U.S. Customs and Border Protection

Slip Op. 14–54

LDA INCORPORADO, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge
Court No. 12–00349

[Denying Customs' motion to dismiss for lack of jurisdiction.]

Dated: 5/13/2014

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OPINION AND ORDER

Kelly, Judge:

Plaintiff LDA Incorporado ("Plaintiff") challenges Defendant United States Customs and Border Protection's ("Defendant" or "Customs") denial of its protest regarding Plaintiff's entry of merchandise. Plaintiff asserts Customs erroneously determined that Plaintiff's merchandise was not excluded from the scope of the antidumping and countervailing duty orders on *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't Commerce July 22, 2008) (notice of antidumping duty order) ("*ADD Order*") and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,545 (Dep't Commerce July 22, 2008) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order) ("*CVD Order*") (collectively the "Orders"). Plaintiff claims Customs' mistake in not determining the proper amount of duties chargeable to Plaintiff's entry is a protestable decision under Section 514(a)(2) of the Tariff Act

of 1930, as amended, 19 U.S.C. § 1514(a)(2) (2006),[1] and the denial of its protest gives rise to the court's jurisdiction under 28 U.S.C. § 1581(a) (2006).[2]

Defendant moves to dismiss Plaintiff's complaint for lack of jurisdiction pursuant to USCIT Rule 12(b)(1), claiming Customs' determination that Plaintiff's merchandise was within the scope of the Orders was not a protestable decision under 19 U.S.C. § 1514(a)(2). Instead, Defendant argues Plaintiff was required to seek a timely scope ruling from the Department of Commerce ("Commerce"), and that its failure to do so deprives this Court of jurisdiction. The court concludes that Customs' determination that Plaintiff's merchandise was not excluded from the scope of the Orders is a protestable decision of the type specified in § 1514(a)(2). Therefore, the court denies Defendant's motion to dismiss.

BACKGROUND

On July 22, 2010, Plaintiff imported a single entry of merchandise, which it described as electrical rigid metal conduit steel, a type of rigid steel conduit product. Plaintiff classified the merchandise under Harmonized Tariff Schedule of the United States ("HTSUS") 7306.30.50.25,[3] as duty free, without reference to the Orders.

Plaintiff believed the merchandise was specifically excluded from the scope of the Orders as "finished electrical conduit." *See* Pl.'s Response 4, Dec. 24, 2013, ECF No. 17. Plaintiff's merchandise is both internally and externally coated with zinc, a conductive material, *i.e.*, galvanized, but is not internally coated with a non-conducting liner (such as rubber or plastic). Therefore, the interior of Plaintiff's electrical conduits would conduct electricity.[4] The Orders define the scope of the subject merchandise as

> welded carbon quality steel pipes and tubes, . . . regardless of wall thickness, surface finish (e.g., black, galvanized, or painted), end finish (e.g., plain end, beveled end, grooved,

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition, and all applicable supplements.

[2] Further citations to Title 28 of the U.S. Code are made to the 2006 edition, and all applicable supplements.

[3] HTSUS 7306.30.50.25 covers "other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel, . . . of iron or non-alloy steel, . . . galvanized, imported with coupling."

[4] Plaintiff's merchandise is compliant with Underwriters Laboratories Inc. ("UL") standard UL-6 and American National Standard Institute ("ANSI") standard ANSI C80.1–2005 for "electrical rigid metal conduit steel," and was labeled with the UL-6 mark at the time of entry. Pl.'s Response 5–6. The UL-6 and ANSI C80.1–2005 standards do not require an internal coating with a non-conducting liner (such as rubber or plastic) in order for rigid electrical conduit to be considered "finished."

> threaded, or threaded and coupled), or industry specification (e.g., ASTM, proprietary, or other), generally known as standard pipe and structural pipe (they may also be referred to as circular, structural, or mechanical tubing). . . Standard pipe is made primarily to American Society for Testing and Materials (ASTM) specifications, but can be made to other specifications. Standard pipe is made primarily to ASTM specifications A-53, A-135, and A-795. Structural pipe is made primarily to ASTM specifications A-252 and A-500. Standard and structural pipe may also be produced to proprietary specifications rather than to industry specifications.[5]

ADD Order at 42,547; *CVD Order* at 42,545. However, "finished electrical conduit" is explicitly excluded from the scope. Specifically the Orders state:

> The scope of this investigation does not include: (a) pipe suitable for use in boilers, superheaters, heat exchangers, condensers, refining furnaces and feedwater heaters, whether or not cold drawn; (b) mechanical tubing, whether or not cold-drawn; (c) finished electrical conduit; (d) finished scaffolding; (e) tube and pipe hollows for redrawing; (f) oil country tubular goods produced to API specifications; and (g) line pipe produced to only API specifications.

ADD Order at 42,548; *CVD Order* at 42,546.

At the time of entry, Customs performed laboratory inspections on the merchandise and subsequently sent Plaintiff a Notice of Action on January 10, 2011, stating that the merchandise was subject to the Orders without re-classifying the goods or providing any further

[5] The Orders indicate that "the pipe products that are the subject of this investigation are currently classifiable in HTSUS statistical reporting numbers 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, 7306.30.50.90, 7306.50.10.00, 7306.50.50.50, 7306.50.50.70, 7306.19.10.10, 7306.19.10.50, 7306.19.51.10, and 7306.19.51.50. However, the product description, and not the [HTSUS] . . . classification, is dispositive of whether merchandise imported into the United States falls within the scope of the order." *ADD Order* at 42,548; *CVD Order* at 42,546. Notably excluded is HTSUS 7306.30.50.28, which covers "other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel, . . . of iron or non-alloy steel, . . . galvanized, internally coated or lined with a non-electrically insulating material, suitable for use as electrical conduit." *ADD Order* at 42,548; *CVD Order* at 42,546. Plaintiff asserts that the only reason its conduit is classifiable under HTSUS 7306.30.50.25 and not HTSUS 7306.30.50.28 is because its conduit has a coupling attached. Pl.'s Response 18.

explanation.[6] *See* Pl.'s Response Ex. 1 at 19, Dec. 24, 2013, ECF No. 17–1. Plaintiff claims that it attempted to convince Customs that its merchandise was "finished electrical conduit" to no avail. Pl.'s Response 7–9. In April of 2011, Customs forwarded the matter to Customs Headquarters, which advised Plaintiff to obtain a scope ruling from Commerce. On January 27, 2012, Customs liquidated Plaintiff's entry. *Id.* at 10. On February 22, 2012, Plaintiff filed a scope inquiry with Commerce. *Id.*

On April 26, 2012, Plaintiff filed a timely protest with Customs, which Customs denied on May 12, 2012. *See* Pl.'s Response Ex. 6, Dec. 24, 2013, ECF No. 17–6. On July 2, 2012, Commerce issued its scope ruling, finding that Plaintiff's merchandise was finished electrical conduit and therefore excluded from the scope of the Orders.

DISCUSSION

Standard of Review

The party seeking the court's jurisdiction has the burden of establishing that jurisdiction exists. *See Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006). "If a Rule 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations—that is, the movant presents a 'facial' attack on the pleading—then those allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (citations omitted). Where

> the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction, however, the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction. In such a case, the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion. All other facts underlying the controverted jurisdictional allegations are in dispute and are subject to fact-finding by the . . . court.

[6] The Notice of Action instructed Plaintiff:

> Be advised that you must exercise reasonable care when you are reviewing and classifying products which are subject to antidumping duties. Imported merchandise is subject to antidumping duties under case A570–910000/85.55% and countervailing duties under case C-570–911–000/37.28%. Please forward duties due and a certificate of reimbursement statement within 20 days after the date of this notice. Failure to comply will result in the assessment of antidumping duties at double the applicable rate at the time of entry liquidation.

Pl.'s Response Ex. 1 at 19.

Cedars-Sinai Med. Ctr., 11 F.3d at 1583–84 (internal citations omitted). Moreover, "[w]here, as here, claims depend upon a waiver of sovereign immunity, a jurisdictional statute is to be strictly construed." *Celta Agencies, Inc. v. United States*, 865 F.Supp.2d 1348, 1352 (CIT 2012) (*citing United States v. Williams*, 514 U.S. 527, 531 (1995)).

Analysis

Under 28 U.S.C. § 1581(a), the 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]." Section 1515(a) instructs Customs to timely review and decide any protest filed in accordance with 19 U.S.C. § 1514, subsection (a) which lists the Customs decisions that may be protested. Section 1514(a) provides that for

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

> mitted shall be returned, together with a copy of the judgment or order to the Customs Service, which shall take action accordingly.

19 U.S.C. § 1514(a). Thus, a proper protest under § 1514(a) that is then denied by Customs will form the basis of the court's jurisdiction under 28 U.S.C. § 1581(a).

Section 1514(b) excludes determinations under subtitle IV, 19 U.S.C. §§ 1671–1677n, covering countervailing and antidumping duties, from those which may be protested under § 1514(a). Section 1514(b), "[f]inality of determinations," provides in relevant part:

> With respect to determinations made under section [1330] of this title or subtitle IV of this chapter which are reviewable under section 1516a of this title, determinations of the Customs Service are final and conclusive upon all persons (including the United States and any officer thereof) unless a civil action contesting a determination listed in section 1516a of this title is commenced in the United States Court of International Trade . . . .

19 U.S.C. § 1514(b). Section 1516a, cited in the statute, is entitled "[j]udicial review in countervailing duty and antidumping duty proceedings." It contains a list of "[r]eviewable determinations" including:

> (vi) A determination by the administering authority [Commerce] as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

19 U.S.C. § 1516a(a)(2)(B)(vi). Thus, as previously held by this court, and affirmed by the Court of Appeals, where Commerce determines that a particular type of merchandise is "within the class or kind of merchandise described in an existing finding of dumping" that determination is not reviewable through the protest mechanism.[7] *See, e.g., Sandvik v. United States*, 21 CIT 140, 141 (1997), *aff'd* 164 F.3d 596, 598 (Fed. Cir. 1998); *Fujitsu Ten Corp. of Am v. United States*, 21 CIT

[7] Section 1516a references other Commerce determinations which are reviewable, such as:

> (i) Final affirmative determinations by the administering authority and by the Commission under section 1671d or 1673d of this title, including any negative part of such a determination (other than a part referred to in clause (ii)).
>
> . . .
>
> (iii) A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title. . . .

19 U.S.C. § 1516a(a)(2)(B)(i), (iii).

104, 105 (1997), *aff'd sub nom. Sandvik v. United States*, 164 F.3d 596, 598 (Fed. Cir. 1998).

In *Sandvik*, the Court of Appeals reviewed the consolidated Court of International Trade cases *Sandvik* and *Fujitsu*, affirming the lower court's dismissals for lack of jurisdiction. In each case, the importer protested Customs' assessment of antidumping duties and claimed jurisdiction pursuant to 28 U.S.C. §1581(a). In each case, the Court of International Trade held Customs' assessment was not a protestable decision. The court held that if the importers wanted to challenge the assessment of antidumping duties they needed to pursue a determination by Commerce that their goods were not within the scope of the orders in question. *Sandvik*, 21 CIT at 145; *Fujitsu*, 21 CIT at 107–08.

In both cases the scope of the order was at issue. *Sandvik*, 21 CIT at 142; *Fujitsu*, 21 CIT at 106. The order at issue in *Sandvik* covered "[S]tainless steel hollow products including pipes, tubes, hollow bars and blanks therefor, of circular cross section, containing over 11.5 percent chromium by weight, as provided for under the Harmonized System (HS) of Customs nomenclature item numbers 7304.41.00.00 and 7304.49.00.00." *Sandvik*, 21 CIT at 141. The plaintiffs' merchandise consisted of seamless composite tubes. As the Court of International Trade explained:

> A composite tube is a carbon steel "inner" tube that has an outer covering or coating made of stainless steel. The carbon steel "inner" portion of the tube constitutes 75 percent of the weight of the entire tube. The stainless steel "outer" portion constitutes the other 25 percent of the tube's weight. Chromium constitutes 18 to 19 percent of the weight of the stainless steel portion of a composite tube. Thus the stainless steel portion of a composite tube accounts for only 25 percent of the weight of the entire tube, and the entire tube contains less than 5 percent chromium by weight.

Sandvik, 21 CIT at 141. Prior to the entries at issue, Customs had not assessed antidumping duties on the plaintiff's merchandise. Customs then decided "without any apparent direction from Commerce" that the merchandise fell within the scope of the order. *Sandvik*, 21 CIT at 142. The Court of International Trade found that the importer should have obtained a scope ruling from Commerce to determine if its goods were covered by the order.

In *Fujitsu*, the plaintiff imported parts of automobile radios known as front ends or ETV front ends. Upon entry, Customs required the deposit of antidumping duties pursuant to an order whose scope covered:

> Tuners of the type used in consumer electronic products consist primarily of television receiver tuners and tuners used in radio receivers such as household radios, stereo and high fidelity radio systems, and automobile radios. They are virtually all in modular form, aligned, and ready for simple assembly into the consumer electronic product for which they were designed.

Fujitsu, 21 CIT at 105. As the Court of International Trade explained:

> Fujitsu requested a scope ruling from Commerce that its front ends and ETV front ends were not tuners within the meaning of the antidumping order. Both before and after filing its request for a scope ruling, Fujitsu filed protests with Customs relating to the assessment of antidumping duties on the subject merchandise.

Fujitsu, 21 CIT at 105. Commerce ultimately found that the merchandise was outside of the scope of the order without the need for a formal inquiry. *Fujitsu*, 21 CIT at 105.

The Court of International Trade found in both *Sandvik* and *Fujitsu* that the importer could not protest Customs' liquidation and bring suit via § 1581(a). The Court of Appeals affirmed stating:

> What section 1514(b) means for these cases is that Customs determinations relating to antidumping duties are final unless a civil action contesting a determination listed in section 1516a is commenced in the Court of International Trade. Section 1516a provides for review of determinations by the administering agency (Commerce) or by the International Trade Commission; it does not provide for review of determinations by Customs. Section 1514(b) therefore makes "final and conclusive" Customs' denial of protests to Customs' application of antidumping duty orders on the imports of Sandvik and Fujitsu because those companies failed timely to seek scope determinations from Commerce and then to seek judicial review under section 1516a(a)(2)(B)(vi) in the Court of International Trade, of any adverse decision by Commerce.

Sandvik, 164 F.3d at 601. Thus, the Court of Appeals reasoned that §§ 1514(b) and 1516a(a)(2)(B)(vi) barred review of denied protests regarding the calculation of duties and of protests where a class or kind determination should have been made by Commerce in a scope ruling. *Sandvik*, 164 F.3d at 601–02. Reading *Sandvik* alone, one might conclude that § 1514(b) made § 1516a the exclusive route for judicial review at the Court of International Trade any time there was a

decision by either Customs or Commerce with respect to whether goods were within the scope of an antidumping or countervailing duty order. In other words, one might read *Sandvik* as holding that any time an importer believed that Customs had erred in applying an antidumping or countervailing duty order to its merchandise, its only recourse was to seek a scope ruling from Commerce.

However, the Court of Appeals in *Xerox* clarified that *Sandvik*'s reasoning only applies to cases where the scope of the order is in question, not where Customs has mistakenly applied that order. *Xerox Corp. v. United States*, 289 F.3d 792 (Fed. Cir. 2002). In *Xerox*, the plaintiff imported paper feed belts for electrostatic photocopiers. Customs liquated entries of plaintiff's goods, assessing antidumping duties based on Customs' determination that the belts were within the scope of an antidumping duty order for power transmission belts containing textile fibers. The importer protested liquidation claiming that the goods were clearly outside the scope of the order and that Customs had made a mistake of fact by including them. Customs denied the protest and the importer brought suit at the Court of International Trade without filing a scope inquiry with Commerce. *Xerox Corp. v. United States*, 24 CIT 1145, 1145 (2000), *rev'd* 289 F.3d 792 (2002). The lower court found plaintiff was challenging an antidumping determination, and thus, citing *Sandvik*, determined it lacked jurisdiction. *Xerox*, 24 CIT at 1147. The Court of Appeals reversed and found that the importer's goods "[were] facially outside the scope of the antidumping duty order," because they "were not used for power transmission and were not constructed with the materials listed in the order . . . ." *Xerox*, 289 F.3d at 795. The court found *Sandvik* was inapposite:

> In this case, however, the scope of the order is not in question, and therefore the reasoning in *Sandvik* does not apply. Xerox asserts that the belts at issue are facially outside the scope of the antidumping duty order and that it did not request a section 1516a(a)(2)(B)(vi) scope determination by Commerce because such an inquiry was unnecessary. We agree. The belts at issue were not used for power transmission and were not constructed with the materials listed in the order, and are clearly outside the order. Xerox persuasively argues that correcting such a ministerial, factual error of Customs is not the province of Commerce. Instead an importer may file a protest with Customs. In cases such as this, where the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, misapplication of the order by Customs is properly the subject of a protest under 19 U.S.C. §

> 1514(a)(2). The Court of International Trade may review the denial of such protests under 28 U.S.C. § 1581(a). And pursuant to 19 U.S.C. § 1515(a), "any duties ... found to have been assessed or collected in excess shall be remitted or refunded." This appeal from Customs' denial is reviewable by the court.

Xerox, 289 F.3d at 795. Thus, under *Xerox* where the importer claims that Customs erred as a matter of fact by including its goods within the scope of the order, Customs' determination is the proper subject for a protest. *Xerox*, 289 F.3d at 795.

Xerox is perfectly consistent with the statutory language. As discussed above, § 1514(b) excludes from protestable decisions those antidumping and countervailing determinations that are properly reviewed via § 1516a, under the court's § 1581(c) jurisdiction. Relevant to this case is § 1516a(a)(2)(B)(vi), which provides:

> A determination by the administering authority [Commerce] as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

19 U.S.C. § 1516a(a)(2)(B)(vi). Subsection (vi) covers scope rulings made by Commerce. Where the determination at issue is one made by Commerce pursuant to § 1516a(a)(2)(B)(vi), no protest is available. Where, as in *Xerox*, the determination is a factual application of the scope of an order by Customs, a protest is available. The decision required in *Sandvik* was one for Commerce, *i.e.*, defining the class or kind of merchandise in the Order. The crux of the complaint in *Xerox* was that Customs made a mistake of fact when it found the goods at issue to be within the scope of the order.

The *Sandvik*/*Xerox* dichotomy between Commerce's decisions regarding the class or kind of merchandise and Customs' decisions applying Commerce's instructions also comports with the Court of Appeals' analytical framework established in *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994). *Mitsubishi* instructs that the "1979 Act amended 19 U.S.C. § 1514(a) and (b) to exclude antidumping determinations from the list of matters that the parties may protest to Customs." *Mitsubishi*, 44 F.3d at 976. Accordingly, "Customs merely follows Commerce's instructions in assessing and collecting duties. Customs does not determine the 'rate and amount' of antidumping duties under 19 U.S.C. § 1514(a)(2)." *Mitsubishi*, 44 F.3d at 977.

Using the *Mitsubishi* framework, the relevant question here is whether the decision at issue was that of Customs or Commerce. In other words, one must ask whether Customs acted in a passive and ministerial manner or made an active decision. The *Mitsubishi* inquiry has been invoked time and again by the Court of Appeals. In *Cemex, S.A. v. United States*, 384 F.3d 1314 (Fed. Cir. 2004), domestic manufacturers of cement intervened in an antidumping duty case challenging Commerce's final results. After a court decision, Commerce instructed Customs to liquidate and assess antidumping duty liability. Some entries were not liquidated pursuant to these instructions. Instead, Customs mistakenly deemed 140 entries liquidated at the rate originally claimed by the importer. *Cemex*, 384 F.3d at 1315. While the domestic manufacturers had no avenue to protest Customs' liquidation, the Court of International Trade found that Customs had made a decision that was a protestable event under § 1514(a) and, therefore, could not be challenged under § 1514(i). *Cemex*, 384 F.3d at 1319. The Court of Appeals, citing *Mitsubishi*, affirmed:

> While we agree that Customs' role in making *antidumping decisions, i.e.,* in calculating antidumping duties, is generally ministerial, Customs here made a decision regarding *liquidation*. Following an inquiry into the legal posture of the Second Review Entries, Customs chose to effect their liquidation by posting the Bulletin Notices. More than passive or ministerial, Customs' actions constitute a "decision" within the context of section 1514(a). Customs' admittedly erroneous decision to liquidate falls within the ambit of section 1514(a)(5), which shields such decisions from challenge, without regard for their legality.

Cemex, 384 F.3d at 1324 (footnotes omitted); *see also Ugine and Alz Belgium v. United States*, 452 F.3d 1289, 1296–96 (Fed. Cir. 2006) ("*Xerox* applies to challenges to actions by Customs in applying Commerce's instructions, not to challenges to the instructions themselves."); *U.S. Shoe v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997) ("[t]ypically, 'decisions' of Customs 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. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision.").

The *Xerox* clarification of *Sandvik* is not only consistent with § 1514(b) and *Mitsubishi*, but it also makes sense. Certainly, as the court alluded to in *Xerox*, Congress did not intend to allow Customs to shield its decision-making process in applying Commerce's liquida-

tion instructions from judicial review by claiming the determination should have been made by Commerce. If Congress had so intended, Customs could act contrary to Commerce's instructions without consequence. Where Customs acts in a merely ministerial fashion it cannot, by definition, be acting contrary to Commerce's instructions. Where Customs makes decisions, on the other hand, it may indeed be acting contrary to the instructions of Commerce and where such conduct affects the rate of duty it is protestable under § 1514(a)(2), as *Xerox* held.[8]

Here, as in *Xerox*, the importer claims that there was a mistake made by Customs. Like the importer in *Xerox*, and unlike the plaintiffs in *Sandvik* and *Fujitsu*, Plaintiff claims that the scope of the Orders specifically excluded its goods:

> The scope of this investigation does not include: (a) pipe suitable for use in boilers, superheaters, heat exchangers, condensers, refining furnaces and feedwater heaters, whether or not cold drawn; (b) mechanical tubing, whether or not cold-drawn; (c) finished electrical conduit; (d) finished scaffolding; (e) tube and pipe hollows for redrawing; (f) oil country tubular goods produced to API specifications; and (g) line pipe produced to only API specifications.

ADD Order at 42,547; *CVD Order* at 42,545. Thus, Plaintiff here, like the plaintiff in *Xerox*, claims no scope ruling from Commerce was

[8] The court notes that in *Xerox*, the court held that where "the goods clearly do not fall within the scope of the order, misapplication of the order by Customs is [a] properly" protestable decision under 19 U.S.C. § 1514(a)(2), the denial of which is reviewable by the court under 28 U.S.C. § 1581(a). One might question how to determine whether the goods clearly fall within the scope of the order. It is not clear from either the lower court or the Court of Appeals decision that Customs knew for certain that the *Xerox* plaintiff's goods were clearly outside the scope of the order. The plaintiff in *Xerox* simply alleged as a matter of fact that the goods were a different product than those covered by the order. Complaint ¶¶14–16, *Xerox Corporation v. United States*, 24 CIT 1145, ECF No. 2 (2000). Plaintiff alleged that the order at issue covered "certain industrial belts for power transmission . . . containing textile fibers (including glass fiber) or steel wire, cord or strand . . ." *Id.* at ¶14 and that "the imported belts . . . are not used in power transmission, and do not contain textile (including glass fiber) or steel wire, cord or strand . . . ." *Id.* at ¶16. Plaintiff did not allege that the fact that these goods were not covered by the order was clear on the documents submitted to Customs, only that the goods were outside the order and that Customs made the erroneous decision to include them within the scope of the order. Surely, jurisdiction cannot depend upon the merits of the dispute, *i.e.*, whether the goods are ultimately determined by this court to be outside the scope of the order. *Xerox* must therefore be read to reinforce the principle established in *Mitsubishi*, that what matters is whether Customs makes the decision to include the goods within the order or merely performs a ministerial role at the direction of Commerce.

needed.[9] As was the case in *Xerox*, Customs did not act in a merely ministerial capacity at the direction of Commerce. It made a decision which, Plaintiff claims, clearly contravened Commerce's instructions in the Orders.

As was the case in *Xerox*, Plaintiff's claim is that Customs did not act at the direction of Commerce. Plaintiff claims "[Customs] made a factual error and misapplied the express scope language of the [Orders]." Pl.'s Response 11. As such, Customs made a protestable decision. To find otherwise would relieve Customs from ever applying a specific exclusion in an order unless Commerce had already issued a scope ruling. It would also require an importer to seek a scope ruling even if Customs made a clear error applying an order. Such a finding would transform Customs' purportedly ministerial role in reading and applying the terms of the scope into a discretionary one immune from judicial review.

Finally, Defendant's argument that jurisdiction is lacking because Plaintiff has not exhausted its remedies is inapposite. Were the Plaintiff here challenging the scope of the Orders and seeking jurisdiction pursuant to § 1516a, such an objection might have merit. If an importer believes the scope of an order is unclear it can seek a scope ruling. A scope ruling, made pursuant to 19 U.S.C. § 1673 and 19 C.F.R. § 351.225, "clarifies the scope of an order . . . with respect to particular imports." 19 C.F.R. § 351.225. If the Plaintiff's claim had been that the scope of the Orders were unclear it could have sought a scope ruling, and 19 U.S.C. § 1514(b) would require the importer to seek jurisdiction under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c). This Court would have exclusive jurisdiction over such an action. The Court would require exhaustion of remedies where appropriate. *See* 28 U.S.C. § 2637. Here, however, the threshold question is first whether the court has jurisdiction under § 1581(a). Plaintiff claims that the scope of the Orders unambiguously exclude its merchandise and that Customs made a protestable mistake including the merchandise. Because the court has jurisdiction to hear the denial of the Plaintiff's protest, the failure to exhaust remedies provided in connection with 19 U.S.C. § 1673 is irrelevant.

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[9] Plaintiff claims that it did not need a scope ruling from Commerce because its goods fell into a clear exclusion provided by the Orders. That Commerce ultimately issued a ruling that applied to entries "that remain unliquidated," Def.'s Mot. Dismiss 9, does not affect Plaintiff's claim that Customs made a factual mistake as to the rate or amount of duties chargeable to Plaintiff's prior entries. Furthermore, merely because Plaintiff eventually filed a scope ruling request after being instructed to do so by Customs, should not work a penalty on Plaintiff here if Plaintiff is correct that the Orders specifically excluded its merchandise.

CONCLUSION AND ORDER

The determination at issue here was Customs' liquidation of merchandise it found was subject to the scope of the Orders after its own laboratory analysis and investigation. The Orders specifically excluded "finished electrical conduit." Plaintiff's claim is that the scope of the Orders was clear and Customs made a mistake in assessing antidumping and countervailing duties on its merchandise. Thus, the decision at issue here is a determination made by Customs under § 1514(a)(2) as to the rate and amount of duties assessed on Plaintiff's entry. Accordingly, the court finds that it has jurisdiction pursuant to 28 U.S.C. § 1581(a). Therefore it is hereby:

ORDERED that Defendant's Motion to Dismiss for Lack of Jurisdiction is denied.

Dated: May 13, 2014
New York, NY

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

Slip Op. 14–56

BLINK DESIGN, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 14–00032
Before: Mark A. Barnett, Judge

[The court denies Defendant's motion to dismiss for lack of subject matter jurisdiction; denies Plaintiff's motion for a preliminary injunction; denies Plaintiff's order to show cause why an expedited litigation schedule should not be issued as moot; denies Plaintiff's motion for oral argument as moot; denies Defendant's motion to strike as moot; and stays this action pending Plaintiff's election of remedies pursuant to the Notices of Seizure and any proceedings resulting from that election.]

Dated: May 21, 2014

John M. Peterson, *Richard F. O'Neill*, and *Elyssa R. Emsellem*, Neville Peterson, LLP, of New York, NY, for Plaintiff.

Jason M. Kenner and *Alexander J. Vanderweide*, Commercial Litigation Branch – Civil Division, U.S. Department of Justice, of New York, NY, for Defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, and *Amy M. Rubin*, Acting Assistant Director. Of counsel on the brief was *Paul Smith*, Office of the Assistant Chief Counsel, United States Customs and Border Protection of New York, NY.

OPINION & ORDER

Barnett, Judge:

Defendant, United States, moves to dismiss this case, pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. (*See generally* Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mot.").) Plaintiff, Blink Design, Inc. ("Blink"), opposes the motion. (*See generally* Mem. P.&A. Opp'n Def.'s Mot. Dismiss ("Pl.'s Opp'n").) For the reasons stated below, the court finds that it lacks subject matter jurisdiction over Plaintiff's claims to the extent that they challenge the seizure of its merchandise and orders this action stayed. Plaintiff has also moved for a preliminary injunction and, for reasons discussed below, that motion is denied.

Background and Procedural History

In November 2013, Plaintiff sought to import certain wearing apparel into the United States under cover of eight consumption entries filed at the Port of Los Angeles/Long Beach, California.[1] (Compl. ¶¶ 5, 12.) Upon examination of the entries by the Bureau of Customs and Border Protection ("Customs"), Customs inspectors determined that the quantities of garments in the containers for each of the eight entries exceeded those reported on their accompanying commercial invoices and packing lists. While the overage varied somewhat for each entry, overall, the actual quantity attempted to be entered was more than double the declared quantity. Customs subsequently detained the entries. (Compl. ¶ 16; Pl.'s Mot. Expedite Ex. B, ECF No. 8.) After receiving notice of the detentions, (Pl.'s Opp'n Am. Ex. 3, ECF No. 32), Plaintiff directed the exporter of the merchandise to prepare and forward to it corrected invoices. (Compl. ¶¶ 17–18.) Upon receiving the corrected invoices, Plaintiff attempted to file Port of Entry Amendments ("PEAs") with Customs and asked that Customs release the merchandise. (Compl. ¶ 19.) Plaintiff tendered the requisite additional estimated duties based on the quantities and values in the PEAs, and filed prior disclosures with Customs, indicating that incorrect values and quantities had been reported on the entries. (Compl. ¶¶ 19–20.) Customs did not release the merchandise and returned the PEAs. (Compl. ¶ 21.)

A contested number of the entries were deemed excluded from entry, pursuant to 19 U.S.C. § 1499(c)(5)(A), on various dates in

[1] The entry numbers are 682–2164003–7, 682–2164001–1, 682–2164002–9, 6822164004–5, 682–2163998–9, 682–2164100–1, 682–2164099–5, and 682–2163970–8. (Compl. ¶ 12.)

December 2013 and January 2014.[2] *See infra.* On December 30, 2013, Plaintiff filed a protest with Customs to challenge the deemed exclusions. (Compl. ¶ 24.) Customs seized the entries between December 6, 2013 and January 2, 2014, pursuant to 19 U.S.C. § 1595a(a) and (c)(1)(A), and issued Notices of Seizure to the Plaintiff between December 20, 2013 and January 16, 2014.[3] (Compl. ¶¶ 26–27; Pl.'s Mot. Expedite Ex. B.) The Notices of Seizure stated that the declared quantities in the seized entries "were used to facilitate the importation of the wearing apparel . . . that was attempted to be clandestinely introduced" into the country (i.e., the undeclared quantities), in violation of 19 U.S.C. §§ 1481, 1484, and 1485.[4] (Compl. ¶¶ 26–27; Pl.'s Mot. Expedite Ex. B.) Customs denied Plaintiff's protest on January 15, 2014, citing the seizure of the entries as the basis for its denial. (Compl. ¶ 25.)

On January 28, 2014, Plaintiff filed suit in this court to contest Customs' denial of its protest, invoking 28 U.S.C. § 1581(a) as the basis for the court's subject matter jurisdiction. (*See* Summons, ECF No. 1.) Defendant now moves to dismiss this case, pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Defendant argues that Customs seized five of the eight entries at issue within thirty days of their presentation to Customs for examination. According to Defendant, these entries were not deemed excluded, and no protestable event occurred. Consequently, Defendant argues this court has no subject matter jurisdiction over these entries because 28 U.S.C. § 1356 grants exclusive jurisdiction over most seizures to the district courts.[5] (Def.'s Mot. 1, 9.) Defendant further contends that Customs seized the remaining three entries before Plaintiff filed this action and before the court's jurisdiction attached to the denied protests. Therefore, the court has no subject matter jurisdiction over these additional entries either. (Def.'s Mot. 1.) Defendant further urges that the court dismiss the

[2] The parties dispute the dates on which the entries were deemed excluded and, in some cases, whether the entries were deemed excluded at all.

[3] Section 1595a(c) states, in relevant part, that "[m]erchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows: (1) The merchandise shall be seized and forfeited if it--(A) is . . . clandestinely imported or introduced." 19 U.S.C. § 1595a(c).

[4] These statutes pertain to an importer's obligation to file true and accurate entry documentation. *See* 19 U.S.C. §§ 1481, 1484, 1485.

[5] Section 1356 states that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title." 28 U.S.C. § 1356.

action for failure to state a claim upon which relief can be granted, because Customs seizure of Plaintiff's entries precludes the court from providing Plaintiff with the only remedy it seeks: release of the merchandise. (Def.'s Mot. 2.) Plaintiff opposes Defendant's motion in full. (*See generally* Pl.'s Opp'n.)

Legal Standard

A court has "an independent duty" to assure that it has subject matter jurisdiction over the matters before it. *Suntec Indus. Co. v. United States*, 37 CIT __, __, 951 F. Supp. 2d 1341, 1345 (2013) (citation omitted). When subject matter jurisdiction is challenged, the plaintiff bears the burden of demonstrating that jurisdiction exists. *E & S Express Inc. v. United States*, 37 CIT __, __, 938 F. Supp. 2d 1316, 1320 (2013) (citations omitted) (citing *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)). When reviewing a Rule 12(b)(1) motion, the court sculpts its approach according to whether the motion "challenges the sufficiency of the pleadings or controverts the factual allegations made in the pleadings." *H & H Wholesale Servs., Inc. v. United States*, 30 CIT 689, 691, 437 F. Supp. 2d 1335, 1339 (2006) (citation omitted). If the motion challenges the sufficiency of the pleadings, the court assumes that the allegations within the complaint are true. *Id.* (citation omitted). If the motion controverts factual allegations within the complaint, as does Defendant's motion, "'the allegations in the complaint are not controlling,' and 'are subject to fact-finding'" by the court. *Id.* at 691–92, 437 F. Supp. 2d at 1339 (quoting *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993)). Moreover, "[w]here, as here, claims depend upon a waiver of sovereign immunity, a jurisdictional statute is to be strictly construed." *Celta Agencies, Inc. v. United States*, 36 CIT __, __, 865 F. Supp. 2d 1348, 1352 (2012) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

DISCUSSION

I. Whether Entries Were Deemed Excluded

a. Defendant's Contentions

Defendant asserts that the court lacks subject matter jurisdiction over five of Plaintiff's entries because Customs seized them before they were deemed excluded. (Def.'s Mot. 6–9.) Deemed exclusion is governed by 19 U.S.C. § 1499(c)(5)(A), which states that "[t]he failure by the Customs Service to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination . . . shall be

treated as a decision of the Customs Service to exclude the merchandise." 19 U.S.C. § 1499(c)(5)(A). According to Defendant, Plaintiff improperly calculated this thirty-day period as beginning on the date of entry of its merchandise, rather than the date when "the merchandise [was] presented for customs examination." *Id*. Defendant claims that this error has led Plaintiff to mistakenly assert that all of its entries were deemed excluded.

Defendant notes that § 1499 does not define when merchandise is presented for customs examination, and Defendant directs the court to Customs regulation 19 C.F.R. § 151.16(b). (Def.'s Mot. 6–7.) The regulation states:

> Decision to detain or release. Within the 5-day period (excluding weekends and holidays) following the date on which merchandise is presented for Customs examination, Customs shall decide whether to release or detain merchandise. Merchandise which is not released within such 5-day period shall be considered to be detained merchandise. For purposes of this section, merchandise shall be considered to be presented for Customs examination when it is in a condition to be viewed and examined by a Customs officer. Mere presentation to the examining officer of a cargo van, container or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for Customs examination for purposes of this section. Except when merchandise is examined at the public stores, the importer shall pay all costs relating to the preparation and transportation of merchandise for examination.

19 C.F.R. § 151.16(b). In light of this regulation, Defendant contends that Customs considers merchandise "presented for examination" when "it is in a condition to be examined by a Customs official." (Def.'s Mot. 7 (quotation marks omitted).) When Customs requests that merchandise be delivered to a container examination station ("CES") for inspection, as occurred in the present action, Defendant specifies that "Customs routinely considers the date on which merchandise is presented for examination as being the date that the last requested container is delivered to the CES, its contents have been unloaded by the private contractor, and Customs has received the pertinent documents that it needs to perform the examination." (Def.'s Mot. 7.)

Turning to the facts of this case, Defendant directs the court to Exhibit 1, attached to its moving brief,[6] which contains (1) the daily logs of the CES operator, indicating the date when the relevant containers were unloaded at the CES, and (2) copies of each entry's CF 3461 form, which have stamps indicating the date on which the containers were unloaded at the CES.[7] (Def.'s Mot. 7–8 (citing Def.'s Mot. Ex. 1, ECF No. 25).) By cross-referencing these documents and the Notices of Seizure, (Pl.'s Mot. Expedite Ex. B), Defendant contends that the seizures of entries 682–2164003–7, 682–2164002–9, 682–2164004–5, 682–2163998–9, and 682–2163970–8 occurred within thirty days of their presentation for customs examination. (Def.'s Mot. 9–8; Def.'s Reply Pl.'s Opp'n ("Def.'s Reply") 3.) Defendant contends that these five entries, seized within thirty days, were not deemed excluded, and suffered no protestable event giving rise to subject matter jurisdiction under 28 U.S.C. § 1581(a). On the contrary, for these five entries, Defendant concludes that Plaintiff's protest amounted to a protest against the seizures – a subject matter over which this court has no jurisdiction, pursuant to 28 U.S.C. § 1356. (Def.'s Mot. 9.)

b. Plaintiff's Contentions

Plaintiff contests Defendant's explanation of when merchandise is presented for customs examination and maintains that all of its entries were deemed excluded before seizure. (Pl.'s Opp'n 9–21.) According to Plaintiff, presentation occurs when a CF 3461 entry document is filed. (Pl.'s Opp'n 10.) To support its theory, Plaintiff also turns to 19 C.F.R. § 151.16(b) and parses the regulation's language. Plaintiff avers that the phrase, "merchandise shall be considered to be presented for Customs examination when it is in a condition to be viewed and examined by a Customs officer," demonstrates that the CF 3461's filing qualifies as the presentation for customs examination, because the document includes the importer of record, a descrip-

[6] Defendant has attached these same documents to the declaration of David Dodge, which Defendant has appended to its reply. (*See generally* Def.'s Reply Pl.'s Opp'n ("Def.'s Reply") Attach. 1.)

[7] In its motion to dismiss, Defendant attached redacted copies of the CES operator's logbooks and relevant CF 3461 entries. (Def.'s Mot. Ex. 1, ECF No. 25.) Plaintiff objected to these documents in its opposition brief, because they were not accompanied by any affidavit, affirmation, or sworn declaration to sponsor or authenticate them. (Pl.'s Opp'n 18–20 (citing 28 U.S.C. § 2641 (stating that Federal Rules of Evidence apply to civil actions before court); Fed. R. Evid. 901 (providing rules for authenticating evidence).) In its reply, Defendant appended the same documents, (Def.'s Reply Ex. 1, ECF No. 31), accompanied by the declaration of David Dodge, a Chief Customs Officer at the Los Angeles/Long Beach Seaport who oversees the Merchandise Enforcement Team and attested to the authenticity of the copies of the records attached to his declaration. (Def.'s Reply Attach 1.) The court finds his sworn declaration sufficient to authenticate the documents attached thereto.

tion of the merchandise, its quantity, its tariff classification, and "the place where the merchandise is being held, awaiting Customs' determination of its admissibility." (Pl.'s Opp'n 11–12.) Plaintiff asserts that the phrase, "Mere presentation to the examining officer of a cargo van, container or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for Customs examination for purposes of this section," buttresses its argument, because only the submission of the CF 3461 "provides Customs with the context from which to determine whether the goods [before it] should be detained or further inspected." (Pl.'s Opp'n 15.) Finally, Plaintiff argues that the sentence, "Except when merchandise is examined at the public stores, the importer shall pay all costs relating to the preparation and transportation of merchandise for examination," reinforces "that transportation and arrival of the goods at a privately owned CES is an act which *follows* presentment of the goods for examination." (Pl.'s Opp'n 16–17.) Plaintiff reasons that because presentment must occur for all merchandise entering domestic commerce, and Customs only occasionally examines imported merchandise, presentment must occur before Customs orders goods to be taken to a CES for examination, thereby causing the importer to incur costs relating to the preparation and transportation of the merchandised to be examined. (Pl.'s Opp'n 17.) Thus, according to Plaintiff, presentment occurs with the filing of a CF 3461, commencing the thirty-day window before a deemed exclusion occurs. Employing this construction, Plaintiff reasons that its entries were all deemed excluded prior to seizure.

c. Analysis

The court declines to adopt Plaintiff's interpretation of when merchandise is presented for customs examination. The rules of statutory construction apply to the interpretation of statutes and regulations alike. *Roberto v. Dep't of the Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (citing *Wronke v. Marsh*, 787 F.2d 1569, 1574 (Fed. Cir. 1986)). "When construing a regulation or statute, it is appropriate first to examine the regulatory language itself to determine its plain meaning." *Id.* (citing *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000)). "If regulatory language is clear and unambiguous, the inquiry ends with the plain meaning"; if a regulation is "silent or ambiguous," the court "gives deference to the agency's own interpretation." *Id.* (citing *Meeks*, 216 F.3d at 1366 (citing *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) ("It is settled that

courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." (citation and quotation marks omitted))); *c.f.,Christopher v. SmithKline Beecham Corp.*, 567 U.S. __ , 132 S. Ct. 2156 (2012) (cautioning that less deference is due to newly announced interpretations that may result in an "unfair surprise" to regulated entities).

The phrase, "the merchandise has been presented for customs examination," in 19 U.S.C. § 1499(c)(5) and its counterpart, "presentation of merchandise for Customs examination," in 19 C.F.R. § 151.16(b) are ambiguous. Only the term "merchandise" is statutorily defined.[8] To discern the meaning of "presented," "presentation," and "examination," the court must turn elsewhere. When a word is undefined in a statute, "the reviewing court normally give[s] the undefined term its ordinary meaning." *AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The dictionary defines "present" as "to lay or put before a person for acceptance," Webster's Third New International Dictionary 1793 (1986), "presentation" as "the act of presenting," *id.*, "examination" as "the act or process of examining or state of being examined," *id.* at 790, and "examine" as "to look over : inspect visually or by use of other senses," *id.* The ordinary meaning of presenting merchandise for customs examination therefore requires that the merchandise itself – not a proxy or summary – be laid out or put before a Customs official to look at or otherwise visually inspect.

Customs interpretation of the regulation meets this ordinary meaning interpretation. By treating the date when (1) the last requested container arrives at a CES and is unloaded and (2) Customs has the relevant explanatory documents, as the date on which merchandise is presented for examination, Customs ensures that the actual merchandise and relevant accompanying information are before its officials so that an examination may proceed. Because Customs interpretation of the regulation is consistent with its ordinary meaning and the record before the court does not suggest that this is a recent or recently altered interpretation of this regulation (*See, e.g.*, Dodge Decl. ¶ 15, Apr. 2, 2014), the court's inquiry need go no further. *See Roberto*, 440 F.3d at 1350.

Plaintiff's interpretation, on the other hand, contravenes the statute and regulation's ordinary meaning. The filing of a CF 3461, which contains information about merchandise, may occur before that mer-

[8] "The word 'merchandise' means goods, wares, and chattels of every description, and includes merchandise the importation of which is prohibited, and monetary instruments as defined in section 5312 of Title 31." 19 U.S.C. § 1401(c).

chandise reaches its port of destination. *See* 19 C.F.R. § 142.2(b). Treating the date of filing of the CF 3461 as the date when merchandise is presented for customs examination would frequently start the thirty-day period Customs has to examine merchandise long before the merchandise physically reaches the United States and the agency's jurisdiction. The presentment of merchandise for customs examination, which requires the presence of the merchandise before a Customs official for inspection, thus is not accomplished upon the filing of the form. When the regulation provides that "[m]ere presentation to the examining officer of a cargo van, container or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for Customs examination," it defies credulity to suggest that presentation of a mere form, with even less access to the actual merchandise, must be treated as presentation.[9] To that end, the court cannot conclude that Congress, or Customs in drafting its own regulation, intended Customs to inspect merchandise lodged inside of stacked containers at sea. (*See, e.g.*, Dodge Decl. ¶ 4, Apr. 2, 2014.)[10]

Having addressed the legal issues regarding the beginning of the thirty-day period leading to deemed exclusion, the court now turns to the question of when Customs effects a seizure. In their briefs, the parties assume that the date of seizure asserted by Customs in its seizure notices marks the time at which the court considers the entries seized. However, this Court has held that "an internal agency decision to proceed with seizure, which did not ripen into a notice to the importer" cannot affect the Court's jurisdiction. *CBB Grp., Inc. v. United States*, 35 CIT __, __, 783 F. Supp. 2d 1248, 1255 n.3 (2011) (citing 19 C.F.R. § 162.31). In that case, the court declined to rely on

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[9] Buttressing the court's conclusion, when the House Committee on Ways and Means reported on the changes to 19 U.S.C. § 1499 accompanying the passage of the North American Free Trade Agreement Implementation Act, it noted:

> In the case of remote filing of paper documentation after January 1, 1999, Customs shall be responsible for ensuring that the required information — including CF 3461, packing list, and the invoice — will be available to the appropriate official in the port of examination. The Committee intends that the absence of required entry of manifest information in a particular location shall not preclude or limit in any way the authority of the Customs Service to conduct examinations.

H.R. Rep. No. 103–361, at 110 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2660. From this statement, it is evident that the absence of a CF 3461 would not hinder Customs authority to examine imported merchandise pursuant to § 1499. Because merchandise must be presented to Customs prior to examination, the filing of a CF 3461 cannot constitute presentment.

[10] Moreover, the court is not convinced by Plaintiff's argument that the form must constitute presentment because every entry must be presented even if it is not examined. Contrary to the premise of Plaintiff's argument, Customs regulations provide that presentation of a CF 3461 is not required in all cases. *See* 19 C.F.R. § 142.3(b)(1).

the date Customs asserted that seizure occurred and, instead, utilized the date of the Notice of Seizure. However, case law appears unsettled on whether the court should consider the date that Customs issued a Notice of Seizure or the date a party received the Notice of Seizure to determine whether an entry was deemed excluded prior to seizure. *See id.* at __, 783 F. Supp. 2d at 1255 & n.3; *H & H Wholesale Servs., Inc.*, 30 CIT at 694, 437 F. Supp. 2d at 1342; *Tempco Mktg. v. United States*, 21 CIT 191, 193, 957 F. Supp. 1276, 1278 (1997). The court need not resolve this issue. As illustrated below, even using the earlier dates upon which Customs issued the Notices of Seizure, such dates are uniformly more than thirty days after the date the merchandise was presented for examination.

After a thorough examination of the record before it, the court determines that the entries were presented to Customs for examination, and the entries' respective Notices of Seizure were issued, on the following dates:

Entry Number	Date Merchandise Presented for Examination	Notice of Seizure Issuance Date
682–2164003–7	11/19/2013	1/9/2014
682–2164001–1	11/13/2013	1/9/2014
682–2164002–9	11/20/2013	1/9/2014
682–2164004–5	11/13/2013	12/20/2013
682–2163998–9	11/13/2013	12/20/2013
682–2164100–1	11/21/2013	1/16/2014
682–2164099–5	11/20/2013	1/16/2014
682–2163970–8	12/6/2013	1/16/2014

(*See* Def.'s Mot. 8–9, Ex. 1; Def.'s Reply Ex. 1; Pl.'s Mot. Expedite Ex. B; *see also* Dodge Decl. ¶¶ 6–9 (explaining preparation of CES logs), 10–11 (discussing use of CF 3461), 13 (explaining relationship between CES log sheets and CF 3461).) Appraising this data under Customs construction of the regulation, the court concludes that Customs seized each entry more than thirty days after presentation and that, therefore, each entry was deemed excluded prior to seizure.

II. Seized Entries

a. Defendant's Contentions

Defendant asserts that the court lacks subject matter jurisdiction over Plaintiff's entries pursuant to 28 U.S.C. § 1356, because Customs seized them prior to the filing of this action. (Def.'s Mot. 9–12.) Section 1356 reads as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any seizure under any law of the United States on land or upon waters not within admiralty and maritime jurisdiction, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

28 U.S.C. § 1356.[11] According to Defendant, once Customs seized the entries, subject matter jurisdiction over them fell within the exclusive purview of the district courts.

b. Plaintiff's Contentions

Plaintiff counters that the court has subject matter jurisdiction over the seized entries because they were deemed excluded, and "the question of whether denial of a protest against exclusion is lawful is a matter solely within the jurisdiction of the CIT." (Pl.'s Opp'n 24.) Plaintiff stresses that it "only challenges the exclusions," and not the seizures, and that "[t]he seizures are relevant only insofar as this Court may have to construe the law cited in the Seizure Notices to determine whether, and to what extent, they limit the court's ability to grant comprehensive relief under its 29 [sic] U.S.C. § 1581(a) protest jurisdiction." (Pl.'s Opp'n 25 n.11; *see* Pl.'s Opp'n 27.) Plaintiff warns that if the court permits the seizures to divest it of jurisdiction, the agency could evade the court's oversight of exclusion protest denials by issuing Notices of Seizure on any legal ground. (Pl.'s Opp'n 26.)

Plaintiff also avers that if the court reviews the Notices of Seizure, it will find that they substantively allege a violation of 19 U.S.C. § 1592 and that the seizures amount to an impermissible use of

[11] Section 1582 concerns actions commenced by the United States and, therefore, is inapplicable to this case. *See* 28 U.S.C. § 1582.

Customs seizure power under subsection (c)(14) of that statute.[12] (Pl.'s Opp'n 28.) Specifically, Plaintiff notes that the Notices of Seizure assert violations of 19 U.S.C. §§ 1481, 1484, and 1485, statutes which Plaintiff characterizes as "inextricably tied to" § 1592. (Pl.'s Opp'n 34 (emphasis removed) (citations and quotation marks omitted).) Plaintiff argues that because subject matter jurisdiction over § 1592 seizures must lie within this Court's purview, the court must exercise jurisdiction over its entries. (Pl.'s Opp'n 29–30 ("The Court has a duty to construe the Notices of Seizure based on their content and to determine whether the laws claimed to be violated relate to 'clandestine introduction' or simply make out a case of entry by means of false documents, in violation of 19 U.S.C. § 1592(a).").)[13]

c. Analysis

The court finds that this case is a seizure case at its heart. "It is well established . . . that the court lacks jurisdiction under § 1581(a) to review a seizure of goods by Customs. If Customs's treatment of the merchandise was a seizure . . . jurisdiction would lie with the United States District Court . . . under 28 U.S.C. § 1356." *H & H Wholesale Servs., Inc.*, 30 CIT at 692, 437 F. Supp. 2d at 1340 (second and third ellipses in original) (citation and quotation marks omitted); *accord PRP Trading Corp. v. United States*, 36 CIT __, __, 885 F. Supp. 2d 1312, 1314 (2012). In this case, Customs uniformly seized the imported merchandise, and provided notice of that seizure, within sixty

[12] That subsection states:

> If the Secretary has reasonable cause to believe that a person has violated the provisions of subsection (a) of this section and that such person is insolvent or beyond the jurisdiction of the United States or that seizure is otherwise essential to protect the revenue of the United States or to prevent the introduction of prohibited or restricted merchandise into the customs territory of the United States, then such merchandise may be seized and, upon assessment of a monetary penalty, forfeited unless the monetary penalty is paid within the time specified by law. Within a reasonable time after any such seizure is made, the Secretary shall issue to the person concerned a written statement containing the reasons for the seizure. After seizure of merchandise under this subsection, the Secretary may, in the case of restricted merchandise, and shall, in the case of any other merchandise (other than prohibited merchandise), return such merchandise upon the deposit of security not to exceed the maximum monetary penalty which may be assessed under subsection (c) of this section.

19 U.S.C. § 1592(c)(14).

[13] As a continuation of its jurisdictional argument, Plaintiff asserts that Customs improperly seized its entries pursuant to 19 U.S.C. § 1595a(c), because the Notices of Seizure do not meet the standards for pleading or proving a seizure claim under the statute. (*See* Pl.'s Opp'n 30–33 (citing *United States v. Davis*, 648 F.3d 84, 87, 90 (2d Cir. 2011); *United States v. Broadening-Info. Enters., Inc.*, 462 F. App'x 93 (2d Cir. 2012)); *see also* Pl.'s Opp'n 36–39 (examining merits of Customs purported § 1592 seizure).) From context, it also appears that Plaintiff believes that these defects demonstrate that Customs actually seized the entries under 19 U.S.C. § 1592. Plaintiff provides no legal support for its contention that Notices of Seizure must meet judicial standards of pleading or proof.

days of the presentation for examination of that merchandise. Significantly, these seizures occurred prior to Plaintiff's effort to invoke this court's jurisdiction pursuant to § 1581(a) and, in the case of five of the eight entries, they occurred prior to the denial of Plaintiff's protests regarding the deemed exclusions of the merchandise, pursuant to 19 U.S.C. § 1499(c)(5)(A) and (B).

The facts in this case are distinct in significant ways from the facts presented to the court in *CBB Group, Inc. v. United States*, 35 CIT __, 783 F. Supp. 2d 1248. In *CBB*, the court was presented with a deemed exclusion, followed by a deemed denial of a protest, in which the imported merchandise was not seized until after the importer had challenged in this court the denial of the protest. In finding that the court retained jurisdiction over the case notwithstanding the seizure, the court analyzed how sections 499(c), 19 U.S.C. § 1499(c), and 596(c), 19 U.S.C. § 1595a(c), of the Tariff Act of 1930, interact. With regard to 19 U.S.C. § 1499(c), the *CBB* court said:

> Section 499(c) was added to the Tariff Act by the Customs Modernization Act, which was included as Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2171. As explained in the report of the House Committee on Ways and Means accompanying the Customs Modernization Act ("House Report"), the purpose of section 499(c) is to "provide a carefully balanced structure which allows the Customs Service, in the first instance, a minimum of 60 days in which to determine whether merchandise initially detained shall be excluded from entry or seized and forfeited if otherwise authorized under other provisions of law." H.R. Rep. No. 103–361, pt. 1, at 111–12 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2552, 2659 ("House Rept."). It is apparent that the House Report, in mentioning a "minimum" of 60 days, refers to the period following presentation of the merchandise for examination as established by paragraph (A) of section 499(c)(5), which is thirty days "or such longer period if specifically authorized by law," together with the thirty-day period following the filing of the protest as established by paragraph (B) of the provision.

35 CIT at __, 783 F. Supp. 2d at 1253. The court found that Customs had failed to make an admissibility or seizure determination within the sixty-day period during which it could examine the merchandise. Therefore, when Customs issued a notice of seizure after the sixty-day period had lapsed, and after the court's jurisdiction had attached

to the plaintiff's claim, the court had to determine the effect the issuance of the seizure notice on its ability to grant relief. *Id.* at __, 783 F. Supp. 2d at 1254–56. The court concluded that it retained jurisdiction over the claim because Customs lacked the authority to take action affecting the status of the merchandise once the court had established its jurisdiction. *Id.* at __, 783 F. Supp. 2d at 1256. In the present case, the court faces no such scenario, because Customs seized the entries within the sixty-day period and before Plaintiff filed suit. Thus, Customs retained the authority to take action through seizure when it did so with regard to the eight entries at issue here.

Moreover, to determine whether a plaintiff has challenged a seizure, as opposed to an exclusion, the Court has considered various factors, including whether:

> 1) the plaintiff's protest indicated that it was challenging the "seizure" of the merchandise; 2) the plaintiff received a notice of seizure from Customs; 3) the government had control over the merchandise; and 4) upon notice, the plaintiff was required to choose between immediate forfeiture proceedings or a petition for relief from seizure.

H & H Wholesale Servs., Inc., 30 CIT at 694, 437 F. Supp. 2d at 1341 (citations omitted); *Tempco Mktg.*, 21 CIT at 193, 957 F. Supp. at 1278 (citation omitted). With respect to the first factor, Plaintiff's protest ambiguously challenges Customs alleged exclusion of Plaintiff's merchandise, claiming that "there is no basis in law for the seizure of these goods." (Pl.'s Mot. Expedite Ex. A at 3.) Next, the record shows that Plaintiff received Notices of Seizure from Customs for each entry. (Pl.'s Mot. Expedite Ex. B.) It is also undisputed that Customs has control over the merchandise. Finally, the Notices of Seizure required Plaintiff to choose between immediate forfeiture proceedings and a petition for relief from seizure. (*See* Pl.'s Mot. Expedite Ex. B.) Three, if not four, of the factors suggest that Plaintiff's case is really concerned with seizure rather than exclusion. Bolstering this conclusion, this Court repeatedly has found subject matter jurisdiction wanting in cases, such as this one, where Customs seized a plaintiff's entries prior to the plaintiff's filing suit in this Court. *See, e.g.*, *PRP Trading Corp.*, 36 CIT __, 885 F. Supp. 2d 1312; *H & H Wholesale Servs., Inc.*, 30 CIT 689, 437 F. Supp. 2d 1335; *Genii Trading Co. v. United States*, 21 CIT 195 (1997); *Tempco Mktg.*, 21 CIT 191, 957 F. Supp. 1276; *Int'l Maven, Inc. v. McCauley*, 12 CIT 55, 678 F. Supp. 300 (1988). *But see CBB Grp., Inc. v. United States*, 35 CIT __, 783 F. Supp. 2d 1248 (holding that court had jurisdiction over excluded and seized entries,

because Customs seized entries after plaintiff had filed suit and this Court's jurisdiction had attached).

In addition, the court finds Plaintiff's contention that the court must exercise subject matter jurisdiction over this case because Customs seized Plaintiff's merchandise pursuant to 19 U.S.C. § 1592 unavailing. Plaintiff asks the court to disregard the Notices of Seizure, which state on their face that Customs seized the merchandise pursuant to 19 U.S.C. § 1595a(a) and (c)(1)(A), examine the underlying legality behind the seizures, and find that Customs, in fact, seized the entries under § 1592. According to Plaintiff, the grounds upon which Customs justified its seizures are "inextricably" bound to § 1592, and this court must exercise subject matter jurisdiction over actions arising from that statute. It is well established that "'Congress did not commit to the Court of International Trade's exclusive jurisdiction *every* suit against the Government challenging customs-related laws and regulations.'" *H &H Wholesale Servs., Inc.*, 30 CIT at 700, 437 F. Supp. 2d at 1347 (quoting *Kmart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988)). The one exception to the jurisdictional bar precluding this court from hearing seizure cases is inapposite. *See* 28 U.S.C. §§ 1356, 1582. Plaintiff essentially asks the court to reach the merits of its case and evaluate the legality of Customs seizure notices in order to discern whether the court has subject matter jurisdiction to hear the case. This the court cannot do. *See Diggs v. Dep't of Housing & Urban Dev.*, 670 F.3d 1353, 1355 (Fed. Cir. 2011) (citations omitted).

The court therefore concludes that, at its heart, this case challenges Customs seizures of Plaintiff's merchandise. It is the court's understanding that, to date, Plaintiff has not yet elected a remedy as provided in the Notices of Seizure and, among its options, pursuant to 28 U.S.C. § 1356, Plaintiff may choose to contest the seizures in district court. While this finding clearly dictates that Plaintiff must find its judicial remedy for the seizure, if any, in district court, it does not completely dispose of the matter before the court. As already discussed, the eight entries in question were deemed excluded prior to being seized by Customs. While the seizures were not implicated by Plaintiff's invocation of this court's jurisdiction, *c.f. CBB*, 35 CIT __, 783 F. Supp. 2d 1248, it is not clear that the seizures negate the deemed exclusion.

Defendant has suggested that, if Plaintiff prevails on its arguments against the seizures and obtains release of its seized merchandise, Plaintiff will have the opportunity to file new documents if it wishes to enter the merchandise into the United States for consumption. *See* Def.'s Mot. Ex. 2 (Customs Public Bulletin regarding submission and

processing of entries for seized merchandise at Port of Los Angeles/Long Beach). While such an opportunity to file new entry documents may exist when Customs has administratively resolved a seizure prior to an exclusion, Defendant has not provided any argument that such administrative practices can trump the finality of a deemed exclusion or denied protest pursuant to 19 U.S.C § 1514(a), in the absence of judicial intervention by this court.

For these reasons, the court finds that only this Court can provide judicial relief to Plaintiff from the denial of the protest; however, only the district court can provide judicial relief to Plaintiff from the seizure of the merchandise. Because the court finds that this case is, at its heart, a seizure case, the court finds that it is in the sound interest of judicial economy to stay this proceeding, pending Plaintiff's election of remedies pursuant to the Notices of Seizure and any administrative and/or judicial proceedings resulting from that election.[14]

III. Plaintiff's Motion for a Preliminary Injunction

Pending before the court is Plaintiff's motion for a preliminary injunction. (ECF No. 17.) Plaintiff moves the court to issue an order enjoining Defendant "from initiating or conducting, during the pendency of this action, administrative summary forfeiture proceedings with respect to the merchandise which is the subject matter of this action." (Mem. P.&A. Supp. Pl.'s Mot. Prelim. Inj. ("Pl.'s PI Mot.") 1.)

To prevail on a motion for a preliminary injunction, a movant must establish that "(1) the movant is likely to succeed on the merits, (2) the movant is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips [in] movant's favor, and (4) an injunction is in the public interest." *Wind Tower Trade Coalition v. United States*, 37 CIT __, __, 904 F. Supp. 2d 1349, 1352 (2013) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Am. Signature, Inc. v. United States*, 598 F.3d 816, 823 (Fed. Cir. 2010)), *aff'd*, 741 F.3d 89 (Fed. Cir. 2014).

Plaintiff does not meet these criteria. The court has found that it lacks subject matter jurisdiction over Plaintiff's claims as they relate to Customs seizure of its merchandise. Any relief that Plaintiff may seek with respect to its seized merchandise must begin with Plaintiff's election of remedies provided in the Notices of Seizure. As such, the court cannot find that Plaintiff is likely to suffer irreparable harm in the absence of an order enjoining Customs from commencing or conducting administrative forfeiture proceedings during the pen-

[14] Because the court is staying this proceeding, Defendant's Rule 12(b)(5) arguments are moot.

dency of this action. It is, in fact, these very proceedings which may provide Plaintiff with the relief it seeks. Plaintiff therefore has not established the elements needed to secure a preliminary injunction, *see id.*, and its motion is denied.

Conclusion and Order

For the reasons provided above, the court hereby **DENIES** Defendant's motion to dismiss. It finds that it has subject matter jurisdiction over Plaintiff's challenge to the denial of its protest; however, because this case is a seizure case at heart, the court **STAYS** further proceedings pending Plaintiff's election of remedies pursuant to the Notice of Seizure and any administrative and/or judicial proceedings resulting from that election. Parties are **ORDERED** to file a status report within thirty days of the completion of any administrative proceeding pursuant to the election of remedies or any subsequent or alternate judicial proceeding resulting from the election of remedies. In addition, the court **DENIES** Plaintiff's motion for a preliminary injunction; **DENIES** Plaintiff's order to show cause why an expedited litigation schedule should not be issued as moot; **DENIES** Plaintiff's motion for oral argument as moot; and **DENIES** Defendant's motion to strike as moot.

Dated: May 21, 2014
New York, New York

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