U.S. Court of International Trade

Slip Op. 15–141

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN HOME ASSURANCE COMPANY, Defendant.

Before: Richard K. Eaton, Judge
Consol. Court No. 09–00401

OPINION

[Plaintiff's motion for summary judgment is granted, in part, and defendant's cross-motion for summary judgment is granted, in part.]

Dated: December 17, 2015
Amended: March 15, 2016

Edward F. Kenny and *Beverly A. Farrell*, Trial Attorneys, Commercial Litigation Branch, Civil Division, United States Department of Justice, of New York, NY, argued for plaintiff. With them on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Amy M. Rubin*, Senior Trial Counsel, and *Justin R. Miller*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice. Of counsel on the briefs were *Melissa Erny*, *Brandon T. Rogers*, and *Kyle Gormon*, Office of Assistant Chief Counsel, United States Customs and Border Protection, of Indianapolis, IN.

Herbert C. Shelley, *Michael T. Gershberg*, and *Mark F. Horning*, Steptoe & Johnson LLP, of Washington, DC, argued for defendant.

EATON, Judge:

This matter is before the court on the cross-motions for summary judgment of plaintiff United States ("plaintiff" or "the Government"), on behalf of the United States Customs and Border Protection Agency ("Customs"), and defendant American Home Assurance Company ("defendant" or "AHAC"). *See* Pl.'s Mot. for Summ. J. (ECF Dkt. No. 76); Def.'s Mot. for Summ. J. (ECF Dkt. No. 78). Jurisdiction lies pursuant to 28 U.S.C. § 1582(2) (2012) ("The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury.").

In this consolidated action,[1] the United States seeks to recover on bonds issued by AHAC securing unpaid duties on garlic, mushrooms, and potassium permanganate imported into the United States from the People's Republic of China ("PRC"). Specifically, the Government claims that AHAC is liable for duties up to the amounts of the bonds,[2] and for (1) pre-liquidation interest pursuant to 19 U.S.C. § 1677g (2006);[3] (2) prejudgment statutory interest pursuant to § 580; (3) post-liquidation interest under § 1505(d) for non-payment of the duties; (4) equitable prejudgment interest; and (5) post-judgment interest under 28 U.S.C. § 1961. *See* Mem. in Supp. of Pl.'s Mot. for Summ. J. 6 (ECF Dkt. No. 76) ("Pl.'s Br."). By its cross-motion, with the exception of post-judgment interest, defendant disputes these claims. *See* Mem. of Law in Supp. of Def.'s Mot. for Summ. J. (ECF Dkt. No. 78) ("Def.'s Br.").

For the reasons set forth below, plaintiff's motion for summary judgment is granted, in part, and defendant's cross-motion for summary judgment is granted, in part.

STANDARD OF REVIEW

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "When both parties move for summary judgment, the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *JVC Co. of Am., Div. of US JVC Corp. v. United States*, 234 F.3d 1348, 1351 (Fed. Cir. 2000). To defeat summary judgment "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 249 (internal quotation marks and citation omitted).

---

[1] This consolidated action also covers court numbers 09–442, 09–491, 10–002, 10–003, 10–311, and 11–206.

[2] In addition to interest, the United States seeks to recover $27,406,336.90 in antidumping duties secured by customs bonds issued by AHAC. *See* Def.'s Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried ¶¶ 12, 34, 52, 69, 86, 107, 121, 225, 232 (ECF Dkt. No. 78) ("Def.'s Statement").

[3] As shall be seen, the United States seeks recovery of pre-liquidation interest pursuant to 19 U.S.C. § 1677g only in case 09–491. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. 39 n.42 (ECF Dkt. No. 92) ("Pl.'s Resp. Br.") ("But for the 'final and conclusive' nature of the 19 U.S.C. § 1677g interest charge in case 09–491, the Government would not be entitled to interest under 19 U.S.C. § 1677g under these facts. The Government concedes that AHAC does not owe 19 U.S.C. § 1677g interest in cases 09–401, 09–442, 10–002, 10–003, 10–311, and 11–206.").

BACKGROUND

The facts described below have been taken from the parties' statement V of undisputed material facts. *See* Def.'s Statement of Material Facts as to Which There Is No Genuine Issue to Be Tried (ECF Dkt. No. 78) ("Def.'s Statement"). Citation to the record is provided where a fact, although not admitted in the parties' papers, is uncontroverted by record evidence.

In each of these seven cases, the bonds under which the Government seeks recovery[4] were issued by AHAC—a company authorized to issue surety bonds—to secure the duties due on entries for four different importers between February 2001 and March 2002. *See* Def.'s Statement ¶¶ 7, 9. Each importer defaulted on payment of antidumping duties owed to Customs and has since disappeared. According to AHAC, the defaults were intentional and part of "a massive scheme of fraud by the exporters of the Chinese products and their importers" to avoid antidumping duties by obtaining surety bonds for entries made by new shippers[5] and importers, which had no intention of remaining in business long enough to pay the assessed duties. *See* Def.'s Br. 2.

Until 1999, AHAC issued customs bonds through an underwriting agent, C.A. Shea & Company, Inc. ("Shea"). *See* Def.'s Statement ¶ 1. Beginning in 1999, AHAC engaged a different underwriting agent, Global Solutions Insurance Services, Inc. ("GSIS"), to "underwrite bonds covering regular customs duties and antidumping duties for AHAC." Def.'s Statement ¶ 2. GSIS underwrote all of the bonds for AHAC at issue in this case. *See* Def.'s Statement ¶ 2.

An important statutory provision in this case pertains to notice that liquidation of imported merchandise[6] has been suspended. *See* 19 U.S.C. § 1504(c). The subsection states, "[i]f the liquidation of any entry is suspended, the Secretary[7] shall by regulation require that

---

[4] These seven consolidated cases comprise a total of 336 entries. *See* Pl.'s Br. Addendum: Pl.'s Statement of Undisputed Material Facts ¶ 1 ("Pl.'s Statement").

[5] "Upon request, [the United States Department of] Commerce is required by statute to perform administrative reviews 'for new exporters and producers' whose sales have not previously been examined." *Jinxiang Yuanxin Imp. & Exp. Co. v. United States*, 39 CIT __, __, Slip Op. 15–22, at 8 (2015) (quoting 19 U.S.C. § 1675(a)(2)(B)).

[6] "*Liquidation* means the final computation or ascertainment of duties on entries for consumption or drawback entries." 19 C.F.R. § 159.1 (2015); *see also Shinyei Corp. of Am. v. United States*, 524 F.3d 1274, 1276–77 (Fed. Cir. 2008).

[7] By regulation Customs has the duty to provide the requisite notice. *United States v. Great Am. Ins. Co. of N.Y.* (*Great Am. II*), 738 F.3d 1320, 1329 (Fed. Cir. 2013); 19 C.F.R. § 159.12(2)(c) (2009) ("If the liquidation of an entry is suspended as required by statute or court order, as provided in paragraph (a)(2) of this section, the port director promptly shall

notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record or drawback claimant, as the case may be, *and* to any authorized agent and surety of such importer of record or drawback claimant." *Id.* (emphasis added). The significance of such notice is that it would have alerted AHAC to the potential for increased antidumping duty liability following the completion of the administrative reviews.[8]

According to Customs, its automated commercial system was, and continues to be, programmed to generate notices of suspension of liquidation to sureties. Def.'s Statement ¶ 24. Prior to May 11, 2005, however, the system was not programmed to issue Customs Form 4333-A notices of suspension of liquidation to sureties other than to those sureties issuing continuous bonds[9] unless the sole bond in the system was a single transaction bond.[10] *See* Def.'s Statement ¶ 24. In other words, in those situations where multiple sureties insured individual entries, only the surety that issued a continuous bond would receive a notice of suspension. Thus, under circumstances where there were multiple entries each secured by a single transaction bond and a continuous bond, the sureties that issued single transaction bonds would not have been given the statutorily-required notice.

In five of the seven consolidated cases (court numbers 09–401, 09–442, 09–491, 10–002, and 10–311), AHAC issued only single transaction bonds, while another surety issued the continuous bonds. *See* Def.'s Statement ¶ 8. Thus, no notice of suspension of liquidation was provided to AHAC by Customs' automated system in these five

notify the importer or the consignee and his *agent and surety* on Customs Form 4333-A, appropriately modified, of the suspension." (emphasis added)).

[8] Liquidation of the entries was suspended because the entries at issue were the subject of administrative reviews. *See United States v. Am. Home Assurance Co.* (*AHAC I*), 35 CIT __, __, Slip Op. 11–57, at 3 (2011) ("Upon the request for an administrative review for each [period of review], liquidation of the entries subject to each review . . . [is] suspended."). The reason "[l]iquidation is suspended upon a request for administrative review [is] to 'enable . . . Commerce to calculate assessment rates for the subject entries . . . , which are then applied by Customs pursuant to liquidation instructions received from Commerce' after it publishes the final results of the review." *Id.* at __, Slip Op. 11–57, at 9 (quoting *SSAB N. Am. Div. v. U.S. Bureau of Customs & Border Prot.*, 32 CIT 795, 798, 571 F. Supp. 2d 1347, 1351 (2008)).

[9] "A 'continuous bond,' as compared to a 'single transaction bond,' covers 'liabilities resulting from multiple import transactions over a period of time, such as one year.'" *United States v. Am. Home Assurance Co.* (*AHAC II*), 789 F.3d 1313, 1316 n.2 (Fed. Cir. 2015) (quoting *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 30 CIT 1838, 1839, 465 F. Supp. 2d 1300, 1302 (2006)).

[10] A "'single [transaction]' bond . . . cover[s] the obligations arising from one entry." *Nat'l Fisheries*, 30 CIT at 1839, 465 F. Supp. 2d at 1302. These seven consolidated actions involve a total of 336 single transaction bonds. Pl.'s Statement ¶ 7.

cases. *See* Def.'s Statement ¶¶ 25–26, 44–45, 62–63, 80–81, 99–100. In the two remaining cases (court numbers 10–003 and 11–206), AHAC issued both single transaction bonds and continuous bonds to secure the entries at issue. Def.'s Statement ¶ 8. In these cases, Customs' automated system generated notices to AHAC because it had issued a continuous bond. Neither AHAC nor GSIS, its underwriting agent for the applicable bonds, however, directly received such notice. *See* Def.'s Statement ¶¶ 114, 128. Rather, in these two cases, notice was sent to Shea, AHAC's previous underwriter for unrelated bonds, who had no relationship to the bonds at issue in this case. Def.'s Statement ¶¶ 114, 128.

All of the bonds issued by AHAC secured the duties eventually owed on imported merchandise that was subject to antidumping duty orders issued by the United States Department of Commerce ("Commerce" or "the Department").[11] *See* Def.'s Statement ¶ 6. In 2004 and 2005, after the importers defaulted on the antidumping duties owed on all of the entries in this action, Customs demanded payment from AHAC, which AHAC timely protested.[12] *See* Def.'s Statement ¶ 10. AHAC filed Freedom of Information Act ("FOIA") requests for "all the documentation relevant" to the demands for payment, to which, according to AHAC, Customs was slow in responding.[13] *See* Def.'s Br. 8. Once AHAC supplemented its protests with the information received in response to its FOIA requests, and after additional delays, Customs denied the protests in all but two cases.[14] *See* Def.'s Statement ¶ 11. AHAC did not appeal any of these protest denials to this Court. Customs commenced these collection actions in this Court between September 2009 and October 2010, close to the six-year statute of limitations for filing collections action. *See* 28 U.S.C. § 2415(a). Shortly after the Government brought these collection actions to recover the unpaid duties on the bonds, AHAC executed time-limited

[11] It is undisputed that AHAC's agents knew the bonds secured entries subject to both regular and antidumping duties. *See* Def.'s Statement ¶ 2.

[12] AHAC filed protests in all of the consolidated cases (i.e., court numbers 09–401, 09–442, 09–491, 10–002, 10–003, 10–311, 11–206). Decl. of Herbert C. Shelley in Supp. of Mot. for Summ. J. ¶¶ 19, 41, 46, 52, 56, 60, 65 (ECF Dkt. 78–42) ("Shelley Decl.").

[13] AHAC filed FOIA requests for all of the consolidated cases (i.e., court numbers 09–401, 09–442, 09–491, 10–002, 10–003, 10–311, 11–206). Shelley Decl. ¶¶ 18, 40, 45, 51, 55, 59, 64. Customs failed promptly to provide the requested documentation in response to AHAC's FOIA request related to Protest No. 2704–04–102014 for eighty-four entries in court number 09–401. Def.'s Statement ¶ 190.

[14] AHAC's protests remain suspended in court numbers 10–002 and 10–311. *See* Pl.'s Resp. Br. 23 n.28.

waivers of the statute of limitations for the entries covered by court numbers 09–491 and 10–311.[15] Def.'s Statement ¶¶ 160, 162.

Earlier in these proceedings, AHAC sought dismissal of the Government's action, arguing the case should be dismissed because the company did not receive notice of the suspension of liquidation of some entries. *See United States v. Am. Home Assurance Co.* (*AHAC I*), 35 CIT __, __, Slip Op. 11–57, at 5 (2011). Specifically, AHAC argued that, because it failed to receive notice of suspension as required by 19 U.S.C. § 1504(c), liquidation of the entries was not actually suspended. Mem. in Supp. of Def.'s Mot. to Stay Discovery and in Opp'n to Pl.'s Mot. for Stay 2–3 (ECF Dkt. No. 28) ("Def.'s Mot. to Stay"). Because, according to AHAC, there was no suspension of liquidation, the entries were deemed liquidated by operation of law one year after entry pursuant to § 1504(a)(l)(A). Def.'s Mot. to Stay 3. Consequently, AHAC insisted the Government's claims were barred by the six-year statute of limitations that started to run when the entries were deemed liquidated. Def.'s Mot. to Stay 3.

The court disagreed, holding that a failure of Customs to provide a surety notice of suspension of liquidation does not vitiate a valid suspension. *See AHAC I*, 35 CIT at __, Slip Op. 11–57, at 11 ("Because it is clear that the giving of notice is not a condition precedent to a suspension of liquidation, the failure to give notice does not prevent an otherwise valid suspension."). The court further held, however, that failure to provide notice could give a surety an affirmative defense to liability on the bonds if the surety could demonstrate it was prejudiced by the lack of notice. *See id.* at __, Slip Op. 11–57, at 13–14.

DISCUSSION

I. CERTAIN OF THE GOVERNMENT'S CLAIMS ARE BARRED

A. Lack of Notice Does Not Invalidate a Suspension of Liquidation

Notwithstanding the court's prior ruling that a lack of statutory notice does not vitiate a suspension of liquidation, AHAC renews its argument here, asking the court to reconsider its holding. *See id.* at __, Slip Op. 11–57, at 8. For AHAC, the lack of notice rendered all of the entries in this action "deemed liquidated by operation of law one year from the dates of entry, and Customs' causes of action accrued on those dates." Def.'s Br. 19. According to AHAC, because "Customs

[15] As shall be discussed in greater detail below, AHAC now argues its waivers of the statute of limitations of 28 U.S.C. § 2415(a) were ineffective because the statute of limitations is jurisdictional in nature and thus cannot be waived. *See* Def.'s Br. 25.

failed to file any of its complaints within the six-year statute of limitations running from those deemed liquidation dates[,] . . . the [G]overnment's claims are time-barred." Def.'s Br. 19–20.

The court declines AHAC's invitation to reconsider its prior ruling, and reaffirms its holding in *AHAC I*. *See AHAC I*, 35 CIT at __, Slip Op. 11–57, at 13–14. The proper vehicle by which to raise these arguments was a motion for reconsideration pursuant to USCIT R. 59(e) within "30 days after the entry of the judgment" in *AHAC I*, not at the summary judgment phase. *See* USCIT R. 59(e). Further, it should be noted that in its papers, AHAC makes no new arguments for the court to consider. Accordingly, the court continues to find its ruling in *AHAC I* to be correct and will not disturb it now. *See AHAC I*, at __, Slip Op. 11–57, at 9–10; *see also United States v. Great Am. Ins. Co. of N.Y.* (*Great Am. II*), 738 F.3d 1320 (Fed. Cir. 2013).

B. Because the Entries Subject to the Department's Notices of Rescission Were Deemed Liquidated Following Publication of the Notices, the Government's Suit Is Untimely As to Those Entries

AHAC argues the Government's claims in court numbers 10–002 and 10–003 and as to certain entries in 10–311 are untimely. *See* Def.'s Br. 20. In these three cases, Commerce partially rescinded its administrative reviews of the antidumping duty orders covering preserved mushrooms from the PRC exported by Raoping Xingyu Foods Co., Ltd. and fresh garlic from the PRC[16] exported by Clipper Manufacturing Ltd. *See*; *Certain Preserved Mushrooms from the PRC*, 67 Fed. Reg. 53,914 (Dep't of Commerce Aug. 20, 2002) (notice of partial rescission of antidumping duty administrative review); *Fresh Garlic from the PRC*, 68 Fed. Reg. 4,758 (Dep't of Commerce Jan. 30, 2003) (final results of antidumping duty administrative review and rescission of administrative review in part).

AHAC claims that publication of the notices of the partial rescissions of these administrative reviews triggered the beginning of the six-month period in which Customs must liquidate entries. *See* Def.'s Br. 23. According to AHAC, because Customs did not liquidate the entries within this six-month period, they were deemed liquidated, which, in turn, commenced the six-year statute of limitations for pursuing collection of duties on the entries. *See* Def.'s Br. 23 (citing

[16] The rescission as to Clipper Manufacturing Ltd. covered thirty of the seventy-nine entries of fresh garlic at issue in court number 10–311. *See* Def.'s Statement ¶¶ 102–03. For these entries, it is undisputed that the Government did not file its case within the six-year limitations period, regardless of the date of liquidation. As shall be seen, however, AHAC executed a waiver of the statute of limitations permitting plaintiff to file its claim beyond the six-year limit, which AHAC now insists was ineffective.

United States v. Great Am. Ins. Co. of N.Y. (*Great Am. I*), 35 CIT __, __, 791 F. Supp. 2d 1337, 1367–68 (2011), *rev'd in part*, 738 F.3d 1320 (Fed. Cir. 2013)). For AHAC, because Customs failed to file its collection actions in court numbers 10–002, 10–003, and 10–311 within the six-year limitations period from the dates of deemed liquidation, "Customs is time-barred from collecting any monies pertaining to the respective entries." Def.'s Br. 23 (citing *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1368).

The Government maintains, however, "the notices of partial rescission did not lift the statutory suspension, nor did they notify Customs that the statutory suspension was lifted." Pl.'s Resp. to Def.'s Mot. for Summ. J. 13–14 (ECF Dkt. No. 92) ("Pl.'s Resp. Br."). Rather, for plaintiff, the notice that lifted the suspension and notified Customs "came later in the form of notice of the final results of the administrative review." Pl.'s Resp. Br. 14.

The court finds plaintiff's arguments to be meritless and thus holds that the publication of the notices of partial rescission in the Federal Register lifted the suspension of liquidation as to the relevant entries for purposes of 19 U.S.C. § 1504(d). This being the case, the statute of limitations began to run at the time the entries were deemed liquidated.

The statute "requires Customs to liquidate entries within six months of receiving 'notice' that a suspension of liquidation of such entries has been removed." *NEC Solutions (Am.), Inc. v. United States* (*NEC II*), 411 F.3d 1340, 1344 (Fed. Cir. 2005) (citing 19 U.S.C. § 1504(d)). "If Customs fails to timely liquidate the entries under the statute, the entries are deemed liquidated at the rate asserted at the time of entry." *Id.* (citing *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)). "Thus, in order for a deemed liquidation to occur, (1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu*, 283 F.3d at 1376. The Federal Circuit has explained, "[t]o be sufficient for purposes of § 1504(d), the 'notice' must be 'unambiguous' that the suspension of liquidation has been lifted, but does not need to include specific liquidation instructions from Commerce to Customs." *NEC II*, 411 F.3d at 1344 (citing *Fujitsu*, 283 F.3d at 1364; *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1276 (Fed. Cir. 2002)). The proper inquiry is therefore whether "a reasonable Customs official would have read the [notice] to provide notification that any suspension of liquidation on the [subject] entries had been removed." *See id.* at 1346.

Moreover, in *Great American I*, this Court held that a suspension[17] is actually removed when a notice of partial rescission is published in the Federal Register. *See Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1364–65. The *Great American I* Court adopted its rule based on the Federal Circuit's rationale that "the suspension of liquidation was removed when the mechanism by which the suspension was initiated was no longer in effect." *Id.* at 1363.

The notice of partial rescission that AHAC contends provided unambiguous notice to Customs that the suspension of liquidation had been lifted on the entries of preserved mushrooms states:

> Accordingly, we are rescinding in part this review of the antidumping duty order on certain preserved mushrooms from the [PRC] as to Compania Envasadora, China Processed and Raoping Xingyu. This review will continue with respect to Gerber, Green Fresh, Shantou Hongda and Shenxian Dongxing.

Certain Preserved Mushrooms, 67 Fed. Reg. at 53,914. Similarly, the notice of partial rescission of the review of the antidumping duty order on fresh garlic from the PRC reads:

> [W]e are rescinding this administrative review as it applies to Clipper. With this rescission, we will instruct the Customs Service to liquidate the entries during the period of review of subject merchandise from Clipper in accordance with [19 C.F.R. § 351.213(d) (2003).[18]]

Fresh Garlic, 68 Fed. Reg. at 4,759. The notice of partial rescission of the review of the antidumping duty order on potassium permanganate from the PRC, affecting only court number 09–442, provides:

> The Department is rescinding its review of the companies named in Carus' request for review because Carus has withdrawn its request. . . . Because Groupstars Chemicals, LLC is not a PRC exporter of the subject merchandise, and failed to identify any PRC exporter(s) of the subject merchandise in its

[17] Unlike this Court's recent decision in *United States v. Am. Home Assurance Co.* (*AHAC V*), 39 CIT __, ___, Slip Op. 15–120 (2015), this is not a case where an injunction against liquidation was entered as the result of a challenge to a final determination by Commerce being filed in this Court.

[18] "If the Secretary rescinds an administrative review (in whole or in part), the Secretary will publish in the Federal Register notice of 'Rescission of Antidumping (Countervailing Duty) Administrative Review' or, if appropriate, 'Partial Rescission of Antidumping' (Countervailing Duty) Administrative Review." 19 C.F.R. § 351.213(d)(4).

> review request, and with Carus' withdrawal of its review requests, the Department is rescinding this review with respect to Groupstars Chemicals, LLC.

Potassium Permanganate From the PRC, 68 Fed. Reg. 58,307 (Dep't of Commerce Oct. 9, 2003) (rescission of antidumping duty administrative review). For AHAC, these notices had the effect of both removing the suspension and giving Customs notice of the removal. *See* Def.'s Br. 14–15, 23–24.

The Government disputes AHAC's claim that the publication of the rescissions in the Federal Register served as unambiguous notice. Rather, plaintiff argues "[t]he notice that actually lifted the suspension and served to notify Customs came later in the form of notice of the final results of the administrative review as to cases 10–002 and 10–003, and in the form of liquidation instructions from Commerce as to the 30 entries in 10–311." *See* Pl.'s Resp. Br. 14. The Government concedes that "a notice of partial rescission[ ] can lift the suspension of liquidation and give notice to Customs, similar to Commerce's notice of the final results of the administrative review," and points to *Great American I* as one of the "rare cases" where this is true. *See* Pl.'s Resp. Br. 14; *see Great Am. I*, 35 CIT __, 791 F. Supp. 2d 1337. Specifically, plaintiff claims that, in order to satisfy the statute, the notice must explicitly state the suspension has been lifted.

The courts, however, have clarified that explicit language stating that a suspension has been lifted is not required to remove a suspension of liquidation so long as "a reasonable Customs official, with knowledge in these matters, would have read the message to provide unambiguously that any suspension of liquidation on [the importer's] entries had been removed." *NEC Solutions (Am.), Inc. v. United States* (*NEC I*), 27 CIT 968, 977, 277 F. Supp. 2d 1340, 1348 (2003); *see also Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1364 ("Language explicitly stating that a suspension is removed is not required to remove a suspension of liquidation.").

In addition, the Government argues that, unlike here, in *Great American I*, "the notice of partial rescission contained language indicating that liquidation instructions should follow," which served as an indication that the suspension of liquidation had been lifted. Pl.'s Resp. Br. 17 (citing *Freshwater Crawfish Tail Meat From the PRC*, 67 Fed. Reg. 50,860, 50,861 (Dep't of Commerce Aug. 6, 2002) (notice of rescission, in part, of antidumping duty administrative review for the period September 1, 2000, through August 31, 2001)). The Government, however, has pointed to no case, and the court can find none, to support its claim that to end the suspension of liquidation, proper

notice must "contain[ ] indicia that liquidation should follow." *See* Pl.'s Resp. Br. 17. Moreover, it can hardly be the case that the omission of a statement that liquidation instructions would follow the lifting of the suspension would have any real meaning because the intent to issue such instructions could be presumed. Therefore, despite the Government's claims to the contrary, it is apparent that to be effective, the notice need not contain language directing Customs that liquidation instructions are forthcoming.

Next, the Government contends it is significant that the partial notice of rescission in *Great American I* "provided Customs with the appropriate duty rate to apply to the relevant entries." Pl.'s Resp. Br. 17. According to the Government, "[b]y contrast, the notices of partial rescission in cases 10–002, 10–003, and the 30 entries in 10–311, contained no such information and, thus, could not and did not lift the suspension." Pl.'s Resp. Br. 17. The Federal Circuit, however, has rejected this argument, holding that the duty rate need not be included in the notice for purposes of 19 U.S.C. § 1504(d). *See NEC II*, 411 F.3d at 1345 ("[N]either the statute nor our precedent requires that the duty rate be included in the notice in order to satisfy the requirements of 19 U.S.C. § 1504(d)."). Moreover, this argument is inconsistent with the Government's assertion that, to be sufficient to lift the suspension of liquidation, the notice must contain language that liquidation instructions (and hence the rate) will be forthcoming.

Further, the Government makes a related argument that, "unlike a notice of final results or a notice of total rescission, which conclude an administrative review as to all parties, a notice of partial rescission suffers from a contextual ambiguity—the administrative review will continue as to some exporters." Pl.'s Resp. Br. 14. Thus, for plaintiff, without clear direction to Customs that liquidation should follow, "Customs has no way of knowing whether the exporters named in the notice of partial rescission remain subject to a country-wide antidumping rate," and therefore "must await the results of the administrative review." *See* Pl.'s Resp. Br. 15. Why alerting Customs to the rate to which the merchandise is subject should be a prerequisite to starting the deemed liquidation clock, however, is unclear. As noted, explicit language directing Customs that liquidation will follow is unnecessary, as is the specific duty rate at which the entries will be assessed. All the law requires is that Customs be given notice that the suspension has been lifted. Thus, while the context may be ambiguous, the effect of these notices of partial rescission is not. *See NEC II*, 411 F.3d at 1345, *Fujitsu*, 283 F.3d at 1381–83; *Int'l Trading*, 281 F.3d at 1275–76; *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1364.

Accordingly, the court holds that Commerce's publication of the notices of partial rescission in the Federal Register was sufficient, for purposes of 19 U.S.C. § 1504(d), to remove the suspension of liquidation of the entries in court numbers 10–002 and 10–003 and certain entries in 10–311. In addition, the publication of the notices in the Federal Register constituted notice to Customs that the suspensions of liquidation had been lifted as to those entries. Thus, the first two requirements of § 1504(d) were satisfied. Because Customs failed to liquidate within six months of the date of publication of the notices of rescission in the Federal Register, these entries were liquidated by operation of law at the entered rates, at which time the Government's cause of action on the bonds began to accrue. Having failed to bring its collection actions within six years of the dates these entries were deemed liquidated, the Government's right to collect any duties from AHAC on the entries in court numbers 10–002, 10–003, and thirty of the seventy-nine entries of fresh garlic in court number 10–311 is time-barred. *See* 28 U.S.C. § 2415(a).

C. Waivers of the Statute of Limitations

As noted, AHAC executed time-limited waivers of the statute of limitations in court numbers 09–491 and 10–311, covering a total of 190 entries. In accordance with the waivers' terms, the Government was permitted to file its collection actions on the bonds covering these 190 entries within an extended period beyond the six-year statute of limitations. The statute providing the six-year limitations period on a collection action reads, in relevant part:

> [E]very action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

28 U.S.C. § 2415(a). AHAC now claims its waivers were ineffective because the statute of limitations set forth in § 2415(a) is jurisdictional in nature, and therefore cannot be waived. Def.'s Br. 25. As a result, for AHAC, the Government's suit seeking recovery on the bonds is untimely.

The court finds AHAC's argument unconvincing and holds the limitations period in § 2415(a) is non-jurisdictional, and therefore waivable. Accordingly, the Government's suits in court numbers 09–491 and 10–311 were timely brought.

The primary purpose of most statutes of limitations is "to protect defendants against stale or unduly delayed claims. Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). On the other hand, if a statute of limitations is jurisdictional, it is not waivable because the court is divested of subject matter jurisdiction at the expiration of the limitations period.

A statute of limitations is not jurisdictional "unless Congress provides a 'clear statement' to that effect." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (describing the court's adoption of "a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional. We inquire whether Congress has 'clearly state[d]' that the rule is jurisdictional." (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)) (alteration in original))). "[I]n case after case, we have emphasized . . . that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Kwai Fun Wong*, 135 S. Ct. at 1633 n.4. In other words, for a statute of limitations to be jurisdictional, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional." *Id.* at 1632.

In *Kwai Fun Wong*, in evaluating the statute of limitations governing claims under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), the Supreme Court found "no clear statement" that the statute was jurisdictional. *Id*. In analyzing the text of the statute, the Court explained that the language of the provision "does not define a federal court's jurisdiction . . . [or] address its authority to hear untimely suits." *Id.* at 1633. The Supreme Court held the statute of limitations at issue contained "run-of-the-mill" language, a jurisdictional provision was not included in the text of the statute's limitations provision, and the legislative history equally failed to provide a "clear statement" specifying the statute's jurisdictional nature. *Id.* (internal quotation marks and citation omitted). Accordingly, the Court concluded § 2401(b) is non-jurisdictional. *Id.*

In like manner, the court finds that § 2415(a) is non-jurisdictional and thus subject to waiver. AHAC argues the statutory text demonstrates the subsection's provisions are mandatory, requiring the sanction of dismissal. Def.'s Br. 25–26. But, as the Government points out, statutes of limitations are by their nature characterized by language that mandates the dismissal of a claim if the time limits are not

adhered to. *See* Pl.'s Resp. Br. 22. AHAC insists that the language in the statute "shall be barred unless" mandates dismissal. Def.'s Br. 25–26. This same argument, however, was found unconvincing in *Kwai Fun Wong*. *Kwai Fun Wong*, 135 S. Ct. at 1632. The Supreme Court explained that statutes including "shall be forever barred" language have been found to be both jurisdictional and non-jurisdictional statutes of limitations; the inquiry is not based on words alone.[19] *Id.* at 1634; *see also Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) (finding that even though the statute at issue was cast in mandatory language, it provided "no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes"); *Scarborough v. Principi*, 541 U.S. 401, 413 (2004).

Next, AHAC claims the jurisdictional nature of the subsection is demonstrated by the intents and purposes behind its enactment outlined in the statute's legislative history. Def.'s Br. 26–27. The Supreme Court indicated in *Kwai Fun Wong*, however, that legislative history may only rebut the non-jurisdictional presumption when it evidences a "clear statement" of jurisdiction. *Kwai Fun Wong*, 135 S. Ct at 1631–33 ("Finally, even assuming legislative history alone could provide a clear statement (which we doubt), none does so here."). AHAC has failed to point to anything in the statute or its legislative history that constitutes a "clear statement" that Congress intended to divest the court of jurisdiction through this limitations period.

Defendant next contends the legislative history for the subsection demonstrates that the provision sought to achieve equality of treatment between the contract claims of private individuals and those of the United States Government. *See* Def.'s Br. 27 (quoting S. Rep. No. 89–1328, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2503 ("'At that hearing it was noted that the Government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.'" (quoting H.R. Rep. No. 89–1534, at 4 (1966))).

[19] As mentioned, § 2401(b), the statute of limitations at issue in *Kwai Fun Wong*, contained the language "shall be forever barred" and was nonetheless held to be non-jurisdictional. *Kwai Fun Wong*, 135 S. Ct at 1634–35. Furthermore, another statute of limitations, 15 U.S.C. § 15b, includes this language and has also been found to be non-jurisdictional and therefore subject to equitable tolling. *Id.* at 1634.

The Supreme Court, however, has found that a statutory provision with similar intents and purposes was not jurisdictional, and the same is true here. *See Kwai Fun Wong*, 135 S. Ct. at 1636–37. That is, just as the Supreme Court in *Kwai Fun Wong* found the Federal Tort Claims Act "treats the United States more like a commoner than like the Crown," the legislative history AHAC cites to defeats its own argument. *See id.* at 1637. "[I]n stressing the Government's equivalence to a private party, the [statute] goes further than the typical statute waiving sovereign immunity to indicate that its time bar allows a court to hear late claims." *Kwai Fun Wong*, 135 S. Ct. at 1638. That a statute of limitations constitutes a waiver of sovereign immunity is a common justification for finding a statute to be jurisdictional in nature. The Supreme Court has held, however, that where a statute is intended to put the United States on equal footing with private parties, the purpose of the statute is to treat the Government as a regular litigant. In other words, when enacting a statute of limitations, if Congress's intent is to treat the United States as any party engaged in commercial activity, the argument that the statute creates a limited waiver of sovereign immunity, and thus is jurisdictional, loses its persuasiveness. Indeed, it cuts against the idea that the statute is jurisdictional by expressing an intent to treat the Government like any other party.

Further, AHAC contends that, where statutes of limitations have the purpose of achieving a broader system-related goal, as distinct from the ordinary purpose of protecting defendants against aged claims, the Supreme Court has found those statutes to be jurisdictional in nature. *See* Def.'s Br. 26 (citing *John R. Sand & Gravel*, 552 U.S. at 133–34). Goals articulated for jurisdictional statutes of limitations thus encourage "facilitating the administration of claims" against the Government and "limiting the scope of a governmental waiver of sovereign immunity." *John R. Sand & Gravel Co.*, 552 U.S. at 133; *see also United States v. Brockamp*, 519 U.S. 347, 352 (1997) (holding a statute of limitations was jurisdictional because, among other reasons, "read[ing] an 'equitable tolling' exception into [the statute] could create serious administrative problems by forcing the [Internal Revenue Service] to respond to, and perhaps litigate, large numbers of late claims"). These considerations, however, are not of particular concern where, as here, the Government is bringing suit against a private entity, not the other way around.

Finally, this Court has previously suggested that the limitations period set forth in 28 U.S.C. § 2415(a) is waivable and thus non-

jurisdictional. *See United States v. Canex Int'l Lumber Sales Ltd.*, 32 CIT 407, 410 (2008) ("[The defendant] was therefore notified of the possibility of further proceedings with regard to liquidated damages and had ample opportunity to *execute the statute of limitations waiver* or petition for mitigation proceedings as necessary." (emphasis added)).

Based on the forgoing, the court holds the six-year statute of limitations period in 28 U.S.C. § 2415(a) is non-jurisdictional and therefore subject to waiver. Accordingly, the time-limited waivers executed by AHAC in court numbers 09–491 and 10–311 were effective and the Government's collection actions with respect to the 190 entries covered by these two cases were therefore timely brought.

II. AHAC MAY RAISE ITS DEFENSES

The Government contends that AHAC may not interpose its contractual defenses to liability on the bonds because the surety failed to appeal Customs' denials of its protests to this Court. For plaintiff, the matters raised by AHAC in this suit were decided by the unappealed protest denials, and therefore "became 'final and conclusive' under 19 U.S.C. § 1514(a)[20] when AHAC failed to . . . contest the denial of its protests." *See* Pl.'s Resp. Br. 23. Specifically, the Government argues:

> AHAC is precluded from defending the Government's claims on the basis of Customs' failure to issue personal notices of suspension of liquidation pursuant to 19 U.S.C. § 1504(c) and from challenging Customs' interest charges under 19 U.S.C. §§

[20] Section 1514(a) specifies that:

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

19 U.S.C. § 1514(a) (emphases added).

> 1505(d) and 1677g. These Customs decisions became "final and conclusive" under 19 U.S.C. § 1514(a) when AHAC failed to protest these issues or contest the denial of its protests in this Court.

Pl.'s Resp. Br. 23. Thus, the Government maintains that AHAC's failure to bring suit challenging Customs' denial of its protests prevents the surety from raising prejudicial lack of notice as a defense in this action, and further prevents AHAC from objecting to certain interest amounts charged to its bonds. *See* Pl.'s Resp. Br. 23–24.

The court finds AHAC is not foreclosed from arguing as defenses in this collection action that: (1) it was prejudiced by failing to receive § 1504(c) notice; (2) § 1677g interest does not accrue on outstanding duties secured by the bonds; (3) § 1505(d) interest does not apply to antidumping duties; and (4) the Government is not entitled to § 580 and equitable prejudgment interest.

A surety, of course, may protest Customs' liquidation determinations on the merchandise for which it undertakes to secure the payment of duties. *See* 19 U.S.C. § 1514(a). In doing so, however, it largely stands in the shoes of the importer, making arguments the importer could make, such as the correct amount the importer owes on the entries secured by its bond. *See id.* If the protest is denied with respect to these protestable matters, the surety must appeal to this Court or be bound, along with the importer, by the rule of finality as to the liquidation itself (i.e., the amount owed by the importer). *See United States v. Utex Int'l Inc.*, 857 F.2d 1408, 1414 (Fed. Cir. 1988).

As to defenses related to its contractual obligations under a bond, however, a surety is not precluded from raising them in a collection action brought by the Government. This is the case even if the defenses replicate claims it made, or could have made, in a protest brought to determine an importer's liability on liquidation. *See id.* ("Once the administrative decision represented by a liquidation is made, the importer must file such a protest in order to secure further administrative review, as well as to preserve his right to judicial review. However, the issue at bar does not relate to administrative review of liquidation, brought by the importer or surety, for the time for such review is long past." (internal quotation marks and citation omitted)).

AHAC may raise its defenses because a cause of action of the kind presented here is on the contract of insurance, not on the entry of goods into the United States. That is, the subject of a protest brought by or in the shoes of an importer covers matters contained in the

Tariff Act of 1930. *See* 19 U.S.C. ch. 4. The cause of action in a collection action on a bond, on the other hand, does not arise under the Tariff Act of 1930; rather, its jurisdiction is separately provided for in 28 U.S.C. § 1582(2) ("The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury.").

Although expressed differently at times, courts have long recognized that appeals following protest denials, and collection actions brought by the Government, travel on different tracks and have separate jurisdictional bases. *See United States v. Sherman & Sons Co.*, 237 U.S. 146 (1915). "[W]e hold that the importer is not concluded by the reliquidation order, and when suit is brought for the amount claimed to be due he may file his plea and be heard in his defense as in other cases, even though he did not file a protest and make the payment required in the case of the original liquidation." *Id.* at 158.

> Customs' power to liquidate
>
> is an incident of the fact that the assessment and collection of duties is an administrative matter,—no notice or hearing being necessary, since the assessment is *in rem* and against the foreign goods which are sought to be entered. . . . [I]f . . . it should be discovered that . . . the United States has been deprived of its just dues, and if the goods themselves cannot be found, so as to be forfeited, the inability to proceed *in rem* would not prevent the [G]overnment from bringing a suit *in personam* to enforce the importer's personal liability for the debt which accrued and which rightfully should have been paid when the foreign merchandise was entered at the domestic port.

Id. at 153.

The concept that an importer's liability is fixed (i.e., "subsumed") by liquidation, but that a surety's defenses to liability on its bond are preserved, was affirmed by the Federal Circuit's holding that, under contracts of insurance, defenses necessarily "are personal to [the surety] and are separate and distinct from [an importer's] protest." *See St. Paul Fire & Marine Ins. Co. v. United States* (*St. Paul I*), 959 F.2d 960, 964 (Fed. Cir. 1992).

> [T]he [G]overnment argues that St. Paul's claims are barred because it failed to file a timely protest. However, the [G]overnment admits that if St. Paul had not filed a protest and had

> refused to comply with the [G]overnment's demand for payment, and the [G]overnment had proceeded to sue St. Paul, no protest would have been required to assert contractual defenses against the [G]overnment's claim. . . . The justiciability of St. Paul's claims is not dependent on [the importer's] protest, nor is it prejudiced by not being part of that protest. One way to clear away the fog is simply to look at the contract claim only—that is, apart from the appeal of [the importer's] protest.

Id. (citing *Utex*, 857 F.2d at 1413–14).

More recently, in *United States v. Cherry Hill Textiles, Inc.*, the Court recognized that, although Customs has the authority to make decisions impacting liquidation directly, it does not have authority to make determinations other than those authorized by § 1514. *United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1554 (Fed. Cir. 1997) ("Congress did not 'authorize the Collector to make findings of fraud' and compel the importer to defend against the fraud determination through the protest mechanism." (quoting *Sherman*, 237 U.S. at 155)).

In *Utex*, moreover, the Court held that a surety need not file a protest and deposit the demanded duties before its claims (or defenses) could be heard in a collection action. *See Utex*, 857 F.2d at 1414 ("Sentry states, without contravention, that protest and advance payment of liquidated damages were not required of defendants in a district court action for damages, prior to enactment of the Customs Courts Act of 1980, which transferred jurisdiction of actions on a surety bond from the district courts to the Court of International Trade, 28 U.S.C. § 1582. There is no suggestion in the legislative history that Congress intended to change the status of the surety in such suits. Indeed, Sentry points out that the Customs Courts Act of 1980 contained a new provision, 28 U.S.C. § 1583, that authorized sureties to implead third parties or file cross-claims in actions on a bond brought under 28 U.S.C. § 1582, an opportunity that is not readily harmonized with the [G]overnment's position that the surety must pay all claimed damages in full before raising any defense."); *see also id.* ("It is not characteristic of either the law of surety or the law of contracts that a defendant must routinely pay," as it must do in order to file a protest, "the amount demanded prior to judicial determination of contractual liability. Absent statutory directive or clear Congressional intent to the contrary, we do not impose it. The cases cited by the [G]overnment referring to finality of assessment absent a timely protest all refer to duties and related exactions subsumed in

final liquidation. We entirely agree that both sides to this action are now barred from challenging the liquidation. But in a suit for damages brought by the [G]overnment, it appears clear that *historically the surety was not required to file a protest and pay the full demanded damages in advance, in order to preserve its right to defend on the issue of liability*. We conclude that the 1980 legislative enactments did not change the right of the surety to defend against a claim for liquidated damages. Under the circumstances that here prevail the surety was not required *to file an administrative protest and pay the damages assessed*, as prerequisites to defending against the charge." (emphases added)); *United States v. Toshoku Am., Inc.*, 879 F.2d 815, 818 (Fed. Cir. 1989) (explaining that, even following liquidation, "[p]roof that the importer has complied with the conditions of the bond has traditionally been and still remains a complete defense to a collection suit brought on the bond").

Thus, the rule found in both law and custom remains that, in a case brought by the Government to collect under a contract of insurance, the surety is not prevented from raising defenses to defeat the Government's claims, even those that would be protestable matters if raised by or on behalf of an importer.[21]

It is also worth noting that the rule found in *Utex* and other cases is a sensible one. First, there are thousands of protests every year and the great majority are resolved at the administrative level using Customs' administrative procedures. By way of contrast, there are only a handful of collection actions brought by the Government to

[21] Citation to *Hartford Fire Ins. Co. v. United States* (*Hartford II*), 544 F.3d 1289 (Fed. Cir. 2008), does not aid the Government's case. *See* Pl.'s Resp. Br. 24. The *Hartford* case involved a unique set of procedural facts. *See Hartford II*, 544 F.3d at 1290–91. It is common for insurance companies to bring declaratory judgment actions to determine their duties and obligations under insurance contracts prior to having a claim lodged by an insured. This is what the plaintiff sought to achieve in *Hartford*. *See Hartford Fire Ins. Co. v. United States* (*Hartford I*), 31 CIT 1281, 1281, 507 F. Supp. 2d 1331, 1332 (2007), *aff'd*, 544 F.3d 1289 (Fed. Cir. 2008). At the time Hartford brought its case, Customs had sent the company a statement of charges for duties owed by its defaulting importer, but the Government had not yet filed a collection action. Acting as many insurance companies would, Hartford brought a declaratory judgment action to have its duties and obligations determined by a Court prior to the Government bringing suit. *See Hartford II*, 544 F.3d at 1291. Because the Court of International Trade (like all federal courts) is a court of limited jurisdiction, Hartford sought to bring its declaratory judgment action under 19 U.S.C. § 1581(i), the Court's "catch-all" jurisdictional provision. *See Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). The Federal Circuit held, however, that § 1581(i) jurisdiction was not available to Hartford because it could have sought relief by protesting the bill from Customs for the duties left unpaid by the insured importer. *Hartford II*, 544 F.3d at 1290. The new rule expressed in *Hartford*, however, did not address an action brought by the Government seeking to enforce a contract of insurance against a surety; a case that has an entirely different jurisdictional basis. *See* 28 U.S.C. 1582(2). Accordingly, *Hartford* did not overrule *Utex* or *Toshoku*, or indeed even mention them.

recover on bonds securing the payment of duties. These suits proceed without any prior administrative proceedings and, like the one now before the court, may involve a great deal of money and are subject to the usual discovery and motion practice typical of lawsuits. Moreover, these cases will normally result in a reasoned decision at summary judgment and, in some cases, a subsequent decision with findings of fact and conclusions of law following trial. It would be a peculiar situation indeed if the unreasoned determination[22] of an administrative agency could preclude a party in an action before this Court from interposing its defenses to insurance coverage and thereby circumvent normal court procedures. Nor would it make much practical sense in these commercial cases to require a surety to establish certain of its contractual rights in one forum, and then require the surety to establish other rights under the same contract of insurance as defenses elsewhere. Therefore, it is apparent that, despite AHAC's failure to appeal the protest denials, it is not bound by the rule of finality and may interpose its defenses here.

III. AHAC'S CLAIMS OF PREJUDICE

A. Legal Framework

As noted in *AHAC I*, "although Customs' failure to provide notice does not invalidate the suspensions, if AHAC was actually harmed as a result of Customs' omission, it would be entitled to appropriate relief." *AHAC I*, 35 CIT at ___, Slip Op. 11–57, at 13. Generally, under insurance law, if a surety is prejudiced by the actions of the insured,[23] then the contract of insurance may be voided in whole or in part. *See generally Chapman v. Hoage*, 296 U.S. 526, 531 (1936); Restatement (First) of Security § 128 (Am. Law Inst. 1941).

AHAC argues it was prejudiced by Customs' failure to provide the statutorily-required notice of suspension of liquidation and, had it

[22] Typically, Customs gives no reasons when it denies a protest, but merely circles the word "[d]enied for the reason checked." U.S. Customs & Border Prot. Form 19 (05/10), *available at* http://www.cbp.gov/sites/default/files/documents/CBP_Form_19.pdf. As a result, these protest demands are accorded no deference. *See United States v. Mead Corp.*, 533 U.S. 215, 228 (2001) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (alteration in original) (internal quotation marks omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))).

[23] The text on the bonds indicates that the United States is the insured. *See, e.g.*, Def.'s Resp. to Ct.'s Order, Ex. 1, at 1 (ECF Dkt. No. 138) (Continuous Bond No. 270712146 issued by AHAC) ("In order to secure payment of any duty, tax or charge and compliance with law or regulation as a result of activity covered by any condition referenced below, we, the below named principal(s) and surety(ies), bind ourselves to the United States in the amount or amounts, as set forth below.").

known of the suspensions, it would have taken measures to mitigate its liability under the bonds. Def.'s Br. 32–35. Because this claim is raised as a defense in a collection action, the burden is on AHAC to both plead and demonstrate it was prejudiced. *See Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1355. "Whether an error is prejudicial or harmless depends on the facts of a given case." *AHAC I*, 35 CIT at ___, Slip Op. 11–57, at 14.

With respect to the claims of prejudice, the Government contends AHAC has not provided *any evidence* that, if the company received notice, it would have, or for that matter could have, taken any action to decrease its risks under the bonds. Pl.'s Br. 16–20. AHAC, however, maintains it has produced ample evidence that it could and would have acted, and urges the court to dismiss the Government's claims on account of the prejudice caused by the lack of notice. *See* Def.'s Br. 30–35. In other words, AHAC seeks to have its duties and obligations under both the single transaction and continuous bonds discharged as a result of the prejudice suffered by the Government's failure to provide the statutorily-required notice that liquidation had been suspended. *See* 19 U.S.C. § 1504(c).

Importantly, if a claim of prejudice is based on the failure of a government entity to perform an act, the resulting harm must be of the sort the required action was designed to prevent. *See Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) ("Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect."). The Federal Circuit recently indicated that the party seeking relief from its obligations under a bond must demonstrate concrete, cognizable, "substantial prejudice." *Great Am. II*, 738 F.3d at 1330. This standard is in line with much of the law of insurance. Notably, "[t]he theory of discharge began as a state law *defense* that a surety could assert to avoid enforcement of its bond obligation on the grounds that the obligee (the beneficiary of the bond) had taken improper actions which prejudiced the surety by increasing its financial risk." *Lumbermens Mut. Cas. Co. v. United States*, 654 F.3d 1305, 1313 (Fed. Cir. 2011); *see also Hartford Fire Ins. Co. v. United States*, 772 F.3d 1281, 1288 (Fed. Cir. 2014) (quoting *Great Am. II*, 738 F.3d at 1332). In such cases, prejudice must be established by a preponderance of the evidence at trial. *Fabil Mfg. Co. v. United States*, 237 F.3d 1335, 1340–41 (Fed. Cir. 2001).

Courts have generally found that the burden placed on an insurer to prove it suffered prejudice by reason of a breach of a notice provision is a substantial one. *Intercargo*, 83 F.3d at 396 ("A party is not 'prejudiced' by a technical defect simply because that party will lose

its case if the defect is disregarded. Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect."); *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1359 ("Without a fact-specific demonstration of injury to an interest that the notice provisions were designed to protect, the court cannot conclude that [the surety] has pled *with particularity* the prejudice suffered by the lack of notice."). For example, courts have required that, to create a triable issue of fact with respect to the issue of prejudice due to late notice, an insurer must demonstrate with competent evidence that it suffered a change in position adverse to its interests. That is, the insurer must show a substantial likelihood that it could have defeated the underlying claim against the insured, settled the case for a smaller sum than that for which it was ultimately settled, suffered tangible economic injury, or irretrievably lost a substantial right or the ability to mount a defense. *See Goodstein v. Cont'l Cas. Co.*, 509 F.3d 1042, 1058 (9th Cir. 2007); *British Ins. Co. of Cayman v. Safety Nat'l Cas.*, 335 F.3d 205, 212 (3d Cir. 2003); *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1249, 1253–54 (3d Cir. 1994); *Ins. Co. of Pa. v. Associated Int'l Ins. Co.*, 922 F.2d 516, 524 (9th Cir. 1991); *Unigard Sec. Ins. Co. v. N. River Ins. Co.*, 4 F.3d 1049, 1068–69 (2d Cir. 1993); *Granite State Ins. Co. v. Clearwater Ins. Co.*, No. 09 Civ. 10607, 2014 WL 1285507, at *20–21 (S.D.N.Y. Mar. 31, 2014) ("[O]ne method to defeat liability under contracts for reinsurance is for the reinsurer to prove that the delay was 'material or demonstrably prejudicial.'" (citation omitted)). Finally, the claimed prejudice must relate to particular bonds, not to a surety's business in general. *See Great Am. II*, 738 F.3d at 1330.

Therefore, in order to be released from its contractual obligations by reason of having suffered prejudice, AHAC must demonstrate: (1) Customs failed to provide the required statutory notice that liquidation had been suspended; (2) the purpose of the notice provision is to protect AHAC from injury to its interest with respect to being liable on the bonds; and (3) AHAC suffered actual prejudice with respect to its obligations on the bond due to Commerce's failure to provide the required notice of suspension. Moreover, to establish prejudice, "courts 'reject speculation, and require evidence of concrete detriment resulting from delay, together with some specific harm to the insurer caused thereby.'" *Goodstein*, 509 F.3d at 1058 (quoting *Canron, Inc. v. Fed. Ins. Co.*, 918 P.2d 937, 941 (Wash. Ct. App. 1996)).

First, as to the notice provision, it is evident that Customs failed to provide the notice required by § 1504(c). Def.'s Statement ¶¶ 114–17. The Government asserts it provided AHAC with actual notice be-

cause Customs sent notice to AHAC's former agent, Shea. Pl.'s Br. 16–18; Pl.'s Resp. Br. 4. The Government also appears to claim that AHAC had actual notice, or at least knowledge, that its bonds secured entries subject to antidumping duties. Pl.'s Br. 19. These arguments, however, simply do not take the place of the notice Congress directed Customs to give, the purpose of which was to protect sureties. The Government's assertion that notice to a stranger to the contracts of insurance, an agent that had been fired by AHAC and which never informed AHAC of the notice, could be said to constitute actual notice is too much of a stretch to be seriously considered. In addition, the Government has produced no evidence that any AHAC employee ever saw any of the publications in the Federal Register, that the company was under any statutory duty to monitor such publications, or that notice to a surety by publication was authorized.

Accordingly, the court finds the alleged service on AHAC's previous agent, Shea, instead of GSIS, the actual agent and underwriter of the bonds, does not satisfy the notice requirements of § 1504(c). *See* 19 U.S.C. § 1504(c) ("If the liquidation of any entry is suspended, the Secretary shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record or drawback claimant, as the case may be, and to *any authorized agent and surety of such importer of record or drawback claimant*." (emphasis added)). Moreover, the statute requires that both the authorized agent and the surety itself be given notice. Even if there could be some argument that service on Shea was sufficient, there is no factual dispute as to whether AHAC received notice. The Government has not submitted evidence sufficient to meet its burden on summary judgment as to whether it sent the required statutory notice to AHAC. That is, the Government's claim that it served Shea, and its proffer of a "screen shot" dated in 2010, without more, is insufficient for a reasonable jury to conclude AHAC received actual or constructive notice.

Second, the legislative history of § 1504(c) demonstrates an intent to protect sureties from greater risk under bonds. H.R. Rep. No. 95–621, at 25 (1977) ("The addition of this subsection gives notice to the sure[t]y companies and other third parties that there is a potential for loss. Thus, the sureties can take appropriate measures upon receiving this notice to make sure that at least as to continuing activities, the risk of loss will be minimized."). Also, it is clear that Congress, by enacting the amendments surrounding § 1504(c), endeavored to protect "[s]urety companies, which are jointly liable with importers for additional duties, [so they] would be better able to

control their liabilities. Sureties would also be better protected against losses resulting from the dissolution of their principals in instances where there has been undue delay in liquidating entries." *Id.* at 4.

In support of AHAC's argument that it suffered injury as a result of Customs' failure to provide notice, the company insists that the required notice "would have alerted AHAC to increased risk of loss on its bonds, which could have led AHAC to take remedial measures." Def.'s Br. 31. AHAC maintains, moreover, that its financial risks were increased by Commerce's failure to provide notice of the suspended liquidation, principally because, had it received notice, it could have (1) demanded more collateral, (2) terminated the bonds, or (3) taken other actions to protect its import duty bond business generally. *See* Def.'s Br. 32–35; Def.'s Resp. Br. 7–8.

The court's inquiry now turns to the question of whether AHAC has presented sufficient evidence of prejudice to be entitled to summary judgment on its defense or to create a triable issue of fact regarding its liability on the bonds. *See AHAC I*, 35 CIT at __, Slip Op. 11–57, at 13–14. Here, there are two types of bonds at issue, and the court will discuss AHAC's claims with respect to each separately.

B. Single Transaction Bonds

As to the single transaction bonds, the court finds AHAC has not shown prejudicial harm from Commerce's failure to provide it with notice of suspension as required by 19 U.S.C. § 1504(c) to prevail on summary judgment.

First, AHAC claims it could have demanded additional collateral from the importers if it was aware that liquidation had been suspended. Def.'s Br. 34. Defendant, however, has not established any basis on which it could have demanded more collateral after the single transaction bonds were executed. As a surety, AHAC's duties and obligations under the single transaction bonds attached when each bond was executed and each individual entry was made. *See Great Am. II*, 738 F.3d at 1330. AHAC has failed to provide any contractual basis by which a post-execution demand for additional collateral from the importer would have amounted to more than a unilateral attempt to modify its preexisting contract without offering any consideration in return. In addition, AHAC has provided no practical reason why any of its importers would have felt compelled to provide additional collateral. That is, because the agreement to act as a surety for the importer was complete once the single transaction bonds were executed, the importers had no reason to put up more collateral. This holding is consistent with the Federal Circuit's ruling

in *Great American II*, where the Court rejected similar arguments, noting that, under a single transaction bond, a surety's obligations have already attached and it would therefore be unable to alter its liability on the bond. *Id.*

AHAC's argument that it could have obtained, at an earlier date, experienced counsel to investigate its liability exposure and alter future business policies accordingly, are equally unavailing because this is irrelevant to the single transaction bonds. *See id.* ("Great American argues that the [G]overnment's failure to send it a separate notice of suspension injured it because, had it gotten such a notice, it could have sought reinsurance, ceased doing business with the importer to limit its future risk, or attempted to minimize its loss on these bonds by participating in the administrative review of the duties at issue and arguing for a lower rate for the entries covered by the bonds. But the trial court correctly recognized that certain of the identified possible actions are irrelevant to the single-transaction bonds at issue here, because altering future business policies could not limit the risk Great American had already incurred under the bonds in question."). Thus, obtaining experienced counsel would not have helped AHAC to mitigate its losses; nor would termination of any of the single transaction bonds have been possible for AHAC. *See Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1356 ("Termination is not a legal option for [a single transaction bond] surety.").

Further, the court rejects AHAC's contention that it suffered prejudice with respect to the single transaction bonds because it could have instructed GSIS, its underwriter, to stop issuing additional bonds securing entries of merchandise subject to antidumping duty orders. While it is true that if AHAC had received notice it may not have issued additional single transaction bonds, this is just a reiteration of AHAC's argument regarding future business practices. As this Court previously found in *Great American I*, "any limitations on future bond issuance by an agent do not affect the surety's liability on the [single transaction bonds] already executed on the surety's behalf." *Id.* at __, 791 F. Supp. 2d at 1357. Put another way, had it received notice, there is nothing that either AHAC or GSIS could have done to limit AHAC's risk under the single transaction bonds that had already been issued.

In sum, to prevail on its prejudice defense at summary judgment, AHAC must show it suffered cognizable prejudice with respect to its liability as to particular single transaction bonds (i.e., specific contracts of insurance) on account of Commerce's failure to provide notice that liquidation of the entries secured by those particular bonds had been suspended. It has not done so. *See Great Am. II*, 738 F.3d at 1330.

C. Continuous Bonds

As to the continuous bond, however, the facts are different because the bonds are different. The *Great American I* Court

> acknowledge[d] that the situation could be quite different for [continuous bonds] because, on a [continuous bond], the surety can terminate the bond as to future entries. In [*Hanover Ins. Co. v. United States*], the court mentions the legislative history of the notice provisions of section 1504: "[T]he House committee explained, thus, the sureties can take appropriate measures upon receiving this notice to make sure that at least as to continuing activities, the risk of loss will be minimized." A [continuous bond] covers entries over a period of time. For a [continuous bond] surety, notice of a suspension, in effect, puts the surety on notice of activity by its principal that involves increased risk. Therefore, a [continuous bond] surety has the ability to terminate the bond and prevent future liability. In contrast, the [single transaction bonds] at issue each covered a discrete activity pursuant to a single entry. Termination is not a legal option for a [single transaction bond] surety.

Id. at __, 791 F. Supp. 2d at 1356 (quoting *Hanover Ins. Co. v. United States*, 25 CIT 447, 455 (2001)) (citing 19 C.F.R. §§ 113.27, 113.61). As noted, unlike a single transaction bond, a continuous bond can be terminated by the surety. 19 C.F.R. § 113.27(b) ("A surety may, with or without the consent of the principal, terminate a Customs bond on which it is obligated. The surety shall provide reasonable written notice to . . . the director of the port where the bond was approved. . . ."). It is clear that the purpose of the notice provisions—to alert AHAC of the potential for increased risk of loss and to afford it an opportunity to mitigate the loss—has more meaning with respect to continuous bonds.[24] Because of the possibility of termination of the continuous bond after it received notice of the suspension of liquidation, AHAC's arguments that it would have demanded additional collateral or terminated its continuous bond business (and hence its existing continuous bond) have more traction.

First, a demand for more collateral is dramatically different when a continuous bond is involved, as distinct from when a surety has issued a single transaction bond. As noted, for the single transaction

[24] It is worth noting the language of the regulations does not indicate that termination is available exclusively on continuous bonds. From the text, the only indication that the regulations are intended to encompass the termination of continuous bonds is subsection c, which states: "If a bond is terminated no new customs transactions shall be charged against the bond." 19 C.F.R. § 113.27(c). Subsection c's language could not, of course, apply to anything other than continuous bonds. *See id.*

bonds, AHAC produced no evidence of a contractual or practical reason why its importer would have complied with demands for increased collateral. As to the continuous bond, however, because LW could have been terminated at any time by AHAC, its importers would have been faced with complying with a demand for additional collateral or prevented from entering their goods in the future. In other words, because the importers needed a surety to guarantee the payment of duties, if they wanted AHAC to continue as their surety, they would have had to put up more collateral or face having AHAC refuse to continue acting as a surety by terminating the continuous bond.

The situation is put into even more relief when comparing AHAC's contractual obligations on single transaction and continuous bonds. With respect to a single transaction bond, even if the statutorily-prescribed notice had been given, AHAC would have been unable to terminate the bond or alter its contractual obligations. By way of contrast, under a continuous bond, had notice been provided, AHAC could have terminated the bond and avoided liability with respect to subsequent entries. Put another way, had AHAC received the statutorily-required notice, it could have terminated the continuous bond and ceased acting as surety on the multiple entries it guaranteed after receiving notice. Thus, it is apparent that if Customs complied with its statutorily-prescribed obligations, AHAC could have taken action to protect itself from assuming greater liability under the continuous bond.

Speculation as to what AHAC might have done, however, is insufficient for the company to be relieved of its duties and obligations. Rather, AHAC must cite to record evidence demonstrating it would have acted to reduce its liability. AHAC claims it could have terminated its bonds business if it had received notice that liquidation was suspended. The court interprets this argument to mean that, together with other actions, AHAC could have terminated its continuous bond. Here, additional entries secured by the continuous bond continued to enter the United States after AHAC should have received notice.[25]

[25] When Commerce receives a request for an administrative review, liquidation of entries subject to the review are suspended. *See* 19 U.S.C. § 1675(a)(2)(C); *Canadian Wheat Bd. v. United States*, 33 CIT 1204, 1208, 637 F. Supp. 2d 1329, 1334 n.6 (2009), *aff'd*, No. 20101083, Slip Op. (Fed. Cir. Apr. 19, 2011) (noting that a request for administrative review suspends liquidation pending the outcome of the review); 19 C.F.R. § 351.212(c)(1). Here, a number of entries secured by AHAC's continuous bond entered the United States after administrative reviews were initiated and liquidation was suspended. *See* Def.'s Resp. to Ct.'s Order, Ex. 1, at 1 (ECF Dkt. No. 138) (Continuous Bond No. 270712146 issued by AHAC); Def.'s Resp. to Ct.'s Order, Ex. 2, at 1 (ECF Dkt. No. 138) (listing entries made in 2001 and 2002 covered by Continuous Bond No. 270712146); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 68 Fed.

Pursuant to the terms of the bond, the antidumping duties owed on these subsequent entries were secured by the bond. Under the applicable regulations, this continuous bond could have been terminated at any time. *Great Am. I*, 35 CIT at __, 791 F. Supp. 2d at 1356. Moreover, AHAC could have demanded additional collateral from the importers as a condition for not terminating the continuous bond. Thus, AHAC could demonstrate it suffered prejudice by Commerce's failure to provide notice by showing that, had it received notice, it would have (1) demanded additional collateral as a condition for not terminating the continuous bond, or (2) terminated its continuous bond and thereby ceasing to insure the duties due on future entries.

With respect to the entries secured by the continuous bond, there were entries made subsequent to when AHAC should have received notice. AHAC, though, must do more than claim that it would have taken action to limit its liability on the bonds had it received notice; it must provide evidence it would have. *See Great Am. II*, 738 F.3d at 1330–32.

The Government asserts that AHAC cannot demonstrate it would have taken any action had it received notice, let alone demand more collateral or terminate the bonds. AHAC's former underwriting agent, Shea, testified that AHAC never requested any notices of suspension of liquidation, that AHAC was unconcerned with such notices, and at times, Shea even discarded the notices altogether. *See* Decl. of Lee Barther, Pl.'s Mot. Ex. 7, at 52:15–52:20 (ECF 76–7) ("Barther Decl."). It is worth noting, however, this evidence was taken from AHAC's underwriting agent that had been discharged before the bonds at issue were executed. In addition, the Government has produced some evidence that GSIS, the actual underwriting agent on the bonds at issue, had no procedures in place even if they received notice that liquidation was suspended. Pl.'s Br. 17. Thus, while there is some evidence of how AHAC might have behaved if it had received notice, it is hardly dispositive. *See Great Am. II*, 738 F.3d at 1330 ("While those admissions would not themselves automatically preclude Great American from showing that it would have acted in this case, it was incumbent upon Great American to come forward with evidence that in this case—unlike prior cases—notification would likely have led it to take action, with some relevant probability of averting the alleged harm.").

Reg. 14394, 14399 (Dep't of Commerce Mar. 25, 2003) (initiation of administrative review for entries of subject merchandise made between February 1, 2002 through January 31, 2003); *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 67 Fed. Reg. 14696, 14697 (Dep't of Commerce Mar. 27, 2002) (initiation of administrative review for entries of subject merchandise made between February 1, 2001 through January 31, 2002).

To demonstrate it would have taken such steps, AHAC points out that it conducted an investigation in 2004 after Customs sought to collect on the bonds. Def.'s Br. 33. Specifically,

> [i]n early 2004, AHAC began to receive demands by Customs for payment under the bonds covering the Chinese imports. Shortly after the first receipt of these demands, AHAC replaced its usual claims handling agent with experienced bond claims counsel to investigate the demands and determine the company's exposure. If AHAC had received timely notice of suspension of liquidation years before, it could have conducted this investigation much earlier than it actually did.

Def.'s Br. 33. According to AHAC, the initiation of an investigation once it knew of its increased exposure is evidence that it would have taken action had it received the statutorily-required notice.

In addition, the primary evidence AHAC claims demonstrates it would have taken action to mitigate its losses had it received notice is the testimony of Mark Pessolano, the Vice President in the Surety Bond Claims Department of Chartis Claims, Inc., the authorized surety claims representative for the company. "I am responsible for managing claims against surety bonds issued by AHAC, including the bonds covering antidumping duties at issue in this litigation." Decl. of Mark Pessolano in Supp. of Def's Mot. for Summ. J. ¶ 2 (ECF Dkt. 78–1) ("Pessolano Decl."). Mr. Pessolano testified: (1) had AHAC received notice that liquidation was suspended, the company would have acted quickly to protect itself: "In my 39 years of handling surety bond claims, delay—particularly substantial delay—corresponds directly with increased likelihood of loss," Pessolano Decl. ¶ 96; (2) with adequate notice, AHAC would have conducted an investigation:

> If AHAC were timely notified of this increased risk, it would then have conducted an investigation of the importers of the Chinese products and the main customs house broker, East-West Associates, which had sought bonds on the importers' behalf from GSIS. Those investigations could well have uncovered facts that would have prompted AHAC to take measures to prevent or mitigate its losses,

Pessolano ¶ 97; and (3) AHAC could have demanded more collateral:

> If AHAC had received timely notice of suspension of liquidation, it could have sought substantial collateral from the importer to protect it against risk of loss. . . .

> Indeed, obtaining collateral from the principal is a frequent practice by AHAC and other sureties. The required collateral often takes the form of an irrevocable letter of credit from a highly-rated financial institution, but can also take other forms such as the posting of cash or security interests in other assets. I have had personal involvement in several instances where AHAC obtained collateral from a bond principal in order to protect AHAC against loss and effectuate the principal's duty to perform its obligation to the obligee.
>
> AHAC's underwriting agreement with GSIS explicitly permitted it to seek collateral from importers. AHAC and GSIS had no occasion to seek such collateral for bonds covering antidumping duties prior to the issuance of the bonds covering Chinese imports because there was no history of losses of sufficient magnitude to make AHAC aware it needed security. Because any notice of suspension of liquidation would have been issued well before the importer's refusal to pay antidumping duties, those notices could have given AHAC sufficient advance warning to seek collateral before the importers reneged on their obligations.

Pessolano ¶¶ 103–05 (citing Pessolano Decl. Ex. 29, at 11–13 (ECF Dkt. No. 78–29). In addition, Mr. Pessolano testified that "[i]f the importers of the Chinese products had refused to provide collateral or could not be found, AHAC could have cancelled the bonds." Pessolano Decl. ¶ 106.

Importantly, Mr. Pessolano testified as to what AHAC actually did after it finally received notice when Customs filed suit against the company. Pessolano Decl. ¶ 94 ("AHAC did not receive information from which it might have learned of this pattern of fraudulent conduct until early 2004, when it first began receiving Customs' demands for payment under the bonds covering the Chinese imports that are the subject of these actions. Soon thereafter AHAC retained experienced Customs bond counsel to conduct an investigation of the [G]overnment claims and the failure by importers to pay antidumping duties that had given rise to those claims."). Mr. Pessolano also testified to actions AHAC had taken in the past when the company learned of increased risk. Pessolano Decl. ¶ 98 ("The possibility that AHAC would have conducted such investigations is not speculative. In mid-2001, AHAC became aware of information not related to antidumping duties which caused concern that GSIS was exceeding its underwriting authority and engaged in other practices of concern. AHAC promptly took corrective action in August 2001 by terminating

GSIS' underwriting authority effective October 2, 2001."); *see also* Dep. of Mark Pessolano ¶¶ 72:7–73:6 (ECF Dkt. No. 78–40) ("Pessolano Dep.") (Q: Mr. Pessolano, can you take a look at what's been marked as Pessolano Exhibit 5, please. A. Okay. Q. Can you tell me what this is? A. It's a letter from Mark Mallonee, President of Surety Division, to [FIA Excess and Surplus Agency ("FIA")] and Global Solutions, dated 8/3/2001, providing Notice of Termination of the agencies and Management Agreement between FIA Global Solutions and AIG. . . . Q. Is this informing FIA and GSIS that their agreement, Customs Bonds Agreement, is terminating? A. That's correct."). Thus, the essence of Mr. Pessolano's testimony is that, as an insurance company, AHAC knew how to protect itself from increased risk of loss and when it finally learned that it faced increased liability, it took action to reduce it.

The Government argues that conducting an investigation would unlikely have helped AHAC because two previous[26] investigations did not result in AHAC terminating the bonds: "We question whether additional investigations would have actually aided AHAC since, as AHAC admits, it had already conducted two investigations and apparently not discovered any actionable fraudulent behavior." Pl.'s Resp. Br. 34 n.38. The Government is correct that in 2001, AHAC conducted an investigation when it received information relating to GSIS potentially acting outside the scope of its underwriting authority. Def.'s Br. 32–33. In this instance, however, AHAC took action by terminating its relationship with GSIS, its agent at the time. Def.'s Br. 32. Moreover, the result of an investigation failing to lead to the termination of the bond in one case does not necessarily mean that for the transactions at issue here, if given proper notice, AHAC would not have terminated the bonds.

"In evaluating a motion for summary judgment, the evidence of the non-movant is to be believed and all justifiable inferences are drawn in favor of the non-movant. This standard is not changed when the parties bring cross-motions for summary judgment, each nonmovant receiving the benefit of favorable inferences." *Chevron U.S.A. Inc. v. Mobil Producing Tex. & N.M.*, 281 F.3d 1249, 1252–53 (Fed. Cir. 2002) (citing *Anderson*, 477 U.S. at 255). Here, AHAC has failed to produce sufficient evidence to prevail on summary judgment. That is, when viewed in the light most favorable to the Government, AHAC has not shown it was prejudiced by Customs' failure to give notice of the suspension such that it should be relieved of its duties and obligations

[26] The 2001 investigation was prompted by AHAC's concern that its then-agent, GSIS, was exceeding its authority. Pessolano Decl. ¶ 98. The 2004 investigation was commenced after AHAC began receiving demands from Customs to pay on the bonds. Pessolano ¶ 94.

under the continuous bond. In other words, AHAC has not "show[n] that there is no genuine dispute as to any material fact." USCIT R. 56(a); *c.f. Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ("'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986))). Here, although AHAC has produced evidence that, as an insurance company, it had experience with risk mitigation and took some steps following receipt of actual notice that its liabilities had grown, it has not produced sufficient evidence entitling the company to summary judgment on its prejudice defense.

Similarly, viewing the evidence in the light most favorable to AHAC, the Government has failed to meet its burden on its cross-motion, and is therefore not entitled to summary judgment on AHAC's prejudice claims. *See Ricci*, 557 U.S. at 586. In other words, because Customs failed to given the statutorily-prescribed notice that liquidation was suspended, there is no actual evidence of actions AHAC took, or did not take, to limit its liability. Rather, all of the Government's arguments relating to AHAC's claimed prejudice are necessarily speculative based on AHAC's actions once it received actual notice that its liability had increased; notice it received when Customs sent the bills. By this time, of course, it was too late for AHAC to either demand more collateral or cancel the continuous bond.

Thus, a factual dispute remains at to what actions, if any, AHAC would have taken to mitigate its losses had it been given the notice directed by Congress. Accordingly, the court finds the parties' proffered evidence is insufficient for either party to prevail at summary judgment, and AHAC's defenses must be resolved at trial. *See Briscoe v. LaHue*, 460 U.S. 322, 343 n.29 (1983) ("If summary judgment is denied, the case must proceed to trial.").

IV. DEFENDANT'S LIABILITY

A. The Government Is Not Entitled to § 1677g Interest

The Government argues it is entitled to pre-liquidation interest pursuant to 19 U.S.C. § 1677g[27] on the entries at issue in court

[27] Section 1677g provides:

> Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after—(1) the date of publication of a countervailing or antidumping duty order under this subtitle or section 1303 of this title, or (2) the date of a finding under the Antidumping Act, 1921.

19 U.S.C. § 1677g(a)(1)–(2).

number 09–491. *See* Pl.'s Resp. Br. 23–24. The Government maintains it is entitled to this interest solely "because this charge became 'final and conclusive' by operation of 19 U.S.C. § 1514." Pl.'s Resp. Br. 39. As a defense[28] to these claims, AHAC asserts that pre-liquidation interest under § 1677g is unavailable to the Government because such interest is only assessed on cash deposits made by an importer, and not on bonds posted by a surety.

Here, the Government seeks pre-liquidation interest pursuant to § 1677g only on the entries in court number 09–491. Pl.'s Resp. Br. 39. According to the Government, it is entitled to such interest on the underpayment of the deposit made by the importers when their merchandise entered the United States solely because: (1) the interest charge was included in the bill sent to AHAC; (2) the amounts contained in this bill were the subject of a protest, and (3) the protest denial was not appealed to this Court. Thus, according to the Government, the interest charge became "final and conclusive" by operation of § 1514(a).

Before the court, the Government concedes that, in fact, it is not owed the money and that the charge was erroneously included in the bill. *See* Pl.'s Resp. Br. 39 n.42 ("But for the 'final and conclusive' nature of the 19 U.S.C. § 1677g interest charge in case 09–491, the Government would not be entitled to interest under 19 U.S.C. § 1677g under these facts. The Government concedes that AHAC does not owe 19 U.S.C. § 1677g interest in cases 09–401, 09–442, 10–002, 10–003, 10–311, and 11–206."). In other words, the Government concedes that, were the court to reject its "final and conclusive" argument and find that AHAC can argue that plaintiff is not owed this interest, no claim for § 1677g interest in this action would lie. The court has found that AHAC is not precluded from raising its affirmative defenses in this contract action before the court. Thus, the interest charges, including the § 1677g interest, are not final and conclusive by reason of AHAC's decision not to file suit following Customs' protest denials.

---

[28] This defense presents a particularly good example of why the *Utex* rule represents good commercial sense. Were the Government's finality claim to be credited, in order to dispute the relatively small amount represented by the amount of § 1677g interest Customs mistakenly charged the importer, AHAC would have been required to pay the full amount of the regular duties and antidumping duties charged at liquidation. As the *Utex* court explained

> Sentry states, without contravention, that protest and advance payment of liquidated damages were not required of defendants in a district court action for damages, prior to enactment of the Customs Courts Act of 1980, which transferred jurisdiction of actions on a surety bond from the district courts to the Court of International Trade, 28 U.S.C. § 1582. There is no suggestion in the legislative history that Congress intended to change the status of the surety in such suits.

Utex, 857 F.2d at 1414.

Further, the Government is not entitled to pre-liquidation interest under § 1677g for the entries at issue in court number 09–491. Accordingly, plaintiff's claim for interest under § 1677g in this action is dismissed.

B. Plaintiff Is Entitled to Statutory Interest Pursuant to § 1505(d)

The Government argues it is entitled to post-liquidation interest in accordance with the provisions of § 1505(d)[29] on all of the entries at issue in this action. *See* Pl.'s Resp. Br. 39–40. Plaintiff maintains it is entitled to § 1505(d) interest because "an unpaid balance remain[ed] on [the] entr[ies] 30 days after liquidation." Pl.'s Br. 40.

As to this claim, AHAC contends: (1) the Government has waived statutory interest under § 1505(d) below the bond limits because plaintiff made no reference to interest under this provision in its motion for summary judgment, despite its reference to such interest in its complaint; and (2) § 1505(d) applies only to post-liquidation interest on customs duties and is therefore "inapplicable to prejudgment interest relating to antidumping duties." *See* Def.'s Br. 11; Def.'s Resp. Br. 13.

The court finds AHAC's arguments unavailing and holds that the Government is entitled to statutory post-liquidation interest pursuant to § 1505(d).

As an initial matter, AHAC's argument that the Government waived its recovery of post-liquidation statutory interest under § 1505(d) on all of the bonds is unconvincing. "A waiver is [ordinarily evidenced by] an intentional relinquishment or abandonment of a known right or privilege." *Yantai Xinke Steel Structure Co. v. United States*, 38 CIT __, __, Slip Op. 14–38, at 18 (2014) (alteration in original) (internal quotation marks omitted) (quoting *NSK Ltd. v. United States*, 28 CIT 1535, 1555, 346 F. Supp. 2d 1312, 1330 (2004)). "[A] trial court's decision whether or not to find waiver [, however,] is discretionary . . . ." *Woods v. DeAngelo Marine Exhaust, Inc.*, 692 F.3d 1272, 1279 (Fed. Cir. 2012).

The Government clearly did not intend to abandon its claimed right to post-liquidation interest under 19 U.S.C. § 1505(d). Although it does not cite to § 1505(d) in its summary judgment papers, it seeks recovery from AHAC on the bonds as a result of the importers' failure

[29] Section 1505(d) reads:

> If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) of this section, any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

19 U.S.C. § 1505(d).

to pay interest. Indeed, in its summary judgment brief, as part of its requested relief, it seeks to recover post-liquidation interest on the bonds. *See* Pl.'s Br. 6 ("Because the importers failed to pay, pursuant to the terms of the bonds, AHAC is liable up to the amounts of the bonds for the importers' defaults. In addition, *AHAC is liable for pre-judgment interest*, post-judgment interest, equitable interest and interest pursuant to 19 U.S.C. § 580." (emphasis added)). Further, the Government specifically sought interest pursuant to § 1505(d) in its Complaint in court number 09–401. Moreover, in plaintiff's response brief, the Government argues it "is entitled to section 1505(d) post-liquidation on all entries, up to AHAC's bond amounts." Pl.'s Resp. Br. 39. AHAC does not claim, nor could it, that it did not receive notice that the Government sought to recover such interest on the bonds, or that it suffered any prejudice as a result of the omission of any explicit reference in plaintiff's summary judgment brief that the Government sought to recover post-liquidation interest under § 1505(d). Thus, the court will consider the Government's request for § 1505(d) post-liquidation interest.

As to the applicability of the statute itself to the facts of this case, "§ 1505 governs the payment of duties and fees on entries of imported merchandise. Once Customs liquidates or reliquidates an entry, any duties and fees . . . due and owing are payable 30 days after Customs issues a bill." *United States v. Am. Home Assurance Co.* (*AHAC III*), 39 CIT __, __, Slip Op. 15–88, at 7 (Aug. 19, 2015). Where, as here, "a bill is not paid in full within the 30-day grace period, the unpaid balance is considered delinquent and subject to 'post-liquidation interest,'" which "accrues in 30-day periods from the date of liquidation or reliquidation until the balance is paid in full, excluding the 30-day period in which the bill is paid." *Id.*. Subsection (d) provides:

> If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) of this section, any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

19 U.S.C. § 1505(d).

Recently, in *AHAC II*, the Federal Circuit construed a different interest provision, 19 U.S.C. § 580, which provides "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due," and found this provision encompassed antidump-

ing duties. *See* 19 U.S.C. § 580; *United States v. American Home Assurance Co.* (*AHAC II*), 789 F.3d 1313, 1324 (Fed. Cir. 2015). "Thus, by the statute's plain terms, it covers, among other things, bonds securing the payment of antidumping duties when the [G]overnment sues for payment under those bonds." *Id.* (citing *Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771, 773 (Fed. Cir. 1999) ("If the words are unambiguous, no further inquiry is usually required.")). The *AHAC II* Court examined the plain language of the provision and found it was "a short, free-standing statute," "d[id] not cross-reference other statutory provisions," and "[t]he language—'all bonds' on which the [G]overnment sues for the recovery of duties'—is clear and unqualified." *Id.*

Similar to § 580, the word "duties" in § 1505(d) is clear and unqualified. Further, there is nothing in the statute or its legislative history suggesting Congress intended the meaning of the term "duties" to "'bear some different import.'" *See id.* (quoting *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 954 (Fed. Cir. 2013) ("In reviewing the statute's text, we give the words their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." (internal quotation marks and citation omitted))). The statute plainly provides for post-liquidation interest on all unpaid duties, including special duties such as antidumping duties.

Thus, the court holds that AHAC is liable for § 1505(d) post-liquidation interest in this consolidated action.

C. Plaintiff Is Entitled to Statutory Interest Pursuant to § 580

In addition to the principal owed on the bonds, the Government seeks an award of statutory prejudgment interest pursuant to 19 U.S.C. § 580. *See* Pl.'s Br. 13–16. Section 580 provides "[u]pon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due." 19 U.S.C. § 580. For plaintiff, as part of its recovery for "unpaid antidumping duties under surety bonds issued by AHAC, [it] is entitled to collect interest at the rate of 6 percent per year from the date on which the Government first made formal demand upon the surety." *See* Pl.'s Br. 13.

AHAC disputes liability under § 580, claiming such interest is unavailable to the Government because "Congress did not intend [for] the 1799 statute now codified at 19 U.S.C. § 580 to apply to antidumping duty bonds, as antidumping duties did not exist for over a century after the statute's enactment." Def.'s Resp. Br. 3.

As noted, however, this question was settled by the Federal Circuit

in *AHAC II*, 789 F.3d at 1313. There, the Court held "§ 580 provides for interest on bonds securing both traditional customs duties and antidumping duties," and thus "the [G]overnment is entitled to statutory prejudgment interest under § 580." *See id.* at 1324, 1328. In reaching its holding, the Federal Circuit examined the plain language of § 580 and found the statute to be "short, free-standing . . . within the Administrative Provisions section of Chapter 3 in Title 19," and that "[i]t d[id] not cross-reference other statutory provisions." *See id.* at 1325. The Court further found the language of the statute "'all bonds' on which the [G]overnment sues for 'the recovery of duties'" to be "clear and unqualified." *Id.* Because, "[a]s written, the term 'duties' d[id] not modify the type of 'bonds' on which interest shall be allowed," but rather, "the statute call[ed] for interest on '*all* bonds,'" the Court found "by the statute's plain terms, it cover[ed], among other things, bonds securing the payment of antidumping duties when the [G]overnment sues for payment under those bonds." *Id.* (quoting 19 U.S.C. § 580).

In accordance with the Federal Circuit's construction of 19 U.S.C. § 580, the court finds § 580 applies to antidumping duties. Thus, AHAC is liable for such interest on the delayed payment of the antidumping duties owed under the bonds at issue.

D. The Government Is Not Entitled to Equitable Prejudgment Interest

Next, the court turns to the question of whether the Government is entitled to equitable prejudgment interest, taking into account the holding that plaintiff is entitled to prejudgment statutory interest under 19 U.S.C. § 580. The decision to award equitable prejudgment interest is "'governed by traditional judge-made principles'" and is "to be exercised at the discretion of the trial judge." *Id.* at 1328 (quoting *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1367 (Fed. Cir. 2005)). The Government argues it is entitled to equitable prejudgment interest in excess of the face value of the bonds as compensation for the loss of its ability to use the amounts owed under the bonds. Pl.'s Br. 8–12. AHAC disputes liability for equitable prejudgment interest on several grounds.

First, AHAC maintains that, because the antidumping duties were subject to the Continued Dumping and Subsidy Offset Act ("Byrd Amendment" or "CDSOA"),[30] "the funds . . . [were] deposited into

[30] Pursuant to the Byrd Amendment, codified at 19 U.S.C. § 1675c (2000), antidumping duties collected by the United States were paid to "affected domestic producers" of goods that were subject to antidumping duty orders. *See Pat Huval Rest. & Oyster Bar, Inc. v. Int'l Trade Comm'n*, 785 F.3d 638, 640 (Fed. Cir. 2015). "The statute defined an 'affected domestic producer' as a party that either petitioned for an antidumping duty order or was an

non-interest bearing accounts and then distributed to domestic producers of products that compete with the applicable imports," and therefore the Government "had no right or ability to earn a return on the bond amounts that were withheld during the pendency of this litigation." Def.'s Suppl. Br. in Supp. of its Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. 1 (ECF Dkt. No. 126) ("Def.'s Suppl. Br."). Therefore, according to AHAC, "the Government did not lose any use of the money and is [therefore] not entitled to compensation" as it would otherwise receive "a windfall that it never would have obtained had the bond been paid upon demand." Def.'s Suppl. Br. 1.

The court finds this argument meritless. As this Court recently held, "[t]he antidumping duties on the bonds in this case, like any other case not subject to the Byrd Amendment, are owed to the United States, not to a fund established by the United States." *United States v. Am. Home Assurance Co.*(*AHAC V*), 39 CIT __, __, Slip Op. 15–120, at 25 (Oct. 28, 2015). In other words, "although the funds, once collected, may be placed in accounts for distribution to domestic producers in accordance with the Byrd Amendment, this does not change the fact that the money is owed to the United States and, once paid, will be paid to the United States." *Id.*; *see also* Pl.'s Resp. to Def.'s Suppl. Br. 5 (ECF Dkt. No. 135) ("[C]hecks issued for antidumping or countervailing duty bills are made payable to the Government, and these checks are not simply forwarded to [affected domestic producers] for them to deposit. Rather, after receiving the funds, the Government computes and distributes the 'continued dumping and subsidy offset.'"). Hence, because the funds are owed to the United States itself, and not to a particular account, the Byrd Amendment is not a bar to the Government's entitlement to equitable interest.

The only remaining question is whether, as a consequence of AHAC's default, the balance of the equities weighs in favor of the Government's entitlement to equitable prejudgment interest in excess of the bond limits in this case. In determining whether to grant an award of equitable prejudgment interest, full compensation, including the time value of money, should be the court's primary concern. *See AHAC II*, 789 F.3d at 1329; *see also West Virginia v. United States*, 479 U.S. 304, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.").

'interested party in support of the petition.'" *Id.* (quoting 19 U.S.C. § 1675c(b)(1)(A)). Although "[t]he Byrd Amendment was repealed in 2006, . . . the repealing statute provided that any duties paid on goods that entered the United States prior to the date of repeal would continue to be distributed in accordance with the pre-repeal statutory scheme." *Id.* (citing Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (2006)).

In other words, as this Court has recently held, "if the United States has been compensated for the time value of money by another provision, it is difficult to *see* why it should collect an amount for this purpose again." *See AHAC V*, 39 CIT at __, Slip Op. 15–120, at 27; *see also United States v. Am. Home Assurance Co.* (*AHAC IV*), 39 CIT __, __, Slip Op. 15–112, at 6 (Sept. 30, 2015); *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 17. In addition, when awarding the Government prejudgment statutory interest under 19 U.S.C. § 580, the Federal Circuit noted that, where, as here, a statute governs the award of prejudgment interest, "the award of prejudgment interest [is] an equitable determination to be exercised at the discretion of the trial judge." *AHAC II*, 789 F.3d at 1328.

Because, due to § 580, this case does not involve the absence of a statute, the court holds that the Government is not entitled to an award of equitable prejudgment interest. The law is clear that the purpose of equitable interest is to ensure that a party is fully compensated for the time period during which it is deprived of the use of its funds. *See United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987). Because the Government will be fully compensated by the statutory prejudgment interest it will receive by means of § 580, the balance of the equities here tips in favor of AHAC, and against an award of equitable prejudgment interest. "In other words, it would be inequitable to award the United States *both* statutory prejudgment interest under 19 U.S.C. § 580 *and* equitable prejudgment interest under the principles of equity." *AHAC V*, 39 CIT at __, Slip Op. 15–120, at 27. Indeed, this Court has observed that the statutory equitable prejudgment interest plaintiff will receive under § 580 exceeds any discretionary equitable prejudgment interest award the United States would otherwise receive:

> Between the relevant dates (Customs' October 2, 2005 demand and the court's January 23, 2014 judgment), the short-term funds rate varied between 0.18% and 5.16%. The average rate was 1.77%. As a result, the 6% rate that the Government received under § 580 "more than fairly compensates the [United States] for the time value of the unpaid duties. To award prejudgment equitable interest in these circumstances would overcompensate the Government."

AHAC IV, 39 CIT at __, Slip Op. 15–112, at 6 (quoting *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 17); *see also AHAC V*, 39 CIT at __, Slip Op. 15–120, at 24–28.

Accordingly, in view of the court's holding that the Government is entitled to prejudgment statutory interest under 19 U.S.C. § 580, plaintiff may not also recover equitable prejudgment interest in this case.

E. Plaintiff Is Entitled to Post-Judgment Interest

Last, the Government maintains it is entitled to post-judgment interest pursuant to 28 U.S.C. § 1961(a), which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." *See* Pl.'s Br. 16; 28 U.S.C. § 1961(a). Although § 1961 does not apply directly to the Court of International Trade, the Federal Circuit has confirmed this Court's ability to award post-judgment interest at the rate set forth in § 1961 based on 28 U.S.C. § 1585, which provides that "[t]he Court of International Trade . . . posses[es] all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." *See Great Am. II*, 738 F.3d at 1325–26; 28 U.S.C. § 1585.

AHAC does not object to an award of post-judgment interest, nor could it. "Postjudgment interest is not discretionary, but rather is available as a matter of right to prevailing parties." *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 19. Thus, to the extent the Government has prevailed in this matter by means of an award of a money judgment against AHAC, plaintiff is entitled to post-judgment interest at the rate set forth in § 1961, calculated from the date of entry of the judgment. *See* 28 U.S.C. § 1961; *AHAC III*, 39 CIT at __, Slip Op. 15–88, at 19–20.

CONCLUSION

Based on the foregoing, the court grants, in part, plaintiff's motion for summary judgment, and grants, in part, defendant's cross-motion for summary judgment. Regarding the Government's interest claims for recovery on the bonds, the court grants its requests for (1) pre-judgment statutory interest under 19 U.S.C. § 580, (2) 19 U.S.C. § 1505(d) post-liquidation interest, and (3) post-judgment interest at the rate set forth in 28 U.S.C. § 1961. The Government's requests, however, for (1) pre-liquidation interest under 19 U.S.C. § 1677g on the entries at issue in court number 09–491, and (2) equitable pre-judgment interest are denied. Finally, because both parties' motions for summary judgment are denied with respect to AHAC's defense of prejudice, this issue will be decided at trial.

Dated: December 17, 2015
New York, New York
Amended: March 15, 2016
New York, New York

s\ Richard K. Eaton
RICHARD K. EATON

Slip Op. 16–20

TRI UNION FROZEN PRODUCTS, INC. ET AL., Plaintiffs and Consolidated Plaintiffs, v. UNITED STATES, Defendant, AND AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Claire R. Kelly, Judge
Consol. Court No. 14–00249

MEMORANDUM AND ORDER

[Denying VASEP's motion for judicial notice.]

Dated: March 7, 2016

Jonathan Michael Freed, Trade Pacific, PLLC, of Washington DC argued for Plaintiffs Tri Union Frozen Products, Inc., Mazzetta Company LLC, Ore-Cal Corporation, and Consolidated Plaintiff Quoc Viet Seaproducts Processing Trading and Import-Export Co., Ltd. With him on the brief was *Robert George Gosselink*.

William Henry Barringer and *Matthew Paul McCullough*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington DC argued for Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers and certain of its individual member companies. With them on the brief were *Claudia Denise Hartleben*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington DC, *Alexandra Bradley Hess* and *Matthew Robert Nicely*, Hughes Hubbard & Reed LLP, of Washington DC.

Nathaniel Jude Maandig Rickard, Picard, Kentz & Rowe, LLP, of Washington DC argued for Consolidated Plaintiff and Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

Joshua Ethan Kurland, Trial Attorney, and *Kara Marie Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, argued for Defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of Counsel on the brief was *Mykhaylo Alexander Gryzlov*, Senior Attorney, Office of the Chief Counsel for Trade and Compliance, U.S. Department of Justice, of Washington DC.

Kelly, Judge:

This matter is before the court on a motion for judicial notice filed by Consolidated Plaintiffs Vietnam Association of Seafood Exporters and Producers and certain of its individual member companies (col-

lectively "VASEP"). *See generally* Consolidated Pls.' Mot. for Judicial Notice, Dec. 3, 2015, ECF No. 90 ("Motion"). In the Motion, VASEP asks that the court take judicial notice of certain information in further support of its USCIT Rule 56.2 motion for judgment on the agency record challenging the U.S. Department of Commerce's ("Department" or "Commerce") final determination in the eighth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the Socialist Republic of Vietnam for the period of February 1, 2012 through January 31, 2013. *See generally id.*; Resp't Pls. VASEP and Individual VASEP Members' Br. Supp. Mot. J. Agency R., Mar. 30, 2015, ECF No. 50 ("VASEP Br."). Specifically, VASEP asks the court to take judicial notice of the following:

> 1. Public comments submitted by university professors in response to a Department of Commerce request for public comments on differential pricing analysis published in the *Federal Register*.
>
> 2. Academic articles on the Cohen's d methodology that explain relevant underlying statistical principles, including an online statistics textbook published by an accredited university and an academic paper published at an educational research conference.

Motion 1.[1] On December 23, 2015, Defendant United States ("Defendant") filed its response opposing VASEP's motion for judicial notice. *See generally* Def.'s Resp Opp'n to Pls.' Mot. for Judicial Notice, Dec. 23, 2015, ECF No. 96 ("Def.'s Resp."). Defendant argues that "VASEP's motion misapplies the principle of judicial notice, and seeks to improperly convert this Court's examination of an agency's action based on the contents of the administrative record into *de novo* re-

[1] VASEP provided the following citations for the offered materials attached to its Motion:
1. J. Gastwirth, R. Modarres, Q. Pan, "*Some statistical aspects of the Department's use of Cohen's D in measuring differential pricing in Anti-Dumping cases that should be considered before it is formally adopted*", received June 19, 2014, *available at* http://enforcement.trade.gov/download/dpa/diff-pricing-analysis-cmts062014.html. (last viewed December 2, 2015).
2. Online statistics Education: A Multimedia Course of Study (http://onlinestatbook.com/). Project Leader: David M. Lane, Rice University., Chapter 19 "*Effect Size*", Section 2 "*Difference Between Two Means*," *available at* http://onlinestatbook.com/2/effect_size/two_means.html (last viewed December 2, 2015).
3. Robert Coe, "*It's the Effect Size, Stupid: What effect size is and why it is important*," Paper presented at the Annual Conference of British Educational Research Association, September 2002, *available at* http://www.leeds.ac.uk/educol/documents/00002182.htm (last viewed December 2, 2015).

Motion 5.

view." *Id.* at 1. Specifically, Defendant argues that judicial notice "is not appropriately exercised in a record-review case, such as this one," and "[c]ontrary to VASEP's assertions, the materials it seeks to submit are *not* of the type that satisfy the standards of judicial notice." *Id.* at 2–3. On February 10, 2016, the court held oral argument allowing the parties to further argue their positions on the issues in this case, including VASEP's Motion. *See generally* Oral Arg., Feb. 10, 2016, ECF No. 101. The other parties in this action have not taken a position on VASEP's Motion. For the following reasons, the court denies VASEP's Motion.[2]

DISCUSSION

Judicial notice is the means by which a court recognizes a fact in the absence of evidentiary proof. "Judicial notice provides a flexible procedure to take notice that certain information is true." Weinstein on Evidence § 201.02[1]. Pursuant to 28 U.S.C. § 2641(a), "the Federal Rules of Evidence shall apply to all civil actions in the Court of International Trade." 28 U.S.C. § 2641(a). Rule 201 of the Federal Rules of Evidence provides that a court may, at any stage of the proceeding, take judicial notice of any fact "not subject to reasonable dispute because: (1) it is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b), (d). The court may take judicial notice on its own without a request, but "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c).

To be entitled to judicial notice, the moving party must submit the necessary information to show that the matter is not "subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)–(c). Rule 201 of the Federal Rules of Evidence requires the court to consider not only whether matter at issue is "not subject to reasonable dispute," but also whether it is not

[2] In its USCIT Rule 56.2 motion for judgment on the agency record, VASEP also argues that Commerce wrongfully rejected portions of mandatory respondent Minh Phu Group's case brief for containing untimely filed new factual information. *See* VASEP Br. 10–16. Much of the information that VASEP argues Commerce wrongfully rejected from Minh Phu Group's case brief overlaps with the information that VASEP requests the court to take judicial notice of here. *See* Motion 5; Rejection of New Information in Case Brief, PD 248 at bar code 3218413–01 (July 29, 2014). Despite this common aspect of both motions, the court notes that VASEP's argument in its motion for judicial notice is separate and distinct from the argument it has made with respect to Minh Phu Group's case brief in its Rule 56.2 motion, and thus the court's decision here has no bearing on the latter.

subject to reasonable dispute because it is either "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2). Therefore, a condition precedent to indisputability is whether the movant submits information showing the matter "is generally known within the trial court's territorial jurisdiction," or, alternatively, "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). VASEP's Motion does not address either condition precedent. VASEP fails to demonstrate that the information within the offered materials are in any way not subject to reasonable dispute as required by the rule.

The public comments are not properly the subject of judicial notice. VASEP has supplied no information showing that the public comments are beyond reasonable dispute, let alone beyond reasonable dispute because they are "generally known" or capable of accurate verification "from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). VASEP's own motion concedes that the public comments are in support of a particular position, not in any way indisputable:

> The public comments . . . were provided to the Department of Commerce in response to a request for comment on differential pricing. *See Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (Dep't of Commerce May, 9, 2014). . . . These comments are relevant because they support Plaintiff's position that the differential pricing approach applied in the underlying proceeding is fundamentally flawed.

Information that is relevant and supports one's position is not the same as information that is "not subject to reasonable dispute." Beyond conclusory statements, VASEP fails to address the applicable standard and fails to provide support for the proposition that the public comments satisfy the requirements of Rule 201 of the Federal Rules of Evidence.

VASEP asserts "[a] court may take judicial notice of information appearing on a government website." Motion 2. VASEP relies on two cases which are not binding on this court and also fail to support VASEP's position. *See id.* VASEP cites to *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992 (9th Cir. 2010), where the Ninth Circuit, in considering a suit by employees in connection with "403(b) retirement plans," took judicial notice of information displayed on school district websites. *See Daniels-Hall*, 629 F.3d at 998–99. VASEP also cites to *Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600 (7th Cir. 2002), where the Seventh Circuit took judicial notice

that one bank was a branch office of another, which was information found on an official website of the Federal Deposit Insurance Corporation. *See Laborers' Pension Fund*, 298 F.3d at 607–08. VASEP therefore argues that the court should take judicial notice of the public comments because they "were provided to the Department of Commerce in response to a request for comment on differential pricing" and "are available on Commerce's website at http://enforcement.trade.gov/download/dpa/diff-pricing-analysis-cmts-062014.html." Motion 2. However, VASEP's reliance on these cases reveals a misunderstanding of the standard.

The fact that information appears on a government website does not make that information generally known or readily verified for accuracy and thus not subject to reasonable dispute. In *Daniels-Hall*, the court took judicial notice of a "list of approved 403(b) vendors" and "neither party dispute[d] the authenticity of the web sites or the accuracy of the information displayed therein." *Daniels-Hall*, 629 F.3d at 998–99. In *Laborers' Pension*, the court took judicial notice of the fact that one bank was a branch office of and owned by another bank, which was not subject to reasonable dispute because the truth of the matter could be "accurately and readily determined" from an official website. *Laborers' Pension*, 298 F.3d at 607–08. Here, however, the posted information is subject to reasonable dispute. Defendant argues the public comments "are not generally known within the trial court's territorial jurisdiction and are subject to reasonable dispute—indeed, the whole *point* of a party submitting comments is to express its views and make an argument on a disputed issue." Def.'s Resp. 3. The truth of the public comments also cannot be accurately and readily determined by referring to the government website. All that can be determined is that those comments were made, which is not the purpose for which VASEP has offered the public comments. The standard is not that the offered information is "not subject to reasonable dispute" because it is published on a website, but rather, the standard is that the offered information is not subject to reasonable dispute because it is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Thus, it is not appropriate for the court to take judicial notice of the public comments because VASEP has not demonstrated that they are not subject to reasonable dispute.

The academic materials are also not the proper subject of judicial notice. VASEP again fails to demonstrate that the information contained within the academic materials is not subject to reasonable dispute. VASEP simply states that the materials are "[a]cademic articles on the Cohen's d methodology that explain relevant underly-

ing statistical principles, including an online statistics textbook published by an accredited university and an academic paper published at an educational research conference" and that "they are directly relevant to the differential pricing analysis that Commerce applied in the underlying proceeding." Motion 1, 3. VASEP additionally states that "[t]hese papers are further unique in that Commerce in issuing its final results in the underlying proceeding indirectly relied upon other aspects of the materials to support its own position." *Id.* at 3. Again, VASEP refers to these materials as "relevant" and "unique." *See id.* However, neither relevance nor uniqueness is the standard for judicial notice. The applicable standard is whether the facts in the documents are not subject to reasonable dispute because they are either "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Nowhere does VASEP address this standard and explain why the information from the academic materials is not reasonably subject to dispute. VASEP has simply failed to supply "the necessary information" warranting judicial notice of the academic materials. Fed. R. Evid. 201(c).

VASEP claims that the court should take judicial notice of the information in the academic materials because it "undermine[s] Commerce's rationale and underlying assumptions." Motion 3. But the standard for judicial notice is not whether the information sought might undermine Commerce's rationale, but whether the information is indisputable because it is "generally known" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). VASEP's citation to *Borlem S.A. – Empreedimentos Industriais v. United States*, 913 F.2d 933 (Fed. Cir. 1990), does not support its position that information that undermines Commerce's position is subject to judicial notice notwithstanding the standard embodied in Rule 201 of the Federal Rules of Evidence.[3] In *Borlem*, the Court of Appeals for the Federal Circuit

[3] VASEP also cites *Union Camp Corp. v. United States*, 23 CIT 264, 53 F. Supp. 2d 1310 (1999) which is not binding on this court and, in any event, fails to support VASEP's position. In *Union Camp*, the court granted a motion to reconsider the court's prior remand order finding that the "Remand Order was ambiguous, in so far as Commerce interpreted the Remand Order as preventing it from considering record evidence of market prices in valuing the octanol-2." *Union Camp*, 23 CIT at 264, 53 F. Supp. 2d at 1313. In doing so, the court took judicial notice of the fact that "in its third administrative review of antidumping duties on sebacic acid from the [People's Republic of China], Commerce, on the basis of a letter from the editor of the Chemical Weekly (India), reversed its previous position and found that the 'octanol' quote from this publication did not refer to octanol–1." *Id.* at 265, 53 F. Supp. 2d at 1313. Taking judicial notice of an agency's finding in a final determination is something that cannot be disputed because it can be accurately and readily verified. That the court went on to direct the agency on remand to open the administrative record and

considered the International Trade Commission's ("ITC") authority to reconsider a determination pursuant to an order from the Court of International Trade. *See Borlem*, 913 F.2d at 940. The Court of International Trade had ordered the ITC to reconsider its affirmative threat of injury determination after taking judicial notice of Commerce's amended final determination of sales at less than fair value of tubeless steel disc wheels from Brazil, noting:

> [T]his Court must take judicial notice of decisions of federal executive departments when requested by a party. *See*, Fed.R.Evid. 201; *Caha v. United States*, 152 U.S. 211, 221–22, 14 S.Ct. 513, 516–17, 38 L.Ed. 415 (1894); 10 Moore's Federal Practice § 201.02(1) (2nd Ed. 1988 & Supp. 1989). Since plaintiff requested this Court to take judicial notice of the Second–Amended Determination by Commerce, this Court must and does take judicial notice of that determination. The Second–Amended Determination terminated suspension of liquidation for all entries of TSDWs from Brazil by FNV. In the Second–Amended Determination Commerce indicated the reason for the suspension was its finding of *de minimis* dumping margins.

Borlem S.A.-Empreedimentos Industriais v. United States, 13 CIT 535, 541, 718 F. Supp. 41, 46 (1989), *aff'd and remanded*, 913 F.2d 933 (Fed. Cir. 1990). The Court of Appeals affirmed the Court of International Trade's decision to take judicial notice of a finding in an administrative proceeding. *Borlem*, 913 F.2d at 940. The Court of Appeals' decision in *Borlem* fits within the framework of the Rule 201(b). In *Borlem*, Commerce's finding in the amended final determination was not subject to dispute because the result reached by Commerce was "on the record, having been published in the Federal Register," and could be accurately and readily determined. *Borlem*, 913 F.2d at 940. While one might have contested that Commerce reached the correct result, one could not dispute that Commerce reached the result it did. The latter point is the point that was judicially noticed. Here, VASEP does not seek to have the court take notice of the fact that the academic articles were written or that the public comments were made, it wishes to have the information from those materials judicially noticed for the truth of the statements contained within for the court to consider. VASEP has failed to put forth any showing that the truth of the information from these materials is indisputable.

VASEP's argument that Commerce relied on the offered academic materials in the final results here mischaracterizes Commerce's con-

consider the letter from the judicially noticed determination does not support supplementing of the record before the court in this case.

duct. VASEP states that "[t]hese papers are further unique in that Commerce in issuing its final results in the underlying proceeding indirectly relied upon other aspects of the materials to support its own position. Specifically, Commerce relied upon findings and direct quotations from *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 Fed. Reg. 67,337 (Dep't of Commerce Nov. 9, 2012) ("*Activated Carbon*"), I&D Memo at Comment 4." Motion 3. However, as Defendant correctly points out, Commerce relied on a prior determination that was reached after considering similar materials, but Commerce did not rely upon those materials in reaching its determination here. *See* Def.'s Resp. 4. The record in *Activated Carbon*, not the administrative proceeding here, contained these materials. Commerce's reliance on a finding from a prior determination did not consequently incorporate the information from the record of that proceeding to the record of the instant administrative review.

Moreover, granting VASEP's Motion in this case would run counter to a fundamental principle of administrative law, namely that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). The purpose of judicial notice is to promote judicial economy by dispensing with formal proof when a matter cannot be disputed. *See* Weinstein on Evidence § 201.02[2]. Judicial notice is not meant to circumvent the creation and review of an agency record. Therefore, the Court of Appeals has recognized, as a general rule supplementation of the administrative record is not permitted. *See Axiom Res. Mgmt. v. United States*, 564 F.3d 1374, 1379– 80 (Fed. Cir. 2009) (determining the lower court abused its discretion by admitting extra-record evidence because an administrative record "should be supplemented only if the existing record is insufficient to permit meaningful review consistent with the APA"); *Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000), *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005) (explaining that the court is disinclined to allow judicial notice to circumvent the rule against supplementing an agency's record on review). While there may be exceptions to that general rule, such as when effective review cannot be had without the information, *see, e.g.*, *Axiom Res. Mgmt.*, 564 F.3d at 1379–80 (Fed. Cir. 2009); *Murakami*, 46 Fed. Cl. at 735, *aff'd*, 398 F.3d 1342 (Fed. Cir. 2005), grounds for an exception do not exist here. VASEP gives the court no reason to ignore this general rule. There is no showing that the absence of these materials precludes judicial review. The court declines to consider information that was not a part of the administrative record before Commerce. Most

importantly, VASEP has made no showing that the information at issue is not subject to reasonable dispute let alone not subject to reasonable dispute because it is generally known or because its accuracy can be readily determined.

CONCLUSION

VASEP has not demonstrated that the public comments or the academic materials meet the requirements of Rule 201 of the Federal Rules of Evidence. Therefore, upon consideration of VASEP's Motion, all papers and proceedings in this action, and upon due deliberation, it is hereby

ORDERED that VASEP's motion for judicial notice is denied.

Dated: March 7, 2016
New York, New York

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

Slip Op. 16–21

KENT INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 15–00135

MEMORANDUM AND ORDER

[Defendant's motion for extension of time granted; Plaintiff's cross-motion to stay denied.]

Dated: March 8, 2016

Philip Y. Simons and *Jerry P. Wiskin*, Simons & Wiskin, of South Amboy, NJ for Plaintiff Kent International, Inc.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, for Defendant United States. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

Gordon, Judge:

Defendant United States moves to dismiss the second and third causes of action ("Count 2" and "Count 3" respectively) of Plaintiff's complaint under USCIT Rule 12(b)(6), and also moves for an extension of time to file its Answer to the first cause of action ("Count 1") until 15 days after the court decides the motion to dismiss. Plaintiff Kent International, Inc. ("Kent") opposes the motion for an extension

of time and cross-moves to stay consideration of the partial motion to dismiss until the court disposes of Count 1. For the reasons set forth below, Defendant's motion for an extension of time to file its answer to Count 1 is granted and Plaintiff's cross-motion for a stay is denied. The court reserves decision on Defendant's partial motion to dismiss.

Plaintiff imported a product known as WeeRide Kangaroo child bicycle seats. U.S. Customs and Border Protection ("Customs") classified the bicycle seats under HTSUS subheading 8714.99.80 as "Parts and accessories of vehicles of headings 8711 to 8713: Other: Other: Other" at a 10% duty rate. In Count 1 Plaintiff argues that the imported merchandise is properly classifiable under subheading 9401.80.40 as "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Other seats: Of rubber or plastic: Other" at a duty-free rate. In Count 2 Plaintiff contends that Customs has an established and uniform practice of classifying child bicycle seats under HTSUS subheading 9401.80. In Count 3 Plaintiff claims that it is entitled to the same treatment afforded other importers of child bicycle seats pursuant to 19 C.F.R. § 177.12 and that the imported bicycle seats are classifiable under HTSUS subheading 9401.80.

Defendant argues that granting an extension of time pending the court's disposition of the partial motion to dismiss promotes efficiency in the litigation by avoiding the possibility of separate tracks for Plaintiff's different claims, and potentially narrowing the scope of litigation if Defendant's motion is granted. Def.'s Mot. to Extend Time Within Which to Resp. to Pl.'s Comp. at 2, ECF No. 15. Plaintiff counters that the parties would realize greater efficiency by litigating Count 1 first rather than "wasting judicial resources to adjudicate [Counts 2 and 3] which may never have to be reached." Pl.'s Opp. to Def.'s Mot. for an Extension of Time at 1, ECF No. 17. Plaintiff also contends that granting the extension of time will prejudice Plaintiff "as there can be no discovery until after Defendant answers the Complaint." *Id.* at 2.

Service of a motion under USCIT Rule 12 alters the time for service of a responsive pleading to a complaint. USCIT R. 12(a)(2). Rule 12(a)(2) does not specify whether a pre-answer partial motion to dismiss tolls the time to answer a complaint. *See* USCIT R. 12(a)(2) (tolling the deadline for filing an answer until after disposition of a pre-answer 12(b) motion, but not specifying whether the same applies to a partial pre-answer motion to dismiss); 5B C. Wright & A. Miller, Federal Practice & Procedure § 1346 (3d ed. 2015) (explaining, in the context of the analogous Federal Rule of Civil Procedure, that "[i]t is unclear from the language of Rule 12(a) whether service of a Rule

12(b) motion directed at only parts of a pleading enlarges the period of time for answering the remaining portions of the pleading").

A majority of courts addressing this issue have concluded that a pending partial motion to dismiss extends the deadline to answer all claims in a complaint. *See, e.g.*, *Compton v. City of Harrodsburg*, 287 F.R.D. 401, 401–02 (E.D. Ky. 2012); *Talbot v. Sentinel Ins. Co.*, 2012 WL 1068763, at *4 (D. Nev. Mar. 29, 2012). *But see Gerlach v. Michigan Bell Telephone Co.*, 448 F. Supp. 1168, 1174 (E.D. Mich. 1978) (concluding that "[s]eparate counts are, by definition independent bases for a lawsuit and the parties are responsible to proceed with litigation on those counts which are not challenged by a motion under F.R.C.P. 12(b)"); *Okaya (USA), Inc. v. United States*, 27 CIT 1509, 1516 (2003) (reaching same conclusion and relying on *Gerlach*). In concluding that the deadline to answer is tolled where there is a pending partial motion to dismiss, the majority courts have considered a number of factors against the backdrop of Rule 1 of the Federal Rules of Civil Procedure, "which directs courts to construe the Rules in a manner that will 'secure the just, speedy, and inexpensive determination of every action and proceeding.'" *Compton*, 287 F.R.D. at 402 (quoting Fed. R. Civ. P. 1).[1] Among the considerations is whether requiring a defendant to answer a complaint even though it has filed a partial motion to dismiss could result in dual track litigation—one for those claims subject to the partial motion to dismiss and another for the remaining claims. To require a defendant to file an answer to those claims not subject to a motion to dismiss and subsequently have the defendant file an additional answer to any claim that survives a motion to dismiss would result in duplicative pleadings and potentially create confusion. *See Brocksopp Eng'g, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486–87 (E.D. Wisc. 1991).

Additionally, those courts look to how (or whether) to permit the parties to conduct discovery for those claims not challenged in the motion. *See Oil Express Nat'l, Inc. v. D'Alessandro,* 173 F.R.D. 219, 221 (N.D. Ill. 1997) (noting that "[l]egal commentators have suggested that not reading Fed. R. Civ. P. 12(a) as extending the time to answer, in the presence of a partial Rule 12(b) motion, . . . could cause confusion over the proper scope of discovery during the motion's pendency"). In so doing, those courts weigh the potential for increased litigation costs in permitting discovery and managing deadlines for claims that have no legal merit against the possibility that parties might miss out on efficiencies that could result from conducting discovery on all claims at once, assuming the claim or claims survive the

[1] USCIT Rule 1 contains the identical instruction.

partial motion to dismiss. *Cf., e.g. Carr v. N.Y. Stock Exch., Inc.*, 414 F. Supp. 1292, 1305–06 (N.D. Cal. 1976) (highlighting efficiencies gained by limiting deposition of factual witness to causes of action that survived motion to dismiss). Lastly, they examine whether piecemeal litigation "would 'cause confusion over the proper scope of discovery'" during the pendency of the partial motion to dismiss. *Compton*, 287 F.R.D. at 402 (quoting Wright & A. Miller, *supra*).

With this reasoning in mind, the court agrees with Defendant that the most cost-effective and efficient course is to follow the ordinary litigation sequence and toll Defendant's time to answer while the court resolves the partial motion to dismiss. Defendant's proposed procedural posture enables consolidated discovery on any viable claims as well as a more straightforward final judgment thereafter. Less appealing is Plaintiff's proposed procedural posture (staying the partial motion to dismiss and adjudicating the merits of Count 1), which raises the possibility of dual tracks of litigation. It is true that consideration of the partial motion to dismiss will delay the time for Defendant's answer to the complaint. Nevertheless, avoiding the inefficiency and uncertainty occasioned by Plaintiff's dual-track approach outweighs, in the court's view, any prejudice to Plaintiff resulting from a short delay in the filing of Defendant's answer to the complaint. *Cf. Hanley v. Volpe*, 48 F.R.D. 387, 388 (E.D. Wisc. 1970).

Accordingly, it is hereby

ORDERED that Defendant's motion for an extension of time to answer the complaint until 15 days after the disposition of the outstanding partial motion to dismiss is granted; and it is further

ORDERED that Plaintiff's cross-motion to stay consideration of the partial motion to dismiss until after the court adjudicates Count 1 of the complaint is denied.

Dated: March 8, 2016
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 16–22

CHANGZHOU TRINA SOLAR ENERGY CO., LTD. AND TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY CO., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Senior Judge
Consol. Court No. 15–00068[1]

[1] This action is consolidated with *SolarWorld Americas, Inc. v. United States*, Ct. No. 15–00085. Order, July 1, 2015, ECF No. 35, at ¶ 3.

OPINION

[denying motion to file brief as *amicus curiae*]

Dated: March 14, 2016

Joanne E. Osendarp, *Matthew R. Nicely*, *Lynn G.Kamarck*, and *Alan G. Kashdan*, Hughes, Hubbard & Reed, LLP, of Washington, DC, for the Government of Canada.

Matthew J. Clark, *Nancy A. Noonan*, and *Julia L. Diaz*, Arent Fox LLP, of Washington, DC, for the Government of Québec.

Lawrence A. Schneider, *Michael T. Shor*, and *Andrew* Treaster, Arnold & Porter LLP, of Washington, DC, for the Government of Alberta.

Spencer Griffith and *Bernd G. Janzen*, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for the Government of British Columbia.

Michele Sherman Davenport, Davenport & James PLLC, of Washington, DC, for the Government of Manitoba and the Government of Saskatchewan.

Donald B. Cameron, Jr., *Julie C. Mendoza*, and *Brady W. Mills*, Morris, Manning & Martin, LLP, of Washington, DC, for the Government of New Brunswick.

Robert C. Cassidy, Jr., *Jack A. Levy*, *Christopher Kent*, *Christopher J. Cochlin*, and *Thomas M. Beline*, Cassidy Levy Kent LLP, of Washington, DC, for the Government of Nova Scotia.

Mark S. McConnell, *H. Deen Kaplan*, *Deborah M. Wei*, and *Mary Van Houten*, Hogan Lovells LLP, of Washington, DC, for the Government of Ontario.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel was *Shelby M. Anderson*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Pogue, Senior Judge:

This consolidated action arises from the United States Department of Commerce's ("Commerce") countervailing duty ("CVD") investigation of certain crystalline silicon photovoltaic products ("solar panels") from the People's Republic of China ("China").[2] Before the court is a motion by the Government of Canada and the Governments of Québec, Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, and Saskatchewan (hereinafter collectively referred to as the "Canadian Governments") to jointly submit a brief in this matter as *amicus curiae*, pursuant to USCIT Rule 76.[3] Defendant United States opposes this motion.[4]

---

[2] *See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China*, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative countervailing duty determination), as amended by 80 Fed. Reg. 8592 (Dep't Commerce Feb. 18, 2015) (antidumping duty order; and amended final affirmative countervailing duty determination and countervailing duty order).

[3] Partial Consent Mot. of the [Canadian Governments] for Leave to Appear [as] *Amici Curiae*, ECF No. 48 ("Canadian Gov'ts' Br.").

[4] Def.'s Opp'n to Canada's & Canadian Provincial Gov'ts' Mot. for Leave to File Br. as *Amicus Curiae*, ECF No. 62.

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2012),[5] and 28 U.S.C. § 1581(c) (2012).

As explained below, because the Canadian Governments' proposed contribution does not seek to provide impartial information on a matter of law about which there is doubt, but instead seeks to advance advocacy interests that are already adequately represented, the motion is denied.

STANDARD OF REVIEW

USCIT Rule 76 provides that "[t]he filing of a brief by an *amicus curiae* may be allowed on motion made as prescribed by Rule 7, or at the request of the court."[6] Rule 76 also provides that the movants must "identify [their] interest" and "state the reasons why an *amicus curiae* is desirable."[7]

Amicus curiae, of course, means "friend of the court,"[8] "as distinguished from an advocate before the court."[9] Historically, courts have accepted *amicus curiae* briefs that "provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest."[10] Courts may be particularly inclined to permit *amicus* participation "if the court is concerned that one of the parties is not interested in or capable of fully presenting one side of the argument."[11] Thus traditionally "an *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another."[12] In contrast to

---

[5] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

[6] USCIT Rule 76. USCIT Rule 7 in turn requires that the motion be in writing and that it state with particularity the grounds for seeking to file the brief. *See* USCIT Rule 7(b)(1).

[7] USCIT Rule 76. The grant or denial of such motions is "discretionary with the court." *In re Opprecht*, 868 F.2d 1264, 1266 (Fed. Cir. 1989); s*ee also Changzhou Hawd Flooring Co. v. United States*, __ CIT __, 6 F. Supp. 3d 1353, 1356 n.7 (2014) (providing additional citations).

[8] *E.g., Changzhou Hawd*, __ CIT at __, 6 F. Supp. 3d at 1356 n.8 (quoting *Black's Law Dictionary* 102 (10th ed. 2014)).

[9] *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (citations omitted).

[10] *United States v. Mich.*, 940 F.2d 143, 164 (6th Cir. 1991) (emphasis in original) (citations omitted); *see also, e.g., Siam Food Prods. Pub. Co. v. United States*, 22 CIT 826, 830, 24 F. Supp. 2d 276, 280 (1998).

[11] *Am. Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991) (citations omitted).

[12] *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982)(citations omitted); *see also, e.g.*, *Ass'n of Am. Sch. Paper Suppliers v. United States*, 34 CIT 207, 209–10, 683 F. Supp. 2d 1326, 1329 (2010).

such legal advice, arguments against specific determinations made by Commerce in the context of particular CVD proceedings may and must generally be presented to the agency in the first instance, through participation in the adversarial administrative process below.[13]

While it is no longer required that an *amicus curiae* be totally disinterested in the outcome of the litigation[14] – indeed, "it is not easy to envisage an *amicus* who is 'disinterested' but still has an 'interest' in the case"[15] – where a purported *amicus* is in fact an interested party that could and should have presented its arguments to Commerce in the first instance at the administrative level, permitting such arguments to effectively circumvent the administrative participatory requirements "deprives [Commerce] of an opportunity to consider the matter, make its ruling, and state the reasons for its

[13] *See, e.g.*, *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT 1906, 1918–19, 675 F. Supp. 2d 1287, 1300 (2009) ("If a party does not exhaust available administrative remedies, 'judicial review of administrative action is inappropriate.'. . . 'In the antidumping [and countervailing duty] context, Congress has prescribed a clear, step-by-step process for a claimant to follow, and the failure to do so precludes it from obtaining review of that issue in the Court of International Trade.'") (quoting *Sharp Corp. v. United States*, 837 F.2d 1058,1062 (Fed. Cir. 1988) and *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000) (citations omitted), respectively). Here the relevant statute specifically contemplates the participation of foreign government trading partners in domestic administrative proceedings, *see* 19 U.S.C. § 1677(9)(B) (defining "interested party" to include foreign governments of countries in which the subject merchandise is produced or from which it is exported); *see also id*. at § 1671a(b)(4)(A)(i) (providing that Commerce must notify the government of any exporting country named in a CVD petition); *id*. at § 1671b(f) (requiring Commerce to notify all interested parties of the agency's preliminary CVD determinations before they are finalized, including all "facts and conclusions on which its determination is based"); 19 C.F.R.§ 351.309 (2014) (providing for the submission of written arguments to Commerce from interested parties), and such participants are generally required to exhaust their available administrative remedies before being heard in this Court, *see* 28 U.S.C. § 2637(d); *Nat'l Knitwear & Sportswear Ass'n v. United States*, 15 CIT 548, 557, 779 F. Supp. 1364, 1372 (1991) ("[T]he courts require exhaustion of administrative remedies to ensure that the agency and the interested parties fully develop the facts to aid judicial review.") (citation omitted).

[14] *See Mich.*, 940 F.2d at 165 ("Over the years, however, some courts have departed from the orthodoxy of *amicus curiae* as an impartial friend of the court and have recognized a *very limited* adversary support of given issues through brief and/or oral argument.") (emphasis in original) (citations omitted).

[15] *Neonatology Assocs. P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002); *cf.* USCIT Rule 76 (requiring a movant seeking to file an *amicus curiae* brief to "identify the interest of the applicant").

ac-tion,"[16] and is therefore not appropriate.[17] Moreover, *amicus curiae* participation that merely duplicates the arguments of one or more of the represented parties is in any event not "desirable."[18]

DISCUSSION

Here, the Canadian Governments identify their interest as advocating in support of the Plaintiffs' challenge to Commerce's determinations in this solar panels CVD proceeding.[19] Specifically, the Governments seek to secure a favorable precedent for Canadian companies facing similar issues in a separate CVD proceeding concerning supercalendered paper from Canada.[20] "Looking ahead, Canadian governments and companies are understandably concerned regarding how [Commerce] will treat [Canadian companies facing similar issues] in future countervailing duty investigations."[21] The Canadian Governments contend that their *amicus curiae* brief is desirable here because it will "provide[] the Court [with] an opportunity to view [Commerce]'s [challenged] practice from the perspective of foreign governments whose unique interests will augment those represented by the private party litigants," and because "the resolution of this question will have a major impact on foreign governments and companies who will be respondents in future U.S. countervailing duty proceedings."[22]

---

[16] *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143,155 (1946) ("The responsibility of applying the statutory provisions to the facts of the particular case was given in the first instance to the [administrative agency]. A reviewing court usurps the agency's function when it sets aside [an] administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.") (footnote and citations omitted).

[17] *Cf. Changzhou Hawd*, __ CIT at __, 6 F. Supp. 3d at 1355(denying motion to file *amicus* brief where the movant was "an interested party that [was] seeking, in effect, intervenor not *amicus* status").

[18] *See* USCIT Rule 76 (requiring movants to "state the reasons why an *amicus curiae* is desirable"); *Changzhou Hawd*, __ CIT at __,6 F. Supp. 3d at 1357 ("The court will deny a motion to file an *amicus* brief that 'essentially duplicates' a litigant's brief.")(quoting *Voices for Choices v. Ill. Bell Tel. Co*., 339 F.3d 542,545 (7th Cir. 2003)).

[19] Canadian Gov'ts' Br., ECF No. 48, at 1–2.

[20] *See id.* at 2 (explaining that the proposed *amici* are "principally interested" in supporting the Plaintiffs' arguments against a practice that Commerce applied in the Chinese solar panels proceeding at issue here, because Commerce used similar reasoning in the Canadian supercalendered paper proceeding).

[21] *Id.* at 3

[22] *Id.* at 3.

In particular, the Canadian Governments refer to Commerce's treatment of a Canadian company – Resolute FP Canada Inc. ("Resolute") – in the Canadian supercalendered paper proceeding.[23] This Court recently denied Resolute's own motion in this case to file an *amicus curiae* brief that sought to augment Plaintiffs' arguments against Commerce's determinations.[24] Resolute argued that it should be heard in this case "because the Court's decision with respect to Plaintiffs' challenge . . . will have implications for Resolute and other respondents in Commerce's recent investigation of *Supercalendered Paper from Canada*, where Resolute was a mandatory respondent."[25] In denying Resolute's motion, the court explained that, "[b]ecause the movant does not 'provide impartial information on matters of law about which there [is] doubt, especially in matters of public interest,' and is instead a party seeking to advance its interest in another proceeding (upon which the decision in this case will have neither res judicata nor collateral estoppel nor even precedential effect), permitting their participation as amicus here would simply allow for the circumvention of administrative participation requirements."[26]

Specifically, Resolute's interest was ultimately to challenge Commerce's use of similar reasoning in the Canadian supercalendered paper proceeding.[27] But each CVD proceeding is based on its own unique record of factual evidence and arguments presented to the agency.[28] As an interested party to the Canadian supercalendered paper proceeding, Resolute must present its specific challenges to Commerce in the first instance, in the context of the particular CVD

[23] *Id.* at 2.

[24] Order, Feb. 8, 2016, ECF No. 61.

[25] Mot. for Leave to File *Amicus Curiae* Br. on Behalf of [Resolute], ECF No. 43 ("Resolute's Mot."), at 2.

[26] Order, Feb. 8, 2016, ECF No. 61 (quoting *Mich.*, 940 F.2dat 164) (additional citation omitted).

[27] *See* Resolute's Mot., ECF No. 43, at 2.

[28] *See, e.g.*, *NSK Ltd. v. United States*, 27 CIT 56, 95,245 F. Supp. 2d 1335, 1367 (2003) (quoting Commerce explaining its "long-standing policy of treating [different antidumping/countervailing duty] orders as separate proceedings" based on unique factual records) (quotation marks and citation omitted); *Clearon Corp. v. United States*, Slip Op. 14–88, 2014 WL 3643332, at *14 (CIT July 24, 2014) ("Although Commerce can and does take into consideration its policies and methodologies as expressed in different administrative case precedent when making its determination, it cannot take the factual information underlying those decisions into consideration unless those facts are properly on the record of the proceeding before it.") (citation omitted); *cf. also Louis Dreyfus Citrus, Inc. v. United States*, 31 CIT 964, 980, 495 F. Supp. 2d 1338, 1353 (2007) ("[O]nly documents and materials directly or indirectly considered by agency decision-makers become part of the administrative record [for a particular administrative proceeding].") (quotation marks and citation omitted).

proceeding in which its interests are implicated – i.e., in the Canadian supercalendered paper proceeding. "A reviewing court usurps the agency's function when it sets aside [an] administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."[29]

The situation is the same with respect to the Canadian Governments' motion here. As with Resolute, the Canadian Governments' interest is to present a challenge to Commerce's determinations in this solar panels proceeding that reflects their concerns regarding what the agency did in the separate supercalendered paper proceeding, which addresses an order covering a different product from a different country, involving its own unique set of facts.[30] Like Resolute, the Canadian Governments qualify as "interested parties" to that other proceeding,[31] and as such could and should present their specific challenges to Commerce's decisions in that proceeding directly to the agency, following the established procedure for participating at the administrative level, thereby permitting the agency to consider their arguments in the first instance in the context of the relevant factual record specific to that proceeding. Thus, like Resolute, the Canadian Governments do not seek to "provide impartial information on matters of law about which there [is] doubt, especially in matters of public interest,"[32] but are instead effectively seeking to advance their interests in other proceedings. Moreover, there is no indication that the Plaintiffs in this case are unable or unwilling to adequately frame their side of the relevant legal issues.

Accordingly, as with Resolute, the Canadian Governments' proposed contribution in this case does not meet the definition of *amicus curiae*, and is therefore not appropriate. Certainly the court, and the agency, may have an interest in being informed of the considered opinions of our country's important trading partners, even if such opinions align with that of an advocate before the court. But where

---

[29] *Aragon*, 329 U.S. at 155 (footnote and citations omitted). *See also, e.g., Melamine Chems., Inc. v. United States*, 2 CIT 113, 116 (1981) (not reported in the Federal Supplement)(quoting S. Rep. No. 96–249, 96th Cong., 1st Sess. 251, 252(1979) ("[The statute] . . . exclud[es] *de novo* review from consideration as a standard in antidumping and countervailing duty determinations[,] . . . [by] provid[ing] all parties with greater rights of participation at the administrative level and increased access to information upon which the decisions of [Commerce] . . . are based.")).

[30] *Compare* Resolute's Mot., ECF No. 43, at 2, *with* Canadian Gov'ts' Br., ECF No. 48, at 2.

[31] *See* 19 U.S.C. § 1677(9)(B) (defining "interested party" as, *inter alia*, "the government of a country in which [merchandise subject to a particular antidumping/countervailing duty proceeding] is produced or manufactured or from which such merchandise is exported").

[32] *Mich.*, 940 F.2d at 164 (emphasis and citations omitted).

(as here) such opinions concern a specific agency practice as applied to particular factual records, they should be presented to the agency in the first instance, using the designated administrative participation procedures, in order to first build an appropriate foundation for judicial review.

CONCLUSION

For all of the foregoing reasons, the Canadian Governments' motion to file a brief as *amicus curiae* in this action, ECF No. 48, is denied.

Dated: March 14, 2016
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE