U.S. Court of International Trade

Slip Op. 16–38

DISTRICARGO, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 14–00208

[Final scope ruling sustained.]

Dated: April 20, 2016

Peter S. Herrick, Peter S. Herrick, P.A. of St. Petersburg, FL, *Josh Levy*, Marlow, Adler, Abrams, Newman & Lewis, P.A. of Coral Gables, FL for Plaintiff Districargo, Inc.

Douglas G. Edelschick, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC for Defendant United States. On the brief with him were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

OPINION

Gordon, Judge:

This action involves a scope inquiry conducted by the U.S. Department of Commerce ("Commerce") regarding the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. *See* Final Scope Ruling on Exhibition Booth Kits (Dep't of Commerce Aug. 14, 2014), *available at* http://enforcement.trade.gov / download / prc-ae / scope / 49-exhibition-boothkits-14aug14.pdf (last visited this date) ("*Final Scope Ruling*"); *see also Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't of Commerce May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't of Commerce May 26, 2011) ("*CVD Order*") (collectively, "*Orders*"). The U.S. Department of Commerce ("Commerce") determined that Plaintiff's exhibition booth kits did not meet the criteria for a "finished goods kit" as outlined in the *Orders*, and therefore were within the scope of the *Orders*.

Before the court is Plaintiff Districargo Inc.'s USCIT Rule 56.2 motion for judgment on the agency record. *See* Pl.'s Mem. of Law & Argument in Supp. of Pl.'s Mot. for J. on the Agency R., ECF No. 16 ("Pl.'s Br."); *see also* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 18 ("Def.'s Resp."). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(vi) of Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(B)(vi) (2012),[1] and 28 U.S.C. § 1581(c) (2012). For the reasons that follow, the court sustains the *Final Scope Ruling*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Jane C. Bergner, Steven W. Feldman, the late Edward D. Re, and Joseph R. Re, 8–8A, West's Fed. Forms, National Courts § 13342 (5th ed. 2015).

II. Legal Framework

The language of the order itself is the "cornerstone" of a scope analysis and "a predicate for the interpretive process." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2007). Commerce first considers the scope language of the order itself, the descriptions

[1] 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, and all applicable supplements.

contained in the petition, and how the scope was defined in the investigation and in the determinations issued by Commerce and the ITC. 19 C.F.R. § 351.225(k)(1) (2015); *Duferco*, 296 F.3d at 1097. If the (k)(1) factors are dispositive, Commerce issues a final scope ruling. *See Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001). If the (k)(1) factors are not dispositive, Commerce analyzes the *Diversified Products* criteria under subsection (k)(2) of its regulations: (1) the physical characteristics, (2) the expectations of ultimate purchasers, (3) the ultimate use, (4) the channels of trade in which the product is sold, and (5) the manner of advertising and display. 19 C.F.R. § 351.225(k)(2). In this action Commerce determined that the (k)(1) analysis was dispositive. Final Scope Ruling at 9. Plaintiff does not argue that the (k)(2) factors are in issue. *See* Pl.'s Br. at 6–16.

III. Scope of the *Orders*

The *Orders* cover "aluminum extrusions," which are "shapes and forms, produced by an extrusion process, made from [certain] aluminum alloys." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. "Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation . . . ." *AD Order*, 76 Fed. Reg. at 30,650–51; *CVD Order*, 76 Fed. Reg. at 30,654. Nevertheless, the scope "excludes finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit'" ("exclusion"). *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. A "finished goods kit" is a "packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The "finished goods kit" exclusion contains an exception: "[a]n imported product will not be considered a 'finished goods kit' and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product." *Id.*

IV. Discussion

Plaintiff imports exhibition booth kits comprised of extruded aluminum poles, extruded aluminum beams, and iron buckles. Plaintiff imports the components together in the same shipment and entry, but packages like parts together (*i.e.*, poles with poles, beams with beams, and buckles with buckles). Plaintiff explains that the components of its exhibition booths were packaged separately for convenience, and

that Plaintiff imported the kits as a single shipment (*i.e.*, in the same shipping container and on the same Customs Form 7501 entry summary). Pl.'s Br. at 6–8, 14–16. After importation, however, a distributor "unpacks, rearranges, and rents the various parts to the ultimate consumer," assembling the products per the specific requests of the end user. *Final Scope Ruling* at 10. There is no dispute here that the poles and beams in Plaintiff's exhibition booth kits are aluminum extrusions and thus within the scope of the *Orders* and that the iron buckles are non-aluminum extrusion parts. The only issue is whether the subject exhibition booth kits, as a whole, qualify for the "finished goods kit" exclusion.

The *Orders* define a "finished goods kit" as a "packaged combination of parts that contains, *at the time of importation*, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled '*as is*' into a finished product." *AD Order*, 76 Fed. Reg. at 30,651 (emphasis added); *CVD Order*, 76 Fed. Reg. at 30,654.

Commerce has treated kits with separately-packaged components as a "finished goods kit" as defined in the exclusion, Final Scope Ruling on Trade Booth Kits 13–15 (Dep't of Commerce June 23, 2014), *available at* http://enforcement.trade.gov/ download/ prc-ae/ scope/ 42-trade-booth-kits-24jul14.pdf (last visited this date) ("*Trade Booth Kits*"). Commerce has not done so, however, in cases where the components must be rearranged into kits *after* importation. Final Scope Ruling on 5 Diamond Promotions, Inc.'s Aluminum Flag Pole Sets 9–11 (Dep't of Commerce Apr. 19, 2013), *available at* http:// enforcement.trade.gov/ download/ prc-ae/ scope/ 30–5-Diamond-Flag-Pole-Sets20130419.pdf (last visited this date) ("Although 5 Diamond imports a sufficient number of packages of unassembled sections to create a predetermined number of three-and/or four-section assembled flag pole sets together on the same Customs Entry Summary, after importation, the packages must be opened, and the parts needed to fully assemble an entire flag pole must be re-packaged before being sold to the end user") ("*Flag Poles*"); Final Scope Ruling on Law St. Enterprises, LLC's Disappearing Door Screens 9–10 (Dep't of Commerce Sept. 12, 2013), *available at* http://enforcement.trade.gov/ download/ prc-ae/ scope/3 3-Law-St-Screen%20Kits-aluminum-extrusion-PRC20130912.pdf (last visited this date) ("Although Law St. imports together, on the same CBP 7501 form, 'each and every element or part that makes up the completed screen kit,' the packages must be opened, and the parts needed to fully assemble an entire disappearing door screen must be re-arranged and re-packaged, after

importation, before being sold to the end user.") ("*Disappearing Doors*").

Commerce below reviewed Plaintiff's submissions and concluded that the exhibition booth kits do not satisfy the "finished goods kit" criteria:

> [I]nformation from Districargo indicates that it imports the exhibition booth kits at issue as a single shipment, in the same shipping container, on the same 7501 entry summary and that at the time of importation like parts are packaged together (*i.e.*, poles with poles, and beams with beams, and buckles with buckles). Information from Districargo further indicates that Districargo acts as the importer of record and that a separate firm, Pyramid Construction Services Inc. (Pyramid), acts as the "ultimate consignee." Information from Districargo also indicates that Pyramid does not transfer or sell the products at issue, but instead that Pyramid enters the materials into "service inventory," and then "assembles" the products at issue per the specific requests of the rental client (aka the exhibitor).
>
> Based on this information, we find that Districargo imports the products at issue in separate packaging (*i.e.*, poles with poles, beams with beams, and buckles with buckles), the products are subsequently transferred to Pyramid where the kits pieces remain unassembled in "service inventory," and that Pyramid, acting as a distributor, unpacks, rearranges, and rents the various parts to the ultimate consumer. We find this fact pattern is akin to that examined in [*Disappearing Doors*] in which the Department found that the products at issue were inside the scope of the *Orders* because upon importation it was necessary for the kits to be opened, re-arranged, and repackaged, before being sold to the end user as a kit ready to be assembled into a finished good.

Final Scope Ruling at 10 (citing *Disappearing Doors* at 9; *Flag Poles* at 9) (footnotes omitted). Commerce determined that Plaintiff's exhibition booth kits are rearranged into kits after importation and, analogizing this case to its prior rulings in *Disappearing Doors* and *Flag Poles*, concluded that the exhibition booth kits are not "finished goods kits" as defined in the *Orders*. *Id.*

Plaintiff argues that Commerce unreasonably concluded that the exhibition booth kits do not meet the "finished goods kit" criteria. Plaintiff insists that there is no evidence that the distributor "rearranges" or "repackages" anything. Pl.'s Br. at 14–15. According to Plaintiff, its exhibition booth kits are "kits at the time of importation"

and therefore meet the "finished goods kit" criteria. *Id.* As a consequence, Plaintiff argues, the facts below are analogous to Commerce's prior scope ruling in *Trade Booth Kits*, where Commerce applied the exclusion to kits consisting of large, separately-packaged components. *Id.* at 15–16 (citing *Trade Booth Kits* at 13, 15).

In the court's view, Commerce reasonably concluded that Plaintiff's exhibition booth kits are not "finished goods kits" as defined in the *Orders*. *Final Scope Ruling* at 910 (citing *Disappearing Doors* at 9; *Flag Poles* at 9). Plaintiff submitted documents to Commerce showing that it sells the booth kits to a distributor, who then rents booth kits to end users. These documents indicate that the distributor opens the separate packages and stores the booth kit parts in its inventory. The distributor "assembles" booths per the specific requests of renters. *Id.* at 5, 9–10. These documents apparently do not specify whether the booth components stay together as individualized kits *from importation until assembly*. More specifically, they do not clarify whether the distributor mixes like components in its inventory, rearranging and repackaging the components before assembling each booth to fit renters' requests. *See id.* On this record, it is reasonable for Commerce to have determined that Plaintiff's "kits" are actually rearranged and repackaged into kits after importation, meaning they are not "finished goods kits" as defined in the *Orders*. *See id.* at 9–10; *see also id.* at 3 (including "final finished products that are assembled after importation" within the scope of the *Orders*).

Plaintiff would have preferred that Commerce had identified direct evidence that the booth components were "rearranged" and "repackaged" after importation. *See* Pl.'s Br. at 15–16 ("Placing the kits unassembled in service inventory does not reasonably bridge Commerce's path to a conclusion that the exhibition booth kits were 'rearranged' or 'repackaged' after importation."). The burden, however, is on Plaintiff, not Commerce, to have demonstrated this fact. For example, Plaintiff does not show that the components required to assemble a booth are arranged together in the shipping container or marked in a way that communicates each box belongs to an individual kit. *Cf.* Final Scope Ruling on J.A. Hancock Co., Inc.'s Geodesic Structures 7 (Dep't of Commerce July 17, 2012), *available at* http://enforcement.trade.gov/download/prc-ae/scope/16-Hancock-Geodesic-Structures-20120717.pdf (last visited this date) (finding that the product in question "meet the initial requirements" for inclusion into the exclusion in part because the separate packages of like parts contained markings like "box 1 of 3," "box 2 of 3," and "box 3 of 3"). Plaintiff does not show that the distributor maintains its inventory of booth components to prevent mixing of parts between kits, which in

turn might suggest the components were kits upon importation. *Cf. Trade Booth Kits* at 13–15 (finding that the importer's detailed description of the shipping, import, and delivery process qualified the product in question as a "finished goods kit," despite separate packaging of components).

Commerce articulated a second basis for including Plaintiff's merchandise within the scope of the *Orders*, which Plaintiff also challenges in its brief. *See* Pl.'s Br. at 11–14. The finished goods kit exclusion has an exception: "An imported product will not be considered a 'finished goods kit' . . . merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Commerce interpreted this language to cover Plaintiff's exhibition booth kits. *Final Scope Ruling* at 9–10. The court does not reach this issue because the merchandise must first fall within the exclusion before the exception may apply. More specifically, the "exception" to the exclusion is only implicated if the merchandise is a "packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product." *See AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. Commerce reasonably concluded as a factual matter that Plaintiff's exhibition booth kits do not satisfy this definition, meaning the exclusion is inapplicable, and by extension, the exception to the exclusion cannot apply. The court therefore does not reach this aspect of Plaintiff's challenge to the *Final Scope Ruling*.

III. Conclusion

The court sustains the *Final Scope Ruling* because Commerce reasonably concluded that Plaintiff's exhibition booth kits do not satisfy the criteria for a "finished goods kit" as defined in the *Orders*. Judgment will enter accordingly.

Dated: April 20, 2016
New York, New York

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

Slip Op. 16–39

CIRCLE GLASS COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 15–00002

[Final scope ruling sustained.]

Dated: April 20, 2016

David J. Craven and *Saichang Xu*, Riggle and Craven of Chicago, IL for Plaintiff Circle Glass Company.

Aimee Lee, Senior Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice of New York, NY for Defendant United States. On the brief with her were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson,* Director, *Reginald T. Blades, Jr.*, Assistant Director of Washington, DC. Of counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce of Washington, DC.

Alan H. Price, *Robert E. DeFrancesco, III*, and *Derick G. Holt*, Wiley Rein LLP of Washington, DC for Defendant-Intervenor Aluminum Extrusions Fair Trade Committee.

OPINION

Gordon, Judge:

This action involves the scope of the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. *See* Final Scope Ruling on Circle Glass Co.'s Screen and Storm Door Grille and Patio Door Kits (Dep't of Commerce Dec. 5, 2014), *available at* http://enforcement.trade.gov/download/prc-ae/scope/59-screen-storm-patio-door-kits-5dec14.pdf (last visited this date) ("*Final Scope Ruling*"); *see also Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Dep't of Commerce May 26, 2011) ("*AD Order*"); *Aluminum Extrusions from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Dep't of Commerce May 26, 2011) ("*CVD Order*") (collectively, "*Orders*"). The U.S. Department of Commerce ("Commerce") determined that Plaintiff's patio screen door kits were within the scope of the *Orders*.

Before the court is Plaintiff Circle Glass Company's USCIT Rule 56.2 motion for judgment on the agency record. *See* Mem. in Supp. of Mot. for J. on the Agency R. Submitted by Pl. Circle Glass Co. Pursuant to R. 56.2 of the Rs. of the U.S. Ct. of Int'l Trade, ECF No. 24 ("Pl.'s Br."); *see also* Def.'s Resp. to Pl.'s R. 56.2 Mot. for J. upon the Agency R., ECF No. 29; Pl.'s Reply to Def.'s & Def.-Intervenor's Resps. to Pl.'s R. 56.2 Mot. for J. upon the Agency R., ECF No. 34 ("Pl.'s Reply"). The court has jurisdiction pursuant to Section

516A(a)(2)(B)(vi) of Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(2)(B)(vi) (2012),[1] and 28 U.S.C. § 1581(c) (2012). For the reasons that follow, the court sustains the *Final Scope Ruling*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2015). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Jane C. Bergner, Steven W. Feldman, the late Edward D. Re, and Joseph R. Re, 8–8A, West's Fed. Forms, *National Courts* § 13342 (5th ed. 2015).

II. Legal Framework

The language of the order itself is the "cornerstone" of a scope analysis and "a predicate for the interpretive process." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2007). Commerce first considers the scope language of the order itself, the descriptions contained in the petition, and how the scope was defined in the investigation and in the determinations issued by Commerce and the ITC. 19 C.F.R. § 351.225(k)(1) (2015); *Duferco*, *id.* at 1097. If the (k)(1)

[1] 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, and all applicable supplements.

factors are dispositive, Commerce issues a final scope ruling. *See Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1071 (Fed. Cir. 2001). If the (k)(1) factors are not dispositive, Commerce analyzes the *Diversified Products* criteria under subsection (k)(2) of its regulations: (1) the physical characteristics, (2) the expectations of ultimate purchasers, (3) the ultimate use, (4) the channels of trade in which the product is sold, and (5) the manner of advertising and display. 19 C.F.R. § 351.225(k)(2). In this action Commerce determined that the (k)(1) factors were dispositive. *Final Scope Ruling* at 12. Plaintiff does not argue that the (k)(2) factors should be considered. *See* Pl.'s Br. at 3–25.

III. Scope of the Orders

The *Orders* cover "aluminum extrusions," which are "shapes and forms, produced by an extrusion process, made from [certain] aluminum alloys." *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. "Subject aluminum extrusions may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, window frames, *door frames*, solar panels, curtain walls, or furniture." *AD Order*, 76 Fed. Reg. at 30,650–51 (emphasis added); *CVD Order*, 76 Fed. Reg. at 30,654. "Such parts that otherwise meet the definition of aluminum extrusions are included in the scope." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

The scope also excludes "finished goods containing aluminum extrusions that are entered unassembled in a 'finished goods kit.'" *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. A "finished goods kit" is a "packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled 'as is' into a finished product." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654. The only issue here is whether the subject patio screen door kits qualify for the "finished goods kit" exception.

IV. Discussion

Plaintiff imports "patio screen door kits" without screens. Response to Supplemental Questionnaire, 4–5 & Exs. S-1, S-4(b) (Dep't of Commerce Aug. 11, 2014), PD 18. The kits include: (1) four pieces of extruded aluminum, (2) a plastic handle, (3) a steel latch, (4) a strike (a component necessary for the assembled product to function as a door), (5) four steel "roller/corner" combination units, and (6) fasteners. *Id.* at 3–4. Even though the subject screen door kits do not include screens, Plaintiff argued to Commerce that its merchandise never-

theless qualified for the "finished goods kit" exclusion because Plaintiff's screen door kits without screens, when imported, contained all necessary parts to fully assemble a final finished good, and is assembled 'as is' into a finished product. *Id.* To be clear, Plaintiff was arguing that its screen door *without* a screen, basically an empty aluminum door frame, was nevertheless, a finished final good or finished product within the meaning of the "finished goods kit" exclusion. Commerce did not agree, concluding that a "screen door" without a "screen" was not a final finished good within the exclusion:

> The plain language of the scope excludes "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl[. . . .]" Accordingly, if a door is imported into the United States without glass or vinyl in the designated place in the door, according to the language of the scope, that door would not be considered "finished merchandise." Likewise, the same is true with a screen door that is imported into the United States without the screen in the designated place for the screen. Because no screen is included with the patio door kit at the time of importation, similar to the kits lacking the glass panel in [the less than fair value investigation], Circle Glass's patio door kit does not meet the exclusion that requires "all of the necessary parts to fully assemble a final finished good."
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> Circle Glass cites to [*Solar Panel Mounts]*, asserting that the fact that its patio door kit does not include a non-essential part, the screen, is insufficient to render the patio screen door kit unfinished. In [*Solar Panel Mounts]*, the Department found the solar panel mounting system kits to contain all the parts necessary to construct a complete finished good (*i.e.*, a solar panel mounting system) and that the mounting systems were finished goods in their own right. The Department stated that the mounting systems were designed to work with removable/replaceable components (*i.e.*, solar panels) and need not include these non-essential components to constitute a finished mounting system. Conversely, in the case of Circle Glass' patio door kit, we determine that Circle Glass' patio door without a screen is not a finished patio screen door absent the screen, as we consider a patio door to be akin to windows or doors, which are only excluded from the scope as "finished windows with glass" and "doors with glass or vinyl".
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> . . . .

> . . . [A]s Petitioner notes, this case is similar to [*Event Décor*]. In [*Event Décor*], the Department found Gorilla Pipes to be in scope, despite containing non-extruded materials, because the product otherwise satisfied the parameters of the scope. The Department determined that individual Gorilla Pipes were included in the scope of the *Orders* because they did not contain all parts necessary to fully assemble a complete, finished product (*i.e.*, a display structure). Thus, our determination that Circle Glass' patio door kit, without the screen, is in-scope is consistent with our determination in [*Event Décor*], because, similarly, here we find Circle Glass' patio door kits to be incomplete as they do not contain all parts necessary to assemble a complete, finished product (*i.e.*, a complete patio screen door).

Final Scope Ruling at 13–14 (citing Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the People's Republic of China, A-570–967, at 21–22 (Dep't of Commerce Apr. 4, 2011), *available at* http://enforcement.trade.gov/ frn/summary/ prc/2011–7927–1.pdf (last visited this date) ("*LTFV I&D Memo*"); Final Scope Ruling: Shower Door Kits, 6 (Dep't of Commerce Nov. 7, 2011), *available at* http://enforcement.trade.gov/ download/ prc-ae/ scope/ 06-Shower-door-kits-20111107.pdf (last visited this date)); Final Scope Ruling on Clenergy (Xiamen) Technology's Solar Panel Mounting Systems, 8–9 (Dep't of Commerce Oct. 31, 2012), *available at* http:// enforcement.trade.gov / download / prc-ae / scope / 21Clenergy-Solar-Panel-Mounting-Systems-20121031.pdf (last visited this date) ("*Solar Panel Mounts*"); Final Scope Ruling on Traffic Brick Network, LLC's Event Décor Parts and Kits, 10 (Dep't of Commerce Dec. 2, 2013), *available at* http://enforcement.trade.gov/ download/ prc-ae/ scope/ 35-event-decor-parts-kits-5dec13.pdf (last visited this date) ("*Event Décor*")) (footnotes omitted).

Now before the court Plaintiff again argues that its merchandise is a patio screen door kit *without* the "screen" and that such a product is a "final finished good" excluded from the scope of the *Orders*. Pl.'s Reply at 3–4. Plaintiff takes great care never to describe its product as a door frame, always maintaining that its product is a patio screen door just without the screen. Like Commerce, the court does not agree. Commerce reasonably explained that Plaintiff's "patio door kit," using only the parts available upon importation, essentially assembles into an empty frame made of extruded aluminum. *See Final Scope Ruling* at 13 (citing *LTFV I&D Memo* at 21–22). Commerce's conclusion that Plaintiff's patio screen door kits are not "fin-

ished goods kits" because they lack all the necessary components to assemble a complete patio screen door therefore strikes the court as not only reasonable, but correct.

V. Conclusion

Plaintiff's "patio screen door kit" as imported assembles into an empty door *frame*, not a "complete" screen door. This simple fact cannot be overcome. Plaintiff imports an aluminum door frame kit, and those kits do not fit within the "finished goods kits" exclusion in the *Orders*. The court sustains the *Final Scope Ruling*. Judgment will enter accordingly.

Dated: April 20, 2016
New York, New York

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

Slip Op. 16–40

SUNTEC INDUSTRIES CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, AND MID CONTINENT NAIL CORP., Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00157

[Granting the defendant's motion for summary judgment.]

Dated: April 21, 2016

Mark B. Lehnardt, Attorney, Antidumping Defense Group, LLC, of Washington, DC, and *Brian R. Soiset*, Attorney, of Shanghai, PRC, for the plaintiff.

Stephen C. Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. 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 *Michael T. Gagain*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Adam H. Gordon, Attorney, The Bristol Group PLLC, of Washington, DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge:

This matter is before the court on the plaintiff's motion for summary judgment and the defendant's cross-motion for judgment on the agency record or, in the alternative, summary judgment, regarding *Certain Steel Nails from the People's Republic of China; Final Results of Third Antidumping Administrative Review*; *2010–2011*, 78 Fed.

Reg. 16651 (Mar. 18, 2013) ("*AR3 Final*"). In bringing this action, the plaintiff Suntec Industries Co., Ltd. ("the plaintiff" or "Suntec") seeks to rescind the results of the *AR3 Final* as applied to Suntec, or to permit Commerce to reopen the record and permit Suntec to submit a separate rate certification for the third antidumping administrative review ("AR3"). Pl's Mot. for Summ. J. and Brief on Substantial Prejudice ("Pl's Br."), ECF No. 77, 24–25. Familiarity with the prior opinion, *Suntec Industries Co., Ltd. v. United States*, 37 CIT ___, 951 F. Supp. 2d 1341 (2013) ("*Suntec I*") is presumed.

In *Suntec I*, the court denied the motion of the defendant United States ("the defendant" or "the government") to dismiss for lack of jurisdiction or failure to state a claim upon which relief can be granted and determined to exercise jurisdiction over the case under 28 U.S.C. §1581(I). *Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1347–48. Further, the court determined that Suntec should "have its day in court for further explanation of [its] claim" that Suntec suffered substantial prejudice resulting from its alleged lack of notice. *Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1355.

Here, Suntec claims that it was substantially prejudiced because it never received actual notice of the *Request for Review* prior to the AR3 nor actual notice of the initiation of the AR3, and that the court should therefore enter summary judgment in its favor. The defendant argues that the court should enter summary judgment for the defendant because Suntec fails to offer evidence that it was substantially prejudiced given its constructive notice of the initiation of the AR3. For the reasons that follow, the court grants the defendant's motion for summary judgment.

Background

Briefly, on August 1, 2011, the defendant United States' International Trade Administration, Department of Commerce ("Commerce") published a notice in the Federal Register of the opportunity to request review of companies subject to antidumping duty orders including the order on certain steel nails from the People's Republic of China ("PRC"). *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 76 Fed. Reg. 45773 (Aug. 1, 2011) ("*Request for Review*"). On August 31, 2011, petitioners Mid Continent Nail Corporation ("Mid Continent") requested review of PRC companies including Suntec. On October 3, 2011, Commerce published a notice of initiation in the Federal Register of the AR3, which included Suntec among the companies listed for review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in*

Part, 76 Fed. Reg. 61076 (Oct. 3, 2011) ("*Notice of Initiation*"). Suntec claims, and the defendant does not contest, that Suntec only received actual notice of its inclusion in the reviewed companies in the AR3 in March 2013 following the release of the *AR3 Final*.

Standard of Review

As discussed in *Suntec I*, this court exercises jurisdiction under 28 U.S.C. §1581(I) over Suntec's challenge to Commerce's decision to initiate review of Suntec in the AR3. *Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1347–48. In exercising such jurisdiction, the court reviews the matter under the scope of review provided in section 706 of the Administrative Procedure Act ("APA"). *See* 28 U.S.C. §2640(e). Accordingly, "[t]o the extent necessary to decision and when presented," the court "shall decide all relevant questions of law" and "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . without observance of procedure required by law." *See generally* 5 U.S.C. §706; *see also Fedmet Res. Corp. v. United States*, 39 CIT ___, ___, 77 F. Supp. 3d 1336, 1339 (2015). The court will not set aside agency action for procedural errors unless the error is prejudicial to the party seeking to have the action set aside. *Sea-Land Serv., Inc., v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991) (internal citations and quotes omitted).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* USCIT R. 56(a). "Where, as here, parties cross-move for summary judgment, each party carries the burden on its own motion to show entitlement to judgment as a matter of law after demonstrating the absence of any genuine disputes over material facts." *Am. Fiber & Finishing, Inc. v. United States*, 39 CIT ___, ___, 121 F. Supp. 3d 1273, 1279 (2015), quoting *Massey v. Del Labs., Inc.*, 118 F.3d 1568, 1573 (Fed. Cir. 1997) (internal quotes omitted). "Once it is clear there are no material facts in dispute" and the case at hand "hinges on pure questions of law, resolution by summary judgment is appropriate." *Canadian Wheat Bd. v. United States*, 32 CIT 1116, 1121, 580 F. Supp. 2d 1350, 1356 (2008), *opinion clarified on denial of reconsideration*, 33 CIT 1204 (2009), *aff'd*, 641 F.3d 1344 (Fed. Cir. 2011). A motion for summary judgment is appropriate in this case because Suntec is not

challenging the final results of an administrative review. *See Michaels Stores, Inc. v. United States*, 37 CIT ___, ___, 931 F. Supp. 2d 1308, 1313 (2013) (finding summary judgment appropriate where plaintiff was challenging liquidation and cash deposit instructions, not the administrative review itself). As there is no genuine dispute of material facts before the court[1] , resolution by summary judgment is appropriate.

Discussion

I

Motions for summary judgment must be supported by "particular parts of materials in the record, including . . . affidavits or declarations" and affidavits or declarations "used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." USCIT R. 56(c)(1), (4); *see also Humane Soc. of United States v. Brown*, 20 CIT 277, 307, 920 F. Supp. 178, 201 (1996) (to be successful on a motion for summary judgment, "the plaintiff . . . must set forth by affidavit or other evidence specific facts which for purposes of the summary judgment motion will be taken to be true").

While the defendant makes several unsuccessful evidentiary arguments as to why the affidavits proffered by Suntec should not be admissible at trial[2], it does not squarely dispute the facts contained

[1] The plaintiff and the defendant have cross-moved for summary judgment, and a statement of stipulated facts has been submitted by each party. Pl's Br. at 3 (Suntec contends there is no genuine dispute of material facts), Attachment A (contains statement of facts); Def's Opp'n to Suntec's Mot. for Summ. J. and Cross-Mot. for J. on Administrative Record, ECF No. 85 ("Def's Opp'n"), 3–6 (statement of uncontroverted facts); *see also* Joint Status Report (Jan. 20, 2015), ECF No. 63 ("the parties have agreed to stipulate facts").

[2] The government relies upon evidentiary arguments to keep Suntec's affidavits from being considered by the court. It alleges that none of the five declarations that Suntec submits meets the standards set forth by 28 U.S.C. §1746, that Suntec fails to lay any evidentiary foundation for the emails submitted in support of its motion, and that the emails themselves are hearsay. Def's Opp'n at 13–15. However, this line of argument is unavailing because under the standard for summary judgment as provided in USCIT R. 56(c)(4), an affidavit or declaration used to support a motion must be made on personal knowledge, set out facts that would be admissible at trial, and show that the affiant or declarant is competent to testify on the matters stated. Suntec, through its full set of affidavits submitted in its opening brief and its later response and reply briefs, has submitted evidence that would be admissible at trial -- though not necessarily in the form in which it is submitted here, *see Celotex*, 477 U.S. at 324 ("[w]e do not mean that the nonmoving party must produce evidence in a *form* that would be admissible at trial in order to avoid summary judgment") -- and are made on personal knowledge. Further, there is no reason apparent to the court why the affiants would not be competent to testify at trial if so required. The defendant's arguments as to the admissibility of Suntec's submitted supporting documents are therefore unpersuasive.

therein. When considering a motion for summary judgment, "[i]f a party fails to properly address another party's assertion of fact, that assertion of fact may be deemed undisputed for purposes of the motion." *Am. Power Pull Corp. v. United States*, 37 CIT ___, ___, 121 F. Supp. 3d 1296, 1298–99 (2015) (internal quotes omitted), quoting USCIT R. 56(e)(2). Suntec has submitted affidavits that are based on personal knowledge, set out admissible facts, demonstrate competency by the affiants, are made under penalty of perjury, and are said to be "true". *See* USCIT R. 56(c)(1), (4) and 28 U.S.C. §1746; *see also, e.g., Kersting v. United States*, 865 F. Supp. 669, 676 (D. Haw. 1994) (finding unsworn documents satisfy statutory requirements if made under penalty of perjury and state that documents are true). The court will therefore consider the affidavits proffered by Suntec part of the record before the court for purposes of review of the parties' cross-motions for summary judgment.

II

It is a "general principle that agencies may relax or modify their procedural rules . . . when in a given case the ends of justice require it" and that a subsequent agency action is only rescindable "upon a showing of substantial prejudice to the complaining party." *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 538–39 (1970); *PAM SpA v. United States*, 463 F.3d 1345, 1348 (Fed. Cir. 2006) ("*PAM*"). "A party is not 'prejudiced' by a technical defect simply because that party will lose its case if the defect is disregarded. Prejudice . . . means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996) (citations omitted); *see also Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 85, 95, 414 F. Supp. 2d 1300, 1310 (2006). The party must plead the prejudice suffered from the procedural error. *United States v. Great Am. Ins. Co. of NY*, 35 CIT ___, ___, 791 F. Supp. 2d 1337, 1354–59 (2011), *aff'd sub nom United States v. Great American Ins. Co. of New York*, 738 F.3d 1320 (Fed. Cir. 2013). "Generalized claims of injury" without "a fact-specific demonstration of injury to an interest that the notice provisions were designed to protect" cannot establish evidence of substantial prejudice arising from a lack of notice. *Great American*, 35 CIT at ___, 791 F. Supp. 2d at 1354–59 (internal citations omitted).

In order to succeed on its motion here, Suntec must demonstrate how it was substantially prejudiced by Commerce's non-compliance with the notice requirements under 19 C.F.R. §351.303(f)(3)(ii). *Id.*; *Kemira Fibres Oy v. United States,* 61 F.3d 866, 875 (Fed. Cir. 1995)

("*Kemira*") (reasoning that because the notice requirement of 19 C.F.R. §353.25(d)(4) was "merely procedural, Kemira must establish that it was prejudiced by Commerce's non-compliance with this requirement"); *PAM*, 463 F.3d at 1349 (same as regards 19 C.F.R.§353.303(f)(3)(ii)); *Intercargo*, 83 F.3d at 396 (same as regards 19 C.F.R. §159.12). In so claiming, Suntec must support its motion with fact-specific arguments that will survive the summary judgment standard. Further, Suntec must demonstrate that any injury suffered is injury to an interest the regulation is intended to protect. *Intercargo,* 83 F.3d at 396.

Suntec repeatedly argues that it did not have actual notice[3] of the third administrative review until March 9, 2013 after an importer notified it by email of the release of the *AR3 Final* naming Suntec as subject to the PRC-wide rate (prior to publication in the Federal Register). Pl's Br. at 9; Pl's Resp. at 9; Pl's Reply at 4, 15. This line of argumentation is not relevant to the resolution of the substantial prejudice issue. Here, as in *Suntec I*, Suntec conflates the two notices relevant to the question of substantial prejudice: the *Request for Review* notice by Mid Continent to Suntec, and the *Notice of Initiation* published by Commerce in the Federal Register. The court addressed both notices in *Suntec I*, finding that while Commerce unlawfully initiated the review despite not having received adequate certificate of service from petitioners, Suntec had constructive notice[4] of the

[3] "Actual notice" is a legal term of art which refers to "notice given directly to, or received personally by, a party" and, for a request for review as in the case before us, it must be achieved through personal service by the petitioner. *See Dusenbery v. United States*, 534 U.S. 161, 170 n.5 (2002), citing Black's Law Dictionary 1087 (7th ed.1999). "Constructive notice is information or knowledge of a fact imputed by law to a person . . . because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it. Every person who has actual notice of circumstances sufficient to put a prudent [person] upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry [they] might have learned such fact." *Transcom Inc. v. United States*, 121 F. Supp. 2d 690, 701, n.10, citing Black's Law Dictionary 1061 (6th ed. 1990). Further, *Suntec I* explains that "19 U.S.C. §1675(a) unambiguously provided for the mechanism of constructive notice through publication in the Federal Register to notify an interested party that a review is being initiated." *Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1350. Suntec had constructive notice of the AR3 as of the date of publication of the Notice of Initiation (i.e. from October 3, 2011 on).

[4] The plaintiff argues Suntec had no actual knowledge or actual notice of the initiation of the AR3 because the Notice of Initiation published in the Federal Register imputed knowledge only to those geographically located within the United States. Pl's Brief at 19, citing 44 U.S.C. §§1507, 1508. However, as this and other courts have held, "prior involvement in antidumping duty proceedings concerning the same subject merchandise gives rise, *a fortiori*, to an interest in monitoring for publication of the annual notice of opportunity to request review" or, as in this case, a notice of initiation. *Huaiyang Hongda Dehydrated Vegetable Co. v. United States,* 28 CIT 1944, 1949, Slip Op. 04–148 (Nov. 22, 2004)

review as of the date of publication of the *Notice of Initiation* (*i.e.,* Oct. 3, 2011). *Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1350–52.

As the defendant correctly observes, Def's Opp'n at 7–8, because Suntec had constructive notice of the review initiated against it as of October 3, 2011, Suntec can only have suffered substantial prejudice in this matter during the period of time between the date of the *Request for Review* (August 31, 2011) and the date of publication of the *Notice of Initiation* (October 3, 2011) (*i.e.*, a period of 34 days prior to the initiation of the AR3). *See PAM*, 463 F.3d at 1349 (the 17-day delay between the date of failure by petitioners to properly notify plaintiff and plaintiff's receipt of actual and constructive notice by publication in the Federal Register was the relevant period of time in assessing a similar question of substantial prejudice). Suntec must therefore demonstrate how it was substantially prejudiced during the 34-day delay in notification.

III

Suntec presents little fact-specific evidence to support its argument that it was substantially prejudiced during the 34-day delay, and in doing so fails to demonstrate that it is entitled to judgment as a matter of law. First, Suntec argues repeatedly that it was "impeded . . . from preparing and presenting its case, or otherwise responding to Commerce or defending its interests". Pl's Br. at 2, 11, 13, 16. However, as the Court of Appeals for the Federal Circuit ("Federal Circuit") determined in *PAM*, an alleged loss of preparation time prior to the initiation of an administrative review does not constitute substantial prejudice when the reviewed entity had constructive notice of the initiation. *PAM*, 463 F.3d at 1349–50 (a 17-day delay in notice between a request for review and an initiation did not prejudice the reviewed entity); *see also NSK Ltd. v. United States*, 28 CIT 1535, 1549, 346 F. Supp. 2d 1312, 1326 (loss of "preparation time . . . does not constitute such substantial prejudice that a remand is required on this issue").

("*Hongda*"), referencing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947). Also, "all industries or businesses availed of the 'substantial privilege' of doing business within the United States are chargeable with knowledge of its laws and the manner of their execution to maintain public order." *Hongda,* 28 CIT at 1949; *see also Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 27 CIT 1541, 1549 n.10, 285 F. Supp. 2d 1371, 1378 n.10 (2003) ("[i]t is well established by both statutes and cases that the publication of an item in the Federal Register constitutes constructive notice of anything within that item") (citations omitted). Suntec participated in the original antidumping investigation and in each of the prior reviews, and therefore was cognizant of its interest in monitoring the Federal Register for publications relevant to its business. Suntec is not excused from its constructive notice because of its geographical location.

Suntec also argues that it "lost its separate status and its cash-deposit rate increased from 21.24% to 118.04%". Pl's Mot. at 2. However, the loss of separate status and inclusion in the China-wide rate apparently resulted from Suntec's failure to submit a separate rate certification to Commerce following the *Notice of Initiation*, not from the deficient notice of the *Request for Review* or from any act or failure to take action during the 34-day delay. *See Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1354–55 ("Suntec's alleged prejudice [pertaining to lost customers] is not prejudice of the pertinent kind, because it does not stem from deficient notice of the review request, but instead from Suntec's choice not to respond to the [*Notice of Initiation*] despite receiving sufficient constructive notice"); *Intercargo*, 83 F.3d at 396; *see also NSK*, 28 CIT at 1545–49, 346 F. Supp. 2d at 1323–26 (plaintiff claimed delay may have been reason for increase in dumping margin; court reasoned that because plaintiff had notice through initiation, no substantial prejudice was suffered). The *Notice of Initiation* provided, in part,

> All firms listed below that wish to qualify for separate-rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate-rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate-rate eligibility, the Department requires entities for whom a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate . . . Separate Rate Certifications are due to the Department no later than 60 calendar days after publication of this Federal Register notice . . . Separate Rate Status Applications are due to the Department no later than 60 calendar days of publication of this Federal Register notice.

Notice of Initiation, 76 Fed. Reg. at 61077 (Oct. 3, 2011). Suntec was aware of this 60-day deadline because it had constructive notice of the initiation and therefore cannot claim having suffered substantial prejudice as a result of lack of notice prior to the initiation.

Suntec's reliance on the court's holding in *Hide-Away* is unavailing. *Hide-Away Creations Ltd. v. United States*, 6 CIT 310, 577 F. Supp. 1021 (1983). In *Hide-Away*, Commerce made a final determination in a countervailing duty investigation and stated that in accordance with 19 U.S.C. §1675, Commerce intended to conduct an administrative review within twelve months of the order publication date, which Commerce later initiated without further notice. The court held that

a mere statement of intent to conduct a review within twelve months of the countervailing duty order without notice of specific date of initiation was inadequate to give notice to the plaintiffs, and such error resulted in substantial prejudice to the plaintiffs. *Hide-Away*, 6 CIT at 317–18, 577 F. Supp. at 1026–27. Here, by contrast, Commerce improperly initiated the review against Suntec, *Suntec I*, 37 CIT at ___, 951 F. Supp. 2d at 1350, but it properly notified all parties in the timely published *Notice of Initiation* which specified the date of commencement of the review and gave constructive notice to the interested parties. The facts of this case are distinguished from *Hide-Away*, and the plaintiff cannot reasonably rely on that case's outcome to govern here.

In furtherance of its substantial prejudice argument, Suntec asserts that "[i]f Suntec had been sent notice of the review, as required by law, its history of meticulous preparation (even being verified) leaves no doubt as to what it would have done. Suntec would have participated in the review, just as it had in the investigation, prior two reviews, and subsequent three reviews". Pl's Br. at 14. Suntec argues that the procedural error resulted in "the inability to present evidence directly related to Suntec's separate rate status." Pl's Br. at 16. However, as observed above, any harm apparently accruing to Suntec because of its failure to participate in the review or to present evidence related to separate rate status does not result from the lack of notice during the aforementioned 34-day delay. At best, despite acknowledging Commerce's unlawful initiation of the AR3 and Suntec's lack of actual notice, *Suntec I*, 37 CIT at ___, 951 F. Supp. 3d at 1350, the court can only be sympathetic to Suntec's plight, given the state of the law.

Suntec has not sufficiently pled how it was substantially prejudiced during the relevant 34-day period in light of the Federal Circuit's proclamation in *PAM* that "if the failure of a party to provide notice as required by such a regulation does not prejudice the non-notified party, then we think neither the government, the non-serving party, nor the public should be penalized for such a failure." *PAM*, 463 F.3d at 1348. Because substantial prejudice has not been shown, the court need not reach any issue of harmless error. *Sea-Land*, 14 CIT at 257, 735 F. Supp. at 1063 (it is "well settled that courts will not set aside agency action for procedural errors unless the errors were prejudicial to the party seeking to have the action declared invalid").

Suntec has not demonstrated that it suffered substantial prejudice as a result of the 34-day delay in notification of the AR3 and therefore cannot "show" the court that it is entitled to judgment as a matter of

law. *Celotex*, 477 U.S. at 322–23 ("the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . [i]n such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial") (internal quotes omitted).

Conclusion

For the foregoing reasons, the court denies Suntec's motion for summary judgment and grants the government's motion for summary judgment. Judgment shall enter accordingly.

Dated: April 21, 2016
New York, New York

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