U.S. Customs and Border Protection

Slip Op. 14–103

CARBON ACTIVATED CORP., Plaintiff, v. UNITED STATES AND U.S. CUSTOMS AND BORDER PROTECTION, Defendant.

Before: Gregory W. Carman, Judge
Court No. 13–00366

[Defendant's motion to dismiss is granted.]

Dated: September 8, 2014

Nancy A. Noonan, Arent Fox LLP, of Washington, DC, for plaintiff.

Antonia R. Soares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Edward N. Maurer*, Deputy Assistant Chief Counsel, U.S. Customs & Border Protection, of New York, NY.

OPINION & ORDER

CARMAN, JUDGE:

Before the Court is the Motion to Dismiss ("MTD") of Defendant United States and U.S. Customs and Border Protection ("Defendant" or "Customs") for lack of subject matter jurisdiction pursuant to USCIT Rule 12(b)(1), or, in the alternative, for failure to state a claim upon which relief may be granted pursuant to USCIT Rule 12(b)(5). ECF No. 13. For the reasons set forth below, the Court grants Defendant's motion to dismiss for lack of subject matter jurisdiction.

BACKGROUND

This action challenges Customs' liquidation of three entries in 2008. *See* Compl. ¶ 12, ECF No. 5. Plaintiff Carbon Activated Corporation ("Plaintiff" or "Carbon Activated") claims that these three entries were prematurely and unlawfully liquidated. *See id*. ¶ 13. Plaintiff argues that it was unaware that these entries "had been erroneously liquated" until June 2012, and consequently filed a protest, despite its belief that it "would not resolve the problem." Pl. Carbon Activated Corp.'s Resp. to Def.'s Mot. to Dismiss the Compl. ("Pl.'s Resp.") at 4,

ECF No. 17. Plaintiff implies that it cannot challenge the denial of its protest under 28 U.S.C. § 1581(a) (2006)[1] because Customs has not yet "acted upon" this protest. *Id*. Plaintiff asserts that the Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(i) because "any other jurisdictional provision is manifestly inadequate." *Id*.

Originally Plaintiff claimed that Customs violated an injunction ordered by the court in *Hebei Foreign Trade & Adver. Corp. v. United States*, 35 CIT__, 708 F. Supp. 2d 1317 (2011).[2] Compl. ¶ 7, Ex. A. Subsequently Plaintiff stated that it "is abandoning its claim that [Customs] failed to comply with the injunction ordered" in *Hebei*. Pl.'s Resp. at 1 n.1. However, Plaintiff continues to assert that its cause of action accrued with the issuance of the decision in *Hebei* because that was "the date that Carbon Activated was notified that the rate used upon liquidation was inaccurate." *Id*. at 2. Plaintiff therefore argues that because this case was filed within two years of the *Hebei* decision, "this case is timely." *Id*.

Defendant moves to dismiss Plaintiff's Complaint. Defendant asserts that "[i]t is settled that jurisdiction pursuant to 28 U.S.C. § 1581(i) is not available if jurisdiction pursuant to another subsection of section 1581 is, or could have been, available." MTD at 5. Defendant explains that jurisdiction was available under subsection (a), which provides for challenges to timely protested denials. *Id*. Defendant claims that in first failing to protest within 180 days of liquidation and then failing to file a court challenge to a denial of that protest within two years of liquidation, Plaintiff failed to follow the "Congressionally-mandated process" for obtaining a remedy and is therefore "preclude[d] . . . from pursuing these claims in this Court pursuant to section 1581(i)." *Id*. Accordingly, Defendant argues that the Court lacks subject matter jurisdiction to hear Plaintiff's case.

JURISDICTION

Plaintiff carries the burden of establishing jurisdiction. *See McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936). A court's determination of subject matter jurisdiction is a threshold inquiry. In the instant action, Plaintiff claims jurisdiction is proper pursuant to 28 U.S.C. § 1581(i). Compl. ¶ 3. It is well-settled that subsection (i) may only be invoked if the other jurisdictional provisions are "manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). Here, subsection (a) would have been available to Plaintiff because the correct avenue for challenges to

[1] All citations to the Unites States Code refer to the 2006 edition unless otherwise stated.

[2] *Hebei* involved separate unliquidated entries by the same importer of record.

liquidations is first to lodge a protest with Customs within 180 days of the liquidation and then to challenge any denial of that protest in this court. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). Plaintiff filed a protest but it did so three years after the alleged erroneous liquidation. It is established that "a remedy is not inadequate simply because [a party] failed to invoke it within the time frame it prescribes." *Id.* (internal quotations and citations omitted). Accordingly, Plaintiff had an adequate remedy for its alleged erroneous liquidation, but it lost that remedy because its protest was untimely, not because the remedy was inadequate.

It is a tenet of customs law that the importer has a duty to monitor liquidation of entries. *Id.* (citations omitted). Plaintiff concedes this point. Pl.'s Resp. at 1–2. Therefore Plaintiff's claim that it "was first made aware [in June 2012] that these three entries had been erroneously liquidated as entered in April and May of 2008" is insufficient to extend the statute of limitations. *Id*. at 4. Plaintiff has the duty to monitor the liquidation of its entries, and a statutory remedy is in place to challenge any erroneous liquidations for a diligent importer who complies with this duty. Plaintiff's failure to pursue that remedy in a timely manner does not fall under the rubric of "manifestly inadequate" and therefore Plaintiff cannot invoke subsection (i) jurisdiction in this case.

Plaintiff claims that "filing a protest in November 2008 would not have resulted in liquidation at the proper rate" because the final rate was unknown until the court's decision in *Hebei.* Pl.'s Resp. at 6–7. Plaintiff asks the Court to consider its "protest remedy under section 1581(a) manifestly inadequate" on that ground. *Id.* at 7. While recognizing that prior decisions have "not found that filing a protest is manifestly inadequate in similar cases," Plaintiff argues that an "importer only definitively knows that the rate was incorrect upon final resolution of the proceeding" before the Department of Commerce, which here was the date of publication of the *Hebei* decision.

This argument is unpersuasive. Had Plaintiff followed the proper procedure by first timely protesting the liquidation within 180 days, and, if the protest was denied, filing in this court within two years of liquidation, it could have brought this action under 28 U.S.C. § 1581(a). As Defendant points out, "[w]hile the lack of information about the final rate would have prevented [Customs] from acting to grant the protest," it "would have kept a protest pending until instructions [as to the final rate] became available." MTD at 12. Plaintiff claims filing a protest to protect its rights before the final rate is determined would be "a waste of administrative resources" and filing a suit in this court to challenge any denial would be "a waste of

judicial resources." Pl.'s Resp. at 7. But this efficiency argument does not demonstrate that the subsection (a) remedy is manifestly inadequate. Therefore, the Court lacks jurisdiction to hear this case under subsection (i) and grants Defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1).

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendant's motion to dismiss is granted; and it is further

ORDERED that Plaintiff's motion for oral argument is denied.

Judgment to enter accordingly.

Dated: September 8, 2014
New York, NY

/*s*/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 14–104

BEIJING TIANHAI INDUS. CO., LTD., Plaintiff, v. UNITED STATES, Defendant, NORRIS CYLINDER COMPANY, Defendant-Intervenor.

Before: Richard K. Eaton, Senior Judge
Court No. 12–00203

[Plaintiff's USCIT Rule 56.2 motion is granted in this targeted dumping case and the Final Determination is remanded to the Department of Commerce.]

Dated: September 9, 2014

Mark E. Pardo and *Andrew T. Schutz*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, D.C., argued for plaintiff. With them on the brief was *Brandon M. Petelin*.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, D.C., argued for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Deborah R. King*, Senior Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Washington, D.C.

Edward M. Lebow and *Nora L. Whitehead*, Haynes and Boone, LLP, of Washington, D.C., argued for defendant-intervenor.

OPINION AND ORDER

EATON, Judge:

Before the court is plaintiff Beijing Tianhai Indus. Co., Ltd.'s ("Tianhai" or "plaintiff") USCIT Rule 56.2 Motion for Judgment on

the Agency Record challenging the United States Department of Commerce's ("Commerce" or "the Department") Final Determination published as *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 26,739 (May 7, 2012) (final determination of sales at less than fair value), and accompanying Issues and Decision Memorandum ("Issues & Dec. Mem.") (collectively, "Final Determination"), and the resulting order published as *High Pressure Steel Cylinders From the People's Republic of China*, 77 Fed. Reg. 37,377 (June 21, 2012) (antidumping duty order) (the "Order"). Resp'ts' Mot. for J. on the Agency R. Pursuant to Rule 56.2 (ECF Dkt. No. 32).

In the Final Determination, Commerce found that plaintiff had engaged in "targeted dumping" and, therefore, that it was permitted to apply an alternate methodology to calculate plaintiff's dumping margin. Issues & Dec. Mem. at cmt. 4. In making that finding, the Department determined that plaintiff had engaged in a pattern of sales under 19 U.S.C. § 1677f-1(d) (2006) which operated to mask sales at less than fair value made during the October 1, 2010 through December 31, 2010 period (the alleged period of targeted dumping). Plaintiff objects that (1) the methodology used by the Department to find that Tianhai engaged in a "pattern" of targeted dumping is contrary to 19 U.S.C. § 1677f-1(d)(1) and unsupported by substantial evidence; (2) in any case, the Department should have limited the application of its targeted dumping remedy to only those sales that it identified as having been made during the targeted time period; (3) the Department should have considered other valid commercial reasons for the alleged pattern of targeted dumping; and (4) the Department improperly used its zeroing[1] methodology to calculate plaintiff's rate after making its finding of targeted dumping. Pl.'s Mem. of Law in Supp. of Mot. for J. on the Agency R. Pursuant to Rule 56.2 1–2 (ECF Dkt. No. 32) ("Pl.'s Br.").

For the reasons set forth below, plaintiff's motion is granted, in part, and defendant's Final Determination is remanded.

BACKGROUND

In 2011, in response to a petition filed by defendant-intervenor Norris Cylinder Company ("Norris" or "defendant-intervenor") alleging targeted dumping, the Department initiated an antidumping duty investigation of high pressure steel cylinders from the People's Republic of China ("PRC") and selected plaintiff as a mandatory

[1] Zeroing is a methodology used for calculating an exporter's weighted average dumping margin "where negative dumping margins (i.e., margins of sales of merchandise sold at nondumped prices) are given a value of zero and only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) are aggregated." *Union Steel v. United States*, 713 F.3d 1101, 1104 (Fed. Cir. 2013).

respondent. High Pressure Steel Cylinders from the PRC, 76 Fed. Reg. 33,213 (Dep't of Commerce June 8, 2011) (initiation of antidumping duty investigation); Issues & Dec. Mem. The period of investigation ("POI") was October 1, 2010 through March 31, 2011, and the alleged period of targeted dumping was October 1, 2010 through December 31, 2010. Issues & Dec. Mem.

The Department issued its Preliminary Determination of sales at less than fair value on December 15, 2011, finding that plaintiff had engaged in targeted dumping during the October 1, 2010 through December 31, 2010 period. High Pressure Steel Cylinders from the PRC, 76 Fed. Reg. 77,964 (Dep't of Commerce Dec. 15, 2011) (preliminary determination of sales at less than fair value) ("Preliminary Determination"). In doing so, the Department used the targeted dumping test that has come to be known as the *Nails* test.[2] That "methodology . . . involves a two-stage test; the first stage addresses the pattern requirement [of 19 U.S.C. § 1677f-1(d)(1)(B)(i) (2006)] and the second stage addresses the significant-difference requirement" of that statutory provision. Preliminary Determination, 76 Fed. Reg. at 77,968. In applying the test, the Department determined that there was "a pattern of prices for comparable merchandise that differs significantly by time period (i.e., targeted dumping)." Preliminary Determination, 76 Fed. Reg. at 77,968.

To calculate plaintiff's antidumping duty rate, the Department used the average-to-transaction ("A-T") methodology[3] because it found that its normally used average-to-average ("A-A") methodology[4] could not properly account for the alleged targeted dumping. Preliminary Determination, 76 Fed. Reg. at 77,968. To calculate Tianhai's dumping margin, the Department applied the A-T methodology, with zeroing, to all of plaintiff's U.S. sales during the POI, not only to those sales that the Department found to be "targeted" using the *Nails* test. Preliminary Determination, 76 Fed. Reg. at 77,968.

In the Final Determination, the Department continued to use the

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[2] "The *Nails* test derives its name from the cases in which it was first used." *Timken Co. v. United States*, 38 CIT __, __ n.3, 968 F. Supp. 2d 1279, 1283 n.3 (2014) (citing Certain Steel Nails from the PRC, 73 Fed. Reg. 33,977 (Dep't of Commerce June 16, 2008) (final determination of sales at less than fair value and partial affirmative determination of critical circumstances); Certain Steel Nails from the United Arab Emirates, 73 Fed. Reg. 33,985 (Dep't of Commerce June 16, 2008) (notice of final determination of sales at not less than fair value)).

[3] The A-T methodology compares "the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions." 19 U.S.C. § 1677f-1(d)(1)(B).

[4] The A-A methodology compares "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(i).

Nails test to find that there was a pattern of sales that differed significantly by time period.[5] It again insisted that the differences could not be taken into account using the "A-A methodology because the A-to-A methodology conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group." Final Determination, 77 Fed. Reg. at 26,740; Issues & Dec. Mem. at cmt. 4. In using the A-to-T methodology, the Department continued to apply its zeroing methodology to all of plaintiff's U.S. sales. Final Determination, 77 Fed. Reg. at 26,740; Issues & Dec. Mem. at cmt. 4. This action challenging the Final Determination followed.

STANDARD OF REVIEW

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).

DISCUSSION

I. LEGAL FRAMEWORK

A. Statutory Framework

During an antidumping investigation, the Department ordinarily determines whether dumping has occurred by using one of the two methodologies identified in 19 U.S.C. § 1677f-1(d)(1)(A). The general rule is that, when determining an exporter's dumping margin, the Department should compare the weighted average normal value of an exporter's merchandise to the average of the exporter's export prices (or constructed export prices) during the POI. If the difference between the weighted average normal value of an exporter's merchandise and the average of an exporter's export prices is a positive number, then dumping is present. Thus, 19 U.S.C. § 1677f-1(d)(1)(A)(i) provides for an average-to-average comparison of an exporter's transactions, a methodology known as A-A. 19 U.S.C. § 1677f-1(d)(1)(A)(ii) also permits the Department to determine an exporter's margin "by comparing the normal values of individual transactions to the export prices . . . of individual transactions for comparable merchandise" ("T-T"), but the Department's regulations limit the use of

[5] The Department made one adjustment to the dates of the sales within the allegedly targeted period. That change is not challenged here.

this methodology. *See* 19 C.F.R. § 351.414(c)(2) (2012) ("The Secretary [of Commerce] will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.").

In enacting the statute, however, Congress recognized that there might be situations where the general "methodology cannot account for a pattern of prices that differ significantly among purchaser, regions, or time periods, *i.e.*, where targeted dumping may be occurring." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. DOC. NO. 103–316, vol. 1, at 843 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178 ("SAA"). Congress anticipated that the patterns of sales might be identifiable on the basis of "purchasers, regions, or time periods."[6] SAA, H.R. DOC. NO. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178. Accordingly, the statute provides that the Department

> may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) the administering authority explains why such differences cannot be taken into account

using A-A or T-T. 19 U.S.C. § 1677f-1(d)(1)(B) (2006); SAA, H.R. DOC. NO. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178 ("Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of [A-A] or [T-T]"). Thus, the statute requires that the Department (1) identify a pattern of pricing that differs significantly among purchasers, and (2) explain what about that particular pattern makes the use of A-A or T-T inappropriate. If the Department finds that 19 U.S.C. § 1677f-1(d)(1)(B)(i) and 19 U.S.C. § 1677f-1(d)(1)(B)(ii) are satisfied, it may compare the weighted average of the normal values to each individual export (or constructed export) price when determining an exporter's margin. Put another way, if both requirements of 19 U.S.C. § 1677f-1(d)(1)(B) are met, the Department may use A-T to determine the exporter's dumping margin.

[6] As noted, in this case, Norris alleged targeting on the basis of time period.

"While the statute prefers the two general methodologies [(A-A and T-T)] over the exception methodology [(A-T)], it is silent as to when to apply the general two methodologies. Further, the statute is also silent as to the body of sales to which Commerce will apply the exception methodology." *Chang Chun Petrochemical Co. v. United States*, 37 CIT __, __, 906 F. Supp. 2d 1369, 1375 (2013) (citation omitted). The so-called *Chevron* line of cases provides guidance to Courts when a statute is silent or ambiguous. *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). "[A]gencies are entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.'" *SKF USA Inc. v. United States*, 254 F.3d 1022, 1030 (Fed. Cir. 2001) (quoting *Chevron*, 467 U.S. at 843). Thus, because of the gap in the targeted dumping provision left by Congress, this Court has repeatedly held that the Department's policies filling that gap are entitled to some deference. *See Timken Co. v. United States*, 38 CIT __, __ n.7, 968 F. Supp. 2d 1279, 1286 n.7 (2014); *Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT __, __, 918 F. Supp. 2d 1317, 1320–21 (2013); *Chang Chun Petrochemical*, 37 CIT at __, 906 F. Supp. 2d at 1375; *Mid Continent Nail Corp. v. United States*, 34 CIT __, __, 712 F. Supp. 2d 1370, 1376–77 (2010).

B. Regulatory Framework and Departmental Practice

Although the Department has the authority to promulgate regulations and establish practices where Congress has left statutory gaps, its discretion is not unfettered. Moreover, once the Department has promulgated a regulation, it is obliged to follow its own regulation so long as the regulation remains in force. *Pujiang Talent Diamond Tools Co. v. United States*, 37 CIT __, __, Slip Op. 13–58, at 15 (2013), *aff'd* 561 Fed. App'x 988 (Fed. Cir. 2014) (citing *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376, 1382 (Fed. Cir. 2009)). Where the Department has not taken the formal step of promulgating a regulation, but has established a practice, it must follow that practice unless it has provided an explanation for its changed approach. *See Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 37 CIT __, __, Slip Op. 13–77, at 13–14 (2013) (citation omitted).

1. Commerce's Regulations

In 1997, as part of the implementation of the provisions of the Uruguay Round Agreements Act, the Department promulgated regulations regarding the targeted dumping provisions of 19 U.S.C. § 1677f-1(d)(1)(B). Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,373–76 (Dep't of Commerce May 19, 1997). In 2008, however, the Department issued a notice, without first seeking spe-

cific public comment, withdrawing these regulations. *Gold East Paper*, 37 CIT at__, 918 F. Supp. 2d at 1325; 19 C.F.R. § 351.414(f) (2007); Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74,930 (Int'l Trade Admin. & Imp. Admin. Dec. 10, 2008) ("Withdrawal Notice").

Prior to the issuance of the Withdrawal Notice, 19 C.F.R. § 351.414(f) contained the following language:

> (f) Targeted dumping—(1) . . . the Secretary may apply the average-to-transaction method . . . in an antidumping investigation if: (i) As determined through the use of, among other things, standard and appropriate statistical techniques, there is targeted dumping in the form of a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time . . . .
>
> (2) *Limitation of average-to-transaction method to targeted dumping.* Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping under paragraph (f)(1)(i) of this section.

19 C.F.R. § 351.414(f) (2007). The withdrawn regulation, therefore, required the Department to identify the set of sales that made up the "pattern of export prices" constituting the targeted dumping, and to limit its application of the A-T methodology to those sales. Thus, were the regulation in effect for this case, the A-T methodology would be applied only for the October 1, 2010 to December 31, 2010 period. Following withdrawal, however, the regulation no longer prohibited the Department from applying A-T to all of a respondent's sales and thus no longer restricted the use of A-T to only those sales that constitute the pattern of "targeted dumping."

2. The Nails Test

In order to determine whether the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(i) have been met under the *Nails* test, the Department engages in a two-step statistical analysis. The first step of the test, also known as the "standard deviation test," seeks to determine whether there is "a pattern of sales" consistent with targeted selling of merchandise. To do so here, the Department "determined the share of subject merchandise sales allegedly targeted by time period that were at prices more than one standard deviation below the weighted-

average price during all time periods, targeted and not-targeted." Def.'s Resp. to Pl.'s Mot. for J. upon the Agency R. 13 (ECF Dkt. No. 47) ("Def.'s Br.") (citing Issues & Dec. Mem. at cmt. 4). The Department performed this "test on a product-specific basis, using the weighted-average price for the alleged targeted time period (October through December 2010), and for the time period not alleged to be targeted (January through March 2011)." Def.'s Br. 13–14 (citing Issues & Dec. Mem. at cmt. 4).

Under the standard deviation test, Commerce finds that a pattern of sales at differing prices is present "if the volume of sales that are more than one standard deviation below the weighted average price exceeds 33 percent of the total volume of the respondent's sales of subject merchandise during the allegedly targeted period." Def.'s Br. 14 (citing Issues & Dec. Mem. at cmt. 4). Thus, in a case in which targeting based on time-period has been alleged, the Department compares the individual prices of the sales during the allegedly targeted period to the weighted average price of all sales during that period in order to determine the range of sales prices, and finds a pattern to be present if more than a third of those individual sales are at more than one standard deviation away from the weighted average.

If the Department determines that more than 33 percent of the sales in the allegedly targeted period are more than one standard deviation from the weighted average, i.e., that a pattern of differing prices exists, it proceeds to the second step of the *Nails* test, also known as the "gap test," to determine if the identified pattern of differently priced sales represented a "significant difference" in pricing. The Department

> first calculates the difference between the weighted-average price of allegedly targeted sales and the next higher weighted-average price of sales to a non-targeted [time period] (the "target gap"). Next, Commerce calculates the average difference, weighted by sales volume, between the prices to non-targeted [periods] (the "non-target gap"). Finally, the agency compares the target gap to the non-target gap. If the target gap exceeds the non-target gap for more than five percent of the exporter's sales to the alleged target by volume, Commerce finds that targeted dumping occurred.

CP Kelco Oy v. United States, 38 CIT __, __, Slip Op. 14–42, at 5 (2014) (footnote omitted). In other words, the Department looks to *see* if the variation in pricing between the targeted and non-targeted

group is greater than the variation in pricing within the non-targeted group for more than five percent of an exporter's sales.

This Court has found these two steps to be a reasonable method for determining whether the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(i) have been met. *See JBF RAK LLC v. United States*, 38 CIT __, __, Slip Op. 14–78, at 14–15 (2014); *CP Kelco Oy*, 38 CIT at __, Slip Op. 14–42, at 14–15; *Timken*, 38 CIT at __, 968 F. Supp. 2d at 1283; *Mid Continent Nail*, 34 CIT at __, 712 F. Supp. 2d at 1377–78.

II. ANALYSIS

A. Plaintiff Failed to Exhaust its Administrative Remedies Regarding its "Pattern" Argument

Plaintiff's central argument was not made during the administrative proceedings before Commerce. Plaintiff contends here, for the first time, that the legislative history and purpose of 19 U.S.C. § 1677f-1(d)(1)(B) show that the Department's application of the *Nails* test in this case was improper because the test can identify a pattern of targeted dumping based on non-dumped sales. Specifically, it argues that the Department's use of the *Nails* test is contrary to the intent of Congress when Commerce only identifies an extremely small number of dumped sales as part of the "pattern." For plaintiff, because, here, the test can be met by identifying outlier sales that are not at less than fair value, the test does not necessarily identify a "pattern" of sales at less than fair value. Rather, according to plaintiff, it only identifies a pattern of sales at disparate pricing. Thus, plaintiff argues that the *Nails* test fails to meet the statutory requirement of identifying a "pattern" if a substantial number of the disparately priced sales are not also sales at less than fair value (i.e., sales that are non-dumped). Pl.'s Br. 11–12.

The Department and defendant-intervenor object to this argument being raised for the first time in Tianhai's brief before the court, and Tianhai concedes that it never made this argument during the administrative proceedings. *See* Pl.'s Reply Br. 2–5 (ECF Dkt No. 50) ("Pl.'s Reply"). Instead, plaintiff asserts that its failure to argue this position before the Department should be excused under the "pure question of law" exception. Pl.'s Reply 2. This argument is unavailing.

"[W]here appropriate," a Court shall "require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (2006); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013). "'The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consid-

eration before raising these claims to the Court.'" *Shandong Huarong Machinery Co. v. United States*, 30 CIT 1269, 1305, 435 F. Supp. 2d 1261, 1292 (2006) (quoting *Ingman v. U.S. Sec'y of Agric.*, 29 CIT 1123, 1126 (2005)). "This court has discretion to determine when it will require the exhaustion of administrative remedies." *Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1321 (2013) (citation omitted). Accordingly, "failure to exhaust administrative remedies is not always fatal to a party's objections to administrative action," and courts have excused a party's failure to meet the exhaustion requirement where the raised objection is a "pure question of law." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1255, 1266–67 (2014) (discussing the exceptions).

One of the purposes of the exhaustion requirement is the "protect[ion of] administrative agency authority." *Itochu Bldg. Prods. v. United States*, 733 F.3d 1140, 1145 (Fed. Cir. 2013) (citation omitted). For this reason, the "pure question of law" exception has only been applied where "[s]tatutory construction alone is sufficient to resolve [the] case." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003). Thus, even where a question of statutory construction is raised, the claim must be one that requires no exercise of agency discretion. *See Itochu*, 733 F.3d at 1146 (citing *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007)).

Plaintiff asserts that its failure to exhaust its administrative remedies should be excused because its challenge is a pure question of law. First, it maintains that the pattern and explanation requirements of 19 U.S.C. § 1677f-1(d)(1)(B) are unambiguous and are "explicit requirements [that] Commerce must satisfy before resorting to an alternative price comparison methodology." Pl.'s Reply 2. According to plaintiff, its objection is a pure question of law "because Commerce failed to satisfy the[] enumerated [pattern and explanation] requirements in the statute." Pl.'s Reply 2. Thus, plaintiff's position is that 19 U.S.C. § 1677f-1(d)(1)(B) provides such a clear congressional directive to the Department, that no exercise of agency discretion is needed to determine whether its requirements have been met. The court is not persuaded by this argument.

This Court has repeatedly held that 19 U.S.C. § 1677f-1(d)(1)(B) is sufficiently ambiguous to permit the Department some discretion as to what methodologies it may use to meet the statutory pattern and explanation requirements. Indeed, as noted, this Court has upheld the *Nails* test itself as a reasonable method for determining whether the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(i) have been met. *See*

CP Kelco Oy, 38 CIT at __, Slip Op. 14–42, at 15; *Mid Continent Nail*, 34 CIT at __, 712 F. Supp. 2d at 1377–78. Because the Department has some discretion to determine the methodology it may use, this is not a case where the construction of a statute may properly be considered without the input of the department to which its administration is entrusted. *See Fuwei Films (Shandong) Co. v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1381, 1384, 1385 (2011) (holding that the pure question of law exception "only *might* apply for a clear statutory mandate that does not implicate Commerce's interpretation of the statute under the second step of *Chevron* . . . . The pure question of law exception cannot apply [where an agency has discretion] because its application would undermine the very purposes the exhaustion requirement is designed to protect").

Beyond its "pure question of law" claim, plaintiff further contends that the Department's commentary on other arguments advanced during the administrative proceess excuses its failure to make its argument in the underlying proceeding. In the Final Determination, the Department responded to several arguments that Tianhai made in its case brief attacking the *Nails* test's methodology, challenging the application of A-T to a respondent's entire sales database, arguing against the use of zeroing, and positing that Commerce should apply a *de minimis* standard. In responding to these arguments, the Department explained its interpretation of the statute in relation to the particular arguments that plaintiff advanced. *See, e.g.*, Issues & Dec. Mem. at cmt. 4 ("The Department finds that the language of [19 U.S.C. § 1677f-1(d)(1)(B)] of the Act does not preclude adopting a similarly uniform application of the alternative A-to-T methodology for all transactions when satisfaction of the statutory criteria suggests that application of the A-to-T methodology is the appropriate method. The only limitations the statute places on the application of the alternative A-to-T methodology are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the alternative A-to-T methodology are satisfied, [19 U.S.C. § 1677f-1(d)(1)(B)] does not limit application of the alternative A-to-T methodology to certain transactions." (footnotes omitted)). According to plaintiff, because the Department explained its interpretation of 19 U.S.C. § 1677f-1(d)(1)(B) when rejecting these arguments, the Department's "claim that Commerce lacked an opportunity to articulate its interpretation of the statute is baseless." Pl.'s Reply 4 (citation omitted) (internal quotation marks omitted).

While the Federal Circuit has recognized that the Court of International Trade may reach a question not presented to the Department if "additional proceedings would [not] further develop the inter-

pretation offered," doing so is not appropriate here. *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1029 n.4 (Fed. Cir. 2007). Here, the Department was never asked to make a determination on, and did not directly address, whether the pattern requirement of 19 U.S.C. § 1677f-1(d)(1)(B) could be satisfied by a showing of disparately priced, but non-dumped, sales. Because there is no indication that Commerce would not have addressed this question, brought up here for the first time, it would have been "preferable to have the agency's interpretation of the statute that it is entrusted to administer, set forth on the administrative record." *Fuwei Films*, 35 CIT at __, 791 F. Supp. 2d at 1384 (citations omitted). Preserving the Department's authority to directly address an issue in the first instance is one of the central purposes of the exhaustion requirement, and the court will not abandon that purpose here by reaching an argument not plainly raised before Commerce. *See Itochu Bldg. Prods.*, 733 F.3d at 1145.

Accordingly, because plaintiff failed to exhaust its administrative remedy with respect to its "pattern" argument, the court will not consider it.

B. The Department Did Not Adequately Explain Why A-to-A or T-to-T Could Not Take into Account the Difference in Pricing

Before the Department, and again here, plaintiff argues that Commerce failed to meet the explanation requirement of 19 U.S.C. § 1677f-1(d)(1)(B)(ii). As noted, that provision requires the Department to explain why the differences in the pattern of prices identified in 19 U.S.C. § 1677f-1(d)(1)(B)(i) "cannot be taken into account" using the standard methodologies. Thus, if Commerce seeks to use A-T, it must explain why it cannot use A-A and T-T. Here, the Department's two-sentence explanation for why the pattern it identified could not be taken into account by the standard methodologies was insufficient because that explanation did nothing more than state the conclusion that the requirements of 1677f-1(d)(1)(B)(i) had been met.

After stating that it had "found targeted dumping for the final determination because there was a pattern of prices that differ significantly by time period," the Department continued that,

> [i]n doing so, the Department finds that the pattern of price differences identified cannot be taken into account using the standard A-to-A methodology because the A-to-A methodology conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Thus, the Department finds, pursuant to [19 U.S.C. § 1677f-

> 1(d)(1)(B)(ii)], that application of the standard A-to-A methodology would result in the masking of dumping that is unmasked by application of the alternative A-to-T methodology when calculating [plaintiff's] weighted-average dumping margin.

Issues & Dec. Mem. at cmt. 4. This explanation neither makes mention of how the Department reached this conclusion nor references any record evidence supporting the conclusion. Moreover, the explanation ignores the potential use of the T-T methodology entirely. In other words, the Department's purported explanation says nothing more than that Commerce has found a pattern of differing prices and invokes the mathematical truism that, when you average a set of numbers, the differences among the individual numbers averaged, cease to be apparent. Thus, it is the case that any time a pattern of disparate pricing exists, averaging the prices will "mask" the differences in the individual prices.

A demonstration that a pattern of disparate pricing exists is sufficient to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(i) because that is what the statute demands in that subsection. Identification of a pattern, however, cannot be sufficient to also satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii), which creates a separate statutory explanation requirement, because to do so would render that second, separately provided for requirement, mere surplusage. Otherwise, the Department's satisfaction of 19 U.S.C. § 1677f-1(d)(1)(B)(i) would in every case also satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii). Therefore, if the Department's explanation here were sufficient, any time that "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" could be identified to satisfy the requirement of 19 U.S.C. § 1677f-1(d)(1)(B)(i), a mere description of what happens when you average a set of numbers would suffice to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii). The statute requires more.

In creating an explanation requirement in 19 U.S.C. § 1677f-1(d)(1)(B)(ii), Congress anticipated that "pattern[s] of prices that differ significantly among purchasers, regions, or time periods," could sometimes be accounted for without resorting to A-T. SAA, H.R. DOC. NO. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178. Accordingly, Congress required the Department to explain why A-A and T-T cannot account for a pattern of disparate prices before using A-T. SAA, H.R. DOC. NO. 103–316, vol. 1, at 843, *reprinted in* 1994 U.S.C.C.A.N. at 4178 ("Before relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average

or transaction-to-transaction comparison."). Thus, if no explanation other than the bare-bones invocation of the differing natures of the A-to-A and A-to-T methodologies would suffice to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii), as defendant and defendant-intervenor would have it, that statutory provision would be superfluous.

Here, the Department has supplied a conclusion but not an explanation. The Department's failure to provide an explanation sufficient to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(ii) was an error of law, and thus, a remand for the Department to provide such explanation is required. On remand, the Department must do more than simply state that the pattern identified to satisfy 19 U.S.C. § 1677f-1(d)(1)(B)(i) would be hidden using A-to-A. It must explain, based on record evidence, why the presence of the pattern renders A-to-A or T-to-T inappropriate methodologies.

C. The Application of 19 C.F.R. § 351.414(f) (2007)

Plaintiff argues that 19 C.F.R. § 351.414(f) (2007) was improperly withdrawn and that the Department's application of A-T to all of its sales is contrary to that regulation. To support its position, plaintiff relies on this Court's decision in *Gold East Paper*, a decision that was issued after the initial briefing in this case.[7] *Gold East Paper*, 37 CIT at __, 918 F. Supp. 2d at 1327–28; *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 37 CIT __, __ n.10, 925 F. Supp. 2d 1332, 1340 n.10 (2013); *see also Timken*, 38 CIT at __ n.8, 968 F. Supp. 2d at 1291 n.8.

This Court held in *Gold East Paper* that the Department's 2008 withdrawal of 19 C.F.R. § 351.414(f) (2007) was in violation of the "Administrative Procedure Act's ('APA') . . . notice and comment requirements." *Gold East Paper*, 37 CIT at __, 918 F. Supp. 2d at 1325 (citation omitted); Withdrawal Notice, 73 Fed. Reg. 74,930. In particular, the *Gold East Paper* Court concluded that the Department was required to provide pre-withdrawal notice and comment, and rejected Commerce's argument "that the withdrawal did not require notice and comment under the 'good cause' exception." *Gold East Paper*, 37 CIT at __, 918 F. Supp. 2d at 1326–28. This Court has similarly observed elsewhere, in dictum, that the Department's "defense of the withdrawal does not appear strong." *Baroque Timber*, 37 CIT at __ n.10, 925 F. Supp. 2d at 1340 n.10; *see also Timken*, 38 CIT at __ n.8, 968 F. Supp. 2d at 1291 n.8.

[7] The Department and defendant-intervenor have argued that this claim should be deemed waived because of plaintiff's failure to raise this issue in its opening brief. Because the court finds that plaintiff's argument fails on the merits, it declines to reach the waiver issue.

While it may be that the Withdrawal Notice failed to comply with the APA's notice and comment requirement, plaintiff's argument that the Department must continue to apply 19 C.F.R. § 351.414(f) (2007) in this case is unpersuasive. That is, even if Commerce erred in its issuance of the Withdrawal Notice, that error is harmless as it applies to plaintiff, and the Department is not bound by the withdrawn regulation here.

"It is well settled that principles of harmless error apply to the review of agency proceedings." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). Although the Federal Circuit has not passed on the applicability of the harmless error rule in the context of a violation of the notice and comment requirements of the APA specifically, this Court and several Courts of Appeals have considered the principle in this context. *See, e.g.*, *Impact Steel Canada Corp. v. United States*, 31 CIT 2065, 2073, 533 F. Supp. 2d 1298, 1305 (2007); *United States v. Reynolds*, 710 F.3d 498, 514–24 (3d Cir. 2013) (collecting cases); *United States v. Byrd*, 419 Fed. App'x 485, 490 (5th Cir. 2011) ("[W]e hold that the Attorney General's APA violations were also harmless error under the circumstances presented by Byrd."); *United States v. Dean*, 604 F.3d 1275 (11th Cir. 2010); *Conservation Law Found. v. Evans*, 360 F.3d 21 (1st Cir. 2004); *Sugar Cane Growers Co-op of Fl. v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479 (9th Cir. 1992).

When determining whether a party is prejudiced by a violation of the APA, the court must first identify the interest of the private party that is potentially prejudiced. The "relevant harm" to be analyzed when the Department fails to comply with the APA's notice and comment procedures is whether "an interested party has lost the opportunity to alter the agency's decision through full participation in the regulatory process." *Parkdale Int'l, Ltd. v. United States*, 31 CIT 1229, 1237, 508 F. Supp. 2d 1338, 1348 (2007) (citing *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991)). In other words, the application of a particular regulation to a party is not the harm that must be demonstrated to obviate agency action for failure to comply with notice and comment procedures.[8] Rather, a party must show that it was injured by being prevented from participating in a public discussion with the agency about the proposed regulation. *See, e.g.*, *Byrd*, 419 Fed. App'x at 491 ("Byrd was also not prejudiced . . . . He neither proposes comments he would have made

[8] The court recognizes that there is some disagreement as to the proper harm to be considered as part of a harmless error analysis for violations of the APA's notice and comment requirement. *See Mid Continent Nail Corp. v. United States*, 38 CIT __, __, Slip Op. 14–72, at 30–31 (2014).

during a comment period nor did he choose to involve himself in the post-promulgation comment period." (citation omitted) (internal quotation marks omitted)).

Where "the technical errors in the process used did not prevent the exchange of views, information, and criticism between interested persons and the agency," errors in following the notice and comment requirements may be found to be harmless. *Reynolds*, 710 F.3d at 517, 518 (internal quotation marks omitted) ("Technical errors are often harmless absent a demonstration that the challenger would have made a comment to the rule not considered by the agency because these errors often do not prevent the purposes of notice and comment from being satisfied." (citing *Riverbend Farms*, 958 F.2d at 1487)).

Here, plaintiff can show no harm from its lost opportunity to alter the agency's decision. Public comments relevant to the Department's decision to withdraw 19 C.F.R. § 351.414(f) (2007) were submitted to the Department prior to the publication of the Withdrawal Notice, having been submitted by other interested parties. Unlike those interested parties, Tianhai submitted no comments to the Department either before or after the Withdrawal Notice was issued, and Tianhai has identified no arguments it would have made that were not presented to the Department by others. Accordingly, the Department's failure to invite notice and comment prior to issuing the Withdrawal Notice was harmless error as to Tianhai.

First, it is clear that a public conversation regarding the future enforcement of the targeted dumping statute, including the scope of the application of A-T and, therefore, 19 C.F.R. § 351.414(f) (2007), was occurring between the Department and others interested in the issue, prior to the issuance of the Withdrawal Notice. This conversation began, at least officially, when the Department sought public comments on its targeted dumping methodology on October 25, 2007, and continued through a second request for public comments on May 9, 2008, well before the issuance of the Withdrawal Notice on December 10, 2008. Targeted Dumping in Antidumping Investigations, 72 Fed. Reg. 60,651, 60,651 (Dep't of Commerce Oct. 25, 2007) (request for comment) ("First Comment Request") ("[T]he Department requests comments and suggestions on what guidelines, thresholds, and tests it should use in determining whether targeted dumping is occurring."); Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations, 73 Fed. Reg. 26,371, 26,372 (Dep't of Commerce May 9, 2008) (request for comment) ("Second Comment Request") ("[T]he Department requests comment on the application of the alternative calculation methodology (average–to-transaction comparison) and the conditions, if any,

under which the alternative methodology should apply to *all* sales to the target even if some sales of a control number do not pass the targeted dumping test.") (collectively, the "Comment Requests").

Nineteen interested parties submitted comments to the First Comment Request, though Tianhai did not. *See* December 7, 2010 Comments on Targeted Dumping in Antidumping Investigations, IMPORT ADMINISTRATION, http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html. Several of those comments discussed the proper application of the A-T methodology once a finding of targeted dumping has been made. *See* Letter from David A. Hartquist, Executive Director, Committee to Support U.S. Trade Laws, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (Dec. 10, 2007), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/csustl-td-cmt-20071210.pdf (arguing that A-T should be applied to all sales if more than 20 percent of an importer's sales are found to be targeted); Letter from Daniel L. Porter, Counsel for the Japan Iron & Steel Federation, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (Dec. 10, 2007), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/jisf-td-cmt-20071210.pdf (discussing the proper remedy once a finding of targeted dumping has been made); Letter from Haruhiko Kuramochi, Executive Managing Director, Japanese Machinery Center for Trade and Investment, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce at 4–5 (Nov. 23, 2007), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/jmc-td-cmt-20071210.pdf ("Because the application of the average-to-transaction method is intended to unmask targeted dumping, there is no reason to apply the average-to-transaction method to non-targets. . . . As suggested by the WTO Appellate Body, non-targets are outside of the scope of targeted dumping, and therefore outside of the application of the targeted dumping methodology. For non-targets, therefore, the average-to-average method must apply. The average-to-transaction method should apply only to targets."); Letter from William A. Fennell, Stewart and Stewart, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (Dec. 10, 2007), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/stewart-stewart-td-cmt-20071210.pdf (arguing that A-T should be applied to all sales if more than 20 percent of an importer's sales are found to be targeted);

Letter from Jeffrey D. Gerrish, Counsel for United States Steel Corporation, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (Dec. 10, 2007), *available at* http://enforcement. trade.gov/download/targeted-dumping/comments-20071210/us-steel-td-cmt-20071210.pdf (arguing that A-T should be applied to all sales if more than 20 percent of an importer's sales are found to be targeted or where the extent of the targeting cannot be determined); Letter from Leo W. Gerard, International President, Counsel for United Steelworkers, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (Dec. 10, 2007), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments 20071210/usw-td-cmt-20071210.pdf (arguing that A-T should be applied to all sales if more than 20 percent of an importer's sales are found to be targeted).

In response to the Second Comment Request, fifteen interested parties submitted comments on or before June 23, 2008. June 23, 2008 Comments on Targeted Dumping in Antidumping Investigations, IMPORT ADMINISTRATION, http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html. Here, too, several interested entities also submitted comments relevant to 19 C.F.R. § 351.414(f) (2007). *See* Letter from Daniel L. Schneiderman, Counsel for Appleton Papers, Inc. and Bridgestone Americas Holding, Inc., to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (June 23, 2008), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/appleton-bridgestone-td-cmt-20080623.pdf (arguing that A-T should be applied to all sales if more than 20 percent of an importer's sales are found to be targeted); Letter from David A. Hartquist, Executive Director, Committee to Support U.S. Trade Laws, to Secretary of Commerce, U.S. Department of Commerce (June 23, 2008), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/ csustl-td-cmt-20080623.pdf (arguing that A-T should be applied to all targeted sales); Letter from Kessiri Siripakorn, Minister (Commercial), Department of Foreign Trade, Ministry of Commerce of Thailand, to Mr. David M. Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (June 6, 2008), *available at* http://enforcement.trade.gov/download/ targeted-dumping/comments-20080623/gov-thailand-td-cmt-20080623.pdf (seeking clarification as to whether A-T would be applied to all sales or only targeted sales); Letter from David A. Hartquist, Kelley Drye & Warren LLP, to Secretary of Commerce, U.S. Department of Com-

merce (June 23, 2008), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/kdw-td-cmt-20080623.pdf (arguing that A-T should be applied to all sales when 20 percent or more of sales are targeted); Letter from Katherine Lugar, SVP, Government Affairs, Retail Industry Leaders Association, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (June 23, 2008), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/rila-td-cmt-2008 0623.pdf (arguing that A-T should not be applied to all sales); Letter from Terence P. Stewart, Stewart and Stewart, to The Honorable David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (June 23, 2008), *available at* http://enforcement. trade.gov/download/targeted-dumping/comments-20080623/stewart-stewart-td-cmt-20080623.pdf (arguing that A-T should be applied to all sales when 20 percent or more of sales are targeted); Letter from Jeffrey D. Gerrish, Counsel for United States Steel Corporation, to David Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce (June 23, 2008), *available at* http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/ussteel-td-cmt-20080623.pdf (arguing that A-T should be applied to all sales if more than 20 percent of an importer's sales are found to be targeted or where the extent of the targeting cannot be determined).

Second, plaintiff submitted no comments in response to either of the two Comment Requests and did not do so in response to the Department's invitation of post-promulgation comments in the Withdrawal Notice itself. That is, after the Withdrawal Notice was issued, the Department solicited comments on the withdrawal. Withdrawal Notice, 73 Fed. Reg. at 74,931 ("Parties are invited to comment on the Department's withdrawal of the regulatory provisions governing targeted dumping in antidumping duty investigations. . . . To be assured of consideration, written comments must be received not later than January 9, 2009.").

While the Department's solicitation of comments after publication of a rule does not necessarily cure noncompliance with the notice and comment requirement under the APA, a party's failure to submit subsequent comment when given the chance to do so is evidence that it would have had nothing to add had it been given the opportunity to comment in the first instance. Moreover, even in its papers submitted in this action, plaintiff has failed to identify any argument that it would have raised if the proper notice and comment procedures had

been followed. *See Dean*, 604 F.3d at 1289 (Wilson, J. concurring) ("[L]egal authority supports the proposition that [plaintiff] suffered no prejudice because he didn't show what comment he might have made on the interim rule." (citing *Air Transp. Ass'n of Am. v. C.A.B.*, 732 F.2d 219, 224 n.11 (D.C. Cir. 1984)).

Consequently, even if the Department's withdrawal of 19 C.F.R. § 351.414(f) (2007) was in violation of the APA's notice and comment requirement, that error was harmless as it relates to the plaintiff in this case. Accordingly, as part of its analysis on remand in this case, the Department need not adhere to the requirements of 19 C.F.R. § 351.414(f) (2007). The Department, however, is free to limit the application of A-T to only the sales it identifies as targeted on remand, should it determine that such a limitation is appropriate.

D. Deferred Issues

Plaintiff also argues that the Department was (1) required to consider whether there were alternate explanations for the alleged targeted dumping, (2) that the Department was not permitted to employ its zeroing methodology,[9] and (3) that the Department should have considered whether the number of dumped sales was too small to justify application of the targeted dumping remedy. Each of these issues may be rendered moot as a result of the Department's determinations on remand. The Department has indicated that, "[s]ince the time of the underlying investigation in this case, [it] has continued to develop its methodology for examining the existence of masked dumping . . . ." Def.'s Br. 18 n.4. Should, for example, the Department employ this new methodology, and should it result in a finding that targeted dumping did not occur, the court's conclusions on each of these issues would be rendered advisory.

CONCLUSION and ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for judgment on the agency record is granted, in part, and Commerce's final determination is remanded; it is further

ORDERED that, on remand, Commerce shall issue a redetermination that complies in all respects with this Opinion and Order, is based on determinations that are supported by substantial record evidence, and is in all respects in accordance with law; it is further

[9] Although the court does not reach the issue here, it is worth noting that the Federal Circuit has "repeatedly addressed zeroing and has held 19 U.S.C. § 1677(35)(A) ambiguous and deferred to Commerce's reasonable interpretation of that statute." *Union Steel*, 713 F.3d at 1104.

ORDERED that, on remand, the Department may, in its discretion, choose to make a determination in accordance with its new targeted dumping methodology mentioned *supra* part II.D.; it is further

ORDERED that, should the Department continue to find that the application of the A-to-T methodology is appropriate, it must adequately explain why the standard methodologies cannot account for the pattern identified under 19 U.S.C. § 1677f-1(d)(1)(B)(i); it is further

ORDERED that the Department may, in its discretion, reopen the record to solicit any additional information it deems necessary to make its determinations; and it is further

ORDERED that the remand results shall be due on January 7, 2015; comments to the remand results shall be due thirty (30) days following filing of the remand results; and replies to such comments shall be due fifteen (15) days following filing of the comments.

IT IS SO ORDERED.

Dated: September 9, 2014
New York, New York

/*s*/ *Richard K. Eaton*
RICHARD K. EATON

Slip Op. 14–105

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, and EHWA DIAMOND INDUSTRIAL CO., LTD., SH TRADING, INC., AND SHINHAN DIAMOND INDUSTRIAL CO. LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 06–00248

[On grant of consolidated-plaintiff's motion for injunction.]

Dated: September 10, 2014

Daniel B. Pickard and *Maureen E. Thorson*, Wiley, Rein & Fielding, LLP, of Washington, D.C., for the plaintiff Diamond Sawblades Manufacturers Coalition.

Jeffrey S. Grimson, *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Daniel R. Wilson*, Mowry & Grimson, PLLC, of Washington, D.C., for the consolidated-plaintiff Hyosung D&P Co., Ltd.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White*, *Jr.*, Assistant Director. Of Counsel on the brief was *Aman Kahar*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

Bruce M. Mitchell, *Max F. Shutzman*, and *Ned H. Marshak*, Grunfeld, Desiderio, Lebowitz, Silverman & Kledstadt, LLP, of Washington, D.C., for defendant-intervenor Ehwa Diamond Industrial Co., Ltd.

Michael P. House and *Sabahat Chaudhary,* Perkins Coie, LLP, of Washington, D.C., for defendant-intervenors SH Trading Inc. and Shinhan Diamond Industrial Co. Ltd.

MEMORANDUM & ORDER

Musgrave, Senior Judge:

This memorandum explains the court's grant on September 9, 2014 of the motion of the consolidated-plaintiff Hyosung D&P Co., Ltd. ("Hyosung") to enjoin U.S. Customs and Border Protection ("Customs") from liquidating entries of diamond sawblades from the Republic of Korea exported by Hyosung that are subject to the antidumping proceeding challenged by this action, *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006) (final less-than-fair-value and critical circumstances determination) ("*Investigation*"), *amended* 75 Fed. Reg. 14126 (Mar. 24, 2010).

I

Conducted by the defendant International Trade Administration, U.S. Department of Commerce ("Commerce"), the *Investigation* was completed May 22, 2006 and timely challenged by domestic industry petitioners, Diamond Sawblades Manufacturers Coalition, on July 24, 2006. After certain other litigation, the antidumping duty order emanating from it was finally published November 4, 2009 and timely challenged by respondents, including Hyosung, in three separate actions, all filed December 4, 2009, that were subsequently consolidated into this action in July 2011.

Beginning in August 2011, and prevailing on October 24, 2011, the domestic industry sought and obtained, *inter alia*, continued suspension of liquidation in the form of a preliminary injunction ("PI") enjoining liquidation of entries of merchandise subject to the *Investigation* "pending a final and conclusive court decision in this litigation, and any appeals therefrom". ECF Doc. 58 (Oct. 24, 2011). For its part, Hysosung's substantive argument concerning the use of "zeroing" during the *Investigation* was later denied on the merits, *per Diamond Sawblades Manufacturers Coalition v. United States*, 37 CIT ___, Slip Op. 13–130 (Oct. 11, 2013), at the conclusion of USCIT Rule 56.2 motions and briefing.

Shortly before issuance of that decision, the defendant-intervenor Shinhan Diamond Industrial Co., Ltd. and SH Trading Inc. (collectively, "Shinhan") moved to modify the PI. ECF Doc. 138 (Sep. 27,

2013). Shinhan's motion was predicated on the fact that subsequent to issuance of the PI, Commerce published the final results of its first and second annual administrative reviews of the antidumping duty order on diamond sawblades from the Republic of Korea ("Korea") and that no party had sued to challenge those final results. *Id*. at 2. Because no case or controversy existed with regard to the final assessment of those duties on entries during the reviews, Shinhan argued that the antidumping duties assessed on relevant entries pursuant to those reviews are final and the entries should be liquidated. *Id*. at 6–8. Shinhan therefore requested modification of the PI to exclude entries of diamond sawblades from Korea subject to those administrative reviews. *Id*. at 12.

In responding to Shinhan's motion, Ehwa objected to amending the PI in the way Shinhan proposed, on the ground that doing so lifted the suspension of liquidation of Ehwa's entries for the first administrative review period where Ehwa had an assessed margin. ECF Doc. 139 at 4 (Oct. 8, 2013). However, because Ehwa did not have antidumping duty liability for the second administrative review period, it did not oppose the liquidation of those entries. *Id*. Therefore, Ehwa pleaded for modifying Shinhan's proposed amendment to preserve suspension of liquidation over its entries during the first administrative review. *Id*. No other response being apparent and the parties otherwise appearing in agreement, the court granted Shinhan's motion to alter the terms of the PI but as modified by Ehwa's proposal. ECF Doc. 147 (Oct. 18, 2013).

Hyosung did not file a response to Shinhan's motion, although it received notice of those proceedings, via its counsel at the time. Several months after the injunction was modified, counsel for Hyosung filed a motion to withdraw from this case, citing a "longstanding and unresolved commercial dispute with Hyosung." ECF Doc. 155 (Feb. 11, 2014). On March 3, 2014, the court granted that motion to withdraw. *See* ECF Doc. 158 (Mar. 3, 2014). The Hyosung corporation was therefore without representation in this judicial action for five and a half months until August 27, 2014.

Approximately two months after the withdrawal of Hyosung's counsel, on April 29, 2014, the defendant filed another motion to amend the October 18, 2013 preliminary injunction. The defendant's request was for the purpose of clarifying what it perceived as ambiguous language in the PI that did not, as amended in accordance with Shinhan's motion, permit issuance of liquidation instructions. *See* ECF Doc. 162 at 3 (Apr. 29, 2014). Proposing alternative language for enjoinder, the defendant's motion represented that "[a]ll parties to this action have reviewed the clarified language we are proposing and

have indicated that they consent to this modification." *Id*. at 1. On April 30, 2014, the court amended the PI as requested by the defendant. ECF Doc. 164 (entered Apr. 30, 2014).

On August 27, 2014, Hyosung obtained from the court, *ex parte*, a temporary restraining order ("TRO"), effective until September 10, 2014, to restrain liquidation of all unliquidated entries of its diamond sawblades. Hyosung represented that as a result of the completed first and second annual administrative reviews[1] that were undertaken pursuant to the antidumping duty order, it would suffer irreparable harm if its entries were liquidated prior to a final decision in this matter, including all appeals. Hyosung averred it was not consulted as to the modification of the PI in contravention of USCIT Rule 7(f), and that its importers have been receiving bills from Customs including antidumping duty assessments. The court issued a TRO the same day to preserve the *status quo*. ECF Doc. 182 (Aug. 27, 2014). Hyosung Br. at 6.

Yesterday, September 9, 2014, the court heard from interested parties on the remainder of Hyosung's motion (styled as "Motion for Temporary Restraining Order and Preliminary Injunction") concerning whether to continue enjoinder. In advance, the defendant filed opposition to that continuance, in which it agreed as to the basic background of the proceedings to this point (above detailed) but argued (1) diligence was lacking on Hyosung's part as a precondition to obtaining equity (2) the injunction Hyosung seeks is not a preliminary one but "permanent" one, albeit of limited duration, and (3) given the prior decision on Hyosung's claim in slip opinion 13130, Hyosung cannot establish a likelihood of success on the merits, which is one of the four necessary prongs considered for injunctive relief.

II

The court found the defendant's arguments unpersuasive as to why suspension of liquidation should not be revived or continued. The reasons therefor are as follows. First and foremost, the defendant's arguments, while carrying a certain appeal, overlook the primary purpose of injunction in these types actions, which is to continue to suspend liquidation pending a final decision on the merits, including all appeals thereof, not only to preserve the *status quo* pending the outcome of the litigation, but also to preserve the court's jurisdiction.

[1] *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 78 Fed. Reg. 11818 (Feb. 20, 2013) (first admin. review final results), and *Diamond Sawblades and Parts Thereof from the Republic of Korea*, 78 Fed. Reg. 36524 (Jun. 18, 2013) (second admin. review final results), *amended* 78 Fed. Reg. 46569 (Aug. 1, 2013). The first administrative review covers entries from January 23, 2009 through October 31, 2010, while the second covers entries from November 1, 2010 through October 23, 2011.

Cf. 19 U.S.C. §1516a(c)(2) (trade-remedy injunctive relief) *with* 28 U.S.C. § 1651 (All Writs Act).

It is true that preliminary injunction is a form of extraordinary relief, but injunction in these type of matters is statutory. As such, trade-remedy injunction is not "traditional," *i.e.*, of the type "predicated upon a cause of action, such as nuisance, trespass, the First Amendment, *etc*., regarding which a plaintiff must show a likelihood or actuality of success on the merits." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004). This is so, regardless of fact that in the absence of statutorily-specified standards for their issuance, this court's practice, from the start, has involved looking to the four prongs of the "traditional" test for injunction. *See Zenith Radio Corp. v. United States*, 1 CIT 53, 505 F. Supp. 216 (1980).

The defendant characterizes what Hyosung seeks as "a permanent injunction, albeit of limited duration", Def's Resp. at 5 (italics omitted), but the absence of a "traditional" equitable cause of action obviates any need to consider conversion of a preliminary injunction into a "permanent" form of final post-judgment relief. And "[t]here is no such thing as a suit for a traditional injunction in the abstract." *Klay*, 376 F.3d at 1097. Moreover, the "traditional" standards for obtaining a *preliminary* injunction, as a form of extraordinary relief, are actually *higher* than the standard for converting to (or commencing) *permanent* injunction after a final decision on the merits: proof of "actual success" is straightforward as compared to proof of "likelihood." *See Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987). And the fact that "likelihood" drops out of the equation does not bolster the defendant's argument, regardless of the present disposition of the consolidated-plaintiff. In any event, having acknowledged the limited temporal nature of the relief Hyosung seeks, Def's Resp. at 5, the defendant also acknowledges that a final decision on this action has not yet issued, from which appeal could lie, so the feasibility of a "permanent" injunction at this point is simply moot.

The defendant also argues *Wind Tower Trade Coalition v. United States*, 741 F.3d 89 (Fed. Cir. 2014) is on point. In that case, upon issuance of antidumping and counterveiling duty orders resulting from final affirmative determinations, Commerce applied the so-called "special rule" of 19 U.S.C. §§ 1671e(b)(2) and 1673e(b)(2) to make the orders prospectively effective from the date of the affirmative determination by the U.S. International Trade Commission, and Commerce also announced it was terminating the suspension of liquidation and refunding cash deposits on imports of subject merchandise that had occurred prior to the Commission's determination. Rep-

resentatives of the domestic industry brought suit to challenge that disposition and obtained TROs, but its motions for PIs were not found to have provided an adequate showing of likelihood of success on the merits, and the TROs dissolved. Importantly, however, when that plaintiff appealed this court's decision, the Court of Appeals for the Federal Circuit "reinstated the TROs pending full consideration of the issues." 741 F.3d at 94. That is essentially, if not precisely, what Hyosung is seeking here through its motion -- a revival of the suspension of liquidation.

More precisely, the relief Hyosung actually seeks at this stage of the litigation is revival of that part of the existing PI that had enjoined liquidation of its entries until it was modified, purportedly without Hyosung's consent or consultations with other parties and Commerce. The October 24, 2011 PI is still in effect; it has only been modified as to certain entries covered by the first and second review periods. Certainly the court can "modify an injunction in adaptation to changed conditions," regardless of whether that is expressly stated or retained in the existing PI. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). The question at this stage, thus, is not whether the TRO should continue, but whether the existing PI should be modified again.

"The decision whether to modify a preliminary injunction involves an exercise of the same discretion that a court employs in an initial decision to grant or deny a preliminary injunction." *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 141 (2d Cir. 2005). In the absence of consent, thus, the question is resolved, again, by resort to the familiar four-part test: (1) the likelihood of success on the merits of the underlying case; (2) whether irreparable injury occurs if injunctive relief is not granted; (3) whether the balance of hardships favors granting injunctive relief; and (4) whether injunction serves the public interest. *E.g.*, *Qingdao Taifa Group Co., Ltd. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009). On these factors, the court employs a "sliding scale," meaning that no single factor is dispositive, and "the weakness of the showing regarding one factor may be overborne by the strength of the others." *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993).

On the likelihood of success on the merits prong, the defendant argues that since Hyosung has already failed on the merits of its claims, the availability of injunctive relief is precluded. As discussed above, that overstates the law. Hyosung argues that a successful appeal of its substantive claim, relating to Commerce's use of zeroing, might mean that the antidumping duty order on diamond sawblades

from Korea was void *ab initio* as to Hyosung. *See* Hyosung Br. at 3. The court previously ruled against Hyosung; regardless, the "likelihood of success" of such an appeal pales in comparison to the harm Hyosung would suffer were its case to be mooted simply by the procedural expedient of liquidation's finality. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). This is in accordance with the principle that "19 U.S.C. § 1516a(c)(2) envisions the use of preliminary injunctions . . . to preserve proper legal options and to allow for a full and fair review of duty determinations before liquidation." *Qingdao Taifa*, 581 F.3d at 1378–79.

Considering the irreparable harm prong, the court accepts Hyosung's representation that if enjoinder is not imposed (or rather revived), liquidation of entries of subject merchandise imported from Hyosung will include antidumping duties assessed at the rate set forth in the liquidation instructions Commerce ordered to Customs in Message No. 4162301 dated June 11, 2014 or Message No. 4175304 dated June 24, 2014. It is well-settled that "liquidation of entries extinguishes the underlying *res* and the accompanying cause of action, stripping this Court of the ability to provide a remedy to an importer." *Laclede Steel Co. v. United States*, 20 CIT 712, 717, 928 F. Supp. 1182, 1188 (1996). And, as mentioned, a court has a duty to resist change, unless by act of God, or Congress, or other *force majeur*, in order to maintain the *status quo* and preserve jurisdiction during the pendency of a cause of action, including appeals.

On the balance of equities, the court concludes the hardships Hyosung will experience are much greater, on balance, than those Commerce will be exposed to. If Customs is permitted to continue to liquidate Hyosung's entries before a final judgment in this matter, and Hyosung ultimately prevails, it will effectively lose its right to appeal Commerce's decision. On the other hand, suspension of liquidation will merely postpone the final settlement of the payment of duties to the United States by Hyosung (or its importers). Postponement is "at most" an "inconvenience" to the United States. *See SKF USA Inc., v. United States*, 28 CIT170,175, 316 F. Supp. 2d 1322, 1328 (2004); *see also Timken Co. v. United States*, 6 CIT 76, 81, 569 F. Supp. 65, 71 (1983). That is, if the United States were to prevail in this case, it would collect, with interest if appropriate, any amount owed by Hyosung. *See SKF*, 28 CIT at 175, 316 F. Supp. 2d at 1328. It should be commonsense that inconvenience to the government in the delay of collecting duties should not outweigh the permanent deprivation of the rights of a party. *See id.*, 316 F. Supp.2d at 1328–29. The requested relief therefore appears appropriate here, because the potential harm posed by the permanent deprivation of Hyosung's rights

would outweigh any inconvenience the defendant or other parties would suffer as a result of the postponement of the collection of duties. But, the defendant attempts to convince that Hyosung's lack of diligence in seeking injunction prior to this point weighs against any entitlement to relief. The argument sounds from the maxims "he who seeks equity must do equity," or "equity aids the vigilant, not those who sleep on their rights." However, Hyosung's and the defendant's recitation of the long history of this proceeding, which has involved a lengthy period of a shifting *status quo*, a PI that the domestic industry obtained, and

> a confluence of timing factors including the termination of an attorney-client relationship, the shutdown of the federal government, the failure of counsel to other litigants to consult with Hyosung's counsel and to recognize Hyosung's live claim as a consolidated plaintiff, the failure to consult with Hyosung as required by the rules, the implementation of final modifications to the injunction that occurred when Hyosung had no counsel at all, and the ambiguities in and overbroad language of the proposed injunction language[,]

Hyosung Br. at 9–10, persuade that "good cause" exists for relieving Hyosung from its current predicament.

Considering the public interest, it is unquestionably best served by having the "correct amount" of antidumping duties assessed on subject merchandise. *E.g.*, *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 397, 590 F. Supp. 1260, 1265 (1984). It is also best served by proper representations to the court that its rules are being complied with. *See, e.g.*, USCIT R. 7(f).

Conclusion

On balance, the court is persuaded that granting Hyosung's motion for injunction, which involves a correction or modification of the current injunction that was erroneously amended without Hyosung's consent, is the correct course of action. A separate order to that effect will issue this date.

So ordered.

Dated: September 10, 2014
New York, New York

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