)(1)(A) for constructing value.[7] *See id.*; 19 U.S.C. § 1677b(f)(1)(A). Mid Continent offers no evidence that Pro-Team's financial statements were inconsistent with Taiwanese GAAP or do not accurately reflect costs. Commerce is entitled to significant deference in determinations "involv[ing] complex economic and accounting decisions of a technical nature." *Fujitsu*, 88 F.3d at 1039. Mid Continent merely urges a different result, but the court declines to disturb Commerce's weighing of the evidence on a determination that is uniquely within the Department's expertise. Commerce's treatment of the subsidy income in its Remand Results is supported by substantial evidence.

CONCLUSION

Therefore, for the reasons discussed, the court sustains the Remand Results. Judgment will enter accordingly.

Dated: October 4, 2017
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

Slip Op. 17–136

UNITED STATES, Plaintiff, v. INTERNATIONAL FIDELITY INSURANCE COMPANY, Defendant.

Before: Leo M. Gordon, Judge
Court No. 13–00256

[Defendant's motion for summary judgment denied; Plaintiff's cross-motion for summary judgment granted, except with respect to its claim for equitable pre-judgment interest, which is denied.]

Dated: October 5, 2017

Monica P. Triana, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of New York, NY, for Plaintiff United States. With her on

[7] The Remand Results provide ample support that such methodology has been consistently applied in prior determinations. *See* Remand Results 7 n.27. Furthermore, this court recognized Commerce's practice of calculating the G&A expense ratio by using a company's audited financial statements in *Ass'n of Am. Sch. Paper Suppliers v. United States*, 33 CIT 1742, 1745–47,1751–52 (2009) (discussing the methodology to decide whether it was proper to depart from its use).

the brief were *Chad A. Readler*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Chi S. Choy*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

Ralph H. Sheppard, Taylor Pillsbury, and *Michael B. Jackson*, Meeks, Sheppard, Leo & Pillsbury of Fairfield, CT, for Defendant International Fidelity Insurance Company.

OPINION

Gordon, Judge:

This is a collection action by Plaintiff United States ("Plaintiff" or "Government") against Defendant International Fidelity Insurance Company ("Defendant" or "Fidelity") as surety for unpaid antidumping duties,[1] plus statutory pre-judgment interest under 19 U.S.C. § 580, equitable pre-judgment interest, and post-judgment interest. Before the court are the parties' USCIT Rule 56 cross-motions for summary judgment. *See* Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. and Supp. Pl.'s Cross-Mot. Summ. J., ECF No. 32 ("Pl.'s Br."); Def.'s Mem. Supp. Mot. Summ. J., ECF No. 24–1 ("Def.'s Br."); Pl.'s Reply to Def.'s Resp. and Supp. Pl.'s Cross-Mot. Summ. J., ECF No. 53 ("Pl.'s Reply"); Def.'s Reply Mem. and Opp'n Pl.'s Cross-Mot. Summ. J., ECF No. 46 ("Def.'s Reply").

Defendant contends that (1) the Government's claims are time-barred; (2) the bond on which those claims are based, Customs Bond No. 017447—a single transaction bond in the amount of $231,000 ("subject bond")—is invalid and unenforceable; and (3) even if the subject bond is valid, the Government is not entitled to statutory or equitable prejudgment interest or post-judgment interest.[2] Conversely, Plaintiff maintains that (1) its claims are timely; (2) the subject bond is valid and enforceable; and (3) the Government is entitled to statutory and equitable pre-judgment interest and post-judgment interest. The court has jurisdiction pursuant to 28 U.S.C. § 1582(2) (2012). For the reasons that follow, the court denies Defendant's motion for summary judgment and grants Plaintiff's cross-motion, except with respect to Plaintiff's claim for equitable pre-judgment interest, which is denied.

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[1] The amount of unpaid antidumping duties is $288,860.69; however, Plaintiff is seeking only $231,000, the face amount of the bond.

[2] There is no dispute that the copies of the bond filed with the court as Exhibit 2 to the Defendant's Brief and as Exhibit A to the Diffley Declaration submitted by Plaintiff represent the subject bond that was filed with and approved by Customs. *See* Def.'s Br., Ex. 2; *see also* Diffley Decl. ¶ 4 & Ex. A, ECF Nos. 32–2, 36–4.

I. Standard of Review

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000). Because the dispositive issues are solely legal and the material facts are uncontroverted, summary judgment is appropriate. *See* 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus & Adam N. Steinman, *Federal Practice & Procedure* § 2725 (4th ed. 2017); *see also Dal–Tile Corp. v. United States*, 24 CIT 939, 944, 116 F. Supp. 2d 1309, 1314 (2000) (citing *Marathon Oil Co. v. United States*, 24 CIT 211, 214, 93 F. Supp. 2d 1277, 1279–80 (2000)).

II. Background

On May 1, 2002, U.S. China Leader Express Co. ("China Leader"), a U.S. importer, imported fresh garlic from the People's Republic of China ("PRC") at the Port of New York/Newark under entry number 267–4221127–4 ("subject entry"). *See* Diffley Decl., ECF No. 32–2 (public version) & 36–4 (confidential exhibits). The underlying merchandise was exported by Huaiyang Hongda Dehydrated Vegetable Company ("Hongda"), a producer and exporter of garlic from the PRC, *see* Diffley Decl., Ex. A, ECF No. 36–4 (entry paperwork), and subject to a PRC-wide antidumping duty margin of 376.67%, *see Fresh Garlic from the PRC*, 59 Fed. Reg. 59,209 (Dep't of Commerce Nov. 16, 1994) (antidumping duty order). At the time of entry, China Leader submitted the subject bond as security for the estimated antidumping duties, in lieu of a cash deposit. *See* Def.'s Br., Ex. 2, ECF No. 24–2.

The subject bond identified China Leader as the principal on that bond, Fidelity as the surety, and Mid-America Overseas, Inc. ("Mid-America") as the customs broker. *See* Def.'s Br., Ex. 2. International Bond & Marine Brokerage, Ltd. ("IB&M") was Fidelity's third-party agent at the time of the execution of the subject bond. *See* Def.'s Statement of Material Facts as to which There is No Genuine Issue to be Tried ¶ 2, ECF No. 24–4 ("Def.'s Statement").

In December 2002, the U.S. Department of Commerce ("Commerce") initiated a periodic administrative review under 19 U.S.C. § 1675 covering Hongda's shipments of garlic for the period May 1, 2002 through October 31, 2002 ("POR"). *Initiation of Antidumping and Countervailing Duty Admin. Revs.*, 67 Fed. Reg. 78,772 (Dep't of

Commerce Dec. 26, 2002). In August 2003, Commerce rescinded the administrative review with respect to Hongda, thereby subjecting Hongda's garlic shipments to the PRC-wide antidumping duty rate. *See Fresh Garlic from the PRC*, 68 Fed. Reg. 46,580 (Dep't of Commerce Aug. 6, 2003) (notice of rescission).

In September 2003, Hongda challenged Commerce's rescission decision and the application of the PRC-wide antidumping duty rate to its garlic shipments by commencing an action in this Court. *See Huaiyang Hongda Dehydrated Vegetable Co. v. United States*, 28 CIT 1944 (2004) ("*Huaiyang Hongda*"). In the course of that action, Hongda obtained a statutory injunction enjoining liquidation of subject merchandise exported by Hongda and entered during the POR, including the subject entry. *See id.*, ECF No. 18 (order enjoining liquidation of entries). Subsequently, Commerce notified U.S. Customs and Border Protection ("Customs") of the injunction, instructing Customs not to liquidate entries of the subject merchandise exported by Hongda during the POR. *See* Pl.'s Br., Ex. E (Commerce Message No. 3316202 to Customs (Nov. 12, 2003)).

In November 2004, at the conclusion of the litigation, the court sustained Commerce's rescission decision. *See Huaiyang Hongda*. Subsequently, a copy of the court's decision was published in the *Customs Bulletin and Decisions* ("*Customs Bulletin*"). Def.'s Statement ¶ 11 (citing 38 Cust. B. & Dec. 50 (Dec. 8, 2004)). Thereafter, on January 21, 2005, the 60-day period for appeal expired, with no party filing an appeal.

Two years later, on January 24, 2007, Commerce sent an electronic message to Customs notifying Customs of the dissolution of the injunction in *Huaiyang Hongda* and directing Customs to liquidate the entries whose liquidation was previously suspended. *See* Pl.'s Br., Ex. F (Commerce Message No. 7024202 to Customs (Jan. 24, 2007)) ("Liquidation Instructions"). On September 21, 2007, approximately nine months after Commerce issued its Liquidation Instructions, Customs liquidated the subject entry at the PRC-wide antidumping duty rate of 376.67%. Def.'s Statement ¶ 13.

Thereafter, Customs sought to collect the outstanding antidumping duties from China Leader but was unsuccessful. *See* Compl. ¶ 14; Def.'s Br., Ex. 6 (Customs letter to Fidelity dated Apr. 21, 2008 regarding delinquent Bill Number 44899663). Customs then demanded payment from Fidelity by letters dated April 21, 2008, and May 1, 2013. *See* Def.'s Br., Ex. 6; Pl.'s Br., Ex. G, ECF No. 36–2.

On July 25, 2008 and December 30, 2010, Fidelity filed protests regarding each of Customs' demand letters, denying liability on the

subject bond. *See* Pl.'s Br., Ex. H, ECF No. 36–3. On September 18, 2009, Customs denied Fidelity's 2008 protest in part, explaining that liquidation had occurred by operation of law at the rate declared by the importer at the time of entry up to $231,000, the face value of the subject bond. *See* Def.'s Br., Ex. 1, ECF No. 24–4. According to Fidelity, Customs had not issued a decision as to the 2010 protest as of the time it filed its summary judgment motion. *See* Def.'s Statement ¶ 20.

Subsequently, on July 23, 2013, the Government commenced this action seeking the unpaid antidumping duties, capped by the face amount of the subject bond, plus pre-and post-judgment interest. *See* Compl., ECF No. 2.

III. Discussion

A. Statute of Limitations

Under 28 U.S.C. § 2415(a), the Government may bring a collection action on a bond contract within six years of the date on which the Government's right of action accrues. In a collection action on a customs bond, "[t]he Government's right of action accrues from the date of liquidation." *United States v. Great Am. Ins. Co.*, 35 CIT ___, ___, 791 F. Supp. 2d 1337, 1350 (2011).

Where, as here, liquidation of an entry was suspended by court order, Customs "shall liquidate the entry . . . within 6 months after receiving notice of the removal [of the suspension] from [Commerce], other agency, or a court with jurisdiction over the entry." 19 U.S.C. § 1504(d). If Customs fails to liquidate the entries within six months of receiving notice of the removal of the suspension of liquidation, liquidation is deemed to have occurred by operation of law. 19 U.S.C. § 1504(d); *see also Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002) ("[I]n order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice.").

When liquidation occurs by operation of law, the six-year statute of limitations commences on the date of the deemed liquidation. *See United States v. Am. Home Assurance Co.*, 40 CIT ___, ___, 151 F. Supp. 3d 1328, 1343 (2016) (holding that Government's cause of action on certain bonds was time-barred because it "failed to bring its collection actions within six years of the dates the [bonded] entries were deemed liquidated") ("*Am. Home Assurance I*"). "Because section 1504 provides that an entry will be deemed liquidated by operation of law if Customs does not liquidate the entry within six months of receiving notice from Commerce that the suspension has been re-

moved, it is critical to determine [1] what constitutes the act that effects the removal of suspension and [2] what constitutes notice of the removal to Customs." *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1271 (Fed. Cir. 2002).

In cases where liquidation is suspended by a court-ordered statutory injunction, the removal of the suspension occurs when the court renders its "final" decision in the matter, and the time to appeal that decision has expired. *See Fujitsu Gen.*, 283 F.3d at 1378–79. The "notice" required under § 1504(d) must provide a sufficiently "unambiguous and public starting point for the six-month liquidation period . . . ." *Id.* at 1381; *see also Int'l. Trading Co.*, 281 F.3d at 1275. "[S]pecific liquidation instructions from Commerce via email or mailed notice, and publishing notice of a decision in the Federal Register are adequate forms of 'notice' under Section 1504(d)." *Travelers Indem. Co. v. United States*, 32 CIT 1057, 1061, 580 F. Supp. 2d 1330, 1334 (2008) (citations omitted). "These methods of notice are acceptable, but they are not exclusive." *Id.*

Here, the six-year statute of limitations on the Government's collection action commenced on the date the subject entry was deemed liquidated by operation of law. *See Am. Home Assurance I*, 40 CIT at ___, 151 F. Supp. 3d at 1343. To determine when the deemed liquidation occurred it is necessary to determine when the removal of suspension occurred and when Customs received notice of the removal. *See Int'l Trading Co.*, 281 F.3d at 1275–76.

It is undisputed that *Huaiyang Hongda* removed the suspension of liquidation when it became final on January 21, 2005. *See* Def.'s Br. 19; Pl.'s Br. 18. The parties disagree, however, on when Customs received notice of the removal. Fidelity argues that Customs received notice on January 21, 2005, i.e., "the date of notice of removal of suspension of liquidation was when there was a 'final court decision' with respect to [Hongda]." Def.'s Br. 18. Fidelity does not point to any evidence that demonstrates that Customs received notice of the removal of suspension on January 21, 2005. Rather, Fidelity maintains that, as a matter of law, Customs received § 1504(d) notice on the date *Huaiyang Hongda* became final.

Fidelity relies on *Fujitsu General*, but that reliance is misplaced. There, the U.S. Court of Appeals for the Federal Circuit held that the date on which Customs could be said to have received notice of the removal of suspension was the date on which Commerce published notice of the removal in the *Federal Register*, not the date on which the underlying decision dissolving the injunction against liquidation became final. *See Fujitsu Gen.*, 283 F.3d at 1382. Accordingly, Fidelity's argument fails.

Alternatively, Fidelity argues that Customs received notice when Customs published *Huaiyang Hongda* in the *Customs Bulletin* because "[t]he Customs Bulletin is made publicly available by Customs." Def.'s Br. 20 (citing 38 Cust. B. & Dec. 50). This argument, too, is without merit. In *Fujitsu General*, the Federal Circuit rejected the argument that Customs received notice of the final decision because it "was available in a variety of commercially available print and electronic media." *Fujitsu Gen.*, 283 F.3d at 1380. The court noted that 19 U.S.C. §1504(d) requires that the notice of removal come from Commerce, another agency, or a court with jurisdiction over the entry, and that "[g]eneral print or electronic media publications does not satisfy that requirement." *Id.* Subsequently, this Court observed that "[t]he [Customs] Bulletin is not an unambiguous and public form of notice, particularly because the Customs employees who are charged with liquidation are not: (1) responsible to read the Bulletin, (2) do not receive the Bulletin on a regular basis, and (3) receive notice only through [a particular] message board where the Bulletin is never posted." *Travelers Indem.*, 32 CIT at 1063, 580 F. Supp. 2d at 1336. Here, Fidelity has not provided a basis to distinguish its case from *Travelers Indemnity*. Therefore, Fidelity's argument fails.

The Government argues that the only date Customs could have received sufficiently "unambiguous and public" notice for purposes of § 1504(d) was January 24, 2007, the date on which Commerce sent the Liquidation Instructions to Customs. *See* Pl.'s Br. 22. The court agrees. Commerce sent the Liquidation Instructions to Customs via electronic message, unambiguously notifying Customs of the dissolution of the injunction in *Huaiyang Hongda. See* Pl.'s Br., Ex. F (Commerce Message No. 7024202 to Customs (Jan. 24, 2007)) (referencing "Liquidation Instructions for Fresh Garlic – China Exp'd by [Hongda] (A-570–831–002) Ct. No. 03–00636 Dissolved"). The Liquidation Instructions were marked "public" and stated that there were no restrictions on the release of the information contained in the instructions. *Id.* ¶ 7. Commerce informed Customs that *Huaiyang Hongda* was issued on November 22, 2004, and the injunction suspending the liquidation of certain entries of garlic dissolved as of January 21, 2005, when that decision had become final as the time to file an appeal with the Federal Circuit had expired. *Id.* ¶ 1. As a result, Commerce instructed Customs to "ASSESS ANTIDUMPING DUTIES ON THE MERCHANDISE ENTERED, OR WITHDRAWN FROM WAREHOUSE FOR CONSUMPTION DURING THE PERIOD 05/01/2002 THROUGH 10/31/2002 AT THE CASH DEPOSIT OR BONDING RATE REQUIRED AT THE TIME OF ENTRY." *Id.* ¶ 2. The message further stated: "THESE INSTRUCTIONS CONSTI-

TUTE NOTICE OF THE LIFTING OF SUSPENSION OF LIQUIDATION OF ENTRIES OF SUBJECT MERCHANDISE DURING THE PERIOD 05/01/2002 THROUGH 10/31/2002." *Id.* ¶ 3. Accordingly, the only date on which Customs can be said to have received § 1504(d) notice of the removal of the suspension of liquidation was January 24, 2007, the date Customs received the Liquidation Instructions. *See Travelers Indem.*, 32 CIT at 1061, 580 F. Supp. 2d at 1334 ("The Federal Circuit has held that specific liquidation instructions from Commerce via email or mailed notice, and publishing notice of a decision in the Federal Register are adequate forms of 'notice' under Section 1504(d)." (citations omitted)). The court now turns its attention to whether the Government commenced this action on a timely basis.

Here, Customs received the Liquidation Instructions on January 24, 2007 and liquidated the subject entry on September 21, 2007, approximately nine months after Commerce received those instructions. Because Customs failed to liquidate the subject entry within the statutory six-month period under § 1504(d), the subject entry was deemed liquidated on July 24, 2007. Therefore, the Government had six years from July 24, 2007 to bring a collection action. While the Government commenced this action on July 23, 2013, although one day prior to the expiration of the six-year statute of limitations, it nevertheless did so within the period. Therefore, this action is timely.

B. Validity of the Bond

A customs bond is a contract entered into by (1) a principal, usually an importer or a customs broker, (2) a surety, who agrees to guarantee payment of any liability arising from principal's failure to comply with its obligations, and (3) Customs. *See* Sarah M. Nappi, *Customs Bonds and Liquidated Damages, in U.S. Customs: A Practitioner's Guide to Principles, Processes, and Procedures* 201 (J. Brew et al. eds., 2016). A customs bond is designed to protect the import revenue of the United States and to ensure compliance with the laws enforced by Customs. *Id.*; *see also* 19 C.F.R. § 113 (2002); Def.'s Br., Ex. 2 (subject bond) ("In order to secure payment of any duty, tax, or charge and compliance with law or regulation as a result of activity covered by any condition referenced below, we, the below named principal(s) and surety(ies), bind ourselves to the United States in the amount or amounts, as set forth below.").

Generally, an importer, or a customs broker on behalf of an importer, prepares and files a bond with Customs, along with other required entry paperwork, in order to secure release of the imported

merchandise. *See* 19 C.F.R. § 142.3. An importer must use "reasonable care" in preparing and filing the documentation and information required in an entry transaction. *See* 19 U.S.C. § 1484(a)(1) (requiring importers of record and their agents to use "reasonable care" in making an entry). Additionally, the customs laws provide that "[t]he documentation or information required under [§ 1484(a)(1)] with respect to any imported merchandise shall be filed or transmitted in such manner and within such time periods as the Secretary shall by regulation prescribe." 19 U.S.C. § 1484(a)(2)(A).

Reasonable care imposes an affirmative obligation on importers and their agents to confirm that the information transmitted to Customs is complete and accurate. *See United States v. Golden Ship Trading Co.*, 25 CIT 40, 48 (2001) (holding that customs broker's failure to attempt to verify entry document information showed that she did not act with reasonable care); *United States v. Rockwell Automation Inc.*, 30 CIT 1552, 1555, 462 F. Supp. 2d 1243, 1247–48 (2006) ("To encourage the accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws, the [Tariff Act of 1930] imposes a duty on importers to present true and correct information at entry." (internal quotation marks and citations omitted)).

For entry transactions where a customs bond is required, Customs' regulations prescribe the form and the content of the bond. *See* 19 C.F.R. §§ 113.11, -.21, -.62. For example, the party making the entry must submit the bond using Customs Form 301. *Id.* § 113.11. The bond must state the names and addresses of the principal and the sureties, any trade names and unincorporated divisions of a corporate principal that are authorized to use the bond in their own name, the amount of the bond, and the date of execution. *See id.* § 113.21(a)(1), (2), (b) & (c).

These regulations also prescribe the requirements necessary to make changes to a bond. *See* 19 C.F.R. § 113.23. The regulations distinguish between changes that go to the substance of the bond and those that do not. "Modifications or interlineations" are changes that "go to the substance of the bond, or are basic revisions of the bond," 19 C.F.R. § 113.23(a)(1), while "alterations or erasures consist of minor changes, such as the correction of typographical errors, or change of address," *i.e.*, changes that "do not go to the substance, or result in basic revision of the bond." 19 C.F.R. § 113.23(a)(2). Parties to a bond may be required to indicate their consent to a change or issue a new bond, depending on whether the change to the bond is substantive or

non-substantive and whether it is made (1) before the bond is signed, (2) after it is signed, but before it is approved by Customs, or (3) after it is approved by Customs.[3]

Before a bond is signed, the parties may make either substantive or non-substantive changes to the bond, *i.e.*, erasures, alterations, modifications, or interlineations. However, regardless of whether a substantive or non-substantive change is made, "a statement by an agent of the surety company or by the personal sureties to that effect must be placed upon the bond." 19 C.F.R. § 113.23(b).

After signature but before Customs' approval, substantive changes to the bond are prohibited, i.e., no modifications or interlineations shall be made on the bond, except in certain circumstances that are not applicable here. 19 C.F.R. § 113.23(c). If a non-substantive change is made, i.e., an erasure or alteration, "the consent of all the parties shall be written on the bond." *Id.* However, if a substantive change is desired, "a new bond will be executed." *Id.*

Once a bond is approved by Customs, no changes, whether substantive or non-substantive, may be made to the bond, except in cases where a change is expressly authorized by regulation or by the Commissioner of Customs: "[T]he port director shall not permit a change as defined in [19 C.F.R. § 113.23(a)] . . . after the bond has been approved by Customs. When changes are desired, a new bond is required, which, when approved, shall supersede the existing bond." 19 C.F.R. § 113.23(d).

Principles of suretyship law as explained in the Restatement (Third) of Suretyship and Guaranty (1996) ("Restatement") guide the court in determining parties' obligations under customs bonds. *See Hartford Fire Ins. Co.*, 36 CIT at ___, 857 F. Supp. 2d at 1361 n.4 (citing *United States v. Great Am. Ins. Co. of N.Y.*, 35 CIT ___, 791 F. Supp. 2d 1337, 1359–60 (2011)); *see also Wash. Int'l Ins. Co. v. United States*, 25 CIT 207, 224, 138 F. Supp. 2d 1314, 1330 (2001). Regarding changes to a bond, the Restatement provides that the modification of an underlying obligation may discharge the surety from any unperformed duties if the change "imposes risks on the [surety] fundamentally different from those imposed pursuant to the transaction prior to modification . . . ." Restatement § 41(b)(i). The Restatement also provides that it is no defense to a surety's obligation where the form

[3] The customs bond must be filed with and approved by the director of the port where the subject merchandise is to enter prior to entry of the merchandise. *See* 19 C.F.R. § 113.11. "The port director will determine whether the bond is in proper form and provides adequate security for the transaction(s)." *Id.* "Customs' approval [of the bond] functions as an acceptance necessary to formation of the [bond] contract . . . ." *Hartford Fire Ins. Co. v.* United States, 36 CIT ___, ___, 857 F. Supp. 2d 1356, 1362 (2012). "Without Customs' approval of the bond, merchandise does not enter the United States, no duty is assessed, and no obligation exists for the surety to assume upon default." *Id.*

of the bond fails to comply with legally mandated formalities. *Id.* § 72 ("When the law requiring a legally mandated bond also requires either that . . . the secondary obligation be in a particular form; or . . . a particular procedure be followed in connection with the furnishing of the bond the fact that such requirements were not fulfilled is not a defense to the secondary obligation."). If the parties to a bond fail to comply with legally mandated formalities, the obligee (here, Customs) "is free to reject the bond. If, however, the obligee accepts the bond, the [surety] cannot avail itself of the defects in form or procedure as a defense." *Id.* § 72 cmt. a.

China Leader's customs broker, Mid-America, transmitted information regarding the subject bond to Fidelity's agent, IB&M, after bond signature. *See* Def.'s Statement ¶ 2. Fidelity argues that sometime after IB&M received the information, handwritten changes were made to that bond.[4] *Id.* ¶ 4. From the face of the subject bond, it is clear that a change was made to the entry number. Specifically, the typewritten number 267–4230877–3 was crossed out, and next to it on the same line, the number 267–4221127–4 was written in by hand. In addition to the crossed-out entry number, Fidelity identifies two other hand-written insertions to the bond form that it alleges were not transmitted to IB&M previously, namely "a port code of '4601' was inserted into the box marked '[t]ransaction district & port code,' indicating the Port of New York/Newark . . . and [the] box . . . for 'CVD/AD' was checked." *Id.* ¶ 4. Fidelity's main argument is that these changes invalidated the subject bond and rendered Fidelity's obligations under that bond unenforceable. *See* Def.'s Br. 12. Fidelity also argues that under the applicable regulations Customs had a duty to reject the subject bond. *See* Def.'s Reply 6.

To the extent that Fidelity contends that the handwritten changes were made by Customs and occurred after Customs accepted and approved the submission of the subject bond, Fidelity offers no evidence in support of that claim. *See* Def.'s Reply 6–7. Fidelity attempts to flip the burden of producing evidence on its head in challenging the Diffley Declaration as failing to "prove that the modifications were not made after the approval of the bond by Customs." *Id.* at 7. By arguing that Customs was responsible for allegedly improper handwritten changes to the subject bond after it was accepted by Customs in

[4] Fidelity asserts that it is "unknown" who made the changes. Def.'s Br. 7. The Government responds that the subject bond and other accompanying entry documentation attached to the Diffley Declaration constitute the entry paperwork as submitted by Mid-America on behalf of China Leader on or about May 2002. *See* Pl.'s Br. 12. In any event, Fidelity's position appears to be that irrespective of who made the changes, or when they were made, Fidelity's obligations under the subject bond were rendered unenforceable by those changes. Def.'s Br. 14–15.

violation of 19 C.F.R. § 113.23(d), Fidelity must overcome the presumption that "public officers perform their duties correctly, fairly, in good faith, and in accordance with law and governing regulations." *Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982). "This presumption stands unless there is irrefragable proof to the contrary." *Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 795 (Fed. Cir. 1993) (internal quotation marks omitted). As Fidelity has provided no evidence demonstrating (or even suggesting) that Customs made the changes at issue, the argument that the subject bond was improperly changed after approval by Customs under § 113.23(d) must fail.

As the importer of record, China Leader had an obligation to use reasonable care both in preparing and submitting the subject bond and complying with the applicable regulations, including the requirements of 19 C.F.R. § 113.23. *See* 19 U.S.C. § 1484(a). It appears this was not done. Whether the failure to comply with § 113.23 was due to a failure to communicate between IB&M and Mid-America, or between Fidelity and IB&M, or some other reason, is unclear. What is clear, however, is that Fidelity did not provide a surety statement pursuant to § 113.23(b) regarding any changes, nor did the parties indicate their consent to the desired changes, pursuant to § 113.23(c), or issue a new bond reflecting desired changes. *See* 19 C.F.R. § 113.23(c), (d).

Rather than take responsibility for its part in these failures, Fidelity contends that "the 'plain and unambiguous' meaning of [the terms of] 19 C.F.R. § 113.23 subsection (b) and (c) require[d] Customs to reject as invalid bonds that fail to comply with [§ 113.23]." Def.'s Reply 5 (citing *Dodd v. United States*, 545 U.S. 353, 359 (2005) and *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)). The court does not agree. Neither the terms of § 113.23(b) nor (c) contain any language requiring Customs to reject a bond for non-compliance with those provisions.[5] To the contrary, the regulations expressly leave it to Customs to determine "whether the bond is in proper form and provides adequate security for the transaction(s)." 19 C.F.R. § 113.11. Here, Customs approved the bond, despite the lack of compliance with § 113.23's requirements. Consequently, Fidelity cannot now "avail itself of the defect[] in form . . as a defense" to enforcement of its obligation under the bond.[6] *See* Restatement § 72 & cmt. a (the

[5] The *Dodd* and *Lamie* cases do not address the meaning of § 113.23(b) or (c); rather, Fidelity appears to have cited these cases for the proposition that where a statute's meaning is plain, the court's role is to enforce its terms.

[6] Fidelity's other arguments are not persuasive. Fidelity presents (1) a question with answer key from the April 2014 Customs Broker License exam and (2) HQ 209973, dated February 14, 1979, in support of its argument that Customs should have rejected the Subject Bond. Def.'s Br., Exs. 10, 11 & 13. Neither is a statement of policy or authority that

obligee "is free to reject the bond. If, however, the obligee accepts the bond, the [surety] cannot avail itself of the defects in form or procedure as a defense.").

The Government argues that it is entitled to judgment as a matter of law because the bond, "on its face, is a valid and enforceable contract entered into by [Fidelity] and China Leader for the benefit of the Government in the amount of $231,000." Pl.'s Br. 9. The court agrees. As discussed above, the plain language of the regulations does not require that Customs reject a bond for non-compliance with § 113.23. Rather, the burden is on the parties submitting the bond for Customs' approval to exercise reasonable care in submitting the required entry paperwork, including a bond. The subject bond and entry documents submitted with the entry support the conclusion that the subject bond was intended to secure the entry. *See* Diffley Decl. ¶ 7 & Ex. A (providing documents from Customs' file for Entry No. 267–4221127–4 including "(1) Entry Summary, Customs Form 7501, (2) Customs Bond No. 0174477, (3) Entry/Immediate Delivery, Customs Form 3461, (4) Hongda Commercial Invoice no. HD02/LE19, (5) Hongda Packing List, (6) Phystosanitary Certificate, and (7) Bill of Lading No. TA0NYC2037023B"). In particular, it is evident from these documents that the entry was subject to antidumping duties and was entered through the port of New York/Newark by importer China Leader on or about May 1, 2002, after the posting of the subject bond. Additionally, based on searching its records for entry number 267–4230877–3–the crossed-out number on the subject bond–Customs determined that "Entry No. 267–4230877–3 does not correspond to *any* entry brought into the United States by *any* importer." Pl.'s Br. 16 (citing Diffley Decl. ¶ 7 & Ex. B). Here, it is clear from the totality of the circumstances that any defect in the form of the subject bond did not prevent Customs from identifying the entry intended to be covered. Because there is no genuine issue of material fact in dispute as to the validity of the subject bond, the court determines that the Government is entitled to summary judgment.

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compels a different result. The Customs Broker License exam is just that – a licensing exam, and HQ 209973 is Customs' response to a letter submitted to the District Director in Philadelphia regarding a "General Bond for Smelting and Refining Warehouses." *See* Def.'s Br., Ex. 10. HQ 209973 is an example of an instance where Customs returned a bond for correction or re-execution due to missing information (specifically, the surety's principal place of business and a corporate seal were missing) and certain interlineations. The interlineations were not accompanied by the statements or consent required by the version of § 113.23(b) and (c) in force at that time. *Id.* It is worth noting that HQ 209973 pre-dates the 1993 changes placing the duty of reasonable care on the importer. Furthermore, HQ 209973 does not indicate any intention to establish a per se rule removing the flexibility provided in the current regulations for Customs determine whether to approve a bond's form on a case by case basis. *Id.*

C. Calculation of Interest

(1) Section 580 Pre-Judgment Interest

The Government requests an award of statutory pre-judgment interest under 19 U.S.C. § 580. Section 580 provides that, in suits brought by the Government on a bond for the recovery of duties, "interest shall be allowed, at a rate of 6 per centum a year, from the time when said bond[] became due." 19 U.S.C. § 580. Fidelity disputes the Government's entitlement to § 580 interest arguing, among other things, that the statute applies to only regular duties and not antidumping duties.

The U.S. Court of Appeals for the Federal Circuit resolved the issue of whether the Government may recover § 580 interest on dumping duties in *United States v. Am. Home Assurance Co.*, 789 F.3d 1313, 1324–28 (2015) ("*Am. Home Assurance II*"). There, the court held, "as a matter of law, that 19 U.S.C. § 580 provides for interest on bonds securing both traditional customs duties and antidumping duties." *Id.* at 1324. Since Defendant has not distinguished this action from *American Home Assurance II*, the court holds that Fidelity is liable for statutory pre-judgment interest on the unpaid antidumping duties secured by the subject bond. In accordance with § 580, that interest will run at a rate of 6 percent per annum from the date the subject bond became due, which is the date of the Government's first formal demand for payment, *see* 19 C.F.R § 113.62(a)(1)(ii), to the date of payment.

(2) Equitable Pre-Judgment Interest

The Government also seeks an award of equitable pre-judgment interest on the unpaid duties. Generally, pre-judgment interest "compensate[s] for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987); *see United States v. Goodman*, 6 CIT 132, 140, 572 F. Supp. 1284, 1289 (1983) (Pre-judgment interest "is awarded to make the wronged party whole."). An award of pre-judgment interest is not limited by the face amount of the subject bond. *See United States v. U.S. Fid. & Guar. Co.*, 236 U.S. 512, 530–31 (1915).

Here, there is a statute, 19 U.S.C. § 580, providing for pre-judgment interest in a Government enforcement action on a bond. *Am. Home Assurance II*, 789 F.3d at 1324–28. That would appear to resolve the matter because equity operates in the absence of a statute governing an award of pre-judgment interest, thereby resulting in the denial of

the Government's request for equitable relief. However, the Federal Circuit has suggested that an award under § 580 may "alter[] the landscape" in this type of action. *Id.* at 1330. The Federal Circuit noted that the Court of International Trade, as the trial court, should have "the opportunity to consider the effect of an award of § 580 interest and whether dual sources of interest are proper," with "full compensation [for the injured party, the Government,] being the court's overriding concern." *Id.* (internal quotation marks omitted); *see also United States v. Am. Home Assurance Co.*, 857 F.3d 1329, 1333–34 (Fed. Cir. 2017) ("*Am. Home Assurance III*").

In determining whether to award equitable pre-judgment interest, the court is to exercise its discretion, *see United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987), guided "by traditional judge-made principles." *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194 (1995). When bonds secure the Government in the payment of antidumping duties, considerations that affect an award of equitable pre-judgment interest include: "[1] the degree of personal wrongdoing on the part of the defendant, [2] the availability of alternative investment opportunities to the plaintiff, [3] whether the plaintiff delayed in bringing or prosecuting the action, and [4] other fundamental considerations of fairness." *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1326 (Fed. Cir. 2013) (quoting *Osterneck v. Ernst & Whitney*, 489 U.S. 169, 175–76 (1989)) (internal quotation marks omitted). Since the court has awarded the Government statutory pre-judgment interest under § 580, it must also "consider the effect" of that award and "whether dual sources of interest are proper." *Am. Home Assurance II*, 789 F.3d at 1338 (internal quotation marks and citations omitted); *see also Am. Home Assurance III*, 857 F.3d at 1334.

Fidelity contends that equitable considerations do not favor an award of equitable pre-judgment interest because Fidelity promptly "asserted colorable defenses in good faith at all relevant times during proceedings before Customs and this Court." Def.'s Br. 27. Fidelity attributes the duration of this dispute to the Government's "inaction and delay" over the years. *Id.* at 29. Specifically, Commerce issued the Liquidation Instructions more than two years after the decision in *Huaiyang Hongda*; liquidated the subject entry more than six months after the receiving notice that the suspension of liquidation was lifted; and issued a decision one year after Fidelity filed its 2008 protest, acknowledging that liquidation had occurred by operation of law. As of the time of briefing in this case, Fidelity had not received a decision from Customs on its 2010 protest. Finally, Fidelity notes that

the Government brought this action one day prior to the expiration of the statute of limitations. *Id.*

The court agrees with Fidelity that the balance of the equities do not favor awarding the Government equitable pre-judgment interest in addition to § 580 interest. *See Am. Home Assurance III*, 857 F.3d at 1334 (affirming denial of equitable pre judgment interest given analysis of equitable factors and availability of pre-judgment interest under § 580). As an initial matter, while the Government's actions and timing may not have been optimal, the court cannot say that the Government unreasonably delayed the filing or prosecuting of this action. The Government's final demand for payment from Fidelity occurred just three months prior to the commencement of this action. Despite the laxity of the Government in bringing this action from Defendant's perspective, it was nonetheless timely commenced, albeit by only one day prior to the running of the applicable the statute of limitations under 28 U.S.C. § 2415. *See United States v. Am. Home Assurance Co.*, 39 CIT ___, ___, 100 F. Supp. 3d 1364, 1372–73 (citations omitted).

The docket of this action reveals a lengthy and involved litigation over the course of four years with many filings and numerous requests for extensions of time by Plaintiff and Defendant alike, but does not reflect that the Government was the source of any unreasonable delay. The court also observes that Fidelity has never paid the outstanding duties, despite Customs' multiple requests. While those factors may favor an award of equitable interest, the Government's entitlement to statutory pre-judgment interest under § 580 outweighs those considerations. Customs' demands for payment occurred initially in April 2008 and for the second time in May 2013. Equitable pre-judgment interest, if applicable, would run at the rate provided in 28 U.S.C. § 2644 and in accordance with 26 U.S.C. § 6621. *See id.* (citations omitted). Starting with April 2008 and ending with the date of issuance of the judgment in this action, the range of the applicable monthly Federal short term funds rates under 26 U.S.C. § 6621 is 0.16% to 2.51%, with an average rate of 0.64%, and a median rate of 0.51%. The 6% rate under § 580 far exceeds the applicable rates at which the Government would receive equitable interest. Section 580 interest more than fairly compensates the Government for the time value of the unpaid duties. To award equitable pre-judgment interest in these circumstances would overcompensate the Government. As to other considerations of fairness, there is no suggestion that Fidelity proffered any defense not in good faith. Accordingly, the Government's claim for equitable interest is denied

(3) Post–Judgment Interest

Lastly, the Government seeks an award of post-judgment interest. 28 U.S.C. § 1961(a) provides that post-judgment "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court."

Section 1961 does not directly apply to judgments rendered by this Court. *See* 28 U.S.C. § 1961(c)(4). However, the award of post-judgment interest by the Court of International Trade is predicated on 28 U.S.C. § 1585 that states the Court "possess[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." *Great Am. Ins. Co.*, 738 F.3d at 1326 (extending power to award post-judgment interest under 28 U.S.C. § 1961 to Court of International Trade pursuant to 28 U.S.C. § 1585).

Post-judgment interest is not discretionary, but rather is available as a matter of right to prevailing parties. *United States v. Servitex, Inc.*, 3 CIT 67, 68 n.5, 535 F. Supp. 695, 696 n.5 (1982); *see also Great Am. Ins. Co.*, 738 F.3d at 1326. Under § 1961(a) post-judgment interest is calculated from the date of entry of the judgment. This is a civil case—a suit on a bond for the collection of unpaid duties—that has resulted in a money judgment against Fidelity. Accordingly, the Government is entitled to post-judgment interest at the rate provided for in § 1961.

III. Conclusion

For the foregoing reasons, the court denies Defendant's motion for summary judgment and grants Plaintiff's cross-motion for summary judgment, except with respect to its claim for equitable pre-judgment interest. Accordingly, Plaintiff is entitled to collect $231,000 in unpaid antidumping duties, the face amount of the subject bond. In addition, the court awards Plaintiff pre-judgment interest under 19 U.S.C. § 580 and post-judgment interest in accordance with this opinion. Judgment shall be entered accordingly.

Dated: October 5, 2017
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 17–137

ABB, INC., Plaintiff, v. UNITED STATES, DEFENDANT, AND HYUNDAI HEAVY INDUSTRIES CO., LTD., HYUNDAI CORPORATION USA, HYOSUNG CORPORATION, AND HICO AMERICA SALES AND TECHNOLOGY, INC., DEFENDANT-INTERVENORS.

Before: Mark A. Barnett, Judge
Court No. 15–00108

[Commerce's remand redetermination is sustained.]

Dated: October 10, 2017

R. Alan Luberda, Kelley Drye & Warren LLP, of Washington, DC, argued for plaintiff. With him on the brief were *David C. Smith, Jr.* and *Melissa M. Brewer.*

John J. Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Chad A. Readler,* Acting Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Franklin E. White, Jr.,* Assistant Director. Of Counsel was *James Henry Ahrens, II,* Attorney, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, of Washington, DC.

David Edward Bond, White & Case, LLP, of Washington, DC, argued for defendant-intervenor Hyundai Heavy Industries, Co., Ltd. and Hyundai Corporation USA. With him on the brief were *Walter Joseph Spak, William Joseph Moran,* and *Ron Kendler.*

Jaehong David Park, Arnold & Porter Kaye Scholer LLP, of Washington, DC, argued for defendant-intervenors Hyosung Corporation and HICO America Sales and Technology, Inc. With him on the brief were *Daniel Robert Wilson, Henry David Almond, Andrew Mercer Treaster*, and *Sylvia Yun Chu Chen.*

OPINION

Barnett, Judge:

This case comes before the court following the Department of Commerce's ("Commerce") redetermination on remand in the first administrative review of the antidumping duty order on large power transformers from the Republic of Korea ("Korea"), for the period of review ("POR") February 16, 2012, through July 31, 2013 ("POR 1"). Confidential Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 104–1;[1] *see also ABB Inc. v. United States* (*ABB I*), 40 CIT ___, 190 F. Supp. 3d 1159 (2016).[2]

[1] The administrative record for this case is divided into a Public Administrative Record ("PR"), ECF No. 26–9, and a Confidential Administrative Record ("CR"), ECF No. 26–8. With the remand, Commerce also submitted a Confidential Remand Administrative Record ("CRR"), ECF No. 106–3, and a Public Remand Administrative Record ("PRR"), ECF No. 106–2. Parties submitted joint appendices containing all record documents cited in their briefs at the conclusion of their pre-remand motions. *See* Public Joint App. ("PJA"), ECF No. 72; Confidential Joint App. ("CJA"), ECF No. 71. Citations are to the confidential joint appendix unless stated otherwise. Additionally, the court requested complete versions of certain record documents for which parties had only submitted selected pages in the joint appendices. These are cited separately as they appear in this opinion.

[2] Commerce published its final results of the antidumping duty order on large power transformers from Korea for POR 1 on March 31, 2015. *Large Power Transformers from the Republic of Kore* a, 80 Fed. Reg. 17,034 (Dep't Commerce Mar. 31, 2015) (final results of

In *ABB I*, the court directed Commerce to "further address the sequencing of certain of [Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation USA's (collectively "Hyundai")] documents in the record," and "defer[red] ruling on the issue of whether Commerce should have applied facts available or [adverse facts available ("AFA")] in calculating Hyundai's dumping margin with respect to the discrepancies in the sequencing of Hyundai's documents alleged by ABB." *ABB I*, 190 F. Supp. 3d at 1164, 1184. The court also directed Commerce to "further explain its treatment of the respondents' U.S. commissions, the record basis for such treatment, whether such U.S. commissions result in the granting of commission offsets, and the legal and factual basis for the granting or denial of the commission offsets." *Id.*

Upon consideration of the court's remand instructions, Commerce issued a supplemental questionnaire to Hyundai on November 1, 2016, to which Hyundai responded on November 10, 2016. *See* Remand Results at 6 and nn.27, 28. Commerce issued a draft redetermination on December 8, 2016, and all parties submitted comments in response. Remand Results at 6. Commerce filed its final remand redetermination with the court on February 2, 2017. *See generally* Remand Results. Based upon Hyundai's response to the supplemental questionnaire, Commerce found that Hyundai sufficiently explained and clarified the sequencing of certain of its sales documents. *Id.* at 16–22. No party challenges Commerce's redetermination on this issue.

Commerce also found that the "respondents' U.S. commissions were incurred in the United States" and declined to "grant[] home market commission offsets to Hyosung and Hyundai," explaining that "when [ ] commission expenses on U.S. sales are incurred in the United States and there are no commission expenses in the home market, which is the case here, such commission expenses are treated as [constructed export price or] CEP selling expenses and the commis-

antidumping duty admin. review; 2012–2013) ("*Final Results*"), CJA 1; PJA 1; PR 276; ECF No. 71–1, and accompanying Issues and Decision Mem., A-580–867 (Mar. 23, 2015) ("I&D Mem."), CJA 2; PJA 2; PR 261; ECF No. 71–1. Commerce then twice amended its *Final Results*. *Large Power Transformers from the Republic of Korea*, 80 Fed. Reg. 26,001 (Dep't Commerce May 6, 2015) (am. final results of antidumping duty admin. review; 2012–2013), CJA 3; PJA 3; PR 291; ECF No. 71–1, and accompanying Am. Final Results of the Antidumping Duty Admin. Review of Large Power Transformers from the Republic of Korea; 2012–2013: Allegations of Ministerial Errors (Dep't Commerce Apr. 28, 2015), CJA 42; PJA 42; PR 284; ECF No. 71–11; *Large Power Transformers from the Republic of Korea*, 80 Fed. Reg. 35,628 (Dep't Commerce June 22, 2015) (second am. final results of antidumping duty admin. review; 2012–2013), CJA 4; PJA 4; PR 304; ECF No. 71–1, and accompanying Second Am. Final Results of the Antidumping Duty Admin. Review of Large Power Transformers from the Republic of Korea; 2012–2013: Allegations of Ministerial Error (Dep't Commerce June 15, 2015), CJA 44; PJA 44; PR 294; ECF No. 71–11.

sion expenses and allocated profit get deducted from the price used to establish CEP, and [ ] there are no home market commission offsets granted." *Id.* at 39. Both Hyosung and Hyundai (together "respondents") challenge Commerce's redetermination on this issue. *See generally* Hyosung's Comments on Remand Results ("Hyosung's Comments in Opp'n"), ECF No. 110; Def.-Ints.' Comments in Opp'n to the Final Results of Redetermination Pursuant to Court Remand ("Hyundai's Comments in Opp'n."), ECF. No. 111. ABB supports Commerce's redetermination. *See generally* Plaintiff ABB, Inc.'s Comments in Supp. of the Results of Remand Determination ("ABB's Comments in Supp."), ECF No. 115.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to § 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[3] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. The Sequencing of Certain of Hyundai's Documents

In briefing its original motion to the court, ABB had argued that a number of Hyundai's sales documents for specific sales contained discrepancies in their dates. Conf. Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. ("Pl.'s Mem.") at 46, ECF No. 45–1. ABB had raised this issue during the administrative proceeding and Commerce "acknowledged that Hyundai did not address the sequencing of documents, but concluded that this was an issue that normally would have been resolved through supplemental questionnaires." *ABB I*, 190 F. Supp. 3d at 1181. Given that Commerce recognized that questions existed as to Hyundai's reported data, the court remanded the sequencing issue so that Commerce could further address the sequencing of certain of Hyundai's sales documents. *Id.* at 1182, 1184. Familiarity with the more detailed discussion of this issue in *ABB I* is assumed.

In light of the court's remand instructions, Commerce requested, and Hyundai provided, explanations for the sequencing of the documents. Hyundai explained that it had a "back-to-back" sales process whereby Hyundai Heavy Industries Co., Ltd. ("HHI") concluded initial contracts with an affiliated middleman "well before the shipment

[3] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2012 edition, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

of the transformers to the United States" and then "HHI issued invoices directly to Hyundai USA and later formalized the agreement in *pro forma* contracts." Remand Results at 17. At the time of shipment, Hyundai "prepare[d] a commercial invoice, which reflected the agreement in principle . . . regarding the transfer price for the transformer," but "the contracts [were] not finalized until the division of the scope of work between the entities ha[d] been agreed upon." *Id.* Hyundai noted that there were "instances [in which] the preparation of the contract . . . was delayed," but that this was not "problematic given [the companies'] close corporate relationship, their agreement in principle, and the confirmation of the transfer price in the commercial invoices." *Id.* Further, Hyundai acknowledged that there were instances in which contracts were "revised . . . to reflect change orders from the ultimate U.S. customers." *Id*. Hyundai supported its assertions with "copies of the initial contracts, contracts between HHI and Hyundai USA (including revised contracts), commercial invoices, and customs entry documents, along with [a] worksheet [] show[ing] the initial contract dates . . . for the U.S. sales identified/requested by [Commerce]." *Id.* at 18.

Commerce found that "Hyundai sufficiently addressed the discrepancies in sequencing of certain of its documents for certain U.S. sales," and that it has "no remaining questions as to the reliability of Hyundai's reporting of U.S. sales." *Id.* at 18–19. No party challenges these findings before the court, and Hyundai requests that these findings be affirmed. *See generally* Def.-Ints.' Comments in Supp. of the Final Results of Redetermination Pursuant to Court Remand, ECF No. 117. On remand, Commerce addressed the sequencing issues it was required to address and, in the absence of any further challenge to the agency's determination in that regard, the court will sustain Commerce's redetermination findings on the issue of Hyundai's document sequencing, including its decision not to apply facts available or AFA.[4]

II. Hyundai and Hyosung's U.S. Commission Expenses

In briefing its original motion to the court, ABB had argued that Commerce erred in granting Hyundai and Hyosung a home market commission offset related to commissions on sales made in the United

[4] In *ABB I*, the court had deferred ruling on the issue of whether Commerce should have applied facts available or AFA in calculating Hyundai's dumping margin because of the discrepancies in the sequencing of Hyundai's documents. 190 F. Supp. 3d at 1182. In its remand redetermination, Commerce addressed the issue of sequencing. Remand Results at 7–22. Subsequently, ABB filed comments regarding the redetermination and no longer challenges the sequencing of Hyundai's documents. *See generally* ABB's Comments in Supp. As such, the court need not further address Commerce's determination not to apply facts available or AFA in connection with the sequencing issue.

States. Pl.'s Mem. at 47–52; *see also ABB I*, 190 F. Supp. 3d at 1182. In *ABB I*, the court ruled that Commerce had not adequately explained its treatment of respondents' commissions and remanded the issue for further clarification. 190 F. Supp. 3d at 1182–84.

In its redetermination, Commerce concluded that Hyosung and Hyundai's U.S. commissions were incurred in the United States and that there were no commission expenses in the home market. Remand Results at 39. Commerce determined that these U.S. commission expenses should be treated as CEP selling expenses and deducted from the U.S. sales price along with the allocated profit. *Id.* Additionally, Commerce did not grant a commission offset to normal value (or "NV"). *See id*. at 32. Hyosung challenges Commerce's redetermination, arguing that the agency went beyond the court's remand instructions when it revised its factual findings on where Hyosung's commissions were incurred and that its new, three-step methodology for determining where commissions are incurred is "results-oriented" and contradicts its previous position. Hyosung's Comments in Opp'n at 1–3. Hyundai also challenges Commerce's redetermination, arguing that "den[ying the] commission offset based on where the commission was 'incurred'" is contrary to the governing statute and regulations. *See* Hyundai's Comments in Opp'n. at 3–6.

Defendant responds that Hyundai and Hyosung fail to establish that Commerce lacked legal or factual support for its treatment of their commissions and that their challenge to Commerce's factual findings on where the commissions were incurred also fails. Def.'s Resp. to Def.-Ints.' Comments Regarding Final Results of Redetermination ("Def.'s Resp.") at 5–9, ECF No. 114. ABB argues that Commerce complied with the court's remand instructions, and that its treatment of respondents' U.S. commissions conforms to statutory requirements. ABB's Comments in Supp. at 2–9.

As an initial matter, in its prior opinion, the court remanded the U.S. commission issue to Commerce "to further explain its treatment of the respondents' U.S. commissions, the record basis for such treatment, whether such U.S. commissions result in the granting of commission offsets, and the legal and factual basis for the granting or denial of the commission offsets..." *ABB I*, 190 F. 3d at 1184. The court did not seek to constrain the agency's reconsideration of its treatment of U.S. commissions. Consequently, Hyosung's claim that Commerce exceeded the court's remand instructions is inapposite. The court now turns to the merits of respondents' remaining arguments.

A. Overview of Commerce's Interpretation of the Law

In its redetermination, Commerce explained its approach to analyzing and adjusting for commission expenses associated with U.S. sales.[5] Remand Results at 28–31. When a commission expense is incurred in the United States, an adjustment is made to the price used to establish constructed export price pursuant to 19 U.S.C. § 1677a(d)(1) and 19 C.F.R. § 351.402(b), and for profit allocated to that commission expense pursuant to 19 U.S.C. § 1677a(d)(3). *See id.* at 28, 30 n.136. Once the U.S. commission is deducted from the price used to establish the constructed export price, there is no resulting adjustment to normal value unless otherwise justified based on a difference in the level of trade, either as a level of trade adjustment or a CEP offset.[6] *See id.* at 31–32. Commerce further explained that there is no basis for granting a home market commission offset for commissions incurred in the United States because "commissions incurred in the United States are not related to economic activities in the home market." *Id.* at 32. On the other hand, when a commission expense is incurred outside the United States (on a sale to the United States), an upward or downward adjustment to normal value may be made pursuant to the circumstances of sale provision, 19 U.S.C. § 1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410(e). *Id.* at 29. This includes the possibility of a commission offset if commissions are only incurred on sales to one market.[7] *See id.* Thus, commissions incurred outside

[5] The court sought to distill the agency's approach and articulated it in questions posed to the parties prior to oral argument on the Remand Results. Confidential Letter from the Court to all Parties, ECF No. 122. All parties agreed that the court had accurately summarized the agency's reasoning. The court will uphold Commerce's determination when the path to that determination is reasonably discernable from the determination itself. *See NMB Singapore Ltd. v. United States,* 557 F. 3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.") (citations omitted). Here, Commerce's path to its determination is reasonably discernable from the determination itself; accordingly, the court sustains Commerce's approach.

[6] Commerce granted a CEP offset to both Hyosung and Hyundai in order to account for differences in levels of trade between the constructed export price sales and normal value sales respectively. Analysis of Data Submitted by Hyosung Corp. in the Prelim. Results of the 2012–2013 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Dep't Commerce Sept. 18, 2014) at 47, 16; CR 423; PR 209; ECF No. 82–3 (proprietary prelim. mem. for Hyosung accompanying the prelim. results); Analysis of Data Submitted by Hyundai Heavy Indus. Co., Ltd., in the Prelim. Results of the 2012–2013 Admin. Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea (Dep't Commerce Sept. 18, 2014) at 4–6, 13, CR 430; PR 211; ECF No. 82–4 (proprietary prelim. mem. for Hyundai accompanying the prelim. results); *see also Large Power Transformers from the Republic of Korea*, 79 Fed. Reg. 57,046 (Dep't Commerce Sept. 24, 2014) (prelim. results of antidumping duty admin. review; 2012–2013), CJA 27; PJA 27; PR 217; ECF No. 71–6, and accompanying Issues and Decision Mem., A-580–867 (Sept. 18, 2014), CJA 62; PJA 62; PR 208; ECF No. 71–15.

[7] "[T]he Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under

the United States are not treated as CEP selling expenses. *Id.* Rather, Commerce "adds such commission expenses to normal value and offsets differences in home market commission expenses and such U.S. commission expenses incurred outside the United States, if any." *Id.*

B. Commerce's methodology for adjusting for commissions incurred in the United States is in accordance with law

In their comments on the redetermination, both Hyosung and Hyundai argue that the statute, regulations, and legislative history do not support the geographic distinction Commerce made when it declined to grant a home market commission offset for U.S. commissions incurred in the United States. Hyosung's Comments in Opp'n at 4; Hyundai's Comments in Opp'n at 3. Defendant disagrees and argues that the distinction Commerce made is supported by law. Def.'s Resp. at 5–6. For the reasons discussed below, Defendant's distinction between U.S. commissions that result in an adjustment in the determination of constructed export price and U.S. commissions that may, instead, result in a circumstance of sale adjustment or commission offset in the determination of normal value is in accordance with law.

This court must accord substantial weight to the agency's interpretation of the statute it administers. *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (citations omitted). "An agency's 'interpretation of the statute need not be the only reasonable interpretation or the one which the court views as the most reasonable.'" *ICC Indus., Inc. v. United States*, 812 F.2d 694, 699 (Fed. Cir. 1987) (emphasis omitted) (citation omitted). When "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted).

Antidumping analysis requires Commerce to compare the export price (or "EP") or constructed export price of the subject merchandise with the normal value of the foreign like product. 19 U.S.C. § 1677b(a) (Commerce must make "a fair comparison . . . between the export price or constructed export price and normal value" of the subject merchandise.); *see also* 19 C.F.R. § 351.401(a) ("In general terms, an antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the

consideration, and no commission is paid in the other market under consideration," (i.e., the commission offset). Remand Results at 28 (quoting 19 C.F.R. § 351.410(e).

foreign market."). Each of these terms, export price, constructed export price, and normal value are defined by statute:

> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

19 U.S.C. 1677a(a).

> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, *as adjusted* under subsections (c) *and (d)*.

19 U.S.C. § 1677a(b) (emphasis added).

> [Normal value typically is] the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price.

19 U.S.C. § 1677b(a)(1)(B)(i).

While many differences between U.S. price (whether based on export price or constructed export price) and normal value are taken into account when the price comparison is made, in the case of constructed export price transactions, the statutory definition of that price requires certain adjustments be made at the outset, in order to determine the constructed export price, and without regard to the comparison with normal value. *See* 19 U.S.C. 1677a(b). One of those statutory adjustments is for commissions incurred in the United States. *See* 19 U.S.C. § 1677a(d). Pursuant to § 1677a(d)(1)(A), in order to arrive at the constructed export price, among other things, Commerce must deduct "commissions for selling the subject merchandise in the United States" from the starting price for constructed export price.[8] *Id.*§ 1677a(d)(1)(A).

[8] In contrast, "other differences in the circumstances of sale" provide a basis for an adjustment to normal value. 19 U.S.C. § 1677b(a)(6)(C)(iii).

Although § 1677a(d)(1)(A) does not contain a geographical distinction on where commissions must be incurred, its regulatory provision references commissions that are associated with commercial activity occurring in the United States, and provides that such commissions be treated as adjustments in the determination of constructed export price. *See* 19 C.F.R. § 351.402(b). Specifically, the implementing regulation, 19 C.F.R. § 351.402(b), explains:

> In establishing constructed export price under section 772(d) of the Act, [19 U.S.C. § 1677a(d),] the Secretary will make adjustments for expenses *associated with commercial activities in the United States* that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act.

19 C.F.R. § 351.402(b) (emphasis added).

The preamble to 19 C.F.R. § 351.402(b) further supports Commerce's construction of § 1677a(d)(1)(A):

> The purpose [of adding a new sentence barring an adjustment to constructed export price for expenses related to sales to affiliated importers] is to *distinguish between selling expenses incurred on the sale to the unaffiliated customer, which may be deducted under [19 U.S.C. § 1677a](d)(1), and those associated with the sale to the affiliated customer in the United States, which may not be deducted* [pursuant to the same] . . . . [T]he reference to adjustments to normal value reflects our agreement . . . that the Secretary *may adjust for direct selling expenses (as well as assumed expenses) associated with the sale to the affiliated importer under the circumstance of sale provision* [pursuant to 19 U.S.C. § 1677b(a)(6)(C)(iii)].

62 Fed. Reg. 27,296, 27,351 (discussing 19 C.F.R. § 351.402) (emphasis added).

Some 20 years ago, when Commerce adopted 19 C.F.R. § 351.402, the agency traced its rationale to the Statement of Administrative Action to the Uruguay Round Agreements Act. *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol.1 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA");[9]

[9] The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d); *RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1345 n.7 (Fed. Cir. 2002).

see also Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,351 (Dep't of Commerce May 19, 1997) (final rule) ("the SAA makes clear that only those expenses associated with economic activities in the United States should be deducted from constructed export price. In discussing [§1677a](d)(1), the SAA states that the deduction of expenses in calculating constructed export price relates to 'expenses (and profit) *associated with economic activities occurring in the United States*.'") (citing SAA at 823, *reprinted in* 1994 U.S.C.C.A.N. at 4164)).

The SAA explains the differences between the commissions incurred on U.S. sales in the United States (adjusted for in the CEP calculation) and commissions incurred on U.S. sales outside the United States by noting that

> [i]n constructed export price situations Commerce will deduct direct expenses incurred in the United States from the starting price in calculating the constructed export price. However, *direct expenses and assumptions of expenses incurred in the foreign country on sales to the affiliated importer will form a part of the circumstances of sale adjustment*.

SAA at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167 (emphasis added). In doing so, the SAA limits the circumstances of sale adjustment, including the home market commissions offset, to direct expenses and assumptions of expenses *incurred in the foreign country on sales to the affiliated importer* (such as with export price sales). The SAA further provides that

> [19 U.S.C. § 1677b](a)(6)(C)] [] authorizes Commerce to adjust normal value to account for other differences . . . between export price (or constructed export price) and normal value that are wholly or partly due to differences in quantities, physical characteristics, or other differences in the circumstances of sale. *With respect to each of these adjustments, as well as all other adjustments, Commerce will ensure that there is no overlap or double-counting of adjustments*.

SAA at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167 (emphasis added).[10]

[10] Notably, in the remand redetermination, Commerce explained that "[b]ecause commissions incurred in the United States are not related to economic activities in the home market, there is no basis for granting a home market commission offset." Remand Results at 32. Commerce stated that "pursuant to section B.2.b.(2) of the SAA [*see* SAA at 823–25 regarding adjustments to export price and constructed export price] and 19 C.F.R. § 351.410(e)," when "there are no home market commissions incurred, a commission offset is

Both Hyosung and Hyundai base their argument on 19 C.F.R. § 351.401(e). Hyosung's Comments in Opp'n at 5; Hyundai's Comments in Opp'n at 5–6. They argue that this regulation states that Commerce will provide a commission offset when commissions are paid in one market and not the other, and that the U.S. commission does not need to be categorized as either a payment eligible for a commission offset or a CEP expense – it can be both. Hyosung's Comments in Opp'n at 5; *see also* Hyundai's Comments in Opp'n at 3–6.

Defendant responds that the "SAA's instruction to deduct from constructed export price only commissions that are 'incurred in the United States'" means that Commerce's decision to deny a home market commission offset for commission expenses incurred in the United States is a "reasonabl[e] interpretation" of §1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410(e). Def.'s Resp. at 6–7. ABB argues that 19 C.F.R. § 351.410(e) implements §1677b(a)(6)(C)(iii), and as such, the regulation is "limited to offsetting direct expenses, including commissions, incurred in the foreign country on [constructed export price] sales." ABB's Comments in Supp. at 5. According to ABB, this is the only interpretation that harmonizes §§ 1677a and 1677b. *Id.* at 4–5 (citing § 1677b(a)(6)(C)(iii), 19 C.F.R. § 351.410(e), and the SAA at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167).

Respondents are mistaken in their interpretation of the relevant statutory and regulatory provisions. The commissions in question are incurred in the United States on constructed export price sales. However, instead of relying on the statutory provision that governs constructed export price calculation, the regulation implementing that provision, and its legislative history, as outlined above, respondents seek an adjustment under the provisions for calculating normal value. Specifically, the commission offset that they seek (and which is contemplated by 19 C.F.R. § 351.410(e)) occurs pursuant to the circumstance of sale adjustment to normal value provided for in 19 U.S.C. § 1677b(a)(6)(C)(iii). In the redetermination, Commerce correctly stated that § 1677b(a)(6)(C)(iii), the statutory basis for 19 C.F.R. § 351.410(e), requires the agency "to make adjustments to normal value based on *other* differences in the circumstances of sale." Remand Results at 36 (emphasis added). Commerce acknowledged that the statute and regulation do not explicitly discuss a geographic distinction for adjusting for U.S. commissions; however, Commerce concluded that its practice of denying commission offsets when the U.S. commission is incurred inside the United States is consistent

granted only when U.S. commission expenses are incurred outside the United States to offset the expenses related to the selling activities in the home market for the matching home market sales." *Id.* at 36.

with the language of the statute as well as relevant sections of the SAA. *Id.* at 37.

Respondents' arguments to the contrary are of no moment. In particular, Hyosung argues that *Federal Mogul Corp. v. United States*, 18 CIT 785, 798, 862 F. Supp. 384, 397–98 (1994) found that 19 C.F.R. § 353.56(b) allowed for an adjustment to normal value when commissions are paid on U.S. sales but not on home market sales. Hyosung's Comments in Opp'n at 5–6. However, *Federal Mogul* is inapposite because it was decided on the basis of the pre-Uruguay Round Agreements Act ("URAA") statute and there have been important statutory changes since then. *See Federal Mogul*, 18 CIT at 797–98. Moreover, to the extent there are analogous provisions between the two versions of the statute, and the regulations based thereon, that court explained that commission adjustments were governed by 19 C.F.R. § 353.56(b), which allowed for an adjustment to "foreign market value" (changed to "normal value" in the URAA) when commissions are paid in one market but not the other; however, subsection (b)(2) expressly distinguishes "export sales price" (changed to "constructed export price" in the URAA) situations and excluded adjustments for, among other things, U.S. commissions in exporter's sales price comparisons.[11] Consequently, *Federal Mogul* is unavailing.

Hyundai argues that Commerce "incorrectly conflated the relevance of where U.S. commissions are incurred to the decision of whether they should be subtracted from U.S. price or added to normal value with the completely separate decision of the amount of a commission offset to normal value." Hyundai's Comments in Opp'n at 3. Specifically, Hyundai argues that the circumstances of sale adjustment to normal value is not conditioned on where expenses were incurred. *Id.* at 5.[12] However, as noted in the court's discussion of the legal framework (above), this is not the case.

Hyundai further argues that § 1677a(d)(1) requires Commerce to reduce constructed export price by the amount "generally incurred . . . for the affiliated seller in the United States" and that § 1677a(d)(1)(A) requires that commissions be incurred "for selling the subject merchandise in the United States," but does not specify where

[11] While the URAA ushered in many substantive changes intended to conform U.S. law to the various World Trade Organization ("WTO") agreements, statutory changes were also made to conform some terms of art to the terms used in WTO agreements. SAA at 820, *reprinted in* 1994 U.S.C.C.A.N. at 4161.

[12] Defendant responds that while the regulations do not contain a geographic distinction, Commerce's interpretation of the regulation is a reasonable one. Defendant asserts that §1677a(d)(1)(A) and the SAA, read together, provide for a CEP deduction only if the commission is incurred in the United States and §1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410(e), read together, account for U.S. commission expenses incurred outside the United States by allowing adjustments to normal value. Def.'s Resp. at 5–6.

the commissions have to be incurred. Hyundai's Comments in Opp'n at 4–5 (emphasis added). However, the SAA supports Commerce's decision to "deduct commissions from constructed export price, but only to the extent that they are incurred in the United States on sales of the subject merchandise," SAA at 823, *reprinted in* 1994 U.S.C.C.A.N. at 4164, and, as discussed below, Hyundai's challenge to the factual finding that the commissions were incurred in the United States also fails.

Finally, Hyundai asserts that 19 C.F.R. § 351.410(e) provides for a commission offset if a commission is granted in one market and not the other and the statute is clear in "defin[ing] both (1) when a commission offset should be made, and (2) the amount of the offset that should be made." Huyndai's Comments in Opp'n. at 5–6. Hyundai contends that the treatment of commissions is not predicated on where they were incurred. *Id.* at 6. Here, Hyundai is reading the regulation in isolation. The regulation addresses the circumstances of sale adjustment to normal value and, within that context, the court has already discussed Commerce's treatment of the commissions and the relationship between where the commissions are incurred and whether a home market commission offset is granted as set forth in the statute, the SAA, and the regulations. Hyundai's argument therefore fails.

C. Commerce's methodology for determining where respondents' commissions were incurred is in accordance with law

The statute, regulations, and SAA provide Commerce with a legal basis to distinguish between commissions incurred in the United States and those incurred outside the United States for U.S. sales. *See supra* Section II.A. In the absence of statutory criteria to apply, Commerce may develop or refine reasonable criteria to determine where commissions on U.S. sales are incurred. *See, e.g., U.S. Steel Corp. v. U.S.*, 34 C.I.T. 252, 257, 712 F. Supp. 2d 1330, 1337 (2010) (Commerce has broad discretion to develop methodology to implement a statue provided that methodology is reasonable). While Commerce had previously deducted commissions incurred in the United States from the starting price used to arrive at the adjusted constructed export price, Commerce had not articulated the factors that it relied upon to determine where the commissions were incurred.

In the remand redetermination, Commerce articulated three, nonexhaustive factors to determine the location of economic activity and where the commissions were incurred. Remand Results at 40. Specifically, Commerce stated that

> [t]o determine the scope of economic activities with regard to the commission expenses which occurred in the United States, we considered the following non-exhaustive factors: (1) where sales agents are located at the time of the commission agreement; (2) where and by what entity the corresponding commission payments were booked or made; and (3) when the commission payments were made during the normal course of business.

Id. Respondents now challenge Commerce's methodology.[13]

Hyosung argues that Commerce's "three-factor test" is new, "unnecessarily broad," and "defies the agency's own previous reasonable interpretation of the facts [in this case], and, more importantly, the commercial reality with respect to the merchandise subject to this proceeding." Hyosung's Comments in Opp'n at 2–3. Hyosung further argues that the fact that Commerce articulated a test "underscores" its position that "Commerce's interpretation of the CEP expense and commission offset regulations is not a matter of settled agency practice." *Id.* at 7. Although Hyosung contends that Commerce's citations showing its practice are limited to two cases and that such a small number of citations indicates that the practice is new, Hyosung itself provides no support for its position that "Commerce has consistently applied a commission offset [when] commissions were paid in one market but not the other." *Id.* at 8.

Hyosung also takes issue with Commerce's reliance on its internal computer programming notes for the margin calculation, arguing that the calculation is inconsistent with the regulations and that the computer program itself changed between the time of the July 2012 investigation and the first administrative review, suggesting again that Commerce's approach is new. *Id.* at 8–9. As Hyosung itself acknowledges, the relevant question is not whether "Commerce followed its standard calculation program, but rather, whether the agency's calculations and treatment of commission expenses is con-

[13] Respondents' arguments rest largely on challenging Commerce's legal interpretation of the statutes and regulatory provisions at issue rather than the test itself. In fact, Hyosung and Hyundai did not challenge Commerce's factual findings in their briefs to the court. *See generally* Hyosung's Comments in Opp'n; Hyundai's Comments in Opp'n. At oral argument, however, Hyundai called into question Commerce's review of the record documents. Hyundai did not raise these arguments in its briefs to the court; as such, they are waived. *See, e.g., United States v. Great American Ins. Co.,* 738 F.3d 1320, 1328 (Fed. Cir. 2013) (stating that "[i]t is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *SmithKline Beecham Corp. v. Apotex Corp.,* 439 F.3d 1312, 1319–20 (Fed. Cir. 2006) (explaining that "[the] law is well established that arguments not raised in the opening brief are waived"). Although the court retains discretion to consider improperly raised arguments when "circumstances indicate that it would result in basically unfair procedure," *Becton Dickinson and Co. v. C.R. Bard, Inc.,* 922 F.2d 792, 800 (Fed. Cir. 1990), the court declines to exercise that discretion here because the circumstances do not support it.

sistent with the regulations." *Id.* at 9. While it is true that Commerce devoted a significant portion of its remand redetermination to discussing the margin program notes, the margin calculation programming notes constitute neither substantial evidence nor legal authority. Nevertheless, Commerce sufficiently addressed the legal and statutory basis for its treatment of respondents' U.S. commissions and, as discussed above, that treatment was in accordance with law.[14] *See supra* Section II.A.

Hyundai contends that Commerce's three-factor test is inconsistent with the statute and regulations. Hyundai's Comments in Opp'n at 7. Hyundai argues that this three-factor test will "likely lead to the conclusion that all commissions are incurred in the United States." *Id.* at 8. Finally, Hyundai alleges that Commerce's new test is made up of factors recommended by the Plaintiff in its pleading before this court regarding the second administrative review of the same antidumping duty order.[15] *Id*. at 7. Hyundai's assertion that Commerce's factors will always lead to a finding that the commission was incurred in the United States is conclusory, and Hyundai did not articulate a scenario in which such a result would be clearly unreasonable. Because the factors, when properly applied to respondents' facts, lead to a reasonable result, and Hyundai failed to establish that the test itself is unreasonable, Hyundai's argument must fail. Also, if the factors themselves are reasonable, the objection that they may have been proposed by Plaintiff, with nothing more, is insufficient to call them into question. As noted above, Commerce has discretion to

[14] Hyosung also argues that Commerce's remand redetermination did not comply with the court's remand instructions because the court had not "take[n] issue with Commerce's factual finding on the [] record," and because Commerce's remand "interpreted the [c]ourt's narrow remand instruction to explain Commerce's findings as an invitation to change its methodology." Hyosung's Comments in Opp'n at 2. As noted above, the court's remand order instructed Commerce to consider the legal and factual basis of its treatment of respondents' commissions and did not expressly limit the scope of Commerce's remand. As such, Commerce acted consistently with the court's remand instructions when it considered the legal basis for its treatment of respondents' U.S. commissions and articulated the factors it considered when evaluating where respondents' U.S. commissions were incurred. Unless specifically directed by the court, Commerce has broad discretion to fully consider the issues remanded. *See Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (1995) ("Any decision to expand the administrative record upon remand is well within [Commerce's] discretion, absent express language from the court barring such action."); *Elkton Sparkler Co. v. U.S. Dep't of Commerce*, 17 CIT 344, 346 (1993) (Commerce did not exceed scope of remand order by investigating certain factor information in the remand proceeding when plaintiff had raised the issue in its complaint).

[15] At oral argument, Hyundai argued that Commerce should have taken into consideration where the commission was paid rather than where it was incurred because the overall purpose is to delineate profit, which is based not just on where the sale or commission actually occurs but also on who bears the risk for the sale. Hyundai made this argument for the first time at oral argument and did not raise this issue in its brief to the court. As such, it has waived the argument. Moreover, Commerce's consideration of where commissions were incurred is based on a reasonable interpretation of the relevant statutory provisions.

fashion, develop, or refine criteria that enable it to administer the statute, so long as its criteria are in accordance with the statute. Thus, Hyundai's arguments fail to persuade the court that Commerce has acted impermissibly.

As the agency tasked with administering the antidumping and countervailing duty provisions of the statute, Commerce has broad authority to determine the criteria by which it will evaluate issues within an investigation or administrative review, provided the criteria are consistent with the statute and regulations. As discussed above, Commerce's treatment of U.S. commissions is in accordance with the relevant legal framework. To the extent that Commerce had to develop and articulate a test to implement the statute, the court's review is limited to determining "whether the agency's [action] is based on a permissible construction of the statute." *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (citing *Chevron*, 467 U.S. at 84243). Neither respondent has shown the court that Commerce's treatment of respondents' U.S. commissions was based on an impermissible construction of the statute, *see supra* Section II.B, and having determined that the statute and regulations support the geographic distinction, Commerce acted within its authority to articulate a non-exhaustive list of factors to help it determine where commissions were incurred. Since respondents were not able to show the court why Commerce's use of these factors was unreasonable, there is no reason for the court to disturb Commerce's determination.

CONCLUSION

In accordance with the foregoing, the court sustains Commerce's remand redetermination on the issue of the sequencing of certain of Hyundai's documents. Further, the court sustains Commerce's remand redetermination on the issue of its treatment of respondents' commissions.

It is so **ORDERED**. Judgment will enter accordingly.

Dated: October 10, 2107
New York, New York

/*s*/ *Mark A. Barnett*
MARK A. BARNETT, JUDGE

Slip Op. 17–139

HARTFORD FIRE INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge
Court No. 13–00352

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.]

Dated: October 10, 2017

Frederic Deming Van Arnam, Jr., Barnes, Richardson & Colburn, LLP of New York, NY, argued for plaintiff.

Edward Francis Kenny, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With him on the brief were *Stuart F.* Delery, Assistant Attorney General, and *Amy Rubin*, Acting Assistant Director. With them on the supplemental briefs was *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General. Of counsel on the reply was *Beth S. Brotman*, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

Paul C. Rosenthal and *Michael J. Coursey*, Kelley Drye & Warren LLP of Washington, DC, argued for amici curiae. With them on the brief were *Will E. Leonard* and *John C. Steinberger*, Adduci, Mastriani & Schaumberg, L.L.P. of Washington, DC.

OPINION

Katzmann, Judge:

Can a surety's argument -- that the United States Customs and Border Protection's ("Customs") demands for payment on bonds issued by the surety are untimely because they fall outside of the statutory limitations period -- be raised in an administrative protest before Customs? Can the surety challenge Customs' denial of its protest and raise that argument before this court? These are the principal questions presented by this case. Plaintiff Hartford Fire Insurance Company ("Hartford") initiated this lawsuit seeking a declaration from this Court that the claims of Customs for payment under certain customs bonds issued by Hartford became barred by the running of the six year limitations period on those claims on January 21, 2012. *See* Pl.'s Compl. at 9, Oct. 9, 2013, ECF No.2 ("Compl."). Defendant United States ("the Government") has moved to dismiss Hartford's action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of the United States Court of International Trade. Def.'s Mot. To Dismiss, Jan. 30, 2014, ECF No. 9 ("Def.'s Mem."); *see* Pl.'s Sum., Oct. 9, 2013, ECF No. 1. The Government argues that the court cannot entertain Hartford's action,

brought under 28 U.S.C. § 1581(i) (2012),[1] the residual or "catch-all" jurisdiction provision,[2] because jurisdiction for the very same arguments was available to Hartford under § 1581(a).[3] *See* Def.'s Mem. at 5. Hartford opposes the Government's motion. Pl.'s Resp. in Opp'n to Def.'s Mot. To Dismiss, July 8, 2014, ECF No. 18 ("Pl.'s Opp'n"). For the reasons discussed hereafter, the court grants the Government's motion and dismisses Hartford's action for lack of subject matter jurisdiction.

BACKGROUND

Hartford is a surety company that issues single-entry bonds ("SEBs") to importers, who use them to cover potential liabilities that may be retroactively assessed by Customs on the goods they import. Compl. ¶¶ 7–9. The bonds at issue covered shipments of preserved mushrooms from the People's Republic of China, and were filed at the Ports of Tampa, Florida, and Minneapolis – St. Paul, Minnesota between March 3 and October 6, 2004 by the importer of record, Sino Trend, Inc. ("Sino"). *Id.*¶¶ 7–8, 11. All of the entries were subject to an anti-dumping duty order for preserved mushrooms from China. *Id.*¶ 10. The entry summaries for each of the entries identify antidumping duty order "A-570–851–000" as applicable to the Imported Merchandise. *Id.*"A570–851–000" refers to the antidumping duty order *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China,* 64 Fed. Reg. 8308 (Feb. 19, 1999).

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[1] All citations to the United States Code are to the official 2012 edition.

[2] 28 U.S.C. § 1581(i) provides:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) 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 subsections (a)-(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

[3] 28 U.S.C. § 1581(a) provides:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

Id. At the time of entry of these goods, the supplier, Guangxi Hengxian Pro-Light Foods, Inc. ("Pro-Light"), was a new shipper undergoing a new shipper review, which entitled the importer to submit a bond in lieu of a cash deposit for each entry from this supplier. Compl. ¶ 11. Hartford, as surety, agreed to issue bonds covering those liabilities for the entries at issue. *Id.*¶ 9. Liquidation of the entries was suspended during the pendency of the Sixth Administrative Review of the Order before the U.S. Department of Commerce ("Commerce"), covering the period of review February 1, 2004 to January 31, 2005. *Id.*¶ 12.

On July 21, 2005, Commerce issued the final results of the Sixth Administrative Review in *Certain Preserved Mushrooms from the People's Republic of China: Notice of Partial Rescission of Antidumping Duty Administrative Review,* 70 Fed. Reg. 42,038 (July 21, 2005), in which Commerce published its partial rescission of the review of the Order as to Pro-Light and twenty-four other companies. Compl. ¶ 13. The subject entries liquidated by operation of law six months thereafter, on January 21, 2006. *Id.*¶ 16; *see* 19 U.S.C. § 1504(d). On July 8 and August 19, 2011, depending on the entry, Customs actually liquidated the subject entries at the bonded antidumping duty rate of 198.63%. Def.'s Mem. at 3. Customs issued bills to Sino. *Id.*; Compl. ¶ 18. Because Sino did not pay the assessed antidumping duties, Customs issued the aforementioned demands for payment to Hartford. Def.'s Mem. at 3; Compl. ¶ 20. On December 30, 2011 and February 15, 2012, Hartford filed six protests ("Protests")[4] contesting Customs' demand for payment on the SEBs, alleging, among other arguments, that the SEBs were unenforceable because of defects in the bonds. Compl. ¶ 21. Protest Nos. 1801–12–100011 and 1801–12–100012 were filed on February 15, 2012, and cover Tampa entry nos. 032–0318520–6, 032–0318521–4 and 032–0319678–1. *Id.*¶ 8. These two Tampa protests asserted that 1) the single entry bonds contain facial defects which cause them to be void and unenforceable, and 2) the statute of limitations set forth in 28 U.S.C. § 2415(a) expired on January 21, 2012, six years from the deemed liquidation of the entries, thereby barring Customs' demands for payment as of that date.[5] Pl.'s Opp'n at 3, n.1. The remaining four protests, Protest Nos. 3501–12–100004/5/6/7, were filed on December 30, 2011, at the Port of Minneapolis and cover the balance of the entries at issue. Compl.

[4] Copies of all six protests are part of the files of this Court for the following actions: *Hartford Fire Insurance Company v. United States,* Court Nos. 12–00279, 12–00280, 12–00281, 12–00282, 1200283, and 12–00286. Each case involves the bond defects argument, while 12–00281, 12–00282, 12–00283, and 12–00286 also raise the deemed liquidation argument currently being litigated in CIT Ct. No. 12–00134, a test case.

[5] Hartford raised the statute of limitations argument in a March 2012 supplement to its two Tampa protests. Pl.'s Opp'n at 3 n.1; *see* 19 C.F.R. § 174.28.

¶ 8. Despite substantial similar circumstances giving rise to the demands for payment challenged in all six protests, these four Minneapolis protests argue only that Customs' demands should be cancelled because the single entry bonds contain facial defects. Pl.'s Opp'n at 3. None of the six protests were ever amended. *See* 19 C.F.R. § 174.14.

Customs denied the Protests on March 13 and 16, 2012. Compl. ¶ 22. Hartford paid the amount demanded by Customs, up to the penal value[6] of the SEBs, and on September 10, 2012 Hartford filed summonses in this Court, contesting the denied Protests under 28 U.S.C. § 1581(a). Compl. ¶¶ 32–33.

Notwithstanding those actions, which challenge the denial of the six underlying Protests, Hartford commenced the instant case on October 9, 2013, pursuant to 28 U.S.C. § 1581(i). Pl.'s Sum. This action covers the same entries and demands at issue in the six § 1581(a) cases noted above. Hartford asserts that the six year statute of limitations set forth in 28 U.S.C. § 2415(a)[7] expired as of January 21, 2012, which is six years plus 30 days after the deemed liquidation of the subject entries on July 21, 2006. Compl. ¶¶ 23–28. Hartford alleges that it was improper for Customs to continue to demand payment on these entries beyond that date, and seeks a declaration from this court that all of Customs' claims against Hartford on the SEBs for the entries were time-barred and thus that all of Customs' actions in demanding and accepting payment from Hartford on the SEBs after January 21, 2012 were a) invalid, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, b) contrary to constitutional right, power, privilege or immunity, c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, d) without observance of the procedure required by law, e) unsupported by substantial evidence, and f) unwarranted by the facts to the extent that the facts are subject to trial de novo by this Court. Compl. ¶ 40. Hartford is asserting these claims in this action, rather than in the relevant § 1581(a) cases, because, it contends, 19 U.S.C.

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[6] The penal sum or penal value on an SEB is the dollar amount which the surety is obligated to cover in the event that the importer, as principal on the bond, fails to pay Customs' demands. *See* 19 U.S.C. § 1623(b)(1) ("Whenever a bond is required or authorized by a law, regulation, or instruction which . . . the Customs Service is authorized to enforce, the Secretary of the Treasury may . . . fix the amount of penalty thereof, whether for the payment of liquidated damages or of a penal sum . . . .); *Hartford Fire Ins. Co. v. United States*, Slip Op. 09–00122, 2017 WL 3447893, at *7 & n.18 (CIT Aug. 10, 2017).

[7] 28 U.S.C. § 2415(a) provides, in relevant part:

> [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later[.]

§ 1514,[8] which enumerates governmental actions that an aggrieved party may protest in order to ultimately obtain jurisdiction under § 1581(a), "does not provide a surety the opportunity via protest to challenge whether the government is time-barred from commencing a collection action against bonds the surety issued, and as such jurisdiction in the U.S. Court of International Trade to raise such an argument cannot be based on 28 U.S.C. § 158l(a)." Compl. ¶ 29. Per Hartford, the only established way to raise that argument was to refuse to pay Customs' demands and allow the Government to commence a collection action against it pursuant to 28 U.S.C. § 1582, whereupon Hartford would raise it as an affirmative defense. Compl. ¶ 30.

On January 30, 2014, the Government moved to dismiss this action for lack of subject matter jurisdiction under USCIT Rule 12(b)(1). Def.'s Mem. Hartford filed its response in opposition to the Government's motion on July 8, 2014. Pl.'s Opp'n. The Government replied on August 29, 2014. Reply to Pl.'s Opp'n, Aug. 19, 2014, ECF No. 25 ("Def.'s Reply"). Oral argument on the motion was held on March 24, 2015. Oral Argument, Mar. 24, 2015, ECF No. 43.

On May 26, 2015, the court ordered parties to submit supplemental briefs, and supplemental replies to those briefs. Order, May 26, 2015, ECF No. 44. Both parties filed their supplemental briefs on July 1, 2015, and both parties filed their supplemental replies on August 5, 2015. Pl.'s Suppl. Br. in Opp'n to Def.'s Mot. to Dismiss, July 1, 2015, ECF No. 47 ("Pl.'s Suppl. Br. 1"); Def.'s Suppl. Br. in Supp. of Mot. to Dismiss, July 1, 2015, ECF No. 48 ("Def.'s Suppl. Br. 1"); Pl.'s Reply

[8] 19 U.S.C. § 1514 provides, in relevant part:

> [A]ny clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in an electronic transmission, adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to--
>
> (1) the appraised value of merchandise;
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
>
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 of this title or section 1504 of this title;
>
> (6) the refusal to pay a claim for drawback; or
>
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;
>
> shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of Title 28 within the time prescribed by section 2636 of that title.

to Def.'s Suppl. Br., Aug. 5, 2015, ECF No. 52 ("Pl.'s Suppl. Reply 1"); Def.'s Reply to Pl.'s Suppl. Br., Aug. 5, 2015, ECF No. 53 ("Def.'s Suppl. Reply 1"). On October 10, 2015, the court again ordered parties to submit supplemental briefs, directing Hartford to submit a brief and a reply, and the Government to submit a response in between. Order, Oct. 5, 2015, ECF No. 54. Hartford filed its second supplemental brief on November 2, 2015. Pl.'s Second Suppl. Br. in Opp'n to Def.'s Mot. to Dismiss, Nov. 2, 2015, ECF No. 55 ("Pl.'s Suppl. Br. 2"). The Government filed its supplemental response on November 23, 2015. Def.'s Resp. to Pl.'s Suppl. Br. 2, Nov. 23, 2015, ECF No. 58 ("Def.'s Supp. Reply 2"). Hartford filed its supplemental reply on December 7, 2015. Pl.'s Reply to Def.'s Suppl. Reply 2, Aug. 10, 2017, ECF No. 60 ("Pl.'s Supp. Reply 2").

On August 10, 2017, the case was reassigned to a new judge. Order of Reassignment, Aug. 10, 2017, ECF No. 61. Oral argument was held anew on September 26, 2017. Oral Argument, Sept. 26, 2017, ECF No. 70.

JURISDICTION AND STANDARD OF REVIEW

Hartford argues, and the Government disputes, that jurisdiction in this case is proper under 28 U.S.C. § 1581(i)(4). The Court of International Trade, like all federal courts, is one of limited jurisdiction and is "presumed to be 'without jurisdiction' unless 'the contrary appears affirmatively from the record.'" *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (quoting *King Iron Bridge & Mfg. Co. v. Otoe Cty.*, 120 U.S. 225, 226 (1887)). The party invoking jurisdiction must "allege sufficient facts to establish the court's jurisdiction," *DaimlerChrysler*, 442 F.3d at 1318 (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)), and therefore "bears the burden of establishing it." *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). The court must draw all reasonable inferences in favor of the non-movant when deciding a motion to dismiss for lack of jurisdiction. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

DISCUSSION

A. Parties' Arguments

The Government presents the well-settled proposition that jurisdiction under § 1581(i) does not lie when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. Def.'s Mem. at 5; *see Miller & Co. v. United States,* 824

F.2d 961, 963 (Fed. Cir. 1987), *cert. denied,* 484 U.S. 1041 (1988). The Government posits that § 1581(i) was not intended to create new causes of action, nor meant to supersede more specific jurisdictional provisions. Def.'s Mem. at 6.

The Government adds that where a plaintiff attempts to avoid the administrative process required for the invocation of the § 1581(a) jurisdiction, "fairness dictates that only the most extraordinary of circumstances would permit the invocation of jurisdiction under section 1581(i)." Def.'s Mem. at 7 (quoting *Allen Sugar Co. v. Brady*, 13 CIT 107, 110, 706 F. Supp. 49, 52 (1989)). Here, the Government contends, Hartford asserted untimely demands or statute of limitations arguments in two of its underlying Protests. *See* Protest Nos. 1801–12–100011 and 1801–12–100012, filed on February 15, 2012, which cover Tampa entry nos. 032–0318520–6, 032–0318521–4 and 0320319678–1. Hartford thereafter filed two actions contesting the denial of those protests pursuant to 28 U.S.C. § 1581(a). *See* Court Nos. 12–00283 and 12–00286. The Government thus argues that by filing suits on the denied Protests which included the untimely demand/statute of limitations issue, Hartford has already requested that this Court take jurisdiction pursuant to 28 U.S.C. § 1581(a) over the very issue it now seeks to raise in an action under 28 U.S.C. § 1581(i). Def.'s Mem. at 7. Accordingly, the Government argues, Hartford's challenges to Customs' demands, whether on the ground that the bonds contain defects rendering them unenforceable or on the ground that the demands were time-barred, are properly raised in protest pursuant to 19 U.S.C. § 1514(a)(3), and subsequently should be litigated before this Court under 28 U.S.C. § 1581(a). Def.'s Mem. at 8–9. Because the remedy thereunder would not be manifestly inadequate, the Government argues, this case, brought pursuant to § 1581(i), should be dismissed. Def.'s Mem. at 9.

Hartford's primary argument is that a statute of limitations argument cannot be raised in a 28 U.S.C. § 1581(a) action, because it is not contemplated under the statutory scheme. Pl.'s Opp'n at 4. Therefore, per Hartford, relief under § 1581(a) would be manifestly inadequate, such that proceeding under § 1581(i) would be appropriate. Hartford enumerates the seven categories of protestable actions found within 19 U.S.C. § 1514(a), characterizing them as exclusive, and asserts that none defines a surety's right to challenge the government's continued demand of a time-barred claim as a protestable event. Pl.'s Opp'n at 7–8. Hartford further contends that, logically, a statute of limitations argument would not be contemplated under § 1581(a), because it is an affirmative defense rather than an independent cause of action. Pl.'s Opp'n at 9.

Citing *Pac Fung Feather Co. v. United States,* 111 F.3d 114 (Fed. Cir. 1997) and *Gilda Indus., Inc. v. United States,* 446 F.3d 1271 (Fed. Cir. 2006), Hartford contends that § 1581(i) jurisdiction will lie properly if an otherwise permissible protest against Customs' actions will not remedy the alleged harm. Hartford here characterizes its action as a challenge to Customs' demands per se, on the basis that they fell outside of the statutory time period. Pl.'s Opp'n at 11. Per Hartford, protesting against these demands would have been a mere formality, as "[t]he issue had already been effectively decided by the government outside of the protest process as demonstrated in its continued listing of the Demands on the 612 reports[9] after the Demands were time-barred." Pl.'s Opp'n at 11. Hartford thus argues that even if alleged statute of limitations violations were protestable, the remedy acquired upon successfully challenging the denial of that protest under § 1581(a) would be a mere formality, or futile.

Hartford analogizes its action to that of the plaintiff surety in *Old Republic Ins. Co. v. United States,* 10 CIT 589, 645 F. Supp. 943 (1986), wherein the surety claimed that Customs' regulation providing notice to the surety, 19 C.F.R. § 159.12(b) (1980), became a term of the bond contract and that failure to provide this notice constituted a material breach of contract, which discharged the plaintiff's liability under the bond. Pl.'s Opp'n at 13. The Court held that it could exercise jurisdiction over the surety's claims pursuant to § 1581(i), because the surety could not have raised its breach of contract claim under § 1581(a); that claim could instead only be raised as an affirmative defense to an enforcement action under § 1582. *Id.* at 599. Having paid the duties necessary to establish § 1581(a) jurisdiction, however, Customs lost any incentive to bring a collection action, and thus the surety would have lost its ability to argue breach of contract if not for § 1581(i). *Id.*

Hartford also argues that § 1581(i)(4) covers matters of administration and enforcement, under which the allegedly out-of-time demands would fall. Pl.'s Opp'n at 15 (citing *US Shoe v. United States,* 114 F.3d 1564, 1570 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998); *Swisher, Int'l, Inc. v. United States,* 205 F.3d 1358, 1369 (Fed. Cir. 2000)). Citing *Parkdale Int'l, Ltd. v. United States,* 31 CIT 720, 491 F. Supp. 2d 1262 (2007), Hartford contends that jurisdiction should come under § 1581(i)(4) when a matter of administration or enforce-

[9] Each month, the Revenue Division sends each surety a report listing their open bills by importer name. The report, known as the 612 Report, provides the surety with specific entry, bill, and protest information as reflected in [the Automated Commercial System] at the end of the month." Surety Inquiries, U.S. Customs and Border Protection, https://www.cbp.gov/trade/priorityissues/revenue/surety-inquiries (last visited Aug. 31, 2017).

ment is under review, and it is not clear that another provision of § 1581 applies. Hartford argues that is the case here. Pl.'s Opp'n at 15–16.

Hartford's second argument is that Customs' demands for payment, which it characterizes as time-barred, raise constitutional issues, and that § 1581(i) jurisdiction is the appropriate venue through which to raise constitutional arguments. Pl.'s Opp'n at 6, 16; Compl. ¶¶ 41, 43. Hartford cites *Thomson Consumer Elecs., Inc. v. United States,* 247 F.3d 1210 (Fed. Cir. 2001), *reh 'g den. without op.* (Fed. Cir. July 19, 2001), for the proposition that administrative exhaustion, as through a protest, is not required where Customs would not possess the institutional competence to resolve the constitutional issues raised. Pl.'s Opp'n at 17. Hartford also characterizes *Totes-Isotoner Corp. v. United States,* 32 CIT 1172, 580 F. Supp. 2d 1371 (2008), *aff'd*, 594 F.3d 1346 (Fed. Cir. 2010), *cert. denied*, 562 U.S. 830 (2010) as holding that an unconstitutionality argument need not be protested. Pl.'s Opp'n at 17–18.

The Government further notes that Hartford did in fact raise its statute of limitations argument in two of the six protests encompassing entries at issue in this case. Pl.'s Reply at 4.

B. Analysis

At the outset, the court recognizes the general rule that jurisdiction under 28 U.S.C. § 1581(i) "may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available." *Miller*, 824 F.2d at 963; *see also Am. Air Parcel Forwarding v. United States*, 718 F.2d 1546, 1549–51 (Fed. Cir. 1983)*; United States v. Uniroyal, Inc.,* 687 F.2d 467, 69 CCPA 179 (1982).

The Federal Circuit has stated:

> Reviewing 28 U.S.C. Sec. 1581(i), frequently referred to as the residual or "catch-all" jurisdiction provision, the court finds no legislative intent to grant a litigant use of this forum where the litigant has failed to exhaust the avenue of protest and denial before the Customs Service and payment of liquidated duties. In the leading case recently issued by the United States Court of Customs and Patent Appeals, (now the United States Court for the Federal Circuit), the court succinctly stated:
>
> "Nevertheless, the legislative history of the Customs Courts Act of 1980 demonstrates that Congress did not intend the Court of International Trade to have jurisdiction over appeals concerning completed transactions when the appellant had failed to utilize an avenue for effective protest before the Customs Service."

Am. Air Parcel, 718 F.2d at 1549 (quoting with approval *Am. Air Parcel Forwarding Co.*, 5 CIT 8, 10, 557 F. Supp. 605, 607 (1983) (citing *Uniroyal*, 687 F.2d at 471)). "It is judicially apparent that where a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i)." *Id.* (citing *Am. Air. Parcel*, 557 F. Supp. at 607).

Importantly, while, as noted, this court has recognized the "general rule that litigants must exhaust their administrative remedies under other subsections of § 1581 before properly invoking § 1581(i) jurisdiction," *NuFarm Am.'s Inc. v. United States*, 29 CIT 1317, 1328, 398 F. Supp. 2d 1338, 1348 (2005), where the remedy under another subsection of § 1581 would be manifestly inadequate, the court does not require exhaustion and exercises jurisdiction under § 1581(i). *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008).

The court concludes that review under § 1581(a) would not be manifestly inadequate, and thus jurisdiction under § 1581(i) is unavailable to Hartford in this action. The court is persuaded by the Government's argument that Hartford could have, and should have, raised these arguments in its Protests and its § 1581(a) cases contesting the denials thereof. Both parties agree that the court must discern the "true nature of the action" before it in ascertaining where jurisdiction properly lies. Pl.'s Opp'n at 6; Def.'s Reply at 2 (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986)). Here, the true nature of the action is that Hartford "seeks to avoid the payment of the demand." *Hartford Fire*, 544 F.3d at 1293; Pl.'s Reply at 2. Customs' demands to sureties for payment on bonds constitute "charges or exactions" within the context of 19 U.S.C. § 1514(a)(3). Those demands are protestable. *See* 19 U.S.C. § 1514(a); *see also Am. Motorists Ins. Co. v. United States*, 22 CIT 461, 8 F.Supp.2d 874, 877 (1998) (finding, where a surety protested Customs' demands as untimely under the applicable statute of limitations, that jurisdiction was proper under § 1581(a) rather than the residual jurisdictional provision, and noting that Customs' time-barred demand for payment was a wrongful exaction protestable under 19 U.S.C. § 1514(a)(3)); *Hartford Fire*, 544 F.3d at 1293 (holding that all theories of defense which could lead to the cancellation of a Customs charge are protestable under section 1514(a)(3)). Hartford has presented no authority dictating that a statute of limitations argument, though procedurally constituting an affirmative defense in collection actions under 28 U.S.C. § 1582, could not be raised as an argument within a Customs

protest or subsequently before this court pursuant to § 1581(a). For the purposes of a claim raised under § 1581(a), the court construes an untimeliness argument as "merely a theory of defense upon which Customs may grant the relief of cancelling the charge." *Hartford Fire*, 544 F.3d at 1293.

The court accordingly finds unpersuasive Hartford's contention that exhaustion of administrative remedies would have been futile. Pl.'s Opp'n at 11. Generally, "Customs does have broad authority over the administration and forms of bonds, including determining their validity and enforceability and a surety's liability pursuant to the bonds." *Hartford Fire*, 544 F.3d at 1294; *see* 19 U.S.C. §§ 66, 1623. Customs is eminently capable of entertaining and adjudicating an untimeliness argument in the administrative process. Hartford's argument that "the issue had already been effectively decided by the government outside of process as demonstrated in its continued listing of the Demands on the 612 reports after the Demands were time-barred" is unavailing.[10] Pl.'s Opp'n at 11. Accepting that argu-

[10] The court is unpersuaded by Hartford's citations to *Pac Fung*, 111 F.3d 114, and *Gilda*, 446 F.3d 1271. In *Pac Fung*, the importer plaintiffs argued that the Customs Service issued Rules of Origin for Textile and Apparel Products ("Rules"), 60 Fed. Reg. 46,188 (1995) (codified at 19 C.F.R. § 102.21 (1996)), promulgated pursuant to Section 334(b) of the Uruguay Round Agreements Act, Pub.L. No. 103–465, 108 Stat. 4809 (1994) (codified at 19 U.S.C. § 3592(b)), were "arbitrary, capricious, an abuse of discretion, and not in accordance with law," and sued to enjoin the government from enforcing them with regards to the origin determination of its merchandise. 111 F.3d at 115–16. The Federal Circuit held that the importers' option of obtaining a ruling pursuant to 28 U.S.C. § 1581(h), which gives the Court of International Trade "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 . . . or similar matters," would constitute "a mere formality," because Customs promulgation of the Rules had "unmistakably indicated" how the agency would ultimately rule on the origin determination. *Id.* at 116. Thus, the "preordained ruling available to the importers under section 1581(h) would be manifestly inadequate," and consequently "[s]ection 1581(i) was the importers' only available and potentially adequate option." *Id.* at 116. In *Gilda*, meanwhile, the importer plaintiff was subject to a duty imposed pursuant to a decision of the United States Trade Representative, and thus Gilda's challenge was not to a decision by Customs. 446 F.3d at 1276. "Because Customs has no authority to overturn or disregard the Trade Representative's decision, Customs would have no authority to grant relief in a protest action challenging the imposition of the duty." *Id.* Thus the portion of Gilda's arguments concerning termination of the duty regime in question could not be directly protested under 19 U.S.C. § 1514(a), and subsequent review pursuant to 28 U.S.C. § 1581(a) would have proven manifestly inadequate. *Id.* at 1276–77.

In the instant case, and as explained *supra*, Customs has not "unmistakably indicated" how it would rule on Hartford's untimeliness argument merely by virtue of continuing to demand payment. Nor does Customs lack the ability to rule on that issue. Customs' demands to sureties for payment on bonds are protestable pursuant to 19 U.S.C. § 1514(a)(3). Indeed, the very nature of the protest procedure provided by 19 U.S.C. § 1514(a) requires that the aggrieved party contest at least one of Customs' enumerated actions, and permits the party to argue through protest that the action was not in accordance with law. Further, the aggrieved party is entitled to challenge Customs' denial of that protested argument through 28 U.S.C. § 1581(a), whereupon this Court could potentially provide the party's desired remedy.

ment would bring the court to territory wherein any administrative action taken by Customs as part of its relationship with a given surety could be construed as an effective replacement of the protest process altogether, formally prejudicing the aggrieved surety and rendering nugatory 19 U.S.C. § 1514. Relevantly, the Federal Circuit, and this Court, have noted that if jurisdiction under §§ 1581(a) and 1581(i) "were interpreted to overlap, litigants could systematically circumvent the administrative remedies established by the jurisdictional statute." *NuFarm Am.'s*, 398 F. Supp. 2d at 1351 (quoting *St. Paul Fire & Marine Ins. Co. v. United States*, 959 F.2d 960, 963 (Fed. Cir. 1992)). Hartford's assertion that "Customs should have been aware that the statute of limitations had passed, but it continued to issue the Demands nevertheless" does not justify avoidance of raising the untimeliness argument in the Protests. Quite the contrary: that assertion is precisely at home in protest pursuant to 19 U.S.C. § 1514(a) and, subsequently, 28 U.S.C. § 1581(a).[11]

The court thus concludes that Hartford's purported quandary, wherein a surety must choose between electing to protest and sue under § 1581(a) while raising the bond defect argument and deemed liquidation claims, or to wait and be sued under § 1582 while raising the statute of limitations affirmative defense, is illusory.[12] Pl.'s Opp'n at 3–5. Relatedly, the court is unpersuaded by Hartford's apparent assumption that a surety is entitled to raise a statute of limitations argument prior to the expiration of the limitations period.[13] So too

[11] As the Government notes, Hartford could have raised its untimeliness argument to Customs as an additional basis for granting its protests at any time prior to Customs' decision on the protests. Def.'s Suppl. Reply 2 at 5 (citing 19 C.F.R. § 174.28). With regard to the four Minneapolis-St. Paul Protests at issue, Nos. 3501–12–00004/5/6/7, Hartford acknowledged that it could have sought Customs' permission to supplement its timely-filed protests to allege a time barred claim after January 21, 2012. *Id.* (quoting Pl.'s Suppl. Br. 2 at 4 n.2).

[12] Hartford's argument that its situation is analogous to the plaintiff's in *Old Republic*, 645 F. Supp. 943, is therefore unpersuasive.

[13] The court directed parties to file a second round of supplemental briefs, this time in response to a series of specific inquiries outlined by the court. Order, Oct. 5, 2015, ECF No. 54.

Hartford presented a possible situation wherein, immediately following the liquidation of an entry, and the triggering of the six-year statute of limitations running on Customs' time to enforce its claim against the bond for unpaid duties, Customs also demands payment on the bonds, thus triggering the 180 day period in which the surety may file a protest. Pl.'s Suppl. Br. 2 at 3.–4. Per Hartford, this situation poses an issue in that the surety could not contest, in a timely-filed protest, that the statute of limitations has passed when it has not; similarly, the surety could not wait until the passage of that statute of limitations, past the 180-day protest period, in order to protest Customs' demands as time barred, because the right to file a protest would be time-barred on the 181st day. *Id.* Hartford represents this situation as posing a dilemma wherein the surety could not raise its statute of limitations claim within the protest period, as the claim would not yet have accrued, and could raise it in an eventual collection action that falls outside of the statute of limitations, but at the expense of any substantive claims that the surety would wish to raise in opposition to the

does the court find unavailing Hartford's argument that if the court were to conclude that the violation of an applicable statute of limitations could have been protested under 19 U.S.C. § 1514(a) and litigated under 28 U.S.C. § 1581(a), then the same argument would become unavailable to surety defendants in § 1582 enforcement actions. Hartford's view of § 1514 as not encompassing a surety's right "to challenge the government's continued demand of a time-barred claim as a protestable event" is an unreasonably narrow view of that statute. Def.'s Reply at 4. Contrary to Hartford's contention, *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550 (Fed. Cir. 1997), does not stand for the broad proposition that protestable matters must only be raised in protests, and not as affirmative defenses. In *Cherry Hill*, the Federal Circuit narrowly concluded that the deemed liquidation at issue was "final and conclusive," against all parties, because the importer or surety had never protested the deemed liquidation. *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1236 (Fed. Cir. 2007). The Federal Circuit did not hold that an importer under *Cherry Hill* would be barred from protesting a deemed liquidation under the statutory protest scheme of § 1514. *Id.* at 1236–37. Thus *Cherry Hill* did not, as Hartford argues, produce a rule whereby matters protested under § 1514(a) are thus foreclosed from being raised in a collection action under § 1582. This Court has observed that: "[T]he rule found in both law and custom remains that, in a case brought by the Government to collect under a contract of insurance, the surety is not prevented from raising defenses to defeat the Government's claims, even those that would be protestable matters if raised by or on behalf of an importer." *United States v. Am. Home Assurance Co.*, 151 F. Supp. 3d 1328, 1349 (2015); *see id.* n.21 ("The new rule expressed in *Hartford* [544 F.3d 1289], however, did not address an action brought by the Government seeking to enforce a contract of insurance against a surety; a case that has an entirely different jurisdictional basis. *See* 28 U.S.C. 1582(2).").

The court turns next to Hartford's argument that the constitutional claims it raises in its complaint cannot be adjudicated. Hartford's arguments are unavailing. The inclusion of a constitutional claim of some nature does not necessarily render jurisdiction under 28 U.S.C. § 1581(a) unavailable or inadequate. If a constitutional claim may be disposed of on non-constitutional grounds, a litigant is required to exhaust its administrative remedies. *NuFarm Am.'s*, 398 F. Supp. 2d

charge or exaction pursuant to 19 U.S.C. § 1514(a). *Id.* at 4–5. The proper remedy to this procedural conundrum, argues Hartford, is for the surety to argue the post-protest period claim, here the statute of limitations, under § 1581(i). *Id.* at 5–8 (citing *St. Paul Fire & Marine Ins. v. United States,* 959 F.2d 960 (Fed. Cir. 1992)).

at 1349–50 (citing *Mont. Chapter of Ass'n of Civ. Tech. Inc. v. Young*, 514 F.2d 1165, 1167–68 (9th Cir. 1975)). Thus, the existence of a constitutional claim does not obviate the exhaustion requirement. *Id.* (citing *Mont,*, 514 F.2d at 1167). Here, as the parties acknowledged at oral argument, Hartford could have raised its untimeliness arguments in protest under 19 U.S.C. § 1514(a), and did so in two instances. Indeed, even had Hartford foregone raising the untimeliness argument in its Protests, the trade laws permit such an argument to be raised before this court under § 1581(a). *See* 28 U.S.C. § 2638.[14] Concluding otherwise would allow litigants to constructively circumvent the protest regime under 19 U.S.C. § 1514 and subsequent litigation under 28 U.S.C. § 1581(a). *Am. Air Parcel*, 718 F.2d at 1550. As the Federal Circuit has recognized, the "the traditional avenue under 28 U.S.C. § 1581(a) was not intended to be so easily circumvented, whereby it would become merely a matter of election by the litigant." *Id.*

CONCLUSION

In summary, because Hartford's untimeliness argument could be raised both in protest under 19 U.S.C. § 1514(a) and before this court under 28 U.S.C. § 1581(a), and the desired relief of cancelling Customs' demands may ultimately be granted, jurisdiction under § 1581(a) is not manifestly inadequate. Jurisdiction under § 1581(i) is thus unavailable to Hartford. The Government's motion to dismiss accordingly must be granted.[15]

SO ORDERED

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[14] 28 U.S.C. § 2638 provides:

> In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground--
>
> (1) applies to the same merchandise that was the subject of the protest; and
>
> (2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

[15] The court acknowledges the participation, by brief and oral argument, of counsel for amici curiae Monterey Mushrooms, Inc., Sioux Honey Association, Adee Honey Farms, The Garlic Company, and Catahoula Crawfish, Inc. Amici argue that Hartford's reckoning of the relevant statute of limitations is incorrect, and that, based on the version of 19 U.S.C. § 1505 in effect since the statute was amended in 1993, the limitations period on Customs' claims against Hartford's bonds actually began to run on August 7 and September 18, 2011. These dates are 30 days after Customs issued bills to the relevant importers. Therefore, amici argue, the limitations period on those claims would end on the same dates six years later, in 2017, and the court cannot issue the declaratory judgment sought by Hartford, namely, that Customs' bond claims became barred on February 20, 2012. Because the court disposes of this matter due to lack of subject matter jurisdiction, it need not reach the issue identified, nor the arguments proffered, by amici.

Dated: October 10, 2017
New York, New York

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 17–140

UNITED STATES, Plaintiff, v. JUAN CARLOS CHAVEZ, AND CHAVEZ IMPORT & EXPORT, INC., Defendants.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00104

[Motion for default judgment on customs penalty action granted.]

Dated: October 10, 2017

Albert S. Iarossi, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Chad E. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel was *Adam M. Cornette*, Office of the Chief Counsel, U.S. Customs and Border Protection.

OPINION

Musgrave, Senior Judge:

As previously alluded, *see* 40 CIT ___, Slip Op. 16–26 (Mar. 25, 2016), ECF No. 43, the plaintiff commenced this case against defendants Juan Carlos Chavez ("Chavez") and Chavez Import & Export, Inc. ("CIE") pursuant to 19 U.S.C. §1592 and 28 U.S.C. §1582 seeking collection of unpaid duties totaling US$40,288.82, plus penalties totaling US$131,358.22, plus interest and costs, for certain misrepresentations on entry documents, as further described below. Slip Op. 16–26 granted summary judgment in favor of the plaintiff for the portion of such items claimed against Chavez,[1] and the plaintiff now moves for entry of default judgment against CIE.

[1] By way of further brief background thereon, Chavez's answer to the complaint, ECF No. 18 (Apr. 22, 2014), denied the substance of the plaintiff's averments. About a year later, the plaintiff moved, *inter alia*, for summary judgment against Chavez, ECF No. 22 (May 4, 2015), and Chavez, through counsel, was then granted three unopposed motions for extension of time to respond to the motion for summary judgment, after which certain circumstances compelled counsel to move to withdraw. *See* ECF No. 33 (Sep. 1, 2015). Chavez was then provided with duplicate copies of the plaintiff's motion for summary judgment, ECF No. 38 (Sep. 29, 2015), and ordered on January 19, 2016 to show cause why judgment should not be entered in favor of the plaintiff, ECF No. 42 (Jan. 19, 2016). No response or other contact from Chavez having been received within the time proscribed, summary judgment entered in favor of the plaintiff. Slip Op. 16–26, ECF No. 43.

I. *Background*

To date, the corporate defendant CIE has remained unrepresented by counsel, has not answered the complaint, and has had default entered against it. ECF No. 23 (May 5, 2015). *See* USCIT Rule 55(a) ("[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as prescribed by these rules . . . the clerk shall enter the party's default"). The papers on the current motion for judgment state that CIE was a Florida corporation prior to being administratively dissolved by the Florida Secretary of State on September 26, 2008, for failing to file an annual report. *See* April 12, 2012 Complaint (Compl.) at ¶ 5; ECF No. 4. CIE had two shareholders, directors, and officers from the time of its incorporation until the time of its dissolution: Augusto E. Chavez (President) and co-defendant Juan Carlos Chavez (Vice President and Secretary). Compl. ¶ 7.

The plaintiff further avers: that from June 24, 2005 to October 2, 2006, CIE, as importer of record, caused to be entered or introduced ten entries of "Soft Dairy Express" and "White Cheese" by means of entry documents filed with U.S. Customs and Border Protection (CBP); that the entry numbers for these shipments were APJ-00061195, AWB-00044747, AWB-00046304, AWB-00060297, AWB-00060305, AWB-00068779, AWB-00069173, AWB-00069934, AWB-00070965, and AWB-00073258; that on the entry forms for their respective entries CIE falsely classified the "Soft Dairy Express" under HTSUS 0405.20.4000, which applies to dairy spreads: butter substitutes, whether in liquid or solid state, other than those containing over 45 percent by weight of butterfat; that on the entry forms for their respective entries, CIE falsely classified the "White Cheese" under HTSUS 0406.90.9900, which applies to cheeses and curds that do not contain cow's milk; that for some entries, in addition, the incorrect HTSUS classifications were preceded by the letter "E", which provides for duty-free treatment under the Caribbean Basin Economic Recovery Act (CBERA) (Pub. L. 98–67); that the "Soft Dairy Express" should have been classified under HTSUS 1901.90.4300, which applies to certain dairy products containing over 10 percent by weight of milk solids; that the "White Cheese" should have been classified under HTSUS 0406.90.9700, which applies to cheeses and curds that do contain cow's milk; that had the "Soft Dairy Express" and "White Cheese" been properly classified under HTSUS 1901.90.4300 and HTSUS 0406.90.9700, they would have been subject to additional duties under HTSUS subheadings 9904.04 and 9904.06; that neither of the correct classifications qualified for duty-free treatment under the CBERA; that the invoices and entry docu-

ments for the entries at issue did not provide meaningful descriptions of the products sufficient to correctly classify the merchandise; that, rather, it was only through laboratory analyses conducted by CBP that the correct HTSUS classifications could be determined; that some of the entries at issue also contained false valuations, allowing them to be processed through informal entries without surety bonds; that the loss of revenue from misclassifying CIE's entries was $53,263.54; that because three entries were liquidated with rate advances totaling $8,403.57, and because four entries were covered by bonds for which the insurer paid $13,344.92, the duties still owed are $31,505.15; that the domestic value of the merchandise that was the subject of the false statements, acts and/or omissions by CIE was $105,916.50; that the false statements, acts, and/or omissions described above were material because they influenced CBP's collection of duties; that until CBP discovered the false statements, defendants were depriving the United States of duties lawfully owed; that CIE failed to ensure that the HTSUS classifications were complete and accurate; that in March 2010, the United States issued an amended pre-penalty notice and demand for duties and an amended penalty notice to CIE regarding the entries for which CIE was the importer of record; that Mr. Juan Carlos Chavez, CIE's Vice President and Secretary (and co-defendant in this case) received these notices on behalf of CIE at his then-current address in North Brunswick, New Jersey; that on April 14, 2010, a waiver of the statute of limitations was executed with respect to the entries for which CIE was the importer of record, which waiver indicated that Mr. Chavez, acting in his "individual and personal capacity, and also on behalf of Chavez Import & Export, Inc.", would "not assert any statutes of limitations defense in any action brought by the United States Government" for two years beginning from the date of execution; that Mr. Chavez and a CBP official signed the waiver; that CBP did not receive any written notice from CIE, pursuant to Fla. Stat. §607.1406, informing CBP of any claims that CBP might be entitled to assert against CIE; that CIE also did not publish or file a notice of dissolution, pursuant to Fla. Stat. §607.1407, in order to address claims that were known to it; and that, accordingly, there is no time limit or statute of limitations under Florida law that would prevent this proceeding against CIE. *See generally* Complaint, ECF No. 4 (Apr. 12, 2012).

II. *Discussion*

Jurisdiction here over this penalty action is conferred by 28 U.S.C. §1582(1). The court's Rules provide that after entry of default, if "the plaintiff's claim is for a sum certain or for a sum that can be made

certain by computation, the court -- on the plaintiff's request with an affidavit showing the amount due -- must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing." USCIT R. 55(b). However, because "a party in default does not admit mere conclusions of law", the question "to consider [is] whether the unchallenged facts constitute a legitimate cause of action". 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* §2688, at 63 (3d ed. 1998). Towards that end, all "well-pled" facts in the complaint are taken as true, *e.g., United States v. Callanish Ltd.*, 34 CIT 1423, 1426 (2010), but consideration of matters outside the complaint are permissible whenever needed to "determine the amount of damages or other relief . . . establish the truth of an allegation by evidence; or . . . investigate any other matter." USCIT R. 55(b).[2]

Pursuant to 19 U.S.C. §1592, it is unlawful for any person to introduce merchandise into the United States by means of a material false statement or document, or a material omission evidencing fraud, gross negligence, or negligence. 19 U.S.C. §1592(a)(1); *United States v. Jac Natori Co., Ltd.*, 108 F.3d 295, 298 (Fed. Cir. 1997). A statement or document is "material" if it has "the tendency to influence Customs' decision in assessing duties." *United States v. Thorson Chemical Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190, 1196 (1992); *see also* 19 C.F.R. Pt. 171, App. B(B) ("[a] document, statement, act, or omission is material if it has the natural tendency to influence . . . a Customs action regarding the classification, appraisement, or admissibility of merchandise[,] . . . determination of an importer's liability for duty[,] . . . [or] determination as to the source, origin, or quality of merchandise").

The plaintiff averments, unchallenged, constitute a legitimate cause of action. The level of culpability asserted in this case is negligence. *See* 19 U.S.C. §1592(c) (establishing penalties at different culpability levels). To prove negligence, the government need only establish the false and material act or omission constituting the violation, and the burden then shifts to the alleged violator to prove that the act or omission did not occur as a result of negligence. 19 U.S.C. §1592(e)(4). The plaintiff's complaint satisfies its burden by averring that CIE's classifications of the ten entries were false in light

[2] "While the rule 'permits the [trial] court to conduct a hearing to determine damages, such a hearing is not mandatory.'" *United States v. Freight Forwarder International, Inc.*, 39 CIT __, ___, 44 F. Supp. 3d 1359, 1362 (2015), quoting (and bracketing) *Cement & Concrete Workers District Council Welfare Fund v. Metro Foundation Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012).

of the laboratory analyses conducted by CBP. *See* Compl. ¶18. The complaint further alleges that the fat content of the "Soft Dairy Express" as determined by CBP rendered it inapplicable for the classification chosen by CIE (*id*. ¶¶ 11, 14), and that the "White Cheese" was actually made from cow's milk, as determined and further alleged by CBP, and was falsely classified by CIE under a tariff provision for cheese not made from cow's milk (*see id*. ¶¶ 12, 15). In addition, for some of the entries, the incorrect classifications were preceded by the prefix "E" to enable them to receive duty-free treatment under the CBERA, and had the correct classifications been used there would have been no entitlement to this duty-free treatment. *Id*. ¶¶ 13, 17.

Although the United States need not be deprived of a portion of a lawful duty in order for a false statement to be considered "material," *see* 19 U.S.C. §1592(a), a false statement that results in such deprivation, which is allegedly the case at bar, is, *a fortiori*, "material." *See, e.g., United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1344 (Fed. Cir. 2009); *United States v. Country Flavor Corp.*, 36 CIT ___, ___, 825 F. Supp. 2d 1296, 1302 (2012). *Cf. United States v. Active Frontier International, Inc.*, 36 CIT ___, ___, 867 F. Supp. 2d 1312, 1316–17 (2012) (discussing non-binding definition of "material" in 19 C.F.R. Part 171, App. B(B)).

Once the government shows materiality and falsity, the burden shifts to CIE to prove that the acts or omissions did not occur as a result of negligence. *See* 19 U.S.C. §1592(e)(4); *United States v. Matthews*, 31 CIT 2075, 2081, 533 F. Supp. 2d 1307, 1312 (2007). The plaintiff contends that in order to do so, CIE must show that the statements did not result from the "failure to exercise reasonable care and competence . . . to ensure that statements made and information provided . . . are complete and accurate" and to prove it exercised reasonable care, CIE must show that it took "measures that will lead to and assure the preparation of accurate documentation" Pl's Mot. at 7, referencing 19 C.F.R. Pt. 171, App. B(C)(1)&(D)(6).

CIE has not appeared in this case or responded to the government's complaint to challenge such recitation. There is, therefore, no claim before the court that CIE exercised "reasonable care and competence" to ensure the accuracy of the classifications for the entries at issue in this case. CIE has offered neither evidence of reasonable care nor other standard of negligence. Nor, the plaintiff asserts, does the government have any reason to believe that CIE would be able to meet its burden to demonstrate that it took steps to ensure the accuracy of the classifications.

And despite CIE's dissolution, claims against CIE are permitted under Florida law. *See* Fla. Stat. §607.1405(2)(e). Because the allegations that CIE violated 19 U.S.C. §1592(a) with respect to the entries at issue in this case have not been challenged, the court must conclude CIE liable to the United States for the actual loss of duties on those entries. *See* 19 U.S.C. §1592(d) ("if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed").

The plaintiff avers the actual loss of revenue from CIE's shipments as $31,505.15. Compl. ¶ 31; Pino Decl. ¶ 3. In addition to the lost revenue, the plaintiff moves that CIE be adjudicated liable for a civil penalty based on negligence in the amount of $105,916.50, which is alleged to be the domestic value of the merchandise that was the subject of the false statements, acts, and/or omissions by CIE.[3] The plaintiff also claims entitlement from CIE for pre-judgment interest[4] on the amount of unpaid duties, post-judgment interest on both the amount of unpaid duties and the civil penalty, and costs.

There does not appear any reason on this record to disallow all or some of such items. Pre-judgment interest accrues during any delay in payment after a demand for payment has been made giving proper notification of liability. *See United States v. Reul*, 959 F.2d 1572, 1577 (Fed. Cir. 1992); *Insurance Company of North America v. United States*, 951 F.2d 1244, 1246 (Fed. Cir. 1991). In this case, the court concurs that the appropriate date for the commencement of pre-judgment interest is March 23, 2010, the date of the Amended CBP Form 5955A, Notice of Penalty, allegedly transmitted to CIE, and attached to the plaintiff's memorandum as Exhibit B. *See United States v. Monza Automobili*, 12 CIT 239, 240, 683 F. Supp. 818, 820

[3] The plaintiff explains that the penalty for negligence that affects the assessment of duties is "the lesser of -- (i) the domestic value of the merchandise, or (ii) two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. §1592(c)(3)(A). In this case, two times the original loss of revenue equaled $106,527.08, and that amount was higher than the domestic value of the merchandise, which was calculated to be $105,916.50. Pl's Mem. at 8, referencing Compl. ¶¶ 31, 38; Pino Decl. ¶ 4.

[4] Pre-judgment interest provides a mechanism to fairly compensate a party for its inability to use monies owed. *West Virginia v. United States*, 479 U.S. 305, 310–11 & n.2 (1987); *United States v. Ford Motor Co.*, 31 CIT 1178, 1181 (2007) ("the long-established rule in the [f]ederal [c]ourts permits the United States to recover interest on money due to the government even in the absence of any statutory authorization for an award of pre-judgment interest"); *United States v. Millennium Lumber Distribution Co.*, 37 CIT __, ___, 887 F. Supp. 2d 1369, 1384 (2013) ("equity compels an award of prejudgment interest," otherwise "the [g]overnment here will not be made whole"). The rationale for awarding prejudgment interest is that "[i]t would be inequitable and unfair for the government to make an interest-free loan of this sum from the date of final demand to the date of judgment." *United States v. Imperial Food Imports*, 834 F.2d 1013, 1016 (Fed. Cir. 1987).

(1988). Further, the plaintiff appropriately demarcates that the government is not here seeking pre-judgment interest on the penalty amount but seeks pre-judgment interest on unpaid duties only. *See United States v. National Semiconductor Corporation*, 547 F.3d 1364, 1369–70 (Fed. Cir. 2008).

The plaintiff also seeks mandatory post-judgment interest pursuant to 28 U.S.C. §1961. That provision generally applies to district court judgments, and this Article III court has employed it as a basis for awarding post-judgment interest. *See United States v. Golden Gate Petroleum Co.*, 30 CIT 174, 183 n.9 (2006). And unlike pre-judgment interest, post-judgment interest on the total amount for which CIE is liable, including the civil penalty, is lawful. *See, e.g., Freight Forwarder International, supra*, 39 CIT at ___, 44 F. Supp. 3d at 1365–66.

Finally, the plaintiff seeks reimbursement of its costs pursuant to USCIT R. 54(d)(1), which provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs -- other than attorney's fees -- should be allowed to the prevailing party." That rule parallels Federal Rule of Civil Procedure 54(d), which creates a presumption that the prevailing party is entitled to costs. *See Neal & Co. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997) ("[c]ourts following [Federal Rule of Civil Procedure] 54(d)(1) have acknowledged in its language a presumption in favor of costs to the prevailing party").

III. *Conclusion*

In accordance with the foregoing, the papers before the court persuade that default judgment in favor of the plaintiff against Chavez Import & Export, Inc. for the unpaid duties, penalty, interest, and cost items discussed above is appropriate. A separate order to that effect will be entered on the docket.

Dated: October 10, 2017
New York, New York

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

Slip Op. 17–141

UNITED STATES, Plaintiff, v. STERLING FOOTWEAR, INC., ET AL., Defendants.

Before: Mark A. Barnett, Judge
Court No. 12–00193

[Defendant Alex Ryan Ng's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment as to Alex Ryan Ng is denied, and Plaintiff's motion for summary judgment as to Sterling Footwear, Inc. and Ng Branding, LLC is granted in part and denied in part.]

Dated: October 12, 2017

Mikki Cottet, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Plaintiff. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Meredith A.* Johnson, Attorney, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, Long Beach, CA.

Thomas Andrew Fasel, Fasel Law, of Newport Beach, CA, argued for Defendants.

OPINION AND ORDER

Barnett, Judge:

The United States of America ("Plaintiff" or the "Government") sued Sterling Footwear, Inc. ("Sterling"), Alex Ryan Ng ("Ng"), and Ng Branding, LLC ("Ng Branding") (collectively, "Defendants"), to recover unpaid duties and a monetary penalty pursuant to section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012),[1] and interest pursuant to 19 U.S.C. § 1505, on 337 entries of footwear it contends Sterling incorrectly classified as "rubber tennis shoes" pursuant to subheading 6402.91.40 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] *See generally* Compl., ECF No. 2. Ng seeks summary judgment as to his personal liability. Def. Alex Ng's Mot. for Summ. J. and Def. Alex Ng's Mem. of Law and Points of

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions o f Title 19 of the U.S. Code, 2012 edition, which are the same in all relevant respects to the versions in effect when the entries were made.

[2] HTSUS 6402.91.40 covers, in pertinent part:

> Other footwear with outer soles and uppers of rubber or plastics:
>
> Covering the ankle:
>
> Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics except [] footwear having a foxing or a foxing-like band applied or molded at the sole and overlapping the upper [. . . .].....6%

"A foxing is a strip of material [that is] separate from the sole and upper, that secures the joint where the upper and sole meet." U.S. Customs and Border Protection, *What Every Member of the Trade Community Should Know About: Footwear, An Informed Compliance Publication*, at 14 (April 2012). "A foxing-like band has the same or nearly the same

Authorities in Supp. of Mot. for Summ. J. ("Ng's MSJ"), ECF No. 53.[3] The Government cross-moves for summary judgment against all Defendants. Pl.'s Cross-Mot. for Summ. J. Against Def. Alex Ng and Mot. for Summ. J. Against Defs. Sterling Footwear, Inc. and Ng Branding, LLC ("Pl.'s XMSJ"), ECF No. 62. The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1582. For the reasons discussed below, Ng's motion for summary judgment will be denied; the Government's cross-motion for summary judgment against Ng will be denied; and the Government's motion for summary judgment against Sterling and Ng Branding will be granted in part and denied in part.

BACKGROUND

I. Material Facts Not Genuinely in Dispute

Pursuant to U.S. Court of International Trade ("USCIT") Rules 56(c)(1)(A) and 56.3(a), movants are to present material facts as short and concise statements, in numbered paragraphs, with citations to "particular parts of materials in the record" as support. *See* USCIT Rule 56.3(a)("factual positions described in Rule 56(c)(1)(A) must be annexed to the motion in a separate, short and concise statement, in numbered paragraphs"). In responsive papers, the opponent "must include correspondingly numbered paragraphs responding to the numbered paragraphs in the statement of the movant." USCIT Rule 56.3(b). "If a party fails to properly . . . address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion." USCIT Rule 56(e)(2).

Parties submitted separate statements of undisputed material facts with their respective motions and responses to the opposing party's statements. *See* Def. Alex Ng's Statement of Mat. Facts Not in Dispute Pursuant to USCIT [Rule] 56.3 ("DSOF"), ECF No. 53–1; Pl.'s Resp. to Def. Alex Ng's Rule 56.3 Statement ("Pl.'s Resp. to DSOF"), ECF No. 64; Pl.'s Rule 56.3 Statement ("PSOF"), ECF No. 63; Defs. Sterling Footwear, Inc., Alex Ryan Ng and Ng Branding, LLC's Joint Resp. to Pl.'s USCIT [Rule] 56.3 Statement ("Defs.' Resp. to PSOF"), ECF No. 84–3. Upon review of Parties' facts (and supporting

appearance, qualities, or characteristics as a foxing." *Id.* However, a foxing-like band "does not have to be a separate component and is often part of the unit-molded sole. A foxing-like band must be applied or molded at the sole, overlap the upper, and substantially encircle the entire shoe." *Id.*; *see also* Pl.'s XMSJ at 4 n.3 (quoting the definition of "foxing" from an earlier edition of Customs' Informed Compliance Publication).

[3] Ng's "motion" consisted of a table of contents and table of authorities. Ng subsequently filed a formal motion. Def. Alex Ng's Mot. for Summ. J., ECF No. 96.

exhibits),[4] the court finds the following material facts not genuinely disputed.[5]

A. Sterling

On April 23, 2007, Ng incorporated Sterling, an importer and wholesaler of footwear, in the State of California. PSOF ¶¶ 1, 5; Defs.' Resp. to PSOF ¶¶ 1, 5; *see also* PSOF ¶ 11; Defs.' Resp. to PSOF ¶ 11 (Ng created and founded Sterling). Sterling began importing footwear on July 17, 2007. PSOF ¶ 50; Defs.' Resp. to PSOF ¶ 50; Pl.'s Ex. 1 (Decl. of Benjamin L. Whitney) ("Whitney Decl."), ECF No. 62–2, Attach. A (Letter from Benjamin Whitney, Import Specialist, to Jonathan Erece, Supervisory Import Specialist, regarding a proposed penalty for Sterling) (Dec. 28, 2009) ("Proposed Penalty Letter") at 2, ECF No. 62–3 (providing Sterling's importer of record number). From July 2007 to October 2009, Sterling made 363 entries of footwear that entered the United States at the Los Angeles/Long Island Beach seaport and the Los Angeles International Airport. PSOF ¶ 51; Defs.' Resp. to PSOF ¶ 51.

Sterling imported and sold several types of shoes, including "flip flops, sandals, heels, boots, and sneakers (high tops and low tops), made from a variety of textiles, leathers, rubber, or combination of materials." PSOF ¶ 35; Defs.' Resp. to PSOF ¶ 35; *see also* Pl.'s Ex. 9, ECF Nos. 93–5, 93–6 (photographs of samples of Sterling's 2009 footwear); Pl.'s Physical Ex. 1, ECF No. 95 (physical samples of Sterling's 2009 footwear). Sterling created its own footwear designs, which were manufactured in Vietnam to Sterling's specifications. PSOF ¶ 36; Defs.' Resp. to PSOF ¶ 36. Sterling sold its footwear to Philip Simon Design, Inc. ("Philip Simon"), using the brand name "Ed Hardy." PSOF ¶ 37; Defs.' Resp. to PSOF ¶ 37. Philip Simon placed orders with Sterling for "specific footwear style numbers," which corresponded to specific designs, colors, and material. PSOF ¶ 38; Defs.' Resp. to PSOF ¶ 38. Before satisfying purchase orders, Sterling had samples made "to ensure that its footwear was manufactured to its specifications and met its quality control standards." PSOF ¶ 39; Defs.' Resp. to PSOF ¶ 39.

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[4] Many of the material facts are taken from Plaintiff's statement of facts and Defendants' response thereto. Ng's statement of facts consisted almost entirely of *immaterial* facts regarding actions Ng asserts he did not take or facts that are otherwise disputed. *See generally* DSOF.

[5] Citations are provided to the relevant paragraph number of the undisputed facts and response; internal citations generally have been omitted. Citations to the record are provided when a fact is admitted based on lack of knowledge, or to the extent the fact is supported by the proponent's cited documents. Citations to the record are also provided when a fact, though not admitted by both Parties, is uncontroverted by record evidence.

Ng was Sterling's president, chief executive officer, and majority shareholder (owning at least 95% of the shares). PSOF ¶¶ 2, 13; Defs.' Resp. to PSOF ¶¶ 2, 13; *see also* DSOF ¶¶ 1–2; Pl.'s Resp. to DSOF ¶¶ 1–2; Ng's Ex. D (deposition of Ty V. Ngo) ("Ngo Dep.") at 38:22–39:14, ECF No. 53–3 (testifying to a five percent ownership interest in Sterling).[6] Ng controlled Sterling' finances, the distribution of its dividends, and the sale of its assets. PSOF ¶ 15; Defs.' Resp. to PSOF ¶ 15; *see also* PSOF ¶¶ 12, 21(1) (Ng determined who owned Sterling's shares); Defs.' Resp. to PSOF ¶¶ 12, 21(1). Ng was the "ultimate decision-maker" for certain of Sterling's business decisions, including the creation of its production department, which was responsible for handling entries; hiring and promoting employees, and delegating authority thereto; and the design, development, and manufacture of Sterling's imported footwear. PSOF ¶ 21(2),(4),(6); Defs.' Resp. to PSOF ¶¶ 21(2),(4),(6); *see also* PSOF ¶ 31; Defs.' Resp. to PSOF ¶ 31 ("Ng actively participated in" the design and manufacture of Sterling's footwear); DSOF ¶ 88; Pl.'s Resp. to DSOF ¶ 88 ("[] Ng set up a production department at Sterling's offices."); Ng's Ex. Y (Decl. of Alex Ng) ("Ng Decl.") ¶ 7, ECF No. 53–7 (Ng's "primary responsibilit[ies]" consisted of footwear design, "marketing, sales and establishing relationships with Chinese manufactur[ers]").

In August 2007, Ng hired Janet Huynh ("Ms. Huynh") "to handle production, i.e., to work with Sterling's customs brokers to enter Sterling's footwear." PSOF ¶ 24; Defs.' Resp. to PSOF ¶ 24. Three months later, Ms. Huynh became Sterling's general manager; she subsequently hired Nancy Ng[7] "to oversee Sterling's entries and to work with Sterling's customs brokers." PSOF ¶ 41; Defs.' Resp. to PSOF ¶ 41; DSOF ¶ 111; Pl.'s Resp. to DSOF ¶ 111; *see also* DSOF ¶ 96; Pl.'s Resp. to DSOF ¶ 96 (Ms. Huynh and Ms. Ng "were the only members of Sterling's production department"). Ms. Ng had prior experience working for a customs broker and filing entries on clients' behalf. PSOF ¶ 42; Defs.' Resp. to PSOF ¶ 42.

B. The Subject Entries

Plaintiff asserts that, of Sterling's 363 footwear entries, 337 entries, which are at issue here, asserted classification pursuant to HTSUS 6402.91.40. PSOF ¶¶ 52, 56. USCIT Rule 56(c)(1)(A) provides that "[a] party asserting that a fact cannot be . . . genuinely disputed must support the assertion by [] citing to particular parts of materials in the record . . . ." In accordance with Rule 56(c)(1)(A), Plaintiff offers

[6] Mr. Ngo is Ng's brother; at some time Ng changed his last name from Ngo to Ng. Ngo Dep. at 10:2–9.

[7] Ms. Ng is not related to Defendant Ng. Ngo Dep. at 10:14–15; Ng Decl. ¶ 4.

several pieces of evidence supporting its assertion that Sterling asserted classification pursuant to HTSUS 6402.91.40 for the 337 entries. *See* Whitney Decl. ¶¶ 19–71 (discussing CBP's examination of certain of Sterling's entries); Whitney Decl. ¶ 90 (averring that CBP reviewed all of Sterling's entries); Whitney Decl. ¶¶ 91–94 (discussing CBP's processing of rate advances for all entries that had not yet liquidated or were within 90 days of liquidation, and CBP's examination of already-liquidated entries); Whitney Decl. ¶ 112 (averring the amount of unpaid duties stemming from the subject 337 entries); Proposed Penalty Letter at 1; Proposed Penalty Letter, Ex. D, ECF No. 62–3 (detailing a rate advance for one entry); Proposed Penalty Letter, Ex. M, ECF No. 62–4 (detailing rate advances for 186 entries); Proposed Penalty Letter, Ex. S, ECF No. 62–6 (summarizing the 337 subject entries).

Defendants assert, without citing any evidentiary support, that Sterling entered "certain footwear" pursuant to HTSUS 6402.91.40. Defs.' Resp. to PSOF ¶ 56. "If a party fails to . . . properly address another party's assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; [or] (2) consider the fact undisputed for purposes of the motion." USCIT Rule 56(e)(1)-(2).

At oral argument, the court endeavored to ascertain whether there was a genuine dispute about the classification asserted in the subject entry summaries, which were not made part of the summary judgment record. Plaintiff informed the court that the entry summaries had been produced during discovery and Defendants had not disputed their accuracy. Oral Arg. 5:30–6:02.[8] Defendants asserted that "there might be a dispute" about the entry summaries, but that defense counsel had not reviewed them. Oral Arg. 4:25–4:40, 18:49–18:56. When pressed for a legal basis for disputing Plaintiff's assertion regarding classification, Defendants could not provide one. Oral Arg. 21:2421:44, 37:05–37:43. Because Defendants failed to properly address Plaintiff's factual assertion on paper, and failed again when given the opportunity to do so at oral argument, the court considers it undisputed, for purposes of summary judgment, that the 337 subject entries asserted classification pursuant to HTSUS 6402.91.40. *See* USCIT Rule 56(e)(2).

Plaintiff further asserts that Sterling described the footwear as "rubber tennis shoes." PSOF ¶ 55 (citing Whitney Decl. ¶ 79, and Proposed Penalty Letter). Defendants again qualify their response, asserting that Sterling described "some of its footwear as 'rubber tennis shoes.'" Defs.' Resp. to PSOF ¶ 55. Defendants' response, which

[8] Citations to the Oral Argument indicate time stamps from the audio recording.

implies that not all entries described the footwear as "rubber tennis shoes," lacks reference to any evidentiary support.[9] Accordingly, the court considers it undisputed for purposes of summary judgment that Sterling described the footwear as "rubber tennis shoes."

In fact, the subject entries consisted of "athletic shoes, slip on shoes, boots, and other styles of shoes that had uppers made up of [] canvas, leather, plastic, or combinations of materials, and in most cases had foxing or foxing-like bands." PSOF ¶ 57; Pl.'s Physical Ex. 1; Pl.'s Ex. 9.[10] The total entered value of the merchandise in the subject entries was $12,298,695.00. Proposed Penalty Letter, Ex. S; *see also* PSOF ¶ 53; Defs.' Resp. to PSOF ¶ 53 (the total entered value exceeded $12,000,000).

C. Customs' Investigation of Sterling's Entries

From May to August 2009, Customs import specialists examined samples of footwear from Sterling's entries. PSOF ¶ 58; Defs.' Resp. to PSOF ¶ 58; Whitney Decl. ¶ 19. On June 4, 2009, Customs issued to Sterling a notice of action covering one entry classified pursuant to HTSUS 6402.91.40, but which consisted of "tennis shoe[s]" with a "textile upper, rubber sole and foxing band." PSOF ¶¶ 65–66; Defs.' Resp. to PSOF ¶¶ 65–66; Proposed Penalty Letter, Ex. D. On July 9, 2009, Customs issued to Sterling a second notice of action covering four additional entries. PSOF ¶ 69; Defs.' Resp. to PSOF ¶ 69; Whitney Decl. ¶ 31; Proposed Penalty Letter, Ex. E. Ng signed and tendered a check for the rate-advanced[11] duties for those four entries. PSOF ¶ 70; Defs.' Resp. to PSOF ¶ 70.

On July 29, 2009, Customs officials met with Sterling representatives, Ms. Huynh and Ms. Ng, and Sterling's customs broker, Scott Kauffman, of Seattle Logistics, Inc. ("Seattle Logistics"). PSOF ¶¶ 75–76; Defs.' Resp. to PSOF ¶¶ 75–76. At the meeting, Customs officials "(1) displayed samples obtained from Sterling's entries; (2)

[9] Defendants also object to Plaintiff's failure to identify the 337 entries. Defs.' Resp. to PSOF ¶ 55. Notwithstanding Plaintiff's apparent production of the entry summaries during discovery and Defendants' failure to review them, Oral Arg. 4:25–4:40, 18:49–18:56, the 337 entries were identified in an exhibit to the Complaint and the Proposed Penalty Letter. *See* Compl., Attach. A, ECF No. 2–1; Proposed Penalty Letter, Ex. S.

[10] Once again, Defendants object to Plaintiff's failure to identify the 337 entries, and "den[y] that [Sterling] misclassified any entries." Defs.' Resp. to PSOF ¶ 57. Defendants do not, however, directly address Plaintiff's assertion regarding the composition of the entered footwear, which is consistent with the type of footwear Defendants admit Sterling imported, *see* PSOF ¶ 35; Defs.' Resp. to PSOF ¶ 35, and the samples submitted to the court, *see* Pl.'s Physical Ex. 1. Because Defendants failed to properly address Plaintiff's factual assertion, which has evidentiary support, the court considers the assertion undisputed for purposes of summary judgment. *See* USCIT Rule 56(e).

[11] An entry is rate-advanced when it is "liquidate[d] at a higher rate" than the rate associated with the claimed classification. *See United States v. Horizon Prods. Int'l, Inc.*, 39 CIT ___, ___, 82 F. Supp. 3d 1350, 1354 (2015).

discussed the reasons for the rate advances and the necessity for post-entry amendments to correct all unliquidated entries; and (3) provided informed compliance handouts on reasonable care and the classification of footwear to Sterling's representatives." PSOF ¶ 76; Defs.' Resp. to PSOF ¶ 76; Whitney Decl. ¶ 76; Proposed Penalty Letter at 5; Proposed Penalty Letter, Ex. J at 1, ECF No. 62–4 (July 29, 2009 meeting summary); Pl.'s Ex 2 (Decl. of Dale Scott Kauffman) ("Kauffman Decl.") ¶¶ 23, 25, ECF No. 62–7. Upon viewing the samples, Mr. Kauffman determined that Sterling's entries had been misclassified. PSOF ¶ 77; Defs.' Resp. to PSOF ¶ 77; Kauffman Decl. ¶ 24. During the meeting, Sterling agreed that Mr. Kauffman would submit post-entry amendments for all entries. PSOF ¶ 78; Defs.' Resp. to PSOF ¶ 78; Whitney Decl. ¶¶ 77–78; Kauffman Decl. ¶¶ 26; *see also* Proposed Penalty Letter, Ex. J at 1. However, no post-entry amendments were submitted. PSOF ¶ 79; Defs.' Resp. to PSOF ¶ 79; Whitney Decl. ¶ 90; Kauffman Decl. ¶¶ 27–28.

The absence of post-entry amendments prompted CBP to review all of Sterling's entries. Whitney Decl. ¶ 90; *see also* PSOF ¶ 83; Defs.' Resp. to PSOF ¶ 83 (CBP reviewed Sterling's 2007 and 2008 entries after determining that 2009 entries had been misclassified). From September to November 2009, Customs issued to Sterling several additional notices of action covering 186 entries made in 2008 and 2009 that CBP determined had been incorrectly classified under HTSUS 6402.91.40. Proposed Penalty Letter, Ex. M. Relying on Sterling's footwear samples, online research regarding specific style numbers, and information from Sterling about "the method used to create style numbers," Customs determined that Sterling had misclassified 41 entries in 2007, 197 entries in 2008, and 99 entries in 2009. PSOF ¶¶ 83–84; Defs.' Resp. to PSOF ¶¶ 83–84;[12] Whitney Decl. ¶¶ 91, 94–99, 112. Sterling protested 57[13] reliquidations on the basis of timeliness. PSOF ¶¶ 105–06; Defs.' Resp. to PSOF ¶¶ 105–06; Proposed Penalty Letter at 9; Pl.'s Ex. 7, ECF No. 93–3 (protests of some

[12] Defendants "admit[] that CBP may have made the erroneous determination that some of its entries in 2007 and 2008 were misclassified," but contends that Sterling's entries were properly classified. Defs.' Resp. to PSOF ¶ 84 (citing Defs.' Ex. A (Harmonized Tariff Services, LLC's ("HTS") Lab Test of Subject Footwear) ("HTS Lab Report"), ECF No. 84–2. In other words, Defendants do not dispute that Customs made a particular determination, however, they dispute the correctness of that determination. The court discusses Defendants' assertions disputing any misclassification in its examination of whether Plaintiff has proved a false statement). *See infra*, Discussion Section IV.B.2.

[13] In its brief, Plaintiff contends that Sterling protested 46 reliquidations. Pl.'s XMSJ at 10 (citing the Proposed Penalty Letter generally). The Proposed Penalty Letter refers to 50 protests of reliquidations on the basis of timeliness. *See* Proposed Penalty Letter at 9. However, Customs demand for payment from Sterling's surety, which was appended to the July 2, 2010 letter from Taylor Pillsbury, Esq., counsel for Sterling's surety, to Elon Pollack, Esq., Sterling's counsel, notes 57 open protests. *See* Pl.'s Ex. 8 at ECF pp. 4–8, ECF No. 93–4.

of Sterling's entries); *see also* Pl.'s Ex. 8 (July 2, 2010 letter from Taylor Pillsbury, Esq., counsel for Sterling's surety, to Elon Pollack, Esq., Sterling's counsel).(noting that Sterling has contested the timeliness of certain reliquidations but not the substance of Customs' action). Customs approved 17 protests. Pl.'s Ex. 5, ECF No. 62–10.[14]

In October 2009, CBP contacted Sterling's nine customs brokers and requested that they respond to a questionnaire asking, in part, who determined the classifications for the imported footwear. PSOF ¶ 88; Defs.' Resp. to PSOF ¶ 88; Whitney Decl. ¶ 102. Eight brokers responded. Whitney Decl. ¶¶ 103, 105–06.

Plaintiff asserts that "most of the customs brokers stated that they had entered Sterling's footwear under the tariff provisions provided by Sterling." PSOF ¶ 89 (citing Whitney Decl. ¶¶ 102–110; Proposed Penalty Letter at 7–8, 13 & Ex. P)[15] . Plaintiff further asserts that "[t]wo of Sterling's customs brokers replied that classification provisions were given to them by Seattle Logistics," PSOF ¶ 90 (citing Whitney Decl. ¶¶ 102–110; Proposed Penalty Letter at 7–8, 13 & Ex. P; Kauffman Decl. ¶ 9, 30), who in turn had received them from Sterling, PSOF ¶ 91 (citing Whitney Decl. ¶ 106). Defendants object to Plaintiff's assertions regarding the brokers' responses as "statement[s that] contain[] inadmissible hearsay evidence." Defs.' Resp. to PSOF ¶¶ 89–91.

Pursuant to USCIT Rule 56(c)(2), "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Thus, for summary judgment purposes, the inquiry is whether the cited evidence may be reduced to admissible form, not whether it is admissible in the form submitted at the summary judgment stage. USCIT Rule 56(c)(2).

Pursuant to USCIT Rule 56(c)(4), "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." The Whitney Declaration is based on the Customs official's personal knowledge of the emails he received from Sterling's brokers. *See* Whitney Decl. ¶¶ 103–107, 109–10 (citing Proposed Penalty Letter, Ex. P). It is also made under "penalty of perjury" and is said to be "true and correct." Whitney Decl. at 25; 28 U.S.C. § 1746 (governing unsworn declarations made under penalty of perjury). There is no

[14] Plaintiff's Exhibit 5 consists of CBP's penalty notices and payment demands. A chart of 17 approved protests reflecting amounts deducted from the payment demand is located at ECF page numbers 26, 64, and 88.

[15] Exhibit P to the Proposed Penalty Letter consists of emails from Sterling's brokers responsive to CBP's inquiries, and emails from Sterling to some of the brokers, which were appended to the brokers' emails. *See* Proposed Penalty Letter, Ex. P, ECF No. 62–5.

indication that the declarant is not "competent" to testify; thus, the issue is whether the affidavit states "facts that would be admissible in evidence." USCIT Rule 56(c)(4).[16]

Hearsay is an out of court statement offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Hearsay is inadmissible at trial unless a federal statute, Federal Rule of Evidence, or other rule "prescribed by the Supreme Court" provides otherwise. Fed. R. Evid. 802. Nonetheless, a court "may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293–94 (11th Cir. 2012) (citation omitted). *Cf.* USCIT Rule 56(c)(2).

The statements by Sterling's customs brokers and freight forwarder as contained in emails to the customs official are hearsay to the extent they are used to prove the truth of the matter asserted, that is, that Sterling (or Seattle Logistics) provided the customs brokers and freight forwarder with the tariff classifications. *See* Proposed Penalty Letter, Ex. P at ECF pp. 11, 14, 25, 28, 32, 40, 54. However, "[t]he most obvious way that hearsay testimony can be reduced to admissible form is to have the hearsay declarant testify directly to the matter at trial." *Jones*, 683 F.3d at 1294 (nevertheless declining to consider a hearsay statement when the declarant's sworn deposition testimony contradicted the hearsay statement). There is no indication that the declarants--the brokers and freight forwarder--would be unable to testify at trial. *Cf. J.F. Feeser, Inc. v. Serv-A-Portion, Inc*., 909 F.2d 1524, 1542 (3d. Cir. 1990) (district court erred in refusing to consider hearsay statements contained in an affidavit for purposes of summary judgment when "there [was] no indication that [the declarants of the hearsay statements] would be unavailable to testify at trial").

Statements by Sterling employees contained in emails to the brokers and freight forwarder and subsequently sent to the customs official are not hearsay, however. The statements, by Ms. Huynh and Ms. Ng, are "offered against [the] opposing party and . . . [were] made by the party's . . . employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(D).[17] Accordingly, Defendants' hearsay objections lack merit for purposes of considering the cross-motions for summary judgment.

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[16] Likewise, the Kauffman Declaration is based on Mr. Kauffman's personal knowledge of Seattle Logistics' entries of Sterling's merchandise, is made under "penalty of perjury" and is said to be "true and correct," and there is no indication that the declarant is not "competent" to testify. *See generally* Kauffman Decl.

[17] Fed. R. Evid. 801(d) governs statements "that are not hearsay."

Defendants also deny Plaintiff's factual assertions on the basis that "Sterling always worked with the customs brokers to make classification determinations." Defs.' Resp. to PSOF ¶ 89 (citing Ng's Ex. N, ECF No. 53–6; Ng's Ex. W, ECF No. 53–7; Ng's Ex. B (Deposition of Janet Huynh) ("Huynh Dep.") at 7:8–14; 24:9–25:8; 51:15–17; 41:111, ECF No. 53–3; Ng's Ex. A (Deposition of Nancy Ng) ("Nancy Ng Dep.") at 28:4–6; 33:2–8; 29:6–22; 45:5–47:3; 47:15–22; 57:20–60:4; 61:12–62:17, ECF No. 53–3). The substance of Defendants' denial goes to the accuracy of the brokers' statements, not whether they were made. Moreover, Defendants' cited evidence does not actually rebut Plaintiff's assertion or the accuracy of the brokers' statements referenced therein; in fact, it mostly supports it.[18] In sum, Defendants have not shown that Plaintiff relies on evidence that would be inadmissible at trial, and have not shown that Plaintiff's factual assertions are genuinely disputed. Thus, the court considers Plaintiff's factual assertions regarding the brokers' statements as undisputed for purposes of summary judgment. *See* PSOF ¶¶ 89–91.

D. Ng Branding

In February 2009, Ng organized Ng Branding as a limited liability company in the State of California. PSOF ¶ 3; Defs.' Resp. to PSOF ¶ 3; Ng's Ex. R (Ng Branding's Articles of Organization), ECF No. 53–6. Ng was the sole investor in Ng Branding and its managing member, and held the majority of its ownership. PSOF ¶ 4; Defs.' Resp. to PSOF ¶ 4. Like Sterling, Ng Branding imported footwear for whole-

[18] The cited portions of Ms. Ng's and Ms. Huynh's deposition testimony mostly contain statements regarding their work at Sterling generally; however, Ms. Ng testified (in the cited portions and elsewhere) that she provided tariff provisions to Sterling's brokers and freight forwarders. *See* Nancy Ng Dep. at 57:21–62:17. In Ng's Exhibit N, Ms. Ng provides Mr. Kauffman with tariff provisions for several styles and asks for assistance classifying just one style. Ng's Ex. N. Moreover, the email is dated July 27, 2009, two years after Sterling began entering footwear, and thus is unsupportive of what Sterling "always" did. *See id.* Ng's Exhibit W is a copy of the Proposed Penalty Letter. Page 8 of the Proposed Penalty Letter refers to a statement made by Ms. Huynh and Ms. Ng during an October 30, 2009 meeting with Customs' officials that they rely on their brokers to classify *Ng Branding's* footwear, they do not, however, state that they relied on their brokers to classify *Sterling's* footwear. *See* Ng's Ex. W at 8. Moreover, the meeting took place after Sterling filed its last entry on October 8, 2009. PSOF ¶ 8; Defs.' Resp. to PSOF ¶ 8; Whitney Decl. ¶ 79.

"When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited and all justifiable inferences are to be drawn in the nonmovant's favor." *Netscape Comm.'s Corp. v. Konrad*, 295 F.3d 1315, 1319 (Fed. Cir. 2002). At most, however, Defendants have shown that, on one occasion more than two years after Sterling began entering footwear, Sterling asked its broker for classification advice as to one style on an unidentified entry. *See* Ng's Ex. N; Oral Arg. at 54:39–57:01 (when given the opportunity to identify the entry associated with Sterling's request for advice, defense counsel was unable to do so). From this, the court cannot reasonably infer that Sterling "always worked with the customs brokers to make classification determinations," particularly when, in the same email, Sterling also instructed the broker to enter certain styles pursuant to HTSUS 6402.91.40 *after* Sterling had received notices of action for incorrectly entering one of those styles under that subheading. *See id.*; Proposed Penalty Letter, Ex. D; Whitney Decl. ¶ 24.

sale. PSOF ¶ 5; Defs.' Resp. to PSOF ¶ 5. From February to October 2009, Sterling and Ng Branding had common shareholders, directors/managers, officers, business departments, employees, manufacturers, customers, business address, company suites, equipment, and telephone numbers. PSOF ¶¶ 8–9; Defs.' Resp. to PSOF ¶¶ 8–9; *see also* Proposed Penalty Letter, Ex. N (emails from Ms. Ng to a Customs official regarding Sterling's footwear wherein Ms. Ng utilized an email address associated with Ng Branding).

E. Administrative Proceedings

On March 29, 2012, CBP issued to Sterling and Ng pre-penalty notices and a demand for payment of unpaid duties. PSOF ¶ 108; Defs.' Resp. to PSOF ¶ 108; Pl.'s Ex. 5 at 1–26.[19] On April 9, 2012, CBP issued penalty notices and a second payment demand to Sterling and Ng, tentatively determining gross negligence as the level of culpability. PSOF ¶ 114; Defs.' Resp. to PSOF ¶ 114; Pl.'s Ex. 5 at ECF pp. 27–34. On June 20, 2012, CBP issued an amended pre-penalty notice also naming Ng Branding and alleging negligence as an alternative determination of culpability. PSOF ¶ 116; Defs.' Resp. to PSOF ¶ 116; Pl.'s Ex. 5 at ECF pp. 35–64. On June 27, 2012, CBP issued Ng, Ng Branding, and Sterling an amended penalty notice. PSOF ¶ 118; Defs.' Resp. to PSOF ¶ 118; Pl.'s Ex. 5 at ECF pp. 65–88. Sterling's surety paid $100,000 towards the unpaid duties; no party has paid the remaining amount. PSOF ¶ 110; Defs.' Resp. to PSOF ¶ 110; *see also* Pl.'s Ex. 8 at 1–2 (explaining the surety's liability in the matter).

II. Procedural History

Plaintiff commenced this enforcement action on July 16, 2012. Summons, ECF No. 1; Compl. On December 18, 2012, the court denied Ng's motion to dismiss the complaint. Order (Dec. 18, 2012), ECF No. 22. On January 10, 2013, Defendants answered the complaint. Answer and Jury Demand of Sterling Footwear, Inc., Ng Branding LLC and Alex Ryan Ng, ECF No. 25.

On November 12, 2015, Ng moved for summary judgment. Ng's MSJ. On February 22, 2016, Plaintiff cross-moved for summary judgment against Ng and moved for summary judgment against Sterling and Ng Branding. Pl.'s XMSJ. The motions are fully briefed, and the court heard oral argument on July 13, 2017. Docket Entry, ECF No. 100.

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[19] Customs sought payment of $1,666,824.85 in unpaid duties, which consisted of an actual loss of revenue equal to $2,003,080.12, minus $336,255.27 attributable to the 17 approved protests. *See* Pl.'s Ex. 5 at ECF pp. 1, 26.

DISCUSSION

I. Standard of Review

This case is brought by the Government against Defendants to recover unpaid duties and a monetary penalty owing from allegedly misclassified entries pursuant to 19 U.S.C. § 1592. The Court of International Trade reviews all issues in actions brought for the recovery of a monetary penalty pursuant to 19 U.S.C. § 1592 *de novo* and on the basis of the record made before the court. 19 U.S.C. § 1592(e)(1); 28 U.S.C. § 2640(a); *see also United States v. ITT Indus., Inc.*, 28 CIT 1028, 1035, 343 F. Supp. 2d 1322, 1329 (2004), *aff'd*, 168 F. App'x 942 (Fed. Cir. 2006).

Summary judgment is proper when "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." USCIT Rule 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The court must view the evidence in the light most favorable to the nonmovant and may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249, 255 (1986); *Netscape Comm.'s Corp.*, 295 F.3d at 1319. When both parties move for summary judgment, the court generally must evaluate each party's motion on its own merits and draw all reasonable inferences against the party whose motion is under consideration. *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000).

II. Legal Framework for Recovery Actions

In relevant part, § 1592 bars the grossly negligent or negligent entry, introduction, or attempt to enter or introduce, merchandise into the commerce of the United States by means of a material false statement or material omission. 19 U.S.C. § 1592(a)(1)(A).[20]

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[20] In full, § 1592(a)(1) provides:

(a) Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence--

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of--

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violatesubparagraph (A).

19 U.S.C. § 1592(a)(1).

A statement is material when it has the "potential to alter Customs' appraisement or liability for duty." *Horizon Prods. Int'l*, 82 F. Supp. 3d at 1356 (citation omitted); *see also United States v. Menard, Inc*., 16 CIT 410, 417, 795 F. Supp. 1182, 1188 (1992) (materiality for purposes of § 1592 refers to the false statement's effect on CBP's determination of the applicable duty); 19 C.F.R. Pt. 171, App. B(B) (2013) (defining materiality for purposes of § 1592). The asserted classification of merchandise in entry paperwork "has the tendency to influence Customs' decision in assessing duties and therefore constitutes a material statement under the statute." *United States v. Optrex Am., Inc.*, 32 CIT 620, 631, 560 F. Supp. 2d 1326, 1336 (2008).

The statute does not define the term "false"; thus, it is defined according to its ordinary meaning. *United States v. Rockwell Automation Inc.*, 30 CIT 1552, 1557 462 F. Supp. 2d 1243, 1248 (2006) (citing *Perrin v. United States,* 444 U.S. 37, 42 (1979)). According to Black's Law Dictionary, a statement is "false" when it is "untrue" or "[n]ot genuine; inauthentic." *Id.* (quoting *Black's Law Dictionary* 635 (8th ed. 2004)) (citing *Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1571 n. 9 (Fed. Cir. 1994) (dictionaries may supply the common meaning of a term)).

Violations of § 1592(a) may be punishable by a civil penalty depending on the degree of culpability. 19 U.S.C. § 1592(c). "Parties must meet their burdens of proof regarding [culpability] by a preponderance of the evidence. The court may determine liability and assess penalties as a matter of law when the uncontroverted facts support such a determination." *United States v. Matthews*, 31 CIT 2075, 2081 533 F. Supp. 2d 1307, 1313 (2007) (citing *United States v. New–Form Mfg. Co., Ltd*., 27 CIT 905, 918–19, 277 F. Supp. 2d 1313 (2003)); *cf. Anderson*, 477 US at 252 (in determining whether summary judgment should issue, "[t]he judge's inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [party bearing the burden of proof at trial] is entitled to a verdict").

To establish gross negligence, Plaintiff must prove "an act or acts (of commission or omission) [by Defendants] done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B(C)(2); *see also United States v. Ford Motor Co*., 463 F.3d 1286, 1292 (Fed. Cir. 2006) ("An importer is guilty of gross negligence if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care"). When a grossly negligent § 1592(a) violation impacts the assessment of duties, the

civil penalty may not exceed "the lesser of [] the domestic value of the merchandise, or [] four times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(2)(A).

A Defendant is negligent when they "fail[] to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or (b) in communicating information in a manner so that it may be understood by the recipient." 19 C.F.R. Pt. 171, App. B(C)(1).[21] Plaintiff bears the initial burden of proving the act or omission constituting the violation; the burden then shifts to the alleged violator to "affirmatively demonstrate that it exercised reasonable care under the circumstances." *Ford Motor Co*., 463 F.3d at 1279 (Fed. Cir. 2006); 19 U.S.C. § 1592(e)(4). When a negligent § 1592(a) violation impacts the assessment of duties, the civil penalty may not exceed "the lesser of [] the domestic value of the merchandise, or [] two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3)(A).

Regardless of whether a civil penalty is assessed, when "the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored." *Id.*§ 1592(d).

III. Ng's Liability

A. Parties' Contentions

Ng contends that he is entitled to summary judgment because he did not personally enter or introduce the subject merchandise into the United States as provided in the U.S. Court of Appeals for the Federal Circuit's ("Federal Circuit") opinion in *United States v. Trek Leather, Inc.*, 767 F.3d 1288 (Fed. Cir. 2014). Ng's MSJ at 712, 24–30; Def. Alex Ng's Reply in Supp. of Mot. to for [sic] Summ. J. ("Ng's Reply") at 2–12, ECF No. 85.[22] Plaintiff contends that Ng is liable pursuant to

[21] "As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence . . . to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate." 19 C.F.R. Pt. 171, App. B(C)(1).

[22] In his motion, Ng criticizes Plaintiff's responses to interrogatories and document production and contends Plaintiff failed to properly amend or supplement its disclosures. Ng's MSJ at 18–24. Ng contends he sent three letters to Plaintiff, which it ignored, but because of his "severely impoverished economic position," he could not afford to file a motion to compel further responses. Ng's MSJ at 20 n.4. Plaintiff asks the court to strike or disregard Ng's arguments. Pl.'s XMSJ at 40–43. Plaintiff contends that Ng violated the scheduling order by

Trek Leather because of his "control, supervision, direct involvement in, and knowledge of and failure to correct Sterling's erroneous importing activities." Pl.'s XMSJ at 31–33. In particular, Plaintiff contends that Ng instructed Ms. Huynh to use classification forms with the classification number pre-printed on the forms, and because he told his employees to continue entering footwear under HTSUS 6402.91.40 after CBP had informed him that was the incorrect tariff provision. Pl.'s XMSJ at 33–35; Reply to Defs.' "Joint" Opp'n to Pl.'s Cross-Mot. for Summ. J. Against Alex Ng and Mot. for Summ. J. Against Sterling Footwear, Inc. and Ng Branding, LLC ("Pl.'s Reply") at 15–19, ECF No. 93.[23] Ng disputes the Government's factual assertions regarding his role in classification, Ng's Reply at 6–10, and contends that, in any event, making classification decisions "does not fulfill the requirements of *Trek* [*Leather*]," Ng's Reply at 10. The inquiry, thus, is twofold. First, the court must ascertain the scope of the term "introduce" pursuant to *Trek Leather*, which is a legal question. Second, armed with that understanding, the court must determine whether the undisputed material facts entitle either Party to summary judgment.

belatedly raising his discovery argument, which is predicated on the false assertion that Plaintiff ignored his letters. Pl.'s XMSJ at 41–42 (citing Pl.'s Ex 3, ECF No. 62–8 (Plaintiff's responses to Ng's, Sterling's, and Ng Branding's discovery letters) and Pl.'s Ex. 4, ECF No. 62–9 (email from defense counsel acknowledging receipt of Plaintiff's responses to Sterling's and Ng Branding's discovery letters)).

USCIT Rule 12(f) provides that the court may strike "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The court has broad discretion in disposing of motions to strike. *Beker Indus. Corp. v. United States*, 7 CIT 199, 200, 585 F. Supp. 663, 665 (1984). Nevertheless, "motions to strike are not favored by the courts and are infrequently granted." *Jimlar Corp. v. United States*, 10 CIT 671, 673, 647 F. Supp. 932, 934 (1986) (citation omitted).

The crux of Ng's argument appears to be Ng's belief that Plaintiff's responses failed to adduce evidence of his liability. *See* Ng's MSJ at 18, 24. However, Ng's characterization of Plaintiff's discovery responses is not relevant to the court's disposition of the pending summary judgment motions, which depends upon the extent to which material facts are undisputed. *See* USCIT Rule 56(c). To make that determination, the court reviews Parties' statements of facts and responses thereto, and relevant record documents, while taking into account Parties' respective arguments about whether the undisputed facts demonstrate that summary judgment is appropriate. *See* USCIT Rules 56, 56.3. Accordingly, the court will disregard Ng's discovery-related arguments in its assessment of whether summary judgment should issue; however, striking those arguments is not merited. *See Jimlar Corp.*, 10 CIT at 673, 647 F. Supp. at 934 (granting a motion to strike is an "extraordinary remedy," and should only occur when "there has been a flagrant disregard of the rules of court"). For the same reasons, Ng's discussion about the Government's motivation for suing him in his individual capacity, Ng's MSJ at 30–35, has no bearing on the propriety of summary judgment for Ng or the Government.

[23] Ng further contends that Plaintiff cannot rely on piercing the corporate veil because it did not allege that theory of liability in the complaint. Ng's MSJ at 35–36; Ng's Reply at 12–13 (Plaintiff's alternative theories of liability may be relevant in a subsequent action but not the instant action). Plaintiff did not allege a veil piercing claim against Ng or facts supporting a veil piercing claim. *See generally* Compl. At oral argument, Plaintiff confirmed that it was not seeking to pierce the corporate veil. Oral Arg. 1:42:18–1:42:24. Accordingly, that aspect of Ng's motion is moot.

B. Individual Liability Pursuant to *Trek Leather*

Trek Leather stands for the proposition that an individual may be held liable for violating § 1592(a)(1)(A) when that individual engages in conduct proscribed by the statutory provision. *Trek Leather*, 767 F.3d at 1296–97 ("person" for purposes of § 1592(a)(1) includes individuals and is not limited to the importer of record); *id.* at 1297–99 (individual defendant/shareholder of importer-of-record corporation, whose conduct came within the scope of the term "introduce" in § 1592(a)(1)(A), was jointly liable for unpaid duties and penalties).[24] The appellant ("Mr. Shadadpuri"), was the president and sole shareholder of Trek Leather, Inc. ("Trek"), the importer of record. *Id.* at 1291. Mr. Shadadpuri imported men's suits through several companies, including Trek. *Id.* While the shipments at issue were in transit, Mr. Shadadpuri "caused the shipments . . . to be transferred from [one of his companies] to Trek." *Id.* at 1292 (noting that Mr. Shadadpuri directed his broker to make the transfer). The broker prepared and submitted the entry summaries "based on papers he received from Mr. Shadadpuri and his aides." *Id.* at 1293 ("When the suit manufacturer was ready to ship completed suits, it sent Mr. Shadadpuri an invoice [], and he . . . would fax, or [his] person who [] help[ed him] would send a fax to the broker and the broker would file the entry.") (internal quotation marks and citation omitted). To determine whether Mr. Shadadpuri's conduct constituted "introducing" merchandise, the Federal Circuit looked to the U.S. Supreme Court's decision in *Panama Hats*, which had "established the breadth of 'introduce.'" *Id.* at 1297–99 (citing *United States. v. 25 Packages of Panama Hats*, 231 U.S. 358 (1913)).

In *Panama Hats*, foreign consignors (merchants) delivered to the U.S. consular agent, at the point of shipment, three sets of invoices that falsely and fraudulently undervalued the merchandise intended for delivery to a domestic consignee. 231 U.S. at 359. Thereafter, the merchandise was "not technically entered at the New York customs house, but was unloaded from the ship and stored in general order." *Id.* The goods were forfeited on the basis of the fraudulent invoices, and the consignee asserted a claim to the merchandise on the basis that they had not been entered or introduced into U.S. commerce. *Id.* at 359–60. Resolving this claim required the *Panama Hats* Court to interpret the forfeiture provision of the Tariff Act of 1890, as amended in 1909. *Id.* at 359–60.

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[24] *Trek Leather* analyzed the scope of the term "introduce" pursuant to § 1592(a)(1)(A); it did not address the scope of the term "enter" or the individual defendant's level of culpability pursuant to § 1592(e). *Trek Leather*, 767 F.3d at 1295 (defining the issues before the court); *id.* at 1297 (declining to address whether Mr. Shadapuri entered the subject merchandise).

Prior to 1909, the Tariff Act of 1890 provided for the forfeiture of goods "if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice." *Id*. at 360 (quoting Tariff Act of 1890, § 9, 26 Stat. 131, 135). In 1909, the Tariff Act was amended to permit forfeiture "if any *consignor*, seller, owner, importer, consignee, agent, or other person or persons, shall enter *or introduce*, or attempt to enter *or introduce*, into the commerce of the United States, any imported merchandise by means of any fraudulent or false invoice." *Id*. at 359–60) (quoting Tariff Act of 1909, § 28, 36 Stat. 11, 97) (emphasis added).

According to the Supreme Court, the amendment's purpose was to "enlarge[ ] the scope of conduct for which the goods should be forfeited" beyond that which constituted the entry of merchandise. *Id*. at 361. Only then could the statute reach the consignor of the goods who did not "make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods," but who had prepared the false and fraudulent invoice in the exporting country. *Id*. at 361 ("Under the [prior] statute, . . . there was no penalty for the grossest fraud on the part of the consignor, notwithstanding the fact that his invoice valuation was of great importance in determining true value, as a basis for collecting the duty."). The Court explained that, "when the goods, fraudulently undervalued and consigned to a person in New York, arrived at the port of entry, there was an attempt to introduce them into the commerce of the United States. When they were unloaded and placed in general order, they were actually introduced into that commerce within the meaning of the statute intended to prevent frauds on the customs." *Id*. at 362.

Pursuant to *Panama Hats*, the term "introduce" in § 1592(a)(1)(A) "is a flexible and broad term that . . . cover[s], among other things, actions completed before any formal entry filings made to effectuate release of imported goods." *Trek Leather*, 767 F.3d at 1298. The Federal Circuit did not define the full reach of the term "introduce," but concluded that it covered "actions that bring goods to the threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents (such as invoices indicating value) for use in the filing of papers for a contemplated release into United States commerce even if no release ever occurs." *Id.* at 1299. Mr. Shadadpuri's conduct came within that understanding of the term "introduce." *Id.* at 1299 ("[Mr. Shadadpuri] did everything short of the final step of preparing the [entry forms] and submitting them and other required papers to make formal entry.").

Ng interprets *Trek Leather* as *requiring* an act "at the threshold of entry," or, in other words, an act "intended to immediately enter the goods." Ng's MSJ at 26 (arguing the *Trek Leather* court "restricted its holding . . . to instances where the personal acts 'bring goods to the threshold of the process of entry . . . .'") (quoting *Trek Leather*, 767 F.3d at 1299). According to Ng, "[a]nything less" than doing "everything short of the final step" in entering goods does not come within the term "introduce" for purposes of § 1592(a)(1)(A). *Id.* at 26–27; *see also id.* at 27 (the *Trek Leather* court "obviously wanted to limit the [Government's] reach under [§]1592(a)(1)(A) to exclude outlying, non-critical acts"). Plaintiff contends Ng has misunderstood *Trek Leather*, wherein the court simply "discussed what the term 'introduce' covered in connection with Mr. Shadadpuri's actions." Pl.'s XMSJ at 25, 29.

Contrary to Ng's assertion, *Trek Leather* did not set the outer bounds of what constitutes the introduction of merchandise for the purpose of § 1592(a)(1)(A). *Trek Leather*, 767 F.3d at 1298 (expressly declining to "define the reach of the term [introduce]"). Instead, *Trek Leather* looked to *Panama Hats* for guidance as to whether Mr. Shadadpuri's conduct was covered by the term. *Trek Leather*, 767 F.3d at 1299. Ng's narrow reading of *Trek Leather* is inconsistent with *Panama Hats*' broad interpretation of the term "introduce" as covering the foreign consignor that made a false and fraudulent statement on invoices prepared in connection with goods the consignor shipped to a U.S. port. *Panama Hats*, 231 U.S. at 361. Moreover, the Federal Circuit's reference to "actions that bring goods to the threshold of the process of entry by moving goods into CBP custody," *Trek Leather*, 767 F.3d at 1299, includes such actions as ordering goods to be shipped to a U.S. port for the purpose of entering those goods into U.S. commerce, because by so doing, the goods are ultimately moved into CBP's custody, *cf. Panama Hats*, 231 U.S. at 361 ("But when the consignor made the fraudulent undervaluation in the foreign country, *and on such false invoice the goods were shipped, and arrived consigned to a merchant in New York*, the merchandise was within the protection and subject to the penalties of the commercial regulations of this country . . . .") (emphasis added). The tariff classification stated in an entry document is no less material to CBP's assessment of duties than is the stated value of the merchandise. *Cf. Panama Hats*, 231 U.S. at 361. Read together, *Panama Hats* and *Trek Leather* demonstrate that one who misclassifies merchandise (or causes merchandise to be misclassified) in a document prepared for the purpose

of entering goods which that person causes to be shipped to, and unloaded at, a U.S. port, falls within the ambit of the term "introduce."

C. The Presence of Disputed Facts Precludes Summary Judgment

There is undisputed evidence that Ng played a role in causing Sterling's footwear to be shipped to the United States. *See* PSOF ¶ 21(2),(4),(6); Defs.' Resp. to PSOF ¶¶ 21(2),(4),(6) (Ng handled the design, development, and manufacture of Sterling's imported footwear); Ng Decl. ¶ 7 (Ng's "primary responsibilit[ies]" consisted of footwear design, "marketing, *sales* and establishing relationships with Chinese manufactur[ers]") (emphasis added). Summary judgment is inappropriate, however, because there is conflicting evidence regarding Ng's role in determining the tariff provision pursuant to which Sterling's footwear would be entered.

Ng testified in his deposition and averred in his declaration that he played no role in determining Sterling's footwear classification, and never instructed Ms. Huynh on preparing paperwork for Sterling's customs brokers. Ng's Ex. E (Deposition of Alex Ng)) ("Ng Dep.") at 147:3–11, 203:8–206:19, ECF No. 53–4; Ng Decl. ¶¶ 4–5. Ng further testified that he told his employees to work with the customs brokers to determine the correct classification. Ng. Dep. at 118:19–119:4; Ng Decl. ¶ 4. Ng also asserts that Ms. Huynh testified that Ng "never spoke to her about customs classifications [and] never instructed her to use any classification [number] . . . ." Ng's Reply at 7 (citing Huynh Dep. generally); *see also* Ng's MSJ at 14 (asserting that "Ms. Huynh did not testify that she ever spoke to Mr. Ng about Sterling['s] . . . HTS classification determinations [or] that Mr. Ng ever instructed her to use any HTS classification . . . ." (citing same).

In fact, as Plaintiff points out, Ms. Huynh testified that Ng showed her how to submit entry documentation to Sterling's customs brokers, that the documents had tariff provisions preprinted on them, that Ng said to use those tariff provisions, which most entries did, and when she hired Ms. Ng, Ms. Huynh showed her how to prepare the entry documents and instructed her to use the same tariff provisions Ng had told Ms. Huynh to use. Huynh Dep. at 36:8–40:9; *see also* Pl.'s XMSJ at 33–35. Ms. Ng testified that Ng and Ms. Huynh had made decisions on classifying footwear. Nancy Ng Dep. at 47:8–14. Further, after meeting with CBP in July 2009, Ms. Huynh told Ms. Ng that Ng wanted to continue entering the footwear under HTSUS 6402.91.40. Nancy Ng Dep. at 51:4–54:2, 56:9–57:4; 63:13–65:4.

According to Ng, "the evidence produced by the Government only establishes that Ms. Ng relied on the [] customs broker to make

classification decisions." Ng's Reply at 7 (citing Ng's Ex. N); *see also* Ng's MSJ at 22–23. Ng further contends that "Ms. Ng and Ms. Huynh confirmed in a 2009 interview with Customs that they were instructed by Mr. Ng to work with the customs brokers to determine the correct classification number." Ng's Reply at 10 (citing Proposed Penalty Letter at 8). Ng's argument, and reliance on the cited documents, is unavailing.

Defendants' Exhibit N consists of an email from Ms. Ng to Mr. Kauffman, Sterling's customs broker. Ng's characterization of the exhibit neglects to mention that, in the email, Ms. Ng *provided* Mr. Kauffman with tariff provisions for 10 styles, and asked for assistance classifying just one style. *See* Ng's Ex. N. Additionally, the email is dated July 27, 2009, *see id.*, more than two years after Sterling began entering footwear, and thus is unsupportive of Sterling's general practice, *see* Defs.' Resp. to PSOF ¶ 89 (averring that "Sterling always worked with the customs brokers to make classification determinations") (citing, *inter alia*,Ng'sEx. N); *supra* note 18. There is also nothing in Ng's Exhibit N to suggest, as Ng contends, that "Sterling . . . only provided [] classification numbers to customs brokers for entry after it had been prior determined correct [sic] by a licensed customs broker." Ng's MSJ at 23 (citing Ng's Ex. N).

Page 8 of the Proposed Penalty Letter describes an October 2009 meeting between Ms. Huynh, Ms. Ng, and customs officials. Proposed Penalty Letter at 8. The meeting was held to discuss the establishment of an Account Management Program for *Ng Branding* as a result of "misclassification and value issues discovered" by CBP. *Id.* During the meeting, Ms. Huynh and Ms. Ng stated that they relied on customs brokers to classify *Ng Branding's* footwear. *Id.* Ms. Ng and Ms. Huynh did not "confirm[]" anything in regards to *Sterling's* entries. *See id.*; Ng's Reply at 10.

In sum, Ng's testimony concerning his role in Sterling's entries conflicts with Ms. Huynh's and Ms. Ng's testimony, and other record evidence. The conflicting testimony precludes the entry of summary judgment for either Party. *See Anderson*, 477 U.S. at 249, 255 (credibility determinations are for the fact-finder). For that reason, Ng's motion for summary judgment, and the Government's cross-motion for summary judgment as to Ng, will be denied.[25]

[25] Because Ng's role in introducing the subject merchandise is disputed, the court does not reach Parties' arguments regarding his culpability, or lack thereof.

IV. Sterling's Liability

A. Entry of Merchandise

Parties do not dispute that Sterling, as the importer of record, made the subject entries. *See* PSOF ¶ 51; Defs.' Resp. to PSOF ¶ 51 (Sterling made 363 entries from July 2007 to October 2009, inclusive of the subject entries); *see also* Proposed Penalty Letter at 2 (stating Sterling's importer identification number). Accordingly, there is no dispute that Sterling "enter[ed]" merchandise for purposes of § 1592(a). *See* 19 U.S.C. §§ 1484, 1485.

B. Material False Statement

1. Parties' Contentions

Plaintiff contends Sterling's entry documents falsely identified the subject merchandise as "rubber tennis shoes," and falsely classified the subject merchandise under the corresponding tariff provision for rubber tennis shoes, HTSUS 6402.91.40. Pl.'s XMSJ at 18–19. Plaintiff asserts that "[s]amples, photographs, and descriptions of the footwear conclusively demonstrate that the footwear [is] not 'rubber tennis shoes.'" Pl.'s XMSJ at 18 (citations omitted). Plaintiff contends the false statements were material because they caused CBP to assess duties at six percent *ad valorem*, which is less than the applicable rates had the footwear been correctly classified. Pl.'s XMSJ at 19.

Defendants contend that Plaintiff has failed to carry its burden of proving that the subject merchandise was misclassified. Defs.' Alex Ng, Sterling Footwear, Inc. and Ng Branding, LLC's Joint Mem. of Law & P. [&] A. in Opp'n to Pl.'s Mot. for Summ. J. Against Alex Ng, Sterling Footwear, Inc. and Ng Branding, LLC ("Defs.' Resp.") at 6, ECF No. 84.[26] Defendants assert that testing of sample footwear

[26] Defendants further assert that "the issue of whether the subject merchandise was properly classified should be argued by the Parties' respective experts and resolved at trial." Defs.' Resp. at 6. Defendants did not, however, file an affidavit or declaration pursuant to USCIT Rule 56(d) urging the court to defer ruling on the pending motions because they are currently unable to "present facts essential to justify [their] opposition." Accordingly, the court must determine whether, on the current record, there is any genuine factual dispute regarding whether Sterling misclassified its footwear. *See* USCIT Rule 56(a); *Celotex Corp.*, 477 U.S. at 322–23. As discussed *infra*, Defendants have failed to establish that there is a genuine dispute about the material characteristics of the subject merchandise or the classification provision asserted in the entry documents. In the absence of any genuine dispute as to the factual issue of what the merchandise is, the proper classification of the merchandise is a legal issue. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (whether merchandise is "properly classified under one or another classification heading . . . [is] a question of law[] . . . because what is at issue is the meaning of the terms set out in the statute") (citations omitted). Defendant's assertion is, therefore, unavailing.

involved in this lawsuit by HTS "indicated that the subject footwear was in fact 'rubber tennis shoes' or 'rubber shoes' and that all the entries were in fact properly classified." Defs.' Resp. at 7. Defendants further assert that they "have always denied" any misclassification, and the quality of certain photographs relied upon by the Government was too poor to establish misclassification. Defs.' Resp. at 7–8.

2. Plaintiff has Demonstrated that Sterling Misclassified its Footwear

There is no genuine dispute that the classification asserted by Sterling for the subject entries is HTSUS 6402.91.40. *See supra* Background Section I.B; Defs.' Resp. at 6–8 (challenging the *falsity* of the statements, not whether they were made). Accordingly, the court must determine whether the undisputed facts demonstrate the falsity of the asserted classification pursuant to HTSUS 6402.91.40.

Plaintiff proffers several pieces of evidence demonstrating that Sterling's footwear was misclassified. This evidence includes a declaration by the customs official responsible for examining Sterling's entries, associated notices of action, and a declaration by Sterling's primary customs broker. *See* Whitney Decl. ¶¶ 24–26, 33–71, 90–91, 94, 112 (describing the official's review of Sterling's entries and footwear based on entered samples and online research about specific style numbers); Proposed Penalty Letter, Exs. D, E, M (notices of action detailing rate-advances for 191 entries); Kauffman Decl. ¶¶ 5, 9, 24, 25 (averring that from 2008 to 2009 the broker made "hundreds of entries" under HTSUS 6402.91.40 for Sterling, and, upon seeing samples of Sterling's footwear at the July 29, 2009 meeting with CBP, determined that Sterling's footwear had been misclassified).[27]

Plaintiff also proffers physical samples of several of Sterling's styles and photographs thereof. *See* Pl.'s Physical Ex. 1; Pl.'s Ex. 9. As discussed above, HTSUS 6402.91.40 covers, in pertinent part, footwear with 90% rubber or plastic uppers and *excludes* footwear with "a foxing or a foxing-like band applied or molded at the sole and overlapping the upper." *In camera* inspection[28] of the submitted samples demonstrates that *none* of the styles are proper candidates for classification under HTSUS 6402.91.40 because they either lack the

[27] Plaintiff has also submitted evidence that Sterling protested the *timeliness* of Customs' reliquidation of certain entries, but not the substance thereof. *See* PSOF ¶¶ 105–06; Defs.' Resp. to PSOF ¶¶ 105–06; Proposed Penalty Letter at 9; Pl.'s Ex. 7; Pl.'s Ex. 8.

[28] It is well-settled that "the merchandise itself is often a potent witness" in the determination of the correct classification. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989) (citation omitted); *see also, e.g., Streetsurfing LLC v. United States*, 38 CIT ___, ___,11 F. Supp. 3d 1287, 1302 (2014); *Latitudes Int'l Fragrance, Inc. v. United States*, 37 CIT ___, ___, 931 F. Supp. 2d 1247, 1257 (2013).

requisite plastic or rubber upper, have a foxing or foxing-like band, or both. *See* Pl.'s Physical Ex. 1; Pl.'s Ex. 9.[29]

The sole evidence Defendants proffer to support their contention that no entries were misclassified is the HTS Lab Report. *See, e.g.*, Defs.'s Resp. at 7; Defs.' Resp. to PSOF ¶ 52. Defendants assert that they "ordered professional laboratory tests from Harmonized Tariff Services, LLC for the sample footwear, *which formed the basis of this lawsuit* and was alleged to be misclassified by Customs." Defs.' Resp. at 7 (emphasis added); *id.* at 10 ("Defendants hired [HTS] to evaluate whether such entries were in fact misclassified. . . .The professional tests determined that they were properly classified.") (citations omitted).

There are two problems with Defendants' contention. First, the HTS Lab Report was obtained in connection with CBP's classification of entries by Ng Branding, *not* by Sterling.[30] *See* Pl.'s Reply, Ex. 6, ECF No. 93–2 (Ng Branding's protest and application for further review, in which counsel discusses Ng Branding's solicitation of laboratory testing by HTS to determine the components of the tested footwear's outsoles, and to which the HTS Lab Report was appended). Second, the HTS Lab Report describes the tested samples as having textile uppers *and* a foxing. *See* HTS Lab Report at DEF00169, DEF00171. The HTS Lab Report, therefore, is irrelevant to the instant case; and to the extent that it is relevant, it damages, rather

[29] The following list summarizes the relevant characteristics of the samples of Sterling's footwear the Government has provided:

Style No. 19FLR121W. Upper: canvas. Foxing or foxing-like band: present.
Style No. 19FLR803M. Upper: canvas. Foxing or foxing-like band: present.
Style No. 19FLR201W. Upper: plastic and canvas. Foxing or foxing-like band: present.
Style No. 19FHR201M. Upper: plastic. Foxing or foxing-like band: present.
Style No. 19FTB101W. Upper: jersey textile. Foxing or foxing-like band: present.
Style No. 19FSL101W. Upper: satin/suede/plastic. Foxing or foxing-like band: present.
Style No. 19FBR101K. Upper: canvas/plastic. Foxing or foxing-like band: present.
Style No. 19FRL101W. Upper: canvas. Foxing or foxing-like band: present.
Style No. 19SLR601M. Upper: canvas. Foxing or foxing-like band: present.
Style No. 19FSZ401W. Upper: leather. Foxing or foxing-like band: absent.
Style No. 19FDN102W. Upper: leather. Foxing or foxing-like band: absent.
Style No. 19FAP102W. Upper: plastic. Foxing or foxing-like band: present.
Style No. 19FSE101W. Upper: rubber. Foxing or foxing-like band: present.
Style No. 19FHR301W. Upper: canvas. Foxing or foxing-like band: present.
Style No. 19FLR129W. Upper: canvas. Foxing or foxing-like band: present.
See Pl.'s Physical Ex. 1.

[30] Although Ng Branding is named in the complaint as Sterling's successor, its entries are not at issue. *See* Compl. ¶ 43.

than supports, Defendants' position that Sterling's entries were correctly classified.[31] Although the court must credit the nonmovant's evidence, *Netscape Comm.'s Corp.*, 295 F.3d at 1319, it is not required to credit that party's blatant mischaracterization of the evidence, *see Scott v. Harris*, 550 U.S. 372, 380 (2007) ("[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts" when ruling on the motion).[32]

Defendants also assert, without explanation, that the "terrible" photographs of Sterling's footwear appended to the Proposed Penalty Letter "establish that the subject footwear was 'Rubber Tennis Shoes' or 'Tennis Shoes' pursuant to the HTS and properly classified," and thereby create a genuine issue of material fact as to whether Sterling misclassified its footwear. Defs.' Resp. at 8. Plaintiff concedes that the quality of the photographs appended to the Proposed Penalty Letter is "less than ideal," and instead relies on the actual samples and more recent photographs of the samples. Pl.'s Reply at 8–9; Pl.'s Physical

[31] At oral argument on the summary judgment motions, defense counsel was afforded the opportunity to explain his characterization of, and reliance on, the HTS Lab Report; he failed to do so. Oral Arg. 38:03–38:14, 38:50–43:45, 44:44–46:03. Defense counsel's characterization of the HTS Lab Report was the subject of a show cause hearing pursuant to USCIT Rule 11. *See* Order (July 18, 2017), ECF No. 101; Mem. and Order (Sept. 15, 2017), ECF No. 110.

[32] Although not necessary to resolve this case, and not directly raised by Plaintiff in its moving brief, there is an additional problem with Defendants' argument. The argument essentially challenges the correctness of CBP's classification decisions with respect to its liquidations and reliquidations of certain of the subject entries. It is well settled that Customs' findings related to a particular liquidation "merge with the liquidation" and are final and conclusive unless challenged in accordance with 19 U.S.C. § 1514. *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008); *see also United States. v. Am. Home Assur. Co.*, 39 CIT ___, ___, 100 F. Supp. 3d 1364, 1369 (2015); 19 U.S.C. § 1514 (providing, *inter alia*, that "decisions of the Customs Service . . . as to . . . the classification and rate and amount of duties chargeable . . . [or] the liquidation or reliquidation of an entry . . . shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the [USCIT]"). Unprotested issues related to the liquidation of the subject entries may not be "raised in any context," *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1557 (Fed. Cir.1997); that is, the rule of finality "applies to both importer duty recovery suits and to [g]overnment enforcement actions," *Am. Home Assur. Co.*, 100 F. Supp. 3d at 1369; *see also Cherry Hill*, 112 F.3d at 1557 (§ 1514's "'final and conclusive clause' . . . is sufficiently broad that it indicates that Congress meant to foreclose unprotested issues from being raised in any context, not simply to impose a prerequisite to bringing suit"). As Plaintiff notes, Sterling elected not to protest Customs' classification of any of its footwear subject to the rate-advances, and only challenged the timeliness of some of the reliquidations. *See* Pl.'s Reply at 7–8; Pl.'s Ex. 7; Pl.'s Ex. 8. Customs' decisions regarding the classification of Sterling's entries thus became "final and conclusive." *See* 19 U.S.C. § 1514(a). Defendants cannot "bypass the protest mechanism" and now "collaterally challenge the liquidation in the ensuing enforcement action." *See Cherry Hill*, 112 F.3d at 1557 ("To give importers . . . that option would create a gaping hole in the administrative exhaustion requirement of section 1514 and would be inconsistent with the underlying policy of section 1514, which is to channel challenges to liquidations through the protest mechanism in the first instance.").

Ex. 1; Pl.'s Ex. 9. Even accounting for the quality of the photographs, however, Defendants' conclusory assertion is difficult to fathom and impossible to credit. Several of the photographs depict boots, one with tassels, that clearly are not tennis shoes, rubber or otherwise. *See* Proposed Penalty Letter, Ex. I, ECF No. 62–4. And although the composition of the upper of each shoe is not ascertainable from the photographs, the presence of a foxing, or foxing-like band, is. *See* Proposed Penalty Letter, Exs. G-H, ECF No. 62–4.

Accordingly, the unrebutted evidence demonstrates the existence of a false statement; i.e., that the subject entries were misclassified. The false statement was material because it had the "potential to alter Customs' appraisement or liability for duty." *Horizon Prods. Int'l*, 82 F. Supp. 3d at 1356 (citation omitted).

C. Culpability

1. Parties' Contentions

Plaintiff contends that Sterling knew the nature of the footwear it imported and could have correctly described the footwear on its entry papers. Pl.'s XMSJ at 21–22. Plaintiff further contends that Sterling "instructed," rather than "consult[ed]," its customs brokers regarding the classification of its footwear entries." Pl.'s XMSJ at 21. And although, according to Plaintiff, Sterling is "presumed to [have] had knowledge of information published by CBP . . . to assist the trade with compliance obligations," it failed to "consult the HTSUS, customs regulations, or CBP's informed compliance publications to assist in describing its merchandise." Pl.'s XMSJ at 21. Plaintiff finally contends that the notices of action issued to Sterling provided it with notice of the correct classification of its footwear, as did Customs officials when they met with Sterling in July 2009, to explain the misclassifications, yet "Sterling blatantly disregarded its obligation to correct its erroneous classifications of entries and continued misclassifying its entries." Pl.'s XMSJ at 22. Plaintiff likens Sterling's conduct to that of the defendant in *New-Form Mfg. Co.*, 27 CIT 905, 277 F. Supp. 2d 1313,[33] and *United States v. Ford Motor Co.*, 29 CIT

[33] In *New-Form Manufacturing Co.*, the court determined that the defendant acted with gross negligence because it "knew that its merchandise was jack parts to be used for jacks[,] . . . knew that jack parts were subject to antidumping duties[,] . . . knew that its broker was not paying those duties[,] . . . identified its merchandise using [tariff provisions] that did not apply to jack parts, [] failed to accurately describe the merchandise[, and] . . . denied to its broker that it was exporting jack parts." 27 CIT at 919, 277 F. Supp. 2d at 1327.

793, 387 F. Supp. 2d 1305 (2005), *aff'd in part, rev'd in part on other grounds*,[34] 463 F.3d 1286 (Fed. Cir. 2006).

Defendants contend that (1) at "all times" they relied on Mr. Pollack's legal opinion "that the entries were properly classified," (2) they relied on Ms. Huynh to hire "experienced employees," including Ms. Ng, and "competent customs brokers" to determine classifications, (3) Ng "always instructed his employees . . . to work with the customs brokers to determine the proper classification," (4) Ng created the production department to determine correct classifications, and (5) they hired HTS to determine whether entries had been misclassified. Defs.' Resp. at 9.[35]

2. Sterling Acted with Gross Negligence

As discussed above, establishing gross negligence requires Plaintiff to prove that Sterling acted "with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B(C)(2).

The undisputed facts demonstrate that Sterling knew the style and composition of its footwear. Sterling imported several types of flip flops, sandals, heels, boots, and sneakers made from a variety of materials that included textiles, leather, and rubber. PSOF ¶ 35; Defs.' Resp. to PSOF ¶ 35. The purchaser of Sterling's imported footwear, Philip Simon, ordered specific styles corresponding to specific designs, colors, and materials. PSOF ¶¶ 37, 38; Defs.' Resp. to PSOF ¶¶ 37, 38. Sterling designed that footwear and set manufacturing specifications, which were confirmed by samples Sterling had produced before it satisfied any purchase orders. PSOF ¶¶ 36, 39; Defs.' Resp. to PSOF ¶¶ 36, 39. In short, Sterling knew the characteristics of the footwear it imported.

The undisputed facts also establish Sterling's indifference to or disregard for its statutory obligations. Sterling knew that it was responsible for correctly classifying its entries and complying with customs laws regarding its footwear entries. PSOF ¶ 34; Defs.' Resp. to PSOF ¶ 34. Yet, Sterling consistently instructed its brokers to enter footwear pursuant to HTSUS 6402.91.40, without regard to the styles of footwear being imported and, thus, without regard for whether

[34] In *Ford Motor Co.*, the defendant "repeated[ly] fail[ed]" to "notify Customs promptly of the value of the engineering purchase orders," which bore on the dutiable value of the imports. 29 CIT at 810, 387 F. Supp. 2d at 1321.

[35] Defendants filed a joint response rebutting their culpability generally; they did not always delineate the individual defendants' conduct for examination. *See* Defs.' Resp. at 8–10.

that was the correct tariff provision. *See* Whitney Decl. ¶¶ 102–110; Proposed Penalty Letter, Ex. P. Even after Customs issued two notices of action to Sterling on June 4, 2009 and July 9, 2009, on July 27, 2009, Sterling instructed its broker to enter the same style pursuant to HTSUS 6402.91.40.[36] *See* Ng's Ex. N (instructing Seattle Logistics to enter 19FLR103M/104M/108M/111M under HTSUS 6402.91.40); Proposed Penalty Letter, Ex. D (issuing a rate-advance on Entry No. CEB 00042295 for incorrect classification under HTSUS 6402.91.40); Whitney Decl. ¶ 24 (explaining that Entry No. CEB 00042295 consisted of 1900 cartons of Style No. 19FLR121W).[37] Additionally, following the July 29, 2009, meeting with customs officials, Sterling failed to submit any post-entry amendments despite its agreement to provide them. PSOF ¶¶ 78–79; Defs.' Resp. to PSOF ¶¶ 78–79; Whitney Decl. ¶¶ 77–78, 90; Kauffman Decl. ¶¶ 26–28; *see also* Proposed Penalty Letter, Ex. J at 2.

Defendants' contrary contentions are unavailing. First, Defendants could not have relied on Mr. Pollack's opinion "at all times" because Sterling did not hire Mr. Pollack until *after* it learned that CBP had determined that its footwear was being misclassified. *See* Ng. Decl. ¶ 9.[38] At oral argument, counsel even conceded that Sterling could not have relied on Mr. Pollack's opinion to classify its entries. Oral Arg. 53:44–54:09. Second, Defendants' purported reliance on Ms. Huynh to hire competent employees and brokers, or Sterling's establishment of a "production department," does not negate Sterling's responsibility to correctly classify its footwear and, in any event, the overwhelming evidence demonstrates that Sterling did not rely on its brokers for classification advice, but rather provided classification information to

[36] The court does not, however, consider that Sterling was any less grossly negligent before Customs issued the notices of action. This is not a situation in which reasonable minds might disagree on whether Sterling's styles meet the requirements of HTSUS 6402.91.40. The composition of the upper is printed inside the footwear and the foxing or foxing-like band is clearly visible on the exterior. *See* Pl.'s Physical Ex. 1. A cursory review of the plain language of HTSUS 6402.91.40 by Sterling would have demonstrated the inapplicability of that provision to the footwear in question.

[37] Sterling used the following method to generate style numbers: the first digit of a style number indicates brand; the second digit indicates the year; the next three letters indicate the style; the final three digits indicate the color or tattoo design; the final letter indicates whether the shoe is for women (W), men (M), or children (K). Whitney Decl. ¶ 96. Accordingly, Style No. 19FLR121W is the same as Style Nos.19FLR103M/104M/108M/111M, except for different color or tattoo designs and sizing for women instead of men.

[38] Further, Plaintiff's unrebutted evidence demonstrates that Mr. Pollack protested the timeliness of Customs' reliquidations of Sterling's entries, not its classification determination. Pl.'s Ex. 7. As Plaintiff points out, it would be "incongruous" for Mr. Pollack to "have advised [Sterling] that [its] entry classifications had been correct while simultaneously not protesting CBP's classification." Pl.'s Reply at 8. In contrast, Mr. Pollack filed a protest challenging Customs' classification of *Ng Branding*'s entries. *See* Pl.'s Ex. 6.

them. Proposed Penalty Letter, Ex. P. *Cf. Optrex Am., Inc.*, 32 CIT at 635, 560 F. Supp. 2d at 1339 (2008) (rejecting the defendant's "attempt to shift responsibility for classification to its customs broker, as it is well settled that the *importer* bears responsibility for classification of its merchandise") (citing 19 U.S.C. § 1484(a)). *See supra* note 18 (discussing Defendants' evidence cited in support of its argument that Sterling relied on its customs brokers for classification advice). Moreover, even when CBP alerted Sterling to the misclassification, Defendants failed to correct their errors and, in fact, compounded those errors by continuing to misclassify their entries of the same goods. Finally, for reasons already amply stated, Defendants' attempt to rely on the HTS Lab Report lacks merit. *See supra* Discussion Section IV.B.2; *supra* note 31.

In sum, Sterling had knowledge of the footwear it imported, because it had designed it. It knew that it was responsible for correctly classifying its footwear. Yet, Sterling repeatedly described the footwear as "rubber tennis shoes" and instructed its brokers to enter the footwear pursuant to the corresponding--incorrect--tariff provision. Sterling failed to correct its errors when pointed out by CBP and, instead, continued to make entries using the incorrect classification. Plaintiff has demonstrated Sterling's gross negligence by a preponderance of the evidence. *See Matthews*, 31 CIT at 2081, 533 F. Supp. 2d at 1313; *cf. New-Form Mfg. Co.*, 27 CIT at 919, 277 F. Supp. 2d at 1327, 27 C.I.T. 905, 919. Accordingly, Plaintiff is entitled to summary judgment as to Sterling's liability for gross negligence pursuant to 19 U.S.C. § 1592(a).

V. Ng Branding's Liability

A. Parties' Contentions

Plaintiff contends that Ng Branding may be held liable because it "was a 'mere continuation' of Sterling." Pl.'s XMSJ at 24–25. In particular, Plaintiff contends that Ng Branding "had the same corporate officer(s), location, employees, scope of business, and telephone numbers, . . ., and it imported and sold the same footwear that is the subject of this civil action." Pl.'s XMSJ at 25. Plaintiff further contends that Ng Branding should be held liable "because it is, for all practical purposes and intents, Sterling"; in other words, "Sterling and Ng Branding . . . essentially constitute a single enterprise." Pl.'s XMSJ at 24. Defendants' filings did not respond to Plaintiff's

assertion of Ng Branding's successor liability or single enterprise theory of liability.[39]

B. Legal Framework and Choice of Law

1. Successor Liability

A successor entity is generally not liable for its predecessor's debts. *See Bud Antle, Inc. v. Eastern Foods, Inc*., 758 F.2d 1451, 1456 (11th Cir. 1985) ("As a general rule, a corporation that purchases or otherwise acquires the assets of a second corporation does not assume the debts and liabilities of the second corporation."). This court has, however, determined that successor corporations may be held liable for a predecessor's violations of 19 U.S.C. § 1592. *United States v. CTS Holding, LLC*, Slip Op. 15–70, 2015 WL 3960890, at *9 (Ct. Intl. Trade June 30, 2015) ("[T]the word 'person' in § 1592 properly includes corporations and their successors and assigns."); *see also United States v. Adaptive Microsys., LLC*, 37 CIT ___, ___, 914 F. Supp. 2d 1331, 1338–42 (2013); *United States v. Ataka Am., Inc*., 17 CIT 598, 600, 826 F. Supp. 495, 498 (1993). The court has, in varying cases, applied both state law and federal common law when determining whether a successor corporation is liable for the actions of its predecessor pursuant to § 1592. *Compare Adaptive Microsys*., LLC, 914 F. Supp. 2d at 1338 (applying Wisconsin law in penalty and recovery actions), *with Ataka Am., Inc*., 17 CIT at 600, 826 F. Supp. at 498 (applying federal common law in recovery action). The court need not address the choice of law issue at this time, however, because California law and federal common law on successor liability are similar and appear to lead to the same outcome in this case.[40]

Federal common law and California law provide that a successor entity may be responsible for its predecessor's debts when "(1) there is an express or implied agreement to assume past debts, (2) the change in corporate form constitutes a de facto merger, (3) the successor is a mere continuation of its predecessor, or (4) the change in corporate form was motivated by the intent to defraud creditors." *Ataka Am*., 17 CIT at 600, 826 F. Supp. at 498 (federal common law) (citing *Bud Antle*, 758 F.2d at 1456 (citing the law of several federal

[39] At oral argument, Defendants asserted that Plaintiff did not plead successor liability in the complaint, Sterling was not dissolved, and there was no transfer of assets. Oral Arg. at 1:54:03–1:54:30. Plaintiff alleged that Ng Branding was Sterling's successor and several supporting facts in its complaint. *See* Compl. ¶ 43.

[40] At oral argument, Plaintiff asserted that California law and federal common law is the same on this issue. Defendants asserted that federal law would likely apply. Oral Arg. at 1:47:11–1:48:45.

district and circuit courts)); *see also Cleveland v. Johnson*, 147 Cal. Rptr. 3d 772 (Cal. Ct. App. 2012) (California law).[41] Successor liability is usually contingent upon the transfer of assets from the predecessor to the successor entity. *See Bud Antle*, 758 F.2d at 1457 ("All four of [the exceptions to the general rule of nonliability] require a transfer of assets in order to hold the acquiring corporation liable."); *Cleveland*, 147 Cal. Rptr. 3d at 781 ("[L]egal discussion begins with 'the rule ordinarily applied to the determination of whether a corporation *purchasing* the principal assets of another corporation assumes the other's liabilities.'") (quoting *Ray v. Alad Corp*. 560 P.2d 3 (Cal. 1977)) (emphasis added).

Relevant here, the "mere continuation" exception may apply when "a new corporation, which purchases all the assets of the old, proceeds exactly as if it were the old corporation." *Ataka Am*., 17 CIT at 602, 826 F. Supp. at 499 (continuity of officers, directors, and stockholders "in the selling and purchasing corporations" are "key element[s]" suggesting continuation) (citing *Bud Antle*, 758 F.2d at 1458–59); *see also Mozingo v. Correct Mfg. Corp*., 752 F.2d 168, 174 (5th Cir. 1985) ("The traditional rule with regard to the continuation exception . . . is that a corporation is not to be considered a continuation of a predecessor unless, after the transfer of assets, only one corporation remains, and there is an identity of stock, stockholders, and directors between the two corporations."). Likewise, as construed pursuant to California law, when "a corporation organizes another corporation with practically the same shareholders and directors, transfers all the assets but does not pay all the first corporation's debts, and continues to carry on the same business, the separate entities may be disregarded and the new corporation held liable for the obligations of the old." *Cleveland*, 147 Cal. Rptr. 3d at 784 (internal quotation marks and citation omitted).

2. Single Enterprise Theory

Plaintiff's brief did not offer legal support for its assertion of a "single enterprise" theory of liability. *See* Pl.'s XMSJ at 24. At oral argument, Plaintiff was offered the chance to provide one, and did not. Letter to Counsel (July 5, 2017) at 5, ECF No. 99 (legal and factual questions issued to Parties in advance of oral argument, in

[41] Like federal common law, California law provides for successor liability when:

> (1) there is an express or implied agreement of assumption, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

Cleveland, 147 Cal. Rptr. 3d at 781 (citation omitted).

which the court asked Plaintiff to "be prepared to explain the legal basis" for its "single enterprise" theory of liability); Oral Arg. 1:51:33–1:53:53.

Mozingo offers some support for Plaintiff's theory. In that case, the U.S. Court of Appeals for the Fifth Circuit explains that two lines of cases have emerged in relation to the "mere continuation" exception to the general rule of nonliability. *Mozingo*, 752 F.2d at 175. Relevant here, one line of cases follows the "continuity of enterprise" theory, and is considered an expansion of the mere continuation exception. *Id.* (citing as seminal cases *Cyr v. B. Offen & Co.*, 501 F.2d 1145 (1st Cir. 1974) and *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich. 1976)).[42] The "continuity of enterprise" theory considers the following factors:

> (1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same physical location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the successor holds itself out as the continuation of the previous enterprise.

Id. (footnote citations omitted); *see also United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992) (endorsing the continuity of enterprise theory of successor liability in the context of CERCLA[43] violations); *Equal Rights Ctr v. Equity Residential*, Civil No. CCB-06–1060, 2016 WL 1258418, at *5 (D. Md., 2016) (finding that the continuity of enterprise theory of successor liability is relevant to assessing successor liability pursuant to the Fair Housing Act). *But see Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1997) (declining to adopt the continuity of enterprise theory in the context of CERCLA violations because in cases in which it has been applied, there is usually some fraudulent intent exposing the purchaser to liability under the fraudulent transaction exception to the general rule of nonliability).

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[42] The other line of cases follows the "product line" theory adopted by the California Supreme Court in *Ray v. Alad*. *Mozingo*, 752 F.2d at 175."The product line theory is based largely on the idea that the successor corporation is, like the predecessor, in a position to assume the risk-spreading role assigned to the manufacturer of a product by strict liability theory." *Id.*"[P]rinciples of fairness" provide an additional basis for the "product line" theory: "a corporation which exploits the goodwill attached to a predecessor's product [should] also bear the burdens attached to the product." *Id.* (citing *Ray*, 560 P.2d at 9).

[43] CERCLA refers to the Comprehensive Environmental Response, Compensation, and Liability Act.

C. Material Facts Regarding Ng Branding's Status as Sterling's Successor are Disputed

Parties do not dispute that Ng Branding and Sterling had common shareholders, directors/managers, officers, business departments, employees, manufacturers, customers, company suites, equipment, and telephone numbers, and shared a business address. PSOF ¶¶ 8–9; Defs.' Resp. to PSOF ¶¶ 8–9. However, there is no record evidence that Ng Branding purchased Sterling, otherwise obtained Sterling's assets, or to what extent, if any, the financial affairs of the companies overlapped. Further, Parties dispute that Ng Branding carried on the same business as Sterling. *See* Defs.' Resp. to PSOF ¶ 5 (denying the companies had the same scope of business) (citing Ng's Ex. S, ECF No. 53–6 (letter authorizing Ng Branding to import "Robin's Jeans" footwear), and Ng Dep. 179:15–181:13, 186:2–23)). In the absence of undisputed evidence that a purchase or transfer of assets occurred, and that Ng Branding carried on the same business as Sterling, the court cannot, at this time, hold Ng Branding liable as Sterling's successor pursuant to the "mere continuation" exception. *See Bud Antle*, 758 F.2d at 1456; *Cleveland*, 147 Cal. Rptr. 3d at 781.[44]

Additionally, the court need not, for purposes of summary judgment, resolve the applicability of the "continuity of enterprise" variant of the "mere continuation" exception. *See Mozingo*, 752 F.2d at 175. The court either lacks record evidence, or there are disputes, about several of the factors pertinent to that inquiry. *See id.*; *supra* pp. 30–31.[45] For these reasons, the Government is not entitled to summary judgment as to Ng Branding's liability.

VI. Damages

A. Unpaid Duties

In count one of the complaint, Plaintiff seeks to recover $1,666,824.85 in unpaid duties, which consists of $2,003,080.12 in lost revenue minus the amount attributable to CBP's approval of 17 of Sterling's protests, $336,255.27. Compl. ¶¶ 45–47. Plaintiff

[44] At oral argument, Plaintiff contended that Ng Branding affected Sterling's footwear entries. Oral Arg. at 1:50:18–1:50:51. Plaintiff further asserted that the HTS Lab Report demonstrates that Ng Branding, like Sterling, imported Ed Hardy footwear. *Id.* at 1:53:15–1:53:43. However, the precise scope of Ng Branding's imports, and whether, for example, Ng Branding also imported Robin's Jeans shoes, is unclear on the current record.

[45] For example, the court lacks information regarding whether Ng Branding (1) retained Sterling's "production facilities in the same physical location"; (2) produced "the same product"; (3) retained Sterling's assets; or (4) held itself out as Sterling's continuation. *See Mozingo*, 752 F.2d at 175. There is no genuine dispute, however, that Ng Branding did not retain Sterling's name. *See id.*; PSOF ¶ 3; Defs.' Resp. to PSOF ¶ 3; Ng's Ex. R.

acknowledges that the $100,000 paid by Sterling's surety should be subtracted from its duty demand. *Id.*¶ 46; Pl.'s XMSJ at 3 n.1.

Section 1592 provides that CBP shall require the restoration of "lawful duties, taxes, and fees" of which the United States may have been deprived as a result of a violation of § 1592(a) "whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d). Having determined that Sterling violated § 1592(a), the court will order Sterling to pay the Government $1,566,824.85 in unpaid duties. At this stage of the proceedings, the presence of disputed facts precludes any finding as to Ng's or Ng Branding's joint and several liability for those duties.

B. Civil Penalty

In count two of the complaint, Plaintiff seeks a $20,758,323.88 penalty for grossly negligent conduct, i.e., four times the lost revenue,[46] which is less than the $22,604,574.01 domestic value of the subject entries alleged in the complaint. Compl. ¶ 53.[47] Alternatively, on count three of the complaint, Plaintiff seeks a $10,379.161.94 penalty for negligent conduct, i.e., two times the lost revenue. Compl. ¶ 59. Based on the court's determination that Sterling was grossly negligent, Plaintiff is eligible for a civil penalty up to the statutory maximum of $20,758,323.88. *See* 19 U.S.C. § 1592(c)(2).

The penalty determination is committed to the court's discretion, subject to statutory maximums. 19 U.S.C. § 1592(c)(1); *Horizon Prods. Int'l*, 82 F. Supp. 3d at 1359. The statutory maximum re-

[46] The total lost revenue consists of the sum of $3,186,500.85 in potential lost revenue and $2,003,080.12 in actual lost revenue. *See* Compl., Attach. A. Four times the resulting sum of $5,189,580.97 equals $20,758,323.88.

[47] At oral argument, the court asked the Government to substantiate its domestic value calculation, which was not part of the summary judgment record. Plaintiff referred the court to Exhibit S to the Proposed Penalty Letter, and stated that the information contained therein was all that was required to calculate the domestic value. According to Plaintiff, domestic value is calculated pursuant to regulation, 19 C.F.R. § 162.43, and equals the sum of entered value, lost revenue, duty paid, and taxes and fees, multiplied by 20%, which is the profit value applicable to footwear. Plaintiff represented to the court that the resulting figure is $31,659,670.10. Oral Arg. 31:33–34:36.

In pertinent part, § 162.43 governs the appraisement of property for penalty assessment purposes. 19 C.F.R. § 162.43(b). Subsection (a) defines "domestic value" as "the price at which such or similar property is freely offered for sale at the time and place of appraisement, in the same quantity or quantities as seized, and in the ordinary course of trade." 19 C.F.R. § 162.43(a). Although Plaintiff's domestic value calculation makes sense in that it represents the sum of cost plus profit, the cited regulation does not expressly substantiate Plaintiff's method or its reliance on a 20% profit multiplier. *See id.* Moreover, the court's calculation of domestic value based on the figures provided in Exhibit S multiplied by 20% results in a domestic value of $22,220,172.70, far less than the $31 million represented by Plaintiff at oral argument, and closer to, though not exactly, the value alleged in the complaint. In any event, the court need not resolve the precise domestic value at this juncture because, as discussed, it will defer determining the amount of any civil penalty to be assessed. Plaintiff will, however, need to confirm the domestic value calculation at the appropriate time.

quested by Plaintiff is not, however, the "default starting point" for the imposition of penalties, only to be adjusted downward when evidence supports mitigation. *See Optrex Am.*, 32 CIT at 641, 560 F. Supp. 2d at 1344 (citing *United States v. Modes, Inc.*, 17 CIT 627, 635, 826 F. Supp. 504, 512 (1993)); *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946, 83 F. Supp. 2d 1307, 1312 (1999) ("[T]he law requires the court to begin its reasoning on a clean state. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight.") (citation omitted). Instead, the court determines the appropriate amount in light of the totality of the evidence supporting a higher or lower penalty. *Cf. Optrex Am.*, 32 CIT at 641–42, 560 F. Supp. 2d at 1344 (starting the "evaluation of the penalty amount at the midpoint where it may be subject to upward or downward departure based on mitigating and aggravating factors"). In the absence of legislative guidance, the court has identified 14 non-exclusive factors that it may consider when determining the appropriate penalty. *Complex Mach. Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999); *see also Optrex Am.*, 32 CIT at 64–42, 560 F. Supp. 2d at 1342–44 (considering four of the fourteen factors). The factors are:

> (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscience of the [c]ourt; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require.

Complex Mach. Works Co., 23 CIT at 949–50, 83 F. Supp. 2d at 1315.

Because the presence of disputed facts prevents this court from resolving Ng's and Ng Branding's liability pursuant to § 1592(a), the court will defer determining the amount of any penalty until all liable parties (whose conduct is relevant to the inquiry) have been identified. This way, Parties will also have an opportunity to fully brief the

Complex Machine Works factors, which will greatly inform the court's analysis. *Cf.* Pl.'s XMSJ at 18, 18–39 (alluding to the *Complex Machine Works* factors but not addressing them).

C. Prejudgment Interest

Plaintiff also seeks prejudgment interest on the unpaid duties pursuant to 19 U.S.C. § 1505. Compl. at 11–12. Section 1505 provides that delinquent "duties, fees, and interest . . . bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid." 19 U.S.C. § 1505(d). Accordingly, the Government is entitled to delinquency interest pursuant to § 1505(d).

CONCLUSION &ORDER

For the foregoing reasons, Ng's motion for summary judgment will be denied; the Government's cross-motion for summary judgment against Ng will be denied; and the Government's motion for summary judgment against Sterling and Ng Branding will be granted in part as to Sterling's liability for gross negligence pursuant to 19 U.S.C. § 1592 and for unpaid duties and prejudgment interest, and denied in all other respects.[48] The court will defer its determination of the amount of any civil penalty until Ng's and Ng Branding's liability is resolved at trial. Accordingly, it is hereby

ORDERED that Defendant Alex Ryan Ng's motion for summary judgment (ECF Nos. 53, 96) is **DENIED**; it is further

ORDERED that Plaintiff's cross-motion for summary judgment against Defendant Alex Ryan Ng and motion for summary judgment against Defendants Sterling Footwear, Inc., and Ng Branding, LLC (ECF No. 62), is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that Sterling Footwear, Inc. is liable to Plaintiff for $1,566,824.85 in unpaid duties lost by reason of grossly negligent violations of 19 U.S.C. § 1592, and a civil penalty, plus prejudgment interest pursuant to 19 U.S.C. § 1505; it is further

ORDERED that the court will defer its determination of the amount of any civil penalty until Alex Ryan Ng's and Ng Branding, LLC's liability is resolved at trial; and it is further

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[48] USCIT Rule 54(b) permits the entry of partial judgment as to one of several claims when there "is no just reason for delay." "Rule 54(b) requires finality—'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *United States v. Horizon Prods. Int'l, Inc.*, 39 CIT ___, ___, 91 F. Supp. 3d 1339, 1340 (2015) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). Here, however, the court has not "ultimate[ly] dispos[ed]" of Plaintiff's claim for unpaid duties because it has not resolved Ng's and Ng Branding's liability for those duties. Thus, entry of partial summary judgment is inappropriate at this time. *See id.*

ORDERED that no later than November 30, 2017, Parties shall file, via CM/ECF, a proposed Pretrial Order, substantially in the form of Standard Chambers Form 1–1 (SCP 1–1), including all Schedules provided for therein.

SO ORDERED.

Dated: October 12, 2017
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE