

U.S. Court of International Trade

Slip Op. 17–121

NEW MEXICO GARLIC GROWERS COALITION, et al., Plaintiffs, SHANDONG JINXIANG ZHENGYANG IMPORT & EXPORT Co., LTD., et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, ZHENGZHOU HARMONI SPICE Co., LTD., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Judge
Consol. Court No. 17–00146

OPINION AND ORDER

Barnett, Judge:

Before the court is consolidated plaintiff-intervenors¹ Shandong Jinxiang Zhengyang Import & Export Co., Ltd. (“Zhengyang”) and Jining Alpha Food Co., Ltd.’s (“Alpha”) partial consent motion for a preliminary injunction to enjoin defendant, the United States (“Defendant”), from liquidating certain of its entries of fresh garlic from the People’s Republic of China. Partial Consent Mot. for a Prelim. Inj. (“Mot.”). ECF No. 31.² Specifically, Zhengyang and Alpha (together, “Plaintiff-Intervenors”) seek to enjoin liquidation of all of their unliquidated entries of fresh garlic that were “entered or withdrawn from warehouse for consumption during the administrative review period” covered by the administrative determination published as *Fresh Garlic from the People’s Republic of China*, 82 Fed. Reg. 27,230 (Dep’t Commerce, June 14, 2017) (final results and partial rescission of the 21st antidumping duty admin. review; 2014–2015) (“Final Results”). Mot. at 2.

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 28 U.S.C. § 1581(c) (2012) and 19

¹ Court Nos. 17–00146 and 17–00166 have been consolidated under lead Court No. 1700146. See Docket Entry, ECF No. 31 (Court No. 17–00146). The instant motion was filed in Court No. 17–00166 before consolidation. Accordingly, references to court filings are to filings in Court No. 17–00166 unless otherwise stated.

² On September 6, 2017, the court granted Zhengyang and Alpha’s partial consent motion to intervene as of right in Court No. 17–00166. See Docket Entry, ECF No. 36 (Court No. 17–00166). The court denied the motion to intervene with respect to proposed plaintiff-intervenor Shenzhen Xinboda Industrial Co., Ltd. (“Xinboda”). See *id.* Because injunctive relief is premised upon the court’s grant of intervention, see Mot. at 1, the court will deny the instant motion with respect to Xinboda.

U.S.C. § 1516a(c)(2) (2012). For the reasons set forth below, Plaintiff-Intervenors' motion for a preliminary injunction is granted.

BACKGROUND

Commerce published the Final Results on June 14, 2017. *See* Final Results, 82 Fed. Reg. at 27,230. On June 27, 2017, now-consolidated-plaintiff Qingdao Tiantaixing Foods Co., Ltd. (“QTF”), a Chinese producer and exporter of fresh garlic, filed a summons commencing Court No. 17–166 *See* Summons, ECF No. 1. On June 30, 2017, QTF filed its complaint challenging the Department of Commerce’s (“Commerce”) application of adverse facts available and Commerce’s collapsing of QTF with several other entities. *See* Compl. ¶¶ 26–30, ECF No. 7.³ On July 11, 2017, the court granted QTF’s consent motion for a preliminary injunction. *See* Order (July 11, 2017), ECF No. 11.

Zhengyang and Alpha are separate rate respondents whose merchandise is also subject to the Final Results. *See* Mot. at 2–3; Final Results, 82 Fed. Reg. at 27,232. Zhengyang and Alpha received the same rate as Xinboda, which was the only mandatory respondent with a calculated rate. *See* Final Results, 82 Fed. Reg. at 27,232. Soon after filing their motion to intervene, Plaintiff-Intervenors filed the instant motion for a preliminary injunction. *See* Mot. Defendant opposes the motion. Def.’s Opp’n to the Mot. for Prelim. Inj. of Proposed Pl.-Ints. Shenzhen Xinboda Industrial Co., Ltd., Shandong Jinxiang Zhengyang Import & Export Co., Ltd., and Jining Alpha Food Co., Ltd. (“Opp’n”), ECF No. 32.⁴

DISCUSSION

“In international trade cases, the [U.S. Court of International Trade (“USCIT”)] has authority to grant preliminary injunctions barring liquidation in order to preserve a party’s right to challenge the assessed duties.” *Qingdao Taifa Grp. Co., Ltd. v. United States*, 581 F.3d 1375, 1378 (Fed. Cir. 2009). “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To prevail, Plaintiff-Intervenors must demonstrate (1) a likelihood of success on the merits; (2) the likelihood of irreparable harm without injunctive relief; (3) that the balance of equities favors Plaintiff-Intervenors; and (4) that injunctive relief serves the public interest. *Id.* at 20; *Zenith Radio Corp. v.*

³ Commerce determined that QTF had failed to rebut the presumption of government control and therefore had not demonstrated its entitlement to a separate rate. Final Results, 82 Fed. Reg. at 27,232. Accordingly, Commerce assigned QTF the China-wide rate of \$4.71 per kilogram. *Id.*

⁴ QTF consented to the motion. Mot. at 6. Defendant-Intervenors informed Plaintiff-Intervenors that they oppose the motion, *id.*, but they did not file a formal response.

United States, 710 F.2d 806, 809 (Fed. Cir. 198; *Nexteel Co., Ltd. v. United States*, 41 CIT ___, ___, 227 F. Supp. 3d 1323, 1327 (2017).

Pursuant to this court's rules, "[a]n intervenor may also preserve its unliquidated entries for eventual liquidation at the rates finally determined by the litigation by moving for a preliminary injunction to bar the liquidation of those entries." *Fine Furniture (Shanghai) Ltd. v. United States*, 40 CIT ___, ___, 195 F. Supp. 3d 1324, 1328 (2016) (citing USCIT Rule 56.2(a)). "[A]n 'intervenor must file a motion for a preliminary injunction no earlier than the date of filing of its motion to intervene and no later than 30 days after the date of service of the order granting intervention, or at such later time, but only for good cause shown.'" *Id.* (quoting USCIT Rule 56.2(a)).

Defendant does not oppose Plaintiff-Intervenors' motion on the basis of the four-factor test for injunctive relief. Instead, Defendant contends that Plaintiff-Intervenors' motion "should be denied because it seeks to enlarge the issues in the case, which an intervenor may not do." Opp'n at 4 (citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944); *Laizhou Auto Brake Equip. Co. v. United States*, 31 CIT 212, 477 F. Supp. 2d 1299–1301 (2007)).⁵

Laizhou relies on *Vinson* for the proposition that an intervenor "is admitted to a 'proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues.'" 31 CIT at 214–15, 447 F. Supp. 2d at 1300–01 (quoting *Vinson*, 321 U.S. at 498) (declining to grant injunctive relief to an intervenor). As a general rule, intervenors may not enlarge the pending substantive issues or "compel an alteration of the nature of the proceeding." *Vinson*, 321 U.S. at 498. However, the court is persuaded by more recent cases in this court, which have consistently found that granting an intervenor's motion for injunctive relief does not expand the scope of the action or change the nature of the proceeding. *See, e.g., Fine Furniture*, 195 F. Supp. 3d at 1328–30. Rather, granting injunctive relief to intervenors brings additional covered entries into the action, thereby ensuring that the intervenors may obtain the benefits of a favorable outcome to the litigation. *See id.* at 1330.

⁵ Defendant also contends that Plaintiff-Intervenors were "not authorized" to request injunctive relief before the court resolved their motion to intervene. Opp'n at 1, 3, 4. Defendant's position is contrary to the court's rules, which permit intervenors to seek injunctive relief concurrent with filing a motion to intervene. *See* USCIT Rule 56.2(a). That the court may not authorize injunctive relief until such time as a proposed intervenor is permitted to intervene does not bar the proposed intervenor from seeking injunctive relief. *See id.* Indeed, as Plaintiff-Intervenors note in their motion, "time is of the essence" because Commerce has issued liquidation instructions for Zhengyang's and Alpha's entries, the liquidation of which would remove those entries from the court's jurisdiction. Mot. at 3; *SKF USA Inc. v. United States*, 28 CIT 170, 174, 316 F. Supp. 2d 1322, 1327 (2004).

During a teleconference on the instant motion, Defendant also pointed to language in Rule 56.2(a) that it contends supports its position. In particular, Defendant relied on the following sentence: “Any motion for a preliminary injunction to enjoin the liquidation of entries that are the *subject of the action* must be filed by a party to the action within 30 days after service of the complaint, or at such later time, for good cause shown.” USCIT Rule 56.2(a) (emphasis added); see also *Laizhou*, 31 CIT at 214–15, 477 F. Supp. 2d at 1301 (quoting USCIT Rule 56.2(a)). Defendant contends that the entries that are the “subject of the action” are those identified in the complaint; because Plaintiff-Intervenors’ entries are not identified in the complaint, they are not entitled to injunctive relief. Defendant’s reliance on Rule 56.2(a) is unavailing.

Further down, Rule 56.2(a) also states that “an intervenor must file a motion for a preliminary injunction no earlier than the date of filing of its motion to intervene and no later than 30 days after the date of service of the order granting intervention, or at such later time, but only for good cause shown.” USCIT Rule 56.2(a). Read together, the sentences provide the respective deadlines that govern plaintiffs’ and plaintiff-intervenors’ motions for injunctive relief: generally speaking, plaintiffs must seek injunctive relief within 30 days of service of the complaint, and plaintiff-intervenors must seek injunctive relief within 30 days of the order granting intervention. The sentence relied on by Defendant is not intended to limit the scope of injunctive relief a court may grant. Indeed, denying injunctive relief would, in effect, provide intervenors “with a statutory right to participate in the litigation” pursuant to 28 U.S.C. § 2631(j)⁶ “without any chance for relief.” *Fine Furniture*, 195 F. Supp. 3d at 1330 (quoting *Tianjin Wanhua Co., Ltd. v. United States*, 38 CIT ___, ___, 11 F. Supp. 3d 1286 (2014)).⁷

The court further finds that Plaintiff-Intervenors have satisfied the requirements for a preliminary injunction. “In reviewing the factors,

⁶ Section 2631(j) provides, with exceptions not relevant here, that “[a]ny person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action.” 28 U.S.C. § 2631(j).

⁷ The sentence in Rule 56.2(a) permitting injunctive relief by intervenors begins with the words “*Notwithstanding the first sentence of this paragraph*, an intervenor must file a motion for a preliminary injunction” USCIT Rule 56.2(a) (emphasis added). In the current version of the court’s rules, the first sentence states that “[a]ny motion to intervene as of right must be filed within the time and in the manner prescribed by Rule 24.” *Id.* However, when the section of the rule governing intervention and motions for injunctive relief by intervenors first went into effect in 1995, the current first sentence regarding motions to intervene pursuant to Rule 24 was set off in a preceding paragraph, such that the first sentence related to motions for preliminary injunction by parties to the action (i.e., the current second sentence was, in 1995, the first sentence). See USCIT Rule 56.2(a) (effective Jan. 1, 1995). It thus appears to the court that the phrase “[n]otwithstanding the first sentence of this paragraph” in the current rule version should be construed as

the court employs a ‘sliding scale.’ Consequently, the factors do not necessarily carry equal weight. The crucial factor is irreparable injury.” *Belgium v. United States*, 452 F.3d 1289, 1293 (Fed. Cir. 2006) (citation omitted). Plaintiff-Intervenors will suffer irreparable harm absent injunctive relief because liquidation of their entries would bar them from obtaining the benefits of a favorable outcome to the litigation, i.e., a refund of any overpayment of anti-dumping duties. *Winter*, 555 U.S. at 24; Mot. at 3–4. The court has determined that QTF has demonstrated a sufficient likelihood of success on the merits, see Order (July 11, 2017), ECF No. 11, and because Plaintiff-Intervenors’ likelihood of success on the merits is tied to that of QTF’s, the court finds that this requirement is satisfied, see *Fine Furniture*, 195 F. Supp. 3d at 1333; Mot. at 5. The balance of equities favors Plaintiff-Intervenors because they will suffer irreparable harm without injunctive relief and Defendant will suffer no apparent hardship from the grant of injunctive relief. *Winter*, 555 U.S. at 24; Mot. at 4–5. Finally, the public interest is served by the grant of injunctive relief. See *SKF USA*, 28 CIT at 176, 316 F. Supp. 2d at 1329 (“As for the public interest, there can be no doubt that it is best served by ensuring that [Commerce] complies with the law, and interprets and applies our international trade statutes uniformly and fairly.”) (citation omitted).

CONCLUSION AND ORDER

Accordingly, upon consideration of Plaintiff-Intervenors’ partial consent motion for a preliminary injunction, and Defendant’s opposition thereto, it is hereby

ORDERED that Plaintiff-Intervenors’ partial consent motion for a preliminary injunction is **GRANTED** as to Shandong Jinxiang Zhengyang Import & Export Co., Ltd. and Jining Alpha Food Co., Ltd., and **DENIED** as to Shenzhen Xinboda Industrial Co., Ltd.; it is further

ORDERED that Defendant, United States, together with the delegates, officers, agents, and employees of the International Trade Administration of the U.S. Department of Commerce and U.S. Customs and Border Protection, shall be, and hereby are, **ENJOINED** from making or permitting liquidation of any unliquidated entries of fresh garlic from the People’s Republic of China (Case No. A-570–831), which:

- (1) were the subject of the administrative determination published as *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 21st Antidumping Duty*

“notwithstanding the *second* sentence of this paragraph.” Construing the rule in this way adds further support to the court’s finding that injunctive relief is not limited to entries that are the “subject of the action.”

Administrative Review: 2014–2015, 82 Fed. Reg. 27,230 (June 14, 2017);

(2) were exported to the United States by Shandong Jinxiang Zhengyang Import & Export Co., Ltd., or Jining Alpha Food Co., Ltd.;

(3) were entered or withdrawn from warehouse for consumption between November 1, 2014 – October 31, 2015; and

(4) remain unliquidated as of 5:00 p.m. on the day the Court enters this order on the docket in this case; and it is further

ORDERED that the entries covered by this injunction shall be liquidated in accordance with the final and conclusive court decision in this matter, including all appeals and remand proceedings.

Dated: September 7, 2017

New York, New York

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



Slip Op. 17–123

KENT INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 15–00135

[Defendant's partial motion to dismiss denied.]

Dated: September 8, 2017

Philip Y. Simons and *Jerry P. Wiskin*, Simons & Wiskin, of So. Amboy, NJ for Plaintiff Kent International, Inc.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection of New York, NY.

OPINION AND ORDER

Gordon, Judge:

Before the court is Defendant United States' partial motion to dismiss the second and third causes of action ("Count 2" and "Count 3" respectively) of Plaintiff's complaint pursuant to USCIT Rule

12(b)(6)¹. Defendant seeks to dismiss Plaintiff's Count 2, which alleges the existence of an established and uniform practice under Section 315 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1315(d),² and Count 3, which alleges the existence of a treatment under 19 U.S.C. § 1625(c) and 19 C.F.R. § 177.12(c)(1)(i). *See* Def.'s Partial Mot. to Dismiss. at 1, ECF No. 16 ("Def.'s Mot."); *see also* Compl. ¶¶ 49, 72–74, ECF No. 9. Plaintiff responded and cross-moved to stay consideration of Defendant's motion until the court resolved Plaintiff's first cause of action, a challenge to the classification of the imported merchandise. Pl.'s Cross-Mot. to Stay Def.'s. Partial Mot. to Dismiss & Pl.'s Opp. to Def.'s Partial Mot. to Dismiss at 2, ECF No. 18. The court denied Plaintiff's motion to stay and reserved decision on Defendant's motion to dismiss. *See Kent Int'l Inc. v. United States*, 40 CIT ____, 161 F. Supp. 3d 1340 (2016) ("*Kent I*"). For the reasons set forth below, the court denies Defendant's motion to dismiss Counts 2 and 3 of Plaintiff's complaint.

I. Background

The background of this litigation is summarized briefly below and provided in detail in *Kent I*. Plaintiff imported a product known as WeeRide Kangaroo child bicycle seats that U.S. Customs and Border Protection ("Customs") classified under HTSUS subheading 8714.99.80, dutiable at 10% *ad valorem*. Plaintiff raises three claims in its complaint: (1) that the subject merchandise is properly classifiable under HTSUS subheading 9401.80.40, duty-free;³ (2) that Customs had an established and uniform practice of classifying child bicycle seats under HTSUS subheading 9401.80; and (3) that the imported merchandise is classifiable under HTSUS subheading 9401.80 because Plaintiff is entitled to the same treatment afforded other importers of child bicycle seats pursuant to 19 C.F.R. § 177.12. Compl.

II. Standard of Review

In deciding a USCIT Rule 12(b)(6) 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

¹ The court renumbered a motion to dismiss for failure to state a claim from USCIT Rule 12(b)(5) to 12(b)(6) in 2015 to bring the USCIT Rules into alignment with the Federal Rules of Civil Procedure.

² Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19, U.S. Code, 2012 edition.

³ If Plaintiff prevails on Count 1, its classification claim, the court may not have to reach either Count 2, the established and uniform practice claim, or Count 3, the treatment claim.

the plaintiff's favor. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993).

A plaintiff's factual allegations must be “enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim of relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

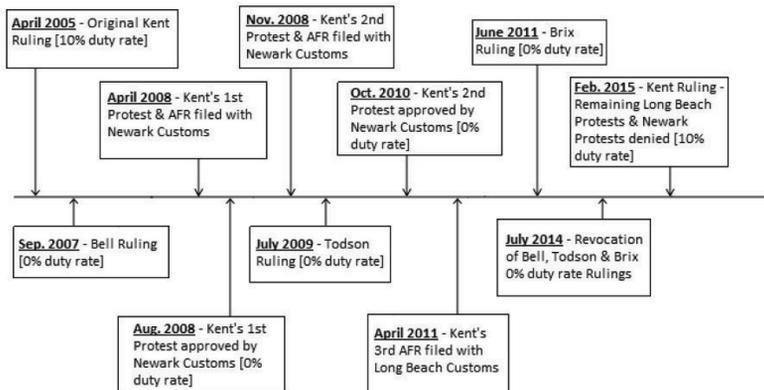
Plaintiff alleges that, in 2005, Customs, through its New York Office (“New York Customs”), issued a ruling letter NY L86862 (“2005 Ruling”) classifying Plaintiff's imported child bicycle seats under HTSUS heading 8417, dutiable at 10 % *ad valorem*. Compl. ¶ 21. Plaintiff further alleges that between 2007 and 2011 New York Customs issued other ruling letters to Bell Sports (“Bell Ruling”) (2007), Todson Inc. (“Todson Ruling”) (2009), and Brix Child Safety Inc. (“Brix Ruling”) (2011) (collectively, “Child Bicycle Seat Rulings”), classifying similar imported child bicycle seats under HTSUS heading 9401, duty free. Compl. ¶¶ 22, 29, 35. According to Plaintiff, from Fall 2007 through September 2014, various importers made numerous entries of child bicycle seats, with “some of these entries . . . [occurring] at ports other than those utilized by plaintiff,” and that Customs liquidated all of those entries under HTSUS subheading 9401.80, duty free. *Id.* ¶¶ 39–41, 46.

Plaintiff claims it made a series of entries of the subject merchandise at the Port of Newark (“Newark Customs”) that Newark Customs classified under HTSUS subheading 8417.99.00, which, in turn, Kent protested relying on the Bell and Todson Rulings. *Id.* ¶¶ 23–27, 31–32, 58–63. In conjunction with its protests, Kent also filed two Applications for Further Review (“AFRs”), seeking review by Customs Headquarters (“Headquarters”) of its claim for duty free classification. *Id.* ¶¶ 24–26. Newark Customs approved Kent's first set of protests, but did not refer the first AFR to Headquarters because it failed to meet the applicable criteria for an AFR. *Id.* ¶¶ 25, 59. Kent further claims that, after approving Plaintiff's first set of protests, Newark Customs agreed to send Kent's second set of protests to Headquarters for review in light of the Bell Ruling. *Id.* ¶¶ 27–28, 30. Kent further alleges that Newark Customs subsequently advised Plaintiff that its second AFR was sent to Headquarters. *Id.* ¶¶ 28, 30, 66. Kent also claims that Newark Customs approved Plaintiff's sec-

ond set of protests, *id.* ¶ 31, but that Headquarters did not act on the second AFR in light of the approval of the protests by Newark Customs, *id.* ¶ 68.

Additionally, Plaintiff alleges that it made entries at the Port of Long Beach (“Long Beach Customs”), seeking duty free classification for its subject merchandise. Long Beach Customs denied Kent’s claimed classification, which was protested in early 2011 (“Long Beach protests”). *Id.* ¶¶ 33–34, 69. In conjunction with its protests, Kent maintains that it filed a third AFR in April 2011, followed by supplemental submissions in 2014, seeking Headquarters’ consideration of its duty free claim for the subject merchandise. *Id.* Plaintiff claims that, in the course of considering the Long Beach protests, Headquarters, in September 2011, advised Plaintiff that the Child Bicycle Seat Rulings were “not correctly decided” and would be revoked in late 2011. *Id.* ¶ 37. However, revocation did not occur for almost three years until July 2014, when notification of the revocation was published. *Id.* ¶ 38 (citing 48 *Cust. B. & Dec.* 29 (July 23, 2014) (“Revocation Ruling”). Thereafter, in February 2015, Customs denied Plaintiff’s Long Beach protests and issued HQ Ruling H170637 (“2015 Ruling”), confirming the 2005 Ruling that Kent’s child bicycle seats are classifiable under HTSUS 8417.99.00, dutiable at 10% *ad valorem*. *Id.* ¶ 69.

For ease of reference, set forth below is a timeline of the key rulings and actions taken by Customs in this action:



A. Count 2 - Established and Uniform Practice

In Count 2, Plaintiff claims that Customs had “an established and uniform practice of classifying [child] bicycle seats under HTSUS

subheading 9401.80.” *Id.* § 49. Under 19 U.S.C. § 1315(d), Customs cannot increase duties when an established and uniform practice (“EUP”) exists either when there is (1) a declared EUP or (2) a “de facto” EUP. A declared EUP exists by virtue of a formal administrative declaration. *Weslo, Inc. v. United States*, 29 CIT 52, 56, 358 F. Supp. 2d 1306, 1310 (2005). Absent that formal declaration, the court may find the existence of a “de facto” EUP when an importer can demonstrate that Customs made actual uniform liquidations over time. *Id.* (citing *Heraeus-Amersil, Inc. v. United States*, 8 CIT 329, 333, 600 F. Supp. 221, 225 (1984)). Plaintiff does not allege the existence of a formal declared EUP, but rather the existence of a “de facto” EUP. To meet the plausibility standard, Plaintiff must allege facts of an established and uniform classification that would cause an importer, “in the absence of notice that a change in classification will occur,” to reasonably expect adherence to that classification. *Heraeus-Amersil, Inc. v. United States*, 9 CIT 412, 416, 617 F. Supp. 89, 93 (1985), *aff’d*, 795 F.2d 1575 (Fed. Cir. 1986). Factors that suggest the existence of a “de facto” EUP include: (1) a high number of entries resulting in the alleged uniform classifications, (2) a high number of ports at which the merchandise was entered, (3) an extended period of time over which the alleged uniform classifications took place, and (4) a lack of uncertainty regarding the classification over time. *Id.*, 9 CIT at 415–16, 617 F. Supp. at 93.

Turning to these four factors, Kent alleges that Customs classified numerous entries of child bicycle seats, duty free, under HTSUS subheading 9401.80 for multiple importers at multiple ports, other than the ports utilized by the Plaintiff. Compl. ¶¶ 39–41, 46. Plaintiff further alleges that over a seven year period—between 2007 and 2014—Customs classified child bicycle seats for Bell, Todson, and Brix under HTSUS heading 9401, duty free. *Id.* ¶¶ 22, 29, 35, 47. Kent also claims that, despite the 2005 Ruling, Customs granted Kent’s protests for duty free classification for the Newark entries of its imported merchandise, but failed to grant Kent the same classification for its Long Beach entries. *Id.* ¶¶ 48, 58, 60, 69. It is true that Plaintiff has not alleged a specific number of entries and has not identified a specific number of ports, other than Newark and Long Beach. Nevertheless, the court can reasonably infer from these allegations that there were more than a small number of entries of child bicycle seats imported by Kent and others at more than two ports over a more than just a few years. As to the final factor, it appears that Plaintiff has alleged the existence of a series of rulings and actions by Customs on protests that reflect uncertainty as to the correct classification of imported child bicycle seats.

Therefore, Plaintiff's allegations set forth in Count 2 contain sufficient factual matter, taken as true, of the plausibility of a claim for an established and uniform practice. Whether Plaintiff can prove the existence of the EUP is a different matter.

B. Count 3 - Treatment

In Count 3, Plaintiff claims that Customs established a "treatment" with regard to imports by Bell, Todson, and Brix, liquidating their entries duty-free under HTSUS subheading 9401.80. Plaintiff further alleges that because of that "treatment" Customs should have liquidated Plaintiff's entries in the exact same manner—duty free. Compl. ¶ 74.

The concept of a "treatment" is found in 19 U.S.C. § 1625(c), which provides, in relevant part:

A proposed interpretive ruling or decision which would—

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625(c)(2).

While the term "treatment" is not defined in § 1625, the implementing regulation provides guidance on what constitutes a "treatment:"

(c) Treatment previously accorded to substantially identical transactions -

(1) General. The issuance of an interpretive ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions must be in accordance with the procedures set forth in paragraph (c)(2) of this section. The following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person:

(i) There must be evidence to establish that:

(A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;

(B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and

(C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues;

(ii) . . .

(iii) . . .

(iv) . . .

19 C.F.R. § 177.12(c)(1) (2014). For Customs to modify a “treatment” previously accorded to substantially identical transactions, it must subject the modifying interpretive ruling or decision to the notice and comment process. *Id.* § 177.12(c)(2).

To ultimately prevail on its claim of a treatment, Kent must establish, at least, the following: (1) that there was a treatment previously accorded by Customs, meaning it must show what specific entries of the subject merchandise were previously classified under the desired tariff provision; (2) that the subject entries are “substantially identical transaction[s]” to the previous treatment; (3) that Customs has made a “proposed interpretive ruling or decision” that would have the effect of modifying the previous treatment with respect to the entries in question; and (4) that the proposed interpretive ruling or decision violated the notice and comment requirements of this statute. *Kahrs Int’l, Inc. v. United States*, 33 CIT 1316, 1354, 645 F. Supp. 2d 1251, 1286 (2009) (quoting 19 U.S.C. § 1625(c)(2)).

Again, in order for Count 3 to survive a motion to dismiss, Plaintiff must make sufficient factual allegations to plausibly establish on its face each element of a claim of treatment. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (“A claim has facial plausibility when the pleaded content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). Accordingly, the court will examine Plaintiff’s allegations in light of each of those elements.

i. The Existence of a Treatment

“[Plaintiff] must demonstrate there was a ‘treatment previously accorded by . . . Customs . . .’ [19 U.S.C.] § 1625(c)(2). That is, it must show what specific entries of [Plaintiff’s] products were previously classified under the desired tariff subheading . . .” *Kahrs Int’l*, 33 CIT at 1354, 645 F. Supp. 2d at 1286. Therefore, to survive Defendant’s motion to dismiss, the court must find that Plaintiff has pled sufficient facts to plausibly claim that the duty-free rate accorded to other child bicycle seats resulted from an actual determination by Customs, and that this determination was consistently applied on a national basis over a two-year period immediately preceding the claim of treatment. 19 C.F.R. § 177.12(c)(1)(i).

Plaintiff alleges that Customs liquidated the entries of three other importers of substantially identical child bicycle seats at a duty-free rate for years, between September 21, 2007 and September 22, 2014. Compl. ¶¶ 52–57. The alleged treatment ended on September 22, 2014, the effective date of Customs’ Revocation Ruling. Plaintiff alleges that Bell, Todson, and Brix made entries “at ports other than those utilized by Plaintiff.” *Id.* ¶¶ 39–41. Plaintiff also alleges that, while it was “required to enter its child bicycle seats under HTSUS subheading 8714.99.00, because it had to follow . . . [the 2005 Ruling],” it successfully protested those decisions with Newark Customs. *Id.* ¶¶ 53, 58, 60.

Therefore, although the factual allegations in Count 3 are not perfectly clear, it appears that Plaintiff is claiming that Customs accorded duty-free treatment to children’s bicycle seats between September 21, 2007 (at the latest), and September 22, 2014, as evidenced by the Child Bicycle Seat Rulings and subsequent liquidation of duty free entries for Plaintiff by Newark Customs, and for Bell, Todson, and Brix at other ports. It also appears that Plaintiff’s requested relief is the duty-free reliquidation for its entries from (at the latest) September 21, 2007 through September 22, 2014 by Long Beach Customs.

Defendant does not dispute that the Child Bicycle Seat Rulings constituted actual determinations by Customs. Rather, Defendant argues that “Kent simply cannot produce [sufficient] evidence” to prove that Customs made an actual determination and consistently applied that determination on a national basis over the two-year period immediately preceding the claim of treatment. Def.’s Mot. at 9. Defendant’s argument is premature. Kent, as the non-moving party in a motion to dismiss, does not have to produce any evidence. Factual allegations that state a claim that is facially plausible are sufficient. Here, Plaintiff has pled that multiple entries (those of the three other

companies plus Plaintiff's Newark entries) were liquidated duty-free, at a number of ports, for a number of years, and that a fifth set (Plaintiff's Long Beach entries) was not accorded the same treatment.

Defendant argues that "a prior interpretive ruling cannot constitute a treatment." *Id.* at 10. This misses the mark because Plaintiff's claim is about the treatment that was afforded to other importers after the 2005 Ruling. Likewise, Defendant's argument that the 2005 Ruling was "affirmed" in 2015, *id.*, is unavailing because Plaintiff's claim is that duty-free treatment of children's bicycle seats came into being on or before September 21, 2007 and ended on September 22, 2014. Notwithstanding either the 2005 or the 2015 Ruling, Plaintiff has pled sufficient facts to have the opportunity to prove that a treatment existed for some period of time within that 10-year period.

ii. Substantially Identical Transactions

For the second element, "Plaintiff must prove that the subject entries . . . are substantially identical transaction[s] to the previous treatment." *Kahrs Int'l*, 33 CIT at 1354, 645 F. Supp. 2d at 1286 (citation omitted). Plaintiff details the exact nature of the child bicycle seats it imports, and alleges that its "child bicycle seats are substantially identical in all material aspects to those imported by Bell Sports, Todson Inc., and Brix Child Safety Inc.," the importers who received the treatment Plaintiff now claims. Compl. ¶ 57. Defendant does not contest this. Therefore, Plaintiff has pled sufficient facts to plausibly raise a claim of substantial similarity.

iii. Modification of Treatment

Regarding the third element, "Plaintiff must prove that Customs has made a proposed interpretive ruling or decision that would have the effect of modifying the previous treatment with respect to the entries in question." *Kahrs Int'l*, 33 CIT at 1354, 645 F. Supp. 2d at 1286 (citation omitted). Plaintiff alleges that "[f]rom September 21, 2007 to September 22, 2014, Plaintiff was not given the same treatment as other importers of child bicycle seats." Compl. ¶ 52. Again, Defendant does not contest this allegation. Accordingly, Plaintiff's complaint contains sufficient allegations to plausibly raise the claim that its entries were not accorded the benefit of that treatment.

iv. Violation of Notice and Comment Requirements

As to the fourth element, "Plaintiff must demonstrate that the proposed interpretive ruling or decision violated the notice and comment requirements of this statute." *Kahrs Int'l*, 33 CIT at 1354, 645 F. Supp. 2d at 1286 (citation omitted). The notice and comment requirement is triggered whenever Customs issues "interpretive rul-

ings, ruling letters, internal advice memoranda, protest review decisions, or decisions that are the functional equivalent of interpretive rulings or decisions.” *Id.*, 33 CIT at 1353, 645 F. Supp. 2d at 1285. Neither party specifically addresses this element in their memoranda on the motion to dismiss. And although Plaintiff’s complaint is not a paragon of clarity, Count 3 contains sufficient factual allegations to permit the court to infer that Plaintiff’s Long Beach entries, which occurred during the existence of the alleged treatment, were treated differently, without the benefit of the notice and comment process as required by 19 C.F.R. § 177.12(c)(2). *See* Compl. ¶¶ 72–74.

Taking Plaintiff’s claims as true and drawing all reasonable inferences in Plaintiff’s favor, the court concludes that Plaintiff’s complaint contains sufficient factual allegations to entitle it to proceed to the court’s consideration of the merits of Count 3. It remains to be seen whether Plaintiff can prove the existence of a treatment under 19 U.S.C § 1625(c).

Accordingly, it is hereby

ORDERED that Defendant’s motion to dismiss Counts 2 and 3 of Plaintiff’s complaint is denied; it is further

ORDERED that Defendant shall file its answer to Plaintiff’s complaint on or before November 7, 2017; and it is further

ORDERED that the parties shall file a proposed scheduling order for the taking of discovery and the disposition of this action on the merits on or before November 21, 2017.

Dated: September 8, 2017

New York, New York

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

Slip Op. 17–124

XYZ CORPORATION, Plaintiff, v. UNITED STATES and U.S. CUSTOMS & BORDER PROTECTION, Defendants, and DURACELL U.S. OPERATIONS, INC., Defendant-Intervenor.

Before: Jennifer Choe-Groves, Judge
Court No. 17–00125

[Plaintiff may not proceed anonymously in this action under the pseudonym “XYZ Corporation”]

Dated: September 12, 2017

John M. Peterson, Russell A. Semmel, and Richard F. O’Neill, Neville Peterson LLP, of New York, N.Y., for Plaintiff XYZ Corporation.

Alexander J. Vanderweide, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for Defendants the United

States and U.S. Customs and Border Protection. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, New York, N.Y.

Frances P. Hadfield, Crowell & Moring LLP, of New York, N.Y., and *Robert N. Phillips* and *John Patrick Donohue*, Reed Smith LLP, of San Francisco, CA and Philadelphia, PA, for Defendant-Intervenor Duracell U.S. Operations, Inc.

MEMORANDUM AND ORDER

Choe-Groves, Judge:

XYZ Corporation (“Plaintiff”) is a company engaged in the business of importing and distributing bulk-packaged gray market batteries bearing the “DURACELL” mark, a United States trademark currently owned by Duracell U.S. Operations, Inc. (“Duracell”). Plaintiff commenced this action to obtain judicial review of the decision made by U.S. Customs and Border Protection to grant Duracell’s application for Lever-Rule protection, thereby restricting imports of certain gray market batteries bearing its trademark. *See* Amended Compl. ¶ 1; *see also* U.S. Customs and Border Protection Grant of “Lever-Rule” Protection, 51 Cust. Bull. & Dec. No. 12 (Mar. 22, 2017). Before the court is the issue of whether Plaintiff may designate its identity as confidential information in all filings with the court and instead use the pseudonym “XYZ Corporation.” For the reasons explained below, the court concludes that Plaintiff may not continue to proceed in this action under a pseudonym.

BACKGROUND

Plaintiff commenced this action against the United States and U.S. Customs and Border Protection (collectively, “Government”) on May 19, 2017 with the filing of a summons and complaint. *See* Summons, May 19, 2017, ECF No. 1; Compl., May 19, 2017, ECF No. 2. The summons and complaint both named “XYZ Corporation” as the plaintiff. *See* Summons; Compl. Plaintiff noted in its complaint that “XYZ Corporation is an assumed name of Plaintiff, which fears commercial retaliation if its name is revealed. Contemporaneous with the filing of this action, Plaintiff submitted an application for a judicial protective order, which would make the name known to counsel for parties in this action, subject to certain specified limitations on dissemination.” Compl. n.1.

After obtaining the Government’s consent, Plaintiff moved the court to enter a judicial protective order. *See* Consent Mot. Judicial Protective Order, May 19, 2017, ECF No. 10. The court entered the requested protective order on May 26, 2017, restricting the disclosure of confidential information produced in this action according to the

terms of the protective order. *See* Judicial Protective Order, May 26, 2017, ECF No. 21. Plaintiff filed a summons and complaint under seal revealing Plaintiff's true identity. *See* Confidential Summons, June 1, 2017, ECF No. 26; Confidential Compl., June 1, 2017, ECF No. 27; *see also* USCIT Rule 81(h)(1) (requiring a party to file a confidential and public pleading if confidential or privileged information is referenced).

Duracell moved to intervene in this action on July 11, 2017. *See* Ex Parte Appl. Leave Intervene, July 11, 2017, ECF No. 61. The court granted Duracell permissive intervention and Duracell was entered as a defendant-intervenor in this action.¹ *See* Order, July 13, 2017, ECF No. 63. The Parties then filed a joint motion to amend the judicial protective order to enable Duracell's counsel to have access to confidential information in this action. *See* Joint Mot. Amend Judicial Protective Order, July 19, 2017, ECF No. 74. The motion was expressly "made without prejudice to Duracell's right to challenge the designation of any information as Confidential" pursuant to the terms of the protective order. *See id.* The court granted the motion and issued the amended judicial protective order on July 19, 2017.

The amended judicial protective order provides for the following procedure in the event there is disagreement regarding what information may be designated as confidential:

In the event the receiving party disagrees with the producing party's designation of confidentiality, whether as to particular information or document, the receiving party shall so advise the producing party in writing, and the producing party shall thereupon have twenty (20) days in which to withdraw the claim to confidentiality or otherwise resolve the disagreement, or move the Court to resolve the disagreement. During the pendency of any such motion the receiving party will not disclose the information or documentation that is the subject of said motion.

Amended Protective Order ¶ 9, July 19, 2017, ECF No. 75. On July 28, 2017, Duracell advised Plaintiff by e-mail that it objected to Plaintiff's assumption of a fictitious name and challenged Plaintiff's designation of its identity as confidential information under the amended judicial protective order. *See* Pl.'s Mot. Order Directing Def.-Intervenor to Show Cause Why Confidential Information Should

¹ The Rules of the Court provide that a party may intervene as of right or with permission from the court. *See* USCIT Rule 24(a)–(b). The court granted Duracell permissive intervention because Duracell, as the applicant for the Lever-Rule grant that is the subject of this action, "has a claim or defense that shares with the main action a common question of law or fact." USCIT Rule 24(b). Duracell did not claim in its motion that it had any right to intervene in this action.

Not Be Redacted, or to Redact Confidential Information Ex. A, Aug. 17, 2017, ECF No. 103. Duracell stated that there was no justification to treat Plaintiff's identity as confidential information and informed Plaintiff that, according to the terms of the protective order, Plaintiff had until August 17, 2017 either to withdraw the claim of confidentiality to its identity or move the court to resolve the disagreement. *See id.* Plaintiff refused to withdraw the designation of its identity as confidential information.

On August 17, 2017, Plaintiff filed a motion for an order directing Duracell to show cause why Plaintiff's identity should not be redacted as confidential information under the amended judicial protective order. *See* Pl.'s Mot. Order Directing Def.-Intervenor to Show Cause Why Confidential Information Should Not Be Redacted, or to Redact Confidential Information, Aug. 17, 2017, ECF No. 103. Plaintiff argued that it should be able to proceed in this action under a pseudonym because Plaintiff's need for anonymity due to fear of commercial and legal retaliation from Duracell outweighs countervailing interests in full disclosure. *See id.* at 4–14. By letter dated August 21, 2017, the court invited the Government and Duracell to submit written comments addressing whether Plaintiff's identity should be treated as confidential under the judicial protective order in this case. *See* Letter filed by the Honorable Jennifer Choe-Groves, Aug. 21, 2017, ECF No. 109. Duracell filed comments on August 23, 2017, explaining that there is no factual or legal basis to justify allowing Plaintiff to conceal its identity. *See* Def.-Intervenor's Resp. Pl.'s Mot. Order Directing Def.-Intervenor to Show Cause Why Confidential Information Should Not Be Redacted, or to Redact Confidential Information, Aug. 23, 2017, ECF No. 111. The Government filed comments on the same date, "defer[ring] to the Court's discretion to determine whether the plaintiff has demonstrated, through particularized evidence, that its concern of retaliation outweighs the countervailing interest in open judicial proceedings." Def.'s Resp Court's Order Dated Aug. 21, 2017 3, Aug. 23, 2017, ECF No. 113.

DISCUSSION

Plaintiff wishes to proceed anonymously in this action using the pseudonym "XYZ Corporation." The amended judicial protective order issued on July 19, 2017 affords the Parties limited protections regarding the disclosure of business information produced in this action. Amended Protective Order, July 19, 2017, ECF No. 75. According to the terms of the protective order, the following categories of information may be designated as confidential information and may not be disclosed to the public:

(1) proprietary, business, financial, technical, trade secret, or commercially sensitive information; (2) information that any party is prohibited from releasing publically pursuant to contractual obligations, applicable statutes, applicable regulations, or directives from the Government; (3) private information that is otherwise protected from disclosure under applicable law including, but not limited to, personnel files; and (4) other confidential research, development, or commercial information as set forth in USCIT Rule 26(c)(1)(G).

Amended Protective Order ¶ 2.A, July 19, 2017, ECF No. 75. Plaintiff's identity does not appear to fall within any of these categories, nor has Plaintiff advanced any argument claiming that its identity is confidential information pursuant to the terms of the protective order. Thus, the court concludes that Plaintiff may not designate its identity as confidential information according to the terms of the protective order.

Having concluded that the protective order does not permit designating Plaintiff's identity as confidential, the court determines next whether to exercise its discretion to allow Plaintiff to proceed anonymously in this action. The Rules of the Court provide that a summons and complaint must "name all the parties," USCIT R. 10(a), and that "[e]very action shall be prosecuted in the name of the real party in interest." USCIT R. 17(a). These rules serve to apprise all parties of the identities of their adversaries and to protect the public's interest in knowing all the facts and events surrounding court proceedings. *AD HOC Utils. Grp. v. United States*, 33 CIT 1284, 1291 n.14, 650 F. Supp. 2d 1318, 1326 n.14 (2009) (quoting *Doe v. Rostker*, 89 F.R.D. 158, 160 (N.D. Cal. 1981)); *Guerrilla Girls, Inc. v. Kaz*, 224 F.R.D. 571, 573 (SDNY 2004).² Although Plaintiff's identity is known to the Parties in this action, Plaintiff's identity is unknown to the public because the pseudonym "XYZ Corporation" has been used to reference Plaintiff in the caption, the docket, and all public filings in this action, upon the consent of the original parties to the case. Neither the Rules of the Court nor the Federal Rules of Civil Procedure provides an explicit exception that allows a litigant to proceed anonymously.

There is no precedent from the Court of Appeals for the Federal Circuit addressing this issue, but several other federal courts of appeals have held that, in determining whether a party may use a

² "Since the Rules of the Court of International Trade mirror the Federal Rules of Civil Procedure, it is without question that this court may look to the decisions and commentary on the Federal Rules in the interpretation of its own rules." *Tomoegawa (U.S.A.), Inc. v. United States*, 15 CIT 182, 185–86, 763 F. Supp. 614, 617 (1991) (citing *Zenith Radio Corp. v. United States*, 823 F.2d 518, 521 (Fed. Cir. 1987)).

pseudonym and remain anonymous in an action, “a district court must balance the need for anonymity against the general presumption that parties’ identities are public information and the risk of unfairness to the opposing party.” *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (allowing plaintiffs to litigate under a pseudonym due to threats of physical violence, immediate deportation, and likely arrest); *see also Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir. 2008) (requiring district court to balance plaintiff’s interest in anonymity against the public interest in disclosure and prejudice to defendants before deciding whether to allow a plaintiff to litigate under a pseudonym). The balancing test is a highly fact intensive inquiry and it is within the court’s discretion to determine whether the circumstances warrant “grant[ing] the ‘rare dispensation’ of anonymity against the world.” *United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (quoting *James*, 6 F.3d at 238).

In this case, Plaintiff wishes to proceed anonymously because it fears that revealing its identity would result in commercial and legal retaliation by Duracell. *See* Pl.’s Mot. Order Directing Def.-Intervenor to Show Cause Why Confidential Information Should Not Be Redacted, or to Redact Confidential Information 4–8, Aug. 17, 2017, ECF No. 103. Plaintiff states that during the twenty-seven years it has been importing gray market battery products bearing Duracell’s trademark, neither Duracell nor previous owners of the trademark have taken any action to interrupt Plaintiff’s business. *See id.* at 6. Plaintiff believes that anonymity in this case is justified because revealing its identity would expose Plaintiff to suit in district court for alleged infringement of Duracell’s trademark, which would bankrupt Plaintiff and destroy Plaintiff’s reputation. *See id.* at 8. Plaintiff’s reason for anonymity – to avoid a potential suit in another forum and prevent financial hardship – does not present the type of special circumstance that warrants the use of a pseudonym. “Courts should not permit parties to proceed pseudonymously just to protect the parties’ professional or economic life.” *Guerrilla Girls, Inc.*, 224 F.R.D. at 573. After balancing the interests presented by the Parties in this motion, the court holds that Plaintiff’s interest in anonymity has failed to overcome the public interest in disclosure of the identity of a litigant.

Therefore, it is hereby

ORDERED that the information Plaintiff has designated as confidential to protect the identities of Plaintiff and its corporate officers shall no longer be designated as confidential information in all future filings in this action; it is further

ORDERED that, on or before September 13, 2017, 5:00 p.m. EDT, Plaintiff shall refile its public summons and amended complaint without redactions of Plaintiff's identity and its corporate officers; it is further

ORDERED that the Government and Duracell shall not submit any public filings with the court that reveal the identities of Plaintiff and its corporate officers prior to the refiling of Plaintiff's public summons and amended complaint; and it is further

ORDERED that Plaintiff's Motion for Order Directing Defendant-Intervenor to Show Cause Why Confidential Information Should Not Be Redacted, or to Redact Confidential Information is denied as moot.

Dated: September 12, 2017

New York, New York

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

