U.S. Customs and Border Protection

Slip Op. 13–27

WUHU FENGLIAN CO., LTD., and SUZHOU SHANDING HONEY PRODUCT CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and AMERICAN HONEY PRODUCERS ASSOCIATION, AND SIOUX HONEY ASSOCIATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 11–00045

[Judgment will be entered sustaining the Department of Commerce's redetermination on remand to rescind Plaintiffs' new shipper reviews.]

Dated: February 27, 2013

Yingchao Xiao, Lee & Xiao, of San Marino, CA for Plaintiffs.

Courtney S. McNamara, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for Defendant. With her on the briefs were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Sapna Sharma*, Attorney, United States Department of Commerce, of Counsel.

Michael J. Coursey, *R. Alan Luberda*, and *Benjamin Blase Caryl*, Kelley Drye & Warren LLP, of Washington, DC for Defendant-Intervenors.

OPINION & ORDER

Carman, Judge:

Plaintiffs Wuhu Fenglian Co., Ltd. and Suzhou Shanding Honey Product Co., Ltd (collectively "Plaintiffs"), exporters of honey from the People's Republic of China ("PRC"), challenge a redetermination decision by the U.S. Department of Commerce ("Commerce") following a remand from this Court. In the Remand Redetermination, Commerce accepted into the administrative record certain documents that Plaintiffs submitted, as required by the Court. Upon evaluation of the record, including the new documents, Commerce determined to rescind antidumping duty new shipper reviews requested by Plaintiffs. *See* Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination"), ECF No. 82. The Court sustains Commerce's remand redetermination because it is supported by substantial evidence on the record and is otherwise in accordance with law.

BACKGROUND

Plaintiffs requested new shipper reviews on honey from the People's Republic of China on February 4, 2010. Remand Redetermination at 2. Commerce published a Preliminary Determination on September 10, 2010, rescinding the new shipper reviews on the grounds that the sales made by Plaintiffs did not appear to be bona fide. *Honey From the People's Republic of China: Preliminary Intent to Rescind New Shipper Reviews*, 75 Fed. Reg. 55,307, 55,308 (Sep. 10, 2010) ("Preliminary Determination"). Commerce's Final Determination came to the same conclusion. *Honey From the People's Republic of China: Final Results and Rescission of Antidumping Duty New Shipper Reviews*, 76 Fed. Reg. 4,289, 4,290 (Jan. 25, 2011) ("Final Determination"). Plaintiffs then challenged the Final Determination by this lawsuit.

I. *Remand to Commerce*

On April 25, 2012, the Court issued Slip Op. 12–57, remanding the case to Commerce for redetermination. ECF No. 80. In the remand opinion, the Court required Commerce to accept certain documents from Plaintiffs that Commerce had initially rejected. Plaintiffs had submitted a number of documents by way of rebutting certain data from U.S. Customs and Border Protection ("CBP") that was placed into the administrative record by Commerce. Commerce rejected the rebuttal as untimely. In the absence of any statutory or regulatory deadline for rebutting a filing by Commerce, the Court held that Commerce had wrongly rejected the rebuttal, which had been submitted only 20 days after Commerce's administrative record filing and almost four months before Commerce issued the final results. *See* Slip Op. 12–57 at 10–14. The Court therefore required Commerce to accept the rebuttal materials and issue a remand redetermination taking account of them. The Court declined, however, to require Commerce to supplement the remand record with certain factual information, consisting of a protest lodged with CBP by an unrelated exporter of honey from the PRC, which Plaintiffs did not submit during the new shipper review. *See id.* at 15–16.

II. *Redetermination on Remand*

On remand, Commerce noted that the rebuttal evidence submitted by Plaintiffs contrasted with CBP data Commerce had placed in the record regarding imports of honey from the PRC during the period of review ("POR"). In resolving the conflict in the data, Commerce determined that Plaintiffs' submission were not as reliable as the CBP data, and therefore reached the same conclusion as in the Final

Results: that Plaintiffs' sales were not *bona fide* and that Commerce would thus rescind the new shipper reviews. Remand Redetermination at 2, 4–5.

A. Honey Export Statistics from PRC

Plaintiffs submitted honey export statistics published by the Ministry of Commerce ("MOC") of the PRC for May 2009, indicating that no honey was exported to the United States that month. *Id.* at 5. According to Plaintiffs, this report shows the CBP data to be inaccurate, since the CBP data showed entries of PRC honey into the United States during May 2009. *Id.*

Commerce stated that it has a routine method to resolve situations in which it faces "two conflicting data sources": Commerce gives preferences to "primary data sources, where the Department knows the methodology used to collect the data." *Id.* at 6.

Applying this analysis, Commerce determined that it would not rely on the PRC honey report because the record lacked information as to how the PRC data was collected and collated; by contrast, the CBP data contained "the actual entry documentation for the shipment, including the Customs 7501 form, invoice, and bill of lading." *Id.* Commerce specifically noted that the record did not show the definition of "honey" employed by the MOC, "which, alone, could explain why the PRC MOC data indicate no exports." *Id.* Commerce also noted that the record did not reveal whether the PRC honey report was based on primary export documents, secondary trade reports, or some other source or sources. *Id.* Finally, Commerce noted that "shipping lag times" might account for the absence of exports in the honey report at a time when the CBP data showed entries of honey from the PRC. *Id.*

B. Website and Advertising Printouts from PRC Exporter

Second, Plaintiffs submitted printouts from the website and internet advertisements of a certain Chinese honey exporter whose identity is Business Propriety Information and who will therefore be referred to simply as the "Confidential Exporter." *Id.* at 7. Sales into the United States by the Confidential Exporter were reported in the CBP data that Commerce used in its *bona fide* analysis. *Id.* Plaintiffs claim the web printouts and advertisements show that the Confidential Exporter did not export to the United States during the relevant time period, and that as a result the CBP data must be incorrect. *Id.*

Commerce again applied its technique for resolving questions about the relative reliability of conflicting documents. Commerce determined that no evidence showed when the website printouts were

created, whether they were ever updated (and, if so, when), and whether the statements in the documents related to the POR for these new shipper reviews. *Id.* As a result, Commerce determined that the website and advertising printouts from the Confidential Exporter did not discredit the CBP data. *Id.*

C. PIERS Data from United States Government

Third, Plaintiffs submitted data from the United States Government Port Import Export Reporting System ("PIERS") which, according to Plaintiffs, show that no honey from the PRC was entered into the United States during May, June, and July 2009. *Id.* Commerce acknowledged that the PIERS data showed "no entries of honey from the PRC to North America during May 2009." *Id.* However, Commerce determined that "without knowing the methodologies used to gather and analyze the PIERS data," it could not be given as much weight as the CBP data. *Id.* at 8. Noting that the CBP data contains entry documentation including the Customs 7501 form, invoice, and bill of lading, Commerce determined that "something as simple as a difference in the collection methodologies between the sources or the different level of specificity of the underlying source of the PIERS data" could explain the discrepancy between the PIERS and CBP data. *Id.* In this regard, Commerce noted more specifically that PIERS data "are gathered from entries on ships' manifests," while the CBP data incorporated "a variety of actual import documentation," including the Customs entry paperwork that determines the "legal description" of imported goods. *Id.* at 18. Having already addressed the issue of conflicts between PIERS data and CBP data in other cases,[1] and having developed a policy of giving more weight to CBP data in the case of such a conflict, Commerce found that the conflicting PIERS data provided no reason to abandon use of the CBP data in this instance. *Id.* at 8.

[1] This particular issue was already addressed in the Final Determination of Commerce, issued prior to the Court's remand in this case, and the accompanying Issues and Decisions Memorandum. The Court's remand did not invalidate this analysis. Commerce also addressed the precise question of whether to rely upon PIERS data or CBP data in the case of a conflict between the two in a 2007 determination, *Preliminary Recission of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China*, 72 Fed. Reg. 32,072 (June 11, 2007). In that case, Commerce articulated a policy of weighing CBP data more heavily than conflicting PIERS data since the CBP data is based on primary import documentation, including entry paperwork that provides the appropriate legal classification of the goods contained in the entry, while PIERS data is simply drawn from ship manifests. Remand Redetermination at 18; Defendant's Response to Plaintiff's Comments upon Commerce's Final Remand Redetermination at 17–18, ECF No. 95.

D. National Honey Reports from the USDA

Finally, Plaintiffs submitted National Honey Reports from the United States Department of Agriculture ("USDA") for December 2008, June and July 2009, and September through November 2009. *Id.* The USDA National Honey Reports contained information at variance with the CBP data as to the price and quantity of honey entered into the United States from the PRC during the period of review; Plaintiffs sought to undercut Commerce's reliance on the CBP data by introducing the honey reports into the record. *Id.* at 8–9. However, Commerce found the record devoid of evidence as to the methodology by which the honey reports were collected. *Id.* Commerce also noted that it was not even clear whether the data contained in the honey reports was related to the relevant sales within the POR. *Id.* Commerce therefore determined that the USDA honey reports could not be given as much weight as the CBP data, which it decided to continue to rely upon.

In the end, then, Commerce determined that the CBP data was the most reliable of the available data regarding honey imports from the PRC to the United States during the POR, and therefore found no reason in the newly-submitted data to alter its analysis of whether Plaintiffs' sales were *bona fide*. Consequently, Commerce determined again that Plaintiffs' sales were not *bona fide* and affirmed its recission of the new shipper reviews.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c), and 19 U.S.C. §§ 1516a(a)(1), (a)(2)(B)(iii). In reviewing Commerce's remand redetermination, the Court will "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

ANALYSIS

Plaintiffs raise three main critiques of Commerce's Remand Redetermination. First, Plaintiffs attack the procedural propriety of the Remand Redetermination, contending that it is "unacceptably incomplete" owing to Commerce's refusal on remand to accept into the record the CBP Protest filed by an unrelated importer. Comments on the Department of Commerce's Final Results of the Redetermination Pursuant to Court Remand ("Plaintiffs' Comments") at 3, ECF No. 85.

In a similar vein, Plaintiffs contend that the substance of the Remand Redetermination is "unacceptably inaccurate" and therefore must be overturned because Commerce acted unfairly in failing to

consider the contents of the rejected CBP Protest. *Id.*

Plaintiffs also assert that, in any case, Commerce acted contrary to the weight of the record evidence in finding that the PRC honey export data, website and advertising printouts from the Confidential Exporter, PIERS data, and USDA honey reports were all less reliable than the CBP data. *Id.* at 26–28.

The Court finds that each of these critiques fails to undermine the Remand Redetermination for the reasons set forth in detail below.

I. *Commerce Properly Refused to Accept the CBP Protest*

Plaintiffs do not argue that they submitted the CBP Protest documents into the record in a timely fashion. Plaintiffs instead offer several reasons why Commerce was wrong to refuse, on remand, to reopen the record and accept the CBP Protest despite its untimely submission.

Plaintiffs assert that Commerce "had a reasonable amount of time in which to consider the information contained in the CBP Protest" because the Court gave Commerce sixty days to submit its Remand Determination. *Id.* at 6. Plaintiffs also insist that Commerce rejected the CBP Protest with no lawful basis, "as doing so unduly hampered Commerce's ability to accurately determine the dumping margins" and improperly substituted finality for accuracy. *See id.* at 7–10.

Plaintiffs also argue that the Court should apply a doctrine that would constructively define the administrative record in this way: the CBP Protest, since it was filed before another federal government agency, was therefore "a matter of federal government record" that was "already in the government's [i.e. Commerce's] possession," putting Commerce "on judicial notice of the content and substance of the CBP Protest." *Id.* at 7. Plaintiffs eventually rise to what may be their most creative expression of this argument, urging the Court that, "because the CBP Protest is a byproduct of and pertains directly to the accuracy of the CBP data used by Commerce, the substance of the CBP Protest is within, or at the very least an essential and inseparable appurtenance of, the original administrative record." *Id.* at 10. (Presumably, the natural consequence of these last two arguments would be to redefine the CBP Protest as being a part of the record *already*, although Plaintiffs leave that deduction for the Court to reach on its own.)

In explaining why these arguments fail, it is appropriate to begin by pointing out two relevant prior decisions in this case. On May 25, 2011, the Court entered an order denying Plaintiffs' First Motion to Stay. *See* ECF No. 10 (motion), ECF No. 28 (order). Plaintiffs' motion sought to delay the case until such time as a final decision was

rendered on the CBP Protest. The Court indicated that it was denying the stay in part "[u]pon consideration of . . . the responses in opposition filed by Defendant and Defendant-Intervenor." *See* Order, ECF No. 28. The opposition filings referenced in the order focused almost entirely on the argument that Plaintiffs' motion improperly sought to stall the case until the CBP Protest was decided. *See generally* Defendant's Response in Opposition to Plaintiffs' Motion to Stay, ECF No. 25; Defendant-Intervenors' Response in Opposition to Motion to Stay, ECF No. 26. Both defendant-side parties argued that such a stay would function to surreptitiously introduce the contents of the CBP Protest into the administrative record, which would be improper because the CBP Protest was not filed until *after* Commerce's final determination and therefore was not before the Department when it rescinded Plaintiffs' new shipper reviews.

Second, the Court's order remanding this case to Commerce for redetermination incidentally disposed of a further attempt by Plaintiffs to introduce the CBP Protest into the administrative record. *See* Plaintiffs' Motion to Supplement Administrative Record, ECF No. 73. The Court denied the motion, and also indicated that it would not require Commerce to add the CBP Protest to the administrative record on remand. (*See* Slip-Op. 12–57 at 15–16 (stating that the Court was "disinclined to obligate Commerce to accept or consider factual information that was not presented during the underlying administrative proceeding").)

For the third (and final) time, the Court now rejects Plaintiffs' attempts to place the CBP Protest at the center of this case. The Court finds that Commerce's decision not to reopen the administrative record on remand was a completely reasonable exercise of its authority. As Commerce explained to Plaintiffs, reopening the record at the time Plaintiffs' request was filed would have hampered Commerce's ability to complete the remand proceeding in the time allotted by the Court, and Defendant-Intervenors would not have had a fair chance to respond to the CBP Protest adequately. Defendant's Response to Plaintiff's Comments upon Commerce's Final Remand Redetermination ("Defendant's Response") at 9, ECF No. 95.

Plaintiffs also urge the Court to misapply the "*NTN / Timken* doctrine," which in certain circumstances requires that the Department accept late factual submissions in order to properly weigh the need for accuracy against the need for finality. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995); *see also Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353–54 (Fed. Cir. 2006). That doctrine is inapplicable here because the CBP Protest is not the kind of untimely factual submission that falls within the *NTN*

/ *Timken* doctrine, which "stress[es] that, at the preliminary results stage, Commerce abuses its discretion where it refuses to let a respondent establish an accurate dumping margin by correcting mistakes in its response." *Fischer S.A. Comercio, Industria and Agricultura v. United States*, 34 CIT ___, ___, 700 F. Supp. 2d 1364, 1375 (2010). The doctrine is not as broad as Plaintiffs urge. It is limited to the correction of mistakes in timely factual submissions to ensure an accurate assessment at the final determination stage, which is inapplicable here. And in any case the doctrine has never been extended to require Commerce to reopen the record in a relatively brief remand redetermination in which the Court, rather than the trade laws, provides the deadlines. The Court declines to extend the *NTN / Timken* doctrine in that manner today.

As to Plaintiffs' contentions that the CBP Protest should be considered to be constructively within the administrative record due to the fact that it is tangentially related to documents previously considered in the record before Commerce, Plaintiff cites no authority for this concept, apart from using the legalese "judicial notice." However, the briefest of references to Black's Law Dictionary reveals that judicial notice involves "[a] court's acceptance, for purposes of convenience and without requiring a party's proof, of a well-known and indisputable fact; the court's power to accept such a fact." Black's Law Dictionary, 9th Ed., at 923. A party may not invoke an inherent power of the Court, especially to assert rights against Commerce, much less to resolve a contested matter such as the classification of entries in a CBP Protest. The Court also rejects Plaintiffs' notion that the Court may, essentially by fiat, interpret the administrative record to include a protest filed after Commerce reached its final determination on that record.

For all of these reasons, the Court concludes that Commerce acted appropriately when it rejected the CBP Protest from the record on remand, and consequently upholds that portion of the Remand Redetermination.

II. *Commerce Correctly Declined to Consider the Contents of the CBP Protest*

The Court also rejects Plaintiffs' argument that Commerce reached an improperly inaccurate result because it refused to examine the contents of the CBP Protest. This point can be seen as moot given the Court's decision that Commerce properly rejected the CBP Protest from the remand record, but the Court believes it is still appropriate to briefly examine this contention in the alternative.

Plaintiffs describe the purported relevance of the CBP Protest this way:

> In a nutshell, an importer unrelated to Plaintiffs made entries of a product it described as non-subject merchandise. CBP reclassified it as honey. Commerce relied on the data from these entries in its unfavorable analyses of the Plaintiffs' U.S. sales. The unrelated importer subsequently filed an official protest, arguing that their [sic] entries were not of honey, and supporting their [sic] argument with laboratory analyses. The results of this protest are pending.

Plaintiffs' Comments at 11–12.

The Court refuses to require that Commerce examine the merits of any CBP Protest related to CBP data it wishes to use before it may rely on such CBP data in determining the final results of a new shipper review. Such a rule would, as Commerce rightly worries, either force Commerce to consider the content of protests and intrude on the statutory authority of Customs, or endlessly delay new shipper reviews while Commerce deferred to CBP and the courts to finalize classification questions. Defendant's Response at 10–11. The statutory presumption of correctness that attaches to Customs' classification decisions would also be weakened and, potentially, rendered a nullity.

The Court immediately sees several significant practical concerns stemming from such a precedent. Commerce would likely be prevented, in practice, from relying on CBP data. Reliance on CBP data would *always* raise the potential that a future protest filed after Commerce's final determination would effectively undo the Commerce proceeding, and require Commerce to reopen its proceeding and record pending (1) the outcome of the protest before Customs, (2) any appeal of a denial by Customs to the Court of International Trade, (3) the conclusion of any appeals of a CIT decision to the Court of Appeals for the Federal Circuit and the Supreme Court, and (4) the eventual final legal settlement of all issues related to proper customs classification of the involved goods. This would be a deeply problematic result.

Not only that, but the Court fears that such a rule could give importers who sought a new shipper review a perverse ability to tamper with Commerce's proceedings. By protesting before Customs the classification of entries that formed the basis of new shipper reviews that they initiated before Commerce, importers could force Commerce into conflict with Customs, potentially obtain contradictory determinations from the two agencies, and render the time limits on new shipper reviews a virtual nullity.

Plaintiffs contend that, "[c]onsidering what the Plaintiffs stand to lose vis-a-vis what can only be a minor and nonrecurring inconvenience to Commerce or CBP of having to wait to wind up their procedures, . . . the minimum of fairness requires that all involved parties at least wait for the results of the CBP Protest." Plaintiffs' Comments at 12. The Court disagrees for the reasons described above, and affirms Commerce's decision to decline to consider the contents of the CBP Protest in its Remand Redetermination.

III. *Commerce's Reliance on the CBP Data Rather Than Plaintiffs' Submissions*

The Court finds that Commerce properly considered the PRC honey export data, website and advertising printouts from the Confidential Exporter, PIERS data, and USDA honey reports that Plaintiffs' submitted. Commerce's decision that these sources of data were all less reliable than the CBP data was supported by the record evidence and otherwise in accordance with law, and is therefore affirmed.

A. Commerce Properly Found the CBP Data More Reliable than the PRC Honey Export Data

Plaintiffs attack on Commerce for weighing the CBP data as more reliable than the PRC honey export data fails because it is (1) based on assumptions that are not part of the record and (2) adopts a backwards approach that Commerce should have the burden of proving *unreliability* of record data, rather than Plaintiffs having a burden to demonstrates the reliability of data they placed in the record. Commerce correctly rejected these contentions, and the Court therefore affirms the agency's decision to rely on the CBP data over the PRC honey export data.

Plaintiffs begin by arguing that "Commerce was fully aware that the MOC is a Chinese Government entity essentially equivalent to Commerce." Plaintiffs' Comments at 15. Plaintiffs rely on "common knowledge" and (again) "judicial notice" to support their assertion that the "MOC obtains its data directly from Chinese customs documentation." *Id.* Plaintiffs do not cite (and the Court has not located) any evidence in the record to establish the truth of these assertions. Plaintiffs also urge that it "was improper for Commerce to treat China's data with any less deference than it would the data of other modern countries." *Id.* "[T]he sensible assumption," Plaintiffs contend, "is that official PRC government data—which the MOC data is—is collected by PRC government officials at the involved ports of export." *Id.* at 17.

The remainder of Plaintiffs arguments on the PRC honey export data are suggestions that Commerce failed in a duty to build an

adequate record as to the data's reliability. Plaintiffs suggesting that "a minimal and reasonable inquiry by Commerce would have revealed" the reliability of the data, *id.* at 15; that it was "unreasonable" for Commerce to question whether the MOC data came from primary sources "when there is nothing on the record to suggest as much," *id.* at 17; and that "Commerce had ample time in which to make basic inquiries in order to satisfy its concerns" about the MOC data, *id.*

Plaintiffs miss the point with these arguments. The Court does not review Commerce's decisions to ensure that they are based on sensible assumptions, but rather for evidentiary support in the administrative record and consistency with law. 19 U.S.C. § 1516a(b)(1), (B)(i) (the Court will "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"). Indeed, any Commerce decision that was based on assumptions—sensible or otherwise—would be very unlikely to survive a substantial evidence challenge before this Court.

Plaintiffs also mistakenly press for the Court to impose a duty on Commerce to assemble the administrative record of substantial evidence upon which its decisions must be made. However, it is Plaintiffs—*not* Commerce—who bear the burden of creating a record of relevant data in a timely fashion. *Alloy Piping Prods., Inc. v. United States*, 26 CIT 330, 349–50, 201 F. Supp. 2d 1267, 1284 (2002) ("The general rule" is that "the respondent bears the burden and responsibility of creating an accurate record within the statutory timeline"). Plaintiffs cite no authority that would oblige Commerce to gather, on behalf of Plaintiffs, information for the record to ensure that Commerce has a complete understanding of the methodology behind Plaintiffs' submitted data. Nor is the Court aware of any such authority.

The Court therefore finds that Commerce fulfilled its duty in regard to examination of the MOC data: Commerce considered the nature of the data, the available information as to the veracity and weight the data should be accorded, and then made a reasonable, evidence-supported decision to rely instead on the CBP import data that conflicted with the MOC data. Remand Redetermination at 5–6, 10–13; Defendant's Response at 13–14. The Court affirms that determination as supported by substantial evidence and in accordance with law.

B. Commerce Properly Found the CBP Data More Reliable than the Website and Advertising Printouts from the Confidential Exporter

Plaintiffs have similarly thin grounds to attack Commerce's treatment of the printouts from the website of the Confidential Exporter.

In the case of these documents, Plaintiffs' arguments are founded on the misapprehension that Commerce did "not give the printouts of the web site of the PRC exporter consideration." Plaintiffs' Comments at 20. Plaintiff cites instances in which Commerce has relied on similar documents and quibbles with Commerce for interpreting ambiguous language in the documents as suggesting that the Confidential Exporter might, in fact, export to the United States. *Id.* at 18–19.

The Remand Redetermination makes it clear that Commerce did, in fact, consider the printouts from the Confidential Exporter. Remand Redetermination at 14–16. Although Plaintiffs wish the Court to substitute Plaintiffs' weighing of those documents for Commerce's weighing, that is not the nature of the Court's inquiry. Instead, the Court finds that Commerce considered the documents and found no evidence in the record from which it could conclude that they were more reliable than the CBP data with which they directly conflicted. *Id.* Therefore, the Court affirms Commerce's decision in the Remand Redetermination not to rely on the Confidential Exporter's website printouts over the CBP data.

C. Commerce's Reliance on the CBP Data Instead of the PIERS Data Was Supported by Substantial Evidence

In challenging the Department's decision to accord more weight to the CBP data than to the PIERS data, Plaintiffs assert that, despite a long history of relying on PIERS data, Commerce departed from its practice and did not give Plaintiffs' PIERS submissions full consideration in this case. Plaintiffs' Comments at 22 ("Commerce knows the PIERS data is probative"), 23 (it is unreasonable for "Commerce not to give the PIERS summaries full consideration"). Plaintiffs claim repeatedly that Commerce has a long practice of obtaining and using PIERS data, is intimately familiar with the collection methodologies underlying PIERS data, knows that it is as accurate as CBP data, and accords it the same weight as CBP data. *Id.* at 20–23.

Plaintiffs also argue that, absent specific evidence that the PIERS data were unreliable, Commerce should be forced to either rely on them or obtain the underlying data to resolve any questions about their adequacy. *Id.* at 20 ("there is nothing in the record to indicate that [PIERS data] is any less reliable or accurate than the similarly collected CBP data"), 21 (Commerce, if "sincerely concerned about the corroboration provided by the entry documentation," could have affirmatively obtained it).

Plaintiffs' assertions are unconvincing. Plaintiffs have it backwards when they suggest that Commerce must rely on the PIERS data absent evidence that it is unreliable; in fact, Commerce must find

substantial evidence to support any data upon which it rests its decision. The Court therefore rejects this attack by Plaintiffs. The Court also finds that Commerce gave full and careful consideration to the PIERS data. Commerce explained that it found the CBP data more reliable because the CBP data was drawn from a variety of entry documents, including CBP documents that determine the legal description of merchandise contained in entries, while the PIERS data was obtained only from ship manifests and did not have the same legal weight as the CBP data. Remand Redetermination at 18. Commerce therefore reasonably applied its long-standing policy of giving weight to CBP data over PIERS data in situations where the data conflict. *Id.* Commerce explained that its reliance on PIERS data in past proceedings never found it more reliable than conflicting CBP data. *Id.* at 17–18. Far from failing to consider the PIERS data, Commerce fully considered it but came to a conclusion that was not to Plaintiffs' liking. However, the agency's decision was supported by substantial evidence in the record and is therefore affirmed.

D. Commerce's Reliance on the CBP Data Instead of the USDA Honey Reports Was Also Supported by Substantial Evidence

Plaintiffs claim that the USDA honey reports reveal that the CBP data are flawed as to price and quantity. Plaintiffs' Comments at 24. In attacking Commerce's decision not to rely on the USDA honey reports, Plaintiffs contend that Commerce should be "considered aware of the data collection methodology and content" of the USDA reports since Commerce and the USDA are "each part of the same branch of the federal government" and are therefore "parts of the same entity." *Id.* at 23–24. From this basis, Plaintiffs argue that Commerce refused to give the USDA honey reports "serious consideration," since it did not rely on them despite a lack of evidence in the record to suggest that the USDA reports were flawed.

Again Plaintiffs mischaracterize Commerce's determination. Commerce in fact gave careful consideration to the honey reports. This is demonstrated by Commerce's decision not to rely on the reports because the record lacked evidence about the time span during which the information was collected or the Harmonized Tariff Schedule numbers employed in the reports. Remand Redetermination at 9. As a result, Commerce was unable to tell whether the honey reports even related to the POR as issue. *Id.* Commerce also points out again that it is Plaintiffs that bear the burden of demonstrating the reliability of the USDA reports, not Commerce. *Id.* at 20–21; Defendant's Response at 20. Given that Commerce closely evaluated the substantial evi-

dence in the record when determining that the USDA honey reports were not as reliable as the CBP data, the Court affirms that decision.

E. Commerce's Redetermination Is Supported by Totality of Evidence

Plaintiffs argue that the totality of the evidence overcame any presumption that the CBP data were accurate. Plaintiffs' Comments at 26–28. Since the CBP data Commerce chose to rely upon conflicts with all other information on the record, goes this argument, the agency's "preference for and reliance on CBP data [became] unreasonable." *Id.* at 27. Plaintiffs urge the Court to overturn the redetermination because all of the sources in the record "are consistent in that they all point to the same conclusion, that the CBP data is wildly incorrect." *Id.*

Plaintiffs overstate their argument. While each of the four sources of data submitted by Plaintiffs conflicts with the CBP data in one way or another, that does not mean that these four data sources agree with each other about the nature of imports of PRC honey into the United States during the POR, or whether Plaintiffs' imports were *bona fide.* Commerce is not required to use perfect data, but to make careful determinations based on the most reliable data in the record. The Court is satisfied that Commerce has done so here. The Court rejects the notion that the mere presence of numerous less reliable data sets in the record can automatically impugn the reliability of the best record evidence.

Plaintiffs' remaining contentions have been examined and found without merit.

CONCLUSION

For the reasons set forth in this opinion, the Court finds that Commerce's Remand Redetermination is based upon substantial evidence in the record and is in accordance with law, and it is therefore

ORDERED that the Remand Redetermination be, and hereby is, SUSTAINED.

Dated: February 27, 2013
New York, New York

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

ERRATA

Wuhu Fenglian Co., Ltd., et al. v. United States et al., Court No. 11–00045, Slip Op. 13–27, dated February 27, 2013.

Page 4: Replace the phrase "Plaintiffs' submission" with "Plaintiffs' submissions" in the 4th line of the 1st paragraph under subheading II.

Page 18: Replace the phrase "Plaintiffs' submitted" with "Plaintiffs submitted" in the 3rd line of the 1st paragraph.

Page 18: Replace the phrase "Plaintiffs attack" with "Plaintiffs' attack" in the 1st line of the 2nd paragraph.

Page 18: Replace the phrase "demonstrates the reliability of data" with "demonstrate the reliability of data" in the 5th line of the 2nd paragraph.

Page 19: Replace "Plaintiffs arguments" with "Plaintiffs' arguments" in the 7th line from the top of the page.

Page 19: Replace "Plaintiffs suggesting" with "Plaintiffs suggest" in the 9th line from the top of the page.

Page 21: Replace "Plaintiff cites instances in which Commerce has relied on similar documents and quibbles with Commerce" with "Plaintiffs cite instances in which Commerce has relied on similar documents and quibble with Commerce" on the 5th through 6th lines of the 1st paragraph under subheading B.

Page 24: Insert the sentence "*Id.* at 24." at the end of the 1st paragraph.

March 4, 2013

Slip Op. 13–28

LEGACY CLASSIC FURNITURE, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 10–00352

JUDGMENT

Upon consideration of the Department of Commerce's Final Results of Second Redetermination Pursuant to Court Order dated 19 September 2012 (ECF No. 63), upon comments in which all parties concur with affirmance of that remand determination (ECF Nos. 64 and 65), upon all other pertinent papers, and pursuant to USCIT Rule 54, it is hereby

ORDERED that judgment is entered sustaining the Final Results of Second Redetermination Pursuant to Court Order; and it is further

ORDERED that this case is dismissed.

Dated: March 6, 2013
New York, NY

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

Slip Op. 13–29

GIORGIO FOODS, INC., Plaintiff, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and L.K. BOWMAN COMPANY, MONTEREY MUSHROOMS, INC., AND THE MUSHROOM COMPANY, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 03–00286

[Grating motions to dismiss pursuant to USCIT Rules 12(b)(1) and 12(b)(5)]

Dated: March 6, 2013

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OPINION

Stanceu, Judge:

This case arose from decisions of two agencies, the U.S. International Trade Commission (the "ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs"), denying plaintiff monetary benefits under the now-repealed Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"), 19 U.S.C. § 1675c (2000).[1] The ITC determined that Giorgio Foods, Inc. ("Giorgio"), a domestic producer of preserved mushrooms, did not qualify for "affected domestic producer" ("ADP") status, which a domestic producer must obtain in order to receive CDSOA disbursements ("offsets") of collected antidumping duties from Customs. Giorgio claims it is owed a share of the duties Customs collected under various antidumping duty orders on imports of certain preserved mushrooms from Chile, the People's Republic of China ("China"), Indonesia, and India and distributed to other domestic mushroom producers.[2] Second Am. Compl. ¶ 17 (June 7, 2011), ECF No. 150–1.

The ITC construed the "petition support requirement" of the CDSOA, 19 U.S.C. § 1675c(b)(1)(A), (d)(1), under which CDSOA offsets are limited to petitioners and parties in support of an antidumping or countervailing duty petition, so as to disqualify Giorgio from the list of potential ADPs because Giorgio indicated to the ITC in questionnaire responses that it did not support the petition that resulted in the antidumping duty orders. *Id*. ¶ 45. Because Giorgio lacked ADP status, Customs made no CDSOA disbursements to Giorgio for Fiscal Years 2001 through 2010. *Id*. ¶¶ 10, 80–84, 87.

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[1] Pub.L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, *repealed by* Deficit Reduction Act of 2005, Pub.L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). Citations are to the codified version of the Continued Dumping and Subsidy Offset Act ("CDSOA"), 19 U.S.C. § 1675c (2000). All other citations to the United States Code are to the 2006 edition.

[2] *See Notice of Antidumping Duty Order: Certain Preserved Mushrooms from Chile*, 63 Fed. Reg. 66,529 (Dec. 2, 1998); *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China*, 64 Fed. Reg. 8,308 (Feb. 19, 1999); *Notice of Antidumping Duty Order: Certain Preserved Mushrooms from Indonesia*, 64 Fed. Reg. 8,310 (Feb. 19, 1999); *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from India*, 64 Fed. Reg. 8,311 (Feb. 19, 1999).

Plaintiff's second amended complaint brings as-applied constitutional challenges to the CDSOA's petition support requirement that are grounded in the First Amendment and the Fifth Amendment equal protection guarantee. *Id*. ¶¶ 89–98. Plaintiff also asserts "unjust enrichment" claims against the defendant-intervenors opposing it in this action, L.K. Bowman Company, a division of Hanover Foods Corporation ("L.K. Bowman"), Monterey Mushrooms, Inc. ("Monterey"), and The Mushroom Company ("Mushroom Co."), each of whom Giorgio alleges to have received and retained, unjustly, Giorgio's share of CDSOA distributions. *Id*. ¶¶ 85, 108.

Before the court are several motions to dismiss. The court concludes that Giorgio's constitutional claims must be dismissed for failure to state a claim upon which relief can be granted and that it lacks subject matter jurisdiction over Giorgio's unjust enrichment claims. The court will enter judgment dismissing this action.

I. BACKGROUND[3]

On January 6, 1998, an antidumping duty petition filed with Commerce and the ITC sought the imposition of antidumping duties on preserved mushrooms from Chile, China, Indonesia, and India. Second Am. Compl. ¶ 26. Beginning that year, the ITC conducted investigations to determine whether imports of certain preserved mushrooms from Chile, China, Indonesia, and India were causing or threatening to cause material injury to a domestic industry. *Id*. ¶ 27 (citing *Initiation of Antidumping Investigations: Certain Preserved Mushrooms from Chile, India, Indonesia, and the People's Republic of China*, 63 Fed. Reg. 5,360 (Feb. 2, 1998)). In conducting those investigations, the ITC sent questionnaires to domestic producers of preserved mushrooms, including Giorgio. *Id*. ¶¶ 9, 45. In its responses to the Commission's questionnaires for the preliminary, as well as the final, phase of the investigations, "Giorgio wrote that it (1) took no position with respect to the petition filed against preserved mushrooms from Chile, China, and Indonesia, and (2) opposed the petition with respect to India." *Id*. ¶ 45.

Based on an affirmative ITC injury determination and its own affirmative finding of sales at less than fair value, the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued an antidumping duty order on certain preserved mushrooms from Chile on December 2, 1998. *Id*. ¶¶ 8, 62; *see also Notice of Antidumping Duty Order: Certain Preserved Mushrooms from Chile*, 63 Fed. Reg. 66,529 (Dec. 2, 1998). Similarly, on

[3] The facts as stated herein are as pled in the Second Amended Complaint.

February 19, 1999, Commerce issued antidumping duty orders on preserved mushrooms from India, Indonesia, and China. Second Am. Compl. ¶¶ 8, 62; *see also Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from India*, 64 Fed. Reg. 8,311 (Feb. 19, 1999); *Notice of Antidumping Duty Order: Certain Preserved Mushrooms from Indonesia*, 64 Fed. Reg. 8,310 (Feb. 19, 1999); *Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Preserved Mushrooms from the People's Republic of China*, 64 Fed. Reg. 8,308 (Feb. 19, 1999).

The CDSOA was enacted on October 28, 2000. 19 U.S.C. § 1675c. Concluding that Giorgio had not supported a petition resulting in any of the four mushroom antidumping orders so as to qualify Giorgio for CDSOA offsets, the ITC did not include Giorgio on its published lists of ADPs for the mushroom antidumping duty orders for Fiscal Years 2001 through 2010.[4] Second Am. Compl. ¶ 10. The ITC subsequently denied Giorgio's written requests for ADP status. *Id.* ¶¶ 71–73. Giorgio filed CDSOA certifications with Customs for various fiscal years to request CDSOA disbursements, but Customs made no disbursements to Giorgio.[5] *Id*. ¶¶ 67, 78. In contrast, the ITC included the defendant-intervenors on its ADP lists, under the four mushroom antidumping orders, for all fiscal years since the CDSOA was enacted, and Customs has distributed CDSOA offsets to the defendant-

[4] *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 40,782, 40,797 (Aug. 3, 2001); *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed. Reg. 44,722, 44,735–36 (July 3, 2002); *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 68 Fed. Reg. 41,597, 41,630–31 (July 14, 2003); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 69 Fed. Reg. 31,162, 31,193–94 (June 2, 2004); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 70 Fed. Reg. 31,566, 32,156–57 (June 1, 2005); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 71 Fed. Reg. 31,336, 31,351, 31,366, 31,369, 31,372 (June 1, 2006); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582, 29,597, 29,612, 29,615, 29,619 (May 29, 2007); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196, 31,211, 31,226–27, 31,230, 31,233 (May 30, 2008); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814, 25,830, 25,846, 25,849, 25,852 (May 29, 2009); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 75 Fed. Reg. 30,530, 30,546, 30,562, 30,565, 30,568 (June 1, 2010).

[5] Plaintiff pleads that Giorgio Foods, Inc. ("Giorgio") did not file a certification for CDSOA benefits under the antidumping duty order for preserved mushrooms from India on account of futility, as the Commission's response to Giorgio's certifications for the three other antidumping duty orders had stated that it was "inappropriate" to add Giorgio to the list of ADPs because of Giorgio's questionnaire responses in the original investigations. Second Am. Compl. ¶¶ 70–73 (June 7, 2011), ECF No. 150.

intervenors in every fiscal year. *Id*. ¶ 11.

Giorgio commenced this action on May 23, 2003. Summons, ECF No. 1; Compl., ECF No. 4. This case was stayed on October 10, 2003 pending resolution of cross-motions for judgment upon the agency record in another case involving a constitutional challenge to the CDSOA, *PS Chez Sidney, L.L.C. v. U.S. Intern. Trade Com'n*, Court No. 02–00635. Order, ECF No. 27. The decision in that case, *PS Chez Sidney*, 30 CIT 858, 442 F. Supp. 2d 1329 (2006) ("*Chez Sidney I* "), rejected a statutory CDSOA claim but held the CDSOA petition support requirement violative of the First Amendment, *id*. at 1331–33.

After the lifting of the stay, plaintiff moved on July 28, 2006 for a temporary restraining order and a preliminary injunction, seeking to prevent further CDSOA distributions to the recognized ADPs for the mushroom antidumping duty orders.[6] Giorgio Foods Inc.'s Mot. for a TRO & for a Prelim. Inj., ECF No. 30. This Court denied the motion for a temporary restraining order on August 2, 2006, Order, ECF No. 32, and on August 9, 2006, plaintiff filed a second motion for a preliminary injunction, Giorgio Foods Inc.'s Mot. for a Prelim. Inj., ECF No. 34. On August 23, 2006, L.K. Bowman, Monterey, Mushroom Canning, and Sunny Dell Foods, Inc. ("Sunny Dell"), parties that were petitioners in the antidumping duty investigations, Second Am. Compl. ¶ 27, moved to intervene in this action, Mot. to Intervene as of Right, ECF No. 39. The court granted the intervention motion with respect to all movants except for Sunny Dell, which declined to produce a witness requested by plaintiff for questioning at the preliminary injunction hearing. Order 2 (Sept. 13, 2006), ECF No. 51. On September 22, 2006, this Court denied the motion for a preliminary injunction. Order Denying Pl.'s Mot. for Prelim. Inj., ECF No. 58.

On October 12, 2006, plaintiff moved for leave to amend its complaint. Giorgio Foods, Inc.'s Mot. for Leave to Amend the Compl., ECF No. 59. Plaintiff sought to abandon a statutory claim it had brought against the ITC, to add facial and as-applied challenges to the petition support requirement under the Fifth Amendment equal protection guarantee, and to add claims for unjust enrichment against the defendant-intervenors. Mem. of Law in Supp. of Pl.'s Mot. for Leave to Amend the Compl. 1–2, ECF No. 59. Plaintiff also sought to "update" its claims, to add "factual allegations" to account for develop-

[6] As a result of the commencement of this action and plaintiff's moving on August 9, 2006 for a preliminary injunction, U.S. Customs & Border Protection ("Customs"), pending resolution of this action, provisionally treated Giorgio as an affected domestic producer for Fiscal Years 2006 through 2009 and withheld Giorgio's claimed share from distribution to recognized ADPs. Second Am. Compl. ¶ 87. Customs did not withhold any CDSOA funds for Giorgio for Fiscal Year 2010. *Id*. ¶ 88.

ments since the case was filed and stayed in 2003, and to clarify its requested relief, which plaintiff specified as CDSOA distributions for fiscal years 2001 through 2005. *Id*.; First Am. Compl. ¶¶ 64, 69 (Oct. 12, 2006), ECF 59–2. On August 21, 2007, the court granted plaintiff's motion with respect to the aforementioned amendments.[7] *Giorgio Foods, Inc. v. United States*, 31 CIT 1261, 1262, 515 F. Supp. 2d 1313, 1316 (2007) ("*Giorgio I* ").

On May 6, 2008, this Court stayed this action a second time pending appellate resolution of the *Chez Sidney* litigation as well as another case that addressed constitutional issues involving the CDSOA, *SKF USA Inc. v. United States*, Court No. 05–00542. Order, ECF No. 84; *SKF USA, Inc. v. United States*, 30 CIT 1433, 1446–47 451 F. Supp. 2d 1355, 1366–67 (2006) ("*SKF USA I*") (holding the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds). On February 19, 2009, the Court of Appeals for the Federal Circuit ("Court of Appeals") reversed *SKF USA I* and upheld the petition support requirement under the First Amendment and the equal protection guarantee of the Fifth Amendment. *SKF USA, Inc. v. United States*, 556 F.3d 1337, 1360 (Fed. Cir. 2009) ("*SKF USA II* "). On May 17, 2010, the United States Supreme Court denied a petition for a writ of certiorari in *SKF USA II*. *SKF USA, Inc. v. Customs and Border Protection*, 130 S.Ct. 3273 (2010). On October 28, 2010, the Court of Appeals issued a non-precedential order in *PS Chez Sidney*, stating that, following the denial of certiorari, *SKF USA II* is a final decision that "is controlling with regard to all constitutional issues presented in [the] appeal," while limiting briefing to the non-constitutional issues in that case. *PS Chez Sidney, L.L.C. v. U.S. Intern. Trade Com'n*, 409 F.App'x 327, 329 (Fed. Cir. 2010) ("*Chez Sidney II* ").

After the lifting of the second stay, plaintiff moved on April 5, 2010 for leave to amend its complaint a second time. Giorgio Foods, Inc.'s Second Mot. for Leave to Amend the Compl., ECF No. 150. Plaintiff sought to withdraw its facial First Amendment and equal protection challenges to the CDSOA and replace them with claims that the CDSOA violates the First Amendment and Fifth Amendment equal protection guarantee "as applied to Giorgio" for Fiscal Years 2001 through 2010. Mem. of Law in Supp. of Pl.'s Second Mot. for Leave to

[7] Plaintiff's motion for leave to amend also sought to add Sunny Dell Foods, Inc. ("Sunny Dell") as a defendant. Giorgio Foods, Inc.'s Mot. for Leave to Amend the Compl. 4 (Oct. 12, 2006), ECF No. 59. The court denied this request, concluding that the addition would unduly prejudice plaintiff, based on Sunny Dell's previous refusal to produce a witness in response to plaintiff's request at the hearing on the motion for preliminary injunction. *Giorgio Foods, Inc. v. United States*, 31 CIT 1261, 1265–1267, 515 F. Supp. 2d 1313, 1318–20 (2007).

Amend the Compl. 2–4, ECF No. 150 ("Pl.'s Mem. in Supp. of Second Mot. to Amend"); Second Am. Compl. ¶¶ 90–91, 94–97. Plaintiff also sought to reinstate its previously abandoned statutory claim and, in the alternative, to add a claim alleging "substantive and procedural due process violations, arising from the CDSOA's failure to afford Giorgio notice and an opportunity to present evidence of actions Giorgio took in support of the petition." Pl.'s Mem. in Supp. of Second Mot. to Amend 3–4. Finally, plaintiff sought to add a claim for money damages against the United States. *Id*. at 3–4, 12. On November 17, 2011, this Court granted plaintiff's request to abandon the facial constitutional claims, *Giorgio Foods, Inc. v. United States*, 35 CIT __, __, 804 F. Supp. 2d 1315, 1320–21 (2011) ("*Giorgio II* "), but denied plaintiff's requests to add a statutory claim, due process claims, and a claim for money damages, *id*. 35 CIT at __, 804 F. Supp. 2d at 1321–25.

On July 13, 2012, the Court of Appeals issued its decision in *PS Chez Sidney, L.L.C. v. U.S. Intern. Trade Com'n*, 684 F.3d 1374 (Fed. Cir. 2012) ("*Chez Sidney III* "). On October 16, 2012, defendant and defendant-intervenors filed their motions to dismiss. On January 30, 2013, the court denied a motion by plaintiff to stay this action pending the outcome of two appeals of CDSOA-related decisions arising from an antidumping duty order on Chinese wooden bedroom furniture that were, and continue to be, pending before the Court of Appeals. G*iorgio Foods v. United States*, 37 CIT __, __, Slip Op. 13–14, at 5 ("*Giorgio III* "). On March 1, 2013, plaintiff filed its response to the motions to dismiss. Pl.'s Opp'n to Defs.' and Def.-Intervenors' Mots. to Dismiss, ECF No. 200 ("Pl.'s Opp'n").

II. DISCUSSION

Before the court are the motions to dismiss the second amended complaint, as filed on October 16, 2012 by defendant United States, defendant ITC, and defendant-intervenors.[8] The claims remaining in

[8] Defendant U.S. International Trade Commission ("ITC") moved to dismiss under Rule 12(b)(5). Def. U.S. Int'l Trade Comm'n's Mot. to Dismiss Pursuant to R. 12(b)(5), ECF No. 179 ("ITC's Mot."). The United States and defendant-intervenors moved to dismiss under Rules 12(b)(1) and 12(b)(5). Def.'s Mot. to Dismiss for Failure to State a Claim upon which Relief Can Be Granted and Mot. to Dismiss for Lack of J. ("Def.'s Mot."), ECF No. 180; Mot. by Def.-Intervenors L.K. Bowman Co. and The Mushroom Co. (Formerly Mushroom Canning Co.) to Dismiss the Second Am. Compl., ECF No. 181 ("L.K. Bowman & Mushroom Co.'s Mot."); Def.-Intervenor Monterey Mushrooms, Inc.'s Mot. to Dismiss Pl.'s Second Am. Compl. Pursuant to Rs. 12(b)(1) and 12(b)(5), ECF No. 182 ("Monterey's Mot."). Earlier (in 2003), a motion to dismiss a count in the original complaint pursuant to USCIT Rule 12(b)(5) was filed by the ITC. Mot. of Def. U.S. Int'l Trade Comm'n to Dismiss Claim 1 of the Compl. (Aug. 25, 2003), ECF No. 18. Because this motion was limited to the statutory claim in plaintiff's original complaint, it became moot when plaintiff abandoned that claim in its first amended complaint.

that complaint following the decision of this Court in *Giorgio II*, 35 CIT at __, 804 F. Supp. 2d at 1320–21, are constitutional challenges to the CDSOA, brought against defendants ITC and the United States, and claims of unjust enrichment, brought against the defendant-intervenors.[9] Specifically, plaintiff challenges the petition support requirement of the CDSOA, as applied to Giorgio, on First Amendment grounds. Second Amended Compl. ¶¶ 89–92. Further, it challenges the petition support requirement, as applied to Giorgio, on Fifth Amendment equal protection grounds. *Id*. ¶¶ 93–98. Finally, invoking supplemental jurisdiction, *id*. ¶ 21, plaintiff claims that the defendant-intervenors have been unjustly enriched at the expense of Giorgio, having received and retained Giorgio's lawful share of CDSOA distributions for certain fiscal years, and seeks restitution, through direct recovery of those distributions, from each of the defendant-intervenors, *id*. ¶¶ 107–108, 109(e).

The court exercises subject matter jurisdiction over plaintiff's constitutional challenges to the CDSOA according to section 201 of the Customs Courts Act of 1980 (2006), 28 U.S.C. § 1581(i)(4), which provides the Court of International Trade jurisdiction of civil actions arising out of any law of the United States, such as the CDSOA, providing for administration with respect to duties (including antidumping duties) on the importation of merchandise for reasons other than the raising of revenue. The CDSOA, out of which the constitutional claims arise, is such a law. *See Furniture Brands Int'l v. United States*, 35 CIT ___, ___, 807 F. Supp. 2d 1301, 1307–10 (2011). The court concludes it lacks subject matter jurisdiction over plaintiff's claims of unjust enrichment. This issue is addressed in Part II(B) of this Opinion.

A. No Relief Is Available on Plaintiff's As-Applied Constitutional Challenges to the CDSOA

In deciding USCIT Rule 12(b)(5) motions to dismiss for failure to state a claim upon which relief can granted, "the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (citations omitted). However, plaintiff's complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining

[9] In accordance with this Court's Order dated April 22, 2011, ECF No. 143, which granted a Consent Motion for Bifurcation, the court adjudicates plaintiff's constitutional claims prior to adjudicating any other issues, including remedy issues and plaintiff's claims for unjust enrichment and restitution.

whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id*. at 679.

The CDSOA amended the Tariff Act of 1930 ("Tariff Act") to provide for the distribution of antidumping and countervailing duties to persons with ADP status, which is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered.[10] 19 U.S.C. § 1675c(a), (d).[11] The statute directed the ITC to forward to Customs "within sixty days after the effective date of this section [19 U.S.C. § 1675c] in the case of orders . . . in effect on January 1, 1999, or thereafter . . . a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." *Id*. § 1675c(d)(1). The CDSOA directed that Customs publish in the Federal Register, prior to each distribution, lists of ADPs potentially eligible for distributions of a "continuing dumping and subsidy offset" based on the lists obtained from the Commission and that Customs request that potentially eligible parties certify eligibility for such an offset. *Id*. § 1675c(d)(2). The CDSOA also directed Customs to segregate antidumping and countervailing duties according to the relevant antidumping or countervailing duty order, to maintain these duties in special accounts, and to distribute to companies determined to be ADPs annually, as reimbursement for incurred qualifying expenditures, a ratable share of the funds (including all interest earned) from duties assessed on a specific unfairly traded product that were received in the preceding fiscal year. *Id*. § 1675c(d)(3), (e).

The Second Amended Complaint states that "[a]s applied to Giorgio . . . the CDSOA's petition support requirement violates the free speech clause of the First Amendment of the United States Constitution."

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[10] The CDSOA provided that:

> The term "affected domestic producer" means any manufacturer, producer, farmer, rancher or worker representative (including associations of such persons) that–
> (A) was a petitioner *or interested party in support of the petition* with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
> (B) remains in operation.

19 U.S.C. § 1675c(b)(1) (emphasis added).

[11] Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . . ." Deficit Reduction Act of 2005, Pub.L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Claims Resolution Act of 2010, Pub.L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

Second Am. Compl. ¶ 90. Plaintiff alleges that "[a]s a result of the unconstitutional application of the petition support requirement, Giorgio has unlawfully been . . . denied CDSOA offsets . . . for fiscal years 2001–2010 . . . ." *Id*. ¶ 91.

Plaintiff alleges, further, that "[a]s applied to Giorgio . . . the CDSOA's petition support requirement violates the Equal Protection guarantee of the U.S. Constitution." *Id*. ¶ 94. The complaint states that the CDSOA's speech-based eligibility criterion "creates a classification that implicates the exercise of constitutional free speech rights . . . that is not narrowly tailored to achieve a compelling government objective." *Id*. ¶ 95. Plaintiff also claims that the petition support requirement "discriminates without a rational basis between Giorgio . . . and other domestic producers . . . , including the Defendant-Intervenors." *Id*. ¶ 96. Plaintiff alleges that because of the equal protection violation, "Giorgio has unlawfully been . . . denied [CDSOA offsets] . . . for fiscal years 2001–2010 . . . ." *Id*. ¶ 97.

Both of plaintiff's constitutional claims are foreclosed by the holding of *SKF USA II*, which upheld the petition support requirement of the CDSOA on both First Amendment and equal protection grounds. The Court of Appeals stated that "the Byrd Amendment is within the constitutional power of Congress to enact, furthers the government's substantial interest in enforcing the trade laws, and is not overly broad. We hold that the Byrd Amendment is valid under the First Amendment." *SKF USA II*, 556 F.3d at 1360. The Court of Appeals further held that "[b]ecause it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard." *Id.*

Although stating that its challenges are "as applied to Giorgio," Second Am. Compl. ¶¶ 90, 94, plaintiff does not plead facts distinguishing Giorgio's constitutional challenges from the challenges asserted, and rejected by the Court of Appeals, in *SKF USA II*. Plaintiff alleges various facts that it characterizes as demonstrating that it is in support of an antidumping duty petition, including "providing all requested factual information" in its questionnaire responses to the ITC. Pl.'s Opp'n 1, 3 (citing Second Am. Compl. ¶ 45). The controlling fact, however, is plaintiff's admission in the complaint that, in both the preliminary and final phases of the Commission's investigation, "in response to one question on each questionnaire asking whether it supported the petition against each country, Giorgio wrote that it (1) took no position with respect to the petition filed against preserved mushrooms from Chile, China, and Indonesia, and (2) opposed the petition with respect to India." Second Am. Compl. ¶ 45. SKF USA,

Inc. ("SKF"), the plaintiff in *SKF USA II*, challenged the petition support requirement on grounds indistinguishable from those asserted here. SKF did not express support for the petition involved in that case. *SKF USA II*, 556 F.3d at 1343.

In opposing dismissal, plaintiff attempts to distinguish its case from *SKF USA II*, arguing that SKF had actively opposed the petition while Giorgio actively "supported" the petition by responding completely to the ITC's questionnaires and performing numerous other actions before and during the ITC's investigation. Pl.'s Opp'n 1–2 (citing Second Am. Compl. ¶¶ 29, 32–44). Plaintiff submits that as-applied constitutional challenges are inherently fact-based, *id*. at 14, and emphasizes that "Giorgio took no *actions* (as distinguished from its abstract expression of viewpoint in response to the petition support question) to oppose the petitions or Petitioners' trade enforcement efforts at any time in the Commission's investigation," *id*. at 1, 3–4 (citing Second Am. Compl. ¶ 54) (footnote omitted).

The court rejects plaintiff's argument. A party in the position of SKF and Giorgio, *i.e.*, a party without petitioner status in an antidumping duty investigation brought under the Tariff Act of 1930, can satisfy the petition support requirement of the CDSOA only if that party "indicate[s]" to the Commission "support of the petition by letter or *through questionnaire response*." 19 U.S.C. § 1675c(d)(1) (emphasis added). From the facts set forth in the Second Amended Complaint, it is clear that Giorgio, like SKF, failed to do so. The fact that Giorgio, as to three of the four countries named in the petition, did not take a position in opposition to the petition is not a meaningful distinction in light of the holding in *SKF USA II*.

Nothing in the *SKF USA II* opinion supports the notion that the Court of Appeals upheld the petition support requirement only partially or upheld the petition support requirement in some form other than as set forth in the CDSOA. Although SKF undertook various actions to "actively oppose" the petition, *id*. at 1358–59, whereas Giorgio opposed the petition only as to one country, this distinction is not meaningful because the petition support requirement draws no distinction between opposing a petition and declining to support a petition. *See* 19 U.S.C. § 1675c(b)(1)(A), (d)(1). Nor is the holding in *SKF USA II* based on any such distinction. As the Court of Appeals stated, "[a]t best, the role of parties opposing (or not supporting) the petition in responding to questionnaires is similar to the role of opposing or neutral parties in litigation who must reluctantly respond to interrogatories or other discovery." *SKF USA II*, 556 F.3d at 1359. The Court of Appeals explained that because "the purpose of the Byrd Amendment's limitation of eligible recipients was to reward

injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings," *id.* at 1352, it was "rational for Congress to conclude that *those who did not support the petition should not be rewarded*," *id*. at 1360 (emphasis added).

Next, plaintiff argues that in *SKF USA II*, the Court of Appeals "adopted a limiting construction of the [CDSOA]" and in so doing established a new test for eligibility based on a company's actions during the investigation, including its litigation support actions, rather than the particular viewpoint expressed in questionnaire responses. Pl.'s Opp'n 18, 20 (citing *SKF USA II*, 556 F.3d at 1353). Accordingly, as plaintiff submits, "the ITC failed to consider [Giorgio's] actions and failed to make any factual findings concerning [the] *actions* it took in support or in opposition to the petition." *Id*. at 21 (citation omitted). Plaintiff misinterprets the holding of *SKF USA II*. The statements in the opinion alluding to a "limiting construction" that "rewards actions (litigation support) rather than the expression of particular views," were made in the context of a theoretical construction of statutory language as an alternative to the Court's previous discussion of congressional purpose and as part of the larger analysis by which the Court subjected the CDSOA to First Amendment standards for the regulation of commercial speech. *See SKF USA II*, 556 F.3d at 1353 ("Finally, if we *were* to view this case as involving the construction of statutory language rather than an exercise in ascertaining statutory purpose, the result would be the same.") (emphasis added).[12] Contrary to plaintiff's view, *SKF USA II* did not establish a new test for ADP eligibility in order to conform the statute to the First Amendment. Instead, the Court upheld, in the face of constitutional challenges, the test for ADP eligibility that Congress enacted. Like the plaintiff in *SKF USA II*, Giorgio did not meet that test.

In support of its as-applied challenges, plaintiff also cites the recent decision of the Court of Appeals in *Chez Sidney III*. Plaintiff considers *Chez Sidney III* to be controlling in this action and submits that the Court of Appeals, "[b]uilding on its First Amendment analysis in *SKF [USA II]* . . . ruled [] that CDSOA benefits could neither be granted *nor denied* to a claimant solely based on an abstract expression of

[12] The court notes, further, that "as applied" First Amendment challenges in the commercial speech context are generally disfavored. *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430–31 (1993) ("[We] judge the validity of the restriction in this case by the relation it bears to the general problem . . . not by the extent to which it furthers the Government's interest in an individual case.").

viewpoint." Pl.'s Opp'n 23. Thus, "*Chez Sidney [III]* [] reiterates that . . . 'it is the surrounding circumstances, not abstract statements of support alone, upon which an appropriate support determination depends.'" *Id*. (citing *Chez Sidney III*, 684 F.3d at 1382–83).[13] Plaintiff argues, further, that "the analysis and holding of *Chez Sidney [III]* cannot be ignored simply because Chez Sidney asserted a statutory claim, rather than a constitutional claim" because "[t]here is little practical difference . . . between a claim that the ITC interpreted the [CDSOA] incorrectly as a matter of statutory construction and a claim that the ITC's construction of the [CDSOA] as applied to Giorgio was unconstitutional." *Id*. at 27.

Chez Sidney III is not controlling of the outcome of this case. That decision did not overturn the decision in *SKF USA II*. Nor did it rule on any issue concerning the constitutionality of the petition support requirement. As the Court of Appeals made clear, the constitutional issues presented in *Chez Sidney III* were definitively resolved by *SKF USA II*, *Chez Sidney III*, 684 F.3d at 1379 n.3, and the decision rendered therein is strictly limited to a statutory challenge, *id*. at 1378–79. No such statutory challenge is found in Giorgio's second amended complaint. *See Giorgio II*, 35 CIT at __, 804 F. Supp. 2d at 1321–22. Plaintiff's assertion that there is "little practical difference" between a constitutional and statutory challenge to the CDSOA thus ignores the explicit pronouncement of the Court of Appeals concerning the scope of *Chez Sidney III*. Neither the holding nor the analysis of *Chez Sidney III* makes viable Giorgio's as-applied constitutional challenges to the CDSOA.

In summary, plaintiff has failed to allege facts sufficient to demonstrate that its constitutional claims are not foreclosed by the binding precedent of *SKF USA III*. As to these claims, therefore, the second amended complaint does not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 662 (citation omitted). The court must dismiss these claims pursuant to USCIT Rule 12(b)(5).

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[13] Plaintiff also argues that in *Chez Sidney III*, the Court of Appeals for the Federal Circuit ("Court of Appeals") stated that the limiting construction "'effectively redefine[ed] [affected domestic producers] from 'interested parties in support of a petition' to 'interested parties in a petition.'" Pl.'s Opp'n to Defs.' and Def.-Intervenors' Mots. to Dismiss 23 (Mar. 1, 2013), ECF No. 200 (citing *PS Chez Sidney, L.L.C. v. United States*, 684 F.3d 1374, 1380 (Fed. Cir. 2012) ("*Chez Sidney III* ")). However, the Court of Appeals made this statement in reference to this Court's decision in *SKF USA Inc. v. United States*, 30 CIT 1433, 1446, 451 F. Supp. 2d 1355, 1366 (2006), which was reversed by *SKF USA, Inc. v. United States*, 556 F.3d 1337, 1360 (Fed. Cir. 2009) ("*SKF USA II* "). The court, therefore, dismisses this misguided argument.

B. The Court Lacks Subject Matter Jurisdiction over Plaintiff's Unjust Enrichment Claims

Subject matter jurisdiction is a threshold issue, *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94–95 (1998), and plaintiff carries the burden of demonstrating that its assertion of subject matter jurisdiction is proper, *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). In ruling on a motion to dismiss for lack of subject matter jurisdiction, the "court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citation omitted).

Plaintiff claims that the three defendant-intervenors have been "unjustly enriched at the expense of Giorgio as a result of the unconstitutional petition support requirement." Second Am. Compl. ¶ 108. According to plaintiff, "Defendant-Intervenors have received . . . more than their appropriate *pro rata* share of CDSOA disbursements under the mushroom antidumping orders, including the portions of such disbursements that rightfully belong to Giorgio." *Id*. ¶ 18. As a remedy, plaintiff seeks "to disgorge and make full restitution to Giorgio of Giorgio's lawful share of all CDSOA disbursements [defendant-intervenors] have received . . . ." *Id*. ¶ 109(e).

Plaintiff submits that the court possesses subject matter jurisdiction over this claim because it "falls within the [court's] supplemental jurisdiction . . . [as it] stems from and is directly related to Giorgio's claims against Defendant the United States in connection with its administration and enforcement of the CDSOA, as to which this Court has original jurisdiction, such that they form part of the same case or controversy." *Id*. ¶ 21 (citations omitted). Plaintiff also submits that its unjust enrichment claims "raise[] complex jurisdictional issues involving not only the applicability of this Court of the federal supplemental jurisdiction statute . . . but also common law doctrines of ancillary, pendant, and pendant-party jurisdiction." Pl.'s Opp'n 32 (citing *Thyssenkrupp Mexinox S.A. v. United States*, 33 CIT __, __, 616 F. Supp. 2d 1376, 1381–83 (2009); *Old Republic Ins. Co. v. United States*, 14 CIT 377, 382, 741 F. Supp. 1570, 1575 (1990)).

The court rejects plaintiff's argument on subject matter jurisdiction. "Some statutory grant of authority is required" for this Court to entertain a direct claim by one private party against another, and this Court lacks statutory supplemental jurisdiction under 28 U.S.C. § 1367(a), which is limited to the district courts. *Sioux Honey Assoc. v. Hartford Fire Insurance Co.*, 672 F.3d 1041, 1051–56 (Fed. Cir. 2012),

cert. denied 133 S.Ct. 126 (2012). Therefore, the court may not exercise jurisdiction over plaintiff's claims against the defendant-intervenors, and those claims must be dismissed according to USCIT Rule 12(b)(1).

III. CONCLUSION

For the foregoing reasons, all of the claims in plaintiff's second amended complaint must be dismissed. Plaintiff's as-applied constitutional claims brought under the First Amendment and Fifth Amendment equal protection guarantee are precluded by binding precedent and must be dismissed for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(5). The court lacks subject matter jurisdiction over plaintiff's unjust enrichment claims, which therefore must be dismissed pursuant to USCIT Rule 12(b)(1). Plaintiff twice has amended its complaint, and the court sees no justification for allowing plaintiff to seek leave for further amendment. Therefore, the court shall enter judgment dismissing this action.

Dated: March 6, 2013
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE