U.S. Court of International Trade

Slip Op. 15–128

AMERICAN POWER PULL CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Mark A. Barnett, Judge
Court No. 14–00088

[The court grants Defendant's Motion to Dismiss and Motion for Summary Judgment, and denies Plaintiff's Motion for Summary Judgment.]

Dated: November 16, 2015

Andrew J. Ayers, Bahret & Associates Co., L.P.A., of Holland, OH, for plaintiff.

Justin R. Miller, Senior Trial Counsel, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Amy M. Rubin* and *Claudia Burke*, Assistant Directors. Of Counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Barnett, Judge:

Defendant, the United States, moves, pursuant to USCIT Rules 12(b)(1) and 56, to dismiss allegations of subject matter jurisdiction pursuant to 28 U.S.C. § 1581(i) in the Complaint of Plaintiff, American Power Pull Corporation, and for summary judgment on all remaining claims brought pursuant to 28 U.S.C. § 1581(a). Def.'s Mot. to Dismiss for Lack of 28 U.S.C. § 1581(i) Subject Matter Jurisdiction; Def.'s Mot. for Summ. J; & Def.'s Mot. to Stay Further Disc. (collectively "MSJ"), ECF No. 26.[1] Plaintiff concedes that this court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Pl.'s Mem. in Opp'n to Def.'s Dispositive Mots. & Cross-Mot. for Summ. J. ("XMSJ") at 2, ECF No. 28. The Court therefore grants Defendant's Motion to Dismiss. Plaintiff cross-moves for summary judgment. XMSJ at 2–6. For the reasons below, the Court grants Defendant's Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment.

[1] Defendant also moves to stay discovery. MSJ at 15–16. The court stayed discovery in this matter on May 13, 2015. ECF No. 27.

BACKGROUND

On May 24 and June 14, 2006, Plaintiff made two entries of industrial hand trucks, manufactured by Qingdao Taifa Group Company, Limited[2] ("Qingdao Taifa"), from the People's Republic of China. Compl. Ex. B at 1, ECF No. 2–2. The merchandise was subject to an antidumping duty order ("2004 AD Order"). *Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 Fed. Reg. 65,410 (Dep't of Commerce Nov. 12, 2004) (2004 amended final determination). Previously, on November 17, 2004, the Department of Commerce ("Commerce") had directed U.S. Customs and Border Protection ("Customs") to collect cash deposits of estimated antidumping duties on imports of hand trucks manufactured by Qingdao Taifa at a rate of 26.49 percent pursuant to the 2004 AD Order. MSJ Ex. A. Plaintiff made proper cash deposits for both entries. At the time of entry, Customs issued notices of suspension of liquidation specific to Plaintiff's entries. MSJ at 3.

On February 2, 2007, Commerce commenced an administrative review of the antidumping duty order for the period of December 1, 2005, through November 30, 2006 ("the second period of review"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 Fed. Reg. 5005 (Dep't of Commerce Feb. 2, 2007). Pursuant to the initiation of that administrative review, Commerce instructed Customs to "continue to suspend liquidations" for "imports of hand trucks and certain parts thereof from" the PRC "entered or withdrawn from warehouse, for consumption on or after May 24, 2004." MSJ Ex. B (Admin. Message No. 4288203 from Directors of Field Ops, Port Directors to Director AD/CVD & Revenue Policy & Programs) ¶ 4. On July 28, 2008, Commerce issued the final results of the administrative review, which assigned a dumping margin of 383.60 percent to imports from Qingdao Taifa ("Review Results") during the second period of review. *Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 73 Fed. Reg. 43,684, 43,687 (Dep't of Commerce July 28, 2008) (2005–2006 administrative review final results).

On August 13, 2008, Qingdao Taifa filed suit in this court, challenging the Review Results and moving for a preliminary injunction to enjoin Customs from liquidating, *inter alia*, American Power Pull's entries, at the 383.60 percent duty rate. *Qingdao Taifa Group Co., Ltd. v. United States*, Ct. No. 08–00245, Compl. ¶ 9, ECF No. 5, Mot. for Prelim. Inj. to Enjoin Liquidation of Entries, ECF No. 7. On August 22, 2008, the court granted the preliminary injunction pend-

[2] Qingdao Taifa Group Company, Limited also is known as Qingdao Taifa Group Import & Export Company. MSJ at 2 n.1.

ing the final resolution of the action. *See id*. (order granting preliminary injunction), ECF No. 12. After multiple remands, this court sustained Commerce's amended final results, which revised the antidumping duty rate to 145.90 percent for imports of hand trucks from Qingdao Taifa during the second period of review, and the Court of Appeals for the Federal Circuit ("CAFC") affirmed this decision on April 11, 2012. *Qingdao Taifa Group, Co., Ltd. v. United States*, 35 CIT __, 780 F. Supp. 2d 1342 (2011), *aff'd*, 467 F. App'x 887 (Fed. Cir. 2012). On June 15, 2012, Commerce published notice of the court decision and the amended final results. *Hand Trucks From the People's Republic of China*, 77 Fed. Reg. 35,939 (Dep't of Commerce June 15, 2012) (notice of court decision not in harmony with final results and notice of amended final results).

On July 20, 2012, Commerce issued liquidation instructions to Customs covering all imports from Qingdao Taifa during the second period of review, including American Power Pull's entries. The instructions informed Customs that the injunction enjoining liquidation of the entries had dissolved and instructed Customs to liquidate, *inter alia*, Plaintiff's entries at the court-affirmed rate of 145.90 percent. MSJ Ex. E ¶¶ 1–2. Customs liquidated the entries on August 10, 2012, assessing antidumping duties as instructed. Compl. ¶ 4; MSJ at 4.

Plaintiff timely protested the liquidations, claiming that the entries had liquidated by operation of law, pursuant to 19 U.S.C. § 1504(b), at the cash deposit rates asserted upon entry. Compl. Exs. A, B. On October 9, 2013, Customs denied the protests, asserting that Plaintiff had confused suspending liquidation with extending liquidation in its arguments. Compl. Exs. C, D. Plaintiff filed suit on March 31, 2014, again averring that the entries had been deemed liquidated at their original cash deposit rates, pursuant to 19 U.S.C. § 1504(b). Compl. The parties now cross-move for summary judgment. *See generally* MSJ; XMSJ.

LEGAL STANDARD

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 or resolve issues of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986) (citation omitted). A genu-

ine factual issue exists if, taking into account the burdens of production and proof that would be required at trial, sufficient evidence favors the nonmovant 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). The court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).

DISCUSSION

I. Defendant's Contentions

Defendant contends that Plaintiff's suit "rests on the incorrect presumption that its entries were never suspended and, as a result, the entries became deemed liquidated." MSJ at 9. Defendant argues that Plaintiff mistakenly applies 19 U.S.C. § 1504(b) to support its claim that Customs' "final assessment of additional duties violated [the statute] 'as the rate of duty, value, quantity, and amount of duties should be no greater than the amount of the 2006 duties.'" MSJ at 9 (quoting Compl. ¶ 6). Defendant counters that 19 U.S.C. § 1504(b) establishes Customs' authority to extend the liquidation of an entry and is distinct from suspending liquidation. MSJ at 9–10. Defendant notes that Plaintiff's "theory of deemed liquidation appears to be premised on an assumption that [Customs] extended the liquidation of its entries, and that after four years from the date of entry, the purported extensions expired and the entries deemed liquidated by operation of section 1504(b)." *Id*.

Defendant asserts that, at the time of importation, the liquidation of the entries was suspended pursuant to 19 U.S.C. § 1673b(d)(2). *Id*. at 9–11. Defendant explains that once Commerce received a request for an administrative review, the suspension continued through the

completion of the review, pursuant to 19 U.S.C. § 1675(a)(2), and when Qingdao Taifa challenged the results of the administrative review before the court, liquidation was further suspended, pending resolution of the action, pursuant to the preliminary injunction issued by the Court. *Id*. at 11–12. Defendant concludes that after the resolution of the action, the preliminary injunction dissolved, and Customs timely and properly liquidated Plaintiff's entries at the new antidumping duty rate pursuant to the judgment of the court. *See id*. at 12–14.

II. Plaintiff's Contentions

Plaintiff requests that the Court "dismiss allegations seeking relief under 28 U.S.C. § 1581(i)." XMSJ at 2. Plaintiff also concedes that Customs never extended liquidation of the entries, pursuant to 19 U.S.C. § 1504(b), but also asserts that there was no basis for suspending the liquidation of the entries. *Id*. at 3. Plaintiff contends that "in the absence of a court order, no valid basis existed for suspension of liquidation of its entries, as no statutory authority required suspension of liquidation of Plaintiff's entries, in light of the fact that a valid antidumping [duty] order was in effect at the time Plaintiff made those entries." *Id*. at 4. Plaintiff asserts that 19 U.S.C. § 1673b(d)(2) did not provide a basis for suspension because the statute permits suspension only after an administrative review has resulted in "an affirmative determination by an administrating authority that additional anti-dumping duties must be imposed before suspension of liquidation shall be ordered" and "no such affirmative determination in this matter as of the date that the notices of suspension of Plaintiff's entries was issued." *Id*. at 4. Plaintiff urges that because there was no affirmative determination when it received the notices of suspension, Commerce lacked authority to suspend liquidation pursuant to 19 U.S.C. § 1504(a)(1). *See id*. at 4–5. Consequently, Plaintiff concludes that the entries were deemed liquidated, pursuant to 19 U.S.C. § 1504, in May and June 2007, at their originally asserted rate of duty. *See id*. at 5–6.

III. Analysis

A. The Statutory Scheme for Suspension of Liquidation in Antidumping Duty System

Liability to pay antidumping duties "accrues upon entry of subject merchandise" into the Customs territory of the United States. *SSAB N. Am. Div. v. U.S. Bureau of Customs & Border Protection*, 32 CIT 795, 797, 571 F. Supp. 2d 1347, 1350 (2008) (citing 19 C.F.R. § 141.1(a)). While such liability accrues upon entry, the amount of

actual liability may not be determined for some time after the entry occurs because the United States employs a 'retrospective' duty assessment system. As Commerce explains in its regulations:

> the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered.

19 C.F.R. § 351.212(a).

The reference to the U.S. antidumping duty system as "retrospective" is a convenient summation of an otherwise complex and technical interaction of statutory provisions. Focusing only on the provisions related to the suspension of liquidation, as relevant to this case, the statutory suspension of liquidation begins with an affirmative preliminary determination by Commerce in an antidumping duty investigation. Specifically, 19 U.S.C. § 1673b(d)(2) provides that if a Commerce preliminary determination is affirmative, then Commerce "shall order the suspension of liquidation of all entries of merchandise subject to the determination which are entered [. . .] for consumption on or after [. . .] the date on which notice of the determination is published in the Federal Register."[3] The suspension of liquidation ordered pursuant to this provision may remain in effect no more than six months. 19 U.S.C. § 1673b(d).[4] This preliminary determination by Commerce will remain the legal basis for any suspension of liquidation during the investigation until an antidumping duty order is issued.[5]

When both Commerce and the International Trade Commission ("ITC") make affirmative final determinations in an investigation, Commerce is required to publish an antidumping duty order, pursuant to 19 U.S.C. § 1673e(a). Among other things, the antidumping

[3] The statute contains several provisions, not relevant to this case, which authorize a different start date for suspension of liquidation in different situations, for example, in the case of a preliminary finding of "critical circumstances," pursuant to section 1673b(e)(2), or an early preliminary determination, pursuant to section 1673b(d)(2)(B).

[4] These so-called "provisional measures" are subject to a four month expiration, extendable to six months at the request of exporters representing a significant proportion of exports of the subject merchandise. 19 U.S.C. § 1673b(d).

[5] Pursuant to section 1673d(c)(2), if either Commerce or the International Trade Commission issues a negative final determination, the investigation is terminated, the suspension of liquidation is terminated, bonds are released, and cash deposits are refunded.

duty order directs Customs to assess an antidumping duty on imports of the subject merchandise based on the amount by which normal value exceeds the export price "after the date on which [Commerce] receives satisfactory information upon which the assessment may be based" and "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise."[6] Thus, the antidumping duty order provides the legal basis for the suspension of liquidation of imports of subject merchandise that enter for consumption on or after the date of publication of that order, throughout the life of the order, and until the order is revoked.

While the antidumping duty order provides the on-going basis for the suspension of liquidation of imports of subject merchandise, the suspension of liquidation for any given entry is not indefinite. Pursuant to 19 U.S.C. § 1673e(a), the antidumping duty to be assessed on that entry is based on the amount by which normal value exceeds the export price, as determined by Commerce. That determination is made pursuant to section 1675.

Section 1675 provides that, on an annual basis, Commerce may conduct a review to determine the amount of any antidumping duty (referred to as an administrative review or a periodic review).[7] That antidumping duty is to be the basis of the duty assessed on the entries during the review period (the earlier period of transactions examined by Commerce in the administrative review) and the new estimated antidumping duty rate (i.e., cash deposit rate) for future entries of subject merchandise. 19 U.S.C. § 1675(a)(1). It has long been recognized that the necessary implication of reading section 1673e(a) together with section 1675, *in pari materia*, is that the suspension of liquidation of an entry must remain in effect throughout an administrative review by Commerce. *Ambassador Div. of Florsheim Shoe v. United States*, 748 F.2d 1560, 1565 (Fed. Cir. 1984) (suspension of liquidation impliedly required by statute during administrative review of countervailing duty order to effectuate retrospective system of duty assessment); *Koyo Corp. v. United States*, 497 F.3d 1231, 1241–42 (Fed. Cir. 2007).

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[6] Section 1673e contains certain special rules, not applicable here, when the ITC makes its affirmative finding on the basis of threat.

[7] Commerce only conducts such periodic reviews upon request (§ 1675(a)(1)), and, in the absence of a request for review, Commerce generally will instruct Customs to assess antidumping duties on the relevant entries at the cash deposit rate in effect at the time of importation. 19 C.F.R. § 351.212(c); *see also Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23954 (Dep't of Commerce May 6, 2003) (notice of policy concerning assessment of antidumping duties) (explaining Commerce's policy with regard to the automatic assessment of antidumping duties for imports of merchandise subject to an antidumping duty order when an intermediary (*e.g.*, reseller, trading company, exporter) exports the merchandise).

The publication of the final results of the administrative review provides the notice to Customs of the lifting of the suspension of liquidation. *Int'l Trading Co.*, 281 F.3d 1268, 1275 (Fed. Cir. 2002). Customs then has six months to liquidate the entries covered by the results of the administrative review.[8] 19 U.S.C. § 1504(d). If Customs does not liquidate within six months of the lifting of the suspension of liquidation, the entries are deemed liquidated at the cash deposit rate in effect at the time of entry. *Id.*; *see Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1379 (Fed. Cir. 2002).

If the final results of the periodic review are challenged at the Court of International Trade, a party may request that the court enjoin the liquidation pending the completion of court review.[9] 19 U.S.C. § 1516a(c)(2). If enjoined, such entries shall be liquidated in accordance with the final court decision in the action. 19 U.S.C. § 1516a(e).[10] In these circumstances, the six month period in which Customs must liquidate the entries may begin with publication of the Federal Register notice by Commerce, pursuant to 19 U.S.C. § 1516a(c)(1), of the final and conclusive court decision. 19 U.S.C. § 1504(d); *Fujitsu Gen. Am.*, 283 F.3d at 1382.

B. The Statutory Scheme for Suspension of Liquidation Applied to Plaintiff's Entries

The parties do not dispute any of the material facts. The sole question before the Court, therefore, is whether the liquidation of Plaintiff's entries was suspended until a date no less than six months prior to when Customs liquidated them on August 10, 2012, at an antidumping duty rate of 145.90 percent. The Court finds that the entries were properly suspended from the time of entry until the completion of the judicial review, first by operation of law pursuant to statute and then by court order pursuant to a preliminary injunction, "until the issuance of a final and conclusive court decision," less than six months prior to Customs' liquidation. MSJ Ex. C at 2.

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[8] In many cases, Customs cannot accurately assess antidumping duties based on the public Federal Register notice. The rates published therein constitute the weighted average results of the review on the basis of all of the producer/exporter's shipments during the period of review whereas Customs assesses antidumping duties on an importer-specific basis. Commerce provides the importer-specific assessment instructions (usually on a business confidential basis), reflecting the final results of the administrative review, to Customs via a separate message.

[9] Special procedures exist in the case of a bi-national panel review pursuant to the NAFTA, which are not relevant here. *See, e.g.*, 19 U.S.C. § 1516a(g)(5).

[10] If they are not enjoined, entries prior to the date of publication of any notice of a decision of this court or the CAFC not in harmony with the Commerce determination shall be liquidated (assessed) in accordance with the original agency determination. 19 U.S.C. § 1516a(c)(1).

On November 17, 2004, based on the 2004 AD Order, Commerce directed Customs to collect cash deposits of estimated antidumping duties on future imports of hand trucks manufactured by Qingdao Taifa at a rate of 26.49 percent, pursuant to 19 U.S.C. §§1673d(c)(1) and 1673e. When the subject merchandise entered the Customs territory of the United States on May 24 and June 14, 2006 those instructions remained in effect and the liquidation of the entries was automatically suspended. This suspension stayed in place until the anniversary month of the antidumping duty order.

As a result of the initiation of the second administrative review of the 2004 AD Order, the liquidation of Plaintiff's entries was further suspended by the combined provisions of 1673e(a) and 1675(a), as discussed *supra*, until the completion of the review in order to determine the final amount of duties for the second period of review. The cash deposits that Customs collected on the entries, at a rate of 26.49 percent, were estimated antidumping duties announced in the 2004 AD Order. *See* MSJ Ex. A. On July 28, 2008, Commerce published the final results of the second administrative review in the Federal Register. *See Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 73 Fed. Reg. 43,684.

After Commerce issued the final administrative review results, Qingdao Taifa timely brought suit to challenge the final results before this court. On August 22, 2008, pursuant to 19 U.S.C. § 1516a(c)(2), Qingdao Taifa secured a preliminary injunction, which enjoined Customs from liquidating Plaintiff's entries, pending the resolution of that challenge. *Qingdao Taifa Group Co.*, No. 08–245 (CIT Aug. 22, 2008) (order granting preliminary injunction).[11] After several remands, on June 15, 2012, Commerce published notice of the amended final results, which included an antidumping duty rate of 145.90 percent for Plaintiff's entries. *Hand Trucks from the People's Republic of China*, 77 Fed. Reg. at 35,939. The conclusion of the litigation dissolved the preliminary injunction on July 11, 2012.[12] *See* MSJ Ex E ¶ 1. On August 10, 2012, Customs liquidated Plaintiff's entries at a duty rate of 145.90 percent, in accordance with the amended final results.

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[11] Had Qingdao Taifa not secured the preliminary injunction, Customs properly could have liquidated the entries and assessed antidumping duties at the rate of 383.60 percent, notwithstanding the on-going judicial review. 19 U.S.C. § 1516a(c)(1).

[12] The preliminary injunction dissolved with the issuance of a final and conclusive court decision. The Federal Circuit's decision became final on July 11, 2012 when the deadline passed to seek review by the U.S. Supreme Court with no party filing a petition for a *writ of certiorari. Fujitsu Gen. Am.,* 283 F.3d at 1379 ("there is not a final court decision until . . . the time for petitioning the Supreme Court for *certiorari* expires without the filing of a petition").

Thus, from the moment of importation on May 24 and June 14, 2006, to the conclusion of the administrative review on July 28, 2008, liquidation of Plaintiff's entries was suspended by statute.[13] Thereafter, during Qingdao Taifa's judicial challenge to the administrative review results, until July 11, 2012, the court-issued preliminary injunction continued the suspension of liquidation of the entries in question. After the removal of the suspension on July 11, 2012, Customs had six months, pursuant to 19 U.S.C. § 1504(d), to liquidate the entries in accordance with the revised antidumping duty rate. Because Customs liquidated Plaintiff's entries at the new antidumping rate on August 10, 2012, well within the six month period beginning on July 11, 2012, the entries were timely and properly liquidated at a duty rate of 145.90 percent, in accordance with the amended final results.

CONCLUSION

For the reasons above, the court grants Defendant's Motion to Dismiss and Motion for Summary Judgment, and denies Plaintiff's Motion for Summary Judgment. Judgment will be entered for Defendant.

Dated: November 16, 2015
New York, New York

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

Slip Op. 15–129

UNITED STATES OF AMERICA, Plaintiff, v. GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, Defendant.

Before: Mark A. Barnett, Judge
Court No. 15–00047

[The court finds that Plaintiff has stated a claim upon which relief can be granted. Accordingly, the court denies Defendant's motion to dismiss.]

Dated: November 16, 2015

Monica P. Triana, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for plaintiff. With her on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Joyce R. Branda*, Acting Assistant Attorney General, and *Amy M.*

[13] To the extent that Plaintiff argues that an injury determination was required in the course of the administrative review, Plaintiff is wrong. Plaintiff cites no authority for its proposition and the statute provides none.

Rubin, Assistant Director. Of Counsel on the brief was *Suzanna Hartzell-Ballard*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

Barry M. Boren of Miami, FL, and *Gerson M. Joseph* of Weston, FL, for defendant.

MEMORANDUM AND ORDER

Barnett, Judge:

The United States of America ("United States" or "Plaintiff") brings this action against Great American Insurance Company of New York ("GAIC" or "Defendant") to recover $50,000 in unpaid antidumping duties and interest, the limit on a continuous entry bond that GAIC issued, plus pre-and post-judgment interest, including but not limited to statutory interest pursuant to 19 U.S.C. § 580, as well as equitable interest. *See generally* Compl., ECF No. 2. Defendant moves to dismiss the Complaint for failure to state a claim upon which relief can be granted, pursuant to USCIT Rule 12(b)(5) (hereafter, Rule 12(b)(6)).[1] *See generally* Mot. to Dismiss ("MTD"), ECF No. 12. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1582. The parties have fully briefed the motion, and the court finds that no hearing is necessary. For the reasons discussed herein, the court denies Defendant's motion.

BACKGROUND AND PROCEDURAL HISTORY

In 2003, GAIC issued a continuous entry bond in the amount of $50,000 as the surety for Orleans Furniture, Inc. ("Orleans Furniture"). The bond covered Orleans Furniture's entries of merchandise between August 22, 2003 and August 31, 2007. Compl. ¶¶ 1, 4 & Ex. A (Bond).

On June 5, 2006, Orleans Furniture made one entry[2] of wooden bedroom furniture from the People's Republic of China at the customs port in Memphis, Tennessee. *Id*. ¶ 6. The entry was subject to an antidumping duty order and Plaintiff paid a cash deposit rate of 6.65% *ad valorem* which was the separate rate in effect at that time. Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") at 2, ECF No. 20; *see Wooden Bedroom Furniture from the People's Republic of China,* 70 Fed. Reg. 329 (Dep't Commerce Jan. 4, 2005) (notice of amended final determination of sales at less than fair value and antidumping duty order). Accordingly, liquidation of this entry was suspended pending the Department of Commerce's ("Commerce") ad-

[1] USCIT Rule 12(b)(5) was renumbered to 12(b)(6), effective July 1, 2015 and without any substantive change to the rule. Hereafter, this Slip Opinion will refer to the rule in its current numbering format, as Rule 12(b)(6).

[2] Entry No. 322–5581818–2.

ministrative review of the order. Compl. ¶ 7. Commerce published the final results of the administrative review on August 20, 2008, and the suspension of liquidation was lifted. *Id*. ¶ 8. Pursuant to the final results of the administrative review, the antidumping duty rate applicable to the entry was 216.01% (the PRC-wide rate). *Wooden Bedroom Furniture from the People's Republic of China,* 73 Fed. Reg. 49,162 (Dep't Commerce Aug. 20, 2008) (final results of antidumping duty administrative review and new shipper review).

Customs took no action to liquidate the entry such that, on February 20, 2009, the entry was deemed liquidated pursuant to 19 U.S.C. § 1504(d). Compl. ¶ 9. Customs provided bulletin notice of the deemed liquidation on December 18, 2009, *id*. ¶ 10, and reliquidated the entry on January 8, 2010, at the rate determined in the final results of the administrative review, with $60,336.14 owing from the importer, *id*. ¶ 11.

Orleans Furniture filed a protest of Customs' reliquidation on February 4, 2010 and requested accelerated disposition of the protest. *Id*. The protest was deemed denied thirty days later, on March 6, 2010. *Id*. ¶ 12. GAIC did not protest Customs' reliquidation of the entry, and neither GAIC nor Orleans Furniture filed suit to contest the deemed denial of Orleans Furniture's protest. *Id*.

Customs mailed its first demand for payment to GAIC on April 27, 2010, and made several other demands thereafter. *Id*. ¶ 13 & Ex. C (First Demand). GAIC has not, to date, made payment to cover the unpaid antidumping duties and interest. *Id.*¶ 15. Consequently, the United States filed this lawsuit on February 19, 2015. *See* Summons, ECF No. 1. GAIC moved to dismiss the case on May 11, 2015, for failure to state a claim upon which relief can be granted. *See generally* MTD. GAIC argues that the court should dismiss this case because Customs lacked authority to reliquidate the entry and, alternatively, failed to reliquidate the entry within the timeframe prescribed by the applicable statute and regulation. *Id*. The United States contends that GAIC's arguments contradict the plain language of the relevant statute and regulation. *See generally* Pl.'s Opp'n.

STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim, "any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000); *see generally* USCIT R. 12(b)(6). A court may properly dismiss a case under Rule 12(b)(6) only if the plaintiff's allegations of fact are not "enough to

raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007) (citations omitted). At the same time, a complaint's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 679.

DISCUSSION

I. Reliquidation of Deemed Liquidations

A. Parties' Contentions

GAIC argues that Customs lacked the authority to reliquidate the entry at issue in this case because the relevant statute, 19 U.S.C. § 1501, does not permit Customs to reliquidate entries that are liquidated by operation of law. MTD at 9–10, 13–17. Citing Federal Circuit precedent, it contends that such deemed liquidations permanently fix the liability of the importer and surety. *Id*. (citing *United States v. Cherry Hill Textiles,* 472 F.3d 1550 (Fed. Cir. 1997). The United States disputes GAIC's contention. *See generally* Pl.'s Opp'n. It avers that the case law GAIC relies upon is either distinguishable or has been overturned by intervening revisions to the statute by Congress. *Id.* at 6–7.

B. Legal Framework

19 U.S.C. § 1504 governs limitations on liquidation of entries of merchandise. Generally, entries for consumption that are not otherwise extended (pursuant to § 1504(b)) or suspended through court order or statute, are deemed liquidated by operation of law "at the rate of duty, value, quantity, and amount of duties asserted by the importer of record" one year after the date of entry. 19 U.S.C. § 1504(a). Suspension of liquidation of entries may be continued by court order or Commerce administrative review. 19 U.S.C. §§ 1675(a)(1) and 1516a(c)(2). Upon conclusion, Commerce publishes the final results of its administrative review in the Federal Register, and provides notice to Customs that the suspended entries may now be liquidated, along with the importer-specific liquidation rates. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1275 (Fed. Cir. 2002).[3]

[3] "For some of the same reasons that publication of the final results [of an administrative review] removes the suspension of liquidation, publication also provides notice of the removal to Customs. Publication in the Federal Register is a familiar manner of providing notice to parties in antidumping proceedings." *Int'l Trading*, 281 F.3d at 1275.

The statute provides for this liquidation to take place within six months of Customs "receiving notice of the removal [of such suspension] from the Department of Commerce." 19 U.S.C. § 1504(d). Further, "any entry . . . not liquidated by the customs service within 6 months after receiving such notice" is liquidated by operation of law "at the rate of duty, value, quantity, and amount of duty asserted by the importer of record." *Id*.

Section 1501 governs reliquidation of entries previously liquidated. Specifically,

> [a] liquidation made in accordance with section 1500 or 1504 . . . or any reliquidation thereof made in accordance with this section may be reliquidated in any respect by the Customs Service . . . within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer.

19 U.S.C. § 1501. On its face, the statute contemplates reliquidation of entries that are deemed liquidated (or liquidated by operation of law), regardless of whether the deemed liquidation occurred pursuant to § 1504(a) or (d). It is worthwhile to note that 19 U.S.C. § 1501 was amended in 2004 specifically to allow for reliquidation of entries initially liquidated pursuant to § 1504, *i.e.* deemed liquidations. Prior to 2004, only entries liquidated pursuant to §1500 could be reliquidated by Customs. Since the events of this case all took place after 2004, it is the current version of the statute that governs Customs ability to liquidate and reliquidate the entries in question.[4]

C. Analysis

GAIC contends that reading 19 U.S.C. § 1501 to allow for reliquidation of deemed liquidations defeats the intent of § 1504 to provide finality for importers. MTD at 15–17. GAIC suggests that the two provisions may be reconciled, however, if 19 U.S.C. § 1501 is read to permit reliquidation only of entries timely liquidated pursuant to § 1504. *Id.* at 17–18. Thus, the Court understands GAIC to suggest that § 1501 would permit reliquidation of entries liquidated pursuant to the first sentence of § 1504(d), but not the second sentence of § 1504(d). Otherwise, GAIC avers there is an "inherent conflict" in applying § 1501 to deemed liquidations given Congress' "express intent [in adopting § 1504] . . . to place a limit on the period within

[4] The reference to §1504 was added to §1501 in the Miscellaneous Trade and Technical Corrections Act of 2004 and the amendment was made effective as to "merchandise entered, or withdrawn from warehouse for consumption, on or after the 15th day after the date of the enactment of this Act." Miscellaneous Trade and Technical Corrections Act of 2004, Pub. L. No. 108–429, § 2108, 118 Stat. 2434, 2598 (2004).

which importers and sureties would be subject to the prospect of liability for a CBP entry." *Id*.

The Court finds GAIC's argument unpersuasive. First, as a matter of statutory interpretation, the Court starts with the language of the statute and when that language is plain and unambiguous, the inquiry ends there. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there . . . . When the words of a statute are unambiguous, then . . . judicial inquiry is complete.") (internal citations omitted); *see also, Chevron, U.S.A., Inc. v. Nat'l Resources Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). GAIC, to the contrary, would have legislative history limit, if not out-right contradict, the plain language of the statute. Moreover, if Congress had intended to permit reliquidation only of timely liquidations pursuant to the first sentence of §1504(d), it could easily have so specified. *Conn. Nat'l Bank,* 503 U.S. at 253–54. Since it did not, the court cannot read such a limitation into the statute.

Furthermore, the legislative history to which GAIC refers relates to the pre-2004 version of the statute. Prior to the 2004 amendment, § 1501 only provided for reliquidation of liquidations made pursuant to § 1500. In 2004, Congress specifically added the reference to § 1504 into § 1501 of the statute, thus allowing Customs to reliquidate so-called deemed liquidations. GAIC offers no support for its suggestion that the legislative history relating to the pre-2004 version of the statute can or should be used to defeat the express language of the 2004 amendment. Plainly, in amending the statute expressly to permit reliquidation of entries deemed liquidated, Congress altered the period prior to which it provided finality to importers.[5] And while finality may be delayed, the delay is not interminable. The statute

[5] Although there is no legislative history explaining Congress' reasoning for amending § 1501, the amendment had the effect of allowing Customs to address deemed liquidations that occur at the cash deposit rate whether higher or lower than the results of a Commerce administrative review. In 2002, not long before the amendment, the Federal Circuit had decided two cases which held that the six month period for deemed liquidation begins to run when Commerce publishes its notice pursuant to 19 U.S.C. § 1516a(c)(1), notwithstanding the fact that the notice contains insufficient information to permit Customs to liquidate the covered entries. *See Fujitsu Gen. Am., Inc., v. United States*, 283 F.3d 1364, 1382 (Fed. Cir. 2002); *Int'l Trading* at 1275. If the deemed liquidation thus resulted in an under-collection of antidumping duties, domestic interested parties in the antidumping case did not have a mechanism to protest the liquidation. *Cemex, S.A. v. United States,* 384 F.3d 1314, 1322–23 (Fed. Cir. 2004). As later confirmed by the Federal Circuit, the deemed liquidation provision did not, however, constrain importers from protesting the liquidation to obtain the benefit of a lower rate resulting from an administrative review and judicial review thereof despite

allows Customs the same period of time to reliquidate an entry that is deemed liquidated as any other entry – "ninety days from the date on which notice of the original liquidation is given or transmitted to the importer, his consignee or agent." 19 U.S.C. § 1501. Once that timeframe has run, importers enjoy the finality which GAIC seeks.

GAIC relies on the Federal Circuit decision *Cherry Hill*, for the proposition that deemed liquidation permanently fixes a surety and importer's liability. The *Cherry Hill* decision, however, predates the 2004 statutory amendment. As the Federal Circuit explained in a subsequent case, the *Cherry Hill* decision

> construed an older version of § 1501 which provided only for reliquidation of entries originally liquidated under § 1500, unlike the current statute, which permits reliquidation of 'a liquidation made in accordance with section 1500 or 1504.' Since § 1504(d) is the deemed liquidation provision, it follows that deemed liquidations are subject to reliquidation by Customs.

Norsk Hydro Can., Inc. v. United States, 472 F.3d 1347, 1362 n.26 (Fed. Cir. 2006) (citations omitted). Given that the events in the case at bar took place after the statutory changes went into effect, the court is bound by the language in *Norsk Hydro* rather than *Cherry Hill*.[6]

GAIC also quotes *Koyo Corp. v. United States*, 497 F.3d 1231 (Fed. Cir. 2007), to suggest that Customs may not reliquidate a deemed liquidation. The *Koyo* court stated, "[a] deemed liquidation under 19 U.S.C. § 1504(d) is final only in so far as Customs cannot liquidate the entries at any other rate than the rate provided under § 1504(d)," such that "Customs can only assess the duty rate that is assessed on the entries at the time of entry." *Koyo,* 497 F.3d at 1237. First, the court in *Koyo* was examining entries that occurred in 1990 and 1991, long before the effective date of the 2004 amendment to § 1501. Second, GAIC misreads the context and import of this language. Notwithstanding the quoted language, in its holding, the Federal Circuit rejected the government's argument that the deemed liquidation permanently fixed the duty rate, finding that the importer's statutory right to protest the deemed liquidation within 90-days was

a deemed liquidation pursuant to § 1504. *Koyo Corp. of U.S.A. v. United States*, 497 F.3d 1231, 1242–43 (Fed. Cir. 2007). Regardless of congressional motivation, the Court is bound by the clear language adopted by Congress.

[6] Two other cases that GAIC cites also predate the revisions to 19 U.S.C. § 1501. *See, Wolff Shoe Co. v. United States*, 141 F.3d 1116 (Fed. Cir. 1998); *Dal-Tile Corp. v. United States*, 17 CIT 764, 829 F. Supp. 394 (1993).

not cut off by the deemed liquidation.[7] Similarly, here, Customs has a statutory right to reliquidate a deemed liquidation within the 90 day period set in 19 U.S.C. § 1501 and nothing in the statute suggests that such a right is cut off by a deemed liquidation. In fact, Congress' amendment of § 1501 to add the reference to § 1504 serves to confirm a contrary intent. In the year following the *Koyo* decision, the Federal Circuit further underlined Customs ability to reliquidate a deemed liquidation *sua sponte*, stating that, while

> [a] liquidation decision itself is "final and conclusive" as to all parties, including the United States, unless protested with Customs . . . even if the liquidation contains a "clerical error, mistake of fact, or other inadvertence." . . . other remedies for liquidation errors exist. Customs may *sua sponte* reliquidate an entry, including an entry "deemed liquidated," within 90 days of its giving notice of the original liquidation to the importer.

Norsk Hydro, 472 F. 3d at 1352 (citing 19 U.S.C. § 1501). The court therefore rejects GAIC's argument that the deemed liquidation was inherently conclusive, final, and binding as to the rate assessed on the entry at issue, and holds that Customs had statutory authority to reliquidate the entry, pursuant to 19 U.S.C. § 1501.

II. Timing and Notice of Reliquidation

A. Parties' Contentions

GAIC raises several arguments challenging the timeliness of Customs' reliquidation of the entry. Assuming arguendo that Customs had the right, pursuant to § 1501, to reliquidate an entry that was deemed liquidated, GAIC contends that Customs did not, in fact, reliquidate the entry in a timely manner (*i.e.* within 90 days). MTD at 9–10. The essence of GAIC's argument has to do with what it considers proper notice of a deemed liquidation. According to GAIC, proper notice is not the bulletin notice posted by Customs regarding the deemed liquidation, but rather the date of the deemed liquidation itself, and that it is this date that starts the 90-day clock for reliqui-

[7] The *Koyo* court explained, in relevant part:

> [t]he government . . . contends that our case law supports its argument that a deemed liquidation is inherently conclusive, final, and binding on all parties in that it cannot be protested by an importer and that the rate of duty asserted by the importer at entry is the only duty rate that can ever be assessed to entries once the entry has been deemed liquidated by operation of § 1504(d). The government is mistaken. None of the holdings in the cases cited by the government decided or relied on whether an importer can protest an adverse deemed liquidation.

Koyo, 497 F.3d at 1238.

dation. This is because, in GAIC's reading of the relevant statute and regulations, Customs is not required to provide notice of a deemed liquidation. Great Am. Ins. Co. of N.Y.'s Reply in Supp. of its Mot. to Dismiss ("Def.'s Reply"), at 8, ECF No. 25. As such, and because a deemed liquidation occurs by operation of law, GAIC argues that notice of a deemed liquidation is "constructive" and can be inferred by calculating six months from the date the suspension is lifted. Relying on its theory of constructive notice, GAIC then contends that Customs' reliquidation was untimely because it took place on January 8, 2010, nearly 11 months after the deemed liquidation pursuant to § 1504(d). MTD at 9. The United States rejects GAIC's argument. It avers that the plain language of 19 U.S.C. § 1501 permits Customs to reliquidate a deemed liquidation within 90 days of the notice being given or transmitted to the importer, not within 90 days of the deemed liquidation, constructive notice, or any other triggering event. Pl.'s Opp'n. at 6–8. Further, the United States argues that while the statute does not require Customs to provide notice of a deemed liquidation, the agency is not precluded from providing such notice. *Id*. 6–8.

B. Legal Framework

The plain language of § 1501 provides that Customs may reliquidate a deemed liquidation "within ninety days from the date on which notice of the original liquidation is given or transmitted to the importer" and that "[n]otice of such reliquidation shall be given or transmitted in the manner prescribed with respect to original liquidations under section 1500(e)." 19 U.S.C. § 1501. Notice may be provided "in such form and manner as the Secretary shall by regulation prescribe." 19 U.S.C. § 1500(e). The applicable regulation indicates that a bulletin notice shall provide notice of entries liquidated by operation of law. 19 C.F.R. § 159.11 ("Notice of liquidation will be given on a bulletin notice of liquidation . . . as provided in §§ 159.9 and 159.10(c)(3)."). Further, the regulation directs Customs to post the bulletin notice of liquidation "within a reasonable period after each liquidation by operation of law" and to date it "as of the date of expiration of the statutory period." 19 C.F.R. § 159.9(c)(2)(ii).

C. Analysis

GAIC argues that it is the date of deemed liquidation (and the date on the notice of the deemed liquidation) that triggers the 90-day clock for reliquidation. MTD at 12–13. According to GAIC, that date was

February 20, 2009,[8] the date the entry was deemed liquidated. *Id.* at 13. Running from that date, the 90-day reliquidation period would have expired on May 21, 2009,[9] long before Customs reliquidated the entry on January 8, 2010. *Id.* at 13. However, the statute is clear that it is the date the notice was transmitted that starts the clock on reliquidation and Customs has 90 days from the date the notice of deemed liquidation is transmitted to reliquidate the entry. 19 U.S.C. § 1501; *see also Norsk Hydro Can.*, 472 F.3d at 1352 ("Customs may *sua sponte* reliquidate an entry, including an entry 'deemed liquidated,' within 90 days of its giving notice of the original liquidation to the importer."); *LG Electronics, U.S.A., Inc. v. United States*, 21 CIT 1421, 1430, 991 F. Supp. 668, 676 (1997) ("Where a liquidation has occurred by operation of law, notice starts the clock for the protest period, 19 C.F.R. § 159.9(c)(2)(iii)."). The date on the bulletin notice serves to inform the importer of the date of deemed liquidation and is not the same as the date that Customs provides bulletin notice. *See LG Electronics*, 21 CIT at 1430, 991 F. Supp. at 676–77.

GAIC avers that Customs did not post the bulletin notice "within a reasonable period" after the deemed liquidation, as required by 19 C.F.R. § 159.9(c)(2)(ii), because Customs posted the notice on December 18, 2009, ten months after the deemed liquidation. MTD at 10, 12–13. Although it is unsettled how long a period between a deemed liquidation and posting of bulletin notice would be unreasonable, the Court cannot conclude, based on the facts before it for the purposes of this motion to dismiss, that Customs unreasonably delayed posting the bulletin notice in this case. A ten-month period may, in fact, be an abnormally or prejudicially long period to wait for the posting of a bulletin notice, or it may be a typical and appropriate timeframe between a deemed liquidation and posting of the bulletin notice. One of the cases GAIC cites, for example, involved entries that were deemed liquidated more than twelve months before Customs posted the relevant bulletin notices, and the court did not find this to be an unreasonable period. *See Koyo*, 497 F.3d at 1240. Consequently, the Court cannot conclude, as a matter of law, that the ten month period in this case is unreasonable.

Taking the facts in the Complaint to be true, as required on a motion to dismiss, the entry was deemed liquidated on February 20, 2009; Customs provided bulletin notice of this liquidation on Decem-

[8] GAIC misstates the date of deemed liquidation as February 10, 2009 in the relevant sections of its Motion to Dismiss. As noted in the Complaint, ¶ 9, the date that deemed liquidation took place is February 20, 2009.

[9] GAIC also misstates the date the 90-day period of reliquidation would have expired if counted from the deemed liquidation date. Ninety days from February 20, 2009 is May 21, 2009.

ber 18, 2009; and Customs reliquidated the entry on January 8, 2010, well within 90 days of issuing the bulletin notice. The court therefore denies Defendant's motion to dismiss.

CONCLUSION AND ORDER

For the foregoing reasons, the court hereby:

ORDERS that Defendant's Motion to Dismiss (ECF No. 12) is DENIED.

The Court will contact parties to schedule a teleconference to discuss next steps.

Dated: November 16, 2015
New York, New York

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