U.S. Court of International Trade

Slip Op. 15–68

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Senior Judge
Court No. 07–00318

[Granting in part Plaintiff's application for fees and expenses under the Equal Access to Justice Act.]

Dated: June 24, 2015

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Edward F. Kenny and *Jason M. Kenner*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With them on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director, International Trade Field Office.

MEMORANDUM AND ORDER

Carman, Senior Judge:

Plaintiff International Custom Products, Inc. ("ICP"), an importer of a product known as white sauce, seeks an award pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), of attorney's fees, expenses, and costs in this case. For the reasons explained below, the Court grants ICP's motion in part.

BACKGROUND

At issue in this case were (1) the validity of a ruling letter issued by Customs and Border Protection ("CBP") to ICP, which established a classification of ICP's white sauce for tariff purposes (the "Ruling Letter"), and (2) the propriety and impact of CBP's issuance on April 18, 2005 of a Notice of Action that classified all unliquidated and future entries of white sauce under a tariff heading different from that provided in the Ruling Letter (and at a rate increase of approximately 2400%). The procedural history of this case is long and involves a number of intertwined actions between ICP and the govern-

ment; the relevant background is laid out in some detail in *Int'l Custom Prods., Inc. v. United States*, 36 CIT ___, 878 F. Supp. 2d 1329 (2012) ("*ICP III*"), familiarity with which is presumed.

In short, ICP applied to CBP for the Ruling Letter, classifying its white sauce under a Harmonized Tariff Schedule ("HTSUS") heading for "[s]auces and preparations therefor." *See ICP III*, 878 F. Supp. 2d at 1331. CBP issued the requested ruling in 1999. *See id.* On April 18, 2005, CBP abruptly changed course, issuing a Notice of Action that reclassified 87 already-imported shipments of ICP's white sauce under an HTSUS provision for "[b]utter and . . . dairy spreads," at a tariff rate approximately 2400% higher than the rate provided in the Ruling Letter. *See id.* The Ruling Letter indicated that "action has been taken" to rate-advance the relevant entries, and mandated that "all shipments of this product must be classified" under the butter and dairy spread tariff provision in the future. *Id.*

ICP has been involved in litigation seeking to remedy the Notice of Action ever since. In its initial case, brought in 2005, the Court found jurisdiction pursuant to 28 U.S.C. § 1581(i) and granted judgment for ICP, but the judgment was reversed on jurisdictional grounds and the case dismissed pursuant to a ruling from the Court of Appeals for the Federal Circuit. *See Int'l Custom Prods. v. United States*, 29 CIT 617, 374 F. Supp. 2d 1311 (2005) ("*ICP I*"), *rev'd in part, vacated in part*, 467 F.3d 1324 (Fed. Cir. 2006). ICP then filed a number of follow-up cases. The present case stems from a group of 11 entries made by ICP shortly after the issuance of the Notice of Action in 2005. In 2007, CBP liquidated those 11 entries pursuant to the rate given in the 2005 Notice of Action, and ICP subsequently protested the liquidation by paying penalties as to a single entry and initiating this suit. *See Int'l Custom Prods. v. United States*, 32 CIT 302, 304–05, 549 F. Supp. 2d 1384, 1388–89 (2008) ("*ICP II*"). This case was tried to the bench in 2012 and resulted in a judgment for Plaintiff on the grounds that the Ruling Letter was improperly revoked by the Notice of Action and that the white sauce at issue was therefore liquidated at the wrong tariff rate. *See ICP III*, 878 F. Supp. 2d at 1331. The Court also found that ICP obtained the Ruling Letter without materially misrepresenting the nature of white sauce, and that the white sauce import underlying this case conformed to the description of the product given in the Ruling Letter. *See id.* at 1350. The judgment was upheld on appeal, *International Custom Products v. United States*, 748 F.3d 1182 (Fed. Cir. 2014) ("*ICP IV*"), after which followed this fee application.

STANDARD OF REVIEW

EAJA entitles a party who prevails in a civil action against the United States for, among other things, judicial review of agency action to recoup its fees and other expenses—"unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

Thus, in order to award fees and expenses, the Court must find that (1) the party seeking the award was the prevailing party, (2) the position of the United States was not substantially justified, (3) special circumstances do not make an award unjust, and (4) the application for fees is timely and supported by an itemized accounting. *See Lizarraga Customs Broker v. Bureau of Customs and Border Protection*, 35 CIT ___, ___, 2011 WL 4910421 at *5 (2011). The government concedes that "ICP prevailed in this action," which is correct. Def.'s Mem. in Opp'n to Pl.'s Application for Att'ys [sic] Fees and Expenses Under the Equal Access to Justice Act ("*Def.'s Mem.*"), ECF No. 274, at 6. ICP has filed an itemized accounting in support of its timely fees application. *See* ECF No. 268 and attachments. What remains for the court is to determine whether the position of the United States was substantially justified and whether special circumstances make an EAJA award unjust.

In determining whether the position of the United States was substantially justified, the phrase "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D). This includes arguments made by government attorneys during the suit as well as the underlying actions of the relevant agency—here, the issuance of the Notice of Action by CBP. *See Shah Bros., Inc. v. United States*, 38 CIT ___, ___, 9 F. Supp. 3d 1402, 1406 (2014) (citing *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012)).

The United States bears the burden of demonstrating that its position was substantially justified by showing it was "*clearly* reasonable." *See id.* (citing *Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003) and quoting *Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original)); *see also Diamond Sawblade Mfrs. Coalition v. United States*, 36 CIT ___, ___, 816 F. Supp. 2d 1342, 1356 (2012).[1] The statute states that "[w]hether or not the position of the United States was substantially justified shall be

[1] The government acknowledges the allocation of the burden given in *Libas*, 314 F.3d at 1365, but argues on the basis of cases from the Courts of Appeals for the Seventh and Eight Circuits that "a government case strong enough to survive either a motion to dismiss or a

determined on the basis of the record . . . which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. § 2412(d)(1)(B). The government's position will be substantially justified where it was founded on a "reasonable basis both in law and fact" and was "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 563–65 (1988). Even where the position of the United States is "not correct," it can be justified; and it can be "substantially" justified as long as "a reasonable person could think it correct." *Id.* at 566 n.2. However, the standard for substantial justification is "slightly more stringent" than a simple reasonableness standard. *Fakhri v. United States*, 31 CIT 1287, 1292, 507 F. Supp. 2d 1305, 1312 (2007) (citing *Spencer v. NLRB*, 712 F.2d 539, 558 (D.C. Cir. 1983)).

The Supreme Court states that the court must evaluate the substantial justification of the government's pre-litigation and litigation conduct together, making only "one threshold determination for the entire civil action." *Comm'r, Immigration & Naturalization Serv. v. Jean*, 496 U.S. 154, 159 (1990); *see also Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991) (instructing trial courts to evaluate substantial justification on an overall basis that takes in "the entirety of the government's conduct"). In making this evaluation, the court should consider the "clarity of the governing law," or whether "the legal issue was novel or difficult." *Norris v. SEC*, 695 F.3d 1261, 1265 (Fed. Cir. 2012) (*per curiam*).

Special circumstances making a fee award unjust, even where the government is not substantially justified, "have been recognized where the government unsuccessfully advanced novel and credible legal theories in good faith." *Am. Air Parcel Forwarding Co. v. United States*, 12 CIT 850, 853, 697 F. Supp. 505, 507 (1988); *see also Shah Bros.,* 9 F. Supp. 3d at 1406. A prior ruling against the government on the theory being advanced can detract from such a claim being found

motion for summary judgment is presumptively substantially justified." *Def.'s Mem.* at 7. The Court declines to adopt the allocation of the burden preferred by the government. And although the government notes there can be no "presumption that the Government's position was not substantially justified simply because it lost the case," citing *Scarborough v. Principi*, 541 U.S. 401, 415 (2004), that principle does not prevent the government from bearing the burden of *production of* a substantial justification (as opposed to the burden of *overcoming a presumption against* substantial justification). The Court also notes the important rationale the Court of Appeals for the Federal Circuit gave in *Gavette* for allocating the burden to the government: "the reluctance of the courts to award fees prompted the adoption of the language in Rule 37 [of the Federal Rules of Civil Procedure] on which this standard is based. Under these circumstances, it is *particularly appropriate* to place the burden on the government to prove the reasonableness of its actions. To do so encourages parties to contest action they believe to be unreasonable and thereby serves to refine public policy." *Gavette*, 808 F.2d at 1456–66 (internal quotations and citations omitted)(emphasis added).

novel. *See Fakhri*, 507 F. Supp. 2d at 1314. The special circumstances exception to fee awards also "gives the court discretion to deny awards where equitable considerations dictate an award should not be made." *Devine v. Sutermeister*, 733 F.2d 892, 895–96 (Fed. Cir. 1984) (internal quotations and citations omitted).

DISCUSSION

I. *Plaintiff is Entitled to EAJA Fees*

The Court finds that the position of the United States was not substantially justified and that no special circumstance makes a grant of fees and expenses improper. As a consequence, the Court finds that Plaintiff is entitled to recover fees and expenses pursuant to EAJA.

A. The Position of the United States

The position of the United States includes actions taken by the relevant agency and also litigation positions adopted by lawyers during the course of the lawsuit. Here, the agency actions at issue are the actions taken by CBP prior to the filing of this lawsuit. The actions of the Department of Justice, which defended this lawsuit in court, are also relevant to understanding the government's position.

1. *Whether the Ruling Letter Applied or Needed to Be Revoked*

CBP's issuance of the Notice of Action is the key action revealing CBP's position. Issuing the Notice of Action had the effect of reclassifying ICP's white sauce at a vastly increased duty rate in contravention of CBP's binding Ruling Letter, and CBP was fully conscious that doing so could run afoul of the limitations in 19 U.S.C. § 1625(c), which require notice and comment before revoking a ruling letter. *See* Compl., Ex. C, ECF No. 4–4 (containing copies of communications between various CBP officials involved in the decision-making process). So CBP engaged in significant deliberation as to the course of action it should pursue before eventually issuing the Notice of Action. *See id.* For example, one memorandum recording an August 2004 discussion indicates that the official who authored the Ruling Letter in 1999 "supports my position that, because of the binding Ruling Letter, we cannot just RA [rate advance] the recent entries . . . . before we RA, we need to have the Binding Ruling revoked by HQ [headquarters]." *Id.* at 66.

A high-level official at CBP sent an email on December 10, 2004 (the "December 2004 email") noting that he preferred to address changed facts regarding a product imported under a ruling letter by issuing a

new ruling, rather than by revoking the old ruling, because "[w]e do not have the time to go through the [19 U.S.C. § 1625(c)] procedures." *Id.* at 290. However, he then suggested that, given information CBP had obtained which it believed to indicate that the principal use of white sauce was not the making of sauces, ICP's request for the Ruling Letter "may even have been and probably was . . . fraudulent," and thus that he did *not* want to pursue his ordinary course of issuing a new ruling in the case of white sauce, "for fear of unduly complicating the agents [sic] case." *Id.* Although admitting that "generally we should correct the earlier ruling"— issue a new ruling, or revoke the old one—"we also know it is not a perfect world." *Id.* The conclusion reached was that "[i]f we do issue another ruling on the principal use of the white sauce while I am here it will be after the criminal and civil penalties issues are resolved, or it is determined at a later date that it is in the best interest of the Government's case to do so or I am directed to do so by some higher authority." *Id.* This position won out, resulting in the CBP rate-advancing ICP's entries without taking the time to first follow the procedures for issuing a new ruling letter or revoking the old one.

A little over four months later, a CBP Director sent a brief letter continuing to warn about the need for revocation proceedings before rate-advancing ICP's entries. On April 13, 2005 (three days before the issuance of the Notice of Action), this writer noted that ICP "is using the HTS number we had provided in the ruling letter . . . . [b]ased on my experience, unless we can demonstrate that the company committed fraud when requesting the ruling, OR&R [CBP's Office of Regulations and Rulings] is going to have to revoke the ruling, issue public notice, and give the company time to adjust their import practices . . . . I doubt [OR&R] will be very supportive of a rate advance, when the company can claim they were relying on a ruling issued by Customs." *Id.* at 192.

As it happened, OR&R took a different view and supported a rate advance via Notice of Action without prior revocation of the Ruling Letter; OR&R maintained that "the Ruling Letter should not be revoked because it was correct for the circumstances presented." *ICP IV*, 748 F.3d at 1186. In OR&R's view, the Ruling Letter simply did not apply to ICP's white sauce imports, past or future, "because those entries would be used to make cheese, not sauce." *Id.*

The Notice of Action characterizes CBP's position on the rate advance as a result of laboratory testing: "CBP Lab analysis reveals that this product is a spreadable, water-in-oil type emulsion with 78% milk fat. As such it will be properly classified under HTS 0405.20.3000"— the dairy spread and butter tariff provision. Ex. 5,

Pub. App'x in Supp. of Pl.'s Mot. for Summ. J. and Pl.'s Opp'n to Def.'s Mot. to Dismiss, ECF No. 28–6 ("Notice of Action"). In other words, CBP indicated in the Notice of Action that it was based on a claim that scientific analysis of the physical makeup of the imported white sauce had revealed that it did not contain the same physical ingredients as the white sauce described in the Ruling Letter. The Notice of Action does not mention principal use, even though the Ruling Letter called for classification under a tariff provision defined by the principal use of the class or kind of good to which the product belonged.

During litigation, the government expanded on the OR&R position, contending that the Notice of Action did not "constitute an 'interpretive ruling or decision'" of the sort contemplated by 19 U.S.C. § 1625(c), which covered only "documents like rulings, ruling letters, internal advice memoranda, and protest review decisions"; the government argued that the Notice of Action did not revoke the Ruling Letter and the protections of § 1625(c) (requiring notice-and-comment before revocation of a ruling letter) were never triggered. *ICP II*, 549 F. Supp. 2d at 1390 (internal quotations omitted). *See also ICP IV*, 748 F.3d at 1187 (showing that the government argued on appeal that "a Notice of Action is an entry specific document that . . . has no effect on a prior policy or ruling by Customs") (internal quotations omitted). The government also claimed that the Notice of Action did not revoke ICP's Ruling Letter because "stringent procedures must be undertaken to revoke a ruling; unless and until Customs follows these regulations, and revokes the ruling, the importer's ruling remains binding." *ICP II*, 549 F. Supp. 2d at 1393. Eventually, however, the government abandoned OR&R's position on appeal, and conceded that "OR&R erred in finding the Ruling Letter did not apply to the white sauce entries." *ICP IV*, 748 F.3d at 1186.

In its opposition to ICP's fees application, the government argues that it was substantially justified in taking the position that the Ruling Letter did not cover the entry, since the claim survived a summary judgment motion, evidence at trial showed white sauce was being used in a manner different than the Ruling Letter classification, and that white sauce was not commercially recognized as a sauce and dressing base. *Def.'s Mem.* at 22.

2. *Material Misrepresentation Allegations at the Court*

Second, the government claimed that ICP materially misrepresented the nature of white sauce when it applied for the Ruling

Letter. *See ICP III*, 878 F. Supp. 2d at 1335.[2] The material misrepresentation claim focused on what information ICP provided about the principal use of white sauce in its request for a Ruling Letter. *See id.* at 1342–43. Defendant claimed multiple misstatements or omissions in ICP's application: (1) that white sauce was commercially recognized; (2) the range of "typical uses" of white sauce; (3) what ingredients white sauce contained and in what amounts; (4) omission of material information about white sauce's commercial designation; (5) omission of information about ICP's prior importation of white sauce; and (6) failure to inform CBP that white sauce was actually a method for importing butter. *See Def.'s Mem.* at 11–22. These contentions stem from Customs regulations, which require applicants for ruling letters to provide "a full and complete description of the article, and whenever germane to the proper classification of the article, information as to the article's chief use in the United States, its commercial, common, or technical designation," and a list and the relative quantities of the components of any article made of more than one material. 19 C.F.R. § 177.2(2)(ii). A sample should be submitted, *id.* at § 177.2(3), as well as relevant documents if "the ruling request directly relate[s] to matters set forth in any invoice, contract, agreement, or other document," *id.* at § 177.2(4). The importer must also tell CBP whether, to the importer's knowledge, "the same transaction, or one identical to it, has ever been considered or is currently being considered" by CBP, or the courts. *Id.* at § 177.2(5).

ICP told CBP in its ruling request that the principal use of white sauce was "as the base for production of gourmet sauces and dressings." *ICP III*, 878 F. Supp. 2d at 1342. The government contended that ICP actually knew of other uses for white sauce but did not disclose them. These claims were supported by ICP white sauce specification sheets listing the principal use of white sauce as a sauce or dressing base, but providing "[o]ther uses" such as "an ingredient in baked goods and butter based sauces" and "processed cheese sauces, processed cheese and club cheese preparations." *Id.* at 1343. All of these specification sheets containing other potential uses of white sauce, however, postdated the Ruling Letter.

A CBP witness established that classification in a principal use provision of the tariff requires first that the class or kind of good to which the product belongs be identified, and then that the principal use of that class or kind of good be determined (rather than the

[2] This appears to be based on CBP's theory that ICP had committed "fraud," although no legal allegations of fraud were brought against ICP.

principal use of the individual product at issue). *See id.* at 1344. The CBP official who issued the Ruling Letter testified that, to his knowledge, CBP did not do "any class or kind determination with regard to white sauce." *Id.* In the absence of other evidence on this question, the Court found that "the government never determined what class or kind of good white sauce belonged to." *Id.* The Court also determined, based on the testimony of the CBP official responsible for issuing the Ruling Letter, that the process of determining the class or kind of good to which an article belongs was comparable to "describing the sound of one hand clapping." *Id.* Testimony established that there were no definite steps for determining the class or kind of merchandise, and that the goods within a class or kind must have similar characteristics, but need not be identical. *See id.* The class or kind of merchandise to which a product belongs is broader than the particular article under consideration. *See id.* Determining the principle use of a class or kind of merchandise is similarly "more a matter of intuition tha[n] rigorous analysis," conducted by "feel," based on facts submitted by the importer as well as on the CBP official's knowledge of similar goods that the official "gain[s] being on the job." *Id.*

3. *Conformance of White Sauce with the Ruling Letter*

Third, the government also alleged that the white sauce contained in the relevant entry did not conform to the description of the product in the Ruling Letter. *See ICP III*, 878 F. Supp. 2d at 1335. The government's underlying position was that ICP designed white sauce as a method of sneaking milkfat into the United States while dodging high tariffs and restrictive quotas. *See id.* at 1345. The government theory was that ICP removed xanthan gum and carboxymethylcellulose ("CMC") (additives used to thicken and emulsify white sauce) while boosting milkfat content, in order to surreptitiously import higher quantities of milkfat. *See id.* At trial, production documents from the manufacturer of ICP's white sauce demonstrated that both xanthan gum and CMC were present. *See id.* at 1338–39. The government's support for its assertion that xanthan gum and CMC had been removed was a specification sheet ICP supplied to a buyer, on which those ingredients were not listed. *See id.* at 1339. Three separate CBP laboratory analyses of white sauce were conducted between 2000 and 2007, and the analyzed product was found by the lab to be consistent with the description in the Ruling Letter. *See id.* at 1336–37. In any case, the amounts of xanthan gum and CMC in white sauce were small—less than half of 1% of the total volume, according to the evidence. *See id.* at 1338. As for the milkfat in white sauce, the Ruling Letter indicated a "typical" content of between 72% and 77%.

Id. at 1336. The Notice of Action alleged that the content was actually 78%, and the government asserted at trial that the product was therefore out of conformance with the Ruling Letter. *See id.* at 1335. But CBP's own lab determined that samples calculated to contain 78% milkfat conformed to the Ruling Letter, and the official who issued the Ruling Letter stated that no strict milkfat concentration or range was required for conformance. *See id.* at 1341, 1347. From this, the Court found that "Customs believed that the Ruling Letter properly applied to ICP white sauce even when that white sauce contained a milkfat concentration of 78%." *Id.* at 1341.

On appeal, the government abandoned its contention that ICP's white sauce did not conform with the Ruling Letter. *See ICP IV*, 748 F.3d at 1186 ("the Government concedes the white sauce Entry materially conformed to the Ruling Letter, and that the Ruling Letter thus applied to the Entry").

B. The Government's Position Was Not Substantially Justified

Considering the entirety of the record, pursuant to 28 U.S.C. § 2412(d)(1)(B), and the positions taken by the government as a whole, pursuant to *Jean*, 496 U.S. at 159, and *Chiu*, 948 F.2d at 715, the Court finds that the government's position was not substantially justified.

As we have seen, when CBP began investigating ICP's imports, a discussion occurred about whether white sauce entries could be rate-advanced without first revoking the Ruling Letter. Multiple officials at CBP saw an obvious nexus between a rate advance of the white sauce entries in a Notice of Action and revocation of the Ruling Letter and raised warnings about doing that. The record establishes that these warnings were not heeded.

The position that won out, explained in the December 2004 letter, was based not on complying with the legal restraints identified by others, but on expedience.[3] The December 2004 letter clearly indicates that revocation is the proper way to change the tariff rate of white sauce entries, but that CBP will not pursue that course because (1) "[w]e do not have the time" for revocation, (2) doing so might "unduly complicat[e]" an investigation of ICP, and (3) CBP will only follow the proper procedure with respect to ICP if "it is in the best

[3] CBP applied the Notice of Action to dozens of entries of white sauce that by all indications were materially-identical to the entry underlying this suit, resulting in astronomical duties. The Court of Appeals has conclusively established the illegality of the Notice of Action, and ICP's consequent entitlement to relief on the merits. Although that judgment is limited in formal effect to the single entry underlying this case, its rationale (and the illegality of the Notice of Action) appear to apply equally to all of the entries rate-advanced. The devastating scope of the Notice of Action does nothing to enhance its reasonableness.

interest of the Government's case to do." Compl., Ex. C, at 290. No reasonable person would approve of such a position.

In issuing the Notice of Action, CBP not only knew that it was effectively revoking the Ruling Letter, but it unreasonably ignored the requirement that a ruling letter governs liquidations until revoked. Although the government, for a time, insisted that the Ruling Letter did not apply to the white sauce entries, we have seen that its own lab reports contradicted its position. On appeal, the government conceded that "OR & R erred in finding the Ruling Letter did not apply to the white sauce entries." *ICP IV*, 748 F.3d at 1186. The government's position appears to be best characterized as an attempt to finesse its own requirements, which was not a reasonable position upon which to base its actions.

Likewise, the Court finds unjustified the government's position that ICP materially misled CBP into issuing the Ruling Letter. First, it bears mentioning that CBP's suspicion that ICP committed "fraud" does not constitute support for this position. Similarly, the handful of record references to a related criminal investigation by CBP agents gives this position no support. All of these references in the record are simply speculation. The government did not bring formal criminal charges of any type against ICP. Nor did the government formally allege fraud in this case. Thus the rumors of potential fraud or criminality in the record are unfounded and provide no justification.[4]

The government's position on material misrepresentation rests on the notion that ICP misrepresented and omitted facts regarding the principal use of white sauce, such as its commercial recognition, range of typical uses, and commercial designation. But these positions are inconsistent with the testimony of CBP's official ("the NIS," for National Import Specialist) responsible for issuing the Ruling Letter. The NIS was unaware of CBP conducting the first step of its principal use analysis: determination of the class or kind of merchandise to which white sauce belonged.[5] CBP produced no evidence that, unbeknownst to the NIS, it conducted this analysis. Without such an analysis, it was unreasonable for CBP to decide that ICP's white sauce was not of the class or kind of merchandise typically used as a sauce preparation. CBP's position ignored the basic two-step process that CBP uses to determine principal use. Instead, CBP focused on

[4] This would be unremarkable except that the December 2004 letter centers its reasoning around the notion that ICP committed fraud and that the Notice of Action should be pursued so as to avoid interference with a potential criminal case.

[5] As discussed, *supra* at § I.A.2., the process of determining classification under a principal use provision requires (1) determining the class or kind of good to which the product at issue belongs; and (2) determining the principal use of that *class or kind* of good (not the principal use of the particular product at issue).

the actual use of white sauce shipments. But the actual use of the shipments, under CBP's own rules, is not the deciding relevant concern for principal use classification.

Additionally, the government's laundry list of slight variations in specification sheets or potential uses of white sauce did not provide substantial justification for taking the position that the Ruling Letter was void or inapplicable to the white sauce imports. The record shows that these nearly all arose after the Ruling Letter had been issued, and were not of the type that a reasonable person would have believed material to the ruling. This is highlighted by the vague nature of the process for determining an article's principal use, attested by the NIS. The process is not regular enough to establish that such minor pieces of information should reasonably be considered material.

Finally, the government was not substantially justified in its argument that the white sauce failed to conform to the Ruling Letter. This position was belied by CBP's own multiple laboratory tests, which reported that the tested samples conformed, and by the NIS testimony that no specific percentage of milkfat content was required for conformance. CBP knew that ICP's white sauce conformed to the Ruling Letter even if it contained the 78% milkfat stated in the Notice of Action. *See ICP III*, 878 F. Supp. 2d at 1341 (finding that CBP "believed that the Ruling Letter properly applied to ICP white sauce even when that white sauce contained a milkfat concentration of 78%" based on statements made in the lab reports and at trial by a CBP witness). The government also conceded on appeal that the white sauce conformed to the Ruling Letter, a gradual process by which the government moved from defending its actions to conceding error. *See Lizarraga*, 2011 WL 4910421 at *7 (stating "throughout this litigation, Customs has progressively acknowledged" that the plaintiff of that case was entitled to the relief he sought). This was not a position that would be justified to a reasonable person.

The record, considered as a whole, establishes that the government position was rooted in a desire to avoid the timely revocation process. At least in part, this was intended to clear a path for a fraud or criminal investigation that never bore fruit. CBP knew at the time that revocation could not properly be avoided, and yet CBP chose to proceed without revocation. The multiple attacks on the Ruling Letter's validity and applicability stem from this effort. The government position can thus best be summarized as an attempt to promote various post-hoc justifications for taking action CBP knew to be improper. Considered as a whole, the government's position was not founded on "a reasonable basis both in law and fact," "justified to a

degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565 (internal quotations and citations omitted).

Nor did the government's position stem from a lack of "clarity of the governing law," or a "legal issue [that] was novel or difficult," such that it could be justified. *Norris*, 695 F.3d at 1265. To the contrary, the governing law was clear: a ruling letter must be applied unless and until it is revoked following notice and comment procedures laid out in 19 U.S.C. § 1625(c). This was acknowledged by CBP officials, including in the December 2004 letter. But CBP had a goal in mind—rate advancing the ICP entries—that was inconsistent with the governing legal framework. The position CBP adopted was an attempt to get around the applicable legal framework. This was not a situation in which the government sought to solve a genuine dilemma for which the law offered no easy resolution. A novel legal issue that serves as a post-hoc rationalization for unjustified action is different from the kind of novel or difficult issue referenced in *Norris*, which the Court finds inapplicable here.

C. No Special Circumstances Make an Award of Fees Unjust

The government argues that special circumstances make an award of fees unjust pursuant to 28 U.S.C. § 2412(d)(1)(A). *Def.'s Mem.* at 22–23. The special circumstance asserted here is that "[p]rior to the final decision by the Court of Appeals for the Federal Circuit in this case . . . it was unsettled whether a CF 29 'Notice of Action' could be characterized as an 'interpretive ruling or decision'" under 19 U.S.C. § 1625(c) such that it could trigger the notice and comment procedures required for revocation of a ruling letter. *Id.* at 23. The government contends that although it "did not ultimately prevail, in light of this unsettled area of law, an award of EAJA fees is not appropriate." *Id.* at 24.

Although special circumstances "have been recognized" based on the novelty of a good faith legal position adopted by the government, *Am. Air Parcel Forwarding*, 697 F. Supp. at 507, the law does not mandate that the Court deny a fee award in all such cases. Indeed, as recognized by *Fakhri*, the novelty of a position may be diminished where the government has presented that position and lost previously. *See* 507 F. Supp. 2d at 1314. The determination of special circumstances is for the Court to make within its discretion, keeping equitable concerns in mind. *See Devine*, 733 F.2d at 895–96.

The Court finds no special circumstances here make an award inappropriate. As previously discussed, CBP appears to have been aware that it was proceeding in an improper manner in issuing the Notice of Action. The Court will not ratify such a position as raising

special circumstances, especially when doing so would have to rest in part on equitable grounds. While it is true that the able government attorneys advanced a legal position that had never been conclusively decided by the Court of Appeals, the novelty of the government's position was diminished because this court rejected the argument once before, for the same reasons, before this litigation began. *See ICP I*, 374 F. Supp. 2d at 1325–30.[6] But more importantly for the question of special circumstances, the purely legal arguments about the nature of a Notice of Action, pursued to final decision by the government's attorneys, do not appear to have been a basis for the government's position at the time CBP issued the Notice of Action. The Court thus finds that the government's positon here was a post-hoc attempt to justify a rate advance CBP knew to be contrary to the governing legal framework at the time it was issued, and no basis for a finding of special circumstances.

II. *The Amount of Fees Granted*

Pursuant to 28 U.S.C. § 2412(d)(2)(A)(ii), "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." ICP requests a cost of living adjustment of the $125 per hour fee of its non-customs attorneys. *See* Pl.'s Application for Award of Att'y Fees and Expenses Under the Equal Access to Justice Act ("*Pl.'s Application*") at 17–18, ECF No. 268. The government does not object to the cost of living adjustment, which the Court will grant.

A. Special Factor Enhancement

ICP also requests a special factor enhancement for certain of its lawyers who are experienced attorneys with a specialized knowledge of customs law. *See id.* at 15–17. According to Plaintiff, this case "required the specialized skills in customs practice and litigation and knowledge of the customs laws and regulations and practices that are beyond what general practice attorneys would encounter." *Id.* at 16. Affidavits were submitted from attorneys with long experience in customs law, supporting the regularity of the rates charged and indirectly supporting Plaintiff's contention that "customs specialists are in short supply and that it would have been difficult to secure the services of less expensive, qualified customs specialists." *Id.* at 16–17, Ex. C., and Ex. D. The government opposes the special factor en-

[6] The Court notes that the portion of *ICP I* addressing this issue was vacated by the Court of Appeals and therefore did not provide final resolution. *See Int'l Custom Prods. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006).

hancement. *Def.'s Mem.* at 24–26.

Awarding a higher hourly rate than the statutory $125 per hour is appropriate where the claimant's attorneys possessed "some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation." *Pierce*, 487 U.S. at 572. Although "cases involving customs law are not automatically worthy of elevated attorneys' fees, a special factor fee enhancement may be appropriate where specialized skills in customs law are both necessary and limited." *Shah Bros.*, 9 F. Supp. 3d at 1410 (internal quotations and citations omitted); *see also Jazz Photo*, 597 F. Supp. 2d at 1369 (finding "customs law to be a specialized practice area, distinct from general and administrative law, for purposes of EAJA"). Plaintiffs have limited their request for a special factor enhancement to the fees of those of ICP's attorneys with specialized customs experience.[7] *Pl.'s Application* at 16.

The Court finds that a special fact enhancement as requested is appropriate. To prosecute its claims, ICP has required lawyers with skills only to be found in the small national cadre of customs attorneys. ICP has also been required to defend against a series of highly technical affirmative defenses asserted by the government, some of which the record shows to have challenged even longtime CBP officials tasked with administering the customs law. The special factor enhancement will be granted to the extent requested by Plaintiff.

The exception to this is that no special factor enhancement can be applied to the preparation of the EAJA fee application, which is not a matter requiring specialized customs experience. The application is therefore denied to the extent Plaintiff seeks a special factor enhancement that augments fees for preparing its EAJA application.[8] *See Diamond Sawblades*, 816 F. Supp. 2d at 1362.

B. Reductions in Requested Fees and Expenses

The government argues that numerous specific items in ICP's request for fees and expenses[9] should be denied even if Plaintiff's application is granted. *See Def.'s Mem.* at 26–30 and *Addendum A* thereto. The government contends that many entries in the fee ap-

[7] These attorneys are Simeon M. Kreisberg, Esq., Andrew A. Nicely, Esq., and Jeffery C. Lowe, Esq. *Pl.'s Application* at 16.

[8] This may have no effect on the amount of fees, as it appears that the entire EAJA application process involved attorneys for which ICP does not seek a special factor enhancement. *See Pl.'s Application* at Ex. B.

[9] ICP's itemized accounting consists primarily of entries specifying attorneys' fees; there are also entries for litigation expenses, broken into the categories "Postage/Fedex," "Travel/Meals," "On-line Research, Library," "Filing Fees," "Phone/Fax," "Copies," and "Courier, Wire Transfer." *See* Addendum A to *Def.'s Mot.* ("*Addendum A*").

plication should be eliminated due to "block billing" (i.e. attributing more than one attorney action to a single billing entry) and "quarter hour billing" (i.e., billing in minimum 15 minute increments) such as that employed by ICP's attorneys with the firm Mayer Brown. *Id.* at 26–27. (The items have been marked with a "B" in *Addendum A*.) The Court has examined the fees application and declines to reduce these entries. The block billing identified by Defendant does not lump together too many activities. Additionally, nothing in the EAJA application required minimum billing increments of a particular length. The fees billed in 15 minute increments are as valid and appropriate as those billed in six minute increments. The government's block billing contention is denied. Those fees marked with a "B" in *Addendum A* are to be paid (subject to any applicable exclusions or reductions discussed below).

Next the government contests fees related to particular segments of the case: ICP's application for a temporary restraining order and preliminary injunction,[10] over which the Court determined it had no jurisdiction; and its motion for an order to show cause,[11] which the Court denied. *Id.* at 27–28. The government is correct that these items are not compensable. *See Inner Secrets/Secretly Yours, Inc. v. United States*, 20 CIT 210, 916 F. Supp. 1258, 1263 (1996) (citing *Traveler Trading Co. v. United States*, 13 CIT 380, 385, 713 F. Supp. 409, 414 (1989)). The fees request will be denied as to the entries associated with these two motions.

Similarly, the government notes that the action was extended and the filing of motions *in limine* resulted due to ICP's failure to produce certain materials during discovery. *See Def.'s Mem.* at 29–30. The government is also correct on this point, and these fees (marked with a "P" in *Addendum A*) will therefore be denied. *See* 28 U.S.C. § 2412(d)(1)(C).

The government's remaining contentions are that certain billing entries are not clearly related to the litigation,[12] too vague to determine their appropriateness,[13] and duplicative because ICP's second attorney was reviewing the file to familiarize himself with the case.[14] *Def.'s Mem.* at 27–29. The government also argues that ICP's entries for litigation expenses, although marked under category headings

[10] These fee entries are marked "NJ" on *Addendum A*.

[11] The fees related to the motion for an order to show cause are not marked in a unique manner on *Addendum A*; instead, they are interspersed among the items marked "NR," a category that also includes entries unrelated to the order to show cause.

[12] These entries are marked "NC" on *Addendum A*.

[13] These entries are marked "V" on *Addendum A*.

[14] These entries are marked "D" on *Addendum A*.

such as "On-line Research, Library" and "Copies," are not described in a manner that shows whether they related to the motions for which fees have been disallowed, or are otherwise inappropriate. *Id.* at 30. In regard to these remaining contentions (i.e., the expense entries and the attorneys' fee entries marked "NC," "V," and "D" in *Addendum A*), the Court finds that it is appropriate to apply a blanket reduction of 33% to those entries. While the Court agrees that certain entries include a quantity of work not clearly related to this case, or are too vague, or involve duplicative work, the Court also finds that many of these entries involved appropriate tasks. Where numerous entries in an EAJA application are problematic but not wholly inappropriate, the Court may properly apply a fixed reduction, tailored to estimate the extent of the deficiencies. *See Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 973–74 (D.C. Cir. 2004) (finding that a "fixed reduction is appropriate" given a "large number of entries that suffer from one or more . . . deficiencies") (internal citations omitted). Here, the Court finds 33% to be an accurate measurement of the extent of deficient or inappropriate fee entries marked "NC," "V," or "D" (and which have not been previously eliminated on other grounds). These entries will therefore be paid at 67% of the requested rates.

With regard to the expenses ICP seeks, the Court finds that an amount of the requested fees are related to motions for which the Court has found fees inappropriate. Although the expenses are generally categorized, some expenses may also have been excessive or otherwise inappropriate. The Court finds, however, that it would be unjust to deny all expenses on that basis, given that Plaintiff without a doubt incurred most of its expenses in successfully pursuing major litigation to overcome a government position that was not substantially justified. Mindful of the need to reimburse Plaintiff's appropriate expenses without exceeding what is permissible, the Court finds that a 33% reduction will balance these concerns and achieve a fair outcome. The expenses sought by Plaintiff will therefore be paid at a rate of 67%.

C. Submission of a Recalculated Fees Application

Pursuant to the Court's above discussion of the fees and expenses to be granted, ICP is to revise its request for fees and expenses to leave out entries and reduce fees as stated in this opinion. The parties shall calculate the resulting amount, and submit a joint statement of the amount accompanied by a proposed order by July 31, 2015. *See Shah Bros.*, 9 F. Supp. 3d at 1414. Approval shall be summarily granted by the Court absent deviation from this opinion.

CONCLUSION

For the reasons given above, the Court grants in part Plaintiff's application for attorneys' fees and expenses. It is therefore

ORDERED that a special factor enhancement apply to those fees payable for the work of ICP attorneys Simeon M. Kreisberg, Esq., Andrew A. Nicely, Esq., and Jeffery C. Lowe, Esq., with the exception of any work related to the application for EAJA fees; and it is further

ORDERED that a cost of living adjustment be made to the remainder of the attorneys' fees; and it is further

ORDERED that payment for fee entries marked "NJ" or "P" in *Addendum A* is denied; and it is further

ORDERED that payment for fees related to Plaintiff's motion for an order to show cause is denied; and it is further

ORDERED that payment for fee entries marked "NC," "V," or "D" on *Addendum A* (and not eliminated on other grounds) be made at a rate of 67% after any relevant special enhancement or cost of living adjustment; and it is further

ORDERED that payment of expenses be made at a rate of 67%; and it is further

ORDERED that the parties calculate the resulting amount and submit it to the Court via ECF in a joint statement, accompanied by a proposed order, no later than July 31, 2015.

Dated: June 24, 2015
New York, New York

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

Slip Op. 15–69

FEDMET RESOURCES CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Chief Judge
Court No. 14–00297

[Granting in part, and denying in part, defendant's motion to dismiss and granting plaintiff's motion for judgment on the agency record]

Dated: June 26, 2015

R. Will Planert, *Donald B. Cameron*, and *Sarah S. Sprinkle*, Morris, Manning & Martin LLP, of Washington D.C., argued for plaintiff Fedmet Resources Corporation. With them on the brief were *Brady W. Mills*, *Julie C. Mendoza*, and *Mary S. Hodgins*.

Amy M. Rubin, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., argued for defendant United States. With her on the brief were *Melissa M. Devine*, Trial Attorney, *Patricia M. McCarthy*,

Assistant Director, *Jeanne E. Davidson*, Director, *Benjamin C. Mizer*, Acting Assistant Attorney General. Of counsel on the brief was *Paula S. Smith*, Senior Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff Fedmet Resources Corporation ("Fedmet"), a U.S. importer, contests decisions by U.S. Customs and Border Protection ("Customs" or "CBP") requiring Fedmet to post 260.24% *ad valorem* single transaction bonds ("STBs") to obtain release of Fedmet's imported merchandise. The merchandise at issue, magnesia carbon bricks ("MCBs") that Fedmet declared upon entry to be products of Vietnam, was the subject of three consumption entries that Fedmet made at the port of Cleveland, Ohio in late 2014. The 260.24% *ad valorem* duty rate upon which Customs based its bond requirement is the sum of the deposit rates Customs applied to effectuate an antidumping duty order (236%) and a countervailing duty order (24.24%) on imported MCBs from the People's Republic of China ("China"). After commencing this action, Fedmet posted 260.24% single transaction bonds for two of the entries at issue in this litigation, each of which was made on October 21, 2014. In response, Customs has released the merchandise on those entries into commerce.

Before the court is Fedmet's Motion for Partial Summary Judgment on the Agency Record, in which Fedmet seeks a judgment declaring unlawful CBP's imposition of the 260.24% bonding requirement on the third entry of merchandise, made on December 2, 2014, and ordering Customs to allow the merchandise covered by that entry to be released without the posting of security for antidumping or countervailing duties. The court grants Fedmet's motion but orders further proceedings concerning the form of relief that will be necessary and appropriate with respect to this entry.

Also before the court is defendant's Motion to Dismiss two of the three counts in Fedmet's complaint for lack of jurisdiction or failure to state a claim on which relief can be granted. The court grants defendant's motion in part and denies it in part.

I. BACKGROUND

A. Proceedings before U.S. Customs and Border Protection

The three consumption entries at issue in this case were made at the port of Cleveland on October 21, 2014 (Entry Nos. 336–3104829–0

and 336–3104919–9) and December 2, 2014 (Entry No. 336–3105573–3). Second Am. Compl. ¶¶ 21, 25, 27, ECF Nos. 45 (conf.), 46 (public) ("Second Am. Compl."); *Entry Documents for Entry No. 336–3104829–0*, Tab 3 in First Admin. R., ECF No. 30–4 (conf.); *Entry Documents for Entry No. 336–3104919–9*, Tab 4 in First Admin. R., ECF No. 30–5 (conf.). With respect to the two October 21, 2014 entries, Customs issued to Fedmet, on November 6, 2014, an "Entry/Rejection Notice" stating that "[t]he country of origin for magnesia carbon brick is believed to be China" and requiring for release the posting of a 260.24% single transaction bond for each entry. *Entry/Summary Rejection Sheet for Entry No. 336–3104829–0*, Tab 1 in First Admin. R., ECF No. 30–2 (conf.); *Entry/Summary Rejection Sheet for Entry No. 336–3104919–9*, Tab 2 in First Admin. R., ECF No. 30–3 (conf.). Fedmet filed with Customs, on November 12, 2014, a submission containing information by which Fedmet attempted to demonstrate that the merchandise on Entry Nos. 336–3104829–0 and 336–3104919–9 was manufactured by a producer in Vietnam that was unaffiliated with Fedmet and that had manufactured the MCBs in Vietnam to Fedmet's specifications. Second Am. Compl. ¶ 18; *Oct. 9, 2014 Letter to the Port of Chicago, Submitted to the Port of Cleveland*, Tab 17 to Supplemental Admin. R., ECF Nos. 47–4 to 47–11 (conf.). After Fedmet submitted the required single transaction bonds for these two entries (received by Customs on November 28, 2014), Customs released the merchandise into commerce. Second Am. Compl. ¶ 20; *Jan. 21, 2015 Decl. of Edward Wachovec*, *Supervisory Import Specialist at the Port of Cleveland* ¶ 2, Supplemental Admin. R., ECF. No. 47–1 ("*Wachovec Jan. 21, 2015 Decl.*")

On December 30, 2014, Customs issued an Entry/Rejection Notice for the December 2, 2014 entry, which informed Fedmet that the shipment would not be released unless Fedmet submitted a single transaction bond in an amount calculated at 260.24% of the entered value. *Entry/Summary Rejection Sheet for Entry No. 336–3105573–3*, Tab 15 to Supplemental Admin. R., ECF No. 47–2 (conf.) ("*Entry/Summary Rejection Sheet for Dec. 2 Entry*"). Fedmet has not submitted a 260.24% single transaction bond on the December 2, 2014 entry, and the merchandise covered by that entry has not been released.

B. Proceedings before the Court of International Trade

Plaintiff initiated this action by filing a summons and a complaint on November 12, 2014. Summons, ECF No. 1; Compl., ECF No. 5. Plaintiff, with leave of the court, filed a second amended complaint on January 9, 2015, which the court deemed filed on January 15, 2015.

Second Am. Compl. Defendant filed an answer to the second amended complaint on January 23, 2015. Answer, ECF No. 51.

Defendant filed its Motion to Dismiss Counts I and III of the second amended complaint on January 23, 2015, to which plaintiff responded in opposition on February 3, 2015, and defendant replied on March 4, 2015. Def.'s Mot. to Dismiss Counts I & III of Pl.'s Second Am. Compl., ECF Nos. 49 (conf.), 50 (public) ("Def.'s Mot. to Dismiss"); Def.'s Mem. in Supp. of its Mot. to Dismiss Counts I & III of Pl.'s Second Am. Compl., ECF Nos. 49 (conf.), 50 (public) ("Def.'s Br. in Supp. of Mot. to Dismiss"); Pl. Fedmet Res. Corp.'s Opp'n to Def.'s Mot. to Dismiss, ECF Nos. 52 (conf.), 54 (public) ("Pl.'s Opp'n"); Def.'s Reply in Supp. of Mot. to Dismiss, ECF Nos. 59 (conf.), 60 (public) ("Def.'s Reply").

On February 3, 2015, plaintiff moved for judgment on the agency record pursuant to USCIT Rule 56.1. Mot. of Pl. Fedmet Res. Corp. for Partial J. upon the Agency R., ECF Nos. 55 (conf.), 56 (public); Mem. of Law in Supp. of Pl.'s Mot. for Partial J. upon the Agency R., ECF Nos. 55 (conf.), 56 (public) ("Pl.'s Br."). Defendant responded in opposition to this motion on March 4, 2015 and plaintiff replied on March 24, 2015. Def.'s Resp. in Opp'n to Pl.'s Mot. for Partial J. upon the Admin. R., ECF Nos. 57 (conf.), 58 (public) ("Def.'s Opp'n"); Reply Br. of Pl. Fedmet Res. Corp. in Supp. of its Mot. for Partial J. on the Agency R., ECF Nos. 64 (conf.), 65 (public) ("Pl.'s Reply").

On April 8, 2015, the court held an oral argument on both pending motions, ECF No. 67, and on April 15, 2015, plaintiff filed a joint report stipulating as to certain facts related to the bonds plaintiff obtained for the October 21, 2014 entries and informing the court of the confidentiality of certain information on the record of this proceeding, Joint Status Report, ECF No. 69 ("Joint Status Report").

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction over this matter pursuant to the residual jurisdiction provision of section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i).[1] *See also* 28 U.S.C. § 2631(i) ("Any civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h) of this section, may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5."); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[1] All statutory citations herein are to the 2012 version of the U.S. Code. All citations herein to the Code of Federal Regulations are to the 2014 version of the code.

In exercising jurisdiction under 28 U.S.C. § 1581(i), the court is to review the matter as provided in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e) ("In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5."). In accordance with 5 U.S.C. § 706, the court must "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (the "arbitrary and capricious" standard of review).

B. Defendant's Motion to Dismiss

1. Defendant's Motion to Dismiss Count I of Fedmet's Second Amended Complaint

In Count I of its second amended complaint, Fedmet claims that the magnesia carbon bricks on the October 21, 2014 entries were produced in, and are products of, Vietnam and that CBP's requirement that Fedmet post 260.24% single transaction bonds on those entries based on the AD and CVD orders, therefore, "is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Second Am. Compl. ¶ 25.

Noting that Fedmet has posted the single transaction bonds and obtained release of the merchandise, defendant argues that any issue as to the bonding requirement on the two October 21, 2014 entries is now moot and that the court therefore lacks jurisdiction under the case and controversy requirement in Article III of the U.S. Constitution to adjudicate the claims in Count I. Def.'s Br. in Supp. of Mot. to Dismiss 3–4. Further, defendant argues that the claims of Count I are moot because "there is no longer any relief this Court can provide to redress any injury Fedmet may purport to have suffered in purchasing the single transaction bonds." *Id.* at 4. In defendant's view, even if Fedmet could establish that the court has authority to order cancellation of the bonds (a point defendant does not concede), such a remedy could not benefit Fedmet because "cancelling the bonds would result only in cancelling the surety's liability under the bond" and "would not effect a refund of any premium that Fedmet may have paid to the surety for the bonds." *Id.* at 5. According to defendant, the posted security does not establish injury-in-fact because "CPB accepted a bond from Fedmet and does not have in its possession any cash from Fedmet to return." Def.'s Reply 2. Defendant submits that had Fedmet, with the permission of Customs, posted cash deposits with Customs in lieu of the bonds, "Fedmet theoretically might have demonstrated continuing harm that this court could remedy (*i.e.*, a

refund from CBP of the cash security)." *Id*.

The court agrees with defendant that the claims in Count I are now moot. In the parties' April 15, 2015 joint status report to the court, plaintiff stated that "Fedmet was not required to post any cash or collateral with the surety as a condition of receiving the bonds it obtained on the two Cleveland entries that have been admitted (Entry Nos. 336–3104829–0 and 336–3104919–9)." Joint Status Report 1. Plaintiff further stated that "[t]he premium on those bonds consisted of a single, lump sum payment, and there are no outstanding premiums that remain to be paid on the bonds." *Id*. From these facts, it follows that no relief the court could grant on the Count I claims could actually benefit Fedmet. These facts indicate that Fedmet would not receive from the surety any refund of the lump sum premium payment were the court to order Customs to cancel the two bonds, and plaintiff alleges nothing to the contrary.

In opposing dismissal of the claims in Count I, plaintiff argues that each of the two bonds at issue "is a three-way contract among the United States, Fedmet, and the surety." Pl.'s Opp'n 7. Pointing to the language of the bond contract, plaintiff submits that Fedmet, as well as the surety, has bound itself to the United States in the amount of the bonds and that "[i]t follows that Fedmet, as a party to the bond, retains an interest in being able to challenge the lawfulness of CBP's requirement to post the bond in this case and to seek its cancellation." *Id*. (footnote omitted). This argument fails to convince the court of the existence of a live case or controversy. Plaintiff is correct that Fedmet, as principal on the two bonds, is jointly and severally liable under the bond contracts for any duties later determined to be owing on the two October 21, 2014 entries up to the limit of liability of the bonds. But as importer of record, Fedmet is under the obligation to pay all such duties, without limit, regardless of the existence of the two single transaction bonds and Fedmet's continuous bond.[2] 19 U.S.C. § 1484; 19 U.S.C. § 1505; 19 C.F.R. § 141.1(b) ("The liability for duties . . . constitutes a personal debt due from the importer to the United States which can be discharged only by payment in full of all duties . . . . Payment to a broker covering duties does not relieve the importer of liability if the duties are not paid by the broker.").

[2] Certain other obligations attendant to importation, specifically, the obligations to redeliver merchandise upon pain of liquidated damages under a bond, also could exist (at least theoretically) under the single transaction bonds, as well as under Fedmet's continuous bond, albeit with a lower limit of liability. Fedmet alleges no facts, and makes no argument, as to redelivery, and the court declines to speculate so as to presume a case or controversy on such a basis.

Plaintiff alleges as a continuing injury its inability to obtain future single transaction bonds from the surety without the posting of significant collateral. The April 15, 2015 joint status report submitted by the parties states as follows:

> *Impact on future requests for bonds*. At the time it acquired the bonds for the admitted entries, Fedmet was informed by its surety that the surety would require collateral for any future single transaction bonds ("STBs") or bonds covering antidumping duties ("ADD") issued to Fedmet.

Joint Status Report 1–2. This statement does not suffice to establish a case or controversy based on a continuing injury-in-fact. The refusal by one surety to issue future single transaction bonds to Fedmet without significant collateral does not establish Fedmet's inability to obtain single transaction bonds from other sureties, potentially under less onerous terms, so as to allow Fedmet to continue importing MCBs. Plaintiff concedes in the April 15, 2015 joint status report that "Fedmet has not approached any other sureties to request a bond after receiving the bonds covering these two entries." *Id*. at 2. Also, the court cannot presume that the surety that issued the two single transaction bonds would issue additional single transaction bonds were the court to order cancellation of the two existing bonds. Such a ruling by the court, were it to be made in the future, would address only the issue of whether the requiring of single transaction bonds for the two entries was unlawful under the "arbitrary and capricious" standard of review, not the issue of ultimate duty liability on the entries (which would depend upon an actual determination of country of origin). Awareness that Customs had raised an issue as to Fedmet's potential antidumping and countervailing duty liability on the underlying entries might well cause the surety to refuse to issue additional single transaction bonds regardless of the court's ruling. In this respect, plaintiff's argument that the claims in Count I are not moot rests on speculation instead of facts upon which the court may exercise jurisdiction. *See City News & Novelty, Inc. v. City of Waukesha,* 531 U.S. 278, 283 (2001) ("[S]peculation standing alone, however, did not shield the case from a mootness determination.").

To summarize, Fedmet has not established facts from which the court could conclude that the claims comprising Count I of the second amended complaint present a live case or controversy. The court will dismiss these claims as moot.

2. Defendant's Motion to Dismiss Count III of Fedmet's Second Amended Complaint

Defendant also moves for dismissal of Count III, in which Fedmet claims that Customs unlawfully imposed a "final determination . . . that all entries of MCBs from Vietnam by Fedmet will be required to be entered with STBs at the 260.24 percent rate applicable to imports of MCBs from China." Second Am. Compl. ¶ 29; Def.'s Br. in Supp. of Mot. to Dismiss 7–13. Fedmet claims that "[t]his determination, which amounts to a standing order to treat future entries by Fedmet as subject to the AD and CVD orders on MCBs from China, is *ultra vires* and in excess of CBP's statutory jurisdiction, authority, or limitations." *Id*.

Defendant moves to dismiss Count III on the ground that the decision complained of, which defendant describes as a "User Defined Rule (UDR)," Def.'s Br. in Supp. of Mot. to Dismiss 1, is not a "final agency action" as required for judicial review under the APA, *id.* at 7–8 (citing 5 U.S.C. § 704 (allowing judicial review of "final agency action for which there is no other adequate remedy in a court.")). According to defendant, the UDR is "a targeting tool employed by CBP" and not a "final agency action on a particular entry or importation and it is not a final decision on bonding." *Id.* at 9. Defendant points out that the decision to require additional security upon a particular entry of merchandise, such as a single transaction bond, is delegated to the port director by regulation, *id*. (citing 19 C.F.R. § 113.13(d)), and the authority to review and reject entries is also exercised by the port, *id*. (citing 19 C.F.R. §§ 141.62–141.64). Defendant would have the court dismiss the claim in Count III on the ground that "[t]he UDR . . . fails to take any action on any individual entry and has no effect on its own on the entry or release of individual shipments." *Id.* at 10.

The court is not convinced by defendant's argument that Count III of the second amended complaint must be dismissed. The court has examined the UDR in question, which, along with related record documentation, is on the record of this judicial proceeding. *UDR 1057274*, Tab 13 to First Admin. R., ECF No. 30–14 ("*UDR Report*"). The UDR is specific to Fedmet and identifies the class or kind of merchandise at issue in this litigation as well as the dates during which the UDR is in effect (September 6, 2014 to September 30, 2015). *Id.* at 1. It contains a paragraph under the title "Instructions to Officer," a title indicating that the UDR is intended as a directive rather than as an advisory notice. *Id.* at 3. The language of the paragraph under this title further supports an interpretation that the

UDR is a directive by containing the words "STB require before release" and by referencing "ADCVD duties," i.e., antidumping and countervailing duties. *Id.* Even the name of the issuance ("User Defined *Rule*") is at odds with an interpretation that the UDR is merely advisory. The record shows that the UDR was generated by an entity within Customs known as the South Florida National Targeting and Analysis Group ("NTAG") for nationwide application and that "UDRs promote a uniform method for targeting merchandise and serve to avoid inconsistent treatment of imports by individual ports." *Aff. of Mary Rivera* ¶ 7, ECF No. 30–15 (Dec. 1, 2014) ("*Rivera Aff.*").

Additionally, while defendant argues that the Customs regulations vest in the port director the authority to require additional security, that argument does not negate the record evidence that the UDR appears to direct all port directors in exercising that authority when encountering imports of MCBs by Fedmet into any port in the United States. The record shows that the UDR challenged in Count III has been applied consistently so as to require STBs when that situation occurs, i.e., when the identified merchandise is imported by Fedmet, and that port directors have consistently relied on the UDR as the primary basis for requiring additional security. *Dec. 5, 2014 Decl. of Edward Wachovec*, *Supervisory Import Specialist at the Port of Cleveland* ¶ 6, Admin. R., ECF.No. 30–1 ("Entry Nos. 336–310482–9 and 336–3104919–9 'hit' on UDR 1057274. It is the port of Cleveland's practice to follow a UDR when making a decision on a particular entry that meets the criteria set forth in the UDR."); *Wachovec Jan. 21, 2015 Decl.* ¶ 5 ("As with Entry Nos. 336–3104829–0 and 336–3104919–9, Entry No. 336–3105573–3 'hit' on UDR 1057274."); *Dec. 8, 2014 Decl. of Linda Golf, Assistant Port Dir. for Trade at the Port of Chicago* ¶ 7, ECF No. 30–16 ("It is the port of Chicago's practice to follow a UDR when making a decision on a particular entry that meets the criteria set forth in the UDR.").

After considering the plain meaning of the language of the UDR and the remainder of the record, the court cannot agree with defendant that the UDR "has no effect on its own on the entry or release of individual shipments." Def.'s Br. in Supp. of Mot. to Dismiss 10. The record shows instead that the UDR was intended to, and does, have just such an effect. Supporting this conclusion is a May 1, 2012 Customs memorandum that the agency provided as guidance to the ports concerning when to request single transaction bonds to address AD/CVD concerns and that indicates that such bonds are to be required uniformly. *Use of Single Transaction Bonds as Additional Security for Antidumping & Countervailing Concerns*, Tab 20 to

Supplemental Admin. R., ECF No. 47–14, *available at* http://www.cbp.gov/trade/priority-issues/adcvd/bonds (last visited June 23, 2015). The memorandum states that "[e]ach import transaction will be judged on its own merits," and that "[o]nly on a case-by-case basis will the STB be required." *Id.* The memorandum, however, concludes that "[a]ll of the ports will be made aware when one port requests an STB to address possible placement of the revenue in jeopardy involving AD/CVD so *that it will be required uniformly at each port*." *Id.* (emphasis added). Because record evidence indicates that ports have uniformly followed the UDR in imposing a heightened bonding requirement on Fedmet's importation of magnesium carbon bricks from Vietnam, the UDR is properly considered "the 'consummation' of the agency's decisionmaking process" according to which "'rights or obligations have been determined,' or from which 'legal consequences will flow' . . . ." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted); *see also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.").

In summary, the administrative record indicates that the UDR is a decision by Customs that a single transaction bond should be required for each entry by Fedmet of MCBs with a stated origin of Vietnam. The court lacks a basis upon which to dismiss the claim contained in Count III of the second amended complaint. As to that claim, the court denies defendant's Motion to Dismiss.

C. Plaintiff's Motion for Partial Judgment on the Agency Record

Section 623 of the Tariff Act of 1930 ("Tariff Act") provides authority under which Customs may require "such bonds or other security" as it "may deem necessary for the protection of the revenue" or to ensure compliance with the customs laws. 19 U.S.C. § 1623(a); *see* 19 C.F.R. Part 113. Plaintiff claims Customs exceeded its authority under Section 623 and the aforementioned regulation, 19 C.F.R. § 113.13(d),[3] when it required a 260.24% bond as security for antidumping and countervailing duty liability as a condition of release of the magnesia carbon bricks on the December 2, 2014 entry (Entry No. 336–3105573–3). According to Fedmet, "CPB's authority to require

[3] The cited regulation provides as follows:

> *Additional security.* Notwithstanding the provisions of this section or any other provision of this chapter, if a port director or drawback office believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security.

19 C.F.R. § 113.13(d).

bonds on import transactions is limited to instances in which [CBP] reasonably determines that such bonds are necessary to protect the revenue and ensure compliance with customs laws and regulations." Pl.'s Br. 7. In arguing that Customs failed to make a reasonable determination that the single transaction bond was necessary for the December 2 entry and instead acted arbitrarily and capriciously, plaintiff states that "the administrative record filed by CBP discloses *no* evidence that Entry No. 336–3105573–3 is actually of Chinese origin." *Id*. (emphasis in original). Fedmet adds that "CBP has made no effort to determine the actual country of origin of the MCBs covered by Entry No. 336–3105573–3" and that CBP "has issued no requests for information or documentation from Fedmet to support Fedmet's declaration that the goods originated in Vietnam" even though "Fedmet has voluntarily provided CBP with extensive documentation regarding its Vietnamese supplier and Fedmet's personal knowledge of that supplier's capabilities and operations." *Id.* at 13.

Defendant concedes that Customs, in imposing the bond requirement, did not determine the country of origin of the MCBs on the December 2, 2014 entry, or on any other of Fedmet's entries. In its brief opposing Fedmet's motion for judgment on the agency record, defendant states as follows:

> CBP's decision to require a single transaction bond was not based upon an affirmative country of origin determination regarding Fedmet's MCBs; rather, it was based upon its belief that acceptance of the entry as filed would place the revenue at risk, given the ongoing criminal investigation being conducted by HSI [Homeland Security Investigations] and information received from HSI regarding the status of that investigation.[4]

Def.'s Opp'n 20 (footnote omitted). Regarding the cited investigation, defendant states that "[o]n September 2, 2014, the United States District Court for the Western District of New York signed a search warrant for the home of Mark Mattar, President of Fedmet." Def.'s Opp'n 2 (citation omitted). Defendant also states that on the following day, the same court executed a grand jury subpoena *duces tecum* to Fedmet, requesting that Fedmet appear with certain specified documents, electronic records, or objects. *Id*. at 3.

[4] Defendant explained elsewhere in its brief that the abbreviation "HSI" refers to Homeland Security Investigations, a component of U.S. Immigration and Customs Enforcement ("ICE"). Def.'s Resp. in Opp'n to Pl.'s Mot. for Partial J. Upon the Admin. R. 3, ECF Nos. 57 (conf.), 58 (public) ("Def.'s Opp'n"). Referring to an affidavit by Customs official Mary Rivera, defendant states that the investigation by HSI "involves allegations that Fedmet has been declaring Chinese-origin MCBs, which are subject to antidumping and countervailing duty orders, to be instead of Vietnamese origin." *Id.* at 4 (citing *Aff. of Mary Rivera* ¶ 4, ECF No. 30–26 (Dec. 10, 2014)).

1. Review of the Decision to Require the 260.24% Single Transaction Bond under the APA "Arbitrary and Capricious" Standard of Review

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency . . . ." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*Motor Vehicle Mfrs. Ass'n*"). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) ("*Burlington Truck Lines*")). When reviewing an agency's explanation, a court "must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

The December 30, 2014 Entry/Summary Rejection Sheet for the December 2, 2014 entry stated that "[w]e have reason to believe the magnesia carbon bricks might be of Chinese origin and covered by antidumping and countervailing duty orders A-570–954–000/236% and C-570–955–000/24.24%." *Entry/Summary Rejection Sheet for Dec. 2 Entry*. It further stated that "[y]our continuous bond is insufficient to secure the revenue and ensure compliance with Customs laws and regulations" and that "pursuant to 19 C.F.R. § 113.13(d), we have determined that additional security in the form of a single transaction bond in the amount of [260.24%] . . . is required to safeguard the revenue." *Id*. The Entry/Summary Rejection Sheet concluded that "[t]he merchandise will not be released until the single transaction bond is received." *Id*.

The written explanation Customs provided for requiring an additional, single-entry bond as a condition of release of the merchandise on the December 2 entry is, essentially, that the additional bond is "required to safeguard the revenue," i.e., such antidumping and countervailing duty liability as is later determined upon liquidation of the entry, because of CBP's having "reason to believe the magnesia carbon bricks might be of Chinese origin." *Entry/Summary Rejection Sheet for Dec. 2 Entry.* Because the Entry/Summary Rejection Sheet does not identify CBP's "reason to believe the magnesia carbon bricks might be of Chinese origin," *id.*, the court cannot conclude that the document provides, in the words of *Motor Vehicle Mfrs. Ass'n*, 371 U.S. at 43, a "satisfactory explanation." Moreover, because a mere

reference to a "reason to believe" does not qualify as a statement of fact, the agency's written explanation fails to identify a "'rational connection between the facts found and the choice made.'" *Id*. (citation omitted).

Nor is the court able to conclude from the record that Customs "examine[d] the relevant data." *Id*. The record shows that the Customs official who issued the December 30, 2014 Entry/Summary Rejection Sheet was aware of the aforementioned criminal investigation and the underlying allegation against Fedmet. *Entry/Summary Rejection Sheet for Dec. 2 Entry*; *Dec. 15, 2014 Aff. of Lisa Olsen, Senior Import Specialist at the Port of Cleveland* ¶ 2, Tab 12 of Admin. R, ECF No. 30–13. Nevertheless, the evidence upon which the investigation was initiated is not on the administrative record. Nor does the record contain any information relevant to the December 2 entry that may have been developed as a result of that investigation. No record information specific to the merchandise on the December 2 entry is available on the record to indicate Chinese origin. The record information specific to that merchandise, albeit limited, indicates a country of origin of Vietnam. *See Entry Documents for Entry No. 336–3105573–3* at 1–10, Tab 16 to the Supplemental Admin. R., ECF No. 47–3.

According to the record, the December 30, 2014 Entry/Summary Rejection Sheet was issued by Lisa M. Olsen, a Senior Import Specialist at the port of Cleveland. *Entry/Summary Rejection Sheet for Dec. 2 Entry*. In an affidavit executed on January 20, 2015, Ms. Olsen stated that she informed Fedmet's broker that "Fedmet would likely have to provide an STB, as with Entry Nos. 336–3104829–0 and 336–3104919–9," the two October 21, 2014 entries. *Jan. 20, 2015 Aff. of Lisa Olsen* ¶ 3, Tab 19 to Supplemental Admin. R., ECF No. 47–13. Her affidavit offers no additional information that suffices to further explain or support the decision to reject the December 2, 2014 entry. In a separate affidavit executed on December 5, 2014, before rejection of the December 2 entry, Ms. Olsen discussed the basis for rejecting the two October 21, 2014 entries. *Dec. 15, 2014 Aff. of Lisa Olsen* ¶ 2. She stated that she had received a telephone call on October 27, 2014 from a special agent of Homeland Security Investigations ("HSI"), a component of U.S. Immigration and Customs Enforcement ("ICE"), and that the special agent had said that Fedmet "was under investigation for alleged transshipment of Chinese-origin refractory bricks through Vietnam, and that the country of origin of magnesia carbon bricks imported by Fedmet from Vietnam was believed to be China." *Id.* Ms. Olsen further stated that the special agent "called to my

attention the User Defined Rule ("UDR") for Fedmet . . . ." *Id.* at ¶ 3. Ms. Olsen concluded her December 5, 2014 affidavit by stating that "I was aware of the investigation of Fedmet prior to the October 27, 2014 call" from the special agent. *Id.* at ¶ 5. The record also contains an affidavit by Edward Wachovec, a Supervisory Import Specialist at the port of Cleveland, stating that "[a]s with Entry Nos. 336–3104829–0 and 336–3104919–9, Entry No. 336–3105573–3 'hit' on UDR 1057274." *Wachovec Jan. 21, 2015 Decl.* ¶ 5. The court cannot conclude from Ms. Olsen's affidavits that Customs possessed any information beyond the fact of, and the nature of, the investigation from which Customs could have formed a belief that the country of origin of the MCBs on the December 2 entry "might be" China. *See Entry/Summary Rejection Sheet for Dec. 2 Entry* at 1. Instead, the record suggests that Ms. Olsen issued the Entry/Summary Rejection Sheet based on the belief of the ICE special agent that Fedmet's MCBs were from China.

The record information specific to the origin of the merchandise on the December 2 entry included the statement of Vietnamese origin on the entry documentation, the bill of lading, and the commercial invoice for the shipment. *Entry Documents for Entry No. 336–3105573–3* at 1–10, Tab 16 to the Supplemental Admin. R., ECF No. 47–3 (conf.). The bill of lading and the invoice bear the name of the Vietnamese company that is described in Fedmet's November 12, 2014 submission. *See Oct. 9, 2014 Letter to the Port of Chicago, Submitted to the Port of Cleveland*, Tab 17 to Supplemental Admin. R., ECF Nos. 47–4 to 47–11 (conf.). In that submission, Fedmet attempted to demonstrate to Customs that the merchandise on Entry Nos. 336–3104829–0 and 336–3104919–9 was manufactured by a producer in Vietnam that was unaffiliated with Fedmet and that had manufactured the MCBs in Vietnam to Fedmet's specifications.[5] *Second Am. Compl.* ¶ 18.

In summary, the court concludes that the decision to require a single transaction bond as a condition of release of the December 2 entry was "arbitrary and capricious" within the meaning of the APA, 5 U.S.C. § 702. That decision was not supported by a satisfactory

[5] As defendant points out in response to plaintiff's Rule 56.1 motion, Def.'s Opp'n 32–33, the information in Fedmet's November 12, 2014 submission does not include or reference production records demonstrating or indicating that the particular merchandise on Entry No. 336–3105573–3 was manufactured by the Vietnamese producer indicated on the commercial invoice. The information in that submission includes, *inter alia*, business registration information related to that producer, what is described as photographs from the producer's plant containing images of MCBs produced for Fedmet and the equipment used to produce the MCBs, and Fedmet's reports from inspections of the producer. *See Oct. 9, 2014 Letter to the Port of Chicago, Submitted to the Port of Cleveland*, Tab 17 to Supplemental Admin. R., ECF Nos. 47–4 to 47–11 (conf.).

explanation, did not rest upon "'a rational connection between the facts found and the choice made,'" and was not made according to an examination of "the relevant data." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted).

Defendant raises various arguments as to why the court must sustain the decision to require the additional security for the December 2 entry. None of these arguments convinces the court.

In rebutting plaintiff's argument that Customs failed to make an origin determination, defendant argues that the court should sustain CBP's decision because it was not necessary for Customs to determine that the goods on the December 2 entry were of Chinese origin before requiring the 260.24% single transaction bond. Def.'s Opp'n 14. But here, the court need not decide the question of whether Customs erred in failing to base its decision on an *actual* determination of country of origin. Instead, the court must decide whether the decision Customs made under 19 U.S.C. § 1623(a)—that the single transaction bond was "necessary for the protection of the revenue"—is, on this administrative record, sustainable under the "arbitrary and capricious" standard of the APA.

At the same time, the issue of the country of origin of the merchandise on the December 2 entry clearly has relevance for this case. Unless China ultimately is determined to be the country of origin of that specific merchandise, there is no revenue to be protected by means of a single transaction bond. The risk to the revenue Customs perceived, therefore, can only have been the risk that the country of origin of that merchandise ultimately will be shown to be China. Accordingly, it is also relevant to the question of whether the agency decision challenged in this case is "arbitrary and capricious" that the record reveals no attempt by Customs to verify, or even seek further information from Fedmet regarding, the statements in the entry documentation that the country of origin of that merchandise is Vietnam.

Defendant argues that 19 U.S.C. § 1623(a) and 19 C.F.R. § 113.13(d) "vest the port director with significant discretion to require additional security based upon his or her 'belief' that such action is necessary," Def.'s Opp'n 15, and that CBP "unquestionably had the authority" to require the bond in the circumstance presented by this case, *id*. at 14. The regulation, 19 C.F.R. § 113.13(d), provides in pertinent part that "if a port director or drawback office believes that acceptance of a transaction secured by a continuous bond would place the revenue in jeopardy or otherwise hamper the enforcement of Customs laws or regulations, he shall require additional security." Defendant argues

that this regulation is entitled to "controlling weight." *Id*. at 15 (citations omitted).

The regulation at issue must be construed according to the statute authorizing its promulgation. The regulation is not correctly interpreted, or given "controlling weight," in a way that negates the obligation placed on Customs by Congress, which is to make a determination that the additional security it is considering requiring is "*necessary* for the protection of the revenue," 19 U.S.C. § 1623(a) (emphasis added), not merely "advisable" or "desirable" for the protection of the revenue. Congress afforded considerable discretion in § 1623(a), but the authority granted thereunder is not boundless. In requiring of Customs a decision that the contemplated security be "necessary," and in providing for any such decision to be subject to review under the APA, Congress placed limits on the agency's exercise of that statutory authority.

Defendant submits that CBP's decision relied upon "information received from HSI regarding the status of that investigation." Def.'s Opp'n 20. But as the court has observed, the administrative record filed by defendant does not demonstrate that Customs, as opposed to ICE, even possessed the information upon which the investigation was initiated or any information that the investigation had produced. The court, in considering plaintiff's claim, must "review the whole record or those parts of it cited by a party . . . ." 5 U.S.C. § 706. If, as defendant argues, any "information" was "received from HSI regarding the status of that investigation," Def.'s Br. 21, that would sustain the agency decision Fedmet challenges on arbitrary and capricious grounds, the court cannot consider that information because it is absent from the record.

Defendant argues, further, that CBP reasonably believed the December 2 entry presented a risk to the revenue, citing the fact that Fedmet was under investigation for transshipping Chinese MCBs through Vietnam and that "the investigation had in fact progressed to the point that a Federal judge had issued a search warrant," which according to defendant "means that the judge had determined that there was 'probable cause' to believe that Mr. Mattar's home contained evidence of a crime, (*i.e.*, documents that evidenced an ongoing criminal transshipment scheme)." Def.'s Opp'n 24 (citing U.S. Const. Amend. IV; Fed. R. Crim. P. 41(c),(d)). Defendant also asserts that "the existence of grand jury proceedings is *precisely* the type of fact that would support CBP's requirements of single transaction bonds." *Id.* at 29 (emphasis in original). Customs, however, did not place on the administrative record information indicating that the investiga-

tion had progressed to the point of grand jury proceedings. Instead, the record evidence that the investigation had included grand jury proceedings was provided to the court in a submission by Fedmet. *Search & Seizure Warrant & Subpoena to Testify before Grand Jury* (Sept. 16, 2014), Attach. 3 to Mem. in Supp. of Pl.'s Appl. for TRO & Mot. for Prelim. Inj. (Nov. 12, 2014), ECF No. 12 (conf.) ("Mot. for Prelim. Inj."). Additionally, even if Customs had placed on the record the fact of the grand jury proceedings, that information would not save the decision from Fedmet's challenge on arbitrary and capricious grounds. The court still would have no means of considering the information by which the search warrant was obtained or any evidence that the search warrant may have produced.

Defendant adds that "the investigation is not necessarily limited to entries made prior to September 2, 2014" (the date of issuance of the search warrant) and that "[t]here is no suggestion that the investigation was based upon information that Fedmet was transshipping for only a limited period of time, or that information gathered during the investigation would not relate to or have no bearing on activities conducted after September 3, 2014." Def.'s Opp'n 25. Defendant argues, further, that "documents related to all of the entries for which CPB requested a single transaction bond (including entry number 336–3105573–3 [the December 2 entry]) are directly covered by the scope of the search warrant and subpoena." *Id*. Defendant adds that "[i]n particular, documents covered under the search warrant and subpoena may reflect *where* the MCBs in entry no. 336–3105573–3 were manufactured." *Id*. at 26 (emphasis in original). Because the record lacks any of the information that caused the investigation to be initiated, any information by which the search warrant was obtained, and any information that the search warrant may have produced, defendant's arguments rest entirely upon speculation, not on the administrative record before the court.

Defendant next argues that it was not unreasonable that CBP was "acting upon information and advice received from ICE/HSI regarding its investigation and its belief that the goods are of Chinese origin" and that "[i]t is appropriate for CBP to accept the advice of, and give significant weight to, information provided by an HSI investigator without being privy to the specific information and documents in that investigator's possession." *Id*. at 28. Defendant explains, in this regard, that in 2004 certain investigative functions then performed by the U.S. Customs Service were transferred to ICE with the creation of the U.S. Department of Homeland Security and that "CBP now relies on ICE and HSI to conduct these investigations and fulfill that function, and it would not have information related to the inves-

tigation in its possession." *Id*. Defendant adds that "there are significant restrictions on ICE's ability to share specific information or documents with CBP," including prohibitions in Fed. R. Crim. P. 6(e) on the disclosure of grand jury information and practical concerns including, *inter alia*, protecting the integrity of the investigation. *Id*. at 28–29.

Defendant's arguments concerning restraints on disclosure of information fail to convince the court, for several reasons. First, the court's resolution of the issue raised by Fedmet's claim does not involve, and will not affect, the ability of ICE to conduct an investigation. With respect to the December 2 entry, the court's responsibility is limited to adjudicating Fedmet's claim challenging a bond requirement on that entry according to the APA "arbitrary and capricious" standard. Second, defendant would have the court presume that it was not possible for the government to place before the court, in a judicial proceeding conducted on an agency record, more than the minimal amount of information that Customs placed on the record in this case. And third, regardless of whether or not the court could agree with that presumption (the validity of which has not been demonstrated), the court still must conclude that the minimal information on the record is insufficient to allow it to sustain the challenged agency decision, particularly in light of the unsatisfactory explanation presented in the Entry/Summary Rejection Sheet for the December 2 entry. Concerning the factual basis for the ICE investigation, defendant appears to admit that Customs did not have "information related to the investigation in its possession," Def.'s Opp'n 28, yet defendant seeks an adjudication of Fedmet's claim that necessarily would rest on speculation that such information, were it on the record, would suffice to sustain the Customs decision that a single transaction bond for the December 2 entry was "necessary for protection of the revenue," 19 U.S.C. § 19 U.S.C. § 1623(a). Under the APA, Fedmet has a statutory right to contest the basis upon which CBP imposed the bond requirement on the December 2 entry. *See* 28 U.S.C. § 2640(e). As the Supreme Court has instructed, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted).

Defendant submits that the Customs decision was further supported by the UDR, which the National Targeting and Analysis Group ("NTAG") unit of CBP issued in cooperation with the HSI investigation, and because UDRs "carry significant weight with the ports." Def.'s Opp'n 24. This argument is unavailing. As the record shows and

defendant acknowledges, the UDR was created upon the recommendation of an HSI special agent who was conducting the investigation. *See Rivera Aff.* ¶¶ 6, 9; Def.'s Opp'n 24. The record fails to show that the UDR was created based on factual information (other than the fact of the investigation and search warrant) that Customs itself possessed, and included in the record, rather than upon the recommendation of an investigator employed by a different government entity.

The court concludes that the administrative decision by Customs to require a 260.24% single transaction bond as a condition for acceptance of Entry No. 336–3105573–3 cannot be sustained under the "arbitrary and capricious" standard of review imposed by the APA. Therefore, the judgment the court enters in this case will set the decision aside as unlawful.

2. Plaintiff Has Not Established Its Need for, or Entitlement to, Injunctive Relief

As relief on its claim in Count II, plaintiff seeks an order that not only holds unlawful the contested decision but also orders Customs "to admit the entry into the United States without the posting of an STB or other security" for payment of antidumping and countervailing duties. Pl.'s Br. 18. At oral argument, the court inquired of defendant whether, should the court set aside the contested decision to require a 260.24% bond on Entry No. 336–3105573–3, Customs promptly would release the merchandise. Oral Arg. Tr. 66 (May 5, 2015), ECF No. 70 (conf.). Because defendant was unable to provide the court and plaintiff an answer at that time, the court cannot determine whether the second form of requested relief will be necessary. Additionally, plaintiff has not, at this point, established its need for, or entitlement to, injunctive relief as plaintiff has not made a showing that the factors for injunctive relief have been met.[6] *See id.* at 20–21. Accordingly, the court is ordering additional procedure concerning the form of remedy to be granted upon the claim stated in Count II of the second amended complaint.

[6] That relief is in the form of an affirmative injunction and, accordingly, may be awarded only upon a showing that the factors for a permanent injunction—(1) irreparable harm, (2) inadequacy of the remedy at law, (3) balancing of the hardships, and (4) that the public interest would not be disserved by a permanent injunction—have been met. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

III. CONCLUSION AND ORDER

Upon consideration of defendant's Motion to Dismiss, plaintiff's Motion for Judgment upon the Agency Record, the responses to these motions and all other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the claim in Count I of plaintiff's second amended complaint be, and hereby is, dismissed as moot; it is further

ORDERED that plaintiff's Motion for Judgment on the Agency Record be, and hereby is, granted to the extent that such motion seeks declaratory relief that the agency decision challenged therein is unlawful; it is further

ORDERED that defendant's Motion to Dismiss the second amended complaint be, and hereby is, denied as to Count III of the second amended complaint; and it is further

ORDERED that plaintiff will confer with defendant and submit, by July 17, 2015, an agreed-upon schedule for the adjudication of the remaining claim in this litigation, set forth in Count III of the Second Amended Complaint, and an agreed-upon procedure and schedule for the court's resolution of the issue of the form of remedy to be granted upon the claim stated in Count II of the second amended complaint.

Dated: June 26, 2015
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Chief Judge

Slip Op. 15–70

UNITED STATES, Plaintiff, v. CTS HOLDING, LLC Defendant.

Before: Mark A. Barnett, Judge
Court No. 12–00327

[The court denies Defendant's motion for summary judgment.]

Dated: June 30, 2015

Paul D. Oliver, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for plaintiff. With him on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia M. Burke*, Assistant Director, and *Antonia R. Soares*, Trial Attorney.

Jason P. Wapiennik, Great Lakes Custom Law, of Livonia, MI, argued for defendant.

OPINION

Barnett, Judge:

Defendant,[1] CTS Holding, LLC ("CTS"), moves, pursuant to USCIT Rule 56, for summary judgment against Plaintiff, United States, in this duty recovery and penalty action. (*See generally* Mot. Summ. J. ("Mot.") (ECF No. 27).) Defendant contends that the court lacks subject matter jurisdiction over the penalty claim because U.S. Customs and Border Protection ("Customs") did not perfect its claim at the administrative level. (Mot. 7.) Defendant also asserts that Plaintiff may not seek recovery from it as successor in interest to TJ Ceramic Tile & Sales Import, Inc. ("TJ"), the entity that imported the subject merchandise. (Mot. 7–8.)[2] Plaintiff opposes the motion. (*See generally* Opp'n (ECF No. 34).) For the reasons provided below, the court denies Defendant's motion.

BACKGROUND AND PROCEDURAL HISTORY

This case arises from TJ's importation of forty entries of granite and stone polishing machines between August 6, 2004, and September 14, 2006.

A. TJ Ceramic, Inc.

TJ, a family business, sold ceramic, tile, marble, granite, and other related products from the time of its incorporation on January 2, 1962, through January 2011. (Philip Mularoni Dep. ("PM Dep.") 16:14–17, 24:4–6, Aug. 1, 2014; Kathleen Mularoni Dep. ("KM Dep.") 31:5, July 31, 2014.) Around 1975, Philip Mularoni ("Mr. Mularoni") and his brother, Richard Mularoni, purchased TJ from their parents, and, in 1991, Mr. Mularoni became the company's sole owner and president. (PM Dep. 13:7–18, 14:7–13.) In 1996, TJ began importing Italian straight edge polishing machinery with cut and polish capabilities, which accounted for 60% to 75% of the company's sales. (PM Dep. 24:21–23, 27:12–13, 60:9–14; Mot. App. ("DApp.") Tab R.) At the time of its dissolution, TJ operated under the following assumed names: Ceramic Tile Sales Inc., T.J. Imports Inc., TJ Marble & Granite Shop, Marmo Meccanica U.S.A., Sileston of Michigan, Inc., Delta Diamond Tools, and Marble & Granite Gallery. (Opp'n App. ("PApp.") 137–51.)

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[1] Plaintiff has voluntarily dismissed Philip Mularoni from the action. (ECF No. 44.)

[2] In its moving brief, Defendant asserted that Customs misclassified the subject merchandise and that the correct classification was duty free. (Mot. 8.) During oral argument, however, Defendant abandoned this argument. (Hr'g Tr. 10:35, May 20, 2015.)

On June 20, 2006, TJ secured a loan from Huntington National Bank ("Huntington"). (PApp. 202.) From 2007 to 2008, TJ's gross sales fell steeply. (PApp. 400, 412.) On June 18, 2010, Huntington filed suit against TJ and Mr. Mularoni in Michigan state court, claiming that they owed Huntington over four million dollars. (PApp. 202.) In the fall of 2010, TJ's assets were appraised at $335,000. (PM Dep. 93:17–22, 94:1–7.) On January 20, 2011, Huntington entered into a settlement agreement with TJ and agreed to dismiss the litigation, with prejudice and without costs, in exchange for $500,000. (PApp. 203–04.) Due to its continuing deterioration, TJ lacked the revenue to fund the settlement. (PM Dep. 104:10–13, 114:13–20.) To pay off Huntington, TJ relied on a $500,000 loan that it obtained from Tile Holding, LLC in exchange for rights, title, and interest in any and all of TJ's assets. *See infra*.On the last Friday of January 2011, Mr. Mularoni held an office meeting and announced TJ's closure.[3] (Michelle Wurst Dep. ("MW Dep.") 12:5–8, 21–23, July 31, 2014.) On July 15, 2011, six months after the company ceased operations, TJ entered into automatic dissolution. (DApp. Tab G.)

B. Tile Holding, LLC

On January 6, 2011, Tile Holding, LLC ("Tile Holding") was organized, with Mr. Mularoni as its resident agent. (PApp. 197, 199 (Tile Holding Articles of Organization).) John Moran, Mr. Mularoni's son-in-law, who had worked at TJ for eight years, served as its president. (KM Dep. 39:16–20, 106:17–25.) On January 20, 2011, the day of the aforementioned settlement agreement between TJ and Huntington, TJ secured a loan from Tile Holding to pay off Huntington. (PApp. 197.) Tile Holding received a security interest conveying all rights, title, and interest in any and all of TJ's assets, in return for a loan of $500,000. (DApp. Tab H.)

C. CTS Holding, LLC

CTS also was organized on January 6, 2011. (PApp. 108; DApp. Tab F; KM Dep. 49:19–25.) Its articles of organization list Kathleen Mularoni ("Ms. Mularoni"), Mr. Mularoni's wife, as 99% owner of the company, and Meghan Moran, the Mularonis' daughter, and wife of John Moran, Tile Holding's president, as owner of the remaining 1%. (PApp. 121–22; KM Dep. 59:10–21, 98:12–23.) A 2013 Dun & Bradstreet, Inc. report lists Mr. Mularoni as a member of CTS. (PApp. 244.)

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[3] It is unclear from the record why TJ closed down and whether Huntington or Tile Holding, LLC, foreclosed on TJ. (*Compare* Michelle Wurst Dep. 12:5–8, 21–23, July 31, 2014, *with* CTS Corp. Rep. Dep. 66:7–12, 22–25, Aug. 1, 2014.) This factual question, however, is immaterial to the present motion.

CTS raised capital by obtaining loans from Ms. Mularoni and friends of the Mularoni family (the "lenders"), totaling $500,000. (DApp. Tab H (documenting the source of $400,000 of the $500,000; the source of the remainder has not been addressed, but is immaterial for purposes of this motion).) As a condition for providing the loans, the lenders insisted that a new company be formed "that had no attachments to the old company [TJ] whatsoever" and that Ms. Mularoni serve as its manager. (KM Dep. 59:10–21; CTS Corp. Rep. Dep. ("CTS Dep.") 73:19–23, Aug. 1, 2014.) CTS subsequently lent this money to Tile Holding in exchange for the right, title, and interest in any and all assets of TJ. (DApp. Tab H; PApp. 208.)

CTS occupies the same location that TJ occupied, at 23455 Telegraph Road, Southfield, MI, 48033. (DApp. Tab J.) On December 1, 2010, thirty-seven days before CTS was organized, Ms. Mularoni signed a lease agreement, on behalf of CTS, with Mr. Mularoni, on behalf of Phil Mularoni Investments, for the building location. (PApp. 108, 113–20 (Lease Agreement).) CTS uses TJ's website address because the address "was pre-paid at the time CTS acquired it as an asset, and because CTS makes no internet sales and generally does not update its website to even accurately reflect store hours." (DApp. Tab F.) CTS's telephone number also is the same as TJ's. (MW Dep. 60:3–5.) When CTS initially received phone calls asking for TJ, Michelle Wurst, CTS's showroom manager, who answers the phones, would respond, "This is Ceramic Tile & Stone," and not claim to be TJ. (MW Dep. 60:21–22.) In addition, CTS possesses the TJ customer list, which contains information about past costumers and their purchases. (CTS Dep. 45:10–15.) CTS asserts that it does not solicit business from the list and that most of the company's sales come from one-time customers. (CTS Dep. 90:5.) CTS does not use any contractual relationships entered into by TJ, but does share common vendors for certain commodity items. (DApp. Tab F; CTS Dep. 54:2–19.)

On January 18, 2011, prior to TJ's entering into the security agreement with Tile Holding, and before Tile Holding entered into the security agreement with CTS, TJ placed an order with Jan Signs II to change the store's sign. (DApp. Tabs F, H, L.) The new sign reads "Ceramic Tile and Stone / T.J. Granite and Stone." (CTS Dep. 64:10–22.)

CTS imports Italian tile, marble, granite, and stone and sells Italian straight edge polishing machinery with cut and polish capabilities. (MW Dep. 31:22–25.) CTS primarily markets itself through a local newspaper. (CTS Dep. 45:22–23.) The company's name is written as "Ceramic Tile and Stone/ T.J. Granite and Stone" on various advertising fliers, company forms, and business cards. (DApp. Tabs

M, N.) CTS conducts business under multiple assumed names: T.J. Granite & Stone, T&J Marble & Stone, Delta Diamond Tooling, Ceramic Tile & Stone, and Marmomachinery. (PApp. 105.)

D. The Employees

After TJ closed its business in January 2011, its eight employees began working at CTS the following week. (MW Dep. 13:11–16, 15:3–4, 52:10–11.) Ms. Wurst, TJ's office manager, became the manager of the CTS Showroom. (KM Dep. 95:5–19.) Her showroom manager duties are similar to her office manager duties at TJ, which included paying bills, payroll, invoicing, and purchase orders. (MW Dep. 15:17–25, 16:18–21; KM Dep. 99:14–19.)

Ms. Mularoni had begun working for TJ in 2006. (KM Dep. 23:1–6.) She conducted outside sales for TJ and worked with "interior designers, architects, [and] friends selling granite for countertops." (KM Dep. 15:3–5.) Although employed by TJ, Ms. Mularoni said that she was unaware of the products the company sold and the litigation stemming from disputes with Plaintiff and Huntington. (KM Dep. 23:19–24, 30:2–12.)

As manager of CTS, she signs all legal documents, deals with the company's insurance, pays taxes, and conducts outside sales. (KM Dep. 99:2–5.) Despite being the manager, Ms. Mularoni said that she lacks knowledge of certain of the company's decisions. (KM Dep. 69:1–3, 6–9.) For example, she said that she did not know who decided that CTS would obtain all of TJ's assets, but thought she might have made the decision. (KM Dep. 71:3–10, 19–23.) She also said that she knew that CTS gave Tile Holdings $500,000 to pay a debt, but was unsure what the debt was for. (KM Dep. 72:8–12.) Ms. Mularoni seeks advice and counsel from Mr. Mularoni on how to run the company. (KM Dep. 99:24–25, 100:1.)

Mr. Mularoni was president of TJ and now directs CTS's operations and business activities. (DApp. Tab F; PM Dep. 10:14–24, 11:2–11, 12–17; MW Dep. 30:3–6; KM Dep. 94:1–4, 7–9.) By no later than 2013, Mr. Mularoni had become CEO of CTS. (PApp. 244.)

E. The Subject Imports

TJ imported Italian straight edge polishing machinery with cut and polish capabilities between August 6, 2004, and September 14, 2006, and classified them under HTSUS 8464.20.1000, "polishing machines: for processing of semi-conductor wafers," with a duty rate of free. (Mot. 2 (citing Compl. ¶¶ 8–9); PApp. 520; DApp. Tab C.) In 2006, Customs initiated an investigation and determined that the imports were misclassified, concluding that they were polishing machines for polishing stone and ceramic, under HTSUS 8464.20.5090, with a duty

rate of 2% *ad valorem*.[4] (PApp. 52021; Answer (ECF No. 15) ¶ 10.)

F. The Administrative Proceedings

On January 24, 2008, Customs issued a Pre-Penalty Notice to TJ, for "forty consumption entries covering imports of granite and stone polishing machines between August 6, 2004 and September 14, 2006." (PApp. 215–17 ("Pre-Penalty Notice").) The Pre-Penalty Notice stated that the subject imports "were incorrectly classified as duty free under 8464.20.1000 HTSUS, as polishing machines that work on semi-conductors," and should have been classified under 8464.20.5090 HTSUS, with a duty rate of 2% *ad valorem*. (Pre-Penalty Notice.) The Pre-Penalty Notice further stated, "the act or omission of misclassifying the goods was material and false," and that TJ, its agents, or employees acted with negligence, by failing "to exercise reasonable care and competence in the filing of entries with the material false classification." (Pre-Penalty Notice.) The Pre-Penalty Notice stated a loss of revenue in the amount of $121,368.76 and proposed a monetary penalty of $242,737.52, "a sum equal to two times the loss of revenue, which is the lesser of the domestic value of the merchandise or two times the loss of duties, taxes and fees." (Pre-Penalty Notice.)

TJ submitted a petition to Customs for cancellation of the Pre-Penalty Notice on July 25, 2008. (PApp. 316.) Among other things, TJ asserted that the alleged misclassification "was not material or false, but was the result of clerical error and/or inadvertence." (PApp. 326.) On October 15, 2008, TJ made a presentation to Customs, in which it responded to the Pre-Penalty Notice and requested waiver and mitigation of the proposed penalty. (PApp. 356, 365.) That same day, TJ, through Mr. Mularoni, executed a two-year waiver of the statute of limitations, covering the subject entries. (PApp. 366.) TJ renewed the waiver on July 24, 2009. (DApp. Tab J.) The statute of limitations expired for TJ on October 15, 2012. (PApp. 379; DApp. Tab J.)

After reviewing TJ's response to the Pre-Penalty Notice, Customs issued a Penalty Notice to TJ on October 30, 2008. (PApp. 371–72 ("Penalty Notice").) Customs found that the violation of the statutes

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[4] Chapter 84 of the HTSUS provides:

8464	Machines tools for working stone, ceramics, concrete, asbestos-cement or like mineral materials or for cold working class:
8464.10.00	Sawing machine.....FREE
	....
8464.20	Grinding or polishing machines:
8464.20.1000	For processing semiconductor wafers .....FREE
8464.20.50	Other..... 2%
	....
8464.20.5090	Other . . . .

cited in the Pre-Penalty Notice occurred and concluded that mitigation of the penalty was not warranted. (Penalty Notice.) The Penalty Notice stated that "the act or omission of misclassifying the goods was material and false, resulting in an actual loss of revenue of $77,220.32." (Penalty Notice.) This figure was lower than that in the Pre-Penalty Notice because it reflected a $4,363.72 collection of duties. (Penalty Notice.) The Penalty Notice also demanded a penalty payment of $242,737.52. (Penalty Notice.) It did not state TJ's level of culpability. Following the paragraph summarizing the violation is the phrase "COMMERCIAL FRAUD 1592," which did not appear in the Pre-Penalty Notice. (*Compare* Penalty Notice, *with* Pre-Penalty Notice.)

On August 28, 2009, TJ submitted a petition for mitigation of the penalty. (PApp. 355.) The petition requested cancellation of the penalty and argued that "under all the circumstances it is extremely difficult to craft a substantive response . . . [and] the legitimate issues raised in the pre-penalty [notice] were never addressed by the Port." (PApp. 356–57.) On April 23, 2010, Customs offered to mitigate the penalty assessed against TJ to $121,368.76, equal to the loss of duties, because TJ had no prior violations and had taken "immediate remedial action." (PApp. 486, 493.) Customs informed TJ that if TJ did not pay the outstanding loss of duties, $77,220.32, or file a supplemental petition within sixty days, Customs would enforce the full penalty against it. (PApp. 486, 493.) On July 12, 2010, TJ submitted a supplement to the petition, (PApp. 425), and, on October 1, 2010, submitted additional materials in response to Customs' "invitation to append additional arguments" to the supplemental petition, (PApp. 388). Of note, TJ argued that it is a small business entity and entitled to waiver of penalty under the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), and that it satisfied the SBREFA's "absence of fraud" requirement for waiver. (PApp. 389, 392.) TJ additionally stated that "the alleged violation involves a claim of negligence and did not involve criminal or willful conduct." (PApp. 391.) It noted that the lack of criminal or willful conduct was "confirmed by the customs pre-penalty and penalty notices issued in this matter alleging negligence." (PApp. 392.) Further, TJ stated that "[C]ustoms maintained its allegation of negligence claims in headquarters internal advice letter [sic]." (PApp. 392.)

On January 11, 2011, and July 15, 2011, TJ submitted offers in compromise, which Customs ultimately rejected. (Compl. ¶ 20.) In the first offer, TJ stated that it was willing to pay Customs $89,320.65. (PApp. 289.) The second offer raised the figure to $90,892.31. (PApp. 256.)

G. The Present Suit

On October 12, 2012, Plaintiff filed suit against Defendant, seeking recovery of unpaid Customs duties and penalties, pursuant to 19 U.S.C. § 1592. (Compl. ¶ 1.) Customs asserts that Defendant is liable for $242,737.52 in penalties and $13,931.54 in duties for negligence-based violations committed by TJ and CTS. (Compl. ¶ 43.) Defendant now moves for summary judgment, pursuant to USCIT Rule 56. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1582.

LEGAL STANDARD FOR SUMMARY JUDGMENT

The court will grant summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" based on the "materials in the record." USCIT R. 56(a), (c)(1). The burden of establishing the absence of a genuine issue of material fact lies with the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The court must view the evidence in the light most favorable to the non-movant and may not weigh the evidence, assess the credibility of witnesses, or resolve issues of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986) (citation omitted). A genuine factual issue exists if, taking into account the burdens of production and proof that would be required at trial, sufficient evidence favors the non-movant such that a reasonable jury could return a verdict in that party's favor. *Id.* at 248.

To defeat summary judgment once the moving party has met its burden, the nonmoving party may not simply rely on the pleadings, but must "'cit[e] to particular parts of materials in the record' to establish the 'presence of a genuine dispute' warranting trial." *Macclenny Prods. v. United States*, 38 CIT __, __, 963 F. Supp. 2d 1348, 1358 (2014) (brackets in original) (quoting USCIT R. 56(c)). "'[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.'" *Id.* (quoting USCIT R. 56(e)(2)). In other words, there must exist more than "a scintilla of evidence" to support the non-moving party's claims, *Anderson*, 477 U.S. at 252; conclusory assertions will not suffice, *see* USCIT R. 56(e). Similarly, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts" when ruling on the motion. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

DISCUSSION

A. Perfection of the Penalty Claim

1. Defendant's Contentions

Defendant asserts that the court lacks subject matter jurisdiction over Plaintiff's penalty claim because Customs failed to perfect its claim, pursuant to 19 U.S.C. § 1592(b), at the administrative level.[5] (Mot. 8–10.) Specifically, it avers that, although the Pre-Penalty Notice alleged a violation based on negligence, the Penalty Notice "made no allegation to the level of culpability (or alternatively, alleged fraud where it says 'COMMERCIAL FRAUD 1592.'[)]"[6] (Mot. 10 (citing DApp. Tabs C & D).) According to Defendant, Customs' failure to include the level of culpability in the Penalty Notice, or the agency's changing the level of culpability in the Penalty Notice, is fatal to the penalty claim. (Mot. 10.)[7]

2. Plaintiff's Contentions

Plaintiff responds that Customs fulfilled the procedural requirements for bringing a penalty claim. (Opp'n 13–16.) It asserts that when Customs issued the Pre-Penalty Notice for a negligence violation, Customs proposed a monetary penalty of $242,737.52, "representing two times the loss of duties, which is the formula for negligence-based penalties under 19 U.S.C. § 1592(c)(3)(ii)." (Opp'n

[5] Defendant characterizes Customs' alleged failure to state expressly the level of culpability in the penalty notice as a failure of Customs to perfect its penalty claim, thereby depriving this court of subject matter jurisdiction. It is well settled, however, that "'when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.'" *United States v. Nitek Elecs., Inc.*, 36 CIT __, __, 844 F. Supp. 2d 1298, 1303 (2012) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)). Because § 1592(b) does not indicate that Customs' administrative procedures are jurisdictional, and these administrative procedures are not restated or otherwise provided for in the statutory provisions that provide the court with subject matter jurisdiction over penalty actions, 28 U.S.C. § 1582, the court concludes that these administrative procedures are not jurisdictional. *See Nitek Elecs., Inc.*, 36 CIT at __, 844 F. Supp. 2d at 1303.

[6] Defendant concedes that, "with the exception of the difference in the actual loss of revenue, the penalty notice is a verbatim rendering of paragraph 4 of Exhibit A of the Pre-Penalty Notice, without any inclusion of the level of culpability found in paragraph 5 of the pre-penalty notice." (Mot. 10.)

[7] Defendant argues that, during the administrative proceedings, Customs alleged that the subject merchandise were "polishing machines" and fell under HTSUS 8464.20.5090. (Mot. 27 (citing DApp. Tabs C & D).) Now, however, Plaintiff avers that the merchandise are "polishing machines" under HTSUS 8464.20.4090, a subheading which does not exist. (Mot. 27 (citing Compl. ¶ 10).) Defendants insist that this discrepancy deprives the court of subject matter jurisdiction because "the administrative claim for which Customs is seeking recovery simply does not exist." (Mot. 27 (citation and quotation marks omitted).) It is clear from the documents submitted to the court that the difference between the alleged HTSUS subheadings is a clerical error. (*See, e.g.*, Opp'n 24 n.7.) The court declines to dismiss Plaintiff's claim on this basis.

14 (citing Pre-Penalty Notice).) The subsequent penalty notice contained the same proposed monetary penalty. (Opp'n 14 (citing PApp. 213).) Plaintiff argues that the identical proposed penalty amounts, which were two times the alleged loss of duties, "by definition, sought a negligence-based penalty under 19 U.S.C. § 1592(c)(3)(ii)" and put Defendant on notice that negligence was the asserted level of culpability. (Opp'n 14.) Plaintiff further contends that Defendant had notice that Customs sought a negligence-based penalty because, in efforts to mitigate the penalty at the administrative level, TJ repeatedly acknowledged that Customs had alleged a negligence-based penalty claim against it. (Opp'n 14–15 (citing PApp. 318, 355, 389, 391).) Plaintiff also urges that the "COMMERCIAL FRAUD 1592" reference in the Penalty Notice does not indicate a change to the alleged culpability level because the Fines, Penalties & Forfeitures Division of Customs, which issues pre-penalty and penalty notices, "refers colloquially to all 1592 penalty actions as 'commercial fraud.'" (Opp'n 15 (citing HB 4400–01B, Seized Asset Management and Enforcement Procedures Handbook, Office of Field Operations, FP&F Division, U.S. CBP, Ch. 13 Penalty Statutes, § 13.1 (July 2011)).)

3. Analysis

To bring a penalty claim before the court, "Customs must perfect its penalty claim in the administrative process" according to the procedures that Congress established in subsection (b) of 28 U.S.C. § 1592.[8] *United States v. Jean Roberts of Cal., Inc.*, 30 CIT 2027, 2030 (2006). That subsection sets forth, in relevant part, the following pre-penalty and penalty procedures:

> If the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) of this section and determines that further proceedings are warranted, it shall issue to the person concerned a written notice of its intention to issue a claim for a monetary penalty [a pre-penalty notice]. Such notice shall–(i) describe the merchandise; (ii) set forth the details of the entry or introduction, the attempted entry or introduction, or the aiding or procuring of the entry or introduction; (iii) specify all laws and regulations allegedly violated; (iv) disclose all the material facts which establish the alleged violation; *(v) state whether the alleged violation occurred as a result of fraud, gross negligence, or negligence*; (vi) state the estimated

[8] Section 1592 "does not provide any administrative process for imposing lost duty claims." *Nitek Elecs., Inc.*, 36 CIT at __, 844 F. Supp. 2d at 1309. The Plaintiff, therefore, "need not exhaust administrative remedies" before bringing a duty recovery claim. *Id.* (citation omitted).

> loss of lawful duties, taxes, and fees, if any, and, taking into account all circumstances, the amount of the proposed monetary penalty; and (vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

19 U.S.C. § 1592(b)(1)(A) (emphasis added).

> After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (1), the Customs Service shall determine whether any violation of subsection (a) of this section, as alleged in the notice, has occurred. . . . If the Customs Service determines that there was a violation, it shall issue a written penalty claim to such person. The written penalty claim *shall specify all changes in the information provided under clauses (i) through (vi) of paragraph (1)(A)*. . . . At the conclusion of any proceeding under such section 1618, the Customs Service shall provide to the person concerned a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

19 U.S.C. § 1592(b)(2) (emphasis added). Thus, Customs must issue a Pre-Penalty Notice, "followed by a Penalty Notice upon Customs' determination that a violation has occurred." *United States v. Rotek, Inc.*, 22 CIT 503, 509 (1998) (citing 19 U.S.C. § 1592(b)(2)). The Penalty Notice must "specify all changes in the information provided [in the Pre-Penalty Notice]." *Id.* (brackets in original) (citation and quotation marks omitted). A principal function of this notice procedure is "'to give an importer an opportunity to fully resolve a penalty proceeding before Customs, before any action in [this court].'" *United States v. Ford Motor Co.*, 463 F.3d 1286, 1298 (Fed. Cir. 2006) (quoting *United States v. Optrex Am., Inc.*, 29 CIT 1494, 1500 (2005)); *accord Jean Roberts of Cal. Inc.*, 30 CIT at 2035.

Defendant concedes that, "with the exception of the difference in the actual loss of revenue, the penalty notice is a verbatim rendering of paragraph 4 of Exhibit A of the Pre-Penalty Notice, without any inclusion of the level of culpability found in paragraph 5 of the pre-penalty notice." (Mot. 10.) Moreover, the court finds that Defendant could not reasonably have interpreted the phrase "COMMERCIAL FRAUD 1592" at the bottom of the Penalty Notice to indicate that Customs was changing the level of culpability asserted in the Pre-Penalty Notice. In the Pre-Penalty Notice, Customs set forth the

level of culpability in a section expressly entitled "DETERMINATION OF CULPABILITY" and explained the asserted level of culpability in a textual sentence. (Pre-Penalty Notice ("Negligence-TJ Ceramic . . . failed to exercise reasonable care and competence in the filing of entries with the material false classification described above.").) In the Penalty Notice, by contrast, the phrase "COMMERCIAL FRAUD 1592" is not a part of a sentence and is set apart from the document's primary text. (Penalty Notice.) Customs thus did not reasonably appear to assert a different level of culpability in the Penalty Notice than in the Pre-Penalty Notice. Instead, in the Penalty Notice, Customs omitted the level of culpability that it already had identified in the Pre-Penalty Notice, as statute permits. *See* 19 U.S.C. § 1592(b); *Rotek, Inc.*, 22 CIT at 509 (noting that Penalty Notice need specify only "all changes in the information provided [in the Pre-Penalty Notice]") (brackets in original) (citation and quotation marks omitted). Customs therefore abided by the procedural requirements of § 1592(b) and perfected its negligence claim against Defendant.

In addition, Defendant's attempts to resolve the penalty claim before Customs, prior to Plaintiff's bringing this action, demonstrate that Defendant received sufficient, actual notice that the claim sounded in negligence. *See United States v. KAB Trade Co.*, 21 CIT 297, 300 (1997) (citing *United States v. Dantzler Lumber & Export Co.*, 16 CIT 1050, 1059, 810 F. Supp. 1277, 1285 (1992)) (holding that court may find notice "where it is evident that the defendant is or should be aware of his potential liability"). After receiving the Pre-Penalty Notice, Defendant submitted to Customs a Petition for Cancellation of Pre-Penalty Notice, in which Defendant stated that the penalty claim was based on negligence. (PApp. 318.) After receiving the Penalty Notice, which did not mention a level of culpability, Defendant submitted a Second Supplemental Petition for Mitigation, in which Defendant specified that the penalty action was based on negligence.[9] (PApp. 391, 392 ("This fact is further confirmed by the

[9] The court declines to adopt Plaintiff's argument that the Penalty Notice indicated negligence because the penalty level was twice the alleged duty owed. While the penalty amount stayed the same between the Pre-Penalty Notice and Penalty Notice, thereby supporting a lack of change in culpability, the multiple of the duty, by itself, does not indicate a negligence level of culpability. 19 U.S.C. § 1592(c) states the maximum penalty levels allowed for each potential level of culpability in a penalty action. *See* 19 U.S.C. § 1592(c)(1)-(3) (establishing maximum penalty for fraud as "the domestic value of the merchandise; for gross negligence as the lesser of "the domestic value of the merchandise" or "four times the lawful duties, taxes, and fees[;]" and for negligence as the lessor of "the domestic value of the merchandise" or "two times the lawful duties, taxes, and fees"). The statute consequently would permit Customs to assess a penalty level of twice the alleged duty owed in penalty actions based in negligence, gross negligence, or fraud.

customs pre-penalty and penalty notices issued in this matter alleging negligence.").) The petition also sought relief under the SBREFA, (PApp. 389, 392), which is available for only violations that "did not involve criminal or willful conduct, and did not involve fraud or gross negligence," i.e. violations based on negligence. *Jean Roberts of Cal., Inc.,* 30 CIT at 2037.

Because Plaintiff complied with the procedural requirements of § 1592(b), and Defendant had notice that the penalty claim sounded in negligence, the court denies Defendant's motion for summary judgment on this issue. *See Rotek*, 22 CIT at 510–11.

B. Whether Customs May Recover from CTS

1. Defendant's Contentions

Defendant asserts that the court cannot hold CTS liable for TJ's alleged § 1592 violations as TJ's successor corporation. (Mot. 20–27.) It avers that § 1592 contains no language referring to successors in interest, or similar terms, and only employs the word "person," which the Tariff Act defines to encompass "'partnerships, associations, and corporations.'" (Mot. 12 (citing 19 U.S.C. § 1592(a)(1), (b)(1)(A)) (quoting 19 U.S.C. § 1401(d)).) According to Defendant, if Congress wanted to include successors in the statute, it would have included a specific term, as it did in 19 U.S.C. § 1313(s), which makes drawback eligibility benefits available to "drawback successors." (Mot. 12–13.)

Defendant also argues that the court should not read successor liability into § 1592(b) because "it appears the only time the courts have created successor liability without a clear and express statutory mandate is under labor and CERCLA [the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*,] legislation," due to the laws' remedial purposes. (Mot. 14 & n.3.) Section 1592(b) penalty actions, on the other hand, are not remedial and are meant to deter.[10] (Mot. 14–15.)

Defendant further argues that, if the court determines that successor liability is available under § 1592, Plaintiff's complaint alleges only that CTS is a "mere continuation" of TJ and avers that the facts do not support a finding that CTS is liable for TJ's violations on this ground. (Mot. 18–19 (citing Compl. ¶¶ 26–31).) Defendant then asserts that, under Michigan law, it does not qualify as a "mere continuation" of TJ because TJ and CTS have different management and personnel; they do not have the same general business operation; there is no continuity of shareholders between them, nor did CTS's

[10] Defendant concedes that recovery actions under § 1592(d) are remedial, but contends that interpreting the cause of action to include successors would require the court to expand the definition of "person" to encompass successors within the entire statute. (Mot. 15.)

purchase of TJ's assets involve the sale of stock; TJ dissolved more than six months after CTS's formation; and CTS has not assumed any of TJ's liabilities. (Mot. 21–27.)

2. Plaintiff's Contentions

Plaintiff asserts that the court repeatedly has held successors liable for the Tariff Act violations of their predecessors. (Opp'n 16.) Plaintiff discounts Defendant's assertion that courts may impose successor liability only for remedial purposes within the international trade context. (Opp'n 17.) Moreover, Plaintiff contends that Congress incorporated successor liability into the Tariff Act's definition of "person." It notes that 19 U.S.C. § 1592(a) prohibits negligent actions of a "person," which the statute defines as including "partnerships, associations, and corporations," in 19 U.S.C. § 1401(d). (Opp'n 17.) In turn, 1 U.S.C. § 5 states that the word "company" or "association," when used in a federal statute, encompasses the "'successors and assigns of such company or association, in like manner as if these last-named words of similar import, were expressed.'" (Opp'n 17–18 (quoting 1 U.S.C. § 5).) Therefore, because the Tariff Act defines "persons" to include associations and corporations, "persons" by extension also encompass those associations' and corporations' successors and assigns. (Opp'n 18.)

Plaintiff also avers that there are genuine issues of material fact about whether CTS is a mere continuation of TJ. Plaintiff asserts that the firms have common owners, management, and employees; perform the same general business; possess similar assumed names; and share the same place of business. CTS also paid TJ's debts. (Opp'n 16–24.)

3. Analysis

a. Successor Liability

The first issue the court must address is whether, in § 1592 penalty and recovery actions, as a matter of law, the court may hold a successor corporation liable for the violations of its predecessor. The court previously has held that corporate successors may be held liable for their predecessors' actions in duty recovery and penalty actions. *See, e.g.*, *United States v. Adaptive Microsys., LLC*, 37 CIT __, __, 914 F. Supp. 2d 1331, 1338–42 (2013); *United States v. Ataka Am., Inc.*, 17 CIT 598, 600, 826 F. Supp. 495, 498 (1993); *see also United States v. KAB Trade Co.*, 21 CIT 297, 300–301 (1997) (stating in dicta that corporation that is "continuation" of another firm will be held liable for latter firm's liabilities in § 1592 actions). For the following rea-

sons, the court considers that a successor corporation may be held liable for the prior firm's liabilities.

When engaging in statutory construction, the court must "begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). If the statute is "unambiguous and 'the statutory scheme is coherent and consistent,'" the inquiry ceases. *Id.* (quoting *Robinson*, 519 U.S. at 340).

With respect to penalty claims, § 1592 states, in relevant part:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no *person*, by fraud, gross negligence, or negligence—(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or (ii) any omission which is material . . . .

19 U.S.C. § 1592(a)(1) (emphasis added). The duty recovery portion of the statute states:

> Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.

19 U.S.C. § 1592(d). While it is unambiguous that Customs may commence penalty actions against "persons" who violate the statute, the absence of the word "person," or any other limiting term, in the duty recovery provision indicates that its reach is at least as broad as that of the penalty provision. 19 U.S.C. § 1401(d) defines "person," as used in the Tariff Act, as "includ[ing] partnerships, associations, and corporations." 19 U.S.C. § 1401(d). Section 5 of the Dictionary Act further provides that "[t]he word 'company' or 'association', when used in reference to a corporation, *shall be deemed to embrace the words 'successors and assigns of such company or association'*, in like manner as if these last-named words, or words of similar import, were expressed." 1 U.S.C. § 5 (emphasis added). Reading these provisions together, the word "person" in § 1592 properly includes cor-

porations and their successors and assigns. As a matter of legal interpretation, therefore, CTS may be found to be liable for TJ's alleged violations of the statute.[11]

b. Choice of Law

The court has, in varying cases, applied both state law and federal common law when determining whether a successor corporation is liable for the actions of its predecessor pursuant to § 1592. *Compare Adaptive Microsys., LLC*, 37 CIT at __, 914 F. Supp. 2d at 1338 (applying Wisconsin law in penalty and recovery actions), *with Ataka Am., Inc.*, 17 CIT at 600, 826 F. Supp. at 498 (applying federal common law in recovery action). The court need not address this issue at this time, however, because Michigan law and federal common law on successor corporate liability are similar and would appear to lead to the same outcome in the present motion.[12]

Michigan law adheres to the "'traditional rule of nonliability for corporate successors who acquire a predecessor through the purchase of assets.'" *Stramaglia v. United States*, 377 F. App'x 472, 474 (6th Cir. 2010) (quoting *Foster v. Cone-Blanchard Mach. Co.*, 460 Mich. 696, 702 (1999)). The state, however, recognizes "five narrow exceptions" to the rule, only one of which is relevant to the present case: "where the transferee corporation [i]s a mere continuation or reincarnation of the old corporation." *Id.* at 475 (quoting *Foster*, 460 Mich. at 702);

[11] Because statutory language leads to this result, the court does not reach Defendant's argument that the court should not infer successor liability into penalty actions. *See Barnhart*, 534 U.S. at 450. Moreover, Defendant's argument that the use of the term "drawback successor" in 19 U.S.C. § 1313(s) demonstrates that, if Congress had wished for successors to be included in § 1592, it would have incorporated the word "successor" into the statute, is unavailing. Section 1313 establishes multiple complex duty drawback procedures that require context-specific terms of art to explain. *Cf. Merck & Co. v. United States*, 30 CIT 726, 731, 435 F. Supp. 2d 1253, 1258 (2006) (noting that duty drawback statutory scheme "is inartfully drafted"), *aff'd*, 499 F.3d 1348 (Fed. Cir. 2007). One such term of art, which is used nowhere else in the U.S. Code, is "drawback successor," the definition of which Congress lays out in § 1313(s)(3). The court is not persuaded that the term's singular appearance in § 1313 illuminates the meaning of "person" in § 1592.

[12] Supreme Court rulings suggest that the court should favor applying state law in these contexts, holding that "cases in which judicial creation of a special federal rule would be justified . . . are . . . few and restricted." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (ellipses in original) (citations and quotation marks omitted). "[T]he existence of related federal statutes" does not indicate that Congress intended to create a body of federal common law, "for Congress acts . . . against the background of the total *corpus juris* of the states." *Id.*(ellipses in original) (citations and quotation marks omitted). Therefore, the Court has concluded that, "when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." *Id.* (ellipses in original) (citations and quotation marks omitted).

Craig v. Oakwood Hosp., 471 Mich. 67, 97 (2004) (footnote omitted). To discern whether a corporation is the mere continuation of another, the court "examine[s] the totality of the circumstances and engage[s] in a multi-factor analysis." *Stramaglia*, 377 F. App'x at 475 (citing *Pearce v. Schneider*, 217 N.W. 761, 762 (Mich. 1928); *Ferguson v. Glaze*, No. 268586, 2008 WL 314544, at *5 (Mich. App. Feb. 5, 2008); *Shue & Voeks, Inc. v. Amenity Design & Mfg., Inc.*, 511 N.W.2d 700, 702 (Mich. App. 1993)). "The only indispensable prerequisites to application of the exception appear to be common ownership and a transfer of substantially all assets," *id.* (footnote omitted) (citing *Pearce*, 217 N.W. at 762; *Gougeon Bros. v. Phoenix Resins, Inc.*, No. 211738, 2000 WL 33534582, at *2 (Mich. App. Feb. 8, 2000); *Shue & Voeks, Inc.*, 511 N.W.2d at 702); *accord City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 251 (6th Cir. 1994), although "no Michigan court has found these factors alone sufficient to justify imposition of successor liability," *Stramaglia*, 377 F. App'x at 475 n.2. After these two factors, the most important element is whether the successor corporation conducts the same business as the predecessor. *Id.* at 475 (citing *Pearce*, 217 N.W. at 762; *Shue & Voeks, Inc.*, 511 N.W.2d at 702; *Ferguson*, 2008 WL 314544, at *2). The court also may consider such factors as whether the new corporation retained the old corporation's employees and officers, maintained the old corporation's place of business, or selectively repaid the old corporation's debts. *Id.* at 475–76 (citing *Ferguson*, 2008 WL 314544, at *5; *Shue & Voeks, Inc.*, 511 N.W.2d a 702; *Gougeon Bros.*, 2000 WL 33534582, at *2).

Under federal common law, "a corporate successor is responsible for its predecessor's debts . . . if . . . (3) the successor is a mere continuation of its predecessor." *Ataka*, 17 CIT at 600–01, 826 F. Supp. at 498 (citing *Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451, 1456 (11th Cir. 1985) (citing law of several federal district and circuit courts)). "In other words, [if] the purchasing corporation is merely a 'new hat' for the seller, with the same or similar management and ownership." *Bud Antle, Inc.*, 758 F.2d at 1458 (citation omitted). A continuation occurs when "a new corporation, which purchases all the assets of the old, proceeds exactly as if it were the old corporation." *Ataka*, 17 CIT at 602, 826 F. Supp. at 499 (citation omitted). A continuity of officers, directors, and stockholders are "key element[s]" indicative of a continuation. *Id.* (citing *Bud Antle, Inc.*, 758 F.2d at 1458–59); *see KAB Trade Co.*, 21 CIT at 301 (noting that two companies "had the same registered agent and shared at least one officer," and "had the same address and engaged in the same import activity").

c. Discussion

The court finds that there are genuine issues of material fact as to whether CTS is a mere continuation of TJ and, thereby, liable for TJ's actions, which prevent the court from granting summary judgment for CTS. From its inception, TJ was a family-run business and, after 1991, completely owned by Mr. Mularoni. (PM Dep. 13:12–18, 14:7–11, 16:14–17; KM Dep. 31:5.) According to CTS's operating agreement, dated January 2011, Mr. Mularoni's wife, Ms. Mularoni, owned 99 percent of the company, and their daughter owned the remaining one percent. (PApp. 121–22; KM Dep. 98:13–18.) Documents from October 2013 and August 2014, however, indicate that Mr. and Ms. Mularoni are CTS's members, (PApp. 244, 246), which makes them owners of the firm under Michigan law. *See Runco v. Francis*, No. 317926, 2015 WL 3796060, at *4 (Mich. Ct. App. June 18, 2015).

The record also indicates that all of TJ's assets were transferred to CTS. On January 20, 2011, Tile Holding acquired all rights, title, and interest in TJ's assets in return for a $500,000 loan. (PApp. 197; DApp. Tab H.) CTS then acquired all rights, title, and interest in the TJ assets from Tile Holding in exchange for a $500,000 loan. (PApp. 108, 208; DApp. Tabs F, H.) That CTS did not acquire TJ's assets directly does not preclude a finding that CTS is the mere continuation of TJ. *See Foster v. Cone-Blanchard Mach. Co.*, 460 Mich. 696, 704 (1999).

Numerous indicia also suggest that CTS conducts the same business as TJ. TJ's business consisted of selling ceramic, tile, marble, granite, and other related products, as well as selling straight edge polishing machinery with cut and polish capabilities. (PM Dep. 24:1–8, 60:9–14; DApp. Tab R.) CTS imports tile, marble, granite, and stone and sells polishing machines. (KM Dep. 87:1–16; MW Dep. 31:22–32:10.) CTS has a list of TJ's customers, indicating that it may share common customers with TJ, and CTS undisputedly shares common vendors with TJ for certain commodity items. (DApp. Tabs F, N; CTS Dep. 45:2–20, 54:2–16.) When representing itself to the public on various advertising fliers, company forms, and business cards, CTS appears to invoke TJ's name recognition, referring to itself as "Ceramic Tile and Stone / T.J. Granite and Stone," (DApp. Tabs F, M, N). The signage on CTS's exterior has the words, "Ceramic Tile and Stone," placed above the words, "T.J. Granite and Stone," (CTS Dep. 64:15–22). CTS also alludes to TJ through the firms' usage of numerous assumed names. TJ's assumed names, Ceramic Tile Sales Inc., T.J. Imports Inc., TJ Marble & Granite Shop, Marmo Meccanica U.S.A., Sileston of Michigan, Inc., Delta Diamond Tools, and Marble

& Granite Gallery, (PApp. 137–51), bear a strong resemblance to those of CTS, T.J. Granite & Stone, T&J Marble & Stone, Delta Diamond Tooling, Ceramic Tile & Stone, and Marmomachinery, (PApp. 105). CTS also occupies the same physical location as TJ and uses TJ's website, address, and telephone number. (DApp. Tabs F, J; MW Dep. 60:3–5.)

CTS also retained TJ's employees and officers. When TJ ceased operations in January 2011, it had eight employees, all of whom began working at CTS in February 2011. (MW Dep. 13:11–22, 52:4–11.) From 1991 onward, Mr. Mularoni served as TJ's president. (PM Dep. 13:7–18, 14:7–11.) Although Ms. Mularoni served as CTS's manager after the company's formation, (PApp. 121–22; KM Dep. 98:22–99:3), she was unable to answer questions about certain aspects of CTS' operations and acknowledged receiving guidance from Mr. Mularoni, suggesting that her role may have been nominal and that Mr. Mularoni may have continued to manage the enterprise. (*See, e.g.*, KM Dep. 69:1–3, 6–9, 71:2–10, 19–23, 72:8–12; PM Dep. 10:14–24, 11:2–17; MW Dep. 30:3–6; DApp. Tab F.) At least by October 2013, it appears that Mr. Mularoni had become the CEO of CTS. (PApp. 244.)

The question before the court is whether there are undisputed facts sufficient to grant Defendant summary judgment on the issue of whether CTS is a mere continuation of TJ. As to that question, the answer is "no." The facts discussed above could lead a reasonable jury to conclude that CTS operates as a mere continuation of TJ. Ultimately, the fact-finder, among other things, will have to evaluate the credibility of the individuals involved in the transition from TJ to CTS at trial. The court therefore denies Defendant summary judgment on the issue of whether CTS is liable for TJ's actions. *See Anderson*, 477 U.S. at 248.

CONCLUSION

For the reasons above, the court denies Defendant's motion for summary judgment. An order follows.

Dated: June 30, 2015
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT. JUDGE