

# Decisions of the United States Court of International Trade

Slip Op. 08–51

GILDA INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: **MUSGRAVE, Senior Judge**

Court No. 07–00474

[Plaintiff importer Gilda Industries filed a complaint (and a motion for class certification) asserting that the 100% duties assessed pursuant to HTSUS 9903.02 should have terminated as a matter of law on July 29, 2007, pursuant to 19 U.S.C. § 2417(c) (2000). The government filed a motion to dismiss on the grounds that (1) Gilda lacked “prudential standing” to bring the claim and (2) section 2417(c) does not apply to USTR actions implemented over 4 years ago. The court denied Plaintiff’s motion for class certification and denied Defendant’s motion to dismiss.]

Dated: May 14, 2008

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## OPINION AND ORDER

Plaintiff Gilda Industries, Inc. (“Gilda”), is an importer of toasted breads from Spain. On December 17, 2007, Gilda filed with the Court a complaint for damages for the 100% duties that U.S. Customs and Border Protection (“Customs”) has collected on Gilda’s imports of toasted breads since July 29, 2007. Gilda alleges that Customs has no legal authority to collect the 100% duties because pursuant to 19 U.S.C. § 2417(c) the “retaliation list” established by the United States Trade Representative (“USTR”) for the imposition of the 100% duties on certain imports from the European Community (“EC”) expired by operation of law on July 29, 2007. Compl. at 2. Gilda requests that the court (1) make a finding that Customs has had no legal authority to collect the duties since July 29, 2007; (2)

award to Gilda a refund, with interest, of all duties collected pursuant to the retaliation list since that date; and (3) “issue an order to prevent Customs from collecting 100% duties from Gilda on its toasted breads imported from Spain since on or about July 29, 2007.” Compl. at 3. Also before the Court is Gilda’s motion for class certification, wherein Gilda contends that there are 212 other importers affected by the HTSUS 9903.02 retaliation list, and that all of these importers should be certified as a class. Mot. for Class Certification at 3.

The government filed a motion to dismiss Gilda’s claim on the ground that Gilda, as an importer, does not possess “prudential standing” to maintain the current action; alternatively, the government moves for dismissal for failure to state a claim on which relief can be granted. Def.’s Mot. to Dismiss and Resp. to Pl.’s Mot. for Class Certification at 1 (“Mot. to Dismiss”). The government opposes Gilda’s motion for class certification and asserts that the Court should deny the motion because Gilda has “failed to demonstrate that this is a suitable case for class certification as a class action lawsuit.” *Id.* For the reasons set forth below, the court will deny Gilda’s motion for class certification and deny the government’s motion to dismiss.

## I. Background

This case stems from a dispute between the EC and the United States over the EC’s ban on imports of U.S. meat products from animals treated with hormones. In response to the EC’s failure to comply with the findings of the World Trade Organization Dispute Settlement Body, which determined that the EC’s ban on hormone-treated meat to be in contravention of its trade obligations, the USTR, pursuant to 19 U.S.C. § 2416, imposed 100% *ad valorem* retaliatory duties on a variety of EC exports to the United States. *See Implementation of WTO Recommendations Concerning EC-Measures Concerning Meat and Meat Products (Hormones)*, 64 Fed. Reg. 14,486 (USTR Mar. 25, 1999). Among the products selected for the retaliatory list were those falling under subheading HTSUS 9903.02.35, which includes “rusks, toasted bread, and similar products.”

In 2003, Gilda filed protests with Customs contesting the imposition of the retaliatory duties on various grounds. Customs denied the protests and Gilda ultimately filed suit in this Court. Before the Court, Gilda asserted, *inter alia*, that it should not be required to pay the 100% duties because the retaliation list had terminated as a matter of law pursuant to 19 U.S.C. § 2417(c), and alternatively, that Gilda should be removed from the retaliation list because the USTR failed to implement the “carousel provision” found in 19 U.S.C. § 2416. *See Gilda Industries, Inc., v. United States*, 28 CIT 2001, 353 F.Supp.2d 1364 (2004) (“*Gilda I*”). The Court dismissed

Gilda's complaint for failure to state a claim upon which relief can be granted because (1) the domestic producers timely requests for the continuation of the retaliation list had prevented the list from terminating pursuant to 19 U.S.C. § 2417(c), and (2) implementation of the carousel provision would not necessarily result in Gilda's removal from the retaliation list. *Id.* On appeal, the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") affirmed the relevant holdings of *Gilda I*, but raised the question, *sua sponte*, as to whether Gilda possessed "prudential standing" under the Administrative Procedure Act ("APA") to challenge the actions of the USTR. *Gilda Industries Inc., v. United States*, 446 F.3d 1271, 1279–80 (Fed. Cir. 2006) ("*Gilda II*").

## II. Jurisdiction

Gilda's claim facially invokes this Court's jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i)(2) (2000) in that Gilda's claim arises out of a law "providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue," and because no other basis for jurisdiction is available or the basis that is available will yield a remedy which is manifestly inadequate. *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988); *see Gilda II*, 446 F.3d at 1277.

## III. Discussion

### A. Class Certification

Pursuant to CIT Rule 23(a), there are four prerequisites to class action. First, the class must be so numerous that joinder of all members is impracticable. Second, there must be questions of law or fact common to the class. Third, the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and finally, the representative parties must fairly and adequately protect the interests of the class. In addition to these prerequisites, CIT Rule 23(b) states that one of the three conditions pursuant to Rule 23(b)(1-3) must also be met.

According to Gilda's motion, the "class" that it purports to represent is the class of importers that have continued to pay 100% duties pursuant to the HTSUS 9903.02 "retaliation list" subsequent to July 29, 2007. The court notes that in *Gilda I*, this court denied the plaintiff's motion for class certification under circumstances almost identical to those present in this matter. In that case the court held:

Because no other class members can be identified the court cannot determine whether joinder is practicable; there are no identifiable common questions of law or fact; and it is unclear whether Plaintiff's claims and defenses are typical of a putative class. It is therefore impossible to determine whether the re-

quirements of class certification can be met. Even assuming that Plaintiff's claims to the contrary are true and a class of plaintiffs does exist, as a discretionary matter a class action should not be maintained. *See, e.g. Baxter Healthcare Corp. v. United States*, 20 CIT 552, 925 F.Supp. 794 (1996). As Plaintiff has been unable to point to any other pending litigation concerning this issue, conflicting decisions are not a concern. There is also no limited fund problem, as the defendant is not a private litigant.

*Gilda I*, 28 CIT at 2005, 353 F.Supp.2d at 1368.

In the current matter, Gilda appears to contend that class certification is now warranted because the class members have been "identified." To this end, Gilda explains that, pursuant to a Freedom of Information Act ("FOIA") request, "the government identified 212 importers who were paying the 100% duties," citing *Gilda Industries, Inc., v. U.S. Customs and Border Protection*, 457 F. Supp. 2d 6, 8 (D.D. C. 2006), the case it brought against Customs to enforce the FOIA request (which Customs had denied).

The court does not agree that the circumstances in this matter are appropriate for class certification. Although Gilda's proposed class of plaintiffs appears to meet the numerosity requirement, the fact that 212 potential plaintiffs may exist in a class does not, by itself, equate to those class members being "identified." In Gilda's FOIA case against Customs, Gilda indicated that it had submitted a request that Customs provide "the names and addresses for all importers for the quarter ending September 30, 2003" who were paying the 100% duties pursuant to HTSUS 9903.02. Customs responded that there were 212 importers subject to the 100% duty at that time, but otherwise refused to divulge the identities of the importers pursuant to FOIA's confidentiality exception. The District Court upheld the denial on the ground that disclosure of the information sought by Gilda "could be used to inflict competitive injury on the companies," and noted that several of the importers in question had submitted letters to Customs requesting that the information remain confidential. *Id.* at 11, 12.

Knowing the probable number of importer-plaintiffs that might ultimately involve themselves in a class action (assuming that data from the last quarter of 2003 accurately represents the number of potential plaintiffs in 2007) does not identify the other plaintiffs in a manner that enables the court to determine whether joinder of those plaintiffs is practicable, whether there are necessarily questions of law or fact common to the class, or whether Gilda's claims and defenses are typical of the class. Further, because neither party is aware of any other plaintiff with pending litigation on this issue, there is no danger of conflicting decisions, and no indication that class action would be superior for the fair and efficient adjudication of the controversy, *see* CIT Rule 23(b)(1), (3). Finally, the government

has not refused to act on any grounds such that injunctive or declaratory relief would be appropriate to a class as a whole, *see* CIT Rule 23(b)(2). Accordingly, Gilda’s motion for class certification will be denied.

### ***B. Prudential Standing - Zone of Interest***

Title 5 section 702 (Section 10(a) of the APA), provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review.” However, despite the APA’s generous review provisions, “it was [never] thought . . . that Congress, in enacting § 702, had . . . intended to allow suit by every person suffering injury in fact.” *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395 (1987). Accordingly, courts have supplied “gloss” to the language of the APA, by adding to the requirement that the complainant be ‘adversely affected or aggrieved,’ *i.e.*, injured in fact, the additional requirement that “the interest sought to be protected by the complainant [be] arguably within the *zone of interests* to be protected or regulated by the statute . . . in question.” *Id.* at 395–96 (emphasis added) (quoting *Ass’n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152–153 (1970)).

The most widely-cited discussion of the zone of interests test is set forth in *Clarke v. Sec. Indus. Ass’n*, where the Supreme Court held:

The “zone of interest” test is a guide for deciding whether, in view of Congress’ evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

*Clarke*, 479 U.S. at 399–400.

In applying the “zone of interests” test, the court does not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, the court must first discern the interests “arguably . . . protected or regulated” by the statutory provision at issue; then the court must “inquire whether the plaintiff’s interests affected by the agency action in question are among them.” *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). In the instant case, therefore, the court must initially determine what interests section 2417(c) arguably protects. We must then ask whether the interests that Gilda alleges have been affected by the challenged agency ac-

tion are among the interests arguably protected or regulated by section 2417(c).

### **1. The Interests Arguably Protected by the Statutory Provision in Question**

The Supreme Court's instruction that the courts consider "the overall context" of the relevant statutory framework in deciding which interests are arguably protected, *Clarke*, 479 U.S. at 401, was not meant to narrow the award of prudential standing, but to broaden it. *Bennett v. Spear*, 520 U.S. 154 (1996) reaffirmed a well-established doctrine that a plaintiff's suit need not "vindicate the overall purpose" of a statutory regime so long as the plaintiff's interest is arguably regulated or protected by "the specific provision which they alleged had been violated." *Bennett*, 520 U.S. at 176. Hence, although an examination of the overall context of the pertinent statutory framework would be relevant, the focus here is ultimately on the specific provision under which Gilda asserts protection: 19 U.S.C. § 2417(c). *See Id. See also Data Processing*, 397 U.S. at 154 (holding that "where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action.").

The relevant statutory sections are found in The Omnibus Trade and Competitiveness Act of 1988 ("the Act") which provides, in pertinent part:

#### SEC. 1001. FINDINGS AND PURPOSES.

- (b) PURPOSES. — The purposes of this title are to —
- (1) authorize the negotiation of reciprocal trade agreements;
  - (2) strengthen United States trade laws;
  - (3) improve the development and management of United States trade strategy; and
  - (4) through these actions, improve standards of living in the world.

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#### SEC. 1301. REVISION OF CHAPTER 1 OF TITLE III OF THE TRADE ACT OF 1974

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#### CHAPTER 1 – ENFORCEMENT OF UNITED STATES RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN TRADE PRACTICES

100 P.L. 418, 1001. As the above-quoted passage indicates, the broad purpose of Chapter 1 (sections 301–309, as amended, codified at 19 U.S.C. §§ 2411–2419 (2000)) is to strengthen U.S. trade laws by providing a means for the enforcement of United States rights, such as the imposition of certain retaliatory measures against foreign coun-

tries that violate trade policies. *See generally* section 2411. Much of the Senate testimony offered in consideration of the Section 301 amendments highlights the broad purpose of achieving foreign compliance with trade laws (through various retaliatory measures); however, that purpose was balanced by an acute concern that, because retaliation often backfired, any retaliatory action must be implemented with the utmost care, and without causing undue harm to broader national economic interests. As noted in the floor statements of Alan Holmer, then USTR General Counsel:

In considering any amendment to Section 301, I hope that you will ask one key question: Will this amendment help or hurt the ability of U.S. negotiators to pry open a foreign market to U.S. exports? It really comes down to this issue: Is Section 301an import relief law, or is it a negotiating tool? If you believe, as I do, that it is a negotiating tool, I would implore you to avoid mandatory retaliation.

Retaliation really means failure. It may make us feel better temporarily. It may provide import relief for another U.S. industry. But . . . the U.S. Industry that brought the case is generally not going to sell a nickel's more goods in that foreign market simply because we have retaliated. In fact, their sales may go down because of subtle or sometimes not so subtle counter-retaliation.

. . .

[R]etaliation is not cost-free. We retaliated against the Europeans in the citrus case. They hit us back on nuts and lemons. We announced retaliation in the EC enlargement case. They threatened counter-retaliation on corn-gluten feed. Legislatively, it seems to me you need to give us the tools which we already (for the most part) have under Section 301, and then use your political leverage to make sure that this Administration and future administrations act.

Senate Hearing 100–474, March 17, 1987 (testimony of Alan Holmer, General Counsel, USTR).

The balancing of concerns reflected in this statement reinforces the notion that although the broad purpose of the Act is to strengthen trade policy by providing an effective means of retaliation, Congress was also keenly aware that such retaliation might cause more problems than it solved. Accordingly, sections 301–308 were equipped with several provisions requiring the USTR to consider any potential economic consequences prior to, and subsequent to, the implementation of retaliatory actions. *See* 19 U.S.C. §§ 2411(a)(2)(iv) (providing that the USTR is not required to take action under section 301 if such action “would have an adverse impact on the United States economy substantially out of proportion to

the benefits of such action”); 2416(d) (providing that in revising the retaliation list, the USTR “shall act in a manner that is most likely to result in the country or countries implementing the recommendations adopted in the dispute settlement proceeding”); *see also Proceedings Concerning the [EC’s] Regime for the Importation, Sale and Distribution of Bananas and the [EC’s] Measures Concerning Meat and Meat Products*, 65 Fed. Reg. 34,786–87 (May 31, 2000) (describing the function of USTR’s Section 301 Committee as “to closely monitor actions taken under section 301 to ensure that such actions remain practicable and effective in terms of obtaining the elimination of the acts, policies, or practices of foreign governments that are the subject of the 301 investigation.”).

**a. Interests Arguably Protected or Regulated by  
Section 2417(c)**

Section 2417(c) provides

(c) Review of necessity.

(1) If—

(A) a particular action has been taken under section 301 [19 U.S.C. § 2411] during any 4-year period, and

(B) neither the petitioner nor any representative of the domestic industry which benefits from such action has submitted to the Trade Representative during the last 60 days of such 4-year period a written request for the continuation of such action, such action shall terminate at the close of such 4-year period.

(2) The [USTR] shall notify by mail the petitioner and representatives of the domestic industry described in paragraph (1)(B) of any termination of action by reason of paragraph (1) at least 60 days before the date of such termination.

(3) If a request is submitted to the [USTR] under paragraph (1)(B) to continue taking a particular action under section 301, the [USTR] shall conduct a review of—

(A) the effectiveness in achieving the objectives of section 301 of—

(i) such action, and

(ii) other actions that could be taken (including actions against other products or services), and

(B) the effects of such actions on the United States economy, including consumers.

19 U.S.C. § 2417(c)(2000). Although there is very little discussion of this subsection in legislative history, section 2417(c) fits easily into the scheme of provisions requiring the USTR to assess (or periodically reassess) the effectiveness of actions taken pursuant to section 301. First, the “Termination” provision becomes effective only where, after having been in effect for 4 years, “neither the petitioner *nor*

*any representative of the domestic industry which benefits from the action* has submitted . . . a written request for the continuation of such action.” *Id.* (emphasis added). The court finds that this provision is consistent with the expressed congressional intent that retaliatory actions be closely monitored to ensure that the intended beneficiaries continue to reap some benefit; where no beneficiary requests the continuation of an action, a question is raised as to whether the action is continuing to have the desired effect.<sup>1</sup> If the representatives of the domestic industry maintain their silence even after the USTR provides to them notice pursuant to section 2417(c)(2), the 301 action terminates.

Further, section 2417(c)(3) provides that even where the intended beneficiary of the USTR’s action submits a request for the continuation of the action, the USTR must perform a review to determine the action’s “effectiveness in achieving the objectives of section 301” and “the effects of such actions on the United States economy, including consumers.”

## **2. Whether Gilda’s Interests Affected by the USTR’s Failure to Act are Among the Interests Arguably Protected or Regulated by Section 2417(c).**

Gilda asserts that it has an interest in remaining competitive, and an interest in not paying the 100% duties if it is not legally required to do so. Reply at 2. To this end, Gilda “seeks the protection of section 2417(c)(1)(B).” The government argues that Gilda does not have prudential standing to sue because Gilda “cannot prove an indication of congressional intent, explicit or implicit, in section 301 to grant protection to importers.” As supporting evidence for that conclusion, the government points out that the definition of “interested persons” set forth in section 301(which apparently includes importers) does *not* apply to § 2417(c). Def.’s Mot. to Dismiss and Resp. to Pl.’s Mot. for Class Certification at 8. *See* section 307(c) (19 U.S.C. § 2417(c)).

This argument is insufficient for at least two reasons. First, it directly contravenes the Supreme Court’s directive that “there need be no indication of congressional purpose to benefit the would-be plaintiff,” and that a “cause of action for review of [agency] action is available absent some clear and convincing evidence of legislative intention to preclude review.” *Clarke* at 398. Second, the argument seems to have ignored that the *Data Processing* zone of interests test also consists of inquiry into “regulated” interests, not merely “protected” interests. Although few courts have had occasion to decide pruden-

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<sup>1</sup>This distinguishes section 2417(c) from the carousel provision discussed by the Federal Circuit in *Gilda II* which required the USTR to review (but not necessarily modify) the retaliation list every 180 days, with no request from the domestic industry prompting such action. *See* section 3 discussion, *infra*.

tial standing issues by inquiry into whether a plaintiff's interests were within the "regulated" zone of interests, the court does not see that as a reason to discard that term from the zone-of-interest test. However, considering the paucity of case law discussing what it means to be "regulated" in this context, the court must take guidance from the general policy that review under the APA is "generous," and that the "zone" considered adequate to sustain judicial review "is particularly broad in suits to compel federal agency compliance with the law." *FAIC Securities Inc. v. U.S.*, 768 F.2d 352, 357 (D.C. Cir. 1985).

The court finds that Gilda's interest is arguably regulated by sections 2411–2417. Because Gilda is required to pay duties pursuant to actions taken under those provisions, those provisions regulate Gilda's implicit interest in maintaining profit, remaining competitive, and in transacting in imported merchandise. Although the statute is not directed to importers and does not by its terms compel action by them or impose penalties upon them because of certain acts or failures to act, the USTR's actions taken pursuant to section 2411 (such as imposing 100% retaliatory duties) certainly does compel action, either in the payment of the duties or in the modification of business plans. Hence, Gilda is still arguably regulated by the statute indirectly. *See Cotovsky - Kaplan Physical Therapy Assoc., Ltd. V. United States*, 507 F.2d 13631367 (7th Cir. 1975). Further, section 2417(c) regulates when the USTR must act to terminate, modify, or review actions (such as retaliatory duties) in effect pursuant to section 2411. Because section 2417(c) sets the standards for when the USTR must take action to terminate a retaliatory measure, the USTR's failure to follow the directive of the statute results in the continued payment of retaliatory duties that may no longer be desired by the domestic industry beneficiaries.

Finally, although it is true that Gilda is not designated as one of the parties to be consulted if the USTR received a request to continue the action, importers such as Gilda were encouraged to submit comments and testimony at several stages before the implementation of the retaliation list. *See* 64 Fed.Reg. at —, —, —. As such, the USTR cannot argue that the interests of importers played no part in the consideration of retaliation lists, or that importers were excluded from an analysis of "the effects of such actions on the United States economy." 19 U.S.C. § 2417(c)(3). The government states correctly that the definition of "interested persons" found in section 2411(d)(9) specifies that it applies "only for the purposes of sections 2412(a)(4)(b), 2414(b)(1)(A), 2416(c)(2), and 2417(a)(2) of this title." 19 U.S.C. § 2411(d)(9) (2000). However, the court does not find this fact to be particularly revealing of congressional intent because the term "interested persons" is simply not found in section 2417(c). Furthermore, because the term "interested persons" is used (and defined somewhat differently) in several *other* sections of Title 19, the court

is unconvinced that the definition in section 2411(d)(9) should be seen as anything more than a simple clarification. Accordingly, the court is unable to find the fact that “interested persons” as defined in section 2411(d)(9) does not apply to section 2417(c) is “convincing evidence of legislative intention to preclude judicial review.”

### **3. Gilda’s Interests are not Contrary to the Purpose of Section 2417(c).**

The government next asserts that Gilda does not have prudential standing to challenge the USTR’s failure to act because Gilda’s interests are *contrary to the purpose* of the statute. Mot. to Dismiss at 8–9. In support of this contention, the government quotes the Federal Circuit’s decision in *Gilda II*, where that Court considered, but did not decide, the issue of prudential standing as it related to 19 U.S.C. § 2416 (the “carousel” provision). In that case, the Federal Circuit observed:

On the one hand, the injury Gilda complains of is precisely the “pain” Congress intended to inflict through the carousel provision. Senator DeWine made that point clearly in the course of the Senate debate on the Trade and Development Act of 2000:

What is a nation to do if its current list of imports subject to retaliatory tariffs is not working to move the offender such as the E.U. into compliance? The solution, I believe, is to seek other products to target and at tariff levels that will impose the kind of pain that will cause the European Union to see compliance as the remedy . . . That is what this amendment is about.

145 Cong. Rec. 26,933–34 (1999). Thus, Gilda’s suit may be viewed as seeking relief that is contrary to, and would frustrate, the objectives of the statute.

*Gilda II*, 446 F.3d at 1280.

The Federal Circuit brings up an important point: Are Gilda’s interests as an importer so “inconsistent with the purpose implicit in the statute” that Congress must have intended to preclude judicial review? The court is dubious as to whether a plaintiff’s interests could be “arguably regulated” by the relevant statute on the one hand, but on the other hand have those interests be so “inconsistent” with the purposes of the statute that standing should be denied. The court need not decide that question here, however, because for the reasons stated below, the court finds that Gilda’s interests are not “inconsistent with the purposes of the statute” and that Gilda does indeed possess prudential standing to pursue the present cause of action.

First, the court does not agree that the purpose of section 2417(c) is accurately described as simply or rather only to “impose . . . pain.” As noted above, the purpose of section 2417(c) is to set certain stan-

dards for when a 2411 “action” should be terminated – standards that reflect the underlying legislative intent that the retaliatory provisions be implemented only when and continue only so long as necessary; at the very least, the intended beneficiaries must express their support for the continuation of a 301 action when it is proper to do so.

In this case, Gilda’s interest in not paying the retaliatory duties – particularly when none of the intended beneficiaries has come forward to request the continued imposition of those duties – is not contrary to the purpose of the statute. Although Congress apparently did not intend to protect importers specifically, one of the interests arguably to be protected by the statute was the interest in ensuring actions pursuant to 2411 effectively continue to serve their purpose. Requiring action by the USTR pursuant to 2417(c) when the domestic industry beneficiaries have failed to request continuation of the action is hardly contrary to that purpose; moreover, even though it is clear that Gilda’s objectives have nothing to do with ensuring the effectiveness of retaliatory actions, that fact is not fatal to Gilda’s claim, but considered “beside the point.” *Nat’l Credit Union*, 522 U.S. at 499.

Additionally, the court notes that the few Supreme Court cases that deal with the “inconsistent with the purposes implicit in the statute” aspect of the zone-of-interests test seem to focus less on the plaintiff’s underlying interests and more on the disruptions to the statutory scheme that would occur if the Court were to afford judicial review to the interloping party. In *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984), the Court noted:

Allowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme. It would provide handlers with a convenient device for evading the statutory requirement that they first exhaust their administrative remedies. A handler may also be a consumer and, as such, could sue in that capacity.

*Block*, 467 U.S. at 347–48. Hence the Court found that because allowing consumers to sue under the statute would be so disruptive to the administrative scheme, Congress could not have intended consumers to be proper parties to sue under the statute. The Fourth Circuit used a similar line of reasoning in *Leaf Tobacco Exporters v. Block*, 749 F.2d 1106 (4th Cir. 1984). In that case, the Leaf Tobacco Exporters Association challenged the decision of the Secretary of Agriculture to permit a growers’ cooperative to sell its tobacco directly to foreign purchasers. The Court noted that the relevant statute was designed to ensure minimum revenues for growers and was created for “the purpose of stabilizing, supporting, and protecting farm income and prices.” *Id.* at 1116. The Court denied standing, holding that “[w]here Congress has in this manner clearly defined the class

to be protected, the zone of interest test works to prevent groups outside of the class from usurping the legislative entitlement. The goal is especially urgent when, as here, such usurpation would come at the expense of the intended beneficiaries.”<sup>2</sup> *Id.*

In this case Gilda’s interests are not contrary to the purpose of section 2417(c), and allowing Gilda to sue the government over its failure to enforce the statute would not, as far as the court can see, “disrupt” a complex scheme of enforcement, nor would it allow Gilda to “usurp legislative entitlement” at the expense of the intended beneficiaries. On the contrary, where an action is supposed to terminate under section 2417(c), the intended beneficiaries may be presumed no longer benefitted, rendering the continuation of that particular section 301 action ineffectual. Accordingly, the court finds no reason to deny Gilda prudential standing to compel the USTR to take action pursuant to the mandate of section 2417(c).

### **C. 12(b)(5) Motion to Dismiss**

In deciding a USCIT R. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the Court assumes all factual allegations to be true and draws all reasonable inferences in the plaintiff’s favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n. 13 (Fed. Cir. 1993); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (subject matter jurisdiction); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (failure to state a claim). Dismissal for failure to state a claim upon which relief can be granted is proper if the plaintiff’s factual allegations are not “enough to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 550 U.S. \_\_\_\_ (2007) (citations omitted).

The government contends that Gilda’s claim must fail as a matter of law because the termination provision contained in section 2417(c) is not applicable in this matter, and that “Gilda’s contentions are contrary to the plain language of the statute.” Mot. to Dismiss at 12. Specifically, the government argues that the phrase “a particular action . . . under section 2411” refers only to the initial “action” undertaken by the USTR to impose the retaliation list. “Contrary to Gilda’s contention, actions taken pursuant to section 2411 do not include the *continuation* of a particular action under section 2411.” *Id.* at 4 (emphasis added). Under the government’s interpretation of the statute,

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<sup>2</sup> The ruling in this case may also relate to when a plaintiff should be denied prudential standing under the “suitable challenger” test referenced in *Clarke*, where the Supreme Court further described the zone of interest test as an inquiry as to “whether Congress intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law.” *Clarke* at 399.

to “take action” pursuant to Section 301 means the exercise of authority under section 2411(c) to modify the tariff schedule of the United States to increase duties on certain imported products. That action must be taken by a certain statutory deadline, after consultation with interested persons, and may not be modified or terminated unless the USTR takes further action, pursuant to specific statutory procedures that include consultation with specific persons. Gilda’s contention – that the USTR is “taking action” each day that an action remains in effect – is, thus, inconsistent with the statutory structure that provides specific deadlines for taking action, requirements for public consultation before taking action, and that new action is required to modify or terminate a prior action. If, as Gilda contends, Congress intended for USTR to review an action every four years, Congress would have used such language in the statute.

Def’s Reply at 6. The Government ultimately concludes that “because the USTR has not taken “a particular action” pursuant to section 2411 in the past four years, termination pursuant to section 2417(c) is inapplicable to the retaliation list.” *Id.* at 7.

In examining the text of the statute and its legislative history, as well as using plain common sense, the court finds no support for the government’s interpretation of section 2417. First, the notion that “an action under section 2411” refers only to the initial USTR decision to implement the retaliatory duties – and not the continued imposition of those duties – is contrary to the language of the statute itself. Section 307 (19 U.S.C. § 2417) is entitled “Modification and Termination of Actions.” If, as the government argues, the “actions” to be modified or terminated pursuant to § 2417 refer only to isolated acts and “do not include the *continuation* of a particular action under section 2411,” how those actions could be “modified” or “terminated” is indeed a puzzle. Indeed, even the specific section at issue (2417(c)) provides that if the conditions pursuant to subsections (A) and (B) are met, “such action” – that is, the particular action taken under section 301 – “shall terminate at the close of such 4-year period.” 19 U.S.C. § 2417(c). Because an action cannot terminate unless the action is somehow continuing, the court is unable to accept that the “action” to which the statute refers is not a continuing one.

For good measure, the court notes that the legislative history regarding 2417(c) also directly contradicts the government’s interpretation of the statute. The House of Representatives Conference Report describing the Senate amendment to modify section 307(c) (eventually codified at 19 U.S.C. § 2417(c)) from a biennial review to its current version states:

The Senate amendment also provides that any action will automatically terminate if it has been in effect during any four-year

period and neither the petitioner nor any representative of the domestic industry submits to the USTR a written request for continuation during the last 60 days of the four-year period. USTR must notify by mail the petitioner and representatives of the domestic industry at least 60 days before the date of termination.

House of Representatives Report 100–576 at 564. The House Report states expressly that the actions will terminate “if it has been *in effect* during any four-year period.” The House Report makes no reference to when the USTR’s decision to implement the action took place. Moreover, the court is unable to see how an action that has been “in effect,” can be interpreted as anything other than continuous.

Finally, common sense does not support the government’s interpretation. Although Customs may collect the duties pursuant to actions implemented pursuant to section 2411, that duty is only ministerial; the legal authority to collect those duties continually emanates from USTR. The government’s interpretation would have us believe that, once implemented, the authority of the USTR is at an end, or that the USTR bears no more responsibility for the matter. Such is hardly the case. *See Gilda II* (holding that challenge to Customs action to collect the duties is unnecessary). Accordingly, the court cannot accept the government’s interpretation of section 2417(c) as “inapplicable” to this matter, and the government’s motion to dismiss will be denied.

#### IV. Conclusion

Upon consideration of the foregoing analysis, the court hereby (1) denies the plaintiff’s motion for class certification; and (2) denies the government’s motion to dismiss. The government shall timely file an answer to the allegations set forth in the plaintiff’s complaint in accordance with the Court’s Rules.

**SO ORDERED.**

**Slip Op. 08–53**

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

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

*[Plaintiff’s motion for a temporary restraining order and a preliminary injunction denied because the Court lacks jurisdiction over the entries which are the subject of the request.]*

May 20, 2008

*Mayer Brown LLP (Andrew A. Nicely, Simeon M. Kriesberg, and Jeffrey C. Lowe) for Plaintiff.*

*Gregory C. Katsas, Acting Assistant Attorney General; Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Edward F. Kenny), and Yelena Slepak, of counsel, Office of Assistant to Chief Counsel, International Trade Litigation, Department of Homeland Security, U.S. Customs and Border Protection, for Defendant.*

**OPINION & ORDER**

Before the Court is the motion by Plaintiff, International Custom Products, Inc. (“ICP”), for a temporary restraining order (“TRO”) and a preliminary injunction against Defendant, United States. ICP requests that the Court order the U.S. Bureau of Customs and Border Protection (“Customs”) to place 98 entries of a product called “white sauce”<sup>1</sup> in “suspended liquidation status” during the pendency of this case.<sup>2</sup> (Mem. of P. & A. in Supp. of Pl.’s Application for a TRO & Mot. for a Prelim. Inj. (“Pl.’s Mem.”) 1.) The government opposes ICP’s motion, arguing that the Court cannot grant a TRO or a preliminary injunction because, first, the Court lacks jurisdiction over the entries, and, second, ICP has not shown that an injunction is warranted in any event. (Def.’s Mem. in Opp’n to Pl.’s Application for TRO & Prelim. Inj. (“Def.’s Resp.”).)

The 98 entries for which ICP requests a TRO and a preliminary injunction are not part of this case: there is only 1 entry listed on the summons, entry number 180–0590029–7, and ICP acknowledges that before filing suit, it paid the liquidated duties for only that en-

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<sup>1</sup>The government refers to the product as “dairy spread.” Because several opinions have issued from the Court of International Trade referring to the product as white sauce, and because these semantics are not outcome-determinative, the Court will continue to call the product white sauce.

<sup>2</sup>The parties differ on the number of entries at issue here: ICP requests a TRO and preliminary injunction over 98 entries, while the government in its brief refers to 99 entries. Because the party requesting an injunction controls the scope of its request, the Court proceeds with the understanding that 98 entries are at issue.

try and no others.<sup>3</sup> (See Pl.'s Mem. 1; Def.'s Resp. 13 n.7.) In fact, for 84 of the entries, Customs has yet to issue its decision regarding ICP's protest. For another 13 entries, Customs has denied ICP's protest, but ICP has not paid the liquidated duties, or filed a complaint in this Court challenging Customs's denial of the protest.<sup>4</sup>

Because the 98 entries are not part of this case, the Court lacks jurisdiction to issue an injunction covering those entries. *Am. Air Parcel Forwarding Co., Ltd. v. United States*, 6 CIT 147, 150, 573 F. Supp. 117, 120 (1983) (denying injunction because "tender of additional duties determined to be due on liquidation is a condition precedent to invoking jurisdiction of this court. . . . [Therefore], this court lacks subject matter jurisdiction as to all entries for which the additional duties have not been paid."); *Dexter v. United States*, 424 F. Supp. 1069, 1071 (Cust. Ct. 1977) (denying injunction) ("[T]his action in reality only covers one specific liquidated entry and has no legal connection to the entries for which relief is sought. . . . Until the entries are liquidated and protests denied this court has no jurisdiction over them, not even by way of its jurisdiction over another entry of exactly the same merchandise."); see also *Daimlerchrysler Corp. v. United States*, 442 F.3d 1313 (Fed. Cir. 2006) (court lacks jurisdiction over entries not included on summons).

ICP attempts to convince the Court that pursuant to 28 U.S.C. § 1367(a) (2000), the Court can exercise supplemental jurisdiction over, at least, the 13 entries for which Customs has denied ICP's protest.<sup>5</sup> (See Pl.'s Reply Mem. 8–12.) Section 1367(a) grants district courts supplemental jurisdiction over all claims that are part of the same case or controversy as a claim within the district court's original jurisdiction. For example, this court could exercise supplemental jurisdiction over a takings claim where an action challenging an import embargo was properly before the court pursuant to original ju-

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<sup>3</sup>Although ICP lists 100 entries in 2 attachments to the summons, one of which is entry number 180–0590029–7, the inclusion of the entries as attachments to the summons does not satisfy the statutory prerequisites to filing suit, namely, that Customs has denied the protest containing the entry; that the importer paid all liquidated duties, charges, or exactions for the entry; and, that the importer filed a summons listing either the protest or entry number within 180 days of the denial of the protest. See 28 U.S.C. §§ 2636(a), 2637 (2000); *Daimlerchrysler Corp. v. United States*, 442 F.3d 1313 (Fed. Cir. 2006).

<sup>4</sup>The Court recognizes that the 84 not-yet denied entries plus the 13 entries that have been denied does not equal 98 entries. It equals 97 entries. In its brief, Customs states that ICP did not properly protest 2 entries, which suggests that Customs's statement that there are 99 relevant entries might be accurate (84 + 13 + 2 = 99), though ICP has requested a TRO and injunction for only 98 of them.

<sup>5</sup>While ICP presumes in its initial brief that the Court has jurisdiction over the 98 entries for which it seeks a TRO and a preliminary injunction, it is only in its reply brief that ICP puts forth any argument on this point. And, while the initial brief requested injunctive relief for all 98 entries, ICP is silent in its reply brief whether it maintains its request to issue a TRO and preliminary injunction for the 84 entries for which Customs has not yet issued a decision regarding ICP's protests. (See Pl.'s Reply Mem. 15.)

risdiction. *B-West Imps., Inc. v. United States*, 19 CIT 303, 315, 880 F. Supp. 853, 864 (1995), *aff'd*, 75 F.3d 633 (Fed. Cir. 1996).

This case is not analogous. ICP acknowledges that this Court would immediately have original jurisdiction over the 13 denied entries pursuant to 28 U.S.C. § 1581(a) (judicial review of a denied protest) if ICP could afford to pay \$28 million in liquidated duties. In fact, ICP brought this very case challenging a denied protest of one entry under 28 U.S.C. § 1581(a). Teaching from the Court of Appeals for the Federal Circuit is clear that a plaintiff cannot avoid the inconvenience of paying liquidated duties by artful pleading. *See, e.g., Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1326–27 (Fed. Cir. 2006). Accordingly, the Court holds that supplemental jurisdiction cannot be used as a basis to grant an injunction over these entries. *Alberta Gas Chems., Inc. v. United States*, 496 F. Supp. 1332, 1335 (Cust. Ct. 1980) (court’s “equity power can apply only to matters within a court’s jurisdiction and cannot be exercised in disregard of the mandatory requirements of the jurisdictional statute.”) (internal quotation marks removed).

Yet, not all is lost for ICP. Customs represented to the Court that it has “*on its own* placed [84 of the] entries into a suspended liquidation status pending the resolution of this case.”<sup>6</sup> (Def.’s Mem. 15 n.8.) The Court expects Customs to, as it states, “continue to handle [ICP’s] entries in the fair and appropriate manner in which it processes all other importers’ goods,” and interprets this commitment to mean that Customs will suspend the protest process for the 84 entries until a final decision is reached in this case, that is, until all appeals have been exhausted.

### CONCLUSION

Because the Court lacks jurisdiction over the 98 entries which are the subject of ICP’s request, it is hereby

ORDERED that ICP’s motion for a TRO and a preliminary injunction is DENIED.

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<sup>6</sup> ICP states that it asked Customs to place the 13 denied entries in suspended liquidation status, but that Customs denied the request because the agency “believes it is powerless to correct its error . . . because the liquidations purportedly have become final. . . .” (Pl.’s Reply 7.) The Court makes no statement as to the validity of Customs’s purported belief.

## Slip Op. 08–54

CONLIN GREENHOUSES, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard K. Eaton, Judge  
Court No. 06–00441

[Plaintiff’s motion for judgment on the agency record denied, defendant’s motion to dismiss granted and case dismissed.]

Dated: May 20, 2008

*Steven D. Schwinn*, for plaintiff.

*Gregory G. Katsas*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Marla T. Conneely*); Office of the General Counsel, United States Department of Agriculture (*Jeffrey Kahn*), of counsel, for defendant.

### OPINION

Eaton, Judge: Plaintiff<sup>9</sup> seeks judicial review of the United States Department of Agriculture’s (“Agriculture,” or the “Department”) denial of its application for cash benefits under the Trade Adjustment Assistance for Farmers (“TAA”) program. 19 U.S.C. § 2401e (2002); Pl.’s R. 56.1 Mot. J. Agency R. (“Pl.’s Mot.”). Defendant moves to dismiss the complaint, pursuant to USCIT Rules 12(b)(1) and 56.1, for lack of subject matter jurisdiction, or, in the alternative, for the court to enter judgment in its favor. Def.’s Mot. Dismiss (“Def.’s Mot.”); *see also* Pl.’s Resp. Mot. Dismiss (“Pl.’s Resp.”). For the following reasons, the court grants the Department’s motion to dismiss and denies plaintiff’s motion for judgment upon the agency record.

### STANDARD OF REVIEW

Because it seeks to invoke the court’s jurisdiction, plaintiff has the burden of proving jurisdiction by a preponderance of the evidence. *Former Employees of Siemens Info. Commc’n Networks, Inc. v. Herman*, 24 CIT 1201, 1202, 120 F. Supp. 2d 1107, 1108 (2000) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

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<sup>9</sup>It does not appear that plaintiff “Conlin Greenhouses” is incorporated. Thus, for purposes of this opinion, it is assumed that John and Susan Conlin are the plaintiffs and are referred to as “the Conlins” or the plaintiff.

## DISCUSSION

According to the record, John and Susan Conlin grew snapdragons at the Conlin Greenhouses in Indianapolis, Indiana, until the business ceased operations in December of 2003. *See* Application for TAA, Conlin Greenhouses, Johnnie, Susan Conlin, dated April 26, 2006, Admin. R. (“AR”) 3; Pl.’s Mot. 13; Letter dated December 8, 2006 from James E. Barbour to Susan Conlin, Compl. Att. 2 at 1. Thereafter, they sought to receive benefits under the TAA program, as compensation for their losses. Petitioning for TAA benefits is a two-step process. In the first step, a group of producers, or their authorized representative, files with the United States Secretary of Agriculture (the “Secretary”) a “petition for a certification of eligibility to apply for adjustment assistance.” 19 U.S.C. § 2401a(a). If the Secretary certifies the group petition, individual producers covered by the group certification may then apply for TAA benefits. 19 U.S.C. § 2401e(a)(1); 7 C.F.R. § 1580.301 (2003).

In this case, in November 2005, a petition for certification was filed on behalf of the Indiana Flower Growers Association. Pl.’s Mot. 5. In February 2006, the group certification was approved. Pl.’s Mot. 5. Thereafter, the Conlins applied for TAA benefits. Pl.’s Mot. 5. On October 3, 2006, the Conlins learned that they had been denied TAA benefits when they received a letter, dated September 7, 2006, from the Department. Pl.’s Mot. 6; Letter dated Sept. 7, 2006, from Robert H. Curtis, Dir., Import Policies and Program Div., Int’l Trade Policy, Foreign Agric. Serv., United States Dep’t of Agric. to Conlin Greenhouses, AR 14 at 1 (the “Denial Letter”). The letter stated “the Foreign Agriculture Service has disapproved your 2006 Indiana Fresh Cut Snapdragons marketing year application for a cash benefit under the Trade Adjustment Assistance for Farmers program (TAA).” Denial Letter, AR 14 at 1. In addition, the letter advised the Conlins of their right to judicial review of the determination in this Court, noting that “[a]ppeals to the Court must be filed within 60 days from the date of this letter.” Denial Letter, AR 14 at 2.<sup>10</sup> Thus, on October 3, 2006, the Conlins had both notice of the Department’s final determination and the sixty-day time limit for filing suit.

On December 10, 2006, Susan Conlin initiated this suit by sending a letter addressed to the Clerk of the Court, via certified mail. Letter dated December 8, 2006 from Susan Conlin to Office of the Clerk, USCIT (“Compl.”). The Clerk of the Court deemed the letter to be a summons and complaint, filed on the postmarked date. *See* USCIT Rule 5(e); Letter dated December 18, 2006 from Office of the Clerk, USCIT, Donald C. Kaliebe, Case Management Supervisor, to Susan

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<sup>2</sup>Although the letter indicates that the sixty-day statute of limitations begins to run “from the date of this letter,” the statute only states that suit must be brought “within sixty days after notice of” a final determination. 19 U.S.C. § 2395(a).

Conlin, at 1. Thus, suit was commenced sixty-eight days after receiving notice of the Department's final determination. Plaintiff does not dispute that it brought its suit more than sixty days after receiving notice. *See generally* Pl.'s Resp. Plaintiff does argue, however, that because the defendant failed to raise the limitations period in its answer, it has waived any affirmative defense predicated upon the statute of limitations. Pl.'s Resp. 1.

Under well-established law, a statute of limitations defense is an affirmative defense, and is waived if it is not pleaded in the answer. USCIT R. 8(d); *Parkdale Int'l Ltd. v. United States*, 31 CIT \_\_\_, \_\_\_, 508 F. Supp. 2d 1338, 1348–1349 n. 6 (2007). It is equally well-settled, however, that a time limitation that is a condition of the court's jurisdiction cannot be waived and thus can be raised at any time. *United States v. Hitachi America Ltd.*, 172 F.3d 1319, 1334 (Fed. Cir. 1999) (“if [a statute of limitations] is ‘jurisdictional’ in nature, it cannot be waived by the parties under any circumstances. . . .”); USCIT Rule 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”). Accordingly, the question of the court's jurisdiction to consider plaintiff's claim turns on whether the sixty-day limitations period imposed by 19 U.S.C. § 2395(a) is jurisdictional in nature.

This question must be answered in the affirmative, and requires plaintiff's claim to be dismissed. The Court of Appeals for the Federal Circuit has held that the sixty-day filing deadline contained in 19 U.S.C. § 2395(a)<sup>11</sup> is a “jurisdictional requirement.” *Kelley v. Secretary, United States Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (“*Kelley*”).<sup>12</sup> *Kelley* further characterized the conditions imposed by 19 U.S.C. § 2395(a) as “the terms upon which the United States has consented to be sued,” and stated that a petitioner's failure to observe the sixty-day filing deadline would leave “the court [without] jurisdiction to entertain the suit.” *Id.* (citation and quotations omitted).

It is noteworthy that the plaintiff in *Kelley* was held to have received constructive notice pursuant to the regulations governing workers seeking trade adjustment assistance from the Department

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<sup>3</sup> “[A]n agricultural commodity producer (as defined in [19 U.S.C.] § 2401(2) of this title) aggrieved by a determination of the Secretary of Agriculture under [19 U.S.C.] § 2401b of this title . . . may within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.” 19 U.S.C. § 2395(a).

<sup>4</sup> Agricultural commodity producers became entitled to receive trade adjustment assistance and to seek judicial review of any final determination in this Court effective August 6, 2002, subsequent to the *Kelley* decision. *See* Trade Act of 2002, § 141, Pub. L. No. 107–210, 116 Stat. 933, 953 (2002). There is no indication that the addition of “agricultural commodity producer[s]” to those who may seek review under 19 U.S.C. § 2395(a) changes the basic holding in *Kelley*.

of Labor, i.e., notice by publication in the Federal Register. By way of contrast, the Conlins had actual notice of denial of benefits when they received the Denial Letter on October 3, 2006. *See* Denial Letter. In other words, in this case there is no question, as there was in *Kelley*, regarding the notice necessary to start the running of the sixty-day limitations period.

Consequently, the court finds that the sixty-day statutory period for challenging Agriculture's final determination cannot be waived, and the Department may properly assert the statute of limitations by way of a motion to dismiss. *See, e.g., Former Employees of Rocky Mountain Region Office of Terra Res., Inc. v. United States*, 13 CIT 427, 713 F. Supp. 1433 (1989) (no jurisdiction over suit brought by pro se petitioners sixty-one days after receiving notice); *see also Washko v. Donovan*, 4 CIT 271, No. 82-9-01333 (December 28, 1982) (not reported in the Federal Supplement); *Brunelle v. Donovan*, 3 CIT 76, No. 81-10-01453 (March 23, 1982) (not reported in the Federal Supplement). Because plaintiff failed to begin its case in the time required by statute, the court has no jurisdiction to hear its claims.

#### CONCLUSION

Based on the foregoing, the court grants defendant's motion to dismiss for lack of subject matter jurisdiction and denies plaintiff's motion for judgment upon the agency record. Judgment shall be entered accordingly.