July 16, 2020

PUBLIC VERSION

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Re: Enforce and Protect Act (“EAPA”) Case Number 7281; 19 U.S.C. § 1517;
All One God Faith, Inc. dba Dr. Bronner’s Magic Soaps; Ascension Chemicals LLC;
GLōB Energy Corporation; Crude Chem Technology LLC; UMD Solutions LLC.

Dear Mr. Snyder, Ms. Moya, and Mr. Kirby:

This decision is in response to five requests for de novo administrative review of a
determination of evasion dated March 9, 2020, made by the Trade Remedy & Law
Enforcement Directorate (“TRLED”), Office of Trade (“OT”), U.S. Customs and Border
Protection (“CBP”), pursuant to 19 U.S.C. § 1517(c), in Enforce and Protect Act (“EAPA”) Case Number 7281 (hereinafter referred to as the “March 9 Determination”).

We note that this decision contains business confidential information submitted by one of
the parties, as well as confidential information submitted to CBP by another entity. As such,
we are issuing both a business confidential version of this decision, as well as a public
version. The public version is being provided to all parties; the party that submitted the
business confidential information will also receive a business confidential version containing
only that party’s confidential information.

One request for administrative review was submitted to CBP, OT, Regulations and Rulings
(“RR”) by the Law Offices of Robert W. Snyder as counsel on behalf of his client, All One
God Faith, Inc. dba Dr. Bronner’s Magic Soaps ("Dr. Bronner’s" or "DBMS"), on April 20,
2020, pursuant to 19 U.S.C. § 1517(f) and 19 C.F.R. § 165.41(a). The four other requests for
administrative review were submitted to RR on April 20, 2020, by Kyl J. Kirby Attorney and

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1 Letter from Brian M. Hoxie, Director, Enforcement Operations Division, Trade Remedy & Law Enforcement Directorate, Office of Trade, U.S. Customs & Border Protection re: Notice of Final Determination as to Evasion in EAPA Case Number 7281 (dated March 9, 2020).
Counselor at Law, PC as counsel on behalf of his four clients: (1) Ascension Chemicals LLC (“Ascension”), (2) Crude Chem Technology LLC (“Crude Chem”), (3) GLōB Energy Corporation (“GLōB Energy”), and (4) UMD Solutions LLC (“UMD”). All five requests for administrative review were submitted to RR within 30 business days after the issuance of the initial determination of evasion, consistent with 19 C.F.R. § 165.41(d).

On May 6, 2020, CP Kelco U.S., Inc., the domestic producer of xanthan gum that filed the initial allegations of evasion against the importers, submitted a timely response to the five requests for administrative review, pursuant to 19 C.F.R. § 165.42.

For the reasons set forth below, there is substantial record evidence that DBMS, Ascension, Crude Chem, GLōB Energy, and UMD, entered “covered merchandise,” as that term is defined in 19 U.S.C. § 1517(a)(3), into the commerce of the United States, on entries of xanthan gum from the People’s Republic of China (“China” or “the PRC”), by means of evasion, as defined in 19 U.S.C. § 1517(a)(5)(A). Therefore, the March 9 Determination is affirmed.

I. BACKGROUND

A. FACTS

Inasmuch as the facts in this case were fully set forth in the March 9 Determination, we will not repeat the entire factual history in this decision.

In brief, on April 16, 2019, TRLED acknowledged receipt of properly filed allegations of evasion submitted by CP Kelco U.S., Inc. (“CP Kelco” or “the Alleger”) against seven importers. The seven importers were (1) DBMS, (2) Ascension, (3) Crude Chem, (4) GLōB Energy, (5) UMD, (6) Tdale Manufacturing & Distributing, Inc. (“Tdale”), and (7) Western Energy & Technologies LLC (“Western Energy”). CP Kelco alleged that the seven importers evaded the payment of cash deposits required by antidumping duty order A-570-985, by importing xanthan gum manufactured in China, and transshipped through India, into the United States.

As a result, on May 7, 2019, TRLED initiated EAPA investigations against the seven named importers in the allegations submitted by CP Kelco. These allegations reasonably suggested that xanthan gum was not produced in India and was being transshipped through India and imported into the United States to evade antidumping duties on Chinese-origin xanthan gum. CBP reviewed responses submitted by each of the seven importers in response to CBP Form (“CF”) 28 Requests for Information (“RFIs”) for the entries which were subject to the EAPA investigation. Additionally, CBP requested sales, production, and factory documentation from each of the seven importers.

After evaluating the CF28 responses, TRLED concluded there was reasonable suspicion to believe that the seven importers were evading the Antidumping Duty (“AD”) order by importing xanthan gum manufactured in the PRC and falsely marking the xanthan gum with
country of origin India. As a result, on August 12, 2019, CBP imposed interim measures against all seven importers and consolidated the individual investigations into consolidated case number 7281.

Subsequently, on August 19, 2019, CBP sent RFIs to each of the seven importers. Between September 10 and September 13, 2019, six of the seven importers submitted responses to the RFIs (Tdale did not submit a response).

On March 9, 2020, TRLED issued its final determination of evasion in consolidated case number 7281. The March 9 Determination stated that there is substantial evidence that each of the seven importers engaged in evasion as defined by the EAPA because each importer entered covered merchandise subject to AD order A-570-985 into the United States by transshipping Chinese-origin xanthan gum through India. As a result, no cash deposits were applied to the merchandise at the time of entry.

On April 20, 2020, five of the seven importers submitted timely and properly filed requests for administrative review to RR. The five importers are (1) DBMS, (2) Ascension, (3) Crude Chem, (4) GLōB Energy, and (5) UMD. Tdale and Western Energy did not submit requests for administrative review to RR.

On April 22, 2020, RR sent an email to the parties notifying them of the assignment of RR case number H310484 to the five requests for administrative review, which constituted notice to all parties of the commencement of the administrative review process pursuant to 19 C.F.R. 165.41.

On May 6, 2020, CP Kelco submitted a response to the five requests for administrative review presenting its counterarguments.

B. THE ORDER AND THE SCOPE

The U.S. Department of Commerce ("Commerce") has issued an antidumping duty order on imports of xanthan gum from the People's Republic of China (the "Order").

Commerce defined the scope of the Order as follows:

The scope of this order covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in this order regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

Xanthan gum that has been blended with other product(s) is included in this scope when the resulting mix contains 15 percent or more of xanthan gum by dry weight. Other products with which xanthan gum may be blended include, but are not limited to, sugars, minerals, and salts.

Xanthan gum is a polysaccharide produced by aerobic fermentation of Xanthomonas campestris. The chemical structure of the repeating pentasaccharide monomer unit consists of a backbone of two P-1, 4-D-Glucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)-P-D-Glucuronic acid-(1,2)-a-D-Mannose monosaccharide units. The terminal mannose may be pyruvylated and the internal mannose unit may be acetylated.

Merchandise covered by the scope of this order is classified in the Harmonized Tariff Schedule (“HTS”) of the United States at subheading 3913.90.20. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.

Weighted-average dumping margins were assigned as follows:

<table>
<thead>
<tr>
<th>Exporters</th>
<th>Weighted-average dumping margins (percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deosen Biochemical Ltd./Deosen Biochemical (Ordos) Ltd.</td>
<td>9.30</td>
</tr>
<tr>
<td>Neimenggu Fufeng Biotechnologies Co., Ltd (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.)/Shandong Fufeng Fermentation Co., Ltd./Xinjiang Fufeng Biotechnologies Co., Ltd.</td>
<td>0.006</td>
</tr>
<tr>
<td>CP Kelco (Shandong) Biological Company Limited</td>
<td>9.30</td>
</tr>
<tr>
<td>Jianlong Biotechnology Co., Ltd. (aka Inner Mongolia Jianlon Biochemical Co., Ltd.)</td>
<td>9.30</td>
</tr>
<tr>
<td>Meihua Group International Trading (Hong Kong) Limited/Langfang Meihua Bio-Technology Co., Ltd./Xianjiang Meihua Amino Acid Co., Ltd.</td>
<td>9.30</td>
</tr>
<tr>
<td>Shanghai Smart Chemicals Co., Ltd.</td>
<td>9.30</td>
</tr>
<tr>
<td>PRC-Wide Entity</td>
<td>154.07</td>
</tr>
</tbody>
</table>

II. DISCUSSION

A. LAW

Title 19 U.S.C. § 1517(c)(1) provides, in relevant part, as follows:

(1) Determination of Evasion.

(A) In general.
   Except as provided in subparagraph (B), not later than 300 calendar days after the date on which the Commissioner [of CBP] initiates an investigation under subsection (b) with respect to covered merchandise, the Commissioner

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shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.

The term “evasion” is defined in 19 U.S.C. § 1517(a)(5), as follows:

(5) Evasion.

(A) In general. Except as provided in subparagraph (B), the term “evasion” refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.

See also 19 C.F.R. § 165.1.

Examples of evasion could include, but are not limited to, the misrepresentation of the merchandise’s true country of origin (e.g., through false country of origin markings on the product itself or false sales), false or incorrect shipping and entry documentation, or misreporting of the merchandise’s physical characteristics. See Investigation of Claims of Evasion of Antidumping and Countervailing Duties, Interim Regulations, 81 Fed. Reg. 56477, 56478 (August 22, 2016).

Additionally, the term “covered merchandise” is defined as “merchandise that is subject to a countervailing duty order (“CVD”) issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. § 1671e), and/or an antidumping order (“AD”) issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. § 1673e).” 19 C.F.R. § 165.1.

Therefore, CBP must determine whether a party has entered merchandise that is subject to an AD or CVD order into the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, that resulted in the reduction or avoidance of applicable AD or CVD cash deposits or duties being collected on such merchandise.

B. ARGUMENTS MADE BY DBMS IN ITS REQUEST FOR ADMINISTRATIVE REVIEW

DBMS requests that CBP reverse the March 9 Determination with regard to the three DBMS entries subject to the EAPA 7281 investigation.

First, DBMS asserts that it demonstrated in its January 6, 2020 and January 24, 2020 submissions that no evasion could be found with respect to the three subject entries because two out of the three prongs were not met to support an affirmative finding of evasion. Specifically, DBMS argues that at the time the subject entries were made, a single Chinese
entity was likely both the manufacturer and exporter of the subject merchandise and that this Chinese entity was excluded from the Order. Therefore, DBMS argues the subject merchandise would not be considered “covered merchandise.” Moreover, as a result of the Chinese entity being excluded from the Order, DBMS asserts the AD duty cash deposit applicable to the subject entries was zero percent (0.00%), which negates the third prong required for a finding of evasion since there was no loss of duty to the United States. Specifically, DBMS argues that the manufacturer and exporter of the subject entries was a single Chinese entity, which has been assigned a zero percent separate rate in Commerce’s administrative reviews of the Order for the following periods of review: (1) July 19, 2013 through June 30, 2014,8 (2) July 1, 2014 through June 30, 2015,9 and (3) July 1, 2015 through June 30, 2016.10 Therefore, DBMS argues that the cash deposit instructions which controlled its subject entries stated that, “for all non-Chinese exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the Chinese exporter(s) that supplied that non-Chinese exporter.”11

Second, DBMS argues that CBP erred in finding that, the evidence presented by DBMS showing that a particular company manufactured and likely exported the subject merchandise, was not credible, without attempting to verify the accuracy of the evidence as specifically permitted under 19 C.F.R. § 165.25(a).

Finally, DBMS asserts that CBP incorrectly applied adverse inferences against DBMS in two instances, at a minimum. For one, DBMS maintains CBP disregarded DBMS’s efforts to comply to the best of its ability. Additionally, DBMS asserts that CBP is “punishing” DBMS for the lack of cooperation from DBMS’s Indian supplier, who purportedly misled DBMS and with whom DBMS claims it ended its business relationship once it discovered that the Indian supplier had been dishonest regarding the origin of the subject merchandise.

C. ARGUMENTS MADE BY ASCENSION, CRUDE CHEM, GLÔB ENERGY, AND UMD IN THEIR REQUESTS FOR ADMINISTRATIVE REVIEW

Ascension, Crude Chem, GLÔB Energy, and UMD (referred to collectively as “the Four Importers”) submitted four separate requests for administrative review. The Four Importers used the same supplier based in India, namely Chem Fert Chemicals (“Chem Fert”), as the source of the xanthan gum imported into the United States for the entries subject to the EAPA investigation.12 The Four Importers are represented by the same counsel, Kyle J.

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11 Id.
12 We note that Crude Chem used a different Indian supplier for one of the two subject entries. However, this supplier did not respond to the RFI, despite TRLED’s extending the RFI due date. We further note that Crude Chem made no reference to this supplier in its request for administrative review.
Kirby, and the arguments presented in all four requests for administrative review are substantially similar, if not identical, and are summarized below.

The Four Importers assert that no substantial evidence exists to support a finding of evasion for four reasons. First, the Four Importers disagree with CBP’s primary conclusion of evasion stating that the Four Importers had “been participating in the transshipment of Chinese-origin xanthan gum through India.”13 The Four Importers argue that they could not have entered xanthan gum for consumption through evasion because “participating” is not an element of evasion. The Four Importers argue that they exercised reasonable care when they relied on Chem Fert’s representations, and therefore, the Four Importers did not intentionally or negligently misstate the country of origin at the time of entry. Furthermore, the Four Importers state that when they became aware that Chem Fert’s certificates of origin were potentially incorrect, the Four Importers sought a legal investigation and complaint with the Indian Chamber of Commerce and the local police department in India, which has since been converted into a civil action.

Second, the Four Importers claim that they acted to the best of their ability to provide the production data and further claim that CBP erred when it issued its final determination too quickly. The Four Importers assert that, while there is no case law currently addressing the EAPA statute and regulations, courts have been addressing the best of ability element for antidumping statutes and regulations administered by the U.S. Department of Commerce. The Four Importers claim they took reasonable steps to keep and maintain complete records, and they had no way of knowing that Chem Fert produced false records. The Four Importers argue that they acted to the best of their ability and therefore, CBP should not apply adverse inferences against them. The Four Importers assert CBP was well aware of the litigation in India. As such, the Four Importers maintain that CBP should have issued a notice of extension of time under 19 C.F.R. § 165.22(c) and investigated the matter further pursuant to 19 C.F.R. § 165.25 in lieu of ignoring their attempts to obtain data and documentation. The Four Importers argue that since CBP is administering antidumping laws, CBP should be following the lead of Commerce with “an overriding purpose… to calculate dumping margins as accurately as possible.”14

Third, the Four Importers assert that the legal complaint in India and allegations that CP Kelco is not producing oilfield grade xanthan gum in the United States detract from the weight of the evidence. The Four Importers cite to case law concerning the substantial evidence standard and assert, “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight”15 including “contradictory evidence or evidence from which conflicting inferences could be drawn.”16 The Four Importers argue that launching a legal investigation and complaint concerning the false certificates of origin with the Indian Chamber of Commerce fairly detracts from the record that the Four Importers should be subject to a country-wide rate. Further, CBP failed to wait for the Four

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13 March 9 Determination at 19.
14 Parkdale Intern v. United States, 475 F.3d 1375, 1390 (Fed. Cir. 2007) (citing Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990)) (emphasis added).
15 CS Wind Vietnam Co. v. United States, 832 F.3d 1367, 1373 (Fed. Cir. 2016).
Importers to obtain production data and documentation. Additionally, as pointed out by the Four Importers, CP Kelco stated on several occasions that it is not producing oilfield grade xanthan gum in the United States. Thus, the Four Importers argue that this information detracts from the record because of the possibility of changed circumstances that could remove oilfield grade xanthan gum as covered merchandise from the antidumping order. The Four Importers further assert that CBP failed to refer the matter to the U.S. Department of Commerce for a determination, as requested by several parties.

Finally, the Four Importers argue that CBP erred when it found that no clerical error caused the misstatements at the time of entry. The Four Importers note that there is an exception for clerical errors pursuant to 19 U.S.C. § 1517(a)(5)(B). However, the term “clerical error” has yet to be defined. The Four Importers argue that they did not intend to state a false country of origin at the time of entry and they exercised reasonable care as part of the entry process. The Four Importers assert that no court has addressed a matter where an importer, as part of reasonable care, innocently relies on the exporter’s country of origin misstatements causing possible clerical errors, and therefore, a legal question remains open.

**D. CP KELCO’S RESPONSE TO THE FIVE REQUESTS FOR ADMINISTRATIVE REVIEW**

CP Kelco agrees with TRLED’s findings in its March 9 Determination, including that it was supported by substantial evidence in the record. CP Kelco further argues that nothing in the five submitted requests for administrative review undermines TRLED’s final determination or detracts from the substantial record evidence on which TRLED based its findings. In its response, CP Kelco limits its rebuttal to two narrow legal issues.

First, CP Kelco asserts that contrary to the arguments made by Ascension, Crude Chem, GLoB Energy, and UMD Solutions, CBP is not “administering antidumping laws” when conducting investigations under the EAPA. CP Kelco points out that CBP is not the administering authority of the U.S. antidumping law—under the statute, the administering authority is the Secretary of the U.S. Department of Commerce.17 Rather, CP Kelco asserts that, when an antidumping order is in place, CBP receives instructions from Commerce, which CBP then applies to entries of merchandise subject to that order when the merchandise enters U.S. customs territory.18 CP Kelco further points out that the standard of review that must be applied in this administrative review is “substantial evidence”19 of evasion, and not the calculation of antidumping margins “as accurately as possible” because CBP does not calculate antidumping margins. CP Kelco states that CBP fairly assessed the evidence on the record under the substantial evidence standard, and fully supports the conclusions of CBP in the March 9 Determination.

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17 See 19 U.S.C. § 1673; 19 U.S.C. § 1677(1) (“The term ‘administering authority’ means the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law.”).
18 19 C.F.R. § 351.212(b) (“The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.”).
19 19 U.S.C. § 1517(c)(1)(A) (“… the Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.”).
Second, CP Kelco asserts that CBP correctly determined that the appropriate cash deposit rate for the requestors’ entries of xanthan gum subject to the Order was the PRC-wide rate of 154.07%. In response to DBMS’s assertions that its entries were subject to a zero (0.00%) AD cash deposit, CP Kelco maintains that there are only two Chinese producers and exporters of xanthan gum that had a 0.00% cash deposit rate during the relevant period: (1) Neimenggu Fufeng Biotechnologies, Co., Ltd., and (2) Shandong Fufeng Fermentation Co., Ltd. Thus, in order for the 0.00% cash deposit to apply, CP Kelco argues that the Chinese exporter must have been one of those two companies. Therefore, CP Kelco asserts that there is no basis for DBMS to assert that the cash deposit rate applicable to its imports of xanthan gum from India was zero because CBP found no evidence in the record indicating which Chinese company exported the subject merchandise imported by DBMS. In the absence of this evidence, CP Kelco argues that the correct cash deposit rate for DBMS entries was the PRC-wide cash deposit rate of 154.07%, as found by CBP based on substantial record evidence in the March 9 Determination.

Therefore, CP Kelco argues that the findings in the March 9 Determination should be affirmed in toto.

**E. ADMINISTRATIVE REVIEW ANALYSIS**

Pursuant to 19 U.S.C. § 1517(f)(1) and 19 C.F.R. § 165.45, the Office of Trade, Regulations and Rulings, will apply a de novo standard of review under the law, based solely upon the facts and circumstances on the administrative record in the proceeding. In making our determination, we reviewed: (1) the entire administrative record upon which the initial March 9 Determination was made by TRLED; and (2) the timely and properly filed requests for review and response. The Office of Trade, Regulations and Rulings, did not request additional written information from the parties to the investigation pursuant to 19 C.F.R. § 165.44. Pursuant to 19 C.F.R. § 165.45, our administrative review of this case has been completed in a timely manner, within 60 business days of the commencement of the review.

The term “evasion” under the EAPA refers to entering covered merchandise into the customs territory of the United States by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, and that results in any cash deposit or other security or any amount of applicable antidumping or countervailing duties being reduced or not being applied with respect to the merchandise.20

The term “covered merchandise” means merchandise that is subject to a CVD order issued under section 706, Tariff Act of 1930, as amended (19 U.S.C. § 1671e), and/or an AD order issued under section 736, Tariff Act of 1930, as amended (19 U.S.C. § 1673e).21

1. **Analysis of DBMS Arguments**

DBMS argues that the xanthan gum in the subject entries likely originated from a producer/exporter “excluded” from the scope of the Order and as a result, the subject entries should

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21 19 U.S.C. § 1517(c)(1) and 19 C.F.R. § 165.1.
be subject to a 0.00% AD cash deposit rate. However, the record evidence does not support DBMS’s argument.

For a determination as to evasion, CBP must determine whether DBMS entered covered merchandise (i.e., Chinese-origin xanthan gum subject to the Order) into the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, that resulted in the reduction or avoidance of applicable AD or CVD cash deposits or duties being collected on such merchandise.

Between April 16, 2018 and December 16, 2019, DBMS filed three entries of xanthan gum [Redacted BC Information], and entered the merchandise under subheading 3913.90.20, HTS. The xanthan gum was to be used as an ingredient in the manufacturing process of certain types of products. The scope of the Order covers “dry xanthan gum, whether or not coated or blended with other products” and “regardless of physical form.”22 Therefore, the entry documentation, including the CBP Form 7501s and invoices submitted to CBP at the time of entry, are substantial record evidence that the xanthan gum entered by DBMS is merchandise described by the Order. However, the Order covers xanthan gum from the PRC. The country of origin claimed by DBMS at the time of entry was India. Nevertheless, substantial record evidence indicates that the actual country of origin of the xanthan gum entered by DBMS was not India, but the PRC.

The record evidence demonstrates that India is not the country of origin of the xanthan gum for the three DBMS entries. Indeed, DBMS has conceded that the merchandise was not of Indian origin. In addition, according to emails from DBMS’s Indian supplier, [Redacted BC Information], to CBP in response to CBP’s inquiry, DBMS’s Indian supplier explains “we are merchant exporters/traders of xanthan gum” and the xanthan gum it exports is sourced from “local traders in India.”23 The Indian supplier, [Redacted BC Information], has stated not only that it did not produce the xanthan gum, but also that the xanthan gum which it shipped to the importer was manufactured in China.24 In multiple email exchanges from November 17, 2017 to June 18, 2019, DBMS’s Indian supplier explains that the length of the manufacturing process of the xanthan gum and the time it takes to ship the xanthan gum from China to India to the United States require orders to be placed several weeks in advance.25 Collectively, these emails indicate that [Redacted BC Information] is not the producer of the xanthan gum supplied to DBMS, and that the xanthan gum is shipped to suppliers in India from China, where it is likely produced by a single Chinese entity. Further,

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23 See Emails from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (March 11, 2019).

24 See id. See also [Redacted BC Information] RFI response (September 3, 2019).

25 See Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (April 10, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (April 10, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (March 27, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (February 27, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (June 18, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (June 18, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (June 18, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (June 18, 2019). Email from [Redacted BC Information] of [Redacted BC Information], Indian supplier of DBMS (November 17, 2017).
neither [Redacted BC Information], in its RFI response, nor the importer, in its responses, provided the requested production documentation for the actual xanthan gum imported into the United States that could have enabled CBP to determine the country of origin, other than email correspondence revealing that the material supplied to DBMS was generally sourced in China. Given their failure to provide that information, and evidence in the allegation cited in the notice of initiation of investigation and interim measures (“NOI”) supporting a conclusion that the merchandise was manufactured in China, we determine that the imported merchandise was covered merchandise, i.e., xanthan gum of Chinese origin, subject to the AD Order.

Following the determination that the xanthan gum in the DBMS entries is considered “covered merchandise,” CBP must now determine whether evasion occurred. DBMS, as the importer of record, at the time of entry, claimed that the country of origin for the covered merchandise was India. It provided false certificates of origin to support its false India origin claims. Additionally, the subject entries were falsely identified as Entry Type “01” at the time entry, instead of as Entry Type “03”. Entry Type “03” is what is required to be identified for goods that are subject to an AD order.26 Declaring the merchandise as Type “01” is in and of itself a material misstatement, as the merchandise is subject to the Order, regardless of the applicable cash deposit rate.27 As a result of DBMS’s material misstatement indicating the merchandise was Type “01”, no cash deposits were applied to the merchandise. Consequently, DBMS entered covered merchandise by means of material and false documents or statements that resulted in the avoidance of applicable AD cash deposits being collected on such merchandise. This conclusion is not altered by DBMS’s claims that its entries were subject to a 0.00% rate.

There is not enough evidence in the record to demonstrate the identity of the specific Chinese producer/exporter of the subject entries, and thus, there is insufficient evidence to show that the entries were in fact subject to a 0.00% cash deposit rate.28 DBMS’s argument asserts that “at the time the Subject Entries were made, not only was the manufacturer of the Subject Merchandise excluded from the ADD Order (thus preventing the Subject Merchandise from falling under the covered merchandise prong), but the ADD duty cash deposit applicable to the Subject Entries was zero percent (which negates the third prong required for a positive finding of evasion—loss of duty to the United States).”29

The issue of whether merchandise is subject to an AD Order, or “excluded” from the Order, is separate from the issue of the AD deposit rate. An entry entitled to a 0.00% deposit rate is still a subject/covered entry under the Order and must be declared as Type “03”. The

26 Entry Type “03” is the code that CBP requires importers to use to designate an entry as subject to antidumping duties; the instructions for CBP Form 7501 (Entry Summary) clearly state that code 03 shall be used for entries subject to an AD order.

27 A cash deposit rate of zero does not mean that a company is excluded from an AD order; a company remains subject to an order unless and until Commerce issues a notice rescinding an order as to that company or otherwise excluding the company from the order (moreover, resellers cannot benefit from an exclusion of a particular producer/exporter combination). A zero rate merely means that, at the time of entry, no estimated AD duties need be deposited. However, under the U.S. retrospective system, Commerce may later determine that the AD assessment rate for the relevant entries is not zero.

28 In light of this lack of evidence, we need not, and expressly do not, address the question of whether, if there had been sufficient proof of entitlement to a zero percent deposit rate, the material misrepresentation as to Indian origin would have nonetheless constituted evasion within the meaning of the EAPA statute.

failure to properly declare is material given the U.S. retrospective system, as well as the impact to CBP’s ability to enforce an AD order by verifying that the correct deposit rate has actually been used. At the time the subject entries were made, it appears that DBMS’s alleged Chinese producer of xanthan gum was not in fact “excluded” from the Order, but rather was subject to the Order under a 0.00% deposit rate.

Neither the Indian supplier in its RFI response nor DBMS provided the production documentation for the actual xanthan gum that was imported into the United States for the three DBMS subject entries. DBMS failed to provide evidence such as an invoice or purchase order directly tracing the xanthan gum to a transaction between its Indian supplier, specifically [ ], to a specific Chinese entity excluded from the Order, allegedly [ ]. While it is unfortunate that DBMS’s Indian supplier did not provide record documentation indicating the specific Chinese producer/exporter of the xanthan gum used in the subject entries, the responsibility nevertheless lies with DBMS as the importer of record to produce the production documentation to CBP to support DBMS’s own claim that the actual Chinese producer/exporter was either “excluded” from the Order or subject to a 0.00% rate. Without adequate proof that the Chinese-origin xanthan gum used was from a specific Chinese producer/exporter who is subject to a 0.00% deposit rate, the three DBMS entries are subject to the country-wide PRC rate of 154.07%. The burden to prove entitlement to a rate other than the PRC-wide rate rests with the importer making the claim – DBMS has failed to meet that burden.

The other arguments presented by DBMS on this issue are unavailing. DBMS argues that CBP arbitrarily excluded evidence that a specific Chinese entity, namely [ ], likely both manufactured and exported the xanthan gum. DBMS objects to TRLED’s determination, which stated that the information presented by DBMS in photographs was not “credible.” DBMS asserts that CBP should have attempted to verify the accuracy of the evidence as permitted by 19 C.F.R. § 165.25, which states “[p]rior to making a determination under § 165.27, CBP may in its discretion verify information in the United States or foreign countries collected under § 165.23 as is necessary to make its determination.”

DBMS’s argument that the xanthan gum was manufactured and exported by a Chinese entity “excluded” from the Order simply does not have sufficient support in the record because DBMS did not provide production documentation linking the actual xanthan gum imported in DBMS’s three subject entries to a Chinese exporter that is either “excluded” from the Order or subject to a 0.00% rate. In its request for administrative review, DBMS specifically refers to photographs of unused cartons of xanthan gum, which DBMS claims were taken at a third party manufacturer’s warehouse in the United States, specifically [ ]. DBMS asserts that the photographs confirm that the Chinese manufacturer of the xanthan gum is [ ], which is subject to a 0.00% cash deposit rate, because the company’s name is listed on the carton’s label. However, the photographic

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30 DBMS Request for Administrative Review (April 20, 2020) at 16 (citing March 9 Determination at 11).
31 19 C.F.R. § 165.25(a).
32 See Photographs from DBMS of the Exterior of a Box Labeled Xanthan Gum with Chinese Name (November 22, 2019).
evidence provided by DBMS relies on several assumptions, including but not limited to: (1) that the cartons depicted in the photographs were actually part of the shipment of xanthan gum involving the three DBMS entries which are subject to this EAPA investigation; (2) that the Indian importer, [ ], listed on the carton label has a business relationship with DBMS’s Indian Supplier, [ ]; and (3) that the Chinese manufacturer, [ ], listed on the carton’s label was also the specific Chinese exporter of the xanthan gum for DBMS’s three subject entries and therefore, the shipment would have been subject to a 0.00% deposit rate under the Order. As such, it is not reasonable to conclude that the Chinese producer/exporter for DBMS’s subject entries is either “excluded” from the Order or subject to a 0.00% rate based on this photographic evidence because it requires several assumptions and inferences to be made.

Moreover, DBMS argues that TRLED incorrectly applied adverse inferences against DBMS pursuant to 19 C.F.R. § 165.6 because, according to DBMS, it did cooperate and comply to the best of its ability. According to DBMS, “DBMS could not and should not be expected to be able to provide information kept by its business partners, and certainly not information kept by its Indian supplier.” First of all, DBMS errs in its characterization of what is or is not expected of an importer. Although an importer’s attempt to exercise reasonable care is not a defense in an EAPA investigation, an importer is nonetheless required to exercise reasonable care. Reasonable care, in turn, requires knowledge of one’s supply chain. An importer cannot absolve itself from responsibility simply by pointing the finger at its supplier – reasonable care means making inquiries of, and getting information from, suppliers, to ensure that the data provided to CBP at entry is correct.33

Furthermore, the EAPA statute authorizes CBP to employ adverse inferences against any party to the investigation that fails to cooperate or does not act to the best of its ability to comply with information requests.34 The exact language of 19 C.F.R. § 165.6 states that “[i]f the party to the investigation that filed an allegation, the importer, or the foreign producer or exporter of the covered merchandise fails to cooperate and comply to the best of its ability with a request for information made by CBP, CBP may apply an inference adverse to the interests of that party in selecting from among the facts otherwise available to make the determination as to evasion pursuant to § 165.27 and subpart D of this part.”35 Moreover, an adverse inference may be used with respect to the U.S. importer, foreign producers, and manufacturers “without regard to whether another person involved in the same transactions

33 See CBP’s Reasonable Care Informed Compliance Publication, at Preface: “For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met.” (Emphasis added.) Also, as to country of origin: “Have you taken reliable and adequate measures to communicate customs country of origin marking requirements to your foreign supplier prior to importation of your merchandise?” And, miscellaneous: “Have you taken measures or developed reliable procedures to check to see if your goods are subject to a Commerce Department antidumping or countervailing duty investigation or determination, and if so, have you complied or developed reliable procedures to ensure compliance with customs reporting requirements upon entry (e.g., 19 C.F.R. § 141.61)?...Have you taken reliable measures to ensure and verify that you are submitting the correct type of CBP entry (e.g., TIB, T&E, consumption entry, antidumping or countervailing duty entry, mail entry, etc.)?” (Emphasis added.)

34 19 U.S.C. § 1517(c)(3).

35 19 C.F.R. § 165.6(a).
under examination has provided the information sought...".\textsuperscript{36} Congress has thus provided CBP with specific guidance regarding CBP’s authority to apply adverse inferences in an EAPA case.

In this case, an adverse inference may be applied if CP Kelco (the allegor), DBMS (the importer), or the foreign producer or exporter, in this context [ ], failed to cooperate and comply to the best of its ability with a request for information. Adverse inferences were warranted, inasmuch as the importer, foreign producers and exporters all failed to provide sufficient evidence to demonstrate that the xanthan gum was produced in China by a specific entity subject to a 0.00\% rate. In the absence of sufficient evidence, CBP may reasonably fill the evidentiary gaps with adverse inferences. Thus, TRIED did not incorrectly apply adverse inferences against DBMS when CBP made its determination of evasion. However, we note that substantial evidence supports the conclusion of evasion even without resorting to adverse inferences. In this case, the adverse inferences merely buttress the determination of evasion with respect to DBMS. Thus, this administrative review determination is made based on the facts of record.


As explained above, Ascension, Crude Chem, GLōB Energy, and UMD (collectively, “the Four Importers”) submitted four separate requests for administrative review but are represented by the same counsel. The arguments contained in the four requests for administrative review were substantially similar, if not identical, and will be addressed in the analysis collectively where appropriate.

For a determination as to evasion, CBP must determine whether each of the Four Importers entered covered merchandise (i.e., Chinese-origin xanthan gum subject to the Order) into the United States for consumption by means of any document or electronically transmitted data or information, written or oral statement, or act that is material and false, or any omission that is material, that resulted in the reduction or avoidance of applicable AD or CVD cash deposits or duties being collected on such merchandise.

Between April 16, 2018 and December 16, 2019, each of the Four Importers filed entries of xanthan gum, and classified the merchandise in subheading 3913.90.20, HTS. Specifically, Ascension filed seven entries of xanthan gum, Crude Chem filed two entries of xanthan gum, GLōB Energy filed two entries of xanthan gum, and UMD filed three entries of xanthan gum. The scope of the Order covers “dry xanthan gum, whether or not coated or blended with other products” and “regardless of physical form.”\textsuperscript{37} Therefore, the entry documentation, including the CBP Form 7501s and invoices submitted to CBP at the time of entry are substantial record evidence that the xanthan gum entered by the Four Importers is merchandise described by the Order.

\textsuperscript{36} 19 U.S.C. § 1517(c)(3)(B).
However, the Order covers only xanthan gum from the PRC. The country of origin claimed by the Four Importers at the time of entry was India. Notwithstanding the entry documents filed by the Four Importers, substantial record evidence indicates that the actual country of origin of the xanthan gum entered by the Four Importers was not India, but was the PRC.

According to the record evidence, the Four Importers entered Chinese-origin xanthan gum subject to the Order into the United States for consumption in the subject entries. All of the Four Importers used Chem Fert Chemicals (“Chem Fert”) as their Indian supplier of xanthan gum. According to Chem Fert Chemical’s RFI response, Chem Fert admits it is not the “manufacturer of xanthan gum in the sense [that it] do[es] not have [an] entire facility to manufacture the product starting from the stage of raw material.” Chem Fert further explained that it imports the xanthan gum into India and then repacks the xanthan gum so it can then be exported out of India. Chem Fert further stated that the foreign buyers listed in the RFI response “knew this fact very well” and “[a]s a matter of fact, they had approached us and had asked us to import this product from China and thereafter repack it into India and export it to United States.” The Four Importers were listed as the “foreign buyers” in Chem Fert’s RFI response with seven consignments of xanthan gum sent to Ascension, one consignment of xanthan gum sent to Crude Chem, two consignments of xanthan gum sent to GLōB Energy, and three consignments of xanthan gum sent to UMD. These consignments of xanthan gum, which Chem Fert stated were imported from China, repacked in India, and shipped to the United States, correspond in quantity to the number of subject entries for each of the Four Importers. Moreover, the Four Importers concede that the merchandise was not of Indian origin. Consequently, the record evidence supports the conclusion that Ascension, Crude Chem, GLōB Energy, and UMD all entered covered merchandise, i.e., Chinese-origin xanthan gum subject to the Order, into the United States.

Following the determination that the xanthan gum in the Four Importers’ entries is considered “covered merchandise,” CBP must now determine whether evasion occurred. The Four Importers, as importers of record, at the time of entry claimed that the country of origin for the covered merchandise was India. The Four Importers provided false certificates of origin to support their false India origin claims. Additionally, the subject entries were falsely identified as Entry Type “01” at the time entry, instead of as Entry Type “03”. As a result, no cash deposits were applied to the merchandise. Therefore, Ascension, Crude Chem, GLōB Energy, and UMD entered covered merchandise by means of material and false documents or statements that resulted in the avoidance of applicable AD cash deposits being collected on such merchandise.

38 See RFI response from Chem Fert Chemicals (Indian CM 1) for EAPA 7281 (dated August 27, 2019) (emailed to TRLED on September 3, 2019) at 4.
39 Id.
40 Id. at 5.
41 Id. at 5.
42 We note again that one of Crude Chem’s two entries came from a different Indian supplier other than Chem Fert. See March 9 Determination at 16, footnote 52. However, no information was obtained from this Indian supplier as it did not respond to the RFI, despite TRLED’s extending the RFI due date. We further note Crude Chem made no reference to this supplier in its request for administrative review.
Each of the Four Importers argues that no substantial evidence exists to support findings of evasion. First, the Four Importers argue that “participating” is not an element of a finding of evasion. Second, the Four Importers argue that they acted to the best of their ability to provide production data and that CBP erred when CBP issued its final determination too quickly instead of issuing a notice of extension of time under 19 C.F.R. § 165.22(c) and investigating the matter further under 19 C.F.R. § 165.25. Third, the Four Importers argue that the legal complaints in India and allegations that CP Kelco is not producing oilgrade xanthan gum in the United States detract from the weight of the evidence. The Four Importers argue that CP Kelco’s allegedly not producing oilfield grade xanthan gum in the United States detracts from the record because of the possibility of changed circumstances that could remove oilfield grade xanthan gum from the antidumping order. As such, the Four Importers assert that CBP failed to refer the matter to Commerce for a determination as requested by several parties. Finally, the Four Importers argue that CBP erred when it found that no clerical error caused the misstatements at the time of entry.

The arguments presented by the Four Importers are unavailing. First, the use of the word “participating” to which the Four Importers refer appears only once in the conclusion summary in TRLED’s final determination. Specifically, TRLED stated, “[b]ased on the evidence on the record, CBP finds that the Indian xanthan gum suppliers have been participating in the transshipment of Chinese-origin xanthan gum through India.” Despite TRLED’s use of the word “participating” in its conclusion, the elements actually evaluated in the determination of evasion conclude that the Four Importers entered covered merchandise, i.e., Chinese-origin xanthan gum subject to the Order, into the United States by transshipping the merchandise through India. The relevant acts are those of the importers in entering merchandise into the United States. The fact that others may have been involved in or participated in the transactions does not matter under the EAPA.

We further note that the definition of “evasion” does not expressly require an intentional or purposeful attempt to avoid duties, or provide for reasonable care as a defense to evasion. Rather, it is sufficient that an importer enters “covered merchandise” into the United States by means of any material false document, statement, act, or omission that results in the reduction or non-payment of antidumping duties or deposits thereof, for evasion to occur. As explained above, the Four Importers have engaged in evasion because the Chinese-origin xanthan gum was identified as Type “01” with India as the country of origin at the time of entry, and no cash deposits were applied to the merchandise.

Second, TRLED did not err in the timing of the issuance of its final determination – TRLED did not act too quickly instead of issuing a notice of extension of time under 19 C.F.R. § 165.22(c) and investigating the matter further under 19 C.F.R. § 165.25. Pursuant to 19 C.F.R. § 165.22(c), “CBP may extend the time to make a determination under paragraph (a) of this section by not more than 60 calendar days if CBP determines that—(1) the investigation is extraordinarily complicated because of—(i) the number and complexity of the transactions to be investigated; (ii) the novelty of the issues presented; or (iii) the number of entities to be investigated; and (2) additional time is necessary to make the determination under paragraph (a) of this section.” Additionally, pursuant to 19 C.F.R. § 165.25, “[p]rior
to making a determination under § 165.27, CBP may in its discretion verify information in the United States or foreign countries collected under § 165.23 as is necessary to make its determination.” In spite of the Four Importers’ assertions, these regulations clearly state that it is within CBP’s discretion to decide whether to issue a notice of extension of time or whether to investigate matters further prior to making a determination. Moreover, it was clearly the intent of Congress that CBP resolve EAPA investigations as quickly as possible; thus, CBP’s discretion is circumscribed by the statute. We note in this regard that the investigation as to the Four Importers involved only 14 entries, there is nothing novel or complex about the issue of transshipment, and only two Indian suppliers were involved. Therefore, TRLED properly did not believe it needed additional time.

Third, the Four Importers assert that the legal complaint in India and allegations that CP Kelco (the alleger) is not producing oilfield grade xanthan gum in the United States detract from the weight of the evidence. The Four Importers cite to case law concerning the substantial evidence standard and assert, “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight” including “contradictory evidence or evidence from which conflicting inferences could be drawn.” The Four Importers argue that launching a legal investigation and complaint concerning the false certificates of origin with the Indian Chamber of Commerce fairly detracts from the record that the Four Importers should be subject to a country-wide rate. Additionally, the Four Importers argue that CP Kelco’s not producing oilfield grade xanthan gum detracts from the record because of the possibility of changed circumstances that could remove oilfield grade xanthan gum as covered merchandise from the antidumping order. The Four Importers further assert that CBP failed to refer the matter to Commerce for a determination, as requested by the Four Importers.

The Four Importers are correct that the substantial evidence standard requires that evidence detracting from a conclusion be considered. However, the evidence must be relevant to the issue being decided. The issue to be decided by CBP under the EAPA is a narrow one – was merchandise which is subject to an AD order entered by means of a material falsehood or omission resulting in the non-payment or reduction of AD duties. Here, that happened, and thus, evasion occurred. The fact that the Four Importers may have taken remedial actions, after the subject entries were made, does not mean that evasion as to the subject entries did not occur. While taking remedial action is commendable, it does not change the fact that AD duties should have been deposited and were not; the EAPA statute permits CBP to take action to collect those deposits.

45 19 C.F.R. § 165.25 (emphasis added).
46 See 19 U.S.C. § 1517(b)(1) (“Not later than 15 business days after receiving an allegation described in paragraph (2) or a referral described in paragraph (3), the Commissioner shall initiate an investigation…”); 19 U.S.C. § 1517(c)(1) (“Except as provided in subparagraph (B), not later than 300 calendar days after the date on which the Commissioner initiates an investigation under subsection (b) with respect to covered merchandise, the Commissioner shall make a determination, based on substantial evidence, with respect to whether such covered merchandise was entered into the customs territory of the United States through evasion.”).
47 CS Wind Vietnam Co. v. United States, 832 F.3d 1367, 1373 (Fed. Cir. 2016).
Moreover, the xanthan gum imported on the subject entries by each of the Four Importers was subject to the Order at the time of entry because the scope of the Order “covers dry xanthan gum, whether or not coated or blended with other products.”49 Thus, the Order covers the type of merchandise entered by the Four Importers, regardless of whether the xanthan gum is to be used as a raw material in oil or petroleum production, or to be blended with other products. Whether there may be a change in circumstances affecting the domestic industry such that the Order’s scope may be modified by Commerce at a later date does not change the fact that, at the time of entry, the xanthan gum was covered merchandise. It is within CBP’s discretion to determine whether the information presented by the Four Importers detracts from the weight of the evidence and whether the substantial evidence in the entire record as a whole demonstrates evasion was committed by the Four Importers. The allegedly detracting information is not relevant to the issue of evasion as to the subject entries.

Finally, CBP did not err when it determined that the material and false statements did not result from a clerical error. The EAPA statute does include a clerical error exception, which states that “[e]xcept as provided in clause (ii), the term ‘evasion’ does not include entering covered merchandise into the customs territory of the United States by means of—(I) a document or electronically transmitted data or information, written or oral statement, or act that is false as a result of a clerical error; or (II) an omission that results from a clerical error.”50 The identification of the imported merchandise as Type 01 with a country of origin of India was not the result of a clerical error. The Four Importers have failed to establish that the false statements on the CBP Form 7501s, the false statements on the invoices, and the false certificates of origin submitted to CBP were all clerical errors. As the Four Importers have pointed out, there is no definition for “clerical error” as outlined in the EAPA statute. However, a “clerical error” typically refers to an error made in copying or writing.51 No assertion has been made that such type of error was involved; rather, the evidence shows otherwise. At the time of entry, the Four Importers consciously declared the merchandise as of Indian origin and Entry Type 01 (“Consumption – Free and Dutiable”); that the declarations were (even if unwittingly) based on false facts, does not make them the result of clerical error. The Four Importers have failed to establish that the false statements were the result of a clerical error. Thus, the record evidence, including the RFI responses from Chem Fert, establish that the false statements were not clerical errors.

III. DECISION

Based upon our de novo review of the administrative record in this case, including the timely and properly filed requests for administrative review submitted by DBMS, Ascension, Crude Chem, GLoB Energy, and UMD on April 20, 2020, as well as the response thereto, we AFFIRM the March 9 Determination by TRLED under 19 U.S.C. § 1517(c).

Substantial evidence exists that all five importers, DBMS, Ascension, Crude Chem, GLōB Energy, and UMD, entered covered merchandise from the PRC into the United States through evasion by transshipping Chinese-origin xanthan gum subject to AD Order A-570-985 through India.

A copy of this determination is being provided to TRLED. TRLED may also take any other appropriate actions consistent with this decision.

This decision does not preclude CBP or other agencies from pursuing additional enforcement actions or penalties. Pursuant to 19 C.F.R. § 165.46(a), this final administrative determination is subject to judicial review pursuant to section 421 of the EAPA.

Sincerely,

Jacinto P. Juarez, Jr.
Acting Chief, Penalties Branch
Regulations & Rulings
Office of Trade
U.S. Customs & Border Protection