

# Decisions of the United States Court of International Trade

Slip Op. 08–40

ARCHER DANIELS MIDLAND COMPANY, Plaintiff, v. UNITED STATES,  
Defendant.

Before: WALLACH, Judge  
Court No.: 05–00592

## **PUBLIC VERSION**

[Plaintiff’s Motion for Summary Judgment is DENIED; Defendant’s Cross-Motion for Summary Judgment is GRANTED; Plaintiff’s Response and Cross-Motion for Summary Judgment is DENIED.]

Dated: April 11, 2008

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## **OPINION**

**Wallach, Judge:**

### **I INTRODUCTION**

This matter comes before the court on Plaintiff Archer Daniels Midland Company’s (“ADM”) Motion for Partial Summary Judgment, Defendant United States’ Cross-Motion for Summary Judgment, and Plaintiff ADM’s Response and Cross-Motion. The United States Bureau of Customs and Border Protection (“Customs”) classified entries of “deodorizer distillate” in Harmonized Tariff Schedule of the United States (“HTSUS”) subheading 3824.90.28 at 7.9% *ad valorem*. Plaintiff challenges the classification and contends that a 2002 amendment to Heading 3824 renders deodorizer distillate clas-

sifiable in Heading 3807 at 0.1% *ad valorem*, or in the alternative, classifiable in the newly created duty-free provisions of subheadings 3825.61 or 3825.90. Plaintiff filed this action pursuant to 28 U.S.C. § 2632. The court has jurisdiction in accordance with 28 U.S.C. § 1581(a).

## II BACKGROUND

The subject merchandise is a substance commercially known as “vegetable oil distillate” or “deodorizer distillate” (“DOD”) and categorized under Chemical Services Abstract (“CAS”) Number 68476–80–2. ADM’s Interrogatory Resp. ¶¶ 3, 9. DOD is a residue produced during the process of refining soybean oil whereby vacuum distillation is utilized to remove undesirable flavors and odors from an otherwise edible oil. *Id.* ¶ 3. The product is a chemical mixture composed of 70–80% free fatty acids but also contains sterols and tocopherols and can embody a number of other materials including tocotrienol, squalene and carotenoids. *Id.* ¶ 8.

Deodorization is the process by which steam strips crude soybean oil from volatile materials under low atmospheric pressure and high temperature. *Id.* ¶ 10. Physically, DOD is a translucent material with a brown, red, or yellow hue, which is solid at room temperature. *Id.* ¶ 8. DOD is primarily used for the recovery of tocopherols and phytosterols, both of which are further used for the production of tocopherol-based vitamin E products, purified phytosterols, distilled methyl esters, vegetable distilled fatty acids, mixed vegetable fatty acids, and vegetable oil residue. *Id.* ¶ 11.

On July 23, 2003, Plaintiff entered DOD through the port of Chicago. Memorandum in Support of Plaintiff’s Cross-Motion for Summary Judgment (“Plaintiff’s Response”) at 1. Customs classified the merchandise in subheading 3824.90.28 as:

Chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances: other.

HTSUS 3824.90.28 (2002).<sup>1</sup>

Customs’ classification was consistent with the decision of this court in *Cargill, Inc. v. United States*, 318 F. Supp. 2d 1279 (CIT 2004), although amendments had been made to Chapter 38 since the importation of the deodorizer distillate at issue in *Cargill*. Memorandum

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<sup>1</sup>At oral argument, Plaintiff agreed that DOD contains “5 percent or more by weight of one or more aromatic or modified aromatic substances.”

dum in Support of Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion") at 1.

In July 2004 Plaintiff filed a protest with an Application for Further Review contesting Customs' classification of DOD in subheading 3824.90.28. Prior to January 1, 2002, subheading 3824.90.28 covered:

Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; **residual products of the chemical or allied industries, not elsewhere specified or included; Other.**

HTSUS 3824.90.28 (2001) (emphasis added); *see also* Amended Complaint ¶ 31.

In the amended tariff schedule that went into effect on January 1, 2002, the language "residual products of the chemical or allied industries, not elsewhere specified or included" was deleted from the description for subheading 3824.90.28. Amended Complaint ¶ 30. At the same time, Heading 3825 was created. *Id.* ¶ 33. Heading 3825 of the 2002 Harmonized Tariff Schedule provides for:

**Residual products of the chemical or allied industries, not elsewhere specified or included;** municipal waste; sewage sludge; other wastes specified in note 6 to this chapter: . . .

HTSUS Heading 3825 (2002) (emphasis added).

Plaintiff claimed that DOD would be properly classified in HTSUS 3825.61.00 which covers "[o]ther wastes from the chemical and allied industries: Mainly containing organic constituents." HTSUS 3825.61 (2002), *see also* Amended Complaint ¶ 18, Plaintiff's Motion at 1. In Plaintiff's Amended Complaint, it also argues for classification in Heading 3807 as "vegetable pitch," and in the alternative classification in subheading 3825.90 as "residual products of the chemical or allied industries" other than the wastes specified in Heading 3825. Amended Complaint ¶¶ 28, 41.

On March 10, 2005, Customs issued Ruling HQ 967288 in which it rejected Plaintiff's proposed classification based on a finding that Heading 3825 is reserved for "environmentally sensitive" or "hazardous" substances and therefore does not apply to DOD. Customs Headquarters Ruling Letter No. 967288 (March 10, 2005) ("HQ 967288"); Amended Complaint ¶¶ 19–21. Customs determined that DOD is clearly a "by-product" of the chemical and allied industries, but classifiable in Heading 3824 as a "chemical preparation" and not in Heading 3825 as a "residual product." HQ 967288 at 6. Customs noted that "residual products" for purposes of Heading 3825 are

“tantamount to waste product” and that DOD is not “the unadulterated ‘leftovers’ of a manufacturing process.” *Id.*

In defining the scope of Headings 3824 and 3825, Customs stated that prior to 2002 there had not been a need to distinguish between “chemical preparations” and “residual products” of the chemical and allied industries. HQ 967288 at 4. Customs acknowledged that neither term is defined in the HTSUS or the accompanying Explanatory Notes (“ENs”) and therefore looked to the available legislative history for Heading 3825. *Id.* In the absence of House or Senate reports, Customs reviewed the papers and notes relating to the proposal of Heading 3825 at the 12<sup>th</sup> session of the Harmonized System Review Sub-Committee and its subsequent adoption by Presidential Proclamation. *Id.* (citing Presidential Proclamation 7515, 66 Fed. Reg. 66,549 (December 18, 2001)). Customs relied on the Sub-Committee’s statements analogizing wastes to residual products of the chemical or allied industries. *Id.* Moreover, Customs stated that the Sub-Committee, at the suggestion of the U.S., only intended to create subheadings for waste products that were “(1) environmentally sensitive and whose transfrontier movement had to be monitored and (2) which were important in international trade.” *Id.* at 5. Based on this, and on the Sub-Committee’s comment that “‘residual products of the chemical and allied industries’ were in fact so nearly similar to other wastes that they should be classified in this new heading,” *id.*, Customs concluded that “residual products” for purposes of Heading 3825 refers only to products “that are environmentally sensitive wastes but can be remediated into a useful product.” *Id.* Furthermore, Customs noted that the examples listed in the ENs of products classifiable in Heading 3825, see n.4 *infra*, resemble hazardous waste products and that the ENs to Heading 3824 indicate that not all by-products were intended to be moved from Heading 3824.<sup>2</sup> *Id.*

On November 29, 2005, Plaintiff timely commenced this action seeking reliquidation of entries of the merchandise in issue and calculation of duties in accordance with Plaintiff’s proposed tariff headings. Complaint ¶ 5. Plaintiff filed a Motion for Partial Summary Judgment seeking adjudication on the issue of whether Heading 3825 is limited to environmentally sensitive substances. Defendant cross-moved for summary judgment. Plaintiff responded and also submitted a cross-motion for summary judgment. In September 2006, Plaintiff filed a motion to amend its statement of material

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<sup>2</sup>The Explanatory Notes to Heading 3824 state, in pertinent part, that:

The chemical products classified here are therefore products whose composition is not chemically defined, whether they are obtained as by-products of the manufacture of other substances (this applies, for example, to naphthenic acids) or prepared directly.

EN 38.24(B) (2002).

facts. Following an in-court conference, the court granted Plaintiff's motion and permitted Defendant to file a sur-reply relating to the amended version of Plaintiff's statement of material facts.

### III STANDARD OF REVIEW

An entry of summary judgment is appropriate when there are “no genuine issues as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In fact, on a motion for summary judgment, the court “may not resolve or try factual issues.” *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989) (citing *Yamaha Int'l Corp. v. United States*, 3 CIT 108, 109 (1982)). Further, while a presumption of correctness attaches to Customs' classification pursuant to 28 U.S.C. § 2639(a)(1), “this presumption ‘is irrelevant where there is no factual dispute between the parties.’” *Bousa, Inc. v. United States*, 25 CIT 386, 387 (2001) (citing *Rollerblade, Inc. v. United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)). Here, both parties agree that there are no disputed issues of material fact, and therefore, the court will review, *de novo*, the scope and meaning of the tariff terms at issue, which are purely questions of law. *See Totes, Inc. v. United States*, 69 F.3d 495, 497 (Fed. Cir. 1995); *see also Rollerblade, Inc.*, 112 F.3d at 483.

Nor is Customs' ruling entitled to deference within the parameters of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). In *Skidmore*, the Supreme Court held that an agency's determination, while not controlling on the court, is entitled to deference given the “specialized experience and broader investigations and information” available to the agency. *Id.* at 139; *see also United States v. Mead Corp.*, 533 U.S. 218, 234, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). The amount of respect afforded “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140. Here, Customs did not use any “specialized expertise” to inform its finding in Ruling HQ 967288 and therefore needs not be afforded deference. Customs' ruling does not have any other characteristics or factors which would give it the power to persuade. Thus, the court has “independent responsibility to decide the legal issue regarding the proper meaning and scope of the HTSUS terms.” *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002) (internal citations omitted).

The court employs a two-step analysis when deciding classification cases: “the first step concerns the proper meaning of the tariff provisions at hand . . . . [T]he second step concerns whether the subject imports properly fall within the scope of the possible headings.” *Uni-*

*versal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). The General Rules of Interpretation (“GRI”) of the HTSUS and the Additional United States Rules of Interpretation guide the court’s classification of goods imported into the United States. *JVC Co. of Am. v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) (citing *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). Absent legislative intent to the contrary, HTSUS terms are construed according to their common and commercial meanings, which are presumed to be the same. *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). In determining a tariff term’s common meaning, the court may rely on its own understanding of the term and may “consult lexicographic and scientific authorities, dictionaries, and other reliable information sources.” *Carl Zeiss, Inc.*, 195 F.3d at 1379. The court may also refer to the Explanatory Notes accompanying a tariff heading, which although not controlling, clarify the scope of the HTSUS subheadings and offer guidance in their interpretation. *Franklin*, 289 F.3d at 758; *see also* H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.

#### IV ANALYSIS

The issue before the court is whether Customs properly classified deodorizer distillate under subheading 3824.90.28 notwithstanding the fact that the reference to “residual products” of the chemical or allied industries was served from the heading. *See* HTSUS 3824.90.28 (2002). Plaintiff proposes that DOD is properly classified under Heading 3807 as “vegetable pitch” or, in the alternative, under Heading 3825 as “other wastes of the chemical or allied industries mainly containing organic constituents” (subheading 3825.61) or as “residual products” of the chemical or allied industries (subheading 3825.90). *See* Plaintiff’s Response at 6.

#### A *Classification Under Heading 3807*

Heading 3807 is an *eo nomine*<sup>3</sup> provision which provides for:

Wood tar; wood tar oils; wood creosote; wood naphtha; vegetable pitch; brewers’ pitch and similar preparations based on rosin, resin acids or on vegetable pitch.

HTSUS Heading 3807 (2002).

The Explanatory Notes accompanying Heading 3807 in pertinent

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<sup>3</sup>An *eo nomine* provision describes goods by name, in contrast to “use” provisions that describe merchandise by their use. *Carl Zeiss, Inc.*, 195 F.3d at 1379.

part describe “vegetable pitch” as follows:

(C) Vegetable pitch

These are residues of the distillation or other treatment of vegetable materials. They include:

- (1) Wood pitch (wood tar pitch), a residue of the distillation of wood tar.
- (2) Rosin pitch, a residue of the preparation of rosin spirit and rosin oil by distillation of rosin.
- (3) Sulphate pitch, a residue after the distillation of tall oil, etc.

These pitches are usually blackish-brown, reddish-brown or yellowish-brown. They generally soften with the heat of the hand. They are used, according to their type, for caulking ships, waterproof-coating of woven fabrics, impregnating woods, preparing anti-rust coatings, as binding materials, etc.

EN 38.07(C) (2002).

Plaintiff argues that the “common and commercial meaning” of vegetable pitch includes deodorizer distillate. Plaintiff’s Response at 9. Plaintiff relies on the dictionary definition of “pitch” which states that “pitch, in the chemical-process industries, is the black or brown residue obtained by distilling coal tar, wood tar, fats, fatty acids, or fatty oils.” *Id.* (citing *The New Encyclopedia Britannica* 474 (15th ed. 2002)). Plaintiff analogizes the physical appearance of DOD and its uses to those of pitch and claims that the merchandise at issue falls within the “commercial understanding” of vegetable pitch. *Id.* at 10. In addition, Plaintiff provides affidavits that attest that DOD mimics the physical description provided in the ENs which characterize vegetable pitch as “blackish-brown, reddish-brown or yellowish-brown” and a substance that “generally soften with the heat of the hand.” *Id.* at 11 (citing *Furcich Aff.* ¶ 11; *Collins Aff.* ¶ 5; *Hart Aff.* ¶ 7).

Plaintiff also argues that the list of uses provided in the ENs is not exhaustive by the use of the term “etc.,” but that vegetable pitch has a “number of modern industrial uses,” and that DOD is used regularly as a substitute for “tall oil pitch” which is specifically covered by Heading 3807. *Id.* at 14. With respect to the uses listed in the ENs, Plaintiff argues that fatty acids, such as methyl esters, which are extracted from DOD are further refined and used in the preparation of anti-rust coatings, a use which is listed in the ENs. *Id.* at 15. Whereas DOD was previously classified under Heading 3824, Plaintiff argues that classification in Heading 3807 is proper because the court is required to classify the product in the tariff heading that either names the product or its specific use. *Id.* at 16 (citing GRI 3(a)).

Defendant argues that DOD does not fall under Heading 3807 because “pitch” generally is defined as a dark sticky substance derived from various wood tars. Memorandum in Support of Cross-Motion for Summary Judgment (“Defendant’s Cross-Motion”) at 15–16. Defendant also asserts that while Heading 3807 is an *eo nomine* and not a “use” provision, each of the definitions listed in the ENs describes various uses of pitch, and none of these correspond to the uses for DOD identified by Plaintiff in its interrogatory responses. *Id.* at 16. Defendant points out that the proposition that “merchandise must be classified in its condition as imported has been a basic tenet of customs law.” Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion for Summary Judgment and Response to Plaintiff’s Cross-Motion for Summary Judgment (“Defendant’s Response”) at 10 n.12. Moreover, Defendant contends that it does not appear from any of Defendant’s research that DOD is ever referred to commercially as “vegetable pitch.” Defendant’s Cross-Motion at 16.

#### **The “Common and Commercial” Meaning of “Vegetable Pitch” Does Not Encompass Deodorizer Distillate**

An *eo nomine* provision describes goods according to their “common and commercial meaning” and includes, without terms of limitation, all forms of the article. *See, e.g., Chevron Chem. Co. v. United States*, 23 CIT 500, 505 (1999). “When a tariff term is not defined in either the HTSUS or its legislative history, the term’s correct meaning is presumed to be its common meaning in the absence of evidence to the contrary.” *Timber Prods. Co. v. United States*, 417 F.3d 1198, 1201 (Fed. Cir. 2005) (citing *Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984)). A party who argues that a tariff term should not be given its common meaning “must prove that ‘there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade.’” *Timber Prods. Co. v. United States*, 515 F.3d 1213, 1219 (Fed. Cir. 2008) (quoting *Moscablades Bros. v. United States*, 42 CCPA 78, 82 (1954)). To the extent that Plaintiff claims the commercial meaning of “pitch” is something other than the common meaning, the question for the court is whether ADM has overcome this presumption.

There is little judicial guidance on the “common and commercial meaning” of “vegetable pitch” for purposes of Heading 3807. Dictionaries do not define the term “vegetable pitch,” but give meaning to the term “pitch.” The dictionary definition of “pitch” is akin to the language found in the ENs to Heading 3807. For example, The American Heritage Dictionary defines pitch as “[a]ny of various thick, dark, sticky substances obtained from the distillation residue of coal tar, wood tar, or petroleum and used for waterproofing, roofing, caulking, and paving.” *The American Heritage Dictionary* 1380 (3<sup>rd</sup> ed. 1996). Other dictionaries contain similar descriptions, describing pitch as:

A tenacious resinous substance, of a black or dark brown colour, hard when cold, becoming a thick viscid semi-liquid when heated; obtained as a residuum from the boiling or distillation of tar, also from the distillation of turpentine; used to stop the seams of ships after caulking, to protect wood from moisture, and for other purposes.

*The Oxford English Dictionary* 915 (2d ed. 1989); or

[A] soft substance that is obtained by distilling fats, fatty oils, or fatty acids (as from the manufacture of soap or candles), contains polymers and decomposition products, and is used chiefly in varnishes and paints and in floor coverings – called also fatty acid pitch, stearin pitch.

*Webster's Third New International Dictionary* 1724 (3rd ed. 1986).

“Vegetable pitch,” is simply “pitch” but derived from a vegetable base, such as soy, or as described in the ENs, substances that are “residues of the distillation or other treatment of vegetable materials.” EN 38.07(C) (2002). The common uses for “pitch” are, both according to dictionary definitions and the Explanatory Notes, caulking, waterproofing and the like.

For purposes of classifying DOD, it is apparent that the substance also is a residue of the distillation of vegetable materials and that DOD shares certain characteristics with various pitches. For example, Plaintiff has furnished affidavits that attest to the physical characteristics of DOD as a yellowish-brown to reddish-brown substance which is viscous at room temperature or solid at lower temperatures and softens with the warmth of a hand, traits common to various pitches described both in dictionary definitions and in the ENs. *See* Hart Aff. ¶ 7; Collins Aff. ¶¶ 13–14. While the Explanatory Notes are not exhaustive when listing examples of vegetable pitch, DOD is not wood pitch, rosin pitch or sulphate pitch, as listed in the ENs. *See* EN 38.07(C) (2002). In fact, there is little similarity between vegetable pitch and DOD other than the fact that both are sticky brown substances that derive from a distillation process.

Moreover, the uses for “pitch” listed in dictionary definitions and in the Explanatory Notes do not comport with any of the applications for which Plaintiff uses DOD or for which DOD can be used. Plaintiff has submitted documentation to suggest that it primarily uses DOD for the recovery of tocopherols and phytosterols which are used in vitamin-E products in the pharmaceutical industry, in dietary supplements and as food additives. ADM Interrogatory Responses at ¶ 11. Other uses include purified phytosterols, distilled methyl esters, mixed vegetable fatty acids and vegetable oil residue. *Id.* None of these uses resemble caulking, waterproofing, or other commonly described “pitch” uses.

This fact, in conjunction with prevailing case law requiring that goods must be classified in the condition in which they are imported, contradict Plaintiff's proposed classification. *Worthington v. Robbins*, 139 U.S. 337, 341, 11 S. Ct. 581, 35 L. Ed. 181 (1891) ("The dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported."); see also *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *United States v. Citroen*, 223 U.S. 407, 414–15, 56 L. Ed. 486, 32 S. Ct. 259 (1911)) ("It is well settled law that merchandise is classified according to its condition when imported."). While Plaintiff does not dispute that a product must be classified in its imported form, Plaintiff asserted at oral argument that there is little evidence of things specifically described as "pitch" in the Explanatory Notes being used to do anything in their imported form. Instead, Plaintiff attempts to establish a link between DOD usage and common "pitch" uses, stating that the production of fatty acids is used in the manufacture of printing ink, paints, and varnishes, which in turn are used in anti-rust coatings. See, e.g., Plaintiff's Response at 14–15; see also Hart Aff. ¶ 18. Because products must be classified "as imported," this link is insufficient.

Furthermore, there is no indication from Plaintiff's submitted materials, dictionary definitions or any other readily available information that DOD is commercially or commonly known, sold or traded as "vegetable pitch." In fact, in Plaintiff's own words, "the residue of deodorization is a complex mixture of chemicals known commercially as deodorizer distillate." Mayfield Aff. ¶ 12; see also Collins Aff. ¶ 5. Plaintiff has not successfully demonstrated that deodorizer distillate falls within the "common or commercial" meaning of vegetable pitch for purposes of HTSUS Heading 3807 or in the alternative, that a different commercial meaning of the substance exists which is "definite, uniform, and general throughout the trade" within the meaning of *Timber Prods. Co.*, 515 F.3d at 1219.

## B

### *Classification Under Heading 3825*

On January 1, 2002, Chapter 38 was amended by Presidential Proclamation and Heading 3825 was created. Presidential Proclamation 7515, 66 Fed. Reg. 66,549 (December 18, 2001). The language of Heading 3825 provides for:

Residual products of the chemical or allied industries, not elsewhere specified or included; municipal waste; sewage sludge; other wastes specified in note 6 to this chapter.

HTSUS Heading 3825 (2002).

The two subheadings at issue, 3825.61 and 3825.90, refer respectively to "Other wastes from the chemical or allied industries: Mainly containing organic constituents" and "Residual products. . . :

Other.” HTSUS 3825.61, 3825.90 (2002). The Explanatory Notes accompanying Heading 3825 list five specific substances pertaining to residual products. These are (1) alkaline iron oxide; (2) residues from the manufacture of antibiotics; (3) ammoniacal gas liquors; (4) spent oxide;<sup>4</sup> and (5) residues from the processing of power plant combustion off-gases.<sup>5</sup> EN 38.25(A)(1)–(4) (2002); EN 38.25(A)(5) (2007).

Note 6 to Chapter 38 which pertains to “other wastes” lists these as: (1) clinical wastes; (2) waste organic solvents; (3) wastes of metal pickling liquors; and (4) other wastes from chemical or allied industries. EN 38.25(D)(1)–(4) (2002).<sup>6</sup> Neither the HTSUS nor the Ex-

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<sup>4</sup>(A) RESIDUAL PRODUCTS OF THE CHEMICAL OR ALLIED INDUSTRIES, NOT ELSEWHERE SPECIFIED OR INCLUDED

(1) Alkaline iron oxide for the purification of gas (in particular, coal-gas) containing impure ferric oxide, obtained as a by-product from one of the processes of the extraction of aluminium from bauxite. These by-products also contain sodium carbonate, silica, etc.

(2) Residues from the manufacture of antibiotics (called “cakes”), with a very low antibiotic content, suitable for use for the preparation of compound animal feeds.

(3) Ammoniacal gas liquors, produced as an aqueous portion settling out from the crude coal tar condensed from coal gas, and also by the absorption of ammonia in the waters used for washing coal. They are usually concentrated before transportation. They are brownish liquids and are used for the manufacture of ammonium salts (particularly ammonium sulphate) and purified and concentrated aqueous solutions of ammonia gas.

(4) Spent oxide. After the water-extraction of the greater part of its ammonia content, coal gas is chemically purified by passing it through a mass usually composed of bog iron ore or of hydrated iron(III)oxide, sawdust and calcium sulphate. This mass removes from the gas certain impurities (hydrogen sulphide, hydrocyanic acid, etc.). When spent, it contains a mixture of sulphur, Prussian blue, a small quantity of ammonium salts and other substances, and is known as spent oxide. It is usually in the form of powder or granules, greenish to brownish in colour, with a disagreeable odour, and is mainly used as a source of sulphur and cyanides (particularly Prussian blue) and as a fertiliser or an insecticide.

EN 38.25(A)(1)–(4) (2002).

<sup>5</sup>The following was added in 2007:

(5) Residues from the processing of power plant combustion off-gases by so called limestone gypsum flue gas desulphurisation (LG FGD). These residues are solid or in the form of a slurry and can be further processed and used as a substitute for natural gypsum in plasterboard manufacture. However, purified calcium sulphate isolated from these residues, is excluded (heading 28.33).

EN 38.25(A)(5) (2007).

<sup>6</sup>(D) OTHER WASTES SPECIFIED IN NOTE 6 TO THIS CHAPTER

The heading also covers a wide variety of other wastes specified in Note (6) to this Chapter. They include:

(1) Clinical waste which is contaminated waste arising from medical research, diagnosis, treatment or other medical, surgical, dental or veterinary procedures. Such waste often contains pathogens, pharmaceutical substances and body fluids and requires special disposal procedures (e.g., soiled dressings, used gloves and used syringes).

(2) Waste organic solvents generally derived from cleaning and washing processes and containing mainly organic solvents, not fit for further use as presented as primary products, whether or not intended for recovery of the solvents.

planatory Notes define the terms “residual products” or “other wastes from the chemical or allied industries.”

Plaintiff argues that DOD is properly classified in Heading 3825 because the relevant language under which DOD had previously been classified was moved to Heading 3825 along with its accompanying Explanatory Notes. Plaintiff’s Motion at 1, 12. Plaintiff contends that Heading 3825’s applicability is not limited to environmentally sensitive products and that DOD qualifies as “waste” because it is a residual product of the chemical or allied industries. *Id.*; Plaintiff’s Response at 28. Plaintiff contends that the legislative history upon which Customs relied in its denial of Plaintiff’s protest is flawed because record discussions and negotiations of the World Customs Organization (“WCO”) Sub-Committee may not be used for interpretative guidance of the HTSUS, and, that any such limitation would be arbitrary absent explicit guidance to importers. Plaintiff’s Brief at 15. Indeed, Plaintiff points out that certain non-hazardous wastes, such as household and road wastes are included under the definition of “municipal waste” in Note 4 to Chapter 38, and certain toxic wastes are precluded by Note 6 to Chapter 38, negating the proposition that all items classified under Heading 3825 must be environmentally sensitive. *Id.* at 6–7.

Defendant’s argument parallels Customs’ interpretation of the scope of the tariff term, and implies a limitation on the applicability of Heading 3825 to environmentally sensitive or hazardous substances. Defendant’s Cross-Motion at 20 (citing Ex. E). While acknowledging that the legislative history in question is not legally binding, Defendant’s argument relies exclusively on conclusions and recommendations formulated by the Harmonized System Review Sub-Committee concerning the scope of Heading 3825. *Id.* Defendant argues the absence of any other legislative history and the express agreement by the Sub-Committee that the provision covers only environmentally sensitive waste products, is sufficient to support its position. *Id.*; Defendant’s Response at 13. Defendant suggests that determining whether a substance is environmentally sensitive should be done on a case-by-case basis by an inquiry into whether its

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Wastes containing mainly petroleum oils or oils obtained from bituminous minerals are excluded (heading 27.10).

(3) Wastes of metal pickling liquors, hydraulic fluids, brake fluids and anti-freezing fluids not fit for further use as presented as primary products. They are generally used for recovery of the primary products.

However, the heading excludes ash and residues from waste of metal pickling liquors of a kind used for the recovery of metals or metal compounds (heading 26.20) and wastes of hydraulic fluids and brake fluids containing mainly petroleum oils or oils obtained from bituminous minerals (heading 27.10).

(4) Other wastes from chemical or allied industries.

EN 38.25(D) (2002).

“disposal, treatment and transport is controlled to protect the environment.” Defendant’s Response at 13–14.

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**Heading 3825 is not Limited to “Environmentally Sensitive” or “Hazardous” Substances**

GRI 1 states that “classification shall be determined according to the terms of the headings and any relative section or chapter notes . . .” GRI 1. The language of Heading 3825 and the accompanying Explanatory Notes do not impose an express limitation on the heading to include environmentally sensitive or hazardous substances. Plaintiff correctly states that the appropriate legislative history on which this court must rely for interpretive guidance does not impose an environmental limitation on Heading 3825. *See, e.g.*, Plaintiff’s Motion at 11; *see also EM Indus. v. United States*, 22 CIT 156, 163 (1999) (nothing that the WCO’s official interpretation of the HTSUS are the Explanatory Notes); *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995). In fact, the International Trade Commission (“ITC”) is obligated by law to keep the HTSUS under continuous review and recommend modifications to the President on an ongoing basis. 19 U.S.C. § 3005(a)-(c). The ITC may take into account decisions issued by the WCO, the WCO’s Harmonized System Committee, and U.S. Customs in making their recommendation. *See, e.g.*, Proposed Modification to the Harmonized Tariff Schedule of the United States, Investigation No. 1205–5 (Final), Pub. 3430 at 5 (June 2001).

Here, neither the reports detailing the modification to Chapter 38 nor Presidential Proclamation 7515, contain explicit language that limits Heading 3825 to environmentally sensitive materials. *See* 66 Fed. Reg. 66,549. Indeed, as Plaintiff points out, “such a major qualification” would most likely warrant a notice and comment period pursuant to 19 U.S.C. § 3005(b). *See* Plaintiff’s Motion at 12. Plaintiff cites to *Cummins, Inc. v. United States*, 454 F.3d 1361 (Fed. Cir. 2006) for the proposition that a WCO opinion may at most be entitled to “respectful consideration,” but the court, according to controlling case law, may consult any number of sources to inform its decision concerning the scope of a tariff term, absent unambiguous statutory language and legislative history to the contrary. *See, e.g.*, *Carl Zeiss, Inc.*, 195 F.3d at 1379 (Fed. Cir. 1999). Accordingly, the court may look to interpretive guidance where found.

In this instance, it seems clear from the available information that the intent of the Harmonized System Review Sub-committee to the Committee may have been to limit the applicability of Heading 3825 to environmentally sensitive products, or waste products. However, in the formulation and adoption of the provision by the U.S., any such qualification was not adopted. First, it would have been logical to include any such qualification in the statutory language of the

HTSUS or, at minimum, in the Explanatory Notes. Second, imposing such a limitation is likely to cause confusion for importers because no objective standards have been set concerning what for example, qualifies as an “environmentally sensitive” or “hazardous” substance for purposes of Heading 3825. Third, no agency was designated to provide any such guidelines, nor is it obvious that all substances detailed in the Explanatory Notes are necessarily environmentally sensitive.<sup>7</sup> Indeed, in an attempt to define what constitutes “environmentally sensitive materials,” the government cites to a state sanitation code. Defendant’s Response at 13. Such haphazard and varying definitions do not provide adequate guidance to commercial importers of goods seeking to classify chemically complex substances and waste products in Heading 3825, nor is it sufficient that individual substances in the ENs are already regulated the U.S. Environmental Protection Agency (“EPA”), when some are not.<sup>8</sup>

Consequently the scope of Heading 3825 is not limited to substances and products that are environmentally sensitive or hazardous. Congress may wish to amend the provision if it was indeed intended to be limited in such a fashion. However, Federal courts, except in highly unusual circumstances, must decline “to act where Congress has not.” *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992) (citing *Denkler v. United States*, 782 F.2d 1003, 1008 (Fed. Cir. 1986) (“Should Congress wish to extend the [statutory scope], it knows how to do so.”). It is not a court’s role to read in legislative intent where none is found, or attribute meaning to HTSUS provisions that would result in arbitrary and unpredictable results.

## 2

### **Deodorizer Distillate is Not Properly Classified in Subheading 3825.61 as “Waste”**

Plaintiff’s chief argument for classifying DOD in subheading 3825.61 is that DOD qualifies as a “waste product” under controlling case law. Plaintiff’s Motion at 9 (citing *Webster’s Third New International Dictionary* 1931–32, 2580 (3rd ed. 2002); Plaintiff’s Response at 26–28. Absent a clear definition of “waste” in the HTSUS or the ENs, Plaintiff relies on the court’s definition of “waste” in *E.T. Horn*

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<sup>7</sup>For example, “municipal waste” is defined in the ENs to Heading 3825 as “waste of a kind collected from households, hotels, restaurants, hospitals, shops, offices, etc. . . .” EN 38.25(B) (2002). The Explanatory Note elaborate further on the definition of “municipal waste,” noting that such waste “generally contains a large variety of materials such as plastics, rubber, wood, paper, textiles . . . and other damaged or discarded articles.” The designation of such items as “environmentally sensitive” or “hazardous” is within the discretion of local municipalities; there is no uniform federal standard designating municipal waste as environmentally sensitive.

<sup>8</sup>“Sewage sludge,” as identified in the ENs to Heading 3825(C), is covered by specific EPA regulations. Other substances are not. See EN 38.25(C) (2002).

*Co. V. United States*, 945 F.2d 1540, 1543 (Fed. Cir. 1991). Plaintiff's Response at 26 (citing *E.T. Horn Co.*, 945 F.2d at 1543).

There the court defined "waste" as "manufactured articles which have become useless for their original purpose . . . and fit only for remanufacture into something else." *Id.* Plaintiff also cites to *Precision Specialty Metals v. United States*, 24 CIT 1016, 1037 (2000) to argue that the court defined waste by a threshold question of whether the merchandise was "purposely produced" or required "remanufacture" prior to exportation. *Id.* at 27. Plaintiff notes that oil refineries are "not in business to produce deodorizer distillate for its tocopherol or any other content," and that its relative value, as compared to the primary products derived from soybeans (soybean meal and crude soybean oil), is insignificant. *Id.* at 5. In fact, Plaintiff characterizes its production of DOD "a reasonable cost recovery effort, akin to recycling spent material." *Id.* at 6.

Defendant argues that DOD cannot be considered "waste" because it is a "purposely sought by-product" of soybean oil production which is "manipulated to maximize the tocopherol level." Defendant's Cross-Motion at 24; *see also* Defendant's Response at 17. Defendant challenges Plaintiff's characterization of DOD under *E.T. Horn Co.*, arguing that DOD is not a manufactured article, and that DOD, albeit a residue of soybean oil manufacturing, is a product in its own right which "has an actual use and does not become 'useless' even if that use is not exploited." Defendant's Response at 19.

"Waste" is a broad term which is for example defined as "damaged, defective, or superfluous material produced during the or left over from a manufacturing process or industrial operation; material not usable for the ordinary and main purpose of manufacture." *Webster's Third New International Dictionary* 2580 (3rd ed. 2002). This comports with the court's definition of "waste" in *E.T. Horn* as a "useless" product. *E.T. Horn*, 945 F.2d at 1543.

Applying *E.T. Horn* here, Plaintiff fails to demonstrate that DOD is "manufactured", and that despite the multiple applications for which DOD is used the product is "useless" and has to undergo "remanufacturing" in order to become usable. As the court said, "[because] something is a residue of a process does not automatically render the substance waste, entitled to entry duty-free. Changes in technology or demand can and do render what was once waste matter which is sought for its own sake." *Id.* Whereas Plaintiff claims that DOD is of little fiscal value as compared with the main oil products it distills, the mere fact that Plaintiff continues to extract DOD for sale is indicative that it is purposely sought, and not merely a waste product "useless for [its] original purpose." *Id.* Moreover, whether a substance is classifiable as "waste" is not linked to the financial worth of the product. Although it is obvious that DOD is an invariable by-product of soybean distillation, the argument that DOD is not "specifically sought" is refuted by Plaintiff's own admis-

sion that “[t]he market demands for vitamin E and other by-products obtained from DOD determines whether ADM will purchase and import DOD from its overseas suppliers.” (Hart Aff. ¶ 12). This statement is indicative that Plaintiff not only “comes upon” DOD as a residue of oil distillation, but that DOD is purchased and imported in its own right for a specific and unrelated purpose. Accordingly, the court rejects Plaintiff’s proposed classification of DOD in subheading 3825.61.00.

### 3

#### **Deodorizer Distillate is Not Properly Classified under Subheading 3825.90 as a “Residual Product”**

In the alternative, Plaintiff argues that DOD is classifiable as a “residual product” or “by-product” of the manufacture of soybean oil and that the substance is properly classified under subheading 3825.90. Plaintiff’s Motion at 9 (citing *Webster’s Third New International Dictionary* 1931–32, 2580 (3<sup>rd</sup> ed. 2002)); Plaintiff’s Response at 28–29. Plaintiff concedes that the term “residual products” is not defined in the HTSUS or the ENs to any relevant section, but advocates that the terms are best construed by their “plain, unqualified meanings.” Plaintiff’s Motion at 12. In addition, Plaintiff asserts that DOD is properly classified in subheading 3825.90 because it is a “basket provision” which was not intended to be limited to the substances listed in the ENs. Plaintiff’s Response at 29.

Defendant argues that the Explanatory Notes limit the scope of subheading 3825.90 to encompass only the residual products listed and therefore precludes classification of DOD in this provision. Defendant’s Cross-Motion at 26–27; Defendant’s Response at 23. Defendant contends that no language in the subheading indicates that the provision be interpreted as open-ended, and that the specific addition of another substance in 2007, illustrates this. Defendant’s Cross-Motion at 26–27.

The question is whether “residual products” under Heading 3825 encompasses DOD. Dictionary definitions speak to “residual products” as a type of “by-products,” which currently are also covered by Heading 3824. See EN 38.24(B); see also discussion Section IV(C) *infra*. In Customs’ ruling, it held that “residual products” for purposes of Heading 3825 are “tantamount to waste products,” and therefore not inclusive of DOD. HQ 967288 at 5. According to dictionary definitions and the court’s articulation in *Cargill*, the terms “residual products” and “by-products” are often used interchangeably. See *Cargill*, 318 F. Supp. 2d at 1290. Therefore classification of DOD in subheading 3825.90 does not turn on whether the court finds that DOD is a “residual product” or a “by-product.” The proper inquiry is whether subheading 3825.90 is a basket provision, and whether the subheading is limited to the substances listed in the accompanying Explanatory Notes.

The Explanatory Notes to subheading 3825.90 list four specific substances under “residual products of the chemical or allied industries,” namely alkaline iron oxide, residues from the manufacture of antibiotics, ammoniacal gas liquors and spent oxide, to which a fifth was added in 2007. EN 38.25 (2007). While recognizing that the Explanatory Notes were only meant as a guide in defining HTSUS tariff terms, there is no indication that other residual products were meant to be included in this provision. *See Bausch & Lomb*, 21 CIT 166, 174, 957 F. Supp. 281, 288 (1997) (“[the Explanatory Notes are] generally indicative of proper interpretation of the various provisions of the Convention. . . .”). Whereas subheading 3825.90 mimics the language of a “basket provision”<sup>9</sup> by containing the language “not elsewhere specified or included” and “other,” Plaintiff’s argument that subheading 3825.90 is a basket provision is not persuasive in light of the limited nature of the language in the Explanatory Notes. The ENs do not contain any language indicating that other substances may be included, as is its function as a basket provision for the merchandise at issue largely negated by the existence of Heading 3824. Heading 3824 specifically provides for chemical mixtures akin to DOD and the ENs explicitly encompass by-products of an unspecified chemical composition. Indeed, the addition of a fifth substance in the 2007 version of the HTSUS, again without the use of terms such as “etc.” or other language indicative that the list is inclusive of other, unnamed substances, suggests that the subheading was intended to be limited only to the listed substances. Accordingly, DOD is not properly classified as a residual product under subheading 3825.90.

### C

***Classification Under Subheading 3824.90.28 is Proper Because DOD is a “Chemical Preparation” Obtained as a By-Product Whose Composition is Not Chemically Defined***

Customs classified DOD, entered by Plaintiff, in Heading 3824, subheading 3824.90.28. Subheading 3824.90.28, after its amendment on January 1, 2002, provides for:

Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances: Other.

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<sup>9</sup>“Basket or residual provisions of HTSUS Headings . . . are intended as a broad catch-all to encompass the classification of articles for which there is not a more specifically applicable subheading.” *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (internal citations omitted).

HTSUS 3824.90.28. (2002).

The Explanatory Notes to Heading 3824 provide in pertinent part:

(B) CHEMICAL PRODUCTS AND CHEMICAL OR OTHER PREPARATIONS

...

The chemical products classified here are therefore products whose composition is not chemically defined, whether they are obtained as **by-products of the manufacture of other substances** (this applies, for example, to naphthenic acids) or prepared directly.

EN 38.24(B) (2002).

Customs' classification was consistent with this court's decision in *Cargill*, 318 F. Supp. 2d 1279 (CIT 2004), although the language of Heading 3824 in effect at the time the merchandise in *Cargill* was entered included a provision for "residual products of the chemical or allied industries." *Cargill*, 318 F. Supp. 2d at 1282. In *Cargill* the court did not need to distinguish between "chemical products and preparations" and "residual products of the chemical or allied industries," but held that classification in subheading 3824.90.28 was proper because "deodorizer distillate is undisputedly a by-product of a chemical or allied industry." *Id.* at 1290. Recognizing that the *Cargill* court was not faced with the issue of whether DOD was best classified as a "by-product" or "residual" product, Customs in its ruling found that the merchandise is more aptly described as a "chemical preparation" in Heading 3824 than a "residual product" in Heading 3825, although it conceded that neither were defined in the HTSUS or the accompanying ENs. HQ 967288 at 4. Customs found that eliminating "residual products" from Heading 3824 did not indicate an intent to preclude by-products from classification in Heading 3824. *Id.* at 5. Indeed, Customs points to the ENs to Heading 3824 which specifically provide for "chemical products . . . obtained as by-products from the manufacture of other substances," and the list provided in the Explanatory Notes in which naphthenic acids are listed as "by-products of the refining of certain petroleum oils and of certain oils obtained from bituminous minerals." *Id.* (citing EN 38.24(B)(1) (2002)). Customs also offered the dictionary definition of the term "preparation" as "a substance . . . prepared for a specific purpose." *Id.* (quoting *Webster's II New College Dictionary* 1789 (3rd ed. 1991)).

Plaintiff argues that DOD is not classifiable in Heading 3824, because it is better defined as a "waste" or "residual product" in Heading 3825. Plaintiff's Motion is 22. Plaintiff refutes Defendant's distinction between Heading 3824 and 3825 which implies that by-products may be commercially valuable and residual products may

not, citing examples of named substances in Heading 3825 that are both valuable and further manufactured substances. *Id.* at 22–23. Additionally, Plaintiff contends that DOD is of lessened value in light of regulations that require manufacturers to leave higher levels of tocopherol in the edible oil, but that the substance is an unavoidable residue resulting from soybean distillation. *Id.* at 23–24.<sup>10</sup> Plaintiff argues that the real distinction between Heading 3824 and 3825 turns on whether the “merchandise is useful in its condition as generated in the production of something else.” *Id.* at 24. Plaintiff notes that naphthenic acid appears to have an immediate practical application, whereas DOD is prepared from oil residue via the process of steam stripping, and that tocopherols are then further extracted for the use in vitamin-E products. *Id.* at 24–25.

Defendant argues that Customs properly classified DOD under Heading 3824, its reasoning mirroring that of Customs. Defendant’s Cross-Motion at 18. In response to Plaintiff’s attempt to distinguish the two headings at issue, Defendant argues that the distinction is not properly illustrated by naphthenic acid, as this substance also requires further manufacturing and therefore disproves Plaintiff’s theory. *Id.* at 25. Moreover, Defendant argues that the focus of the court’s enquiry must be whether the substance qualifies as a by-product, as opposed to a waste product. *Id.*

Classifying merchandise under a “basket” provision is only appropriate when no other tariff terms cover the product more specifically. *EM Indus., Inc.*, 22 CIT at 165 (1998) (“basket” or “residual” provisions are intended as broad catch-all tariff terms for which “there [are] no more specifically applicable subheadings.”). Basket provisions are generally only used where other applicable provisions have been excluded. *See Rollerblade, Inc.*, 282 F.3d at 1354.

Deodorizer distillate is properly classifiable as:

Chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances: Other.

HTSUS 3824.90.28.

The Explanatory Notes to Heading 3824 define such products as those “whose composition is not chemically defined, whether they are obtained as by-products of the manufacture of other substances.” EN 38.24. Plaintiff submitted affidavits that attest to the fact that “[d]eodorizer distillate is a complex mixture of approximately 10% sterols and steryl esters, and approximately 10% tocopherols (collec-

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<sup>10</sup>At oral argument, Defendant indicated that it does not dispute this characterization.

tively ‘aromatic’); mixed fatty acids (approximately 70–80%), including glycerides, hydrocarbons, oleic acid, stearic acid, linoleic acid, linolenic acid; and organic compounds including herbicides, pesticides, insecticides, dissolved gases, moisture, and other general impurities.” (Mayfield Aff. ¶ 16). Plaintiff conceded that “there are no formal specifications of the composition of DOD, which is dependent on the source of the vegetable material and processing conditions,” (Hart Aff. ¶ 8), and that “[t]he residue of deodorization is a complex mixture of chemicals . . .” (Collins Aff. ¶ 5). These statements suggest that DOD qualifies as a chemical product or preparation with a non-specific chemical composition.

While Plaintiff agrees that DOD is a by-product of soybean distillation, it contends that not all by-products are classifiable in Heading 3824. Plaintiff’s Response at 24–25; *see also The American Heritage Dictionary of the English Language* (4th ed. 2000) (a by-product is “something produced in the making of something else”). This assertion is clearly validated by the creation of Heading 3825, which refers to “residual products” that may also be construed as a type of “by-product.” However, because subheading 3825.90 is limited to the residual products listed, classification of DOD in subheading 3824.90.28 is proper. Thus, because DOD is not properly classified in Heading 3807, subheading 3825.61, or subheading 3825.90, and in lieu of a more specific provision, Customs properly classified entries of DOD in subheading 3824.90.28.

## V CONCLUSION

For the foregoing reasons Plaintiff’s Motion for Summary Judgment is DENIED, Defendant’s Motion for Summary Judgment is GRANTED, and Plaintiff’s Response and Cross-Motion is DENIED. Accordingly, Customs’ classification of deodorizer distillate, CAS Number 68476–80–2, in HTSUS subheading 3824.90.28 is AFFIRMED.

**SLIP OP. 08-46**

UNITED STATES, Plaintiff, v. CANEX INTERNATIONAL LUMBER SALES LTD., AND XL SPECIALTY INSURANCE COMPANY, Defendants. XL SPECIALTY INSURANCE COMPANY, Cross-Claimant, v. CANEX INTERNATIONAL LUMBER SALES LTD., Cross-Defendant.

Before: Jane A. Restani, Chief Judge  
Court No. 06-00141

[Defendant's motion to dismiss denied.]

Dated: May 1, 2008

*Jeffrey S. Bucholtz*, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Aimee Lee*); *Christopher Shaw*, Office of Assistant Chief Counsel, Department of Homeland Security, U.S. Customs and Border Protection, of counsel, for the plaintiff.

*Joel R. Junker & Associates (Joel R. Junker)* for the defendant and cross-defendant Canex International Lumber Sales Ltd.

*Sandler Travis Rosenberg Glad & Ferguson, PC (Thomas R. Ferguson)*, for the defendant and cross-claimant XL Specialty Insurance Company.

**OPINION**

Restani, Chief Judge: Between April 12, 2000, and October 23, 2000, defendant Canex International Lumber Sales Ltd. ("Canex") entered 151 entries of angle-cut lumber under Harmonized Tariff Schedule of the United States ("HTSUS") heading 4418.<sup>1</sup> (Compl. ¶¶ 11, 23.) After entry, U.S. Customs and Border Patrol ("Customs") classified the merchandise under HTSUS heading 4407.<sup>2</sup> (*Id.* at ¶¶ 13, 25.) Because Canex did not provide proof of the export permits required for imports under heading 4407, Customs issued notice assessing liquidated damages against Canex.<sup>3</sup> (*Id.* at ¶¶ 17, 29.) Canex protested Customs' classification of the subject merchandise, and subsequently filed an action in this Court challenging Customs' classification decision. *See Canex Int'l Lumber Sales Ltd. v. United States*, No. 02-00596. While the classification case was still pending, plaintiff United States ("Government") initiated the current proceedings to recover liquidated damages.<sup>4</sup> Canex moves to dismiss on the

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<sup>1</sup>Heading 4418 covers "[b]uilders' joinery and carpentry of wood," and is not covered by the permitting requirements of the United States-Canada Softwood Lumber Agreement ("SLA"). HTSUS 4418; (Compl. ¶¶ 12, 14, 24.)

<sup>2</sup>Heading 4407 covers "[w]ood sawn or chipped lengthwise, sliced or peeled," and is subject to the SLA's export permit requirements. HTSUS 4407; (Compl. ¶¶ 13-15, 25-27.)

<sup>3</sup>The entries were secured by two separate bonds issued by cross-claimant XL Specialty Insurance Company ("XL"). (Compl. ¶¶ 7-8.)

<sup>4</sup>Although Customs indicated in a letter dated August 24, 2001, that it would withhold

grounds that the Government failed to exhaust administrative remedies prior to the commencement of this action.<sup>5</sup>

The court has jurisdiction pursuant to 28 U.S.C. § 1582(2). Dismissal will be denied unless the factual allegations are “‘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.’” *Corus Staal BV v. United States*, 515 F. Supp. 2d 1337, 1345 (CIT 2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1959 (2007)).

Canex argues that the Government failed to exhaust administrative remedies by commencing this action for liquidated damages without engaging in mitigation proceedings. Under 19 C.F.R. § 172.1(b) and 19 U.S.C. § 1623(c), a principal or surety can petition Customs for relief from payment of liquidated damages through such proceedings. See *United States v. Cocoa Berkau, Inc.*, 990 F.2d 610, 615 (Fed. Cir. 1993). Mitigation proceedings are voluntary and informal, and relief is granted at the discretion of Customs. *United States v. Ataka Am., Inc.*, 826 F. Supp. 495, 502 (CIT 1993) (holding that a “mitigation proceeding for liquidated damages under 19 U.S.C. § 1623(c) . . . is voluntary”); *Cocoa Berkau*, 990 F.2d at 615 (“[T]he determination whether to authorize cancellation of a bond under section 1623(c) falls within the discretion of [Customs].”). Although exhaustion of mandatory administrative remedies is generally required prior to action before the court, see 28 U.S.C. § 2637(d),<sup>6</sup> mitigation proceedings are permissive and need not be resolved prior to the commencement of a suit to recover liquidated damages. *Ataka*, 826 F. Supp. at 502 (“These discretionary and informal proceedings need not be resolved in order for the government to recover liquidated damages under a bond through court action.”); *Cocoa Berkau*, 990 F.2d at 615 (“[N]othing in either the express language or the legislative history of section 1623(c) indicates that Congress intended that a bond surety be required to file a petition for mitigation or that such a petition must be filed before the government can bring suit to recover liquidated damages.”). Accordingly, the Government was not required to postpone its filing of the instant action until Canex exercised its right to request mitigation proceedings.

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further action on the liquidated damages claims until “resolution of the filed protest(s),” (Def. Canex Int’l Lumber Sales Ltd.’s Mot. to Dismiss for Failure to State a Cl. (“Motion to Dismiss”) at Ex. 1), the Government initiated the current proceedings to recover liquidated damages following Canex and XL’s refusal to execute statute of limitations waivers as requested by the Government in 2005. (See Compl. at ¶¶ 19, 31, Confidential Ex. 7.)

<sup>5</sup> Canex mistakenly filed its motion to dismiss pursuant to USCIT R. 12(b)(6). (See Motion to Dismiss at 1.) The court will treat the motion as filed pursuant to the proper provision, USCIT R. 12(b)(5). See *United States v. Ford Motor Co.*, Slip Op. 05–24, 2005 WL 400399, at \*1 n.3 (CIT Feb. 18, 2005).

<sup>6</sup> “[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies.” 28 U.S.C. § 2637(d).

Canex's reliance upon *Warner-Lambert Co. v. United States*, 24 CIT 205 (2000), and *United States v. Bavarian Motors, Inc.*, 4 CIT 83 (1982), is misplaced. *Warner-Lambert* dismissed a complaint alleging threat of sanctions by Customs where sanctions proceedings had not yet been initiated and Customs had denied its intent to seek sanctions for claims still under active agency consideration. *Warner-Lambert*, 24 CIT at 205–10. Such is not the case here. As discussed above, mitigation proceedings are not required prior to the commencement of an action before the court, and the instant case is ripe for action. In addition, *Ataka* noted that *Bavarian Motors*, which dismissed a suit for failure to exhaust administrative remedies, was decided prior to the effective date of 19 U.S.C. § 1505(c), which gave the Government an immediate right to sue for liquidated damages. *Ataka*, 826 F. Supp. at 503 (“[S]ince the effective date of 19 U.S.C. § 1505(c), completion of protest proceedings has not been a requirement for suit to collect.”). Even if Canex had protested the assessment of liquidated damages, “the payment obligation runs independently of the protest proceedings.” *Id.*

Finally, Canex asserts that it had not yet petitioned for mitigation proceedings because the letter from Customs dated August 24, 2001, indicated that Customs would “continue to update [the liquidated damages] cases with a holding status until resolution of the filed [classification] protest(s).” (Motion to Dismiss at Ex. 1.) In subsequent correspondence dated May 23, 2005, however, Customs noted that the six-year statute of limitations on its liquidated damages claims was approaching,<sup>7</sup> and requested a waiver of the statute of limitations from Canex and XL. (Compl., Confidential Ex. 7 at 2.) Customs indicated its intent to pursue legal action to protect its interests if the waiver was not executed. (*Id.*) Canex was therefore notified of the possibility of further proceedings with regard to liquidated damages and had ample opportunity to execute the statute of limitations waiver or petition for mitigation proceedings as necessary. Canex's argument that it was deprived of the opportunity to do so is therefore without merit.

Accordingly, defendant Canex International Lumber Sales Ltd.'s Motion to Dismiss is DENIED.

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<sup>7</sup> Under 28 U.S.C. § 2415(a), a complaint to recover liquidated damages must be filed “within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.” 28 U.S.C. § 2415(a); *see also Ataka*, 826 F. Supp. at 500.

**Slip Op. 08-47**

AEGIS SECURITY INSURANCE COMPANY, Third Party Plaintiff, v. MATTHEW FLEMING AND MAINLAND, INC., Third Party Defendants.

Before: Jane A. Restani, Chief Judge  
Court No. 05-00276

[Third party plaintiff's motion for attorneys' fees and expenses granted.]

Dated: May 1, 2008

*Sandler Travis Rosenberg Glad & Ferguson, PC (Thomas R. Ferguson) and Sandler, Travis & Rosenberg, PA (Arthur K. Purcell) for the third party plaintiff.  
Galvin & Mlawski (John J. Galvin) for the third party defendants.*

**OPINION**

Restani, Chief Judge: This matter is before the court on third party plaintiff Aegis Security Insurance Company's ("Aegis") motion for sanctions in the form of attorneys' fees and expenses, filed pursuant to USCIT R. 37(d), against third party defendant Matthew Fleming ("Fleming"). Aegis seeks an award of fees and expenses incurred as a result of Fleming's failure to respond to Aegis' interrogatories and other discovery requests, and failure to appear on the first day of a scheduled two-day deposition. The court will grant the motion.

**FACTS**

The facts are undisputed. In the underlying action, the United States filed a complaint against Aegis to collect antidumping duties that importer Mainland, Inc. failed to pay.<sup>1</sup> *United States v. Aegis Sec. Ins. Co.*, No. 05-00276 (CIT filed Mar. 23, 2005). Aegis asserted this third party action against Mainland, Inc. and Fleming.<sup>2</sup> (Am. Answer & Third Party Claim.) A default judgment was entered against Mainland, Inc., but the action was maintained against Fleming. (Entry of Default, Apr. 3, 2007.)

During discovery, Aegis submitted interrogatories and requests for production of documents. The Second Set of Interrogatories and Request for Production of Documents ("Second Set of Interrogatories"), propounded in December 2006, requested the capitalization and financial records of Mainland, Inc. from 1997 through 2007. (Third Party Claimant's Second Set of Interrog. Propounded Upon Third

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<sup>1</sup>The action was dismissed after Aegis and the United States settled. (See Settlement Agreement, Ex. A to Answer & Second Am. Third Party Claim); *United States v. Aegis Sec. Ins. Co.*, No. 05-00276 (CIT Jan. 28, 2008) (order of dismissal).

<sup>2</sup>Fleming is the president and sole shareholder of the company. (Third Party Def. Fleming's Objections & Resp. to Third Party Claimant's Second Set of Interrog. & Req. for Produc. 3, Ex. A.1 to Mot. to Compel Disc. in Third Party Action ("Mot. to Compel").)

Party Def., Matthew Fleming & Req. for Produc. of Docs., Ex. A.2 to Mot. to Compel.) The Third Set of Interrogatories and Request for Production of Documents (“Third Set of Interrogatories”), propounded in March 2007, requested information to clarify the relationship between Fleming, “Mainland, Inc.,” and a “Mainland Enterprises, Inc.,” and information concerning the origins, *bona fides*, preparation, location, and custodian of the corporate documents that Fleming had previously submitted to Aegis.<sup>3</sup> (Third Party Claimant’s Third Set of Interrog. & Req. for Produc. of Docs. Propounded Upon Third Party Def., Matthew Fleming, Ex. B to Mot. to Compel.)

In May 2007, Aegis moved to compel discovery. Aegis claimed that Fleming had not responded to the Third Set of Interrogatories and, to the extent that he responded to the Second Set of Interrogatories, he submitted financial records only from 2002 through 2007 for “Mainland Enterprises, Inc.,” rather than the requested 1997 through 2007 capitalization and financial records for “Mainland, Inc.” (Third Party Claimant’s Statement Detailing the Disc. that Remains Outstanding 2–3 (“Statement Detailing Outstanding Disc.”); *see also* Def./Third Party Claimant’s Consent Mot. for a Second Amendment of Scheduling Order; Am. Scheduling Order, Sept. 29, 2006; Resubmission of Def./Third Party Claimant’s Consent Mot. for a Third Amendment of Scheduling Order Affecting Third Party Action; Am. Scheduling Order, Mar. 5, 2007.) The court granted the motion and directed Fleming to respond by July 4, 2007. (Order, June 19, 2007.) On July 3, the court granted Aegis’ motion to amend the scheduling order and extended discovery to September 30. (Fourth Am. Scheduling Order, July 3, 2007.)

The parties agreed thereafter to meet on September 25 and 26 to depose Fleming.<sup>4</sup> (*See* Am. Notice to Take Dep., Ex. B to Aegis Sec. Ins. Co.’s R. 37(d) Mot. for Sanctions & Att’y Fees & Expenses (“Mot. for Sanctions”); Emails, Ex. C to Mot. for Sanctions.) Fleming failed to appear for his deposition on September 25. He did not inform counsel until that morning, when contacted on his cell phone and when the other parties were already present, that he was still in Florida.<sup>5</sup> He stated that he had travel complications but that he

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<sup>3</sup>Aegis propounded the Third Set of Interrogatories upon Fleming because, in responding to the First Set of Interrogatories and Request for Production of Documents, Fleming had produced corporate documents (i.e. the Articles of Incorporation, Bylaws, and Stock Certificate) bearing the name “Mainland Enterprises, Inc.” rather than “Mainland, Inc.” According to Aegis, this created the impression that there were two separate entities at issue. (Aegis’ Reply to Fleming’s Resp. & Opp’n to Aegis’ Mot. for an Order to Show Cause Re: Contempt, & for Sanctions 3–4 (“Reply Br.”).)

<sup>4</sup>The parties had scheduled the deposition for September 10 and 11 but rescheduled it to September 25 and 26. (Consent Mot. to Amend Scheduling Order 1; *see* Notice to Take Dep., Ex. A to Mot. for Sanctions.)

<sup>5</sup>The parties agreed to meet at the New York City office of Fleming’s counsel. Aegis’ counsel traveled from California, and counsel for the United States from Washington, D.C.

could take a later flight to New York that day. (Third Party Def., Matthew Fleming's, Combined Resp. in Opp'n to Third Party Pl.s' Mot. for an Order to Show Cause Why Third Party Def. Fleming Should Not be Held in Contempt & Sanctioned & in Opp'n to Third Party Pl.'s Mot. for Sanctions & Att'y Fees & Expenses 6 ("Combined Response").) The parties rescheduled the deposition for the following day, when Fleming appeared and was deposed until mid-afternoon. (*Id.* at 7.) At the deposition, Aegis requested responses to the Third Set of Interrogatories and additional discovery. (Ferguson Decl., Jan. 29, 2008, Ex. A to Third Party Claimant Aegis Sec. Ins. Co.'s Mot. for Order to Show Cause Why Third Party Def. Fleming Should Not be Held in Contempt & Sanctioned for Repeated Failures to Respond to Disc. ("Mot. to Show Cause").) Fleming agreed to submit the requested information. (Combined Resp. 2–3.)

On September 25, Aegis filed a motion to amend the scheduling order. (Mot. for Fifth Am. Scheduling Order.) The court granted the motion and extended discovery to November 29, 2007. (Fifth Am. Scheduling Order, Oct 1, 2007.) Aegis filed another motion on January 14, 2008.<sup>6</sup> (Mot. for Sixth Amendment of Scheduling Order.) The court also granted that motion and extended discovery to January 30, 2008. (Sixth Am. Scheduling Order, Jan. 23, 2008).

On January 29, still not having received responses, Aegis moved for an order to show cause as to why Fleming should not be held in contempt and sanctioned for his failures to respond to the discovery requests.<sup>7</sup> The court granted the motion. (Order Granting Mot. to Show Cause & Ordering Fleming to Show Cause, Jan. 30, 2008.) Aegis now moves under USCIT R. 37(d) for sanctions in the form of attorneys' fees and expenses incurred as a result of Fleming's failure to appear at the September 25 deposition, failure to respond to discovery requested during the September 26 deposition, and failure to re-

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Fleming resided in Florida. (*See* Am. Notice to Take Dep., Ex. B. to Mot. for Sanctions; Mot. for Sanctions 2.)

<sup>6</sup>In this motion, in addition to requesting additional time for discovery, Aegis also requested more time for Fleming to respond to its Amended Third Party Complaint, filed in November 2007, in which Aegis added a subrogation cause of action after settling with the United States in the underlying action. (Answer & Second Am. Third Party Claim 4; Mot. for Sixth Amendment of Scheduling Order 1–2.) Fleming responded to the Amended Complaint but not to the discovery requests.

<sup>7</sup>On that day, after Aegis advised Fleming's counsel of its intention to file the motion, counsel emailed Aegis a letter purported to be responses to the discovery requests made during the September 26 deposition. (*See* Letter (Attach A to Ex. A to Mot. to Show Cause).) The letter stated that "Fleming's May 23, 2007 Response to Third Set of Interrogatories, etc., as well as a copy of his Response to Chief Judge Restani's June 19, 2007 Order, responding to Interrogatories #30–32 [from the Third Set of Interrogatories]" were attached to the email, but there were no such attachments. (*See id.*)

The motion appears to pertain only to Fleming's failure to respond to the Third Set of Interrogatories and the September 26 discovery requests. It notes that Aegis's "motion to compel also sought [Fleming's] responses to prior discovery, but those are not the immediate subject of the instant motion." (Mot. to Show Cause 2.)

spond fully to the Second and Third Sets of Interrogatories. (Mot. for Sanctions 4.)

In response to the Order to Show Cause, Fleming claims that he responded to the discovery requests. He submits an unsigned, undated, and unnotarized document purporting to be the “missing”<sup>8</sup> response to the Third Set of Interrogatories that Aegis claimed it never received. (See Third Party Def., Matthew Fleming’s Supplemental Response to Third Party Claimant’s Interrogs. & Reqs. for Produc., Attach. to Combined Resp. (“Attachment A”).) He explains that, “due to [his] counsel’s inadvertence,” Attachment A “was mistakenly identified as a ‘Supplemental’ Response, when, in fact, it should have been identified as [his] ‘Combined Supplemental Response to Aegis’ Second Set of Interrogatories *and* his Response to Aegis’ Third Set of Interrogatories and Production.’”<sup>9</sup> (Combined Resp. 4.) Fleming further states that the requested capitalization, financial, tax, or corporate records for “Mainland, Inc.” do not exist because he incorporated the company as “Mainland Enterprises, Inc.” and “Mainland, Inc.” is merely a short-hand reference to “Mainland Enterprises, Inc.” (*Id.* at 4–6.)

Fleming also now responds to the requests made at the deposition, and in support, submits an unsigned, undated, and unnotarized document containing the responses. (See Third Party Def., Matthew Fleming’s Supplemental Resps. to Third Party Claimant’s Interrogs. & Reqs. for Produc., Attach. to Combined Resp. (“Attachment B”).) The document also contains the information concerning the origin, *bona fides*, source, and chain of custody of the corporate documents, requested in the Third Set of Interrogatories. Fleming states that the documents were prepared by a Kramer Law Firm in March 2007, “with the originals thereof remaining under [his] custody and control.” (Combined Resp. at 4; *see also* Attachment B at 2.)

In response to the Motion for Sanctions, Fleming claims that Aegis has not incurred any additional expenses for his failure to appear on September 25 for the two-day deposition. (Combined Resp. at 7.) In the response, he does not address the part of the motion seeking an

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<sup>8</sup>The record shows that Fleming told Aegis that he had provided the responses but was unable to locate them when Aegis denied receipt and requested resubmission. (See Mot. to Show Cause 3 n.1.)

<sup>9</sup>In Attachment A, Fleming stated that “Mainland, Inc.” and “Mainland Enterprises, Inc.” are the same entity, and that “Mainland, Inc.” is merely a “short-hand reference” to “Mainland Enterprises, Inc.” (Attachment A 3–5.) Fleming also stated that he had already provided the 2002 through 2007 capitalization and financial information of “Mainland Enterprises, Inc.” via his submissions of a sales ledger detailing the date, customer names, and amounts of the transactions; bank statements; copies of each cancelled check; copies of the company credit card statements; and detailed ledger of loans. (*Id.* at 5.) He further noted that he would attempt to locate the records from 1997 through 2001. (*Id.*) Fleming also noted that he had requested his corporate counsel to verify the origin, *bona fides*, source, and chain of custody of the corporate documents. (*Id.* at 6.)

award of fees and expenses for his failure to respond to the Second and Third Sets of Interrogatories and to the additional requests made at the deposition.

In light of Fleming's response that the Kramer Law Firm prepared the corporate documents in March 2007 and admission that Fleming himself is the custodian of the documents, Aegis additionally seeks sanctions for Fleming's alleged withholding of such information. Aegis questions Fleming's response at his deposition that he could not recall this information. Aegis also claims that the corporate documents are questionable on their face and that, contrary to Fleming's assertion, he had not submitted the electronic copies of the corporate documents, as requested.<sup>10</sup>

### ***DISCUSSION***

USCIT R. 37(d) provides:

Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party . . . fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories . . . , the court on motion may make such orders in regard to the failure as are just. . . . In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

USCIT R. 37(d). USCIT R. 37(d) "mirrors the Federal Rules of Civil Procedure," and the court, in applying the Rule, has relied on opinions of other federal courts applying the Federal Rules of Civil Procedure ("FRCP"). *United States v. Neman Bros. & Assocs.*, 18 CIT 89, 90 (1994); *see also, e.g., Zenith Radio Corp. v. United States*, 2 CIT 59, 59–60 (1981).

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<sup>10</sup>Aegis claims that, except for the Articles of Incorporation, the corporate documents were unsigned and mostly undated; the documents were identical; the Stock Certificate, while dated 1997, was on a certificate with a copyright of 1999. (Reply Br. 4; *see also* Stock Certificate, Attach. 1 to Reply Br.) Aegis also questions whether the Kramer Law Firm had in fact prepared the Stock Certificate and Bylaws, in light of an invoice showing that Fleming had ordered a Corporate Form Book containing the Stock Certificate and Bylaws from a Mark's Corpex Banknote Company, Inc. in June 2006. (Reply Br. 6; *see also* Invoice, Attach. 4 to Reply Br.)

## 1. Failure to Respond to Discovery Requests

Some courts have held that Rule 37(d) of the FRCP does not authorize sanctions unless a party totally fails to respond to the discovery requests. *See Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1339–40 (9th Cir. 1985) (disagreeing with district court’s finding that Rule 37(d) sanctions were warranted because partial answers were incomplete, evasive, and false); *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 995 (8th Cir. 1975) (“Rule 37(d) sanctions only apply where there is a total non-compliance with discovery.”); *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F.2d 32, 35 (3d Cir. 1979) (“Rule 37 sanctions are contemplated when there has been virtually total noncompliance with discovery.”), *abrogated on other grounds by Alexander v. Gino’s, Inc.*, 621 F.2d 71, 73 (3d Cir. 1980); *see also Southard v. Pa. R.R. Co.*, 24 F.R.D. 456, 457 (E.D. Pa. 1959) (“Even if the defendant had filed false answers, it is extremely doubtful that such filing should be considered tantamount to a refusal to answer.”). Other courts have imposed sanctions where parties have responded but “the evasive or incomplete answers are tantamount to no answer at all.” *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 155 (7th Cir. 1976); *see also Minn. Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1260–61 (Fed. Cir. 1985) (holding that “unable to respond” constitutes no response); *Fautek v. Montgomery Ward & Co.*, 96 F.R.D. 141, 145 (N.D. Ill. 1982) (“Parties are required to respond to requests to produce in a complete and accurate fashion.”); *Bell v. Auto. Club of Mich.*, 80 F.R.D. 228, 232 (E.D. Mich. 1978) (“The answers provided in defendants’ responses . . . were so misleading and deceptive as to constitute a failure to answer these interrogatories.”). Although this issue is undecided, *Neman Brothers* suggests that the court would adopt the broader view.<sup>11</sup> *See Neman Bros.*, 18 CIT at 92 (acknowledging the existence of “clear policies underlying Rule 37(d) to deter the serious disregard of discovery requests that would be undermined if the parties had only further orders directing compliance to fear”). Here, sanctions are warranted for Fleming’s failures to respond to the discovery requests

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<sup>11</sup> Sanctions also would be warranted under the narrow view, as Aegis had moved to compel discovery, *see Fox*, 516 F.2d at 995 (“Defendants’ remedy for incomplete or otherwise objectionable answers to interrogatories, and for failure to produce the correct documents . . . was to file a motion under Rule 37(a) for an order requiring plaintiffs to answer and to produce documents for evidence.”); *GFI Computer Indus., Inc. v. Fry*, 476 F.2d 1, 3 (5th Cir. 1973) (“Plaintiff’s remedy for incomplete or otherwise objectionable answers to interrogatories, and for failure to produce pursuant to a Rule 34 request, was to file a motion under Rule 37(a) for an order requiring defendant to answer and to produce documents for inspection.”), and sanctions may be imposed under USCIT R. 37(b) for noncompliance with the court’s June 2007 Order to Compel, *see USCIT R. 37(b)*; *see also Ohio v. Arthur Andersen & Co.*, 570 F.2d 1370, 1374 (10th Cir. 1978) (upholding sanctions under FRCP Rule 37(b) despite eventual production of documents because “[f]inal production is not determinative”).

because he either failed to respond completely or his answers were so misleading that they constitute a failure to respond.

Fleming claims that “in accordance with the [c]ourt’s June 19, 2007, order . . . [he] timely provided his responses [to the Third Set of Interrogatories],” but he does not specify when he provided such responses. (See Combined Resp. 2.) Aegis consistently denies receiving these responses, (see Mot. to Show Cause 3 n.1; Mot. for Sanctions 4), and Attachment A is not signed, dated, notarized, or accompanied by any proof of mailing, (see Attachment A). Furthermore, Fleming’s own counsel “represented and maintains that he does not have a copy of the subject responses in his files.” (Ferguson Decl. ¶ 7.) Nonetheless, even assuming that Fleming had submitted the responses, his failure to resubmit it until the Combined Response is insupportable.

Belated responses generally do not excuse a party from Rule 37 sanctions. See *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2nd Cir. 1979) (rejecting argument that court should not preclude evidence because, although plaintiff had “at last filed answers” to interrogatories, “plaintiff’s hopelessly belated compliance should not be accorded great weight”); *Fautek*, 96 F.R.D. at 145 (“Ultimate production of the material in question does not absolve a party where it has failed to produce the material in a timely fashion.”). Here, even assuming that Fleming was unable to locate his responses for a period of time, the record shows that Aegis had given him time to resubmit them after they had been located. (See Ferguson Decl. ¶ 7; Mot. to Show Cause 3 n.1.) Yet, Fleming did not resubmit them until the Combined Response. Sanctions are similarly warranted for his tardy responses to the September 26 discovery requests, which also were not produced until the Combined Response.

As to Fleming’s claim that “Mainland, Inc.” is nonexistent, this assertion is inconsistent with his responses to prior interrogatories that he was an employee of “Mainland, Inc.” and a Customs entry indicating “Fleming, Matthew dba Mainland, Inc.” as the importer of record. (See Third Party Def. Matthew Fleming’s Resp. to Third Party Claimant’s First Set of Interrogs. & Req. for Produc. of Docs. 6, Ex. E to Statement Detailing Outstanding Disc.; Customs Entry Summary, Attach. I to Statement Detailing Outstanding Disc.) Even assuming that “Mainland, Inc.” is a short-hand reference to “Mainland Enterprises, Inc.,” Fleming could have so explained upon his receipt of the Third Set of Interrogatories in March 2007. His failure to respond until the Combined Response in February 2008<sup>12</sup> impeded discovery for close to a year and caused Aegis to incur unnecessary discovery expenses and therefore warrants sanctions.

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<sup>12</sup> Although the Combined Response is dated June 19, 2007, it was served and filed on February 5, 2008. (See Combined Resp. 7; Certificate of Service, Attach. to Combined Resp.)

Fleming's assertions that the Kramer Law Firm prepared the corporate documents in March 2007 and that he is the custodian of the documents contradict his prior claims that he could not recall the source, time of preparation, location, and custodian of the documents. His prior misleading answer constitutes a failure to respond. See *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1363 (Fed. Cir. 1990) (concluding that "clear misrepresentation" constitutes "failure to respond"). His belated disclosure in the Combined Response does not excuse him from sanctions.<sup>13</sup>

## 2. Failure to Appear at Deposition

Although Fleming's failure to appear for his deposition on September 25 was not justified, whether his nonappearance on the first day of a scheduled two-day deposition is sanctionable presents a close question. Aegis was able to depose Fleming the following scheduled day, and Aegis does not contend that the deposition took longer than anticipated or that it was unable to complete the deposition that day. Also, nothing in the record shows that Aegis incurred any additional travel expenses for the deposition.

Nonetheless, in determining whether sanctions are warranted, the court must take into consideration the history of the discovery phase of the litigation. See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) ("We need not decide whether unexplained absence from a pretrial conference would alone justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on all the circumstances that were brought to its attention, including the earlier delays."); *Cine Forty-Second St. Theatre*, 602 F.2d at 1068 ("[S]anctions must be weighed in light of the full record in the case") (citing *Nat'l Hockey League, v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)); *Al Barnett & Son*, 611 F.2d at 36 ("The full record reveals a course of conduct that frustrates the fundamental purpose underlying the discovery rules to provide adequate information to litigants in civil trials."). Here, even if Fleming's failure to appear for his deposition on September 25 may not warrant sanctions, his failure falls within a pattern of noncooperation and noncompliance with Rule 37(d). Cf. *First Nat'l Bank of Wa. v. Langley-Howard, Inc.*, 391 F.2d 207, 208 (3d Cir. 1968) (holding that delayed appearance for deposition does not warrant default judgment but warrants sanctions in the form of costs). Thus, his failure to appear for his own deposition on September 25 is sanctionable in light of the history of the litigation.

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<sup>13</sup>Although it is not determinative, the court is skeptical of Fleming's claim that the Kramer Law Firm prepared the documents, in light of the copy of the invoice from Mark's Corplex Banknote Company Inc. submitted by Aegis. (See Invoice, Attach. 4 to Reply Br.)

### 3. Amount to be Awarded

Because Fleming fails to show that his lack of cooperation during discovery was substantially justified or that circumstances would render an award unjust, the court shall grant Aegis' motion for attorneys' fees and expenses. Aegis is entitled to an award of the following: (1) the unanticipated costs incurred as a direct result of Fleming's failure to appear for the September 25 deposition, (2) costs associated with drafting and filing of the motions to amend the scheduling orders to enlarge the discovery period to accommodate Mr. Fleming's delays in responding, (3) costs associated with drafting the motion to compel discovery, (4) costs associated with drafting the motion for an order to show cause, and (5) costs associated with the drafting of the motion for sanctions. The copies of the invoices that Aegis submitted, which total \$31,188.31 in fees and expenses, include fees and expenses that fall beyond the above-defined categories.<sup>14</sup> (*See* Invoices, Ex. D to Mot. for Sanctions.) Because the invoices do not enable a proper and accurate calculation of the fees and expenses to be awarded, the court directs Aegis to file a complete and detailed statement of expenses and fees that Aegis believes fall within the parameters stated above, in accordance with the attached order.

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<sup>14</sup>Limiting the expenses to services directly related to address the discovery problems here – such as drafting the motion to compel production and the current motion for attorneys' fees and expenses, discussions arising out of the cancellation of the September 25 deposition, and the motions to amend the scheduling order to accommodate Fleming's failure to provide discovery – this court estimates the attorneys' fees and expenses to be substantially less than the full amount submitted by Aegis.

**Slip Op. 08–48**

EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., TYLER PIPE COMPANY, U.S. FOUNDRY & MANUFACTURING CO., BINGHAM & TAYLOR, and MUNICIPAL CASTINGS FAIR TRADE COUNCIL, Plaintiffs, v. UNITED STATES, Defendant, and A.Y. MCDONALD MFG. CO., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge  
Court No. 07–00082

[Commerce’s determination is sustained].

Date: May 1, 2008

*Kelley Drye Collier Shannon (Robin H. Gilbert)* for Plaintiffs East Jordan Iron Works, Inc., LeBaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Tyler Pipe Company, U.S. Foundry & Manufacturing Co., Bingham & Taylor, and Municipal Castings Fair Trade Council.

*Jeffrey S. Bucholtz*, Acting Assistant Attorney General; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg*); Office of the Chief Counsel, U.S. Department of Commerce (*Sapna Sharma*), Of Counsel, for Defendant United States.

*Katten Muchin Rosenman, LLP (Mark S. Zolno, Eric R. Rock, and Kazumune V. Kano)* for Defendant-Intervenor A.Y. McDonald Mfg. Co.

**OPINION**

**GOLDBERG, Senior Judge:** East Jordan Iron Works, Inc., LeBaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Tyler Pipe Company, U.S. Foundry & Manufacturing Co., Bingham & Taylor, and Municipal Castings Fair Trade Council (collectively “East Jordan”) challenge the U.S. Department of Commerce’s (“Commerce”) determination that A.Y. McDonald Manufacturing Company’s (“AYM”) imports are not within the scope of the antidumping duty order in place against certain iron products. For the reasons that follow, Commerce’s final scope ruling is sustained.

**I. BACKGROUND**

In 1986, Commerce published an antidumping duty order on certain iron products manufactured in China. *See Iron Construction Castings from the People’s Republic of China*, 51 Fed. Reg. 17,222 (Dep’t Commerce May 9, 1986) (notice of antidumping duty order). This antidumping duty order covered meter, service, and valve boxes. In July 2006, AYM asked Commerce to determine whether its imports of meter box bases and upper bodies from China were within the scope of the antidumping duty order. Upon investigation, Commerce found that “cast iron bases and cast iron upper bodies, when imported independently, do not fall within the scope of the order be-

cause the order does not contain language to include parts or components of meter boxes.” Scope Ruling on the Antidumping Duty Order on Iron Construction Castings from the People’s Republic of China: Request by A.Y. McDonald Mfg. Co. (Jan. 18, 2007) (“AYM Scope Ruling”). East Jordan challenges this determination arguing that: (1) Commerce’s scope ruling lacks substantial evidence; and (2) Commerce acted contrary to law by abdicating its responsibility for administering the antidumping duty order.<sup>1</sup>

## II. JURISDICTION & STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c). In reviewing a scope ruling, the Court must sustain a determination “unless it is unsupported by substantial evidence or is otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence “is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 620 (1966). It “requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence.” *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004).

## III. DISCUSSION

### A. Commerce’s Scope Ruling is Supported by Substantial Evidence

For Commerce’s final scope ruling to be supported by substantial evidence, the agency must have properly followed its regulatory interpretive process. This interpretive process consists of two steps.<sup>2</sup>

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<sup>1</sup>East Jordan also argues that Commerce erred in not considering the evidence it submitted related to potential circumvention of the antidumping duty order. However, this type of evidence is not a part of Commerce’s regulatory interpretive process. See 19 C.F.R. § 351.225 (2007).

<sup>2</sup>A necessary precondition to Commerce’s regulatory interpretive process is language in the antidumping duty order that is subject to interpretation. See *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002). In this case, Commerce applied its regulatory interpretive process without finding the language of the scope ambiguous as to whether parts or components were within the order’s scope. See Scope Ruling on the Antidumping Duty Order on Iron Construction Castings from the People’s Republic of China: Request by A.Y. McDonald Mfg.Co. (Jan. 18, 2007), at 9. The Court finds no error in this analysis. *Duferco* does not require Commerce to halt its analysis after finding that the scope language is not subject to a proposed interpretation, or to resolve this question at all. Rather, *Duferco* seeks to emphasize the fact that Commerce cannot use this interpretive process to override the express language of the antidumping duty order. *Id.* “[R]eview of the petition and investigation may provide valuable guidance as to the interpretation of the order. But they cannot substitute for language in the order itself.” *Id.* at 1097. Here, Commerce’s application of its regulatory interpretive process is consistent with the language

See 19 C.F.R. § 351.225(d) (2007). First, Commerce considers “the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.” *Id.* § 351.225(k)(1). If these criteria are dispositive of the order’s scope, Commerce will issue the appropriate scope ruling. If the order’s scope is still unclear, Commerce must continue and evaluate the criteria provided under section 351.225(k)(2). Here, Commerce concluded that the section 351.225(k)(1) criteria dispositively excluded parts and components from the order’s scope. East Jordan now argues that Commerce erred in finding these criteria dispositive and in failing to consider the section 351.225(k)(2) criteria. The Court must now analyze whether substantial evidence supports the agency’s determination that the section 351.225(k)(1) criteria are dispositive of the order’s scope. See *Sango Int’l L.P. v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007).

To be dispositive, the section 351.225(k)(1) criteria “must be controlling of the scope inquiry in the sense that they definitively answer the scope question.” *Id.* Here, the section 351.225(k)(1) criteria definitively answer the scope question. All evidence indicates that the focus of Commerce’s investigations was on completed meter boxes and box sets rather than individual parts or components. For example, the initial petition explained that meter boxes are “also manufactured in sets, usually containing three pieces—a base, a straight midsection, and a cover.” This language indicates that while a meter box set does need not to be preassembled, the set must consist of all of the parts required to form a completed meter box to be within the order’s scope. A prior scope ruling further supports this conclusion.<sup>3</sup> See Scope Ruling on the Antidumping Duty Order on Construction Castings from the People’s Republic of China: Request by Frank J. Martin Company (Oct. 17, 2003). In the Martin Scope Ruling, Commerce found that “the scope does not contain language that can reasonably be constructed to cover parts or components of ‘valve, service and meter boxes.’” *Id.* at 8. The Martin Scope Ruling further noted that “including individual parts within the scope of the order in question would impermissibly expand the terms in the order.” *Id.* at 7. When considered collectively, the section 351.225(k)(1)

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of the antidumping duty order. As such, its analysis is not in conflict with the Federal Circuit’s holding in *Duferco*.

<sup>3</sup>East Jordan argues that Commerce erred in relying on the Martin Scope Ruling for several reasons. First, East Jordan objects to the validity of the Martin Scope Ruling’s interpretation of the scope language. However, this argument fails as Commerce’s interpretation was reasonable and the result of the proper application of the agency’s interpretive process. East Jordan’s argument that factual distinctions prevent Commerce from relying on the Martin Scope Ruling also fails. Factual distinctions have no bearing on the reasonableness of the agency’s interpretation of the scope language. Notably, East Jordan does not dispute Commerce’s factual finding that AYM’s imports are meter box parts or components as opposed to a complete meter box set.

criteria definitively resolve the scope question. Accordingly, Commerce's conclusion that AYM's imports are not within the scope of the order is supported by substantial evidence as its interpretation is based on a reasonable construction of the scope language and is the result of the proper application of the agency's regulatory interpretive process.

#### **B. Commerce Did Not Abdicate Its Administrative Responsibilities**

East Jordan also argues that Commerce abdicated its administrative responsibility by failing to more broadly interpret the scope language in order to prevent potential circumvention. This argument also lacks merit. While Commerce enjoys substantial freedom in conducting scope inquiries, the agency's role is to clarify the scope of the order; not to expand or modify it. *Eckstrom Indus. Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001). Additionally, a scope ruling is not a proper mechanism for addressing circumvention concerns. If a party is "concerned about the possibility of circumvention, the appropriate method to resolve such concern would appear to be proceedings under the provisions specifically designed to prevent circumvention." *Mitsubishi Elec. Corp. v. United States*, 16 CIT 730, 739, 802 F. Supp. 455, 462–63 (1992); see also *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998). Adopting East Jordan's argument would lead to the impermissible expansion of the underlying antidumping duty order to parts and components, and East Jordan's circumvention concerns have no bearing on Commerce's reasonable interpretation of the scope language. As such, Commerce did not act contrary to law in refusing to expand the scope of the antidumping duty order to meter and valve box parts and components.

#### **IV. CONCLUSION**

In light of the foregoing, Commerce's scope ruling is sustained.