Slip Op. 03–104

VOLKSWAGEN OF AMERICA, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 96–00132

[Plaintiff's motion for summary judgment is denied, and Defendant's motion for summary judgment is denied.]

Date: August 13, 2003

Law Offices of Thomas J. Kovarcik (Thomas J. Kovarcik) for plaintiff Volkswagen of America, Inc.

Peter D. Keisler, Assistant Attorney General; John J. Mahon, Acting Attorney in Charge; Barbara S. Williams, Civil Division, Commercial Litigation Branch, United States Department of Justice; Yelena Slepak, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for defendant United States.

OPINION

GOLDBERG, Senior Judge: In 1994 and 1995, Plaintiff Volkswagen of America, Inc. ("VW") imported automobiles from foreign manufacturers Volkswagen Aktiengesellschaft ("VWAG") and Audi Aktiengesellschaft ("Audi"). VW then sold the imported automobiles to customers in the United States under consumer warranties. After importation, VW discovered some automobiles were defective. Pursuant to the consumer warranties, VW repaired the defects, and tracked the repairs by the individual Vehicle Identification Numbers ("VINs"). VW also maintained computer records of the cost for each warranty repair, and was reimbursed by VWAG and Audi for all warranty repairs.

VW appeals the United States Customs Service's[1] ("Customs") denial of the following protests in its complaint: 5301–95–100342,

[1] The United States Customs Service has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

5301–4–100550, 5301–5–100072, 5301–5–100178, 5301–5–100279, 5301–95–100342, 1803–94–100041, 1803–94–100042, 1803–94–100072, 5401–94–100010, 5401–94–100019, 5401–94–100016, 5401–93–100022, 5401–93–100026, 5401–93–100078, 1101–95–100590, 1101–95–100499, 1101–95–100679, and 1101–95–100708. These protests cover sixty-nine entries; however, VW maintains that it is only moving for summary judgment on eighteen of the entries. VW also states in its Reply Brief that it "moves to sever and dismiss from this action other entries and protests included in the Summons that are not set forth in Appendix 1." The Court will grant VW's motion to dismiss the other entries from the case, without prejudice. Therefore, the Court retains jurisdiction over the following: entry numbers 110–1030393–9, 110–9691248–7, 110–9691645–4, 110–1030968–8, 110–9691813–8, 110–1030670–0, 110–7609214–4, 110–9691328–7, 110–7609254–0, 110–7609111–2, 110–7157040–9, 110–7157943–4, 110–7157110–0, 110–7157246–2, 110–7158048–1, 110–7157706–5, 110–7157464–1, 110–7157491–4. These entries are contained in protest numbers 1101–95–100708, 1101–95–100679, 1101–95–100590, 1101–95–100499, 5301–4–100550, 5301–95–100342, 5301–5–100178, 5301–5–10072.

I. STANDARD OF REVIEW

This case is before the Court on VW's motion for summary judgment and Customs' cross-motion for summary judgment. The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d). A party opposing summary judgment must "go beyond the pleadings" and by his or her own affidavits, depositions, answers to interrogatories, and admissions to file, designate "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). "While it is true that Customs' appraisal decisions are entitled to a statutory presumption of correctness, see 28 U.S.C. § 2639(a)(1), when a question of law is before the Court, the statutory presumption of correctness does not apply." Samsung Electronics America, Inc. v. United States, 23 CIT 2, 5, 35 F. Supp. 2d 942, 945–46 (1999) (citing Universal Elecs., Inc. v. United States, 112 F.3d 488, 492 (Fed. Cir. 1997)) (hereinafter "Samsung III").

II. DISCUSSION

A. Jurisdictional Issues

The Court has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (2000).

Therefore, a prerequisite to jurisdiction by the Court is the denial of a valid protest. Washington Int'l Ins. Co. v. United States, 16 CIT 599, 601 (1992). Based on the following analysis, the Court concludes that VW filed a valid protest, and thus the Court has jurisdiction.

A protest is required to "set forth distinctly and specifically" the following information: (1) "each decision . . . as to which protest is made"; (2) "each category of merchandise affected by each decision . . ."; and (3) "the nature of each objection and the reasons therefor." 19 U.S.C. § 1514(c)(1) (2000). The implementing regulations expand the requirements, specifying that the protest must include "[a] specific description of the merchandise affected by the decision as to which protest is made"; and "[t]he nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a) (2002).

In the seminal case Davies v. Arthur, 96 U.S. 148 (1877), the Supreme Court articulated the rationale for the specificity required of protests:

> Protests . . . must contain a distinct and clear specification of each substantive ground of objection to the payment of the duties. Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Davies, 96 U.S. at 151.

Customs contends that the protests filed by VW were not distinct and specific since VW did not (a) tie specific repairs to specific entries and give the dollar amounts for the repairs; (b) state the amount of the allowance claimed; or (c) identify the claimed defects. Under Customs' reasoning, the protests' deficiencies undermined the rationale for requiring specificity in the protest, namely to notify Customs of the true nature of VW's protest so that Customs could correct any defect. Customs argues that this case is similar to Washington, because the claimed deficiencies in the protests would " 'eviscerate the protest requirements mandated by Congress and effectively require Customs to scrutinize the entire administrative record of every entry in order to divine potential objections and supporting arguments which an importer meant to advance.' " Custom's Brief at 10–11 (quoting Washington at 604).

The Court concludes that Customs' argument is not persuasive. In the principal case upon which Customs relies, Washington, the court held that an importer's protest of a Customs' classification ruling

was not valid because it did not counter with its own asserted classification. In that context, the Court found that the protests' deficiencies required Customs to analyze the entire administrative record to determine every possible classification the importer could assert, and argue against each possibility.

The critical distinction between this case and Washington is that VW is not challenging a classification. There is no alternative classification for VW to propose. Ideally, in challenging a classification an importer would provide Customs with the alternative(s) so that Customs could analyze sample evidence to determine the classification for the entire shipment. In this case VW has provided Customs with the regulation to apply: VW protested the liquidation because of "latent defects." Unlike the protest in Washington, Customs does not have to contemplate all of the statutory and regulatory provisions pertaining to liquidation to determine why VW is protesting the liquidation. Customs' real concern with VW's protests is that the protests will require Customs to evaluate the evidence of each repair to determine if the repaired defect existed at the time of importation, admittedly a time-consuming task. But the task remains the same even if VW listed all of the various defects in its protest. Customs would still have to analyze the evidence of repairs for every automobile, since the defects claimed are not uniform throughout the entries. Customs simply cannot avoid sifting through the entire evidentiary record in this type of claim.

Although VW's protests are distinct and specific in the spirit of Davies, VW's protests must contain the statutory and regulatory required elements for a valid protest. Because VW has set forth in its protest all of the required elements, VW has filed valid protests and the appeal from them is properly before the Court.

(1) VW's protest identified the decision protested

The regulations require the protestant to identify the decision "with respect to each category, payment, claim, decision, or refusal." 19 C.F.R. § 174.13(a). VW identified in its protests each decision as to which the protest was made, namely "the appraised value of the subject merchandise" in the attached entries. The attachments listed the entry numbers for entries of both defective and non-defective vehicles. Customs contends that VW was required to identify each defective vehicle, not simply identify entries that contained some defective vehicles. By including non-defective vehicles in the protests, Customs complains it is required to go through every entry and ascertain which vehicles were defective. The statute does not require that level of specificity in the protest, and as previously discussed, supra at 5–7, Customs cannot avoid sifting through each entry to evaluate the evidence of defects.

(2) VW identified the category of merchandise

VW identified the only category of the merchandise at issue, namely referring to "all merchandise covered by the above cited entry," and attaching the contested entries of automobiles to the protest.

(3) VW identified the nature of each objection

VW set forth the nature of its objection and the reason therefor in the identical language in protest numbers 1101–95–100708, 1101–95–100679, 1101–95–100590, 1101–95–100499, 5301–4–100550, 5301–95–100342, 5301–5–100178, 5301–5–10072:

> Protest is hereby made against your decision, liquidation, and assessment of duties on all merchandise covered by the above cited entry. The claim is that the appraised value of the subject merchandise, and consequently the duties assessed, should be reduced by a reasonable allowance for latent defects and/or maintenance costs.

VW Protests. The language of the protests and the attachments do not reference the specific vehicles that were defective or the types of latent defects, or tie the defects to specific vehicles. However, these are not fatal flaws in the protests. In Mattel v. United States, the court stated that the "one cardinal rule in construing a protest is that it must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made and was brought to the knowledge of the collector to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated." 72 Cust. Ct. 257, 260, 377 F. Supp. 955, 959 (1974)(citing Bliven v. United States, 1 Ct. Cust. 205, 207 (Ct. Cust. App. 1911)). Customs contends the absence of precise facts makes the protests invalid. However, the protest is the tool whereby the collector seeks the precise facts. VW's protests clearly contest the appraised values of the entries because many of the vehicles allegedly contained latent defects, and clearly request an allowance commensurate with those defects.

On a more practical level, Customs cannot now claim that the language of the protests was insufficient to appraise Customs that the claims were sought under 19 C.F.R. § 158.12. The protests in this case contained the same language as the protests in the Samsung case. Customs did not challenge the language of the protests in Samsung at any point during the administrative proceedings or before the Court. The protests in Samsung read as follows:

> Protest is hereby made against your decision, liquidation, and assessment of duties on all merchandise covered by the above cited entry. The claim is that the appraised value of the subject

> merchandise, and consequently the duties assessed, should be reduced by a reasonable allowance for latent defects and/or maintenance costs.

Samsung, Protest No. 1001–9–000182. It is disingenuous for Customs to claim now that the language of the protests by VW is insufficient when Customs has previously recognized the same language as a valid protest under 19 C.F.R. § 158.12. And while the Court is not constrained by Customs' admission of jurisdiction before the Court, it is persuasive here that when Customs first answered VW's complaint, Customs admitted that the Court had jurisdiction over this matter. See Answer, ¶1.

There is one problem with VW's protests that limits the Court's jurisdiction. It is clear that VW had in mind at the time of protest defective automobiles that had already been repaired; however, VW could not have had in mind defects to automobiles that had not been repaired before the protests were filed. Therefore, the Court does not have jurisdiction over the automobiles that were repaired after the date VW filed its protests with Customs.[2] See Mattel, 72 Cust. Ct. at 260, 377 F. Supp. at 959 ("a protest . . . must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made"). As a result, the Court does not have jurisdiction over vehicles repaired after the individual protest dates of each of the eighteen entries.

B. The Evidence Submitted by VW

19 C.F.R. § 158.12 allows an importer to claim an allowance in value for merchandise partially damaged at the time of importation.[3] "A protestant qualifies for an allowance in dutiable value where (1) imported goods are determined to be partially damaged at the time of importation, and (2) the allowance sought is commensurate to the diminuation in the value of the merchandise caused by

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[2] VW styled its request for re-liquidation as § 1514 protests, most of which were filed within 90 days of liquidation, and therefore were timely protested. Section 158.12, which provides for a refund of duties if the goods were defective at the time of importation, has no time limit to request the refund. Because VW filed its request as a protest, the Court does not opine at this time on whether VW could have filed a request for reconsideration under § 1520 or directly under § 158.12, and then protest a denial of that request. See, e.g., HRL 547062, May 7, 1999 (In a section § 158.12 claim, protestant first filed a claim under § 520(c) of the Tariff Act to seek a reduction in the appraised value because the goods were defective when imported. Protestant later filed a protest when the § 520(c) claim was rejected.).

[3] The relevant part of § 158.12 reads:

> (a) *Allowance in value.* Merchandise which is subject to ad valorem or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage. However, no allowance shall be made when forbidden by law or regulation . . . .

19 C.F.R. § 158.12 (2002).

the defect." Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 946. Customs opposes VW's claims under §158.12 because (A) § 158.12 does not cover damaged goods when the damage was not discovered at importation; and (B) VW has not provided adequate evidence to overcome the presumption of correctness afforded Customs' denial of VW's protests.[4]

(1) Section 158.12 Covers Damage Undiscovered at Time of Importation

Customs' first challenge to the substance of VW's claim under § 158.12 is that this section does not apply to latent damage which was undiscovered at the time of importation. VW, however, argues that the section applies to defects existing at the time of importation, even if those defects remain undiscovered until some time after entry.

For the reasons articulated in Saab Cars USA v. United States, Slip Op. 03–82 (July 14, 2003), this Court rejects Customs argument that the port director has to discover the defects at the time of importation. Therefore, § 158.12 applies to defects existing at the time of importation, whether or not the defects were discovered by the port director at the time of importation.

(2) VW has shown that material issues of fact exist in its claim for an allowance under 19 C.F.R. § 158.12

Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by clear and convincing evidence. See Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 946 (approving this evidentiary standard). In Samsung III, the Court set forth three requirements for an importer to successfully claim an allowance under 19 C.F.R. § 158.12. First, the importer must show that it contracted for "defect-free" merchandise. Samsung III, 23 CIT at 4–5, 35 F. Supp. 2d at 945. Second, the importer must be able to link the defective merchandise to specific entries. Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 945–46 (citing Samsung II, 106 F.3d at 379, n.4). Third, the importer must prove the amount of the allowance value for each entry. Id.

Regarding the first requirement, VW has easily shown that it contracted for "defect-free" merchandise. VWAG and Audi, the manufacturers, agreed to pay for the costs of repairing defects in the merchandise. See Samsung II, 106 F.3d at 379 (agreements between manufacturer and importer that some merchandise will be defective merely acknowledges the commercial reality that some goods will be defective, and does not mean that the importer contracted for defective merchandise). VW also warranted to its customers that the

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[4] Customs also challenges VW's claims because some repair claims allegedly include overhead expenses under 19 C.F.R. § 158.12. The Court will reserve that issue for trial.

goods were free of defects. See id. (evidence that importer warranted to its customers that the goods were defect-free demonstrated that importer ordered defect-free merchandise). And finally, VW, VWAG, and Audi, have a close corporate relationship, implying that VWAG and Audi would not sell VW defective merchandise. See id. at 379 (the close corporate relationship between manufacturer and importer implies Page 14 Court No. 96–00132 that the importer would not provide defective equipment to its consumers).

VW has shown there are material issues of fact regarding the second factor. Samsung III required the importer to establish by clear and convincing evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47. The importer in Samsung III did not provide sufficient evidence, offering only the consumer warranties and internal documents showing that claims for defects not existing at the time of importation were rejected. 23 CIT at 7–8, 35 F. Supp. 2d at 947–48. VW provides the evidence the Court in Samsung III sought: descriptions of repairs to each vehicle, and connects each vehicle repaired to a specific entry through the VINs. See Samsung III, 23 CIT at 8, 35 F. Supp. 2d at 947 ("a claimant should provide specific descriptions of the damage or defect alleged and, in some manner, relate that defective merchandise to a particular entry"). What remains for trial is development of the factual record to "independently confirm the validity" of the repair records, to establish that the defects did indeed exist at the time of importation. Id.

The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by clear and convincing evidence of the amount of the allowances for each entry of the defective vehicles. Samsung III, 23 CIT 9–11, 35 F. Supp. 2d at 948–50. VW has detailed repair records that indicate the costs for each repair. Through the VINs, VW can tie the repair costs to each entry. Trial is necessary to independently verify the amount of the allowances. Therefore, VW has created a material issue of fact regarding the amount of the allowances, which will be resolved at trial.

III. CONCLUSION

Because material issues of fact remain, the Court denies VW's motion for summary judgment and denies Customs' cross-motion for summary judgment. Factual questions remain regarding whether the defects existed at the time of importation, and the amount of allowances tied to those defects. See Samsung II at 380, n.4 ("For purposes of the remand, we specially note that only those defects in existence at the time of importation qualify for an 'allowance' in value. Samsung thus bears the burden of proving, for instance, that the costs to repair defects under consumer warranties were incurred to repair defects in existence at importation, and not, for instance, those caused by its own mishandling or by consumer misuse of the

equipment."). The factual record to be developed at trial will include any new, relevant evidence produced by VW to meet the burden of proof on its 19 C.F.R. § 158.12 claim. See E.I. Dupont de Nemours and Co. v. United States, 24 CIT 1301, 1302–04, 123 F. Supp.2d 637, 639–41 (2000) (pursuant to 28 U.S.C. § 1581(a), the importer is permitted to present new evidence to develop the Court's record).

Richard W. Goldberg
SENIOR JUDGE

Dated: August 13, 2003
New York, New York

ERRATA

Volkswagen of America, Inc. v. United States, Court No. 96–00132, Slip Op. 03–104, issued August 13, 2003.

- On page 12, the sentence "Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by clear and convincing evidence. See Samsung III, 23 CIT at 6, 35 F. Supp. 2d at 946 (approving this evidentiary standard)" should read "Customs requires the protestant to establish the elements of 19 C.F.R. § 158.12 by a preponderance of the evidence. Fabil Mfg. Co. v. United States, 237 F.3d 1335, 1340–41 (Fed. Cir. 2001)".
- On page 14, the sentence "Samsung III required the importer to establish by clear and convincing evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47" should read "Samsung III required the importer to establish by a preponderance of the evidence which entries had defects at the time of importation. 23 CIT at 7–9, 35 F. Supp. 2d at 946–47; see also Fabil Mfg., 237 F.3d at 1340–41".
- On page 14, the sentence "The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by clear and convincing evidence of the amount of the allowances for each entry of the defective vehicles. Samsung III, 23 CIT 9–11, 35 F. Supp.2d at 948–50" should read "The third and final requirement for a successful claim under 19 C.F.R. § 158.12 is a showing by a preponderance of the evidence of the amount of the allowances for each entry of the defective vehicles. Samsung III, 23 CIT at 9–11, 35 F. Supp. 2d at 948–50; see also Fabil Mfg., 237 F.3d at 1340–41".

August 18, 2003.

Slip Op. 03–105

NISSEI SANGYO AMERICA, LTD., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR.

Court No. 00–00113

[Plaintiff's motion for summary judgment is granted; liquidation instructions issued by U.S. Department of Commerce are remanded.]

Dated: August 18, 2003

Katten Muchin Zavis Rosenman (Michael E. Roll) for plaintiff Nissei Sangyo America, Ltd.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia McCarthy Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Patrick V. Gallagher, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant United States.

Hale & Dorr, LLP (Michael D. Esch) for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, Senior Judge: Nissei Sangyo America, Ltd. ("NSA"), moves for summary judgment upon the agency record pursuant to USCIT R. 56.1, contesting the issuance of liquidation instructions contained in message numbers 9305211 and 9305212 ("Liquidation Instructions") by the U.S. Department of Commerce ("Commerce") to the U.S. Customs Service[1] ("Customs"), dated November 1, 1999. The Liquidation Instructions ordered the liquidation of NSA's entries of Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") at the manufacturer's cash deposit rate rather than the rates determined for the manufacturer during the administrative reviews of May 6, 1996 and January 7, 1997.

For the reasons that follow, the Court holds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i).

I. BACKGROUND

NSA is an importer of Korean DRAMs manufactured by LG Semicon Co., Ltd. ("LG Semicon"), formerly Goldstar Electron Co., Ltd. ("Goldstar"). NSA purchased DRAMs manufactured by Goldstar

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[1] It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

from an unnamed reseller, and entered 38 shipments between February 17, 1994 and April 28, 1995. At the time of entry, an antidumping duty order was in effect covering DRAMs imported by NSA. See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, Antidumping Duty Order and Amended Final Determination, 58 Fed. Reg. 27,520 (May 10, 1993). Pursuant to the antidumping order of May 10, 1993, Commerce issued suspension instructions on May 25, 1993 ordering Customs to require NSA to post cash deposits of estimated antidumping duties applicable to the merchandise at issue, and such deposit was made. These suspension instructions provided deposit rates for all entries at the manufacturer's rate, and did not provide separate rates for importers or resellers. Id. at 27,522.

On June 15, 1994, Commerce initiated an administrative review of imports of DRAMs manufactured by Goldstar and Hyundai Electronics Co., Ltd. ("Hyundai"), another Korean manufacturer of DRAMs, that were imported into the United States from October 29, 1992 through April 30, 1994 ("POR 1"). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). Upon conclusion of the administrative review, Commerce determined that the dumping margin for Goldstar was 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996).

On June 15, 1995, Commerce initiated a second administrative review of imports of DRAMs manufactured by LG Semicon and Hyundai that were imported into the United States from May 1, 1994 through April 30, 1995 ("POR 2"). Initiation of Antidumping and Countervailing Duty Administrative Review, 60 Fed. Reg. 31,447 (June 15, 1995). Commerce determined that the dumping margin for LG Semicon was de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997).

Subsequently, Defendant-Intervenor Micron Technology, Inc. ("Micron") filed an action in opposition to the rates determined in POR 1 and POR 2 for LG Semicon. The Court of International Trade and the Court of Appeals for the Federal Circuit sustained the results of the first and second administrative reviews for LG Semicon DRAMs. Micron Technology v. United States, 23 CIT 55, 44 F. Supp. 2d 216 (1999); Micron Technology v. United States, 23 CIT 208, 40 F. Supp. 2d 481 (1999).

In addition, prior to the conclusion of the Micron cases, Commerce issued final results for a third administrative review period covering LG Semicon and Hyundai DRAMs that were imported from May 1, 1995 though April 30, 1996 ("POR 3"). During POR 3, Commerce is-

sued instructions to Customs to liquidate entries of LG Semicon and Hyundai DRAMs during that period irrespective of the identity of the importer.

Upon conclusion of the Micron cases, Commerce instructed Customs to assess antidumping duties on NSA's imports of LG Semicon DRAMs at the manufacturer's cash deposit rate upon entry. Commerce did not instruct Customs to liquidate NSA's entries at the rates determined for POR 1 or POR 2.

NSA contests the Liquidation Instructions and moves for summary judgment on the grounds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and were issued without advance notice to NSA. Commerce argues that the Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Alternatively, Commerce argues that NSA has not exhausted its administrative remedies or that otherwise the Liquidation Instructions are rational and in accordance with law.

II. STANDARD OF REVIEW

Assuming that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), 28 U.S.C. § 2640(e) (1994) governs this case. Section 2640(e) establishes the standard of review in an action brought under 28 U.S.C. § 1581(i), providing that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter provided in section 706 of title 5." Accordingly, the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

III. DISCUSSION

A. The Court has residual jurisdiction under § 1581(i).

As a threshold matter, Commerce argues that the Court lacks residual jurisdiction pursuant to 28 U.S.C. § 1581(i). Commerce claims that NSA had an alternative remedy under § 1581(c). It claims that NSA could have filed an independent request for an administrative review and/or participated in POR 1 and POR 2 under § 1581(c). Commerce argues that this alternative remedy renders § 1581(i) residual jurisdiction unavailable.

NSA argues that Commerce's prior practice dictated that the rates determined during the administrative review periods applied to all importers of the subject merchandise. This was the governing practice irrespective of whether the importer filed an individual request for an administrative review. In support of this argument, NSA points to Consolidated Bearings Company v. United States, 25 CIT ___ , 166 F. Supp. 2d 580 (2001) and ABC International Traders, Inc. v. United States, 19 CIT 787 (1995). Additionally, NSA points to two

notices recently published by Commerce. See "Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties," 68 Fed. Reg. 23,954 (May 6, 2003) ("Final Notice"); "Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to Notice of Opportunity To Request Administrative Review," 68 Fed. Reg. 26,288 (May 15, 2003) ("Amendment to Final Notice"). NSA argues that these notices constitute Commerce's admission that the Liquidation Instructions constituted a change from its past practice without notice and that, prior to the issuance of the Liquidation Instructions, entries for a given importer such as NSA were liquidated at the rate determined for the producer of the subject merchandise in the administrative review.

The merits of this action and the resolution of the jurisdictional issue are intertwined. Pursuant to § 1581(i), the Court does not possess jurisdiction to decide issues relating to antidumping law if review is specifically provided for by other subparagraphs of § 1581. "[I]t is well established that the residual jurisdiction of the court under [sub]section 1581(i) 'may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.' " Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 583 (quoting Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998) (internal citation omitted) (emphasis in original)).

In Consolidated, Commerce issued liquidation instructions that required Customs to assess antidumping duties on the plaintiff-importer's entries of the subject merchandise at the cash deposit rates in effect at the time of entry instead of at the weighted-average rates determined for the subject merchandise in the amended final results of the administrative review. The plaintiff-importer contested the instructions on the grounds that they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and requested that Customs apply the liquidation rates determined in the administrative review. The court found that it "[was] appropriate to exercise residual jurisdiction because jurisdiction under other subsections of section 1581 [was] not available." Id. at 583. The court explained that:

> Commerce's liquidation instructions also are not reviewable under subsection 1581(c) because they were not part of the Final Results or the Amended Final Results. Rather, such instructions are issued after relevant final determinations are published and, accordingly, it was impossible for [the importer] to contest the instructions as required under 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994). . . [F]inally, none of the other subsections of section 1581 of Title 19 provides a viable basis for jurisdiction. Id.

In the instant case, Commerce did not publish the Liquidation Instructions until November 1, 1999. This was after the final results of POR 1 and POR 2 were published on May 6, 1996 (61 Fed. Reg. 20,216) and January 7, 1997 (62 Fed. Reg. 965), respectively. The Liquidation Instructions changed Commerce's prior instructions in message number 7128114 issued for POR 2, dated May 8, 1997. Those instructions ordered Customs to liquidate "all entries covered by the [Order] at the rates established in the administrative reviews for the three Korean manufacturers: Goldstar, Hyundai, and Samsung." In addition, the reasoning set forth in ABC dictated that in the absence of another or "all other" rate, all importers of the subject merchandise were covered by the review. Thus, it was reasonable for NSA to assume that its entries would be liquidated at the administrative review rates and that it need not file an independent request for an administrative review pursuant to §1581(c). NSA, as an importer of DRAMs covered in POR 1 and POR 2, should have been able to rely on such assessment without apprehension that Commerce would change its mind later and change the properly assessed rates. Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 593.

Likewise, in ABC, the court held that the manufacturers' rates determined in the administrative review applied to the plaintiff-reseller since there was no other rate that could have applied:

> Absent an applicable reseller, or even an 'all other' rate, [the plaintiff] should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist. ABC, 19 CIT at 790.

Similarly, at the time of entry, a § 1581(c) request by NSA was wholly unnecessary, thereby failing to provide an adequate remedy under the reasoning set forth in ABC. Finally, Commerce does not present the argument that any other subsection of § 1581 provided NSA with an adequate remedy, and the Court finds no other subsection of § 1581 applicable.

Accordingly, the Court exercises jurisdiction over the matter under 28 U.S.C. § 1581(i).

B. The exhaustion doctrine does not dictate dismissal of NSA's claim.

Commerce argues that the exhaustion doctrine applies since Commerce never had an opportunity to properly consider NSA's argu-

ment. This was allegedly because NSA never presented the issue to Commerce in the appropriate administrative proceeding. NSA asserts that the exhaustion doctrine does not apply to the instant case because its circumstances qualify it as an exception. Specifically, NSA maintains that it had no reason to expect that Commerce would refuse to apply the manufacturer's rates to its entries. Alternatively, NSA claims that the issue at hand is of a purely legal nature that requires no further agency involvement.

The exhaustion doctrine requires that a party present its claims to the relevant administrative agency for the agency's consideration before bringing these claims to the Court. Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 586 (citing Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946)). However, there is no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. Id. (citing Alhambra Foundry Co. v. United States, 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988)). Thus, the Court has the discretion to determine proper exceptions to the doctrine of exhaustion. Id.

Exceptions to the requirement of exhaustion have been found where requiring it (1) would be futile or (2) would be "inequitable and an insistence of a useless formality." See Rhone Poulenc, S.A. v. United States, 7 CIT 135, 153, 583 F. Supp. 607, 610 (1984); United States Canes Sugar Refiners' Ass'n v. Block, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982). A second exception exists where the "question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question." See id.

The circumstances in the instant case fall under the "pure question of law" exception to the exhaustion doctrine. In Consolidated, the court set out the requirements for the "pure question of law" exception as follows: (a) plaintiff's argument is new; (b) this argument is of a purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce time and resources. See Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 587. This instant case presents a pure question of law that fits squarely within this exception for the reasons that follow: (a) NSA's presents a new argument to the Court; (b) the inquiry involves a question of law—namely, whether Commerce's liquidation instructions are arbitrary and capricious; (c) the inquiry does not require any special expertise by Commerce and/or the development of a special factual record either before or after the Court's consideration of the issue; and (d) for the reason mentioned in part (c), judicial inquiry here will not create undue delay or unnecessary expenditure. Id.

C. The Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

NSA argues that the Liquidation Instructions are arbitrary, capricious, and contrary to law, and were issued without advance notice to NSA. Commerce contends that the Liquidation Instructions are rational and in accordance with law, and were issued within the scope of its authority.

Commerce argues that since NSA did not argue that LG Semicon knew its goods were destined for export to the United States, NSA is not covered by the administrative reviews. In support of its argument, Commerce refers to the "knowledge test" upheld in NSK Ltd. v. United States, 190 F. 3d 1321, 1334 (Fed. Cir. 1999). Commerce's argument is flawed. The knowledge test that was upheld in NSK only applies to the producer, LG Semicon, and speaks nothing of the application of the administrative reviews to the importer, NSA. See generally id. The knowledge test as it stands in NSK is inapplicable to this case. Therefore, Commerce asks the Court to hold that the knowledge test stands for the proposition that the importer is only covered by an administrative review if the producer knew that its goods were destined for export to the United States. See Defendant's Response in Opposition to Plaintiff's Motion for Judgment upon the Agency Record, 20. However, Commerce has not spoken of this application of the knowledge test in the past. Additionally, Commerce failed to speak of this application of the knowledge test in the liquidation instructions issued in POR 1 and POR 2 and, thereby, issued the contested instructions without explaining the basis for its action. Therefore, this application of the knowledge test was unwarranted. See Consolidated, 25 CIT at ___ , ___ , 166 F. Supp. 2d at 589, 590 ("If the Department of Commerce fails to explain the basis for its liquidation instructions, Commerce's action is arbitrary and capricious.").

In Consolidated, the court found arbitrary and capricious liquidation instructions that changed Commerce's previous practice of liquidating at the rate determined in the administrative review but instead liquidated at the cash deposit rate. The court found the instructions arbitrary, in part, because they were not clear to the plaintiff and were completely contrary to instructions that were issued previously. The court saw the following problems with Commerce's action:

> Considering that on September 9, 1997, Commerce already instructed Customs to liquidate certain entries subject to the review at certain rates, it is entirely unclear to this Court why, almost a year later, Commerce felt compelled to issue the

> liquidation instructions at issue if, as Commerce now contends, the conclusions contained in these liquidation instructions were already self-evident from the very same record and from the previously issued September 9, 1997, instructions. . . . Such action by Commerce shows that Commerce contemplated a scenario under which certain entries of the [subject merchandise], including [the merchandise] manufactured by the [plaintiff-importer] could have been liquidated at one rate prior to the issuance of the contested liquidation instructions and an entirely different rate after the issuance of [said] instructions. Id. at 592.

The Court finds the same problem with the Liquidation Instructions in the instant case. Commerce issued new instructions on November 1, 1999 and, thereby, changed its past practice of liquidating at "the rate established for the most recent period for the manufacturer of the merchandise." 61 Fed. Reg. 20,216, 20,222. The Liquidation Instructions were issued without notice to NSA, which had no reason to know that Commerce would change the instructions and require it to request a separate and independent administrative review. Commerce's past practice and the reasoning set forth in ABC and Consolidated gave NSA a reasonable expectation that their entries were covered by the rates established in POR 1 and POR 2, and therefore that they would not need to file an independent request for an administrative review. The Final Notice and Amendment to Final Notice appear to acknowledge Commerce's past liquidation practice. See 68 Fed. Reg. 23,954; 68 Fed. Reg. 26,288. NSA had no reason to know that their entries were not covered by the rates determined in POR 1 and POR 2. Commerce failed to explain the basis for the Liquidation Instructions at issue and failed to provide NSA with notice of the change. See Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 590. Therefore, the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

IV. CONCLUSION

For the aforementioned reasons, the Court finds that jurisdiction attaches under 28 U.S.C. § 1581(i) and that NSA's claim is not precluded by the exhaustion doctrine. In addition, for the reasons stated herein, the Court finds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to this opinion, this case is remanded to Commerce to (1) rescind the Liquidation Instructions and (2) issue new instructions ordering Customs to liquidate and/or re-liquidate NSA's entries at

the antidumping rates determined for LG Semicon during POR 1 and POR 2.

Richard W. Goldberg
Senior Judge

Date: August 18, 2003
New York, New York

Slip Op. 03–106

RENESAS TECHNOLOGY AMERICA, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT.

Court No. 00–00114

[Plaintiff's motion for summary judgment is granted; liquidation instructions issued by U.S. Department of Commerce are remanded.]

Dated: August 18, 2003

McDermott, Will & Emery (David J. Levine) for plaintiff Renesas Technology America, Inc.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; Patrick V. Gallagher, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for defendant United States.

Hale & Dorr, LLP (Michael D. Esch) for defendant-intervenor Micron Technology, Inc.

OPINION

GOLDBERG, Senior Judge: Plaintiff Renesas Technology America, Inc.[1] ("Renesas"), moves for summary judgment upon the agency record pursuant to USCIT R. 56.1, contesting the issuance of liquidation instructions contained in message numbers 9305211 and 9305212 ("Liquidation Instructions") by the U.S. Department of Commerce ("Commerce") to the U.S. Customs Service[2] ("Customs"),

[1] Plaintiff, formerly known as Hitachi Semiconductor (America), Inc., has changed its name to Renesas Technology America, Inc. See Certificate of Amendment to the Certificate of Incorporation of Hitachi Semiconductor (America) Inc. (Mar. 31, 2003).

[2] It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

dated November 1, 1999. The Liquidation Instructions ordered the liquidation of Renesas's entries of Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") at the manufacturer's cash deposit rate rather than the rates determined for the manufacturer during the administrative reviews of May 6, 1996 and January 7, 1997.

For the reasons that follow, the Court holds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i).

I. BACKGROUND

Renesas is an importer of Korean DRAMs manufactured by LG Semicon Co., Ltd. ("LG Semicon"), formerly Goldstar Electron Co., Ltd. ("Goldstar"). Renesas purchased DRAMs manufactured by Goldstar from a reseller, and entered numerous shipments in 1993, 1994, and 1995. At the time of entry, an antidumping duty order was in effect covering DRAMs imported by Renesas. See Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea, Antidumping Duty Order and Amended Final Determination, 58 Fed. Reg. 27,520 (May 10, 1993). Pursuant to the antidumping order of May 10, 1993, Commerce issued suspension instructions on May 25, 1993 ordering Customs to require Renesas to post cash deposits of estimated antidumping duties applicable to the merchandise at issue, and such deposit was made. These suspension instructions provided deposit rates for all entries at the manufacturer's rate, and did not provide separate rates for importers or resellers. Id. at 27,522.

On June 15, 1994, Commerce initiated an administrative review of imports of DRAMs manufactured by Goldstar and Hyundai Electronics Co., Ltd. ("Hyundai"), another Korean manufacturer of DRAMs, that were imported into the United States from October 29, 1992 through April 30, 1994 ("POR 1"). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 59 Fed. Reg. 30,770 (June 15, 1994). Upon conclusion of the administrative review, Commerce determined that the dumping margin for Goldstar was 0.00%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,222 (May 6, 1996).

On June 15, 1995, Commerce initiated a second administrative review of imports of DRAMs manufactured by LG Semicon and Hyundai that were imported into the United States from May 1, 1994 through April 30, 1995 ("POR 2"). Initiation of Antidumping and Countervailing Duty Administrative Review, 60 Fed. Reg.

31,447 (June 15, 1995). Commerce determined that the dumping margin for LG Semicon was de minimis at 0.01%. Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 965, 968 (Jan. 7, 1997).

Subsequently, Defendant-Intervenor Micron Technology, Inc. ("Micron") filed an action in opposition to the rates determined in POR 1 and POR 2 for LG Semicon. The Court of International Trade and the Court of Appeals for the Federal Circuit sustained the results of the first and second administrative reviews for LG Semicon DRAMs. Micron Technology v. United States, 23 CIT 55, 44 F. Supp. 2d 216 (1999); Micron Technology v. United States, 23 CIT 208, 40 F. Supp. 2d 481 (1999).

In addition, prior to the conclusion of the Micron cases, Commerce issued its final results for a third administrative review period covering LG Semicon and Hyundai DRAMs that were imported from May 1, 1995 though April 30, 1996 ("POR 3"). During POR 3, Commerce issued instructions to Customs to liquidate entries of LG Semicon and Hyundai DRAMs during that period irrespective of the identity of the importer.

Upon conclusion of the Micron cases, Commerce instructed Customs to assess antidumping duties on Renesas's imports of LG Semicon DRAMs at the manufacturer's cash deposit rate upon entry. Commerce did not instruct Customs to liquidate Renesas's entries at the rates determined for POR 1 or POR 2.

Renesas contests the Liquidation Instructions and moves for summary judgment on the grounds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and were issued without advance notice to Renesas. Commerce argues that the Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Alternatively, Commerce argues that Renesas has not exhausted its administrative remedies or that otherwise the Liquidation Instructions are rational and in accordance with law.

II. STANDARD OF REVIEW

Assuming that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), 28 U.S.C. § 2640(e) (1994) governs this case. Section 2640(e) establishes the standard of review in an action brought under 28 U.S.C. § 1581(i), providing that "[i]n any civil action not specified in this section, the Court of International Trade shall review the matter provided in section 706 of title 5." Accordingly, the Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706.

III. DISCUSSION

A. The Court has residual jurisdiction under § 1581(i).

As a threshold matter, Commerce argues that the Court lacks residual jurisdiction pursuant to 28 U.S.C. § 1581(i). Commerce claims that Renesas had an alternative remedy under § 1581(c). It claims that Renesas could have filed an independent request for an administrative review and/or participated in POR 1 and POR 2 under § 1581(c). Commerce argues that this alternative remedy renders § 1581(i) residual jurisdiction unavailable.

Renesas argues that Commerce's prior practice dictated that the rates determined during the administrative review periods applied to all importers of the subject merchandise. This was the governing practice irrespective of whether the importer filed an individual request for an administrative review. In support of this argument, Renesas points to Consolidated Bearings Company v. United States, 25 CIT ___, 166 F. Supp. 2d 580 (2001) and ABC International Traders, Inc. v. United States, 19 CIT 787 (1995). Additionally, Renesas points to two notices recently published by Commerce. See "Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties," 68 Fed. Reg. 23,954 (May 6, 2003) ("Assessment Policy Notice"); "Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Amendment to Notice of Opportunity To Request Administrative Review," 68 Fed. Reg. 26,288 (May 15, 2003) ("Review Amendment Notice"). Renesas argues that these notices constitute Commerce's admission that the Liquidation Instructions constituted a change from its past practice without notice and that, prior to the issuance of the Liquidation Instructions, entries for a given importer such as Renesas were liquidated at the rate determined for the producer of the subject merchandise in the administrative review.

The merits of this action and the resolution of the jurisdictional issue are intertwined. Pursuant to § 1581(i), the Court does not possess jurisdiction to decide issues relating to antidumping law if review is specifically provided for by other subparagraphs of § 1581. "[I]t is well established that the residual jurisdiction of the court under [sub]section 1581(i) 'may not be invoked when jurisdiction under another [sub]section of § 1581 is or could have been available, unless the relief provided under that other subsection would be manifestly inadequate.' " Consolidated, 25 CIT at ___, 166 F. Supp. 2d at 583 (quoting Ad Hoc Comm. of Fla. Producers of Gray Portland Cement v. United States, 22 CIT 902, 906, 25 F. Supp. 2d 352, 357 (1998) (internal citation omitted) (emphasis in original)).

In Consolidated, Commerce issued liquidation instructions that required Customs to assess antidumping duties on the plaintiff-importer's entries of the subject merchandise at the cash deposit rates in effect at the time of entry instead of at the weighted-average

rates determined for the subject merchandise in the amended final results of the administrative review. The plaintiff-importer contested the instructions on the grounds that they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and requested that Customs apply the liquidation rates determined in the administrative review. The court found that it "[was] appropriate to exercise residual jurisdiction because jurisdiction under other subsections of section 1581 [was] not available." Id. at 583. The court explained that:

> Commerce's liquidation instructions also are not reviewable under subsection 1581(c) because they were not part of the Final Results or the Amended Final Results. Rather, such instructions are issued after relevant final determinations are published and, accordingly, it was impossible for [the importer] to contest the instructions as required under 19 U.S.C. § 1516a(a)(2)(B)(iii) (1994). . . [F]inally, none of the other subsections of section 1581 of Title 19 provides a viable basis for jurisdiction. Id.

In the instant case, Commerce did not publish the Liquidation Instructions until November 1, 1999. This was after the final results of POR 1 and POR 2 were published on May 6, 1996 (61 Fed. Reg. 20,216) and January 7, 1997 (62 Fed. Reg. 965), respectively. The Liquidation Instructions changed Commerce's prior instructions in message number 7128114 issued for POR 2, dated May 8, 1997. Those instructions ordered Customs to liquidate "all entries covered by the [Order] at the rates established in the administrative reviews for the three Korean manufacturers: Goldstar, Hyundai, and Samsung." In addition, the reasoning set forth in ABC dictated that in the absence of another or "all other" rate, all importers of the subject merchandise were covered by the review. Thus, it was reasonable for Renesas to assume that its entries would be liquidated at the administrative review rates and that it need not file an independent request for an administrative review pursuant to § 1581(c). Renesas, as an importer of DRAMs covered in POR 1 and POR 2, should have been able to rely on such assessment without apprehension that Commerce would change its mind later and change the properly assessed rates. Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 593.

Likewise, in ABC, the court held that the manufacturers' rates determined in the administrative review applied to the plaintiff-reseller since there was no other rate that could have applied:

> Absent an applicable reseller, or even an 'all other' rate, [the plaintiff] should have known that it would have been assigned the only existing rates, that is, the manufacturers' duty rates determined in the final results of the various administrative reviews. The fact that no review was requested to establish rates

> for the resellers at issue, or for ABC individually, does not compel Commerce to apply the automatic assessment regulation in this case. In fact, Commerce is compelled to apply the manufacturers' rates as determined on review, because no reseller rates exist. ABC, 19 CIT at 790.

Similarly, at the time of entry, a § 1581(c) request by Renesas was wholly unnecessary, thereby failing to provide an adequate remedy under the reasoning set forth in ABC. Finally, Commerce does not present the argument that any other subsection of § 1581 provided Renesas with an adequate remedy, and the Court finds no other subsection of § 1581 applicable.

Accordingly, the Court exercises jurisdiction over the matter under 28 U.S.C. § 1581(i).

B. The exhaustion doctrine does not dictate dismissal of Renesas's claim.

Commerce argues that the exhaustion doctrine applies since Commerce never had an opportunity to properly consider Renesas's argument. This was allegedly because Renesas never presented the issue to Commerce in the appropriate administrative proceeding. Renesas asserts that the exhaustion doctrine does not apply to the instant case because its circumstances qualify it as an exception. Specifically, Renesas maintains that it had no reason to expect that Commerce would refuse to apply the manufacturer's rates to its entries. Alternatively, Renesas claims that the issue at hand is of a purely legal nature that requires no further agency involvement.

The exhaustion doctrine requires that a party present its claims to the relevant administrative agency for the agency's consideration before bringing these claims to the Court. Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 586 (citing Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946)). However, there is no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. Id. (citing Alhambra Foundry Co. v. United States, 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988)). Thus, the Court has the discretion to determine proper exceptions to the doctrine of exhaustion. Id.

Exceptions to the requirement of exhaustion have been found where requiring it (1) would be futile or (2) would be "inequitable and an insistence of a useless formality." See Rhone Poulenc, S.A. v. United States, 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984); United States Canes Sugar Refiners' Ass'n v. Block, 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982). A second exception exists where the "question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question." See id.

The circumstances in the instant case fall under the "pure question of law" exception to the exhaustion doctrine. In Consolidated,

the court set out the requirements for the "pure question of law" exception as follows: (a) plaintiff's argument is new; (b) this argument is of a purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce time and resources. See Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 587. This instant case presents a pure question of law that fits squarely within this exception for the reasons that follow: (a) Renesas's presents a new argument to the Court; (b) the inquiry involves a question of law—namely, whether Commerce's liquidation instructions are arbitrary and capricious; (c) the inquiry does not require any special expertise by Commerce and/or the development of a special factual record either before or after the Court's consideration of the issue; and (d) for the reason mentioned in part (c), judicial inquiry here will not create undue delay or unnecessary expenditure. Id.

C. The Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Renesas argues that the Liquidation Instructions are arbitrary, capricious, and contrary to law, and were issued without advance notice to Renesas. Commerce contends that the Liquidation Instructions are rational and in accordance with law, and were issued within the scope of its authority.

Commerce argues that since Renesas did not argue that LG Semicon knew its goods were destined for export to the United States, Renesas is not covered by the administrative reviews. In support of its argument, Commerce refers to the "knowledge test" upheld in NSK Ltd. v. United States, 190 F. 3d 1321, 1334 (Fed. Cir. 1999). Commerce's argument is flawed. The knowledge test that was upheld in NSK only applies to the producer, LG Semicon, and speaks nothing of the application of the administrative reviews to the importer, Renesas. See generally id. The knowledge test as it stands in NSK is inapplicable to this case. Therefore, Commerce asks the Court to hold that the knowledge test stands for the proposition that the importer is only covered by an administrative review if the producer knew that its goods were destined for export to the United States. See Defendant's Response in Opposition to Plaintiff's Motion for Judgment upon the Agency Record, 20. However, Commerce has not spoken of this application of the knowledge test in the past. Additionally, Commerce failed to speak of this application of the knowledge test in the liquidation instructions issued in POR 1 and POR 2 and, thereby, issued the contested instructions without explaining the basis for its action. Therefore, this application of the knowledge test was unwarranted. See Consolidated, 25 CIT at ___ , ___ , 166

F. Supp. 2d at 589, 590 ("If the Department of Commerce fails to explain the basis for its liquidation instructions, Commerce's action is arbitrary and capricious.").

In Consolidated, the court found arbitrary and capricious liquidation instructions that changed Commerce's previous practice of liquidating at the rate determined in the administrative review but instead liquidated at the cash deposit rate. The court found the instructions arbitrary, in part, because they were not clear to the plaintiff and were completely contrary to instructions that were issued previously. The court saw the following problems with Commerce's action:

> Considering that on September 9, 1997, Commerce already instructed Customs to liquidate certain entries subject to the review at certain rates, it is entirely unclear to this Court why, almost a year later, Commerce felt compelled to issue the liquidation instructions at issue if, as Commerce now contends, the conclusions contained in these liquidation instructions were already self-evident from the very same record and from the previously issued September 9, 1997, instructions. . . . Such action by Commerce shows that Commerce contemplated a scenario under which certain entries of the [subject merchandise], including [the merchandise] manufactured by the [plaintiff-importer] could have been liquidated at one rate prior to the issuance of the contested liquidation instructions and an entirely different rate after the issuance of [said] instructions. Id. at 592.

The Court finds the same problem with the Liquidation Instructions in the instant case. Commerce issued new instructions on November 1, 1999 and, thereby, changed its past practice of liquidating at "the rate established for the most recent period for the manufacturer of the merchandise." 61 Fed. Reg. 20,216, 20,222. The Liquidation Instructions were issued without notice to Renesas, which had no reason to know that Commerce would change the instructions and require it to request a separate and independent administrative review. Commerce's past practice and the reasoning set forth in ABC and Consolidated gave Renesas a reasonable expectation that their entries were covered by the rates established in POR 1 and POR 2, and therefore that they would not need to file an independent request for an administrative review. The Assessment Policy Notice and Review Amendment Notice appear to acknowledge Commerce's past liquidation practice. See 68 Fed. Reg. 23,954; 68 Fed. Reg. 26,288. Renesas had no reason to know that their entries were not covered by the rates determined in POR 1 and POR 2. Commerce failed to explain the basis for the Liquidation Instructions at issue and failed to provide Renesas with notice of the change. See Consolidated, 25 CIT at ___ , 166 F. Supp. 2d at 590. Therefore, the Liqui-

dation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

IV. CONCLUSION

For the aforementioned reasons, the Court finds that jurisdiction attaches under 28 U.S.C. § 1581(i) and that Renesas's claim is not precluded by the exhaustion doctrine. In addition, for the reasons stated herein, the Court finds that the Liquidation Instructions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Pursuant to this opinion, this case is remanded to Commerce to (1) rescind the Liquidation Instructions and (2) issue new instructions ordering Customs to liquidate and/or re-liquidate Renesas's entries at the antidumping rates determined for LG Semicon during POR 1 and POR 2.

Richard W. Goldberg
Senior Judge

Date: August 18, 2003
New York, New York

Slip Op. 03–107

SKECHERS U.S.A., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT,

Consol. Court No. 98–03245

[Defendant's motion for summary judgment granted in part, denied in part.]

Dated: August 19, 2003

Law Offices of Elon A. Pollack (Elon A. Pollack) for plaintiff.
Peter D. Keisler, Assistant Attorney General, John J. Mahon, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Amy M. Rubin), Beth C. Brotman, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection of the United States Department of Homeland Security, of counsel, for defendant.

OPINION

RESTANI, Judge:

This matter is before the court on a motion for summary judgment pursuant to USCIT Rule 56(c) brought by defendant, the Bureau of

Customs and Border Protection of the United States Department of Homeland Security ("Customs"). Customs asks the court to decide, as a matter of law, that plaintiff Skechers U.S.A., Inc. ("Skechers"), failed to prove that its claimed interest payments made on imported footwear were bona fide. In the alternative, Customs requests that the court decide, as a matter of a law, that Skechers failed to satisfy statutory and regulatory requirements for interest charges to be non-dutiable.

FACTUAL AND PROCEDURAL BACKGROUND

Skechers is a California-based importer, and the exclusive U.S. distributor, of "Skechers" brand footwear. The majority of its products are manufactured in the People's Republic of China and are shipped to the United States from Hong Kong through the port of Los Angeles.

The company was founded in 1992 and often "financed" its footwear purchases through a combination of letters of credit and delayed payments. According to Skechers, it would typically enter into oral financing agreements with its suppliers whereby Skechers was to pay an "interest" fee every time it deferred full payment on the applicable invoices. In most cases the "interest" rate was 2% of the transaction amount and allegedly reflected the prime rate of the suppliers' home countries (Taiwan and Hong Kong) at the time of each transaction, plus rate increases attributable to factors such as the short-term nature of the financing and Skechers's absence of domicile and assets in those countries. See Pl.'s Opp'n Def.'s Mot. Summ. J. at 10–12. The applicable rate for the unsecured "loans" would be effective for the first 30, 45, 60, or 90 days depending on the supplier, and Skechers agreed to negotiate additional interest and penalties for payments made after the initial financing periods. See Supplemental Decl. of Douglas Parker ("Supp. Parker Decl.") ¶12 & Ex. A (producing written financing agreements for most of Skechers's suppliers). According to Skechers, it operated under oral financing agreements with its suppliers for up to two years before they were memorialized in formal written financing agreements. See Pl.'s Opp'n Def.'s Renewed Mot. Summ. J. at 9.

Since 1995, Customs has been appraising Skechers's entries at "transaction value" as set forth in 19 U.S.C. § 1401a(b) (1994) (describing appraisal methods). For each of Skechers's entries, Customs determined that the transaction value of the imported footwear was the invoice price plus the claimed interest charge. Skechers has filed numerous protests with Customs since that time, claiming, among other things, that the charges were not dutiable under § 1401a because they constituted interest payments. Customs denied the protests based on its conclusion that Skechers had not complied with the statute and applicable regulatory guidance.

Skechers appealed the protest denials to the Court of International Trade, claiming that the finance charges were exempt from duty pursuant to the statute. As such, Skechers requested a refund of those duties charged plus interest. Customs responded that the charges did not constitute bona fide interest payments within its interpretation of the statute and Generally Accepted Accounting Principles ("GAAP"), adding that its statutory interpretation is entitled to deference under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that an agency's interpretation may be entitled to some deference based on its "power to persuade"). Customs also argued that Skechers had failed to comply with the statute and the applicable regulatory guidance, citing Luigi Bormioli Corp. v. United States, 118 F. Supp. 2d 1345 (Ct. Int'l Trade 2000) (granting summary judgment in favor of Customs where importer failed to prove that payments in dispute were bona fide interest payments as defined by Customs's interpretation of § 1401a), aff'd, 304 F.3d 1362 (Fed. Cir. 2002).

The court declined to rule on the government's first motion for summary judgment because of the parties' disputes as to which fact patterns were at issue, and ordered the expansion of the test case to make it meaningful.[1] Order of Feb. 8, 2002. This gave Plaintiff a second shot at making its factual presentation coherent.[2]

On March 21, 2003, the court issued an order indicating that Skechers had failed to comply with the court's February 2002 order requiring it to submit a "full package of evidence" demonstrating satisfaction of Customs's guidelines as interpreted from § 1401a. The court ordered Skechers to prepare a detailed chart relating the evidence with each entry or face a default judgment. Skechers filed a chart on April 18, 2003, that contains, among other things, a list of every entry number in dispute and related information on Skechers's manufacturers and suppliers, invoice issue dates, and claimed interest amounts paid. The chart also purports to itemize where the court can find evidence that Skechers satisfied the applicable regulatory requirements, see Discussion infra, to prove that its claimed interest charges should not be included in transaction value under § 1401a.

The chart, however, does not fully comply with the court's order. It often contains inaccurate or misleading information, or fails to direct the court to the supporting evidence altogether.[3] Significantly, while

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[1] The court designated this matter a test case and suspended related court actions pending final decision herein on December 21, 2000. The test case included fourteen entries from 1997. The court designated Court No. 99–11–00697 (26 entries from 1998) and Court No. 00–09–00456 (61 entries, most in 1999) as additional test cases and consolidated them with Court No. 98–03245 on September 25, 2002.

[2] Plaintiff's counsel repeatedly has requested a trial, but plaintiff cannot get to trial unless it demonstrates that it will present evidence to sustain its claim.

[3] For example, the chart does not indicate where the court can find evidence of a written financing agreement between Skechers and supplier Lusung Shoe. See Pl.'s Chart of Evi-

the chart lists the invoice date and the rate of interest for each entry, the chart itself does not indicate, for any of Skechers's entries, when those interest payments were made or what the agreement terms were. Because the chart does not reveal the length of the delay between the invoice issue date and the date of the interest payments, it is impossible for the court to determine whether the amount paid complied with the terms of Skechers's financing agreements.[4] As discussed infra, Skechers provides supporting documentation on payment dates for only three of the 101 entries at issue in this consolidated test case.

The chart reveals 14 entries covered by the original Court No. 98–12–03245 test case. For those entries where interest payments were made, the interest amount paid by Skechers is consistently stated to be 2%. Written financing agreements existed between Skechers and these suppliers/manufacturers at the time of entry,[5] and the agreements each set forth a rate of interest "up to 2% of the invoice price per month up to 90 days" with the potential for higher interest rates and penalties for payments made past 90 days. See Decl. of William Liao Ex. A; Supp. Parker Decl. Ex. A. Skechers, however, provides no information regarding when its invoice payments were made, rendering it impossible to determine whether Skechers complied with the terms of its agreements for these entries.

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dence, Entry Nos. 175–0336827–0, 175–0337349–4, 175–0754925–5, 175–0755226–7, 175–0755389–3, and 175–0755403–2. Nor is such direction provided for suppliers Pacific Footgear, see id. Entry Nos. 175–0755224–2, 175–0755509–6, 175–0755709–2, 175–0755587–2, and 175–0755492–5; Hwashun/Morgan International, see id. Entry Nos. 175–0753338–2 and 175–0754143–5; Luxfull/Lux S.R.L., see id. Entry No. 175–0348188–3; Shoe Biz, see id. Entry No. 175–0755605–2; and Long Shoe, JJL Fashion, and Pacific Footwear, see id. Entry No. 175–0347665–1. Evidence of written financing agreements is crucial to Skechers case under Customs's regulatory guidance but is not provided for any of these suppliers. For Entry No. 175–0347665–1, the chart also fails to show where the court can verify that the goods at issue were actually sold at the price declared as paid or payable, another regulatory requirement for proving that interest payments are non-dutiable, for Long Shoe, JJL Fashion, and Pacific Footwear.

The exhibits also reveal discrepancies between the interest payments as documented by the evidence and the interest payments as claimed by the chart. For example, for Entry No. 175–0347510–9 (Asia Billion, 2/7/98), 1.5% interest was paid although the chart claims that 0% interest was paid. Similarly, for Entry No. 175–0754362–1 (Enble/Reflex, 3/18/99), the interest payment was 2%, but the chart claims 1.4% in interest paid. Finally, for Entry No. 175–0755694–6 (Schaefer, 6/10/99), Skechers's actual interest payment was 1.5% of the financed amount, though the chart claims that Skechers paid 0.7% of the total invoice price.

[4] The chart does reveal that, in practice, Skechers's interest payments amounted to a flat rate of 2% of the invoice amount for just over half the transactions at issue. Within the 101 entries at issue are 114 payment transactions. Of these 114 transactions, the chart itemizes 62 occurrences of 2% in interest paid, 35 occurrences of 1.5% in interest paid, 5 occurrences of 1%, 2 occurrences of 1.2%, 1 occurrence of 1.4%, 1 occurrence of 0.7% , and 8 occurrences of 0% or no interest paid. See Pl.'s Chart of Evidence. This information, however, is not meaningful without proof of the terms of each financing agreement and the corresponding payment dates.

[5] Skechers did not have written financing agreements at the time of entry, and did not pay interest to, two suppliers included in the original test case: Lusung Shoe and Reflex Corporation of America (parent corporation to Dar Shyong and Enble/Enable Enterprises). See id.; Supp. Parker Decl. Ex. A.

Of the 26 entries covered by the Court No. 99–11–00697 test case, there are 14 entries where the financing agreements purporting to govern the transactions post-date the corresponding invoice issue dates, which means that the court cannot verify the precise terms that governed these transactions.[6] Another nine entries are ostensibly governed by written agreements that were in place at the time of entry,[7] but Skechers again fails to provide information regarding when payment for these nine entries were made, making it impossible to determine whether the agreement terms were followed. The remaining three entries are discussed infra.

Of the 61 entries covered by the Court No. 00–09–00456 test case, there are 20 entries where the agreed-upon interest rates, as evidenced by the financing agreements, differ from the interest payments claimed by Skechers in the chart.[8] This could be attributable to payments made after the initial "loan" period, but Skechers provides no evidence of such. An additional six entries listed in the chart feature transactions that were not governed by written financing agreements.[9] For another 12 entries, Skechers provides no formal documentation whatsoever to prove that it had written agreements with these suppliers (all Hwashun/Morgan International, Lusung Shoe, Pacific Footgear, and Shoe Biz entries). For the remaining entries, Skechers provides proof of the applicable interest rates and lists interest payments made on the chart, but once again fails to provide information regarding when those payments were made, making it impossible to determine whether Skechers adhered to the agreement terms. In fact, for none of the 61 entries does Skechers provide sufficient information that would allow the court to verify compliance with its written agreements.

As illustrated, for the vast majority of the entries mentioned herein, adequate payment details cannot be found from the evidence supplied by Skechers, making verification of its adherence to agreement terms impossible. Examining the evidence as directed by the

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[6] The 14 entries without written agreements in place at the time of import are for suppliers Reflex, Asia Billion, and Hopeway/Diamond Group. Evidence of written financing agreements does not exist for suppliers Luxfull/Lux S.R.L., Long Shoe, JJL Fashion, and Pacific Footwear; Skechers, however, does not claim to have paid interest to these suppliers.

[7] This includes most entries by suppliers Easy Dense, Miri, and Shing Tak.

[8] Of the 20 entries, four are for supplier Easy Dense (where the paid interest was 1.5% and agreed-upon rate was 0.75% per month), six are for Evergo (where paid interest was 2% and agreed-upon rate was 1.33% per month), one for Enble/Reflex (1.4% paid, 1.33% per month agreed-upon rate), one for Dar Shyong/Reflex (2% paid, 1.33% per month agreed-upon rate), one for Allied Jet (1.5% paid, up to 1% per month agreed-upon rate), six for Hopeway/Diamond Group (1.5% paid, 1.33% per month agreed-upon rate), and one for supplier Shaefer (0.7% paid according to the chart, 1.5% per month of the financed amount was agreed-upon rate). See Pl.'s Chart of Evidence.

[9] Of these, four are for supplier Asia Billion, and suppliers Dar Shyong/Reflex and Evergo each had one entry that was not subject to a written financing agreement. See id.

chart reveals complete payment details for only three entries, all of which are covered by Court No. 99–11–00697. See Pl.'s Chart of Evidence, Entry Nos. 175–0347530–7 (Easy Dense, 2/16/98; 2% interest paid after 45 days; up to 2% per month up to 90 days is the agreed-upon rate), 175–0347512–5 (Miri, 2/11/98; 1.5% interest paid after 50 days, up to 2% per month up to 90 days is the agreed upon-rate), and 175–0347726–1 (Shing Tak, 3/3/98; 2% interest paid after 44 days; up to 2% per month up to 90 days is the agreed upon rate).

In sum, there is no evidence that Skechers strictly adhered to its agreements for any of the entries at issue.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). The court will grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT Rule 56(c).

DISCUSSION

The "transaction value" of imported merchandise is defined as the "price actually paid or payable for the [imported] merchandise" plus any "packing costs" or "selling commission incurred by the buyer with respect to the imported merchandise," the "value, apportioned as appropriate, of any assist," any "royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise," and "the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller." 19 U.S.C. § 1401a(b). Although the statute does not expressly include or exclude interest payments as part of the transaction value, Customs regards interest payments as being non-dutiable and expressed this policy in Treasury Decision 85–111. See Treatment of Interest Charges in the Customs Value of Imported Merchandise, 19 Cust. B. & Dec. 258 (1985), 50 Fed. Reg. 27,886 (Customs Serv. July 8, 1985) [hereinafter "TD 85–111"]; see also Treatment of Interest Charges in the Customs Value of Imported Merchandise, 54 Fed. Reg. 29,973 (Customs Serv. July 17, 1989) [hereinafter "Statement of Clarification"].

TD 85–111 interprets § 1401a and was promulgated by Customs to implement a decision by the Committee on Customs Valuation of the General Agreements on Tarriffs and Trade. TD 85–111 provides four criteria for interest charges to be non-dutiable (part (c) contains the last two requirements):

> Charges for interest under a financing arrangement entered into by the buyer and relating to the purchase of imported goods shall not be regarded as part of the customs value provided that:
>
> (a) The charges are distinguished from the price actually paid or payable for the goods;
>
> (b) The financing arrangement was made in writing;
>
> (c) Where required, the buyer can demonstrate that
>
> —Such goods are actually sold at the price declared as the price actually paid or payable, and
>
> —The claimed rate of interest does not exceed the level for such transactions prevailing in the country where, and at the time when the finance was provided.

TD 85–111, 50 Fed. Reg. at 27,886. Customs issued a Statement of Clarification to clarify TD 85–111. See Statement of Clarification, 54 Fed. Reg. at 29,974 ("Interest . . . encompass[es] only bona fide interest charges, not simply the notion of interest arising out of delayed payment. Bona fide interest charges are those payments that are carried on the importer's books as interest expenses in conformance with generally accepted accounting principles."). Without addressing the Statement of Clarification, Bormioli upheld TD 85–111 as a reasonable method of determining if interest is bona fide and nondutiable. See Bormioli, 118 F. Supp. 2d at 1350, aff'd, 304 F.3d at 1368–69.

Therefore, at the very least, the importer must establish that the claimed interest charges meet the four requirements set forth in TD 85–111, failing which summary judgment is appropriately granted in Customs's favor. See Bormioli, 304 F.3d at 1372–73. In the instant case the government concedes that the claimed interest charges were separately identified from the price paid or payable and that the claimed interest rate did not exceed TD 85–111's specifications. See Def.'s Mem. in Support Mot. Summ. J. at 18; see also Def.'s Supp. Mem. in Support Renewed Mot. Summ. J. at 5. The government argues that, as an initial matter, the charges do not meet a threshold for analysis under TD 85–111. Thus, the issues before the court are whether the charges may be analyzed under TD 85–111 and, if so, whether Skechers met the requirements that the financing agreements be in writing and that the goods were actually sold at the declared price.

A. Whether the Finance Charges are "Bona Fide Interest"

Customs maintains that the claimed finance charges are not bona fide interest payments, but rather flat fees that Skechers paid in re-

turn for a delayed payment schedule regardless of when it paid its invoices in full. Therefore, Customs asserts, the payments do not conform to any accepted definition of "interest"[10] and are thus outside the scope of TD 85–111 and the Statement of Clarification.

Skechers counters that the payments are "bona fide" for several reasons. First, the charges were bona fide because they were carried as interest expenses on Skechers's books in accordance with GAAP, as required by the Statement of Clarification. Skechers's independent certified public accountant, KPMG, certified the books as such. See Supp. Parker Decl. Exs. B & C (providing independent auditors' reports and internal accounting documents that separately list interest charges paid to each of Skechers's suppliers). Second, interest rates and payment terms varied with each supplier. Third, the written agreements refer to the payments as interest. Finally, Skechers points out that where invoices were covered in part by cash or letter of credit, interest was only charged for the unpaid balance. See, e.g., Supp. Parker Decl. ¶10 & Ex. A. Thus, Skechers maintains, the payments at issue are non-dutiable bona fide interest payments.

The Statement of Clarification requires only that the charges be carried as interest expenses on the importer's books in conformance with GAAP. Skechers has established this through its auditor's certification and internal accounting documents. Customs does not challenge this evidence and instead argues that a criterion not required by the Statement of Clarification, i.e., that the interest charges must be other than "flat fees," has not been fulfilled.[11] Customs has published reasonable tests for determining whether "interest" is bona fide and nondutiable. The court has upheld TD 85–111 and the test of the Statement of Clarification is not in dispute. Consequently, Customs's additional criterion is precluded by its own regulatory guidance. These issues are not easy and importers are entitled to a non-moving target.

B. The TD 85–111 Requirements

As indicated, Customs alternatively argues that Skechers has not met all of the TD 85–111 criteria. The Court of Appeals for the Federal Circuit, in affirming this court, noted that the criteria are conjunctive, i.e., all four have to be met for interest charges to be non-

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[10] See Lightbulb Online Dictionary of Financial Terms, Lightbulb Press, Inc. (2003), at http://www.lightbulbpress.com/onlinedictionary/onlinedictionary.html ("Interest is the cost of using the money provided by a loan, credit card, or line of credit, usually expressed as a percentage of the amount you borrow and pegged to a specified period of time."); see also BLACK'S LAW DICTIONARY 818 (7th ed. 1999) (defining "interest rate" as "[t]he percentage that a borrower of money must pay to the lender in return for the use of the money").

[11] The written agreements at issue may reflect more than simply "flat fees." Whether Skechers complied with the agreements is another issue.

dutiable. Bormioli, 304 F.3d at 1373. As discussed above, the court need only address the TD's requirements that the financing agreements be in writing and, if this requirement is met, that the goods were actually sold at the declared price.

Bormioli holds that while Customs may ignore de minimis variations from the terms of a written financing agreement, if parties repeatedly stray from its salient terms, then the written agreement requirement in TD 85–111 is not met. Bormioli, 304 F.3d 1372 (finding that the importer failed to satisfy the written financing agreement requirement when importer acknowledged departing from the terms of its agreements with its suppliers). "TD 85–111 does not merely require that the parties have a written financing arrangement, but that the written financing arrangement actually govern the payments at issue." Id.

To illustrate that it satisfied the written financing agreement requirement, Skechers submits photocopies of its written financing agreements for most of its suppliers. See Supp. Parker Decl. Ex. A. Skechers also provides declarations by officers from several of its suppliers asserting that they had oral financing agreements with Skechers that were memorialized approximately two years later.[12] Skechers points out that nowhere in the statute, TD 85–111, the Statement of Clarification, or other Customs guidelines, is there a prescribed format for the written agreement. Skechers concludes that this evidence satisfies the written financing agreement requirement and alternatively claims that any ambiguity in its agreements gives rise to genuine issues of material fact that make this case inappropriate for summary judgment.

Putting aside the argument that no format for the written financing agreement requirement exists, the question is whether an objective examination of the evidence indicates that Skechers sufficiently departed from the terms of its agreements so that the written fi-

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[12] Because Skechers claims to have had oral financing agreements with several of its suppliers before those agreements were memorialized, Skechers argues that there is a material issue of fact as to when the agreements were reached. Skechers insists that the written financing agreements should apply retroactively to the earlier transactions. This is an invitation to fraud. A written financing agreement must be in place when the goods are sold because it must govern the payments at issue. Bormioli, 304 F.3d at 1372.

Skechers also contends that, at a minimum, the written agreements should be held applicable to transactions that occurred after the agreement had been set forth in writing even if both parties had not had a chance to sign them. Skechers presents evidence to support this theory for suppliers Asia Billion (affiliated with Dah Lih Puh Co.) and Reflex Corporation. See Supp. Parker Decl. Ex. A. Skechers adds that past Customs Headquarters rulings concur with this analysis as does California contract law, which the parties deemed to be controlling by agreement. Because the court concludes, however, that Skechers has failed to provide enough information (specifically, payment dates) for the entries mentioned herein to prove that it either had written agreements or that it actually complied with their terms, it is not necessary to address the issue of whether some of the written agreements should apply retroactively.

nancing agreement requirement was not met. As discussed above, Skechers has only provided evidence which potentially supports its claim for three entries. See Pl.'s Chart of Evidence, Entry Nos. 175–0347512–5 (Miri, 2/11/98), 175–0347530–7 (Easy Dense, 2/16/98), and 175–0347726–1 (Shing Tak, 3/3/98). For the three entries for which the agreed-upon interest rate, the invoice issue date, the payment date, and the amount paid are all provided, there is some question as to whether the payments should be found to be consistent with the written agreements. For each of the three entries, the agreed-upon interest rate was "up to 2% of the invoice price per month up to 90 days." Skechers, however, paid the 2% interest charge on the Easy Dense shipment 45 days after the invoice date. Skechers paid Shing Tak 2% of the invoice amount 44 days after the invoice issue date. Finally, Skechers paid Miri a 1.5% interest fee 50 days after invoice issue date.

For all of the remaining entries, Skechers failed to provide enough information for Customs, or the court, to determine whether Skechers complied with the terms of its written financing agreements.[13] Thus, Skechers failed to prove that it satisfied the requirement that it's financing agreements were made in writing in compliance with TD 85–111, except perhaps as to Entry Nos. 175–0347512–5, 175–0347530–7, and 175–0347726–1. As to these three entries, a material issue of fact exists as to whether the time of payment represents a material change from the financing terms and whether the alleged interest payments qualify as "interest" under applicable published guidance.[14]

The government's arguments that the goods were not actually sold at the price declared as the price paid or payable relate to the status of the "interest" charges under the arguments addressed previously and cannot be further disposed of at this stage.

CONCLUSION

Except for the three entries mentioned above, the court finds that Skechers has failed to present evidence that its financing arrangements satisfied the written financing agreement requirement in TD

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[13] As discussed in the Facts section, many entries suffer from other evidentiary deficiencies. A substantial number of entries showed discrepancies between the agreed interest rates and the payments claimed by Skechers. Skechers provides no evidence of written financing agreements with several suppliers. Finally, many entries preceded the effective dates of the applicable financing agreements, taking these transactions outside TD 85–111. See supra n.12.

[14] Although Skechers has not submitted evidence of the non-materiality of the deviations, the government has not addressed this issue directly in its motion. Thus, summary judgment on these entries is not appropriate at this juncture.

85–111. Customs's motion for summary judgment is granted in part and the parties are instructed to attempt to resolve this matter and report to the court in fifteen days as to whether mediation is desired.

Jane A. Restani
JUDGE

Dated: New York, New York
This 19th day of August, 2003.