

U.S. Court of International Trade

Slip Op. 20–33

SUMECHT NA, INC., d.b.a. SUMEC NORTH AMERICA, Plaintiff, v. UNITED STATES, Defendant, and SOLARWORLD AMERICAS, INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00244

[Denying Plaintiff's motion for attorneys' fees.]

Dated: March 12, 2020

Mark B. Lehnardt, Michael S. Snarr, Lindita Ciko Torza, and Jake Frischknecht, Baker Hostetler, LLP, of Washington, D.C., for Plaintiff Sumecht NA, Inc., d.b.a. Sumec North America.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Choe-Groves, Judge:

Before the court is an application for an award of attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, requested by Plaintiff Sumecht NA, Inc., d.b.a. Sumec North America ("Sumecht"). Pl.'s Mem. in Supp. for Appl. of Attorney's Fees Under the EAJA and Am. Br. in Supp., ECF Nos. 87–89 ("Pl. Mem.").¹ Defendant United States ("Defendant") opposes the fee application. Def.'s Mem. in Opp'n, ECF No. 92 ("Def. Opp'n"). For the reasons set forth below, Sumecht's fee application is denied.

I. BACKGROUND

The court presumes familiarity with the facts and record of proceedings as set out in the court's prior opinion and recounts only those facts relevant to the pending motion for attorneys' fees. *See Sumecht NA, Inc. v. United States*, 43 CIT ___, 399 F. Supp. 3d 1370, 1372–76 (2019).

¹ Sumecht filed a confidential and public version of its amended memorandum in support of its fee application. ECF Nos. 88 (Confidential Amended Brief) and 89 (Public Amended Brief).

Commerce initiated an antidumping duty investigation of certain solar cells from China in 2011. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 76 Fed. Reg. 70,960 (Dep't Commerce Nov. 16, 2011) (initiation of antidumping duty investigation). In reaching an affirmative determination and issuing an antidumping order, Commerce concluded that Sumecht's affiliated exporter, Sumec Hardware, satisfied its showing for separate status and was assigned the separate rate of 24.48%. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 63,791, 63,794 (Dep't Commerce Oct. 17, 2012) (final determination of sales at less than fair value and affirmative final determination of critical circumstances, in part), *as amended by Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 77 Fed. Reg. 73,018, 73,021 (Dep't Commerce Dec. 7, 2012) (amended final determination of sales at less than fair value and antidumping duty order) (collectively, "AD Order"); Pl. Mem. in Supp. of Mot. for J. Upon the Agency Rec. 21, ECF No. 61-1 (referring to Sumec Hardware as Sumecht's "affiliated exporter"). The China-wide entity rate for exporters who did not establish separate rate status was 238.95%. AD Order, 77 Fed. Reg. at 73,021.

Petitioner and Defendant-Intervenor SolarWorld Americas, Inc. challenged the final results of the investigation and Sumec Hardware's separate rate status. *Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 38 CIT ___, 28 F. Supp. 3d 1317 (2014), *review after remand*, 39 CIT ___, 121 F. Supp. 3d 1263 (2015) ("*Jiangsu Jiasheng*"). The *Jiangsu Jiasheng* litigation concluded when the court sustained Commerce's remand results in a confidential opinion and entered judgment on October 5, 2015. *Jiangsu Jiasheng*, 121 F. Supp. 3d at 1266. The court issued a public version of the opinion on December 22, 2015. *Sumecht NA, Inc.*, 399 F. Supp. 3d at 1374.

On November 23, 2015, Commerce published a notice in the Federal Register regarding the court's decision in *Jiangsu Jiasheng* that was not in harmony with Commerce's final determination ("*Timken Notice*").² *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*, 80 Fed. Reg. 72,950 (Dep't Commerce Nov. 23, 2015) (notice of court decision not in harmony and amended final LTFV determination). The *Timken Notice* reflected a change in Sumec Hardware's antidumping duty

² "A '*Timken Notice*' is a notice issued by Commerce if this Court or the U.S. Court of Appeals for the Federal Circuit renders a decision that is not in harmony with Commerce's prior determination." *Sumecht NA, Inc.*, 399 F. Supp. 3d at 1372 (citations omitted).

rate from 13.18% to the 238.95% China-wide entity rate and stated that the new rate would apply retroactively 39 days to October 15, 2015 (beginning on the tenth day after the court decided *Jiangsu Jiasheng*).³ *Id.* Commerce published the *Timken Notice* more than ten days after the court decided *Jiangsu Jiasheng*. *Id.*; *Sumecht NA, Inc.*, 399 F. Supp. 3d at 1376–77.

Sumecht filed suit in 2017 challenging Commerce’s decisions to issue the late *Timken Notice* and to make the new 238.95% rate effective retroactively to 39 days before Commerce published notice of the new rate in the Federal Register. Summons, ECF No. 1; Compl., ECF No. 2; Am. Compl., ECF Nos. 15–16. Sumecht filed a USCIT Rule 56.1 motion for judgment on the agency record that was opposed by Defendant, and the court held oral argument in March 2019. ECF Nos. 61, 70, 71, 78.

Sumecht appealed this court’s orders denying its motion for a preliminary injunction and motion for reconsideration. *Sumecht NA, Inc. v. United States*, 42 CIT ___, 331 F. Supp. 3d 1408 (2018); Notice of Interlocutory Appeal, ECF No. 66. The U.S. Court of Appeals for the Federal Circuit affirmed this court’s denial of the motion for reconsideration and denial of the requested injunction on May 8, 2019. *Sumecht NA, Inc. v. United States*, 923 F.3d 1340, 1348 (Fed. Cir. 2019) (finding, in relevant part, that Sumecht failed to show irreparable harm absent an injunction).

The court decided Sumecht’s motion for judgment on the agency record on September 6, 2019. In a matter of first impression, the court found that Commerce’s late publication of the *Timken Notice* beyond the ten-day statutory timeframe violated 19 U.S.C. § 1516a(c)(1). *Sumecht NA*, 399 F. Supp. 3d at 1377. The court determined also that the plain language of 19 U.S.C. § 1516a(c)(1) compelled liquidating the subject merchandise entered by Sumecht between November 9, 2015 and November 23, 2015 at the 13.18% rate assigned in Commerce’s prior determination. *Id.* at 1378. The court then concluded that Defendant’s late publication of the *Timken Notice* “prejudiced the Plaintiff and amounted to more than harmless error.” *Id.* at 1379.

Defendant did not appeal the court’s decision. Sumecht filed an application for an award under 28 U.S.C. § 2412, EAJA. In the application, Sumecht seeks an EAJA award of \$111,007.40. Pl. Mem. at 16.

³ Commerce lowered Sumec Hardware’s rate from 24.48% to 13.18% for entries made on or after August 2, 2015, as part of the Uruguay Round Agreements Act (“URAA”) implementation. *Sumecht NA, Inc.*, 399 F. Supp. 3d at 1374 (citing *Implementation of Determinations Under Section 129 of the URAA*, 80 Fed. Reg. 48,812, 48,818 (Dep’t Commerce Aug. 14, 2015)).

II. DISCUSSION

Sumecht argues that a fee award is appropriate under two provisions in the EAJA. Sumecht contends that Section 2412(d)(1)(A) authorizes an award because (1) it is both an eligible and prevailing party in the action against the United States; (2) Defendant took a position that was not substantially justified; and (3) no special circumstances would make an award unjust. *See* Pl. Mem. at 6–11. Alternatively, Sumecht contends that Section 2412(b) provides a separate basis to award fees and expenses. *Id.* at 7. Defendant responds that Sumecht presented insufficient evidence to meet the “prevailing party” eligibility criteria. Def. Opp’n at 6. Defendant argues that even if Sumecht qualifies as a prevailing party, its position was substantially justified. *Id.* at 13–22. In the alternative, Defendant avers that special circumstances bar an award. *Id.* at 25.

A. Governing Law

The EAJA “ensure[s] that certain individuals, partnerships, corporations . . . or other organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved” in vindicating their rights. *Scarborough v. Principi*, 541 U.S. 401, 407 (2004) (noting that Congress passed EAJA “to eliminate the barriers that prohibit small businesses and individuals from securing vindication of their rights” in actions brought by or against the United States); *see Comm’r; I.N.S. v. Jean*, 496 U.S. 154, 163 (1990) (“[T]he specific purpose of the EAJA is to eliminate for the average person the financial disincentive to challenge unreasonable governmental actions.”).

The court may award EAJA fees and other expenses when the applicant shows that it is an eligible and prevailing party in a civil action brought by or against the United States, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. 28 U.S.C. §§ 2412(d)(1)(A)–(B). A “prevailing party” is one that “has been awarded some relief by the court.” *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept of Health and Human Res.*, 532 U.S. 598, 603 (2001). An eligible “party” includes a “partnership, corporation, . . . or organization,” if the entity did not have more than 500 employees and its net worth did not exceed \$7,000,000 at the time the civil action was filed. 28 U.S.C. § 2412(d)(2)(B).

A plaintiff bears the burden of showing it is a “prevailing party” that meets the financial eligibility conditions (in this case, the net worth and headcount requirements) and that it filed a timely appli-

cation containing an itemized account of fees and costs. *See Scarborough*, 541 U.S. at 405, 414. The Government bears the burden of showing that its position was substantially justified. *Id.* at 415 (citing, among other cases, *Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003)). The Government need do so only by a preponderance of the evidence. *De Allende v. Baker*, 891 F.2d 7, 12 (1st Cir. 1988) (citation omitted).

The phrase “substantial justification” means “justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (noting the Government’s position must have a “reasonable basis both in law and fact”); *see Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) (“The government can establish that its position was substantially justified if it demonstrates that it adopted a reasonable, albeit incorrect, interpretation of a particular statute or regulation.”). Thus, a prevailing party may recover fees in the “very small category of cases” in which “the Government’s position will be deemed so unreasonable as to produce an EAJA award.” *Pierce*, 487 U.S. at 574.

Even if the Government’s position was not substantially justified, special circumstances may bar granting a prevailing party an EAJA award. *See* 28 U.S.C. § 2412(d)(1)(A). The “special circumstances” exception is intended to serve as a “safety valve . . . to [e]nsure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.” *Devine v. Sutermeister*, 733 F.2d 892, 895–96 (Fed. Cir. 1984) (quoting H.R. Rep. No. 96–1418, at 11, *as reprinted in* 1980 U.S.C.C.A.N 4984, 4990) (internal quotation marks omitted).

B. Entitlement to Award Under Section 2412(d)

1. Prevailing Party Status

Defendant challenges the sufficiency of Sumecht’s evidence as to net worth and number of employees that would satisfy a corporate applicant’s prevailing party status. Def. Opp’n at 6.⁴ In its motion, Sumecht attached a declaration from the President and CEO of Sumecht and a copy of an independent auditor’s report for the year ending 2017 to show that, at the time of filing this action on September 29, 2017, Sumecht’s net worth did not exceed \$7,000,000. Pl.

⁴ Defendant does not contest that Sumecht obtained a judgment on the merits and timely filed its EAJA fee application that contained an itemized statement of fees and costs.

Mem. at 7, Ex. 3, Declaration of Alex Levrán (“Levrán Declaration” or “Levrán Decl.”) and 2017 Independent Auditor’s Report and Financial Statements.

In this case, Sumecht put forth insufficient evidence to meet the prevailing party criteria. The Levrán Declaration contains an assertion that “[t]hroughout 2017, Sumec NA, Inc. was operating at a loss and its net value⁵ was below \$7,000,000.” Levrán Decl. ¶ 3. Neither the declaration, nor the additional exhibits attached to the motion, make any mention of Sumecht’s employee headcount as of the day it initiated this action on September 29, 2017.⁶ See *Missouri Pac. Truck Lines, Inc. v. United States*, 746 F.2d 796, 797–98 (Fed. Cir. 1984) (“The legislative history [of the EAJA] shows that Congress intended the 500 employees limit to be an additional eligibility requirement for corporations.”). Sumecht’s evidence in the form of the Levrán Declaration and 2017 Financial Statements as to meeting the net worth requirement are also insufficient. The Independent Auditor’s Report accompanying the 2017 Financial Statements lacks indicia of reliability. Absent from the cover letter of the Independent Auditor’s Report accompanying the Financial Statements is a declaration from an accountant at the firm stating who provided accounting services to Sumecht and that the accountant prepared the financial statements using Generally Accepted Accounting Principles (“GAAP”). See *Stromness MPO, LLC v. United States*, 140 Fed. Cl. 415, 433–34 (Fed. Cl. 2018) (finding sufficient evidence of net worth being below \$7,000,000 when the applicant provided a filed tax return, balance sheets, and a declaration from an accountant who attested to preparing and filing the tax return and financials using GAAP principles).

Even if Sumecht supplemented its 2017 Financial Statements, the court’s consideration of the net worth of Sumecht’s parent company and affiliated exporter, Sumec Hardware, would disqualify Sumecht from claiming an EAJA award. Def.’s Opp’n, Ex. A (showing that Sumecht’s webpage lists the “financial health” of Sumecht as “part of a family of businesses” and “backed by parent companies with over \$39 Billion US in annual revenue”). When evaluating net worth, courts in the Federal Circuit aggregate affiliated entities “when the underlying litigation pursued by the EAJA claimant substantially benefitted another party, or if the claimant was not the real party in

⁵ The statute requires the applicant to show that its “net worth” does not exceed \$7,000,000. 28 U.S.C. § 2412(d)(2)(B). Levrán asserts that Sumecht’s “net value was below \$7,000,000.” Levrán Decl. ¶ 3.

⁶ Sumecht attached to its motion six exhibits: (1) this court’s Slip Opinion and Judgment, dated September 6, 2019 (Slip Op. 19–118); (2) Itemized Statement of Fees; (3) Levrán Declaration and 2017 Independent Auditor’s Report and Financial Statements; (4) Affidavit of Counsel; (5) Biographies of Counsel of Record; and (6) CPI Information. Pl. Mem., Exs. 1–6.

interest to the underlying litigation.” See, e.g., *Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 505, 510 (Fed. Cl. 2003) (holding that aggregation of affiliated entities is necessary when “the underlying litigation bestowed significant benefits on entities other than the EAJA claimant[]”). Here, Sumecht derived a significant benefit from the underlying litigation when Sumec Hardware participated in the antidumping duty investigation and remand proceedings before Commerce and received a separate status and separate antidumping duty rate of 24.48%. The court concludes that Sumecht cannot assert prevailing party status.

2. Substantial Justification

Sumecht argues that Defendant maintained a position that was not substantially justified. Pl. Mem. at 9. In support, Sumecht cites a judge’s comment made during oral argument before the U.S. Court of Appeals for the Federal Circuit, as well as this court’s decision granting Sumecht’s Rule 56.1 motion for judgment on the agency record concluding that Commerce’s actions rose above the level of harmless error. *Id.*; *Sumecht NA, Inc.*, 399 F. Supp. 3d at 1377, 1379. Defendant contends that Commerce’s issuance of the *Timken Notice* after the court’s decision in *Jiangsu Jiasheng* had a reasonable basis in law and fact because the matter involved a novel issue and Commerce’s actions showed an intent to give prompt effect to the court’s decision. Def. Opp’n at 13–16.

In this case, the court finds that Defendant had substantial justification for maintaining its position at the administrative agency level and defending the validity of the agency action in court. The record shows that Commerce sought to implement the court’s decision within the ten-day statutory timeframe set out in 19 U.S.C. § 1516a when it assigned the effective date of the *Timken Notice* as the tenth day after the court decided *Jiangsu Jiasheng*. See *Diamond Sawblades Mfrs. Coalition v. United States*, 650 F. Supp. 2d 1331, 1356 (2009), *aff’d*, 626 F.3d 1374 (Fed. Cir. 2010) (noting “the basic proposition that all orders and judgments of courts must be complied with promptly” (quoting *Maness v. Meyers*, 419 U.S. 449, 458 (1975))). The legal merits of Defendant’s position also had a basis in the record. The fact that Defendant maintained a consistent position throughout this action when it implemented the court’s decision and imposed a retroactive duty rate supports a finding of substantial justification. See *Patrick*, 668 F.3d at 1330. The uncertainty in the law during the underlying litigation also supports a conclusion that Defendant’s position was substantially justified. As this court recognized, late

publication of the *Timken Notice* presented a novel issue. *Sumecht NA, Inc.*, 399 F. Supp. 3d at 1377 n.2 (recognizing the absence of challenges to late issuance of the *Timken Notice* when Commerce applied a lower duty rate); see *Cody v. Caterisano*, 631 F.3d 136, 142 (4th Cir. 2011) (noting that “litigating cases of first impression is generally justifiable” (citations omitted)); *Saysana v. Gillen*, 614 F.3d 1, 6 (1st Cir. 2010) (When “a case presents a novel issue and one on which there is little precedent, courts have found that an award of EAJA fees is not warranted.” (citation omitted)); *Vacchio v. Ashcroft*, 404 F.3d 663, 675 (2d Cir. 2005) (holding that the Government’s position was substantially justified when no binding precedent supported the plaintiff’s position, “the issue [wa]s far from settled law,” and “the Government’s legal argument [wa]s far from unreasonable”). That Defendant was unsuccessful in the litigation does not support a presumption that its position was unreasonable. *Aronov v. Napolitano*, 562 F.3d 84, 94 (1st Cir. 2009) (en banc) (citing *Pierce*, 487 U.S. at 566 n.2) (“[T]he position of a government agency can be substantially justified even if a court ultimately determines the agency’s reading of the law was not correct.”). The court concludes that Defendant’s position was substantially justified because it advanced a novel issue and credible legal theory, though incorrect, in good faith that had a reasonable basis in both law and fact.⁷ Because the court finds Defendant’s position was substantially justified, it need not decide whether special circumstances would make a fee award unjust.

C. Entitlement to Award Under Section 2412(b)

Sumecht contends that Section 2412(b)’s common law cost-shifting analysis justifies an award. Pl. Mem. at 7. Defendant points to the absence of supporting evidence or development of Sumecht’s argument seeking fees under Section 2412(b) and avers that, in any event, there is a lack of record evidence showing that Defendant acted in bad faith. Def. Opp’n at 26–27.

Under Section 2412(b), Defendant retains liability for fees and costs “to the same extent that any other party would be liable under common law or under the terms of any statute which specifically

⁷ Sumecht’s insistence that this court rely on a judge’s comment made during oral argument at the U.S. Court of Appeals for the Federal Circuit supporting Sumecht’s position has a fatal flaw in that the appeals court affirmed this court’s decision denying the injunction and did not discuss the language of 19 U.S.C. § 1516a. *Sumecht NA, Inc.*, 923 F.3d at 1348; see, e.g., *Dellew Corp. v. United States*, 855 F.3d 1375, 1377 (Fed. Cir. 2017) (recognizing that a “strong comment by a trial court is not tantamount to a ruling on the merits or a court order”).

provides for such an award.” *Starry Assocs., Inc. v. United States*, 892 F.3d 1372, 1377 (Fed. Cir. 2018). The common law or “American Rule” directs that parties typically are responsible for their own attorneys’ fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975). A recognized exception to the American Rule allows fee-shifting “when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Id.* at 258–59 (internal quotation marks and citations omitted); *see also Centex Corp. v. United States*, 486 F.3d 1369, 1371–75 (Fed. Cir. 2007) (discussing Section 2412(b) fee awards under the bad-faith exception to the American Rule). Here, the court finds no grounds to award fees under Section 2412(b) when the record contains no evidence that Defendant acted in bad faith while maintaining its position or acted with improper purpose.

III. CONCLUSION

For the foregoing reasons, the court concludes that Sumecht does not qualify for an EAJA award. Accordingly, it is hereby **ORDERED** that Sumecht’s motion for fees, ECF No. 87, is denied.

Dated: March 12, 2020

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

Slip Op. 20–34

TR INTERNATIONAL TRADING COMPANY, Plaintiff, v. UNITED STATES, et al.,
Defendants.

Before: Mark A. Barnett, Judge
Court No. 19–00022

[Defendants’ motion to dismiss for lack of subject matter jurisdiction is granted. The partial consent motion to intervene as Defendant-Intervenors is denied as moot.]

Dated: March 16, 2020

John M. Peterson, Neville Peterson LLP, of New York, NY, argued for Plaintiff. With him on the brief were *Lawrence J. Bogard* and *Michael K. Tomenga*.

Justin R. Miller, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for Defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *L. Misha Preheim*, Assistant Director, and *Joshua E. Kurland*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Of counsel on the brief were *Paula S. Smith*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, and *Emma T. Hunter*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Justice.

OPINION AND ORDER

Barnett, Judge:

In this case, an importer asserts that the product it imports should be considered a product of India. The importer contends that its supplier produces the subject imports in India from an input sourced in India, but of undetermined country of origin. U.S. Customs and Border Protection (“CBP” or “Customs”) determined that the supplier’s processing of the input did not constitute a substantial transformation. In the absence of a substantial transformation by the Indian supplier and documentation otherwise supporting India as the country of origin, CBP determined that the subject imports were of Chinese origin and subject to the antidumping and countervailing duty orders on the same. The importer seeks to invoke the court’s residual jurisdiction to challenge that determination, and the matter is now subject to a motion to dismiss for lack of subject matter jurisdiction.

The aforementioned importer, TR International Trading Company (“Plaintiff” or “TRI”), commenced this action specifically seeking an injunction directing Customs to reliquidate 17 entries of citric acid imported into the United States from India without regard to anti-dumping (“AD”) or countervailing (“CVD”) duties. *See generally* Compl. for Inj. Relief (“Compl.”), ECF No. 4. Plaintiff alleges unlawful action by Customs and the U.S. Department of Commerce (“Commerce” or “the agency”) and asserts three counts relevant thereto.

Count one alleges, “[o]n information and belief,” that Customs assessed AD/CVD duties on TRI’s entries in response to “undisclosed or confidential instructions from [Commerce].” *Id.* ¶ 68. According to TRI, Commerce’s alleged authorization of the assessment of AD/CVD duties “was arbitrary, capricious, [] an abuse of process,” *id.* ¶ 70, and “without observance of procedure required by law,” *id.* ¶ 71. Count two alleges that Customs exceeded its authority when it determined that TRI’s imports of citric acid anhydrous from India were within the scope of certain AD/CVD orders because such determinations are reserved to Commerce. *See id.* ¶¶ 72–84. Count three alleges that Customs misapplied Commerce liquidation instructions and disregarded procedural requirements to issue notices of action proposed or action taken “before liquidating TRI’s entries” and thereby deprived TRI of the opportunity to “present[] ‘compelling reasons’ for Customs to withhold liquidation of the entries at issue.” *Id.* ¶ 94. As noted, Plaintiff seeks to invoke this court’s subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i). *Id.* ¶ 16.

Defendant United States (“Defendant” or “the Government”) moves to dismiss TRI’s complaint for lack of subject matter jurisdiction pursuant to United States Court of International Trade (“USCIT” or “CIT”) Rule 12(b)(1) or, alternatively, for failure to state claim upon which relief can be granted pursuant to USCIT Rule 12(b)(6). Def.’s Mot. to Dismiss (“Def.’s Mot.”), ECF No. 17; *see also* Defs.’ Reply in Supp. of Their Mot. to Dismiss (“Def.’s Reply”), ECF No. 29.¹ TRI opposes the motion. Pl. TR Int’l Trading Co.’s Resp. to Defs.’ Mot. to Dismiss (“Pl.’s Opp’n”), ECF No. 26.

Archer Daniels Midland Company, Cargill, Incorporated, and Tate & Lyle Ingredients Americas LLC (collectively, “Proposed Intervenor”) are members of the domestic industry relevant to the orders on Citric Acid from the People’s Republic of China and seek to intervene as Defendant-Intervenors. *See* Partial Consent Mot. to Intervene, ECF No. 9. Defendant consents to the motion. *Id.* at 1. Plaintiff opposes the motion. *See* Opp’n to Partial Consent Mot. to Intervene, ECF No. 12.

For the following reasons, the court grants Defendant’s motion to dismiss for lack of subject matter jurisdiction, does not reach Defendant’s alternative basis for dismissal, and denies as moot Proposed Intervenor’s motion to intervene.

¹ Additional named Defendants include U.S. Department of Commerce, International Trade Administration; Wilbur Ross, in his official capacity as Secretary of Commerce; CBP; and Kevin McAleenan, in his official capacity as Commissioner of CBP. Compl. ¶¶ 12–15. While the pending motion identifies the Government as the sole movant, Def.’s Mot. at 1, the reply was filed on behalf of all named Defendants, Def.’s Reply at 1. This discrepancy is immaterial for purposes of the court’s resolution of the pending motion.

STANDARD OF REVIEW

To adjudicate a case, a court must have subject-matter jurisdiction over the claims presented. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). “[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the complaint must be dismissed in its entirety.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006).

Plaintiff bears the burden of establishing subject-matter jurisdiction. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). When, as here, the plaintiff asserts section 1581(i) jurisdiction, it “bears the burden of showing that another subsection is either unavailable or manifestly inadequate.” *Erwin Hymer Group N. Am., Inc. v. United States*, 930 F.3d 1370, 1375 (Fed. Cir. 2019) (citation omitted). Because the pending motion to dismiss rests on the availability of jurisdiction pursuant to other subsections, and therefore challenges the existence of jurisdiction, “the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true.” *See Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012). To resolve the pending motion, the “court is not restricted to the face of the pleadings” and may, if necessary, “review evidence extrinsic to the pleadings.” *Id.* (internal quotation marks and citation omitted).

BACKGROUND

From July to December 2017, TRI filed 17 entries (“the subject entries”) at various U.S. ports of entry of citric acid anhydrous purchased from the Indian manufacturer Posy Pharmachem PVT. LTD (“Posy”). Compl. ¶ 18. The subject entries identified India as the country of origin. *Id.* ¶ 19. TRI filed the subject entries “as type 01 ‘consumption’ entries and not as type 03 ‘consumption—antidumping (AD)/countervailing duty (CVD)’ entries.” *Id.* ¶ 21. TRI sought “duty free treatment for the merchandise as qualifying goods under the Generalized System of Preferences.” *Id.* ¶ 2.

On February 1, 2018, Customs requested from TRI information regarding “value, production, and process quality” for the subject entries. *Id.* ¶ 24. On March 19, 2018, TRI responded to the request, documenting, *inter alia*, Posy’s purchase and receipt of citric acid monohydrate from suppliers in India and “Posy’s processing, in India, of the [citric acid monohydrate] into citric acid anhydrous.” *Id.* ¶ 25; *see also* Def.’s Mot., Attach. B (TR Int’l Trading Co.—Resp. to Request for Information on Citric Acid Anhydrous from India (March 19,

2018)).² TRI averred that “[t]he processing of the citric acid monohydrate into citric acid anhydrous performed by Posy satisfies the new and different product test for a substantial transformation thereby establishing India as the country of origin of the citric acid anhydrous it supplied to TRI.” Def.’s Mot., Attach. B at 6. On May 16, 2018, CBP extended liquidation of the subject entries. Compl. ¶ 33; *see also* 19 U.S.C. § 1504(b)(1) (permitting extension of the time period for liquidation when CBP requires additional information “for the proper appraisement or classification of the imported or withdrawn merchandise”).

On October 3, 2018, CBP informed TRI (via email to TRI’s counsel) (“CBP’s 10/3/18 Email”) that its review of TRI’s entries had been transferred to CBP’s Pharmaceuticals, Health & Chemicals Center for Excellence and Expertise (“the PCEE”). Compl. ¶ 34; *see also* Def.’s Mot., Attach. A at 1 (Email from Lori J. Kreidermacher-Carter, Senior Import Specialist, PCEE, CBP, Port of Chicago, to M. Tomenga, Esq., Neville Peterson, LLP (Oct. 3, 2018)). In the email, the PCEE official explained that, as of September 6, 2018, she had not received TRI’s response to CBP’s February 1, 2018 request for information and, thus, on September 6, 2018, CBP had issued a Notice of Action to TRI on CBP Form 29 setting the entries for liquidation. Def.’s Mot., Attach. A at 1. The PCEE official directed TRI’s counsel to the “attached CBP-29 for reference”; *i.e.*, a copy of CBP’s Form 29 Notice of Action, dated September 6, 2018 (“CBP’s 9/6/18 Notice”). *Id.*³

CBP’s 9/6/18 Notice stated:

As of today, this office has not received a response to the CBP-28 originally sent on 2/1/18 requesting information to support the use of India as the country of origin for the Citric acid on these entries. *We believe the Citric Acid is of Chinese origin and subject to antidumping and countervailing duties.* The proposed change includes changing the entry to type 03 and adding antidumping case A570–937–000/156.87% and countervailing case C570–938–000/8.14%. If this office does not receive documents to support your use of [India] as country of origin within 20 days of this notice, the entries will be changed as proposed.

² TRI alleges that the country of origin of the citric acid monohydrate Posy sourced from Indian suppliers is unknown. Compl. ¶ 28.

³ The email contained an attachment named “file.pdf.” Def.’s Mot., Attach. A at 1. TRI “does not allege that Plaintiff’s counsel did not receive a copy of [CBP’s 9/6/18 Notice].” Pl.’s Opp’n at 16 n.15; *cf.* Compl. ¶ 39 (alleging that TRI—not TRI’s counsel—“has never seen [CBP’s 9/6/18 Notice]”).

Def.'s Mot., Attach. A at 2 (emphasis added); *see also* Compl., Ex. 1 (*Citric Acid and Certain Citrate Salts from Canada and the People's Republic of China*, 74 Fed. Reg. 25,703 (Dep't Commerce May 29, 2009) (antidumping duty orders), and *Citric Acid and Certain Citrate Salts From the People's Republic of China*, 74 Fed. Reg. 25,705 (Dep't Commerce May 29, 2009) (notice of countervailing duty order) (together, "the *Citric Acid Orders*")).⁴

That day, TRI provided to the PCEE evidence "of delivery of its [March 19, 2018] response and supplemental responses to the February [request for information] and requested that the scheduled liquidation be unset." Compl. ¶ 37. A different PCEE official responded "that the scheduled liquidations were unset" and "the PCEE would be seeking the advice of Customs' Office of Laboratory and Scientific Services [(“CBP Laboratory”)] on Posy's processing of the citric acid anhydrous in India." *Id.* ¶ 40. The PCEE official also requested additional information, which TRI provided. *Id.* "CBP suspended liquidation of the 17 TRI entries at issue" on October 3, 2018. *Id.* ¶ 41. According to CBP's website, "[t]he stated basis for suspension of liquidation . . . [was] 'Other 1 Suspend.'" *Id.* On October 4, 2018, TRI resubmitted its March 19, 2018 response directly to the PCEE. *Id.* ¶ 42.

On October 24, 2018, TRI learned that the CBP Laboratory had determined that the "citric acid anhydrous [imported] from India was not considered to be substantially transformed" as defined by CBP. *Id.* ¶ 43; *see also id.*, Ex. 6 (copy of the CBP Laboratory report). The PCEE relied on this report to conclude that TRI's citric acid "was not a product of India." *Id.* ¶ 43. The PCEE advised TRI that the subject entries "would be liquidated with the applicable consumption, anti-dumping and countervailing duties." *Id.*

On October 31, 2018, TRI requested that the PCEE extend liquidation to permit TRI time to challenge the PCEE's conclusion as to country of origin. *Id.* ¶ 46; *see also* Def.'s Mot., Attach. C (TR Int'l Trading Co.—Request for Ext. of Liquidation of Entries of Citric Acid

⁴ The *Citric Acid Orders* contain identical scope descriptions, which cover, *inter alia*:

[A]ll grades and granulation sizes of citric acid, sodium citrate, and potassium citrate in their unblended forms, whether dry or in solution, and regardless of packaging type. The scope also includes blends of citric acid, sodium citrate, and potassium citrate; as well as blends with other ingredients, such as sugar, where the unblended form(s) of citric acid, sodium citrate, and potassium citrate constitute 40 percent or more, by weight, of the blend.

...
The scope of [these orders] include[] the hydrous and anhydrous forms of citric acid, the dihydrate and anhydrous forms of sodium citrate, otherwise known as citric acid sodium salt, and the monohydrate and monopotassium forms of potassium citrate.

Anhydrous from India (Oct. 31, 2018)). On November 1, 2018, CBP “changed the basis for suspension of liquidation to ‘AD/CVD’ Suspend.” Compl. ¶ 48.

On November 2, 2018, the PCEE contacted a CBP National Import Specialist (“NIS”) for their views on TRI’s assertion that the processing of citric acid monohydrate into citric acid anhydrous constituted a substantial transformation. Def.’s Mot., Attach. D (QUICS Message 44748). On November 13, 2018, the NIS official indicated his agreement with the CBP Laboratory’s conclusion that the “processing performed does not result in a substantial transformation.” *Id.* The official stated further that CBP should encourage TRI to “obtain a scope ruling from [Commerce] on this product if they disagree.” *Id.*

On December 7, 2018, CBP liquidated the subject entries. Compl., Ex. 2 (summary of liquidated entries). On December 12, 2018, CBP issued to TRI a CBP Form 29 Notice of Action (“CBP’s 12/12/18 Notice”) stating that the subject entries had been liquidated inclusive of AD and CVD duties in accordance with Commerce’s liquidation instructions pursuant to the *Citric Acid Orders*. *Id.* ¶ 53, Ex. 7.

TRI commenced this action on February 7, 2019. Summons, ECF No. 1. Since then, TRI has protested CBP’s liquidation of its entries. Def.’s Reply at 4; Pl.’s Opp’n at 2 n.2. Protest No. 5301–19–100903 covers one entry and Protest No. 4601–19–104102 covers the remaining 16 entries. Def.’s Reply at 4. On June 6, 2019, TRI requested accelerated disposition of Protest No. 5301–19–100903; that protest was subsequently deemed denied by operation of law 30 days after the date of mailing. *Id.* at 4 n.3; *see also* 19 U.S.C. § 1515(b) (2012) (governing requests for accelerated disposition of protests).⁵ CBP has suspended action on Protest No. 4601–19–104102 in light of this litigation. Def.’s Reply at 4 n.3.⁶

On October 16, 2019, the court granted Plaintiff’s unopposed motion for oral argument on the motion to dismiss, and, as proposed by Plaintiff, stayed scheduling the hearing pending the U.S. Court of Appeals for the Federal Circuit’s (“Federal Circuit”) disposition of the Government’s request for a panel rehearing or rehearing *en banc* filed in response to the appellate court’s decision in *Sunpreme Inc. v. United States* (“*Sunpreme II*”), 924 F.3d 1198 (Fed. Cir. 2019). *See* Order (Oct. 16, 2019), ECF No. 31. The Federal Circuit granted that petition and issued an *en banc* opinion on January 7, 2020. *See*

⁵ Citations to the United States Code are to the 2012 edition.

⁶ TRI has appealed Customs’ disposition of Protest No. 5301–19–100903 to this court. *See TR Int’l Trading Co. v. United States*, Court No. 19-cv-00217 (CIT Dec. 23, 2019).

generally *Sunpreme Inc. v. United States* (“*Sunpreme III*”), 946 F.3d 1300 (Fed. Cir. 2020).⁷ Plaintiff, Defendant, and Proposed Interveners filed supplemental opening and response briefs discussing the relevance of the Federal Circuit’s decision to this case. See Pl.’s Comments on *Sunpreme, Inc. v. United States*, App. Nos. 2018–1116, –1117, –1118, Jan. 7, 2020, ECF No. 38 (“Pl.’s Suppl. Br.”); Def.’s Suppl. Br. Regarding the [Federal Circuit’s] *En Banc* Decision in *Sunpreme Inc. v. United States* (“Def.’s Suppl. Br.”), ECF No. 39; Cmts. of Proposed Ints. Regarding the Sunpreme Decision (“Proposed Ints.’ Suppl. Br.”), ECF No. 37; Pl.’s Resp. to Def.’s Cmts. on *Sunpreme III* (“Pl.’s Suppl. Resp. Br.”), ECF No. 42; Def.’s Resp. to Pl.’s Cmts. on *Sunpreme Inc. v. United States* (“Def.’s Suppl. Resp. Br.”), ECF No. 43; Rebuttal Cmts. of Proposed Ints. Regarding the Sunpreme Decision (“Proposed Ints.’ Suppl. Resp. Br.”), ECF No. 41.

The court heard oral argument on February 25, 2020, Docket Entry, ECF No. 45, and now rules upon the pending motions.

DISCUSSION

I. Subject Matter Jurisdiction

The U.S. Court of International Trade, like all federal courts, is a “court[] of limited jurisdiction marked out by Congress.” *Norcal / Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976)). The court’s jurisdiction is governed by 28 U.S.C. § 1581, *et seq.* See *id.*

Relevant here, section 1581(a) grants the court jurisdiction to review a denied protest. 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. Section 1581(c) grants the court jurisdiction to review Commerce’s scope determinations. 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a(a)(2)(B)(vi). Section 1581(i) grants the court jurisdiction to entertain “any civil action commenced against the United States, its agencies, or its

⁷ In *Sunpreme II*, a unanimous panel of the Federal Circuit affirmed Commerce’s scope determination that Sunpreme Inc.’s (“Sunpreme”) imported solar modules were subject to certain AD/CVD orders. 924 F.3d at 1205–12. However, a divided panel found that Customs had exceeded its authority when it suspended liquidation based on its interpretation of those orders in the first instance and, thus, Commerce could not lawfully order the continuation of suspension of liquidation in order to apply the agency’s scope determination to Sunpreme’s entries made prior to Commerce’s initiation of the scope inquiry. *Id.* at 1212–15. The *Sunpreme III* court vacated the divided panel’s opinion and instead concluded that “it is within Customs’[] authority to preliminarily suspend liquidation of goods based on an ambiguous antidumping or countervailing duty order, such that the suspension may be continued following a scope inquiry by Commerce.” 946 F.3d at 1303. The appellate court explained, however, that Customs’ initial determination does not “invoke the kind of deference-deserving, boundary-defining authority reserved to Commerce when it interprets or clarifies an order during scope proceedings,” *id.* at 1320, and is not “an interpretive act that would modify Commerce’s determinations or otherwise impinge upon Commerce’s authority to issue and set the scope of duty orders,” *id.* at 1321 (internal quotation marks omitted).

officers, that arises out of any law of the United States providing for— . . . (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue,” and “(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.”

“Section 1581(i) embodies a ‘residual’ grant of jurisdiction[] and may not be invoked when jurisdiction under another subsection of [section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” *Sunpreme Inc. v. United States* (“*Sunpreme I*”), 892 F.3d 1186, 1191 (Fed. Cir. 2018) (citation omitted). The scope of the court’s jurisdiction pursuant to 28 U.S.C. § 1581(i) (referred to as “(i) jurisdiction”) is “strictly limited.” *Erwin Hymer*, 930 F.3d at 1374 (citation omitted). Otherwise, the court’s (i) jurisdiction would “threaten to swallow the specific grants of jurisdiction contained within the other subsections.” *Id.* (citation omitted).

II. Parties’ Contentions

The Government contends that TRI had, “depending on the precise nature of its claims,” remedies available in the form of a protest lodged with Customs or a scope ruling requested from Commerce, Def.’s Mot. at 11, and “TRI cannot through creative pleading expand the [c]ourt’s jurisdiction to cover its claim[s],” *id.* at 16. According to the Government, claims that CBP made factual errors or misapplied the clear language of the *Citric Acid* Orders are proper subjects for a Customs protest. *See id.* at 15; Def.’s Reply at 13; Def.’s Suppl. Br. at 6; Def.’s Suppl. Resp. Br. at 5.

Additionally, the Government contends, TRI could have challenged (and still may challenge) Customs’ substantial transformation analysis and corresponding conclusion that the subject entries are covered by the *Citric Acid* Orders by requesting a scope determination from Commerce. Def.’s Mot. at 14–15 (citing *Sunpreme I*, 892 F.3d at 1193–94);⁸ *see also* Def.’s Suppl. Br. at 7 (averring that *Sunpreme III*

⁸ While *Sunpreme II* and *Sunpreme III* addressed the merits of Commerce’s scope determination and Commerce’s ability to order the continuation of CBP’s suspension of liquidation of Sunpreme’s entries when the suspension is based on CBP’s interpretation of ambiguous orders, *Sunpreme I* addressed the proper jurisdictional basis for Sunpreme’s challenge to CBP’s allegedly *ultra vires* action. Following Customs’ suspension of liquidation of, and request for cash deposits on, Sunpreme’s imports, Sunpreme requested a scope determination from Commerce. *Sunpreme I*, 892 F.3d at 1190. Before Commerce initiated a formal scope inquiry, however, Sunpreme commenced an action before the CIT alleging that Customs had exceeded its authority by taking those steps pursuant to Customs’ interpretation of ambiguous orders. *Id.* The Federal Circuit reversed the CIT’s finding that it had (i) jurisdiction to resolve Sunpreme’s claims and held that “Sunpreme was required to exhaust the administrative remedies available to it in the form of a scope ruling inquiry and

clarified that CBP acts within its authority when it determines the applicability of AD/CVD orders and 19 U.S.C. § 1514(b) directs an importer to challenge CBP's determination by seeking a Commerce determination). According to the Government, TRI had the opportunity to pursue a scope ruling because Customs informed TRI that the subject entries were not considered to be of Indian origin and would be liquidated inclusive of AD/CVD duties pursuant to the *Citric Acid Orders* well in advance of liquidation. Def.'s Mot. at 16–17; *see also* Def.'s Suppl. Resp. Br. at 2–3. The Government contends that any scope ruling could have applied to the subject entries because CBP lawfully suspended liquidation of those entries. Def.'s Reply at 11; Def.'s Suppl. Resp. Br. at 4. The Government contends further that TRI's available remedies were not mutually exclusive and Customs would likely stay any action on a protest pending Commerce's scope ruling.⁹ Def.'s Mot. at 18.¹⁰

TRI contends that, notwithstanding the filing of its protests, any Commerce involvement in the liquidation of the subject entries would mean that “the liquidations are not subject to protest.” Pls.' Opp'n at 2 n.2 (citing 19 U.S.C. § 1514(b)). If Commerce did not direct the liquidations, TRI contends that the court should “waive exhaustion of the administrative protest” requirement. *Id.* at 25–26.

TRI further contends that it is not seeking a scope ruling from Commerce, Pl.'s Opp'n at 4, and, in any event, it lacked the information necessary to request a scope ruling, *id.* at 19; *see also id.* at 20 (averring that “Commerce's review of applications for scope rulings are subject to a ‘reasonable basis’ standard” pursuant to 19 C.F.R. § 351.225(f)(3) and Plaintiff “had no reasonable basis to believe that citric acid anhydrous imported from India was within the scope of the [*Citric Acid Orders*]”). According to TRI, CBP never made a “factual determination that [either] the citric acid anhydrous imported from scope ruling determination” before commencing an action before the CIT. *Id.* at 1192. While the Federal Circuit referred to exhausting administrative remedies, it did not suggest that such alternative, adequate remedies could be waived so as to permit (i) jurisdiction.

⁹ At oral argument, the Government averred that Customs has informed TRI that it would stay its resolution of the pendant protest concerning 16 of the subject entries pending Commerce's scope ruling. Oral Arg. at 10:10–10:18 (reflecting the time stamp from the recording). The Government noted that the liquidations remain non-final pursuant to *Thyssenkrupp Steel North America, Inc. v. United States*, 886 F.3d 1215 (Fed. Cir. 2018), and Customs' action on the protest may include consideration of Commerce's decision. Oral Arg. at 9:20–9:55; *see also Thyssenkrupp*, 886 F.3d at 1218 (explaining that Customs' “final” assessment of duties at liquidation “is not entirely ‘final’” because it is subject to administrative and judicial review). TRI asserted, without support, that Commerce will not issue a scope determination applicable to the subject entries because Commerce has already issued liquidation instructions covering that time period. Oral Arg. at 24:10–25:25, 27:00–27:37.

¹⁰ Proposed Intervenor concurs with the Government that *Sunpreme I* requires dismissal of this case and *Sunpreme III* forecloses TRI's allegations concerning Customs' alleged *ultra vires* suspension of liquidation respecting the subject entries. Proposed Ints.' Suppl. Br. at 1–2; Proposed Ints.' Suppl. Resp. Br. at 1–2.

India, [or] the citric acid monohydrate from which it was produced, were of Chinese origin.” *Id.* at 13. Instead, TRI asserts, Customs maintained an “unsupported belief” as to country of origin that was rendered moot when CBP unset the liquidation, *id.* at 15–16, and the CBP Laboratory’s report addressing substantial transformation did not identify a country of origin, *id.* at 18–19. TRI avers that it did not know that CBP considered the *Citric Acid* Orders to apply to the subject entries until it received CBP’s 12/12/18 Notice. *Id.* at 19.

TRI also contends that any scope determination, if available, would not apply to the subject entries because Commerce had issued instructions directing CBP to liquidate entries subject to the *Citric Acid* Order prior to CBP’s suspension of liquidation of the subject entries. *Id.* at 14, 22–23; Pl.’s Suppl. Br. at 3–6; Pl.’s Suppl. Resp. Br. at 6. At most, Plaintiff contends, “a scope inquiry submitted by TRI after Customs’ November 1, 2018 suspension of liquidation might afford TRI clarity with respect to the scope of the [*Citric Acid*] Orders prospectively from that date,” but would not apply to the earlier-entered subject entries. Pl.’s Suppl. Br. at 6; *see also* Pl.’s Suppl. Resp. Br. at 5 (any scope determination would apply to entries made on or after November 1, 2018, but not before).¹¹

III. TRI Has or Had Available Remedies Pursuant to 28 U.S.C. § 1581(a) and (c) That Were Not Manifestly Inadequate; Thus, the Complaint Must Be Dismissed for Lack of Subject Matter Jurisdiction

It is well settled that “[a] party may not expand a court’s jurisdiction by creative pleading.” *Sunpreme I*, 892 F.3d at 1193 (quoting *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006)). Instead, the court must “look to the true nature of the action . . . in determining jurisdiction of the appeal.” *Id.* (quoting same). The “true nature” of TRI’s action is a challenge to Customs’ allegedly *ultra vires* assessment of AD/CVD duties associated with the *Citric Acid* Orders and a requested injunction directing CBP to reliquidate the subject entries without regard to AD/CVD duties. Compl. at 22–23 (Prayer for Relief); *see also* Oral Arg. at 47:15–47:45. As discussed more fully below, TRI’s cause of action must be dismissed for lack of subject matter jurisdiction.

Section 1514 of title 19 distinguishes between the finality of certain “decisions” in subsection 1514(a) and the finality of certain “determinations” in subsection 1514(b). Subsection (a) states:

¹¹ TRI cited *Sunpreme II* in support of several arguments it made regarding Customs’ authority to interpret ambiguous orders. *See* Pl.’s Opp’n at 3–28. To the extent those arguments are no longer valid in light of *Sunpreme III*, the court does not consider them.

Except as provided in subsection (b) of this section, . . . *decisions* of the Customs Service, including the legality of all orders and findings entering into the same, as to—

. . .

(2) the classification and rate and amount of duties chargeable; [or]

. . .

(5) the liquidation or reliquidation of an entry

. . .

shall be final and conclusive upon all persons (including the United States and any officer thereof) 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.

19 U.S.C. § 1514(a)(2), (5) (emphasis added). Thus, factual findings by Customs regarding a subject import may be protested pursuant to 19 U.S.C. § 1514(a) when “the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order.” *Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002); see also *Chemsol, LLC v. United States*, 755 F.3d 1345, 1350 (Fed. Cir. 2014) (“[F]indings related to liquidation . . . merge with the liquidation.”) (quoting *Volkswagen of Am., Inc. v. United States*, 532 F.3d 1365, 1370 (Fed. Cir. 2008)). In such situations, a scope ruling by Commerce is unnecessary because “the scope of the order is not in question.” *Xerox*, 289 F.3d at 795 (“[C]orrecting such a ministerial, factual error of Customs is not the province of Commerce.”).

Subsection (b) addresses the “[f]inality of determinations.” 19 U.S.C. § 1514(b). It states:

With respect to determinations made under . . . subtitle IV of this chapter which are reviewable under section 1516a of this title, *determinations* of the Customs Service are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade

Id. (emphasis added). Subtitle IV, referenced therein, refers to the antidumping and countervailing duty provisions of the Tariff Act of

1930, as amended. See *Fujitsu Ten Corp. of Am. v. United States*, 21 CIT 104, 107, 957 F. Supp. 245 (1997), *aff'd sub nom. Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998)). Section 1516a of Title 19 provides for judicial review in AD/CVD proceedings, including Commerce scope determinations. 19 U.S.C. § 1516a(a)(2)(B)(vi). Thus, the Federal Circuit has explained that subsection 1514(b) provides CBP the authority to determine “whether goods fall within the scope of [an AD/CVD] order,” which determination is then “final and conclusive” unless an interested party seeks a scope ruling from Commerce (which ruling would then be reviewable pursuant to section 1516a). *Sunpreme III*, 946 F.3d at 1318 (quoting 19 U.S.C. § 1514(b)).¹²

Customs’ “statutory responsibility to fix the amount of duty owed on” the subject entries authorized CBP to determine in the first instance whether the subject entries were covered by “existing anti-dumping or countervailing duty orders” and suspend liquidation based on an affirmative determination. *Id.* at 1317. Thereafter, it was up to TRI to pursue its available administrative remedies prior to seeking recourse before the court. See *Norcal*, 963 F.2d at 359 (limitations on the court’s (i) jurisdiction “preserve[] the congressionally mandated procedures and safeguards . . . provided in the other subsections”) (citations omitted). Two such remedies were available, and the court discusses each, in turn.

A. Customs Protest and Jurisdiction Pursuant to 28 U.S.C. § 1581(a)

TRI has failed to establish that its claims challenging CBP’s application of the *Citric Acid Orders*, including claims concerning factual or procedural errors, may not properly be subject of a Customs protest and judicial review pursuant to 28 U.S.C. § 1581(a). See Compl. ¶¶ 28, 56–59, 63–65, 69 (alleging that the citric acid monohydrate input is of “unknown origin”); *id.* ¶ 88 (alleging that Customs misapplied the

¹² While *Sunpreme III* did not directly address jurisdictional issues, it is consistent with precedent establishing that challenges to Customs’ determinations regarding the applicability of AD/CVD orders generally must be resolved through a scope proceeding before Commerce and, thereafter, judicial review pursuant to 28 U.S.C. § 1581(c). See *Sunpreme I*, 892 F.3d at 1193 (“When an importer disputes Customs’ application of an antidumping or countervailing duty order, the proper remedy is for the importer to seek a scope inquiry from Commerce, the result of which may subsequently be challenged before the CIT.”) (citing 19 U.S.C. § 1514(b)); *Sandvik*, 164 F.3d at 599–602 (affirming the CIT’s dismissal of importers’ subsection 1581(a) actions when importers failed to challenge the applicability of an antidumping duty order before Commerce). *But cf. Thyssenkrupp*, 886 F.3d at 1225–27 (distinguishing between a “ministerial” collection action by CBP, which is not a “decision” pursuant to 1514(a), and a non-ministerial “decision” by CBP requiring judgment to determine whether “unliquidated entries” included liquidated entries for which the liquidation was not yet final, and holding that the latter, non-ministerial decision was protestable notwithstanding that the applicability of antidumping duties was at stake).

Citric Acid Orders); *id.* ¶ 94 (alleging that Customs failed to issue notices of action proposed or taken); *cf.* *Xerox*, 289 F.3d at 795 (importer properly protested CBP’s misapplication of a duty order when the subject imports “were not used for power transmission” as required by the pertinent scope “and were not constructed with the materials listed in the order”); 19 U.S.C. § 1514(a) (clerical errors, mistakes of fact, or other inadvertencies in a liquidation, as well as decisions as to the “rate and amount of duties chargeable,” are final unless a protest is filed or judicial review thereof is obtained).¹³

TRI’s argument that a protest proceeding is a non-jurisdictional administrative remedy that the court could waive is incorrect. *See* Pl.’s Opp’n at 24–28; *cf.* Def.’s Reply at 14. As stated above, (i) jurisdiction is *unavailable* “when jurisdiction under another subsection of [section] 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.” *Sunpreme I*, 892 F.3d at 1191. Plaintiff offers no persuasive rationale as to why a protest proceeding is unavailable—indeed, it cannot, given its lodging of two Customs protests. *See* Pl.’s Opp’n at 2 n.2.¹⁴ Plaintiff also fails to persuade that the remedy afforded by a protest proceeding would be manifestly inadequate.¹⁵

TRI’s argument that the court should stay the action rather than dismiss it in the event the court requires Plaintiff to pursue its

¹³ The Government suggests that CBP’s country of origin determination was “factual” and, thus, amenable to protest. *See* Def.’s Mot. at 21; Def.’s Reply at 5–6; Def.’s Suppl. Br. at 5. However, a country of origin determination based on the application of CBP’s substantial transformation test to a set of facts is a “mixed question of fact and law.” *CPC Int’l, Inc. v. United States*, 20 CIT 806, 808 n.3, 933 F. Supp. 1093, 1095 n.3 (1996) (characterizing CBP’s substantial transformation test used to determine country of origin for purposes of the marking statute as “a mixed question of fact and law”); *see also United States v. Gaudin*, 515 U.S. 506, 512 (1995) (explaining that the application of a legal standard to a set of facts is “commonly called a ‘mixed question of law and fact’”) (citation omitted); *Campbell v. Merit Sys. Protection Bd.*, 27 F.3d 1560, 1565 (Fed. Cir. 1994) (same). Commerce—not CBP—is the agency tasked with resolving competing arguments concerning the scope and application of AD/CVD orders—which would include a country of origin determination based on a substantial transformation analysis of Chinese citric acid monohydrate—prior to judicial review. *See, e.g., Sunpreme I*, 892 F.3d at 1192.

¹⁴ TRI’s argument that the court should not “require Plaintiff[] to exhaust protest remedies, and to allow CBP to reconsider, or consider, a decision it had no power or authority to make in the first place,” Pl.’s Opp’n at 26–27, is premised on the since-overruled holding of *Sunpreme II* that CBP exceeded its authority when it interpreted ambiguous AD/CVD orders to cover *Sunpreme*’s products, *id.* at 24 (citing *Sunpreme II*, 924 F.3d at 1214). The argument, therefore, fails.

¹⁵ At the hearing, TRI argued that its remedy under 28 U.S.C. § 1581(a) is manifestly inadequate because a protest (and judicial review thereof) is an inappropriate vehicle for determining whether its conversion of citric acid monohydrate into citric acid anhydrous constitutes a substantial transformation. Oral Arg. at 45:55–46:57. Without prejudice to the court’s resolution of TRI’s separate protest appeal and claims asserted therein, TRI’s argument does not persuade the court that TRI’s only remedy lies in an action under 28 U.S.C. § 1581(i), but instead supports the Government’s argument that TRI has a remedy pursuant to 28 U.S.C. § 1581(c).

protest remedies “before resolving definitively the question of whether Commerce directed CBP’s action” also lacks merit. Pl.’s Opp’n at 28¹⁶; *but see id.* at 27 n.22 (arguing that a stay would be inappropriate). TRI cannot circumvent statutorily prescribed remedies through its “creative pleading.” *Sunprime I*, 892 F.3d at 1193 (quoting *Norsk Hydro*, 472 F.3d at 1355); *see also* 19 U.S.C. § 1514(a)–(b). TRI has an available remedy pursuant to 28 U.S.C. § 1581(a) and that remedy is not manifestly inadequate.

B. Commerce Scope Ruling and Jurisdiction Pursuant to 28 U.S.C. § 1581(c)

In addition to the possibility of protesting certain aspects of Customs’ liquidation of the subject entries, TRI has also failed to establish that it could not have challenged Customs’ country of origin by requesting a scope ruling from Commerce and, if necessary, judicial review pursuant to 28 U.S.C. § 1581(c). *See Sunprime I*, 892 F.3d at 1193; *cf. Bell Supply Co. v. United States*, 888 F.3d 1222, 1229 (Fed. Cir. 2018) (“Where an imported article is ‘from’ can be an inherently ambiguous question.”).¹⁷

¹⁶ TRI cites three cases in support of this argument. Pl.’s Opp’n at 28–29 (citing *Blink Design, Inc. v. United States*, 38 CIT ___, ___, 986 F. Supp. 2d 1348, 1361 (2014); *Target Corp. v. United States*, 34 CIT 1570, 1574 (2010); and *Am. Signature, Inc. v. United States (“AS”)*, 598 F.3d 816, 828 (Fed. Cir. 2010)). The cited cases are inapposite.

In *Blink Design*, the court found that although it had jurisdiction over the protest denial, at its heart, the case concerned the seizure of the plaintiff’s merchandise, which must be challenged in a federal district court pursuant to 28 U.S.C. § 1356. 986 F. Supp. 2d at 1361. The court stayed the plaintiff’s challenge to the denied protest pending the plaintiff’s pursuit of administrative and judicial remedies respecting the seizures because there were underlying deemed exclusions that may have nevertheless required resolution by the CIT. *Id.* In contrast, here, the court finds that it lacks subject matter jurisdiction over TRI’s claims; thus, dismissal is required. *Target Corp.* addressed the plaintiff’s motion for a preliminary injunction. 34 CIT at 1570. While TRI accurately quotes the court’s statement that “the jurisdictional facts which might establish 28 U.S.C. § 1581(a) jurisdiction . . . have not been established” and, “[i]n such an uncertain situation, preservation of remedies is to be favored,” Pl.’s Opp’n at 28–29 (quoting *Target Corp.*, 34 CIT at 1573), TRI’s quotation lacks context. The court made the statement in connection with its finding that the plaintiff had shown irreparable harm. *Target Corp.*, 34 CIT at 1573. Although the court noted that the precise jurisdictional basis for the plaintiff’s challenge to Commerce’s liquidation instructions was unclear, there was no doubt that the court had subject matter jurisdiction pursuant to subsection (a), (c), or (i) of 28 U.S.C. § 1581. *See id.* at 1572–73. *ASI* likewise addressed a motion for a preliminary injunction and the Federal Circuit, in that case, found that injunctive relief barring liquidation was necessary to preserve the plaintiff’s challenge. 598 F.3d at 828–29. Opinions enjoining liquidation in order to ensure that a plaintiff may obtain the relief afforded by its chosen remedy in no way support TRI’s contention that the court must stay an action over which it lacks subject matter jurisdiction.

¹⁷ *Bell Supply* addressed an importer’s challenge to a Commerce scope determination concluding that oil country tubular goods (“OCTG”) made from unfinished OCTG from China but finished in third countries were covered by AD/CVD orders on OCTG from China. 888 F.3d at 1224. Domestic producers had requested the scope ruling following CBP’s determination that the third country processing constituted a substantial transformation of the OCTG that conferred a country of origin other than China. *Id.* at 1225–26. The importer argued that Commerce must conduct a circumvention inquiry pursuant to 19 U.S.C. § 1677j

TRI's arguments regarding the availability of a scope determination are unpersuasive. TRI asserts that it first learned that CBP considered the subject entries covered by the *Citric Acid* Orders when it received CBP's 12/12/18 Notice of Action following liquidation. Pl.'s Opp'n at 19. However, at least as of October 3, 2018, TRI was on notice that CBP considered the subject entries to be of Chinese origin and subject to the *Citric Acid* Orders. Compl. ¶ 34 (alleging TRI's counsel's receipt of CBP's 10/3/18 Email); Def.'s Mot., Attach. A.¹⁸ Thereafter, on October 24, 2018, TRI learned that CBP had concluded that the subject entries were "not considered to be substantially transformed in India as defined by Customs and therefore [were] not a product of India," and "would be liquidated with the applicable consumption, anti-dumping and countervailing duties." Compl. ¶ 43; *see also id.* ¶ 48 (alleging that, on November 1, 2018, CBP "changed the basis for suspension to 'AD/CVD Suspend'"). TRI argues further that the CBP Laboratory "made no determination that the citric acid was from any country other than India" and CBP never identified the applicable AD/CVD orders in its October 24, 2018 communication. Pl.'s Opp'n at 19. TRI's attempt to divorce the information provided on October 24, 2018 from the information provided on October 3, 2018 is unpersuasive. TRI knew or should have known, prior to liquidation, that the subject entries would be liquidated inclusive of AD/CVD duties associated with the *Citric Acid* Orders, and it could have requested a scope ruling.

TRI's reliance on the "reasonable basis" language in Commerce's regulation to assert that it had no reason to believe that its imports before imposing AD/CVD duties on products imported from non-subject countries. *Id.* at 1226. The Federal Circuit disagreed, holding that Commerce is entitled to apply its substantial transformation analysis to determine country of origin before conducting a circumvention inquiry. *Id.* at 1229.

According to TRI, *Bell Supply* holds that "CBP has no authority to make a substantial transformation decision for purposes of an AD or CVD order." Pl.'s Opp'n at 18 (citing *Bell Supply*, 888 F.3d at 1229). TRI is incorrect; the Federal Circuit did not speak to CBP's authority and, in any event, any such holding would be questionable in light of *Sunpreme III*. Additionally, *Bell Supply's* discussion regarding the ambiguous nature of country of origin for purposes of an AD/CVD order supports the conclusion that TRI's challenge to CBP's country of origin determination in this case lies in requesting a scope ruling from Commerce. *See Bell Supply*, 888 F.3d at 1229 (discussing the ambiguities inherent in determining whether an imported article "assembled from various components" and further processed in a third country may properly be considered "the product of the country in which the [processing] occurred").

Additionally, to the extent that TRI asserted at oral argument for the first time that Commerce may only find Posy's citric acid anhydrous to be merchandise subject to the *Citric Acid* Orders by means of a circumvention inquiry, that position is belied by *Bell Supply*.

¹⁸ Plaintiff's assertion that CBP's 9/6/18 Notice "was provided only after CBP agreed on October 3, 2018 to unset the liquidation, and was by then moot," Pl.'s Opp'n at 16 n.15 (emphasis added), is unpersuasive. According to the Complaint and uncontroverted evidence appended to Defendant's motion, TRI's counsel received CBP's 9/6/18 Notice before requesting CBP to unset the liquidations, which request prompted CBP to unset the liquidations. *See* Compl. ¶¶ 34–37, 40; Def.'s Mot., Attach. A.

of citric acid were within the scope of the *Citric Acid Orders* is unpersuasive. See Pl.'s Opp'n at 20 (citing 19 C.F.R. § 351.225(f)(3)). The "reasonable basis" language TRI refers to applies to Commerce's preliminary scope rulings, not an applicant's request for a scope ruling. 19 C.F.R. § 351.225(f)(3). The requirements for requesting a scope ruling are found in section 351.225(c)(1) of the regulations and include, "to the extent reasonably available," the interested party's position and "factual information supporting this position" among other things. Thus, an application for a scope determination from TRI could have included any information within its possession concerning the processing performed in India and the source of the citric acid monohydrate. See Compl. ¶¶ 25–27, 35 (alleging the submission of roughly 1,500 pages of information to CBP).

Having concluded that TRI could have requested a scope ruling, the court must consider whether that remedy was manifestly inadequate. "[T]o be manifestly inadequate," a scope ruling request "must be an exercise in futility, or incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain." *Sunpreme I*, 892 F.3d at 1193–94 (quoting *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008)) (internal quotation marks omitted). This ensures that the administrative remedies prescribed by Congress are preserved and (i) jurisdiction operates as a residual grant of jurisdiction in limited circumstances. See *Erwin Hymer*, 930 F.3d at 1374; *Norcal*, 963 F.2d at 359.

TRI argues that Commerce's issuance of liquidation instructions in connection with the *Citric Acid Orders* means that any scope ruling would not apply to the subject entries. See Pl.'s Opp'n at 22–23; Pl.'s Suppl. Br. at 4–5.¹⁹ However, pursuant to Commerce's regulation governing the suspension of liquidation, "[w]hen [Commerce] conducts a scope inquiry . . . and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued" pending Commerce's scope determination. 19 C.F.R. § 351.225(l)(1). If Commerce issues an affirmative scope ruling, "any suspension of liquidation under paragraph (l)(1) . . . will continue." *Id.* § 351.225(l)(3). When "there has been no suspension of liquidation," Commerce will instruct Customs "to suspend liquidation and to require a cash deposit of estimated duties, at the applicable

¹⁹ TRI argues further that a Commerce scope determination would not result in a decision judicially reviewable pursuant to 28 U.S.C. § 1581(c) because "Commerce has no authority to expand an AD/CVD order through a scope proceeding," and "cannot add the term 'India' to the [*Citric Acid Orders*]." Pl.'s Opp'n at 23 n.20. Whether Commerce has "interpret[ed] an antidumping order so as to change the scope of th[e] order" or "in a manner contrary to its terms" are issues the court properly may resolve when exercising jurisdiction pursuant to 28 U.S.C. § 1581(c). See *Echstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (internal quotation marks omitted).

rate, for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry.” *Id.* ; *cf. Sunpreme I*, 892 F.3d at 1194 (a scope proceeding was not manifestly inadequate because “the suspension of liquidation mitigate[d] the long-term effect of any alleged financial hardship . . . by ensuring the return of cash deposits pending the merits of its scope dispute”). Thus, it was entirely possible that a scope determination could have applied to the subject entries.

TRI suggests, however, that the absence of a *guarantee* that Commerce would have initiated a scope inquiry prior to liquidation renders a scope determination manifestly inadequate as a remedy.²⁰ See Pl.’s Opp’n at 22–23; Oral Arg. at 26:12–26:40, 38:54–39:10 (asserting that Commerce lacked the time necessary to initiate a scope inquiry prior to liquidation). However, a prompt scope ruling request by TRI might have afforded Commerce time to act prior to liquidation and, thus, a scope determination was not “*incapable* of producing *any* result” and did not suffer from “*intrinsic* defect.” *Sunpreme I*, 892 F.3d at 1193 (emphasis added). Moreover, the Government has represented that TRI still could pursue a scope determination applicable to 16 of the subject entries through Customs’ staying of its action on the second protest. Oral Arg. at 10:10–10:18. While TRI failed to acknowledge this point, it is not unusual for Customs to do so. *Cf. Carbon Activated Corp. v. United States*, 791 F.3d 1312, 1316 (Fed. Cir. 2015) (affirming the absence of (i) jurisdiction and finding that a protest was an adequate remedy for erroneous liquidations even if Customs would have delayed acting on the protest pending the availability of the correct rate pursuant to the USCIT’s resolution of litigation challenging Commerce’s final results of an administrative review); *Thyssenkrupp*, 886 F.3d at 1223 & n.3 (providing that so long as the liquidation of the entries is not final, any changed law (such as the applicability of an AD/CVD order) may be applied in the direct review of the liquidation either by CBP or the court). Accordingly, TRI has not shown that a scope determination was a manifestly inadequate means of seeking relief—only that TRI is unwilling to pursue it.

In sum, TRI has or had one or more remedies available to it and those remedies were not manifestly inadequate. TRI is actively pursuing its remedy pursuant to 28 U.S.C. § 1581(a) and has, thus far, declined to pursue a remedy pursuant to 28 U.S.C. § 1581(c). In these circumstances, the court lacks (i) jurisdiction and this action will be

²⁰ Commerce’s regulation affords the agency 45 days from “the date of receipt of an application for a scope ruling” to “issue a final ruling” or “initiate a scope inquiry.” 19 C.F.R. § 351.225(c)(2).

dismissed pursuant to USCIT Rule 12(b)(1) and the court need not reach Defendant's alternative argument pursuant to USCIT Rule 12(b)(6).

CONCLUSION AND ORDER

For the foregoing reasons, Defendant's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. The motion to intervene is **DENIED** as moot. Judgment will be entered accordingly.

Dated: March 16, 2020

New York, New York

/s/ Mark A. Barnett

MARK A. BARNETT, JUDGE

Slip Op. 20–35

JANSSEN ORTHO LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jennifer Choe-Groves, Judge
Court No. 13–00296

ORDER AND AMENDED JUDGMENT

Upon consideration of Plaintiff's Consent Motion to Amend the Judgment, ECF No. 277, and for the reasons set forth in the court's February 6, 2020 Opinion and Judgment, ECF Nos. 274 and 275, it is hereby

ORDERED that the Judgment, ECF No. 275, is amended as follows:

This case having been duly submitted for decision, and the court having rendered a decision after due deliberation, and Plaintiff Janssen Ortho LLC's Fourth Claim for Relief having been dismissed voluntarily, ECF No. 201, it is hereby **ORDERED, ADJUDGED, and DECREED**

That, consistent with the court's Opinion, ECF No. 274, Plaintiff Janssen Ortho LLC's Second Claim for Relief is **GRANTED**, and its Third Claim for Relief is **DENIED**, ECF No. 129. As to the Second Claim for Relief, Plaintiff Janssen Ortho LLC's subject merchandise in this action is classified under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2935.00.60 and is eligible for duty-free treatment under the Pharmaceutical Appendix, and, upon consent of the parties, the entries at issue shall be reliquidated under the aforesaid HTSUS subheading and any refunds or duties owed by reason of this judgment shall be paid with interest as provided by law; and

Upon consent of the parties, Plaintiff Janssen Ortho LLC's First and Fifth Claims for Relief, ECF No. 129, are **DISMISSED** as moot.

Judgment will be entered accordingly.

Dated: March 12, 2020

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE