

# U.S. Customs and Border Protection

8 CFR PARTS 103, 212, 214, AND 274A

CBP DEC. 22-10

RIN 1651-AB42

## CONFORMING AMENDMENTS RELATED TO TEMPORARY ENTRY OF BUSINESS PERSONS UNDER THE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA, THE UNITED MEXICAN STATES, AND CANADA (USMCA)

**AGENCY:** U.S. Customs and Border Protection, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Department of Homeland Security (DHS) regulations relating to the temporary entry of Canadian and Mexican citizen business persons into the United States by replacing references to the North American Free Trade Agreement (NAFTA) with references to the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA). The USMCA superseded NAFTA and its related provisions on July 1, 2020. Chapter 16 of the USMCA generally maintains the same treatment as provided under NAFTA with respect to the temporary entry of Canadian and Mexican citizen business persons, so substantive changes to the regulations are not needed. This document simply updates the relevant regulations to replace all references to NAFTA, including references to its appendices and annexes, with the corresponding USMCA references. This document also makes other minor, non-substantive conforming amendments and stylistic changes and corrects typographical errors.

**DATES:** This final rule is effective on July 11, 2022.

**FOR FURTHER INFORMATION CONTACT:** Paul Minton, CBP Officer (Program Manager), Office of Field Operations, U.S. Customs and Border Protection, (202) 344-1581 or *Paul.A.Minton@cbp.dhs.gov*.

## SUPPLEMENTARY INFORMATION:

### I. Background

On November 30, 2018, the Office of the United States Trade Representative (USTR) signed the “Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada” (the Protocol) to replace the North American Free Trade Agreement (NAFTA).<sup>1</sup> The Agreement Between the United States of America, the United Mexican States (Mexico), and Canada (the USMCA)<sup>2</sup> is attached as an annex to the Protocol and was subsequently amended to reflect certain modifications and technical corrections in the “Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada” (the Amended Protocol), which USTR signed on December 10, 2019.

#### *A. The USMCA and Its Effect on NAFTA*

Pursuant to section 106 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4205) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), the United States adopted the USMCA through Congress’ enactment of the United States-Mexico-Canada Agreement Implementation Act (USMCA Implementation Act), Public Law 116–113, 134 Stat. 11 (19 U.S.C. Chapter 29), on January 29, 2020. Section 103(a)(1)(B) of the USMCA Implementation Act (19 U.S.C. 4513(b)(1)) provides authority for new or amended regulations to be issued as necessary or appropriate to implement the USMCA.

Mexico, Canada, and the United States certified their preparedness to implement the USMCA on December 12, 2019, March 13, 2020, and April 24, 2020, respectively. Pursuant to paragraph 2 of the Protocol, the USMCA was to take effect on the first day of the third month after the last signatory party provides written notification of the completion of the domestic implementation of the USMCA through the enactment of implementing legislation. As a result, the USMCA entered into force on July 1, 2020.

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<sup>1</sup> Protocol Replacing the North American Free Trade Agreement with the Agreement Between the United States of America, the United Mexican States, and Canada, available at [https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA\\_Protocol.pdf](https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/USMCA_Protocol.pdf) (last visited Apr. 19, 2022).

<sup>2</sup> The Agreement Between the United States of America, the United Mexican States, and Canada is the official name of the USMCA treaty. Please be aware that, in other contexts, the same document is also referred to as the United States-Mexico-Canada Agreement.

On its entry into force date, the USMCA superseded NAFTA and its related provisions. *See* Protocol, paragraph 1. NAFTA entered into force on January 1, 1994. Pursuant to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 2903) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), the United States adopted NAFTA through the enactment of the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), Public Law. 103–182, 107 Stat. 2057 (19 U.S.C. 3301 *et seq.*), on December 8, 1993. Section 601 of the USMCA Implementation Act repealed the NAFTA Implementation Act, as of the date that the USMCA entered into force. *See* 19 U.S.C. 3301.

### *B. The Temporary Entry of Canadian and Mexican Citizen Business Persons*

On December 30, 1993, the legacy Immigration and Naturalization Service (INS)<sup>3</sup> published an interim rule in the **Federal Register** (58 FR 69205) to implement the provisions of NAFTA by amending its regulations to establish procedures for the temporary entry of Canadian and Mexican citizen business persons into the United States. On January 9, 1998, the final rule was published in the **Federal Register** (63 FR 1331).

Chapter 16 of the USMCA sets forth the provisions for the temporary entry of Canadian and Mexican business persons. As stated in its Statement of Administrative Action, the USMCA maintains the same treatment as provided under NAFTA for the temporary entry of business visitors, traders and investors, intra-corporate transferees, and professionals.<sup>4</sup> Further, Section 503 of the USMCA Implementation Act, Public Law 116–113, 134 Stat. 11, makes conforming changes to the NAFTA-specific provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, in order to provide the same treatment to Canada and Mexico with respect to temporary entry as was provided under NAFTA. The USMCA does not modify or expand access to visas issued or visa classifications authorized under the INA.

## **II. Discussion of Amendments to Regulations**

This document makes conforming amendments to title 8 of the Code of Federal Regulations (CFR) in order to reflect statutory changes made in section 503 of the USMCA Implementation Act. As the immigration-related provisions of the USMCA are substantially

<sup>3</sup> The Homeland Security Act of 2002, Public Law 207–296, 116 Stat. 2135, as amended, transferred the responsibilities of the INS to the Department of Homeland Security (DHS).

<sup>4</sup> Statement of Administrative Action, available at <https://www.finance.senate.gov/imo/media/doc/FINAL%20SAA%20USMCA.pdf> (last visited Apr. 19, 2022).

similar to those contained within NAFTA, substantive amendments to the regulations are not required. References to NAFTA's immigration-related provisions are currently found in 8 CFR 103.7(d)(11), 212.1(l), 214.1(a)(2), 214.2(b)(4), 214.2(e)(22)(i), 214.2(l)(17), 214.6, and 274a.12(b)(19). Specific changes to 8 CFR are as follows:

In 8 CFR 103.7(d)(11), 212.1(l), 214.1(a)(2), 214.2(e)(22)(i), 214.2(l)(17), and 274a.12(b)(19), references to NAFTA are replaced with the corresponding references to the USMCA.

Similarly, in 8 CFR 214.2(b)(4), references to NAFTA, including references to its appendices and annexes, are replaced with the corresponding references to the USMCA. The word "existing" is removed from the first sentence in the introductory paragraph of § 214.2(b)(4), along with the entire second sentence of the introductory paragraph of § 214.2(b)(4), which referenced "existing requirements." These sentences in the introductory paragraph of § 214.2(b)(4) are being amended because NAFTA Appendix 1603.A.3 (Existing Immigration Measures) and the definition of "existing" in NAFTA Annex 1608 do not appear in USMCA Chapter 16. The third sentence in the introductory paragraph of § 214.2(b)(4) is being removed because it is redundant with 8 CFR 214.2(b)(4)(ii). Additionally, "existing" is removed from § 214.2(b)(4)(ii) to conform with the introductory paragraph and the USMCA. Other amendments include minor wording, punctuation, and stylistic changes to bring the regulations in line with the text of the USMCA, as well as corrections of typographical errors. Additionally, under NAFTA, occupations in the fields of commercial transactions, public relations and advertising, tourism, tour bus operation, and translation were all grouped together under the heading entitled, "General Service". The USMCA moved those occupations and changed them into separate categories. To reflect this organizational change in the regulations, paragraphs (b)(4)(i)(G)(2) through (7) are removed from under the "General Service" heading and are set out in paragraphs (b)(4)(i)(H) through (L). Lastly, language is added to clarify the cross-reference in paragraph (b)(4)(ii).

In 8 CFR 214.6, references to NAFTA, including references to its appendices and annexes, are replaced with the corresponding references to the USMCA. Other changes include minor wording, punctuation, formatting, and stylistic changes to bring the regulations in line with the text of the USMCA, as well to correct typographical errors.

### III. Statutory and Regulatory Requirements

#### A. *Administrative Procedure Act*

Under section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), agencies generally are required to publish a notice of proposed rulemaking in the **Federal Register** that solicits public comment on the proposed regulatory amendments, consider public comments in deciding on the content of the final amendments, and publish the final amendments at least 30 days prior to their effective date. This rule is exempt from APA rulemaking requirements pursuant to 5 U.S.C. 553(a)(1) as a foreign affairs function of the United States because it is amending U.S. domestic regulations to conform to the immigration-related provisions of the USMCA, which is an international agreement negotiated between the United States, Mexico, and Canada.

CBP also has determined that there is good cause pursuant to 5 U.S.C. 553(b)(B) to publish this rule without prior public notice and comment procedures. This rule simply makes conforming amendments to existing DHS regulations to reflect the statutory changes made by section 503 of the USMCA Implementation Act, Public Law 116–113, 134 Stat. 11. Specifically, this rule replaces references to NAFTA with the USMCA, along with other minor, non-substantive stylistic changes. Chapter 16 of the USMCA provides the same treatment to Canada and Mexico regarding temporary entry that NAFTA provided. As a result, prior public notice and comment procedures for this rule are impracticable, unnecessary, and contrary to the public interest.

For the same reasons, a delayed effective date is not required under 5 U.S.C. 553(d)(3). The USMCA entered into force on July 1, 2020. A delayed effective date would be impractical, unnecessary, and contrary to the public interest.

#### B. *Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Rules involving the foreign affairs function of the United States are exempt from the requirements of Executive Orders 12866 and 13563.

Because this rule involves a foreign affairs function of the United States by implementing a specific trilateral agreement negotiated between the United States, Mexico, and Canada, the rule is not subject to the provisions of Executive Orders 12866 and 13563.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act.

### *D. Paperwork Reduction Act*

As there is no new collection of information required in this document, the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) are inapplicable.

## **List of Subjects**

### *8 CFR Part 103*

Administrative practice and procedure, Authority delegations (Government agencies), Fees, Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

### *8 CFR Part 212*

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

### *8 CFR Part 214*

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

### *8 CFR Part 274a*

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

## **Amendments to the DHS Regulations**

For the reasons stated above in the preamble, DHS amends parts 103, 212, 214, and 274a of title 8 of the Code of Federal Regulations (8 CFR parts 103, 212, 214, and 274a) as set forth below:

### **PART 103—IMMIGRATION BENEFIT REQUESTS; USCIS FILING REQUIREMENTS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS**

- 1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1365b; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557; 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112–54; 125 Stat. 550; 31 CFR part 223.

#### **§ 103.7 [Amended]**

- 2. Amend § 103.7, in paragraph (d)(11), by removing the words “North American Free Trade Agreement” and adding in their place the words “Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)”.

### **PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

- 3. The general authority citation for part 212 continues to read as follows:

**Authority:** 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1187, 1223, 1225, 1226, 1227, 1255, 1359; section 7209 of Pub. L. 108–458 (8 U.S.C. 1185 note); Title VII of Pub. L. 110–229 (8 U.S.C. 1185 note); 8 CFR part 2; Pub. L. 115–218.

\* \* \* \* \*

#### **§ 212.1 [Amended]**

- 4. Amend § 212.1, in paragraph (l), by removing the words “North American Free Trade Agreement (NAFTA)” and adding, in their place, the words “Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)”.

### **PART 214—NONIMMIGRANT CLASSES**

- 5. The authority citation for part 214 continues to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 6. Amend § 214.1, in the table in paragraph (a)(2), by removing the entries for “NAFTA, Principal” and “NAFTA, Dependent” and adding entries for “USMCA, Principal” and “USMCA, Dependent” in their places to read as follows:

**§ 214.1 Requirements for admission, extension, and maintenance of status.**

(a) \* \* \*

(2) \* \* \*

Section	Designation
* * * *	
USMCA, Principal .....	TN.
USMCA, Dependent .....	TD.
* * * *	

\* \* \* \*

■ 7. Amend § 214.2 as follows:

■ a. Revise paragraph (b)(4);

■ b. In paragraph (e)(22)(i) introductory text, remove the words “section B of Annex 1603 of the NAFTA” and add in their place the words “Section B of Annex 16–A of Chapter 16 of the USMCA”; and

■ c. In the heading to paragraph (l)(17), remove the words “North American Free Trade Agreement (NAFTA)” and add in their place the words “Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)”.

The revision reads as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \*

(b) \* \* \*



(4) *Admission of aliens pursuant to the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA).* A citizen of Canada or Mexico seeking temporary entry for purposes set forth in paragraph (b)(4)(i) of this section, who otherwise meets the requirements under section 101(a)(15)(B) of the Act, including but not limited to requirements regarding the source of remuneration, shall be admitted upon presentation of proof of such citizenship in the case of Canadian applicants, and valid, unexpired entry documents such as a passport and visa, or a passport and BCC in the case of Mexican applicants, a description of the purpose for which the alien is seeking admission, and evidence demonstrating that he or she is engaged in one of the occupations or professions set forth in paragraph (b)(4)(i) of this section.

(i) *Occupations and professions set forth in Section B of Appendix 1 of Chapter 16 of the USMCA—(A) Research and design.* Technical, scientific and statistical researchers conducting independent research or research for an enterprise located in the territory of another Party.

(B) *Growth, manufacture, and production.* (1) Harvester owner supervising a harvesting crew admitted under applicable law. (Applies only to harvesting of agricultural crops: Grain, fiber, fruit and vegetables.)

(2) Purchasing and production management personnel conducting commercial transactions for an enterprise located in the territory of another Party.

(C) *Marketing.* (1) Market researchers and analysts conducting independent research or analysis, or research or analysis for an enterprise located in the territory of another Party.

(2) Trade fair and promotional personnel attending a trade convention.

(D) *Sales.* (1) Sales representatives and agents taking orders or negotiating contracts for goods or services for an enterprise located in the territory of another Party but not delivering goods or supplying services.

(2) Buyers purchasing for an enterprise located in the territory of another Party.

(E) *Distribution.* (1) Transportation operators transporting goods or passengers to the United States from the territory of another Party or loading and transporting goods or passengers from the United States, with no unloading in the United States, to the territory of another Party. (These operators may make deliveries in the United States if all goods or passengers to be delivered were loaded in the territory of another Party. Furthermore, they may load from locations in the

United States if all goods or passengers to be loaded will be delivered in the territory of another Party. Purely domestic service or solicitation, in competition with the United States operators, is not permitted.)

(2) Customs brokers performing brokerage duties associated with the export of goods from the United States to or through Canada.

(F) *After-sales services.* Installers, repair and maintenance personnel, and supervisors, possessing specialized knowledge essential to the seller's contractual obligation, performing services or training workers to perform services, pursuant to a warranty or other service contract incidental to the sale of commercial or industrial equipment or machinery, including computer software, purchased from an enterprise located outside the United States, during the life of the warranty or service agreement. (For the purposes of this provision, the commercial or industrial equipment or machinery, including computer software, must have been manufactured outside the United States.)

(G) *General service.* Professionals engaging in a business activity at a professional level in a profession set out in Appendix 2 to Annex 16-A of Chapter 16 of the USMCA, but receiving no salary or other remuneration from a United States source (other than an expense allowance or other reimbursement for expenses incidental to the temporary stay) and otherwise satisfying the requirements of Section A to Annex 16-A of the USMCA.

(H) *Commercial transactions.* (1) Management and supervisory personnel engaging in commercial transactions for an enterprise located in the territory of another Party.

(2) Financial services personnel (insurers, bankers or investment brokers) engaging in commercial transactions for an enterprise located in the territory of another Party.

(I) *Public relations and advertising.* Public relations and advertising personnel consulting with business associates, or attending or participating in conventions.

(J) *Tourism.* Tourism personnel (tour and travel agents, tour guides or tour operators) attending or participating in conventions or conducting a tour that has begun in the territory of another Party. (The tour may begin in the United States; but must terminate in foreign territory, and a significant portion of the tour must be conducted in foreign territory. In such a case, an operator may enter the United States with an empty conveyance and a tour guide may enter on his or her own and join the conveyance.)

(K) *Tour bus operation.* Tour bus operators entering the United States:

(1) With a group of passengers on a bus tour that has begun in, and will return to, the territory of another Party.

(2) To meet a group of passengers on a bus tour that will end, and the predominant portion of which will take place, in the territory of another Party.

(3) With a group of passengers on a bus tour to be unloaded in the United States and returning with no passengers or reloading with the group for transportation to the territory of another Party.

(L) *Translation.* Translators or interpreters performing services as employees of an enterprise located in the territory of another Party.

(ii) *Occupations and professions not listed in Section B of Appendix 1 of Chapter 16 of the USMCA.* Nothing in paragraph (b)(4) of this section shall preclude a business person engaged in an occupation or profession other than those listed in Section B of Appendix 1 of Chapter 16 of the USMCA from temporary entry under section 101(a)(15)(B) of the Act, if such person otherwise meets the requirements for admission as prescribed by the Attorney General.

\* \* \* \* \*

■ 8. Amend § 214.6 as follows:

■ a. Revise the section heading;

■ b. In paragraph (a), remove the words “North American Free Trade Agreement (NAFTA)” and add in their place the words “Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)”;

■ c. In paragraph (b):

■ i. In the definition for *Business activities at a professional level*, remove the words “Appendix 1603.D.1 of the NAFTA” and add, in their place, the words “Appendix 2 to Annex 16–A of Chapter 16 of the USMCA”;

■ ii. In the definition for *Business person*, remove “NAFTA” and add in its place “USMCA”;

■ iii. In the definition for *Business person*, remove the word “provision” and add in its place the word “supply”;

■ iv. In the definition for *Temporary entry*, remove “NAFTA” and add in its place “USMCA”;

■ d. Revise paragraph (c);

- e. In the heading of paragraph (d), remove the word “NAFTA” and add in its place the word “USMCA”;
- f. In paragraph (d)(1), remove “NAFTA” and add in its place “USMCA”;
- g. In paragraph (d)(3)(ii)(A), remove the words “Appendix 1603.D.1” and add the words “under Appendix 2 to Annex 16–A of Chapter 16 of the USMCA” after the word “applicant”;
- h. In paragraph (d)(3)(ii)(D), add a closing parenthesis after “(D)”;
- i. In paragraph (e), remove “NAFTA” and add in its place, “USMCA”; and
- j. In paragraph (i)(2), remove “NAFTA” and add in its place “USMCA”.

The revision reads as follows:

**§ 214.6 Citizens of Canada or Mexico seeking temporary entry under USMCA to engage in business activities at a professional level.**

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(c) *Appendix 2 to Annex 16–A of Chapter 16 of the USMCA.* Pursuant to the USMCA, an applicant seeking admission under this section shall demonstrate business activity at a professional level in one of the professions set forth in Appendix 2 to Annex 16–A of Chapter 16. The professions in Appendix 2 to Annex 16–A and the minimum requirements for qualification for each are as follows:<sup>5</sup>

**Appendix 2 to Annex 16–A of Chapter 16 (Annotated)**

General

—Accountant—Baccalaureate or Licenciatura Degree; or C.P.A., C.A., C.G.A., or C.M.A.

—Architect—Baccalaureate or Licenciatura Degree; or state/provincial license.<sup>6</sup>

<sup>5</sup> A business person seeking temporary employment under this Appendix may also perform training functions relating to the profession, including conducting seminars.

<sup>6</sup> The terms “state/provincial license” and “state/provincial/federal license” mean any document issued by a state, provincial, or federal government, as the case may be, or under its authority, but not by a local government, that permits a person to engage in a regulated activity or profession.

—Computer Systems Analyst—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma<sup>7</sup> or Post-Secondary Certificate,<sup>8</sup> and three years experience.

—Disaster Relief Insurance Claims Adjuster (claims adjuster employed by an insurance company located in the territory of a Party, or an independent claims adjuster)—Baccalaureate or Licenciatura Degree, and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims; or three years experience in claims adjustment and successful completion of training in the appropriate areas of insurance adjustment pertaining to disaster relief claims.

—Economist—Baccalaureate or Licenciatura Degree.

—Engineer—Baccalaureate or Licenciatura Degree; or state/provincial license.

—Forester—Baccalaureate or Licenciatura Degree; or state/provincial license.

—Graphic Designer—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

—Hotel Manager—Baccalaureate or Licenciatura Degree in hotel/restaurant management; or Post-Secondary Diploma or Post-Secondary Certificate in hotel/restaurant management, and three years experience in hotel/restaurant management.

—Industrial Designer—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

—Interior Designer—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

—Land Surveyor—Baccalaureate or Licenciatura Degree; or state/provincial/federal license.

—Landscape Architect—Baccalaureate or Licenciatura Degree.

—Lawyer (including Notary in the province of Quebec)—L.L.B., J.D., L.L.L., B.C.L., or Licenciatura Degree (five years); or membership in a state/provincial bar.

—Librarian—M.L.S. or B.L.S. (for which another Baccalaureate or Licenciatura Degree was a prerequisite).

<sup>7</sup> “Post-Secondary Diploma” means a credential issued, on completion of two or more years of postsecondary education, by an accredited academic institution in Canada or the United States.

<sup>8</sup> “Post-Secondary Certificate” means a certificate issued, on completion of two or more years of postsecondary education at an academic institution, by the federal government of Mexico or a state government in Mexico, an academic institution recognized by the federal government or a state government, or an academic institution created by federal or state law.

—Management Consultant—Baccalaureate or Licenciatura Degree; or equivalent professional experience as established by statement or professional credential attesting to five years experience as a management consultant, or five years experience in a field of specialty related to the consulting agreement.

—Mathematician (including Statistician)—Baccalaureate or Licenciatura Degree.<sup>9</sup>

—Range Manager/Range Conservationist—Baccalaureate or Licenciatura Degree.

—Research Assistant (working in a post-secondary educational institution)— Baccalaureate or Licenciatura Degree.

—Scientific Technician/Technologist<sup>10</sup> —Possession of (a) theoretical knowledge of any of the following disciplines: agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology, or physics; and (b) the ability to solve practical problems in any of those disciplines, or the ability to apply principles of any of those disciplines to basic or applied research.

—Social Worker—Baccalaureate or Licenciatura Degree.

—Sylviculturist (including Forestry Specialist)—Baccalaureate or Licenciatura Degree.

—Technical Publications Writer—Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

—Urban Planner (including Geographer)—Baccalaureate or Licenciatura Degree.

—Vocational Counselor—Baccalaureate or Licenciatura Degree.

#### Medical/Allied Professionals

—Dentist—D.D.S., D.M.D., Doctor en Odontologia or Doctor en Cirugia Dental; or state/provincial license.

—Dietitian—Baccalaureate or Licenciatura Degree; or state/provincial license.

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<sup>9</sup> The term “Mathematician” includes the profession of Actuary. An Actuary must satisfy the necessary requirements to be recognized as an actuary by a professional actuarial association or society. A professional actuarial association or society means a professional actuarial association or society operating in the territory of at least one of the Parties.

<sup>10</sup> A business person in this category must be seeking temporary entry for work in direct support of professionals in agricultural sciences, astronomy, biology, chemistry, engineering, forestry, geology, geophysics, meteorology or physics.

—Medical Laboratory Technologist (Canada)/Medical Technologist (Mexico and the United States)<sup>11</sup> —Baccalaureate or Licenciatura Degree; or Post-Secondary Diploma or Post-Secondary Certificate, and three years experience.

—Nutritionist—Baccalaureate or Licenciatura Degree.

—Occupational Therapist—Baccalaureate or Licenciatura Degree; or state/provincial license.

—Pharmacist—Baccalaureate or Licenciatura Degree; or state/provincial license.

—Physician (teaching or research only) —M.D. or Doctor en Medicina; or state/ provincial license.

—Physiotherapist/Physical Therapist— Baccalaureate or Licenciatura Degree; or state/provincial license.

—Psychologist—State/provincial license; or Licenciatura Degree.

—Recreational Therapist—Baccalaureate or Licenciatura Degree.

—Registered Nurse—State/provincial license; or Licenciatura Degree.

—Veterinarian—D.V.M., D.M.V., or Doctor en Veterinaria; or state/provincial license.

#### Scientist

—Agriculturist (including Agronomist) —Baccalaureate or Licenciatura Degree.

—Animal Breeder—Baccalaureate or Licenciatura Degree.

—Animal Scientist—Baccalaureate or Licenciatura Degree.

—Apiculturist—Baccalaureate or Licenciatura Degree.

—Astronomer—Baccalaureate or Licenciatura Degree.

—Biochemist—Baccalaureate or Licenciatura Degree.

—Biologist—Baccalaureate or Licenciatura Degree.<sup>12</sup>

—Chemist—Baccalaureate or Licenciatura Degree.

—Dairy Scientist—Baccalaureate or Licenciatura Degree.

—Entomologist—Baccalaureate or Licenciatura Degree.

—Epidemiologist—Baccalaureate or Licenciatura Degree.

—Geneticist—Baccalaureate or Licenciatura Degree.

—Geochemist—Baccalaureate or Licenciatura Degree.

—Geologist—Baccalaureate or Licenciatura Degree.

—Geophysicist (including Oceanographer in Mexico and the United States)—Baccalaureate or Licenciatura Degree.

—Horticulturist—Baccalaureate or Licenciatura Degree.

—Meteorologist—Baccalaureate or Licenciatura Degree.

<sup>11</sup> A business person in this category must be seeking temporary entry to perform in a laboratory, chemical, biological, hematological, immunologic, microscopic or bacteriological tests and analyses for diagnosis, treatment, or prevention of diseases.

<sup>12</sup> The term “Biologist” includes the profession of Plant Pathologist.

- Pharmacologist—Baccalaureate or Licenciatura Degree.
- Physicist (including Oceanographer in Canada)—Baccalaureate or Licenciatura Degree.
- Plant Breeder—Baccalaureate or Licenciatura Degree.
- Poultry Scientist—Baccalaureate or Licenciatura Degree.
- Soil Scientist—Baccalaureate or Licenciatura Degree.
- Zoologist—Baccalaureate or Licenciatura Degree.

#### Teacher

- College—Baccalaureate or Licenciatura Degree.
- Seminary—Baccalaureate or Licenciatura Degree.
- University—Baccalaureate or Licenciatura Degree.

\* \* \* \* \*

### **PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

- 9. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

#### **§ 274a.12 [Amended]**

- 10. Amend § 274a.12, in paragraph (b)(19), by removing the words “North American Free Trade Agreement (NAFTA)” and adding in their place the words “Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)”.

ALEJANDRO N. MAYORKAS,  
*Secretary,*  
*U.S. Department of Homeland Security.*

[Published in the Federal Register, July 11, 2022 (85 FR 41027)]



# U.S. Court of International Trade

Slip Op. 22–78

SHUZHEN ZHONG, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge  
Court No. 22–00041

[In challenge to customs broker’s license denial, judgment on the pleadings for defendant.]

Dated: July 7, 2022

*Shuzhen Zhong*, plaintiff, of Staten Island, N.Y., proceeding *pro se*.  
*Luke Mathers*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant. With him on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge, International Trade Field Office, and *Aimee Lee*, Assistant Director. Of counsel on the brief was *Mathias Rabinovitch*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

## OPINION

### Restani, Judge:

Plaintiff, Shuzhen Zhong, proceeding *pro se*, brings this action to challenge the decision of U.S. Customs and Border Protection’s (“Customs”) upholding the denial of her appeal of her result on the Customs Broker License Exam (“CBLE”) and consequent denial of a customs broker’s license. Compl., ECF No. 2 (Feb. 10, 2022) (“Compl.”); Pl.’s Resp. to Mot. for more definite statement, ECF No. 6 (Apr. 8, 2022) (“Pl.’s Resp.”); Pl.’s Letter in support of Mot. for J. on the pleadings (“Pl.’s Br.”), ECF No. 13 (June 7, 2022); section 641(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(e) (2018).<sup>1</sup> Customs denied Ms. Zhong’s appeal based on her failure to attain a passing score of 75 percent or higher on the CBLE held on April 25, 2018 (“April 2018 exam”). Compl. at 2; Def.’s Mot. for J. on the Agency R. or J. on the pleadings, ECF No. 14 (June 17, 2022) (“Gov’t’s Br.”) at 8; 19 C.F.R. § 111.11(a)(4) (2017).

Before the court, Ms. Zhong appeals Customs’ decision to deny her credit for two questions on the April 2018 exam. *See* Pl.’s Resp. at 2, 8–11. Should Ms. Zhong receive credit for one of the two contested

<sup>1</sup> Further citations to the Tariff Act of 1930, as amended, are also to the relevant portions of Title 19 of the U.S. Code, 2018 edition.

questions, she would attain a passing score of 75 percent. She also raises concerns with Customs' handling of her administrative appeal. *See* Pl.'s Resp. at 1.

The government opposes Ms. Zhong's request for relief and argues that Customs' decision to deny her credit for the contested questions was reasonable. *See* Gov't's Br. at 11–16. On this basis, the government asserts that she did not attain a passing score of 75 percent or higher on the April 2018 exam and, consequently, that Customs "did not abuse its discretion, act arbitrarily or capriciously, lack substantial evidence in reaching its decision, or otherwise violate the law." *Id.* at 10; 5 U.S.C. § 706(2)(A). The court has construed Ms. Zhong's filings as a motion for judgment on the pleadings. *See* Letter, ECF No. 11 (May 26, 2022).<sup>2</sup>

For the reasons discussed below, Ms. Zhong's motion is denied.

### BACKGROUND

Ms. Zhong sat for the CBLE on April 25, 2018. *See* Admin. R., Ex. A at 2, ECF No. 10 (May 19, 2022). On May 18, 2018, Customs notified her that she had received a score of 70 percent—5 percent below the passing score of 75 percent. *See* Admin. R., Ex. B at 37. She first appealed this result, challenging questions 32 and 56, among others, as faulty. *See id.*, Ex. C at 40–46. Customs denied this first appeal. *See id.*, Ex. D at 48.

Ms. Zhong appealed a second time again challenging questions 32 and 56, among others. *See id.*, Ex. E at 50–56. Customs granted Ms. Zhong credit for one question, but otherwise denied her credit for questions 32 and 56. *Id.*, Ex. L at 80–88. This left her with a score of 73.75 percent, one question from a passing score. *Id.* at 80. When issuing its decision letter, Customs made two mistakes. *Id.* First, Customs mistakenly referred to Ms. Zhong by the incorrect honorific "Mr." *Id.* Second, Customs mistakenly addressed the letter to 63 Quintin Road instead of the correct address at 64 Quintin Road. *Id.*

After receiving Customs' decision, Ms. Zhong filed a complaint with the court, challenging Customs' denial of credit for her answers to questions 32 and 56. *See* Compl.; Pl.'s Resp. at 8–11.

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<sup>2</sup> In its filing, the government included a motion for judgment on the agency record or, in the alternative, judgment on the pleadings. *See* Gov't's Br. at 2. The court construes the motion as a judgment on the pleadings under U.S. Court of International Trade ("USCIT") R. 12(c) because the relevant agency documents were attached to Ms. Zhong's pleadings. *See* Compl. at 3–14; Pl.'s Resp. at 4–11. Further, all parties have had a full opportunity to present all pertinent material and the court concludes it need not resort to any material outside the pleadings.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to hear Ms. Zhong’s appeal pursuant to 28 U.S.C. § 1581(g)(1) (2020) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review . . . any decision of the Secretary of the Treasury to deny a customs broker’s license.”). “[T]he material allegations of a complaint are taken as admitted and are to be liberally construed in favor of the plaintiff(s).” *Humane Soc’y v. Brown*, 19 CIT 1104, 1104, 901 F. Supp. 338, 340 (1995); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972) (“[T]he allegations of [a] pro se complaint [are] h[e]ld to less stringent standards than formal pleadings drafted by lawyers.”).

Two elements of review apply with respect to the appeal of an applicant’s result on the CBLE. *See Kenny v. Snow*, 401 F.3d 1359, 1361 (Fed. Cir. 2005). The first element addresses whether Customs’ decision to deny an applicant credit for a contested question was supported by “substantial evidence.” *See id.* at 1361–62 (concluding that the “decision to deny credit [for the contested question] [was] supported by substantial evidence”) (citing 19 U.S.C. § 1641(e)(3)). The second element addresses whether, on the basis of an applicant’s failure to attain a passing score on the CBLE, Customs’ decision to deny the applicant a customs broker’s license was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Kenny*, 401 F.3d at 1361 (citing 5 U.S.C. § 706 (2000)).

## LEGAL CONTEXT

### I. Application for a customs broker’s license

Customs brokers are responsible for the application of statutes and regulations “governing the movement of merchandise into and out of the customs territory of the United States.” *Dunn-Heiser v. United States*, 29 CIT 552, 553, 374 F. Supp. 2d 1276, 1278 (2005). Pursuant to 19 U.S.C. § 1641(b)(2), the Secretary of the Treasury is vested with “broad powers” with respect to the licensing of customs brokers. *Depersia v. United States*, 33 CIT 1103, 1105, 637 F. Supp. 2d 1244, 1247 (2009). 19 U.S.C. § 1641(b)(2) provides:

The Secretary may grant an individual a customs broker’s license only if that individual is a citizen of the United States. Before granting the license, the Secretary may require an applicant to show any facts deemed necessary to establish that the applicant is of good moral character and qualified to render valuable service to others in the conduct of customs business. In assessing the qualifications of an applicant, the Secretary may conduct an examination to determine the applicant’s knowledge

of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters.

19 U.S.C. § 1641(b)(2) (2016).

Customs has promulgated several regulations to implement this statute. For instance, 19 C.F.R. § 111.11 details the “[b]asic requirements” for an individual to obtain a customs broker’s license:

(a) Individual. In order to obtain a broker’s license, an individual must:

- (1) Be a citizen of the United States on the date of submission of the application . . . and not an officer or employee of the United States Government;
- (2) Attain the age of 21 prior to the date of submission of the application...;
- (3) Be of good moral character; and
- (4) Have established, by attaining a passing (75 percent or higher) grade on an examination taken within the 3-year period before submission of the application . . . that he has sufficient knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters to render valuable service to importers and exporters.

19 C.F.R. § 111.11(a)(1)–(4). Further, § 111.12(a) provides information with respect to the submission of an application for a customs broker’s license, and § 111.13 regulates the examination that is described in § 111.11(a)(4).

## II. Customs Broker License Exam

Customs’ regulations provide that “[t]he examination for an individual broker’s license” — referred to as the CBLE — is “designed to determine the individual’s knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters.” *Id.* § 111.13(a); *see* 19 U.S.C. § 1641(b)(2). The fact that this “comprehensive written licensing exam” constitutes one of the requirements to obtain a customs broker’s license reflects the “complex[ity]” of the applicable statutes and regulations as well as the “integral role [of customs brokers] in international trade.” *Dunn-Heiser*, 29 CIT at 553–54, 374 F. Supp. 2d at 1278.

Customs administers the CBLE twice each year, in April and October. 19 C.F.R. § 111.13(b) (2017). “The exam is open-book,” and applicants are advised to bring certain specified materials to which

they may refer during the exam, including the Harmonized Tariff Schedule of the United States (“HTSUS”) and Title 19 of the Code of Federal Regulations.<sup>3</sup> *Dunn-Heiser*, 29 CIT at 554, 374 F. Supp. 2d at 1278.

As noted, an applicant is required to attain a score of 75 percent or higher to pass the CBLE. 19 C.F.R. § 111.11(a)(4); 19 U.S.C. § 1641(b)(2). An applicant who does not attain a passing score, however, is entitled to retake the exam. 19 C.F.R. § 111.13(e). In addition, an applicant who does not attain a passing score is entitled to appeal this result to the Broker Management Branch (“BMB”). *Id.* § 111.13(f). Should the BMB affirm the result, the applicant is entitled to request that the Executive Assistant Commissioner (“EAC”) review the BMB’s decision. *Id.* Should the EAC uphold the BMB’s decision, the applicant is then entitled to appeal the EAC’s decision to the USCIT. 19 U.S.C. § 1641(e)(1) (“[An] applicant . . . may appeal . . . by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part.”).

## DISCUSSION

The court concludes that Customs’ decision to deny Ms. Zhong credit for two questions on the April 2018 exam was supported by substantial evidence. On this basis, she does not establish that she scored 75 percent or higher on the exam. Accordingly, Customs’ decision to deny Ms. Zhong a customs broker’s license was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *See* 5 U.S.C. § 706(2)(A).

### I. Customs’ denial of credit for the contested questions

#### A. Question 32

First, Ms. Zhong appeals Customs’ decision to deny her credit for question 32 on the April 2018 exam. Question 32 states:

What is the CLASSIFICATION of glazed ceramic mosaic cubes on a mesh backing, which measure approximately 1 centimeter wide by 1 centimeter long by 1 centimeter thick, and have a water absorption coefficient by weight of .3 percent?

A. 6802.10.0000

B. 6907.21.2000

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<sup>3</sup> *See also Customs Broker License Exam (CBLE)*, U.S. CUSTOMS AND BORDER PROT., <https://www.cbp.gov/trade/programs-administration/customs-brokers/license-examination-notice-examination> (last visited June 23, 2022) (providing a list of permitted reference materials).

C. 6907.21.3000

D. 6907.30.3000

E. 6914.10.8000

Admin. R., Ex. L at 83 (emphasis omitted). Customs designated D as the correct answer, and Ms. Zhong chose answer B. *Id.*

Ms. Zhong argues that answer B “provided more of a detail oriented, comprehensive description that better matched the glazed ceramic mosaic cubes on a mesh backing,” whereas answer D was less accurate because it “omitted the water absorption coefficient.” Pl.’s Resp. at 9.

Customs’ decision to deny her credit for question 32 was supported by substantial evidence. The court applies the General Rules of Interpretation (“GRIs”) for custom classification “in numerical order and only continues to a subsequent GRI if proper classification of the imported goods cannot be accomplished by reference to a preceding GRI.” *In Zone Brands, Inc. v. United States*, 44 CIT \_\_\_, \_\_\_, 456 F. Supp. 3d 1309, 1315 (2020) (quotation omitted). GRI 1 requires classification to “be determined according to the terms of the headings and any relative section or chapter notes.” GRI 1 (2022). HTSUS chapter and section notes are considered binding statutory law. *See BenQ Am. Corp. v. United States*, 646 F.3d 1371, 1376 (Fed. Cir. 2011). Once the correct heading is identified, the court determines which subheading correctly identifies the merchandise in question. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998) (citing GRI 1, 6).

Here, heading 6907 explicitly covers question 32’s cubes because it provides for “ceramic mosaic cubes.” *See* 6907, HTSUS. At the subheading level, the language of 6907.21 covers “[f]lags and paving, hearth or wall tiles, other than those of subheading 6907.30 and 6907.40” of a water absorption coefficient by weight not exceeding 0.5 percent. Subheading 6907.21, HTSUS (emphasis added). Thus, subheading 6907.21 specifically excludes “[m]osaic cubes and the like” of subheadings 6907.30 and 6907.40. *Id.* Subheading 6907.30 covers “[m]osaic cubes and the like, other than those of subheading 6907.40.” Subheading 6907.30, HTSUS. And subheading 6907.40 only covers “[f]inishing ceramics.” Subheading 6907.40, HTSUS. As a result, at the subheading level, the ceramic mosaic cube in question 32 is explicitly covered by 6907.30 and, thus, explicitly excluded from 6907.21.

Although subheading 6907.30.3000 omitted the language about water absorption coefficient that question 32 mentioned, and sub-

heading 6907.21.200 included it, answer B is nevertheless incorrect because subheading 6907.30 covers mosaic cubes regardless of water absorption. For an applicant to select answer B it would require skipping the proper subheading and ignoring the structure of the HTSUS. See *In Zone Brands*, 456 F. Supp. 3d at 1315. Such analysis is erroneous. Thus, answer D is the best answer to question 32. Customs' decision to deny Ms. Zhong credit for answer B was reasonable.

### **B. Question 56**

Second, Ms. Zhong appeals Customs' decision to deny her credit for question 56 on the April 2018 exam. Question 56 states:

While examining your client's shipment of 1,000 handbags at the container examination station, CBP discovered that the goods bear a mark suspected of infringing a trademark associated with a well-known designer. The designer's mark is registered on the Principal Register of the U.S. Patent and Trademark Office and recorded with CBP. The suspect mark is not identical with or substantially indistinguishable from the registered and recorded mark; rather, CBP determines that it copies or simulates the registered and recorded mark and, consequently, detains the handbags.

Which of the following options is available to the importer to obtain relief from detention within 30 days?

A. The importer may remove or obliterate the suspect marks from the handbags in such a manner that they are incapable of being reconstituted.

B. The importer may label the merchandise with the following statement: "This product is not a product authorized by the United States trademark owner for importation and is physically and materially different from the authorized product."

C. The importer may file a petition under 19 CFR pt. 171, persuasively arguing that the suspect marks do not actually so resemble the recorded mark as to be likely to confuse the public.

D. The importer may claim the personal use exemption under 19 CFR 148.55.

E. None of the above.

Admin. R., Ex. L at 86. Customs designated the correct answer as A, and Ms. Zhong chose B. *Id.*

She argues that question 56 suffered from “a major grammatical defect which confused” her and allegedly other test takers, resulting in a question with no possible answer. Pl.’s Br. at 1; Pl.’s Resp. at 11. She asserts that “copies” has the same meaning as “identical,” and thus the question contradicted itself and could not be answered. Pl.’s Br. at 1; Pl.’s Resp. at 11.

Customs’ decision to deny Ms. Zhong credit for question 56 was supported by substantial evidence. The question’s phrasing, “identical with or substantially indistinguishable from” and “copies or simulates” are quoted from the applicable federal regulations. *Compare* 19 C.F.R. § 133.21(a) *with id.* § 133.22(a). The regulations define a “counterfeit mark” as a “spurious mark that is identical with, or substantially indistinguishable from, a mark registered.” *Id.* § 133.21(a). Another regulation, however, defines a “copying and simulating” mark as “one which may so resemble a recorded mark . . . as to be likely to cause the public to associate the copying or simulating mark . . . with the recorded mark.” *Id.* § 133.22(a). If a mark copies or simulates, then the regulation provides that the importer can either remove or obliterate the mark so that it cannot be “reconstituted.” *Id.* § 133.22(c).

Here, Customs intended to “test[] the ability to differentiate between goods bearing counterfeit trademarks . . . and goods bearing copying or simulating trademarks” and identify proper remedies. *See* Pl.’s Resp. at 10. While “copy” might be synonymous with “identical” in some contexts, this question clearly sought to have test takers distinguish between the applicable regulations and identify the proper remedy. *Compare* 19 C.F.R. § 133.21(a) *with id.* § 133.22(a). Because the question states that the mark “copies or simulates” the importer may remove or obliterate the mark. *See* Admin. R., Ex. L at 86; *see also* 19 C.F.R. § 133.22(a), (c). Thus, answer A is the best answer to question 56. Because there was a best answer available, Ms. Zhong’s contention that the question was so confusing as to result in no possible answer lacks merit. Thus, Customs’ decision to deny Ms. Zhong credit for answer B was reasonable.

## **II. Customs’ decision to deny plaintiff a customs broker’s license**

In reviewing Customs’ decision to deny a customs broker’s license, the court is required to determine whether such a decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A lawful ground for such a decision is an applicant’s failure to pass the CBLE. *See* 19 U.S.C. § 1641(b)(2); 19 C.F.R. § 111.16(b)(2), 111.11(a)(4).



As discussed, a passing score on the CBLE is 75 percent or higher. 19 C.F.R. § 111.11(a)(4). The court previously recognized that to successfully appeal a result on the CBLE, an applicant must establish entitlement to credit for the “minimum” number of questions that the applicant requires to achieve a passing score. *Harak v. United States*, 30 CIT 908, 929 (2006). Should the applicant fail to meet this “minimum threshold,” then Customs’ denial of a customs broker’s license is not “arbitrary, capricious, or otherwise not in accordance with law.” *Id.* (citing 5 U.S.C. § 706(2)(A)).

Ms. Zhong scored 73.5 percent on the April 2018 exam. *See* Admin. R., Ex. L at 80. To attain a passing score of 75 percent or higher, she is required to establish that she is entitled to receive credit for at least one of the two contested questions. Based on the foregoing analysis, the court concludes that Customs’ decision to deny Ms. Zhong credit for both of the contested questions was supported by substantial evidence. For this reason, Customs’ decision to deny her appeal was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *See* 5 U.S.C. § 706(2)(A); *see also* 19 C.F.R. § 111.16(b)(2).<sup>4</sup>

### CONCLUSION

For the foregoing reasons, the court concludes that Customs’ decision to deny Ms. Zhong credit for questions 32 and 56 on the April 2018 exam was supported by substantial evidence, and consequently that Customs’ decision to deny her a customs broker’s license was not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *See* 5 U.S.C. § 706(2)(A).

Accordingly, the court denies plaintiff’s motion for judgment on the pleadings and grants defendant’s corresponding motion. Judgment will enter for defendant dismissing the action.

Dated: July 7, 2022

New York, New York

*/s/ Jane A. Restani*

JANE A. RESTANI, JUDGE

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<sup>4</sup> To the extent Ms. Zhong raises a claim related to Customs sending its appeal decision to the wrong address or addressed to “Mr.” Zhong, the claim does not give rise to any possibility of relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). She has suffered no recognizable harm because she was able to pursue administrative appeals and was able to challenge the result in court. *See* 19 U.S.C. § 1641(e)(1); 19 C.F.R. § 111.13(f).

## Slip Op. 22–79

RIMCO, INC., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: Mark A. Barnett, Chief Judge  
Court No. 21–00537

[Dismissing Rimco, Inc.'s challenge to U.S. Customs and Border Protection's assessment of countervailing and antidumping duties on entries of certain imported steel wheels from the People's Republic of China for lack of subject-matter jurisdiction.]

Dated: July 8, 2022

*John M. Peterson*, Neville Peterson LLP, of New York, NY, argued for Plaintiff Rimco, Inc. With him on the brief were *Richard F. O'Neill* and *Patrick B. Klein*.

*Beverly A. Farrell*, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, Justin R. Miller, Attorney-In-Charge, International Trade Field Office, *Claudia Burke*, Assistant Director, and *Ashley Akers*, Trial Attorney. Of counsel on the brief were *Ian McInerney*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, and *Yelena Slepak* and *Fariha Kabir*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

*Nicholas J. Birch* and *Roger B. Schagrin*, Schagrin Associates, of Washington, DC, for Proposed Defendant-Intervenor, Accuride Corporation.

**OPINION AND ORDER****Barnett, Chief Judge:**

In this matter, Plaintiff Rimco, Inc. (“Plaintiff” or “Rimco”) seeks to challenge the constitutionality of United States Customs and Border Protection’s (“CBP”) assessment of countervailing and antidumping duties on entries of certain steel wheels from the People’s Republic of China (“China”). *See* Compl., ECF No. 2. Relevant here, Defendant United States (“Defendant” or “the Government”) moves to dismiss Rimco’s complaint for lack of subject-matter jurisdiction pursuant to United States Court of International Trade (“USCIT”) Rule 12(b)(1). Def.’s Mot. to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim Upon Which Relief Can be Granted (“Mot. to Dismiss”), ECF No. 32; Def.’s Reply Mem. of Law in Supp. of its [Mot. to Dismiss], ECF No. 43.<sup>1</sup> Rimco opposes the motion. Pl.’s Opp’n to Def.’s Mot. to Dismiss (“Pl.’s Resp.”), ECF No. 38.

Also before the court are (1) a motion to intervene filed by proposed Defendant-Intervenor Accuride Corporation (“Accuride”), Mot. to Intervene, ECF No. 14; (2) Accuride’s amended motion to amend its

<sup>1</sup> Defendant also argues that Rimco has failed to state a claim upon which relief can be granted pursuant to USCIT Rule 12(b)(6). Because the court dismisses the case for lack of subject-matter jurisdiction, it need not address the parties’ arguments regarding the alleged failure to state a claim.

motion to intervene, Am. Mot. to Amend Mot. to Intervene, ECF No. 25; (3) Accuride's proposed response in support of Defendant's motion to dismiss, Proposed Resp. to Def.'s Mot. to Dismiss, ECF No. 37; and (4) Plaintiff's motion to strike the proposed response from the docket, Pl.'s Mot. for an Order Directing the Clerk to Remove ECF 37 from the Docket, ECF No. 39.

As discussed below, the court grants Defendant's motion to dismiss. Accordingly, the court denies, as moot, Accuride's motion to intervene and amended motion to amend the motion to intervene and declines to consider Accuride's proposed response in support of the motion to dismiss. The court further denies, as moot, Rimco's motion to strike Accuride's proposed response.

### BACKGROUND

On March 28, 2019, the U.S. Department of Commerce ("Commerce") published the final countervailing and antidumping duty determinations on certain steel wheels from China. *See generally Certain Steel Wheels From the People's Republic of China*, 84 Fed. Reg. 11,744 (Dep't Commerce Mar. 28, 2019) (final aff. countervailing duty determination) ("*Final CVD Determination*"); *Certain Steel Wheels From the People's Republic of China*, 84 Fed. Reg. 11,746 (Dep't Commerce Mar. 28, 2019) (final determination of sales at less-than-fair-value) ("*Final AD Determination*"). No respondents participated in the antidumping duty investigation; consequently, Commerce determined only a China-wide entity rate of 231.70 percent. *See Final AD Determination*, 84 Fed. Reg. at 11,747. In the countervailing duty investigation, Commerce established individual rates for two companies based on total adverse facts available and an all-others rate of 457.10 percent. *See Final CVD Determination*, 84 Fed. Reg. at 11,745; *see generally* 19 U.S.C. § 1677e(b) (governing use of adverse inferences). Commerce published both the antidumping duty order ("AD Order") and countervailing duty order ("CVD Order") on May 24, 2019. *Certain Steel Wheels From the People's Republic of China*, 84 Fed. Reg. 24,098 (Dep't Commerce May 24, 2019) (anti-dumping and countervailing duty orders).

On May 1, 2020, Commerce published a notice of opportunity to request an administrative review of the countervailing and antidumping duty orders for the periods August 31, 2018, through December 31, 2019, and October 30, 2018, through April 30, 2020, respectively. *See Antidumping or Countervailing Duty Order; Finding, or Suspended Investigation; Opportunity to Request Admin. Review*, 85 Fed. Reg. 25,394, 25,396 (Dep't Commerce May 1, 2020)

(“*Opportunity Notice*”). The *Opportunity Notice* explained that interested parties (which includes importers), had the opportunity to participate in administrative reviews to ensure that entries were liquidated at the proper rate. *See id.* at 25,397; *see also Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 Fed. Reg. 65,694, 65,695 (Dep’t Commerce Oct. 24, 2011).

Neither Rimco nor any other interested party requested an administrative review of the transactions covered by the respective periods of review. Compl. ¶¶ 17, 28. Having received no review requests, Commerce issued liquidation instructions directing CBP to liquidate entries of steel wheels subject to the CVD Order and AD Order. *Id.* ¶¶ 18, 29. Consistent with the *Final CVD Determination* and *Final AD Determination*, the instructions directed CBP to liquidate entries subject to the CVD Order at 457.10 percent and entries subject to the AD Order at 231.70 percent. *See* Compl. 18–29. CBP liquidated seven entries of Rimco’s imported merchandise at the rates provided for in Commerce’s liquidation instructions. *See id.*

On March 16, 2021, Rimco filed a protest challenging CBP’s assessment of antidumping and countervailing duties on these entries. *See* Protests and Entries at 1, 4–22. CBP denied the protest on March 30, 2021, explaining that “19 U.S.C. [§] 1514 does not authorize protests or petitions filed against Commerce calculations or findings” and that “[p]rotest must be filed with Commerce.” Protests and Entries at 2.

Rimco then commenced this action, alleging that CBP’s assessment of countervailing and antidumping duties at rates of 457.10 percent and 231.70 percent, respectively, constituted “excessive fines” in violation of the Eighth Amendment to the U.S. Constitution. Compl. ¶¶ 1, 46–48.

## 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).

Here, Rimco alleges jurisdiction pursuant to 28 U.S.C. § 1581(a) or, alternatively, 28 U.S.C. § 1581(i). Compl. ¶¶ 2–3. Section 1581(a) grants the court jurisdiction to review denied protests by CBP. When a 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). Additionally, because the pending motion to dismiss rests on the absence of jurisdiction pursuant to section 1581(a) and the availability of jurisdiction pursuant to section 1581(c), thereby challenging the existence of section 1581(i) jurisdiction, “the factual allegations in the complaint are not controlling and only uncontroverted factual allegations are accepted as true.” *Shoshone Indian Tribe of Wind River Rsr., Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012).

## DISCUSSION

### I. Subject-Matter Jurisdiction

The USCIT, 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 protest denied pursuant to 19 U.S.C. § 1515. 28 U.S.C. § 1581(a). Section 1581(c) grants the court jurisdiction to review Commerce determinations in countervailing and antidumping duty proceedings commenced in accordance with 19 U.S.C. § 1516a. 28 U.S.C. § 1581(c). Section 1581(i) grants the court jurisdiction to entertain “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-- . . . (B) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue,” and “(D) administration and enforcement with respect to the matters referred to in paragraphs (A) through (C) of this paragraph and subsections (a)–(h) of this section.” 28 U.S.C. § 1581(i)(1)(B), (D). Section 1581(i) also expressly excludes jurisdiction over antidumping and countervailing duty determinations reviewable by the court pursuant to 19 U.S.C. § 1516a(a). *Id.* § 1581(i)(2)(A).

“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.” *Sunprime Inc. v. United States*, 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) is “strictly limited.” *Erwin Hymer*, 930 F.3d at 1374 (citation omitted). Otherwise, the court’s jurisdiction under subsection (i) would “threaten to swallow the specific grants of

jurisdiction contained within the other subsections.” *Id.* (citation omitted). “An importer may not simply ‘elect to proceed under section 1581(i) without having first availed [itself] of the remedy provided by section 1581(c).” *Wanxiang America Corp. v. United States*, 12 F.4<sup>th</sup>, 1374 (Fed. Cir. 2021) (citing *Sunpreme*, 892 F.3d at 1193); *see also* 28 U.S.C. 1581(i) (expressly excluding antidumping and countervailing duty determinations that are reviewable by the court under 19 U.S.C. § 1516a(a) from section 1581(i) jurisdiction).

### **A. The Availability of Jurisdiction Pursuant to Section 1581(a)**

The Government contends that the court lacks jurisdiction pursuant to section 1581(a) to hear Rimco’s claim “because CBP did not make a protestable decision with respect to either the countervailing or antidumping rate applied to the imported merchandise.” Mot. to Dismiss at 8. The liquidation is not a protestable decision, the Government contends, because “CBP does not possess any discretion” when liquidating “entries pursuant to Commerce’s liquidation instructions.” *Id.* at 9.

Rimco responds that the court has subject-matter jurisdiction pursuant to section 1581(a) because “CBP made a protestable decision” by liquidating Rimco’s entries. Pl.’s Resp. at 7; *see also id.* at 5, 7–10. Rimco also contends that its Eighth Amendment claim “could not have been raised before Commerce or in an action brought” pursuant to section 1581(c) because, “in the absence of liquidation,” it had “suffered no injury” and its claim would not have been ripe. *Id.* at 7; *see also id.* at 10–12.

Pursuant to section 1581(a), this court has “exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515].” 28 U.S.C. § 1581(a). Section 1515 governs CBP’s review of protests filed under 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). Section 1514(a), in turn, sets forth the exclusive list of CBP decisions that are subject to protest. 19 U.S.C. § 1514(a)(1)–(7). The introduction to section 1514(a) begins, however, by excepting certain determinations from its purview, most notably, antidumping and countervailing duty determinations reviewable pursuant to 19 U.S.C. § 1516a as referenced in subsection 1514(b).

This distinction between protestable determinations by CBP and antidumping and countervailing duty determinations by Commerce has long been recognized in both the statute and judicial precedent. *See* 19 U.S.C. § 1514(a)–(b); *see also Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed Cir. 1994); *American Nat’l Fire Ins. Co. v. United States*, 30 CIT 931, 939–940, 441 F. Supp. 2d 1275, 1285 (2006). “[I]f [CBP’s] underlying decision does not relate to any of

the[] seven categories” enumerated in section 1514(a), “the court may not exercise [section] 1581(a) jurisdiction over an action contesting [CBP’s] denial of a protest filed against that decision.” *American Nat’l Fire Ins.*, 30 CIT at 940, 441 F. Supp 2d at 1285. Moreover, “[s]ection 1514(a) does not embrace decisions by other agencies.” *Mitsubishi*, 44 F.3d at 976. Thus, section 1514(a) and (b), read together, “exclude antidumping [and countervailing] determinations from the list of matters that parties may protest to [CBP].” *Id.*

In this action, Rimco challenges CBP’s denial of its protest of the agency’s liquidation of certain entries of Rimco’s imported merchandise. See Compl. ¶¶ 18, 29. Rimco contends that 19 U.S.C. § 1500 “mandates that CBP make a ‘decision’” with respect to every entry.<sup>2</sup> Pl.’s Resp. at 7. This contention is without merit.

It is well settled that in liquidating entries subject to countervailing and antidumping duties, CBP simply “follows Commerce’s instructions”—its role is “merely ministerial.” *Mitsubishi*, 44 F.3d at 977. In other words, because CBP lacks discretion when it liquidates entries pursuant to Commerce’s liquidation instructions, it “does not make any section 1514 . . . ‘decisions.’” See *id.*; cf. *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997), *aff’d*, *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998) (“Typically, ‘decisions’ of [CBP] are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty.”).

Despite this issue being well-settled law, Rimco contends that “[i]t is of no moment that . . . CBP acted in a ministerial capacity by following [Commerce’s] directions.” Pl.’s Resp. at 6. Rimco cites *Wirtgen Am. v. United States*, 44 CIT \_\_\_, 437 F. Supp. 3d 1302 (2020), for the proposition that CBP can make protestable decisions even when acting pursuant to directions from another agency, in that case, the U.S. International Trade Commission (“ITC”). See *id.* *Wirtgen*, however, is inapposite. *Wirtgen* involved a challenge to CBP’s decision to exclude merchandise from entry pursuant to an exclusion order issued by the ITC. *Wirtgen*, 437 F. Supp. 3d at 1304–05. The defendant in *Wirtgen* argued that CBP was acting ministerially because it simply implemented the ITC exclusion order. *Id.* at 1306. The court, however, found that the plaintiff had pleaded sufficient facts according to which CBP had interpreted the ITC’s exclusion order to find

<sup>2</sup> While Rimco does not specifically address the provision in section 1500 under which CBP made a protestable decision, it appears that it is referring to section 1500(b), whereby CBP is to “fix the final classification and rate of duty applicable to such merchandise.” 19 U.S.C. § 1500(b); see also Pl.’s Resp. at 18 (“[Pursuant to] 19 U.S.C. § 1500, CBP is required to determine the rate and amount of duty applicable to an entry of imported merchandise, and render a decision regarding same.”).

that the plaintiff's merchandise was subject to that order. *Id.* at 1307. Here, no comparable interpretation was made by CBP. Instead, as described by the *Mitsubishi* court, CBP's role was merely ministerial in assessing the antidumping and countervailing duties based on the instructions received from Commerce. *See* Compl. ¶¶ 18, 29.

Rimco also relies on *Swisher International Inc. v. United States*, 205 F.3d 1358, (Fed. Cir. 2000), for the proposition that a constitutional challenge to fees levied by CBP may be brought under the court's section 1581(a) jurisdiction following a protest. *See* Pl.'s Resp. at 9, 15. In *Swisher*, however, the court found that the denial of a refund of the Harbor Maintenance Tax constituted a "decision as to a charge or exaction" within the meaning of 19 U.S.C. § 1514(a)(3). 205 F.3d at 1366. By contrast, in this case, Rimco disregards the fact that the statute expressly excludes antidumping and countervailing duty determinations from the list of protestable decisions.

In sum, because CBP's liquidation of the entries at issue was not a protestable decision, the court does not possess jurisdiction to hear this claim pursuant to section 1581(a).

### **B. The Availability of Jurisdiction Pursuant to Section 1581(i)**

The Government argues that jurisdiction pursuant to section 1581(i) is unavailable in this case because jurisdiction pursuant to section 1581(c) would have been available had Rimco requested an administrative review of Rimco's imports by Commerce. *See* Mot. to Dismiss at 10. The Government argues that because Rimco was an "interested party" as defined by 19 U.S.C. § 1677(9), Rimco could have requested an administrative review to address the level and constitutionality of the countervailing and antidumping duty rates assessed against its imports. *See id.* at 11. Thus, according to the Government, section 1581(c) serves as "the only valid basis for jurisdiction." *Id.* at 13. The Government also argues that "Rimco has not established or even alleged . . . that the potential remedy provided under section 1581(c) is manifestly inadequate." *Id.* at 11.

Rimco argues that, should the court not find jurisdiction pursuant to 28 U.S.C. § 1581(a), the court possesses residual jurisdiction under section 1581(i) because the "action relates to the administration and enforcement of matters covered by [the court's other bases for jurisdiction]." Pl.'s Resp. at 19–20. Rimco argues that section 1581(c) jurisdiction was not available because "[n]o unconstitutional injury . . . existed until CBP exacted monies from Rimco" and "Commerce [was] not competent to judge the constitutionality of its actions." *Id.* at 20.



It is well settled that “[a] party may not expand a court’s jurisdiction by creative pleading.” *Sunpreme*, 892 F.3d at 1193 (quoting *Norsk Hydro*, 472 F.3d at 1355). 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 Rimco’s action is a challenge to the assessment of countervailing and antidumping duties in accordance with the rates established by Commerce and communicated to CBP in the liquidation instructions. *See* Compl. ¶¶ 1, 48. Thus, the court lacks jurisdiction pursuant to section 1581(i) because jurisdiction pursuant to section 1581(c) was available and would not have been manifestly inadequate.

Rimco, as an importer of subject merchandise, was an interested party that could have requested administrative reviews of the countervailing and antidumping duty rates on its imports. *See* 19 U.S.C. § 1677(9); 19 C.F.R. § 351.213(b); *Opportunity Notice*, 85 Fed. Reg. at 25,396–97. In such administrative reviews, Rimco could have challenged the constitutionality of the rates selected by Commerce. Had Commerce disagreed with Rimco’s assertions that the antidumping and countervailing duties were unconstitutional under the Eighth Amendment, Rimco could have brought an action in this court pursuant to section 1581(c) challenging one or both administrative reviews. *See* 19 U.S.C. § 1516a; 28 U.S.C. § 1581(c). Rimco, however, declined to request an administrative review and, pursuant to 19 C.F.R. § 351.212(c)(1), Commerce issued instructions to CBP to liquidate the entries at the antidumping and countervailing duty rates in effect at the time of entry. Compl. ¶¶ 18, 29.

For Rimco to invoke the court’s section 1581(i) jurisdiction, it must show that any remedy available under the court’s section 1581(c) jurisdiction would have been manifestly inadequate. *See Sunpreme*, 892 F.3d at 1191. For a remedy to be manifestly inadequate, it must be an “exercise in futility, or ‘incapable of producing any result; failing utterly of the desired end through intrinsic defect; useless, ineffectual, vain.’” *Id.*

Rimco contends that the constitutionality of the rates could not have been addressed by Commerce or the court pursuant to its section 1581(c) jurisdiction. *See* Pl.’s Resp. at 10–12. Rimco argues that Commerce does not have the capacity to address such claims and that Rimco would lack standing to bring an Eighth Amendment claim prior to liquidation. Pl.’s Resp. at 11–12. Both arguments fail.

First, Rimco’s undeveloped assertion that Commerce lacks the capacity to consider its Eighth Amendment argument is unfounded. It has long been recognized that Commerce is the “master” of the coun-

tervailing and antidumping duty laws and was entrusted by Congress with determining the appropriate countervailing and antidumping duties. See *Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985). Assuming that Rimco's foreign producer(s) or exporter(s) would decline to participate in such an administrative review, had Rimco requested one, Commerce has a great deal of discretion in selecting the appropriate rate to use when making an adverse inference pursuant to 19 U.S.C. § 1677e. In particular, subsection (b)(2) lists four broad categories of information upon which Commerce may draw in making an adverse inference:

An adverse inference under paragraph (1)(A) may include reliance on information derived from—

- (A) the petition,
- (B) a final determination in the investigation under this subtitle,
- (C) any previous review under section 1675 of this title or determination under section 1675b of this title, or
- (D) any other information placed on the record.

19 U.S.C. § 1677e(b)(2). Nothing in this provision, or any other provision regarding Commerce's selection of an adverse facts available rate, suggests that Commerce would not be able to account for any objections reasonably founded in the Eighth Amendment when making any adverse inference. This is particularly true in this case when Rimco expressly directs its challenge to the rates selected by Commerce and not the constitutionality of the statute.

Rimco suggests that the language of 19 U.S.C. § 1677e(d)(3) is relevant to its Eighth Amendment claim. See Pl.'s Resp. at 2–3, 11, 19. That subsection clarifies that in using an adverse inference in selecting from facts otherwise available Commerce is not required:

(A) to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated;  
or

(B) to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.

19 U.S.C. § 1677e(d)(3)(A)–(B). Without deciding the merits of Rimco's position, nothing about this language suggests that Commerce would be incapable of considering the merits of an Eighth Amendment argument in determining how to exercise its discretion

in selecting information for purposes of making an adverse inference. To the contrary, the provision simply clarifies the absence of certain requirements.

Rimco acknowledges that “whe[n] the constitutional challenge is to an administrative . . . action,” it is “appropriate to encourage ‘further factual development within the agency.’” Pl.’s Resp. at 17 (citing *Nufarm Am.’s Inc. v. United States*, 29 CIT 1317, 1327, 398 F. Supp. 2d 1338, 1348 (2005)). While Rimco makes this argument to suggest that its protest to CBP constituted the appropriate avenue to judicial review, this argument more appropriately supports requiring Rimco to raise this issue before Commerce, the agency that determined the allegedly unconstitutional assessment rates. Consideration by Commerce would have provided the court with a record basis for reviewing the rates and a context in which to evaluate whether they were, in fact, “excessive.” As Plaintiff recognized in its complaint, “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality[,]” *United States v. Bajakajian*, 524 U.S. 321, 334 (1997), and that “[i]f the amount of the forfeiture is grossly disproportional to the gravity of the . . . offense, it is unconstitutional,” *id.* at 337. Antidumping and countervailing duties are designed to offset sales at less than fair value and the effects of unfair subsidization, respectively. Without a record developed by Commerce, it would be impossible for the court to evaluate whether the duties were unconstitutionally disproportionate.

Here, Rimco has not demonstrated that pursuing its claims through an administrative review would have been an exercise in futility, useless, or incapable of producing the result it seeks. If Rimco established that Commerce’s selected rates violated the Eighth Amendment, Commerce could have exercised its ample discretion to modify the information upon which it relied in making its adverse inference. See 19 U.S.C. § 1677e(b); *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1338–39 (Fed. Cir. 2002) (“In the case of uncooperative respondents, the discretion granted by [19 U.S.C. § 1677e(b)] appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences.”); see also *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983) (“The Secretary has broad discretion in executing the [antidumping and countervailing duty] law.”).

Rimco’s argument that it would lack standing to challenge such a determination pursuant to 1581(c) is equally unavailing. In order to have standing, a plaintiff must have suffered an “injury in fact” that is “concrete and particularized” and “actual or imminent”; the injury

must be “fairly traceable” to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff’s injury.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992); see also *Shenyang Yuanda Aluminum Indus. Eng’g Co. v. United States*, 918 F.3d 1355, 1364 (Fed. Cir. 2019). Rimco offers no persuasive reason to treat this case differently from other cases arising under section 1581(c) based on the constitutional nature of its claim. Standing does not require past injury. See *Shenyang Yuanda*, 918 F.3d at 1364 (“For such standing to exist, a plaintiff must have already suffered or be imminently threatened with a concrete, particularized injury . . . .”) (emphasis added); cf. *Barber v. Charter Township of Springfield*, 31 F.4th 382, 389–393 (6th Cir. 2022) (holding that plaintiff had standing to bring a Fifth Amendment takings claim despite plaintiff’s property having not yet been taken). As is true in any case arising under section 1581(c), liquidation would not have occurred at the time Commerce makes its determination, but is sufficiently imminent for standing purposes and, once Commerce issues liquidation instructions, CBP will have no discretion to alter or disregard those instructions.<sup>3</sup> See *Mitsubishi*, 44 F.3d at 977. Furthermore, the injury would be fairly traceable to Commerce as the agency which determined the allegedly unconstitutional rates. Finally, the court could grant relief to redress or prevent a plaintiff’s

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<sup>3</sup> The court’s jurisprudence with respect to the determination and assessment of antidumping and countervailing duties demonstrates that parties are entitled to adjudicate their claims concerning the determination of those duties prior to liquidation—and indeed must or else they risk losing their claims to mootness. See *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983) (holding that the USCIT erred in refusing to grant plaintiff a preliminary injunction because “the statutory scheme has no provision permitting reliquidation” even when a plaintiff is successful on the merits); *SKF USA Inc. v. United States*, 28 CIT 170, 186, 316 F. Supp. 2d 1322, 1337 (2004) (“Once liquidation occurs, judicial review is ineffective and thus, [a]llowing the liquidation to proceed would be tantamount to denial of the opportunity to challenge administrative determinations.”) (quoting *PPG Indus., Inc. v. United States*, 11 CIT 5, 7 (1987)). If Rimco’s argument were to prevail, the carefully crafted statutory scheme would be turned on its head. Congress has provided interested parties with an avenue for challenging countervailing and antidumping duty rates at the administrative level by participation in administrative reviews and in the courts through section 1581(c) jurisdiction. Endorsing Rimco’s approach of protesting the assessment of antidumping and countervailing duties could convert every challenge to a Commerce determination to an action under section 1581(a), rendering the court’s section 1581(c) jurisdiction superfluous, contrary to congressional intent. See Customs Courts Act of 1980, H.R. Rep. No. 96–1235, at 1 (1980) (“It is the intent of the committee that importers . . . not utilize proposed section 1581(a) to circumvent the exclusive method of judicial review of an antidumping and countervailing duty determination listed in section 516A of the Tariff Act of 1930 . . . .”).

injury by remanding the issue to Commerce to redetermine any rates found to be unconstitutional.<sup>4</sup>

Because the “true nature” of this dispute is a challenge to the countervailing and antidumping duty rates set by Commerce in the respective orders—rates which directly informed the liquidation instructions—Rimco could have raised its constitutional claims by requesting an administrative review and in any subsequent challenge to the final results of such administrative review. Rimco failed to pursue the administrative avenue available to it and thereby missed its opportunity to challenge the rates set by Commerce. It cannot avoid the consequences of that failure through the exercise of the court’s section 1581(i) jurisdiction.

## II. Moot Issues

Also before the court are (1) Accuride’s motion to intervene; (2) Accuride’s amended motion to amend its motion to intervene; and (3) Plaintiff’s motion to strike the proposed response. Because the court grants the Government’s motion to dismiss, these motions are denied as moot. *See TR Int’l Trading Co. v. United States*, 44 CIT \_\_, \_\_, 433 F. Supp. 3d 1329, 1346 (granting defendant’s motion to dismiss for lack of subject-matter jurisdiction and denying proposed defendant-intervenor’s motion to intervene as moot). Because the court denies Accuride’s motion to intervene, the court does not consider its proposed response.

## CONCLUSION AND ORDER

For the foregoing reasons, the court **GRANTS** Defendant’s motion to dismiss for lack of jurisdiction. Because the court lacks jurisdiction, proposed Defendant-Intervenor’s motion to intervene and amended motion to amend the motion to intervene, and Plaintiff’s motion to strike the proposed response are **DENIED AS MOOT**. Judgment will enter accordingly.

Dated: July 8, 2022

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE

<sup>4</sup> In *KYD, Inc. v. United States*, 36 CIT 676, 836 F. Supp. 2d 1410 (2012), the plaintiff sought to raise an Eighth Amendment claim challenging an antidumping duty rate based on adverse facts available in a case brought pursuant to the court’s section 1581(c) jurisdiction. In that case, however, the court ruled that because plaintiff had not raised its Eighth Amendment claim in its post-remand brief, its claim had been waived. 36 CIT at 678–79, 836 F. Supp. 2d at 1413–14. While this case is not binding on the court, it supports the proposition that parties may raise Eighth Amendment challenges to Commerce determinations pursuant to section 1581(c).

## Slip Op. 22–80

GUANGDONG HONGTEO TECHNOLOGY CO., LTD., Plaintiff, v. UNITED STATES,  
Defendant.

Before: Jennifer Choe-Groves, Judge  
Court No. 20–03776

[Denying Plaintiff's counsel's motion to withdraw as counsel.]

Dated: July 11, 2022

*Lawrence R. Pilon* and *Serhiy Kiyasov*, Rock Trade Law LLC, of Chicago, IL, for Plaintiff Guangdong Hongteo Technology Co., Ltd.

*Edward F. Kenny*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendant United States. With him were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Justin R. Miller*, Attorney-in-Charge, and *Aimee Lee*, Assistant Director.

### **OPINION AND ORDER**

#### **Choe-Groves, Judge:**

Before the Court is the Consent Motion for Withdrawal of Attorneys (“Withdrawal Motion”), ECF No. 20, filed by counsel for Plaintiff Guangdong Hongteo Technology Co., Ltd. (“Plaintiff” or “Hongteo”). For the reasons discussed below, the Court denies the Withdrawal Motion.

### **BACKGROUND**

Hongteo is a publicly owned company, Disclosure of Corporate Affiliations and Financial Interest, ECF No. 3, and the owner and importer of record of the merchandise involved in this action, Compl. ¶ 2, ECF No. 8. Plaintiff retained the services of Rock Trade Law LLC on September 21, 2020 to represent Hongteo in this action. Withdrawal Mot. at 1. Mr. Pilon filed his notice of appearance on October 19, 2020. Notice of Appearance, ECF No. 4. Mr. Kiyasov filed his notice of appearance on October 13, 2021. Notice of Appearance, ECF No. 7. Plaintiff filed its Complaint on November 11, 2021. Compl.

### **DISCUSSION**

Pursuant to USCIT Rule 75(d), “[t]he appearance of an attorney of record may be withdrawn only by order of the court.” USCIT R. 75(d). “Except for an individual (not a corporation, partnership, organization[,], or other legal entity) appearing *pro se*, each party . . . must appear through an attorney authorized to practice before the court.” USCIT R. 75(b)(1); *see also Lady Kelly, Inc. v. U.S. Sec’y of Agric.*, 30 CIT 82, 83, 414 F. Supp. 2d 1298, 1299 (2006) (“The rule is well

established that a corporation *must always* appear through counsel.”). Granting the withdrawal of counsel motion may leave the party unrepresented in violation of the Rules of the U.S. Court of International Trade.

Hongteo is a company, not an individual, and must be represented by counsel before this Court. The only basis for withdrawal that Plaintiff’s counsel provides is that Plaintiff has not paid outstanding legal fees. Withdrawal Mot. at 1. Because no substitute counsel has yet been identified to replace Plaintiff’s counsel, the Court denies the Withdrawal Motion without prejudice.

Plaintiff is directed to notify the Court within 30 days of issuance of this Opinion of its new counsel. Plaintiff’s counsel may refile its motion to withdraw, and the Court is likely to dismiss Plaintiff’s case if Plaintiff fails to hire new counsel or resolve its issues with current counsel, in light of the inability of Plaintiff to proceed as an unrepresented party in this matter before the Court.

Plaintiff also filed Plaintiff’s Consent Motion to Amend the Scheduling Order (“Motion to Amend”), ECF No. 19. The Court will deny the Motion to Amend and stay the remaining deadlines until the issue of counsel for Plaintiff is resolved.

### CONCLUSION

Upon consideration of the Withdrawal Motion, ECF No. 20, and all other papers and proceedings in this action, it is hereby

**ORDERED** that the Withdrawal Motion, ECF No. 20, is denied without prejudice; and it is further

**ORDERED** that Plaintiff shall notify the Court within 30 days of the issuance of this Order of its new counsel; and it is further

**ORDERED** that Plaintiff’s counsel shall file a status report and/or updated motion to withdraw within 30 days of the issuance of this Order; and it is further

**ORDERED** that Plaintiff’s Consent Motion to Amend the Scheduling Order, ECF No. 19, is denied; and it is further

**ORDERED** that the remaining deadlines in Scheduling Order, ECF No. 18, are stayed pending further order of this Court.

Dated: July 11, 2022

New York, New York

*/s/ Jennifer Choe-Groves*

JENNIFER CHOE-GROVES, JUDGE

## Slip Op. 22–81

UNITED STATES, Plaintiff, v. CHU-CHIANG “KEVIN” HO, AND ATRIA CORPORATION, Defendants.

Before: Timothy M. Reif, Judge  
Court No. 19–00038

[Denying defendant’s motion to dismiss pursuant to USCIT Rule 12(b)(2), denying in part and granting in part defendant’s motion to dismiss pursuant to USCIT Rule 12(b)(6) and giving plaintiff leave to file an amended complaint.]

Dated: July 12, 2022

*William Kanellis*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for plaintiff. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Robert E. Kirschman, Jr.*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Brian P. Beddingfield*, Staff Attorney, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of San Francisco, CA.

*Elon A. Pollack* and *Kayla R. Owens*, Stein Shostak Shostak Pollack & O’Hara, LLP, of Los Angeles, CA, for defendant Chu-Chiang “Kevin” Ho.

**OPINION AND ORDER****Reif, Judge:**

Before the court is a motion by defendant Chu-Chiang “Kevin” Ho (“Mr. Ho” or “defendant”) to dismiss the complaint filed by the United States (“plaintiff” or the “Government”) pursuant to section 592(a)(1)(A) and (B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592(a)(1)(A) and (B) (2012),<sup>1</sup> for lack of personal jurisdiction and failure to state a claim upon which relief can be granted pursuant to United States Court of International Trade (“USCIT”) Rules 12(b)(2) and 12(b)(6), respectively. *See* Def. Chu-Chiang “Kevin” Ho’s Mot. to Dismiss Pursuant to USCIT Rules 12(b)(1), 12(b)(2), 12(b)(5), and 12(b)(6) (“Def. Mot. Dismiss”), ECF No. 4. Mr. Ho argues that the complaint does not plead fraud with particularity and does not allege facts such that Mr. Ho is personally liable. *Id.* Plaintiff opposes the motion to dismiss. *See* Pl.’s Opp’n to Def.’s Mot. to Dismiss (“Pl. Opp’n”), ECF No. 7.

For the following reasons, the court denies defendant’s motion to dismiss for lack of personal jurisdiction and denies in part and grants in part defendant’s motion to dismiss for failure to state a claim, with leave for plaintiff to amend its complaint.

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<sup>1</sup> Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, 2012 edition, which was in effect when the subject entries were made, and which is the same in each relevant respect to the 2018 edition.



## BACKGROUND

On March 19, 2019, plaintiff filed a complaint against Mr. Ho and Atria Corporation (“defendants”). *See* Compl., ECF No. 2. The complaint alleges that defendants are jointly and severally liable for penalties for attempting to enter, or cause to be entered, merchandise by fraud, or in the alternative by gross negligence or negligence, in violation of 19 U.S.C. § 1592(a)(1)(A) and (B). *Id.* ¶¶ 17–25; *id.* at 5. The complaint asserts that Mr. Ho was the owner and director of Atria Corporation, an alleged manufacturing and distribution company for indoor and warehouse lighting. *Id.* ¶¶ 3–4. The complaint describes high-intensity discharge (“HID”) headlight conversion kits and explains the reasons that their importation is prohibited. *Id.* ¶ 5 (citing 49 C.F.R. § 571.108). The complaint alleges:

On March 20, 2014, ATRIA and HO attempted to enter, or attempted to cause to be entered, into the United States one entry of HID headlight conversion kits through the Area Port of San Francisco identified by entry number D53–141064604–01, with the intention that this merchandise be entered into United States commerce.

*Id.* ¶ 6. The complaint alleges further that both defendants declared, or caused to be declared, the HID headlight conversion kits as classifiable under Harmonized Tariff Schedule of the United States (“HTSUS”)<sup>2</sup> subheading 8504.40.9570 (inverters), “knowing that this declaration was not true.” *Id.* ¶ 7. The complaint repeats these allegations for a second entry of HID headlight conversion kits on March 29, 2014, under entry number D53–1410799–01. *Id.* ¶¶ 8–9. U.S. Customs and Border Protection (“Customs”) issued pre-penalty and penalty notices to defendants in June 2018 for both entries based on fraud and gross negligence and negligence in the alternative; the complaint alleges that neither defendant responded to the notices. *Id.* ¶¶ 12–16.

In addition, the complaint asserts that both defendants “submitted, or caused to be submitted, to [Customs] documents which falsely described the HID headlight conversion kits as ballasts for interior track lighting fixtures.” *Id.* ¶ 10. Moreover, the complaint alleges that these statements “were intended to affect determinations made by [Customs] concerning the admissibility of the merchandise into United States commerce.” *Id.* ¶ 11.

<sup>2</sup> Plaintiff refers to the “Harmonized Tariff Code of the United States (HTSUS).” Compl. ¶ 7, ECF No. 2 (emphasis supplied). However, the correct nomenclature is the “Harmonized Tariff Schedule of the United States.”

On April 29, 2019, Mr. Ho filed a motion to dismiss under USCIT Rules 12(b)(1), 12(b)(2), 12(b)(5) and 12(b)(6). Def. Mot. Dismiss at 1. On May 15, 2020, this court denied Mr. Ho's motion to dismiss for lack of subject matter jurisdiction under USCIT Rule 12(b)(1) but did not rule on the motion to dismiss for lack of personal jurisdiction under USCIT Rule 12(b)(2), the motion to dismiss for insufficient service of process under USCIT Rule 12(b)(5) or the motion to dismiss for failure to state a claim under USCIT Rule 12(b)(6). *United States v. Ho*, 44 CIT \_\_, \_\_, 452 F. Supp. 3d 1371, 137576 (2020). On September 14, 2021, this court denied Mr. Ho's motion to dismiss under USCIT Rule 12(b)(5), granted plaintiff's motion to extend the time of service and denied Mr. Ho's motion to quash service. Order (Sept. 14, 2021) ("Order"), ECF No. 37. Consequently, the two outstanding motions to dismiss are under USCIT Rules 12(b)(2) and 12(b)(6). *See* Def. Mot. Dismiss at 1.

Mr. Ho argues that the court lacks personal jurisdiction over him under USCIT Rule 12(b)(2) due to insufficient service of process. *See* Def. Mot. Dismiss at 3–4. In addition, Mr. Ho argues that the complaint fails to state a claim under USCIT Rule 12(b)(6) because plaintiff does not plead fraud with particularity against Mr. Ho in accordance with USCIT Rule 9(b) and does not allege facts that would make Mr. Ho personally liable. *See id.* at 6–8. Mr. Ho argues that the complaint contains only “a recitation of the elements of the cause of action and conclusory statements about intent.” *Id.* at 6. Mr. Ho asserts that the complaint lacks allegations and supporting facts that he either “had any personal involvement with the preparation or filing of the two entries and related documents” or that he “knowingly and intentionally prepared false documents, instructed the preparation of false documents, made any false declarations, or caused the entries to be filed.” *Id.* at 7 (emphasis omitted). Moreover, Mr. Ho asserts that the complaint “does not provide any specific fact to support that Mr. Ho was involved personally in describing the merchandise, instructing anyone on how to describe the merchandise, or the submission of documents to [Customs].” *Id.* Mr. Ho argues that the complaint, unlike the complaint in *United States v. Islip*, 22 CIT 852, 871, 18 F. Supp. 2d 1047, 1063–64 (1998), does not provide allegations sufficient to meet the pleading standard. *Id.* at 8.

In opposition to the motion to dismiss, plaintiff states: “The complaint specifies the date of the attempted entries, the parties involved, the area port location, the entry numbers, and the subject merchandise.” Pl. Opp'n at 9 (citing Compl. ¶¶ 5–10). Therefore, plaintiff states that fraud was pleaded with sufficient particularity.

*Id.* Plaintiff asserts further that additional details are not required to allege personal liability and that Mr. Ho’s liability is not “based upon his role as ATRIA’s director.” *Id.* at 10 (citing Def. Mot. Dismiss at 6–8 (citing *United States v. Trek Leather*, 767 F.3d 1288, 1299 (Fed. Cir. 2014)) (comparing this allegation of liability to the holding of *Trek Leather*, in which liability was based on an individual’s own acts in introducing men’s suits into U.S. commerce under agency law and not on his status as an officer or owner of a corporation).<sup>3</sup>

On July 27, 2021, the parties submitted a joint status report stating: “If this case is not dismissed, the parties will file a stipulation for partial judgment solely on the issue of Defendant CHU-CHIANG ‘KEVIN’ HO’s liability within 21 days from the date of the Court’s decision.” Joint Status Report at 1, ECF No. 32.

On July 27, 2021, plaintiff emailed the summons and complaint to Mr. Ho’s counsel. The United States’ Notice of Error and Mot. for Extension of Time of Service, ECF No. 34 at Ex. 3. Service was subsequently effected on July 27, 2021, pursuant to the court’s order of September 14, 2021, which granted plaintiff’s motion for an extension of time of service until and through July 27, 2021. *See* Order.

### STANDARD OF REVIEW

This court has jurisdiction pursuant to 28 U.S.C. § 1582(1) and reviews the case *de novo* under 28 U.S.C. § 2640(a)(6) and 19 U.S.C. § 1592(e)(1).

A complaint must have “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Taken as true, “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Id.*; *see United States v. Int’l Trading Services, LLC*, 40 CIT \_\_\_, \_\_\_, 190 F. Supp. 3d 1263, 1268–69 (2016). A complaint must meet also the “plausibility standard” and include more than “mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant

<sup>3</sup> Mr. Ho and plaintiff do not further address the motion to dismiss for failure to state a claim in later briefs. *See* Def. Chu-Chiang “Kevin” Ho’s Reply to Pl.’s Opp’n to Def.’s Mot. to Dismiss, ECF No. 8; Pl.’s Sur-Reply in Supp. of its Opp’n to Def.’s Mot. to Dismiss, ECF No. 20. Moreover, the parties’ briefs on the subsequent motions to quash and for an extension of time for service — both of which were disposed of in the court’s order of September 14, 2021 — do not present arguments as to the motion to dismiss for failure to state a claim. *See* Order (Sept. 14, 2021) (“Order”), ECF No. 37; Def.’s Mot. to Quash Service in Resp. to Pl.’s Notice of Service Filed June 15, 2020, ECF No. 33; The United States’ Notice of Error and Mot. for Extension of Time of Service, ECF No. 34; Pl.’s Resp. to Def.’s Mot. to Quash Service, ECF No. 35; Def. Ho’s Resp. to Pl.’s Mot. for an Extension of Time of Service, ECF No. 36.

is liable for the misconduct alleged.” *Id.* at 678.

For fraud allegations, USCIT Rule 9(b) states: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” See *United States v. Greenlight Organic, Inc.* (“*Greenlight II*”), 44 CIT \_\_, \_\_, 466 F. Supp. 3d 1260, 1263 (2020); see also *United States v. NYWL Enters. Inc.* (“*NYWL I*”), 44 CIT \_\_, \_\_, 476 F. Supp. 3d 1394, 1399–1400 (2020); *United States v. NYWL Enters. Inc.* (“*NYWL II*”), 45 CIT \_\_, \_\_, 503 F. Supp. 3d 1373, 1378 (2021).

The court has held that “[t]he plaintiff must . . . plead[] in detail ‘the who, what, when, where, and how of the alleged fraud.’” *Greenlight II*, 44 CIT at \_\_, 466 F. Supp. 3d at 1263 (quoting *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009) (citation omitted)); see also *Islip*, 22 CIT at 869–70, 18 F. Supp. 2d at 1063 (noting that the court had previously determined that providing the “time, place, and contents’ of the alleged false misrepresentations” was sufficient (quoting *United States v. F.A.G. Bearings Corp.*, 8 CIT 201, 206–07, 615 F. Supp. 562, 566 (1984))). See generally *United States v. Univar USA, Inc.*, 40 CIT \_\_, \_\_, 195 F. Supp. 3d 1312, 1317 (2016) (including references to analogous Federal Rules of Civil Procedure (“FRCP”). Further, “[a]lthough intent and knowledge may be pled with generality, the pleading must contain ‘sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.’” *Greenlight II*, 44 CIT at \_\_, 466 F. Supp. 3d at 1263 (quoting *Exergen Corp.*, 575 F.3d at 1327) (citing *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 123–24 (D.C. Cir. 2015)).

## DISCUSSION

The court is required to address the issue of personal jurisdiction before the issue of whether a claim is stated upon which relief can be granted. *En Vogue v. UK Optical Ltd.*, 843 F. Supp. 838, 841–42 (E.D.N.Y. 1994) (“Where a Court is asked to rule on a combination of Rule 12(b) defenses, it will pass on the jurisdictional issues before considering whether a claim is stated in the complaint.” (citing *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 221 (2d Cir. 1963))); see *Intercontinental Chems., LLC v. United States*, 44 CIT \_\_, \_\_ n.1, 483 F. Supp. 3d 1232, 1235 n.1 (2020) (“A court presented with a motion to dismiss under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6) must decide the jurisdictional question first because a disposition of a Rule 12(b)(6) motion is a decision on the merits, and therefore, an exercise of jurisdiction.” (quoting *Congregation Rabbinical Coll. of Tartikov*,

*Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 588 (S.D.N.Y. 2013)); see also *Terry v. Dewine*, 75 F. Supp. 3d 512, 520 (D.D.C. 2014).

### **I. Motion to dismiss for lack of personal jurisdiction under USCIT Rule 12(b)(2)**

The court has personal jurisdiction over Mr. Ho. “Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirements of service of summons must be satisfied.” *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 880 (Fed. Cir. 1997) (quoting *Omni Capital Int’l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)); see USCIT R. 4(b). As stated in the court’s order of September 14, 2021, plaintiff effected service of process on Mr. Ho’s counsel as of July 27, 2021. See Order. Therefore, proper service established personal jurisdiction over Mr. Ho as of the effective date of service.<sup>4</sup> Accordingly, the court denies the motion to dismiss under USCIT Rule 12(b)(2) and exercises personal jurisdiction over Mr. Ho before turning to the motion to dismiss under USCIT Rule 12(b)(6). See *En Vogue*, 843 F. Supp. at 841-42 (citing *Arrowsmith*, 320 F.2d at 221).

### **II. Motion to dismiss for failure to state a claim upon which relief can be granted under USCIT Rules 12(b)(6) and 9(b)**

For the following reasons, the court denies in part and grants in part the motion to dismiss under USCIT Rule 12(b)(6). However, as noted *infra* Section III, the court allows plaintiff leave to amend its complaint.

#### **A. Legal framework**

Section 1592 of Title 19 of the U.S. Code prohibits the entry, introduction or attempted entry or introduction of merchandise into U.S. commerce by fraud, gross negligence or negligence through materially false information or material omission, as well as the aiding and abetting of such entry. 19 U.S.C. § 1592(a)(1)(A)-(B). As such, a person can be held liable for their own violation of § 1592 or for aiding and abetting another’s violation of § 1592. *Id.*; see *Trek Leather, Inc.*, 767 F.3d at 1299 (holding that a defendant was liable “because he personally committed a violation of subparagraph (A),” not because of his position as a corporate officer) (citing *United States v. Matthews*, 31 CIT 2075, 2082–83, 533 F. Supp. 2d 1307, 1314 (2007), *aff’d*, 329 F. App’x 282 (Fed. Cir. 2009); *United States v. Appendagez, Inc.*, 5 CIT 74, 79–80, 560 F. Supp. 50, 54–55 (1983)).

<sup>4</sup> Mr. Ho does not contest personal jurisdiction on any other grounds. See Def. Mot. Dismiss at 3–4.

“A Section 1592(a) claim must contain sufficient factual matter showing that a person entered, introduced[] or attempted to enter or introduce merchandise into the commerce of the United States through making either a material and false statement, document, or act, or a material omission.” *Greenlight II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1265 (citing 19 U.S.C. § 1592(a)(1)(A)(i)-(ii); *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1343 (Fed. Cir. 2009)); *see also Trek Leather, Inc.*, 767 F.3d at 1297 (“Deciding whether a defendant is liable requires applying each subparagraph’s language specifying the proscribed actions or omissions to determine if the defendant’s conduct is within the proscriptions.”); *United States v. Sterling Footwear, Inc.*, 41 CIT \_\_\_, \_\_\_, 279 F. Supp. 3d 1113, 1132 (2017) (“[O]ne 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.’”) (citing *United States v. Twenty-Five Packages of Pan. Hats*, 231 U.S. 358, 361 (1913); *Trek Leather, Inc.*, 767 F.3d at 1298-99). “Material” is defined as having “the natural tendency to influence or [being] capable of influencing agency action including . . . [d]etermination of the classification, appraisement, or admissibility of merchandise . . .” 19 C.F.R. Pt. 171, App. B(B); *accord United States v. Optrex Am., Inc.*, 32 CIT 620, 631, 560 F. Supp. 2d 1326, 1336 (2008).

There are “three degrees of culpability” for a violation of § 1592: (1) negligence, where an act is committed (or omitted) by a “failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation”; (2) gross negligence, where an act is committed or omitted “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”; and (3) fraud, where “a material false statement, omission, or act in connection with the transaction [i]s committed (or omitted knowingly, i.e., [] done voluntarily and intentionally, as established by clear and convincing evidence.” 19 C.F.R. Pt. 171, App. B(C)(1)-(3). Plaintiff has the following burdens of proof: (1) for negligence, to “establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence”; (2) for gross negligence, to “establish all the elements of the alleged violation”; and (3) for fraud, “to establish the alleged violation by clear and convincing evidence.” 19 U.S.C. § 1592(e)(2)-(4).

## B. Analysis

The court concludes that the complaint alleges sufficient facts as to Mr. Ho's potential personal liability for the entry, introduction or attempt to enter or introduce the HID headlight conversion kits by way of a material and false statement. *See* 19 U.S.C. § 1592. However, the court is unable to reasonably infer knowledge or intent for a violation of § 1592 based on fraud under USCIT Rule 9(b). *See Exergen Corp.*, 575 F.3d at 1327.

### 1. Allegations of personal liability

The complaint alleges sufficiently Mr. Ho's personal liability. As noted above, the complaint must detail "the who, what, when, where, and how of the alleged fraud." *Greenlight II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1263 (quoting *Exergen Corp.*, 575 F.3d at 1327 (citation omitted)).

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") and this Court have examined previously the pleading of fraud under § 1592 in various cases, thereby providing examples of the extent and nature of factual allegations sufficient to plead fraud with particularity.

In *Exergen*, the Federal Circuit determined whether inequitable conduct was sufficiently pleaded under FRCP 9(b) — the rule parallel to USCIT Rule 9(b) — in a patent law case. 575 F.3d at 1325–31. The Federal Circuit held that the pleading did not include the requisite "who," "what," "where," "why" and "how" facts because it did not name a specific individual or identify certain patent-related claim limitations or where material information was located. *Id.* at 1329–30.<sup>5</sup>

In *NYWL I*, a decision involving a motion for entry of default judgment, the court found that the complaint included the requisite facts as to materially false statements because the complaint included the dates, entries and location of the entries of merchandise and the incorrect and correct classification information. 44 CIT at \_\_\_, 476 F. Supp. 3d at 1399. However, the motion was denied because sufficient factual allegations were not pleaded as to the defendant's knowledge in that case. *See id.* at 1399–1400; *infra* Section II.B.2. Subsequently, on a second motion for entry of default judgment, following the filing of an amended complaint in that case, the court again found adequate specificity as to the "falsity and materiality" of

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<sup>5</sup> *See infra* Section II.B.2 for a discussion of the *Exergen* court's determination that there had also been insufficient pleading of the conditions of mind. *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1329–30 (Fed. Cir. 2009) ("[T]he allegations are deficient with respect to both the particularity of the facts alleged and the reasonableness of the inference of scienter.").

the incorrect classifications based on the inclusion of the date, the entries, their documentation, the port of entry and the correct and incorrect classification information. *NYWL II*, 45 CIT at \_\_\_, 503 F. Supp. 3d at 1379.

In *Islip*, the court found that fraud had been pleaded with sufficient particularity under USCIT Rule 9(b). 22 CIT at 853, 18 F. Supp. 2d at 1051. In that case, the complaint “accuse[d] Defendant of knowingly placing, or causing others to place, false country of origin markings on merchandise entering the United States through the port of Buffalo from Canada from September 11, 1987, through August 27, 1992, by means of 390 entries identified in Plaintiff’s Exhibit A.” *Id.* at 870, 18 F. Supp. 2d at 1063. The court found this information to suffice for the “who,” “where,” “what” and “when” details. *Id.* In addition, the court determined that grouping the defendants together and accusing them of the same acts still satisfied USCIT Rule 9 because the individual in question was specifically accused. *Id.* at 871, 18 F. Supp. 2d at 1064 (“[T]he fact remains that the Complaint does, as the Rule requires, accuse Brown of participating in particular fraudulent acts, at particular times and in particular circumstances.”). *But see United States v. Greenlight Organic, Inc.* (“*Greenlight I*”), 43 CIT \_\_\_, \_\_\_, 419 F. Supp. 3d 1298, 1305 (2019) (stating that the plaintiff did not “identify or attribute to a specific Defendant who made what statements that were false and material, or critically, the degree of each Defendant’s participation in the fraudulent scheme” when referring simultaneously to various actors in allegations).

In *United States v. Scotia Pharmaceuticals Ltd.*, 33 CIT 638, 644 (2009), the court held that a complaint alleging a violation of 19 U.S.C. § 1592 for the attempted introduction of evening primrose oil failed to meet even the general pleading standard, on a motion for default judgment. There, the complaint did not “attribute to [a certain defendant] an act or omission punishable under § 1592” and otherwise “refer[red] to the ‘defendants’ only collectively.” *Id.* at 644–45 (reciting that the complaint stated that “defendants entered, introduced, or attempted to enter or introduce, or aided or abetted another to enter or introduce or attempt to enter or introduce” the merchandise). The court also determined that the complaint “makes no allegation as to what [one defendant] did in furtherance of the scheme and fails to link [that defendant] to any of the fifty-two entries.” *Id.* at 644. The court referred to the assertions as “nothing more than a



formulaic recitation of the elements of a cause of action” under the statute. *Id.* at 645.<sup>6</sup>

In the instant case, as in *NYWL I*, *NWYL II* and *Islip*, the Government provides “the who, what, when, where, and how of the alleged fraud.” *Greenlight II*, 44 CIT at \_\_, 466 F. Supp. 3d at 1263 (quoting *Exergen Corp.*, 575 F.3d at 1327 (citation omitted)). The “who” is defined as “ATRIA and HO.” Compl. ¶¶ 6, 8. Unlike in *Exergen*, Mr. Ho is named specifically in the complaint. *Compare id.*, with *Exergen Corp.*, 575 F.3d at 1329 (naming “Exergen, its agents and/or attorneys” (quoting Answer ¶¶ 40, 43, *Exergen Corp. v. Wal-Mart Stores, Inc.*, No. 01-cv-11306 (D. Mass. Sept. 6, 2002), ECF No. 51)). The “what” is defined as the “HID headlight conversion kits . . . identified by entry number D53-141064604-01” and “entry number D53-1410799-01.” Compl. ¶¶ 6, 8. The “when” is defined as March 20, 2014, and March 29, 2014. *Id.* The “where” is described as the Area Port of San Francisco. *Id.* Last, the “how” is that the defendants “attempted to enter, or attempted to cause to be entered,” the kits, and falsely “declared, or caused to be declared,” the kits to be classifiable under a specific HTSUS subheading. *Id.* ¶¶ 6–9.

As in *Islip*, plaintiff in this case refers to both Atria Corporation and Mr. Ho by name in the complaint. *See* 22 CIT at 871, 18 F. Supp. 2d at 1064; *see, e.g.*, Compl. ¶¶ 6–11. Unlike in *Scotia*, the complaint in this case names Mr. Ho explicitly in describing the facts and counts when alleging fraud, instead of naming “defendants” collectively. *Compare* Compl. ¶¶ 6–11, 18–19, 21–22, 24–25, with *Scotia*, 33 CIT at 644–46. Therefore, specific acts or omissions under § 1592 are attributed to Mr. Ho by name, leaving no room for speculation, unlike in *Scotia*, as to Mr. Ho’s involvement in and connection to attempting to make the HID headlight conversion kit entries. *Compare* Compl. ¶¶ 6–11, 18–19, 21–22, 24–25, with *Scotia*, 33 CIT at 644–46. Unlike in *Greenlight I*, plaintiff in this case does not refer to other agents of Atria Corporation, but names only Atria Corporation and Mr. Ho. *See* 43 CIT at \_\_, 419 F. Supp. 3d at 1305 (“Plaintiff combines Greenlight, Aulakh, [] ‘and other Greenlight agents’ together to allege that they ‘knowingly made material false statements’ about the classification and value of the subject merchandise.” (citing First Am. Compl. ¶¶

<sup>6</sup> In that case, plaintiff amended its complaint and therein alleged in more detail what that defendant, Callanish Ltd., did in violation of § 1592; however, the court determined that the first amended complaint lacked a sufficient pleading of the value of the merchandise for the penalty amount. *See United States v. Callanish Ltd.*, 34 CIT 1423, 1424–28 (2010). *See generally United States v. Callanish Ltd.*, 37 CIT 462, 465 (2013) (holding that the second amended complaint pleaded sufficient allegations as to aiding and abetting a violation of § 1592 by fraud).

6–8, 10–16, 24, ECF No. 111)). Moreover, unlike in *Greenlight I*, plaintiff does not allege actions taken by Atria Corporation under Mr. Ho's direction, but rather alleges actions taken by both Atria Corporation and Mr. Ho. *Compare id.* (“Absent adequate facts supporting the fraud allegations, Plaintiff cannot impute knowledge to Aulakh merely by virtue of his position of power and influence over Greenlight.” (citing *Exergen Corp.*, 575 F.3d at 1327 & n.4)), *with* Compl. ¶¶ 6–11 (presenting facts in each paragraph about actions taken by “ATRIA and HO”).

The complaint alleges actions that Mr. Ho took personally, thereby providing a basis for liability not based merely on his status as an officer or director. *See, e.g.*, Compl. ¶ 9 (stating that Mr. Ho “declared, or caused to be declared,” that the merchandise was classifiable under a specific HTSUS subheading, “knowing that this declaration was not true”). In *Trek Leather*, the court “[did] not hold [the defendant] liable because of his prominent officer or owner status in a corporation that committed a subparagraph (A) violation. [The court held] him liable because he personally committed a violation of subparagraph (A).” 767 F.3d at 1299. Similarly, Mr. Ho's liability here is alleged based on his personal actions, as detailed in the complaint in this case. *See, e.g.*, Compl. ¶ 9.

Last, an “asserted classification of merchandise in entry paperwork ‘constitutes a material statement under the statute.’” *NYWL I*, 44 CIT at \_\_, 476 F. Supp. 3d at 1399 (quoting *Optrex. Am., Inc.*, 32 CIT at 631, 560 F. Supp. 2d at 1336); *see also Sterling*, 41 CIT at \_\_, 279 F. Supp. 3d at 1132 (noting classification for entry of merchandise at a U.S. port comes within the meaning of the term “introduce”). Mr. Ho's alleged declarations and statements regarding classification would be, therefore, a material introduction under § 1592(a)(1)(A). *See* Compl. ¶¶ 7, 9–11.

Accordingly, the court concludes that the complaint provides sufficient factual allegations as to Mr. Ho's personal liability for the entry, introduction or attempt to enter or introduce the HID headlight conversion kits by way of a material and false statement.

## 2. Allegations for the culpability level of fraud

The court concludes that there are insufficient factual allegations as to Mr. Ho's knowledge and intent to allege a violation of § 1592 based on fraud. “Although ‘knowledge’ and ‘intent’ may be averred generally, [Federal Circuit] precedent, like that of several regional circuits, requires that the pleadings allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.” *Exergen Corp.*, 575 F.3d at 1327 (footnote

omitted); *see also In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1311 (Fed. Cir. 2011) (“*Exergen’s* pleading requirements apply to all claims under Rule 9(b), not just inequitable conduct cases.”). With respect to fraud, the allegations in the instant complaint provide little factual basis to support that the misclassifications were made knowingly. The decisions of this Court make clear that plaintiff’s complaint fails to plead sufficient factual allegations for the culpability level of fraud. *See, e.g., Exergen Corp.*, 575 F.3d at 1325–31 (insufficient allegations); *Matthews*, 31 CIT at 2081–82, 533 F. Supp. 2d at 1313 (sufficient allegations); *NYWL I*, 44 CIT at \_\_, 476 F. Supp. 3d at 1399–1400 (insufficient allegations); *NWYL II*, 45 CIT at \_\_, 503 F. Supp. 3d at 1380 (sufficient allegations); *Greenlight I*, 43 CIT at \_\_, 419 F. Supp. 3d at 1304–05 (insufficient allegations); *Greenlight II*, 44 CIT at \_\_, 466 F. Supp. 3d at 1266 (sufficient allegations); *Islip*, 22 CIT at 871, 18 F. Supp. 2d at 1064 (sufficient allegations); *United States v. Am. Cas. Co. of Reading Pa.*, 39 CIT \_\_, \_\_, 91 F. Supp. 3d 1324, 1335–36 (2015), *as amended* (Aug. 26, 2015) (sufficient allegations).

Plaintiff relies in part on two cases — *United States v. Rotek, Inc.*, 22 CIT 503 (1998), and *United States v. International Trading Services, LLC*, 40 CIT \_\_, 190 F. Supp. 3d 1263 (2016) — to argue that the complaint pleads sufficiently the allegations based on fraud. *See* Pl. Opp’n at 8–9 (citing *Rotek, Inc.*, 22 CIT at 513; *Int’l Trading Servs., LLC*, 40 CIT at \_\_, 190 F. Supp. 3d at 1273). Specifically, plaintiff notes that the court in *Rotek* held: “[T]he Complaint alleges that Rotek negligently made 132 entries of merchandise at various ports by means of false statements and omissions. This is all that is required to state a claim pursuant to § 1592.” *Id.* (quoting *Rotek, Inc.*, 22 CIT at 513). In *Rotek*, however, the complaint alleged a violation of § 1592 based on negligence instead of fraud. 22 CIT at 507 (noting that the government alleged liability for a penalty under § 1592(c)(3) — corresponding to negligence — “as a result of Rotek’s negligence”). Similarly, in *International Trading Services*, the complaint was based on negligence. 40 CIT at \_\_, 190 F. Supp. 3d at 1273 (“Here, the complaint alleges that Lorza negligently made eight entries of merchandise by means of material false statements or omissions.”).

In this case, the complaint alleges a violation of § 1592 based on fraud, or, in the alternative, either gross negligence or negligence. Compl. ¶ 1. Therefore, neither *Rotek* nor *International Trading Services* addresses the sufficiency of the pleading at the level of culpability for fraud that defendant challenges in its motion to dismiss. *See* Def. Mot. Dismiss at 6–8.

In *Exergen*, in addition to finding insufficient factual details as discussed *supra* Section II.B.1, the Federal Circuit found that the facts did not support “a reasonable inference of scienter” as to inequitable conduct. 575 F.3d at 1330. As to knowledge, the court stated that there was “no factual basis to infer that any specific individual” knew of the material information at issue. *Id.* The court explained further that even if an individual knew of the existence of certain withheld patent references,<sup>7</sup> which could be “many pages long,” that individual might not know whether such information was included somewhere therein. *Id.* Moreover, the court found that the government did not show that an individual at Exergen who made an alleged misrepresentation was aware that a company website contained potentially contrary information to that included in the statement that individual made. *Id.* (“As for the alleged misrepresentation, any knowledge of its alleged falsity is similarly deficient.”).

In *NYWL I*, the court denied entry of default judgment upon finding that the complaint failed to include the requisite facts as to the pleading of fraud when the complaint alleged insufficiently that the defendant had knowledge of the merchandise and its intended use and that the defendant made voluntarily and intentionally the materially false statements. 44 CIT at \_\_\_, 476 F. Supp. 3d at 1399–1400 (“Plaintiff’s Complaint lacks the factual allegations that would permit the court reasonably to infer that NYWL knowingly misclassified the 107 entries.”). The court stated that the complaint’s allegations as to knowledge of the use of the merchandise did not “support the plausible inference” that the defendant knew that the classification of the merchandise was incorrect. *Id.* at \_\_\_, 476 F. Supp. 3d at 1400 (citing *Iqbal*, 556 U.S. at 678). Subsequently in *NYWL II*, the court found that the pleading standard for culpability based on fraud had been met in the amended complaint, which “demonstrate[d] NYWL’s knowledge through allegations concerning the importing history of

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<sup>7</sup> In a patent case, a “reference” entails “[i]nformation . . . that a patent examiner considers to be anticipatory prior art or proof of unpredictability in the art that forms a basis for one or more of an applicant’s claims to be rejected.” *Reference*, BLACK’S LAW DICTIONARY (11th ed. 2019). The court in *Exergen* stated: “To anticipate a claim, a single prior art reference must expressly or inherently disclose each claim limitation.” *Exergen Corp.*, 575 F.3d at 1318 (quoting *Finisar Corp. v. DirectTV Group, Inc.*, 523 F.3d 1323, 1334 (Fed. Cir. 2008)). In addition, the court explained that, as related to FRCP 9(b), “[t]he relevant ‘conditions of mind’ for inequitable conduct include: (1) knowledge of the withheld material information or of the falsity of the material misrepresentation, and (2) specific intent to deceive the [U.S. Patent and Trademark Office].” *Id.* at 1327 (citing *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1116 (Fed. Cir. 1996); *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1181 (Fed. Cir. 1995)).

NYWL's sole corporate executive . . . in connection with his previous companies." 45 CIT at \_\_, 503 F. Supp. 3d at 1379.<sup>8</sup>

As noted above, the court in *Islip* determined that there were sufficient allegations in the complaint to survive a motion to dismiss. 22 CIT at 853, 18 F. Supp. 2d at 1051. The court in *Islip* viewed the complaint to have "more than enough specific allegations of fraud" because the complaint included allegations about the defendant giving employees orders and instructions about mismarking merchandise and lying to Customs, and "false documents were filed, all in the pursuit of reduced duty rates." *Id.* at 871, 18 F. Supp. 2d at 1064 ("Although Rule 9(b) states that intent 'may be averred generally,' courts have required plaintiffs to provide a strong inference of fraudulent intent." (citing Compl. ¶¶ 12, 15–19; *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 663–64 (2d Cir. 1997))). In *Islip*, however, the court noted that the filing of false documents and the orders and instructions that the defendant gave to employees in that case provided a "level of specificity that goes well beyond the general 'time, place, and contents' pleading requirement" for fraud. *Id.* at 870, F. Supp. 2d at 1063.<sup>9</sup> So, the conclusion that fraudulent intent had been sufficiently pleaded was based explicitly on the fact that the complaint included more allegations than necessary. *See id.*

In *Greenlight II*, the court found that fraud was sufficiently pleaded based on the complaint's inclusion of "facts detailing Defendants' fraudulent misclassification and undervaluation activities" and description of "the particulars of the fraudulent importation scheme," including a double invoicing and payment mechanism, the defendant's knowledge of a difference in invoice values and the names of the individuals with whom the defendant worked. 44 CIT at \_\_, 466 F. Supp. 3d at 1266.<sup>10</sup> Further, in *Matthews*, the court granted a motion for summary judgment where "communications with [] Korean companies demonstrate[d] beyond refute [that the defendants] were not only aware of the Chinese origin of the silicon metal they were importing and the additional duties that were owed to the

<sup>8</sup> The court concluded that there was liability based on the factual allegations pleaded: "The Government's allegations are sufficient for the court to infer that NYWL knew the correct classification for its entries of coaxial cable prior to its first entry yet knowingly misclassified its entries under the same incorrect tariff provisions that [NYWL's executive's other corporations] had used." *United States v. NYWL Enters. Inc.* ("NYWL I"), 45 CIT \_\_, \_\_, 503 F. Supp. 3d 1373, 1380 (2021).

<sup>9</sup> Mr. Ho referenced in detail the defendant's instructions in that case in his motion to dismiss. *See* Def. Mot. Dismiss at 8 (quoting *United States v. Islip*, 22 CIT 852, 870–71, 18 F. Supp. 2d 1047, 1063–64 (1998)).

<sup>10</sup> "The Government's Second Amended Complaint provides sufficient factual precision to satisfy 'the who, what, when, where, and how' standard for particularity under Rule 9(b)." *United States v. Greenlight Organic, Inc.* ("Greenlight II"), 44 CIT \_\_, \_\_, 466 F. Supp. 3d 1260, 1266 (2020) (citing *Exergen Corp.*, 575 F.3d at 1327).

United States, but also made specific efforts to disguise the true origin from the government.” 31 CIT at 2081–82, 533 F. Supp. 2d at 1313.

Last, on a motion to dismiss in *American Casualty Co.*, the court found that a complaint pleaded fraud with particularity as to the country of origin of the crawfish at issue based on a collection of facts, including: (a) a declaration concerning a conversation in which the defendant was told that the crawfish at issue was from China and not Thailand, as declared; (b) a contract in which the defendant secured a supply of Chinese crawfish; (c) a letter to Customs stating that the crawfish came from Thailand; and (d) the knowing filing with Customs of various letters and an invoice that incorrectly included Thailand as the country of origin. 39 CIT at \_\_, 91 F. Supp. 3d at 1335–36.<sup>11</sup> The court added: “Moreover, Plaintiff pled fraud with particularity, because the complaint detailed the identity of the person who made the fraudulent statement; the time, place, and content of the misrepresentation; the resulting injury; and the method by which the misrepresentation was communicated.” *Id.* (citing *Islip*, 22 CIT at 869, 18 F. Supp. 2d at 1063), *as amended* (Aug. 26, 2015).

Plaintiff’s allegations in this case do not need to provide the same level of detail as in *Islip* to meet the pleading standard for fraud under § 1592. However, a complaint must still provide sufficient allegations for the court to reasonably infer the defendant’s state of mind. *Exergen Corp.*, 575 F.3d at 1327; *see also Islip*, 22 CIT at 871, 18 F. Supp. 2d at 1064 (citing *Campaniello Imports, Ltd.*, 117 F.3d at 663–64). In this case, the court concludes that the complaint does not meet this threshold.

The complaint here alleges certain actions by Mr. Ho in relation to the entries at issue. Compl. ¶¶ 6–11. Specifically, the complaint describes the circumstances of the entries and alleges that Mr. Ho made classification declarations with the wrong classifications, knowing those declarations to be untrue. *Id.* ¶¶ 6–9. In addition, the complaint alleges that Mr. Ho “submitted, or caused to be submitted, to [Customs] documents which falsely described the HID headlight conver-

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<sup>11</sup> The court stated:

[G]iven that [an association and a defendant] previously signed a contract for the supply of “Chinese [c]rawfish [t]ail [m]eat,” and that the court construes the facts in the light most favorable to the plaintiff in reviewing a motion to dismiss, the court finds that Customs pled knowledge and intent with enough particularity that its fraud claim survives the Motion to Dismiss.

*United States v. Am. Cas. Co. of Reading Pa.*, 39 CIT \_\_, \_\_, 91 F. Supp. 3d 1324, 1335 (2015), *as amended* (Aug. 26, 2015) (third, fourth and fifth alterations in original) (citing Pl.’s Opp’n to Mot. to Dismiss Purchase Agreement between POPCA and Rupari, Ex. 10, at 13, ECF No. 94–6; *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009)).

sion kits as ballasts for interior track lighting fixtures.” *Id.* ¶ 10. Further, the complaint alleges that the “false declarations and statements . . . were intended to affect determinations made by [Customs] concerning the admissibility of the merchandise into United States commerce.” *Id.* ¶ 11. Accordingly, unlike in *Scotia*, the statement in the complaint about Mr. Ho’s submission of documentation with a false description is not merely formulaic; the statement provides some information about the actual merchandise and the false description thereof. *Compare* Compl. ¶¶ 7, 9–10, with *Scotia*, 33 CIT at 644.

Nevertheless, in contrast to the factual allegations sufficiently alleging fraud in other cases discussed above, the allegations in the instant complaint provide little factual basis to support that the misclassifications were made knowingly. For example, unlike in *NYWL II*, in which the court granted an entry of default judgment, the complaint here does not include allegations about Mr. Ho’s prior importing history in connection with other companies to show his knowledge of the fraud. *See* 45 CIT at \_\_\_, 503 F. Supp. 3d at 1379. Similarly, unlike in *American Casualty Co.* and *Matthews*, the complaint in this case alleges that defendant provided the wrong classification and a false description of the merchandise but does not provide factual bases to show defendant’s awareness of the actual nature of the merchandise or other actions taken to conceal such nature, respectively. *Compare Am. Cas. Co. of Reading Pa.*, 39 CIT \_\_\_, 91 F. Supp. 3d at 1335, and *Matthews*, 31 CIT at 1312, 533 F. Supp. 2d at 2080–81, with Compl. ¶¶ 7, 9–10. No further actors involved were referenced in the complaint, unlike in *Greenlight II*. 44 CIT at \_\_\_, 466 F. Supp. 3d at 1263 (noting identification of colleagues with whom the defendant carried out the alleged fraud). In addition, no double-invoicing scheme or other facts supporting knowledge were alleged in the complaint in this case. *See Greenlight II*, 44 CIT at \_\_\_, 466 F. Supp. 3d at 1262–63.

Even in *Islip* and *American Casualty Co.*, which note the filing of false documents, the courts referenced other facts to support their respective denials of the motions to dismiss.<sup>12</sup> *See Am. Cas. Co. of Reading Pa.*, 39 CIT \_\_\_, 91 F. Supp. 3d at 1335 (noting a contract for Chinese crawfish); *Islip*, 22 CIT at 871, 18 F. Supp. 2d at 1064 (raising an order to mismark merchandise and an instruction that employees lie to Customs).

The allegations in the complaint as to Mr. Ho’s declaration of the wrong classifications and submission of documents with a false de-

<sup>12</sup> In *Islip*, the court noted that there were “more than enough specific allegations of fraud.” 22 CIT at 871, 18 F. Supp. 2d at 1064.

scription alone do not allow the court to “reasonably infer” defendant’s knowledge in violation of § 1592 to the degree of fraud of the introduction of the HID headlight conversion kits. *See Greenlight II*, 44 CIT at \_\_, 466 F. Supp. 3d at 1263 (“Although intent and knowledge may be pled with generality, the pleading must contain ‘sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.’” (quoting *Exergen Corp.*, 575 F.3d at 1327) (citing *AT & T, Inc.*, 791 F.3d at 123–24)); *Islip*, 22 CIT at 871, 18 F. Supp. 2d at 1064 (noting that “courts have required plaintiffs to provide a strong inference of fraudulent intent”) (citing *Campaniello Imports, Ltd.*, 117 F.3d at 663–64); *see also NYWL I*, 44 CIT at \_\_, 476 F. Supp. 3d at 1400 (citing *Iqbal*, 556 U.S. at 678). Specifically, plaintiff does not point to any particular facts to allow the court to reasonably infer defendant’s knowledge despite plaintiff’s claim that Mr. Ho knew his declarations to be untrue. *See* Compl. ¶¶ 7, 9.

Accordingly, the court concludes that the complaint does not provide sufficient factual allegations as to defendant’s state of mind.

### III. Leave to amend the complaint

The court gives plaintiff leave to amend the complaint. USCIT Rule 15(a)(2) states that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Still, “the Court must also consider whether there was undue delay, bad faith or dilatory motive on the part of the Plaintiff, undue prejudice to the opposing party, a repeated failure to cure deficiencies by amendments previously allowed, and futility of amendment.” *Am. Cas. Co. of Reading Pa.*, 39 CIT at \_\_, 91 F. Supp. 3d at 1333 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

The court does not identify any “undue delay, bad faith or dilatory motive” on the part of plaintiff. *Id.* (citing *Foman*, 371 U.S. at 182). In addition, Mr. Ho has not alleged that he would be unduly prejudiced by any such amendment. *See id.* (“[T]o demonstrate prejudice, Defendant ‘must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendment been timely.’” (quoting *Ford Motor Co. v. United States*, 19 CIT 946, 956, 896 F. Supp. 1224, 1231 (1995))). As this would be the first amendment to the complaint, there has not been a “repeated failure to cure deficiencies.” *Id.* (citing *Foman*, 371 U.S. at 182).



Last, an amendment to the complaint to plead sufficient facts as to fraud would not be futile; the information provided in the complaint makes it apparent that there may have been fraud, even though the complaint fails to plead sufficient conditions of mind as to fraud. *See Greenlight I*, 43 CIT at \_\_\_, 419 F. Supp. 3d at 1306 (“Generally, courts should allow repleading if the complaint gives any indication that a valid claim might be stated.” (citing *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1158 (Fed. Cir. 2014))). In addition, court records from the U.S. District Court for the Northern District of California indicate that Mr. Ho pleaded guilty to one count of smuggling into the United States, 18 U.S.C. § 545, for “fraudulently and knowingly” importing HID ballasts. Indictment at 3, *United States v. Chu-Chiang Ho*, No. 19-cr-00125 (N.D.C.A. 2021), ECF No. 1; Stipulation and Order Dismissing Counts Two Through Seven ¶ 1, *United States v. Chu-Chiang Ho*, No. 19-cr-00125 (N.D.C.A. 2021), ECF No. 52. Moreover, this court has ordered a stipulation in a related case in which the parties jointly stipulate to, among other things, Mr. Ho’s knowledge since 2005 of the illegality of importing HID headlight conversion kits following his submission of a report to the Government as well as his efforts to avoid being caught importing such merchandise. *See Parties’ Joint Stipulation of Facts as to Liability* ¶¶ 5, 8–9, *United States v. Chu-Chiang Ho*, No. 19-cv00102 (Ct. Int’l Trade Sept. 14, 2021), ECF No. 24.<sup>13</sup>

These court records demonstrate that it was quite possible that Mr. Ho knew that it was illegal to import HID headlight conversion kits. Therefore, amendment of the complaint would likely not be futile.

### CONCLUSION AND ORDER

The court denies defendant’s motion to dismiss for lack of personal jurisdiction and denies in part and grants in part defendant’s motion to dismiss for failure to state a claim, with leave for plaintiff to file an amended complaint.

For the foregoing reasons, it is hereby

**ORDERED** that defendant’s motion to dismiss for lack of personal jurisdiction pursuant to USCIT Rule 12(b)(2) is **DENIED**; it is further

**ORDERED** that the motion to dismiss for failure to state a claim pursuant to USCIT Rule 12(b)(6) is **DENIED IN PART** and **GRANTED IN PART**; and it is further

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<sup>13</sup> A motion to join four companies as defendants or consolidate the instant case with *United States v. Chu-Chiang Ho* (Ct. Int’l Trade No. 19-cv-00102) is pending before this court. *See* Pl.’s Mot. Join Defs., Or Alternatively, Consolidate Related Cases, ECF No. 15.

**ORDERED** that plaintiff shall have 45 days following the date of this Opinion and Order, to file an amended complaint pursuant to USCIT Rule 15(a)(2).

Dated: July 12, 2022

New York, New York

*/s/ Timothy M. Reif*

TIMOTHY M. REIF, JUDGE

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