

U.S. Customs and Border Protection

Slip Op. 14–121

KWO LEE, INC. Plaintiff, v. UNITED STATES, Defendant.

PUBLIC VERSION

Before: Donald C. Pogue, Senior Judge
Court No. 14–00212

[preliminary injunction granted]

Dated: October 16, 2014

Robert T. Hume and Carol Wyzinski, Hume & Associates, LLC, of Ojai, CA, for the Plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. Also on the brief were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel was *Chi Choy*, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION AND ORDER

Pogue, Senior Judge:

Plaintiff, Kwo Lee, Inc. (Shuzhang “Steven” Li, owner), moves to enjoin U.S. Customs and Border Protection (“Customs” or “CBP”) from imposing a single transaction bond requirement on Plaintiff’s entries of fresh garlic from the People’s Republic of China (“PRC”). Pl.’s Appl. for a TRO & Mot. for a Prelim. Inj., ECF No. 7 (“Pl.’s Br.”), at 1. Plaintiff’s entries are subject to an antidumping duty order (A-570–831). Customs enhanced bond requirement would equal Plaintiff’s total potential antidumping duty liability as calculated at the PRC-wide rate (\$4.71/kg), rather than the expected \$0.35/kg cash deposit rate otherwise applicable to Plaintiff’s exporter/producer (Qingdao Tiantaixing Foods Co., Ltd. (“QTF”). *Id.*; Am. Compl., ECF No.19, at ¶ 1. Because Plaintiff has established his entitlement to a preliminary injunction, his motion is granted.

BACKGROUND

This action has its origins in a nearly twenty-year old antidumping duty order on fresh garlic from the PRC. *Fresh Garlic from the [PRC]*, 59 Fed. Reg. 59,209 (Dep't Commerce Nov. 16, 1994) (antidumping duty order). This order set a PRC-wide rate at 376.67 percent (which translates to a cash deposit rate of \$4.71/kg of garlic). *Id.* at 59,210; Ex. 3 to Pl.'s Br. (Undated Port of San Francisco Information Notice), ECF No. 7-2 at Ex. 3 ("Information Notice").

QTF did not begin shipping fresh garlic to the United States until 2006, at which point it requested and, following investigation, was granted a new shipper rate ("NSR") by the U.S. Department of Commerce ("Commerce"). *Fresh Garlic from the [PRC]*, 73 Fed. Reg. 56,550, 56,552 (Dep't Commerce Sept. 29, 2008) (final results and rescission, in part, of twelfth new shipper reviews) ("*Twelfth NSR*"). QTF's NSR is 32.78 percent (which translates to a cash deposit rate of \$0.352/kg of garlic). *Id.*; App. to Mem. Supp. Def.'s Opp'n to Pls.' Appl. for TRO & Mots. for Prelim. Inj. ("Def.'s App."), (CBP Cash Deposit Instructions for Fresh Garlic from China, A-570-831 (Oct. 15, 2008)), ECF No. 25-1 ("CBP Cash Deposit Instructions"), at A3.¹ QTF made no subsequent shipments of the subject garlic to the United States until 2014,² when Plaintiff attempted to import some of QTF's fresh garlic. Ex. 5 to Pl.'s Br. (Decl. of Steven [Li] (Owner)), ECF No. 7-2 ("Li Decl."), at ¶ 10. Customs denied entry, conducted import specialist review of entry documents, and, ultimately, denied release of the entries. Def's App. (Edert Decl.), ECF No 25-1 ("Edert Decl."), at A10-A11 ¶¶ 6, 11. Customs provided Plaintiff with notice that "[t]o ensure entries are filed correctly and to protect [the] revenue [of the

¹ See also Ex. 1 to Pl.'s Br. (July 3, 2014 letter from QTF to Customs), ECF No. 7-1 at 3 (requesting verification of \$0.352/kg rate); Pl.'s Br., ECF No. 7, at 2 n.3 (Plaintiff receiving oral confirmation of \$0.352/kg rate from Customs).

² For administrative reviews in which QTF timely certified it had no shipments during the period of review, see *Fresh Garlic from the [PRC]*, Issues & Decision Memorandum, A-570-831, ARP 07-08 (June 14, 2010) (adopted in 75 Fed. Reg. 34,976, 34,980 (Dep't Commerce June 21, 2010) (final results and partial rescission of the 14th antidumping duty administrative review)) Issue 3 at 11n.7 (noting that Customs issued a no-shipment inquiry for QTF, and will only do so when the company has submitted a timely and properly filed no shipment certification); *Fresh Garlic from the [PRC]*, 76 Fed. Reg. 37,321, 37,323 (Dep't Commerce June 27, 2011) (final results and final rescission, in part, of the 20082009 antidumping duty administrative review); *Fresh Garlic from the [PRC]*, 77 Fed. Reg. 11,486, 11,489 (Dep't Commerce February 27, 2012) (partial final results and partial final rescission of the 2009-2010 administrative review); *Fresh Garlic from the [PRC]*, 78 Fed. Reg. 36,168, 36,170 (Dep't Commerce June 17 3013) (final results of antidumping administrative review; 2010-2011); and, *Fresh Garlic from the [PRC]*, 79 Fed. Reg. 36,721, 36,724 (Dep't Commerce June 30, 2014) (final results and partial rescission of the 18th antidumping duty administrative review; 2011-2012).

United States]” it would require that he provide an “additional single transaction bond [for each entry] to cover antidumping duties” at the PRC-wide rate of \$4.71/kg. *See* Information Notice, ECF No. 7–2 at Ex. 3. Plaintiff challenges this determination as arbitrary and capricious under 28 U.S.C. § 1581(i) (2012).³ *See* Am. Compl., ECF No. 19, at ¶ 2; Pl.’s Br., ECF No. 7, at 1.

Plaintiff sought a temporary restraining order (“TRO”) and preliminary injunction to prevent Customs from imposing the heightened bonding requirement, Pl.’s Br., ECF No. 7, at 1. The court held an evidentiary hearing on October 1, 2014, *see* Hr’g, ECF No. 29, and subsequently granted Plaintiff’s request for a TRO. *See* TRO, Oct. 2, 2014, ECF Nos. 35 (conf. version) & 36 (pub. version). This TRO, effective through midnight on October 16, 2014, enjoined Customs from imposing the heightened bond requirement on the subject entries, and required instead that the Plaintiff provide security to this Court in the amount of one million dollars (\$1,000,000.00), “to pay the costs or damages as may be incurred or suffered by the Defendant in the event of a finding that the Defendant has been wrongfully enjoined or restrained.” *Id.* at 2.

DISCUSSION

“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) (citation omitted). To obtain a preliminary injunction, Plaintiff must establish: “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Id.* at 20 (citations omitted). No one factor is dispositive, *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993), but “[c]entral to the movant’s burden are the likelihood of success and irreparable harm factors.” *Sofamor Danek Grp., Inc. v. DePuy-Motech, Inc.*, 74 F.3d 1216, 1219 (Fed. Cir. 1996). The court evaluates a request for a preliminary injunction on a “sliding scale,” where “the more the balance of irreparable harm inclines in the plaintiff’s favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction.” *Qingdao Taifa Grp. Co. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009) (citing *Kowalski v. Chi. Tribune Co.*, 854 F.2d 168, 170 (7th Cir. 1988)). Because of this “sliding scale,” we begin our analysis with discussion of irreparable harm.

³ All further citations to the U.S. Code are to the 2012 edition.

I. Plaintiff Has Shown a Viable and Immediate Threat of Irreparable Harm.

Plaintiff must establish that, in the absence of a preliminary injunction, he will suffer irreparable harm. *Winter*, 555 U.S. at 20. Harm is irreparable when “no damages payment, however great,” can address it, *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) (citations omitted); see also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (holding that equitable relief is only appropriate where legal remedies are inadequate). The threat of irreparable harm must be immediate and viable — “[a] preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great.” *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983) (quotation marks and citations omitted).⁴

Financial loss alone – compensable with monetary damages — is not irreparable. *Sampson v. Murray*, 415 U.S. 61, 90 (1974). However, “the simple fact that one could, if pressed, compute a money damages award does not always preclude a finding of irreparable harm.” *Celsis In Vitro*, 664 F.3d at 930. Irreparable harm may take the form of “[p]rice erosion, loss of goodwill, damage to reputation, and loss of business opportunities.” *Id.* (citing *Abbott Labs. v. Sandoz, Inc.*, 544 F.3d 1341, 1362 (Fed. Cir. 2008); *Sanofi–Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1382–83 (Fed. Cir. 2006)).⁵ Bankruptcy is an irreparable harm because, in addition to the obvious economic injury, loss of business renders a final judgment useless, depriving the movant of

⁴ See also *Winter*, 555 U.S. at 22 (holding that movant must “demonstrate that irreparable injury is likely in the absence of an injunction”) (emphasis in original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983)); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974) (additional citation to treatise omitted).

⁵ See also *Corus Grp. PLC v. Bush*, 26 CIT 937, 943, 217 F. Supp.2d 1347, 1354 (2002) (“Generally, where a party is required to fundamentally alter its business operations during litigation in order to comply with a challenged Government action, that party suffers irreparable harm.”), *aff’d in part sub nom. Corus Grp. PLC v. Int’l Trade Comm’n*, 352 F.3d 1351 (Fed. Cir. 2003); *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT 357,365–66, 427 F. Supp. 2d 1249, 1257–58 (2006) (importer may suffer irreparable harm when “unable to secure the necessary credit to cover the erroneous cash deposit rate pending a final and conclusive court decision”); *CPC Int’l, Inc. v. United States*, 19 CIT 978, 979, 896 F. Supp. 1240, 1243 (1995) (Irreparable harm occurs where “compliance with a ruling of Customs . . . would cause the importer to incur costs, expenditures, business disruption or other financial losses, for which the importer has no legal redress to recover in court, even if the importer ultimately prevails on the merits in contesting the ruling.”).

effective and meaningful judicial review. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).⁶

Here, Customs seeks to impose single transaction bond requirements on Plaintiff's entries of fresh garlic from the PRC equal to Plaintiff's total potential antidumping duty liability if calculated at the PRC-wide rate (\$4.71/kg), *see* Information Notice, ECF No. 7–2 at Ex. 3, rather than the expected \$0.35/kg cash deposit rate otherwise applicable to Plaintiff's exporter/producer, QTF. *See Twelfth NSR*, 73 Fed. Reg. at 56,552 (setting the antidumping duty rate); CBP Cash Deposit Instructions, ECF No. 25–1, at A3 (setting cash deposit rate); Ex. 1 to Pl.'s Br. (July 3, 2014 letter from QTF to Customs), ECF No. 7–1 at 3 (requesting verification of \$0.352/kg rate); Pl.'s Br., ECF No. 7, at 2 n.3 (Plaintiff receiving oral confirmation of \$0.352/kg rate from Customs). For the Plaintiff, this means more than \$10 million in additional bonding (i.e., 129 containers at an average of \$117,500 additional bonding per container). *See* Li Decl., ECF No. 7–2 at Ex. 5, at ¶ 10; Attach. to [Pl.'s] Resp. to Ct.'s Req., Oct. 2, 2012, ECF No. 34–1.⁷

Normally, an importer could obtain such single transaction bonds from a surety for a fraction of the bond value, *see* Mem. Supp. Def.'s Opp'n to Pls.' Appl. for TRO & Mots. for Prelim. Inj., ECF Nos. 17 (pub. version) & 25 (conf. version) ("Def.'s Br.") at 16; [Def.'s] Resp. to Ct.'s Req., Sept. 30, 2014, ECF No. 26, at ¶ 1. But Plaintiff does not present a normal case. Rather, obtaining a bond at this time, in this industry would require full collateral for the millions of dollars at issue. Pl.'s Resp. to Ct.'s Req., Oct. 2, 2012, ECF No. 30; *see also* Conf. Tr. of Hr'g Held on Oct. 1, 2014 ("Tr. TRO Hr'g") (test. Of Mr. Shuzhang "Steven" Li), ECF No. 40 ("Li Test."), at 8:20–9:8, 17:21–18:17.⁸ Plaintiff represents that he cannot provide this collateral any more than he can post the full amount as a cash deposit. Li Test., ECF No. 40, at 15:1–4, 17:8–11; Tr. TRO Hr'g (Pl.'s Ex. 4), ECF No. 40 (bank statements). While he has paid the additional bonding for two entries himself, *see* Attach. to [Pl.'s] Resp. to Ct.'s Req., Oct. 2, 2012, ECF No. 34–1 at 1 (listing two entries as released with payment of full collateral (\$116,572.50)); Tr. TRO Hr'g (Pl.'s Exs. 1 & 2), ECF No. 40 (providing Customs bonds and collection receipts noting that

⁶ *See also Queen's Flowers de Colombia v. United States*, 20 CIT1122, 1127, 947 F. Supp. 503, 507 (1996); *Am. Parcel Forwarding Co. v. United States*, 4 CIT 94, 98 (1982) (not reported in F.Supp.); *McAfee v. U.S.*, 3 CIT 20, 24, 531 F. Supp. 177, 179(1982) ("It is difficult for this court to envision any irreparable damage to a plaintiff and his business more deserving of equitable relief than the [very] loss of the business itself.").

⁷ Defendant places total additional bonding required at \$[[]]million. [Def.'s] Resp. to Ct.'s Order, Oct. 2, 2014, ECF Nos. 32 (conf. version) & 33 (pub. version), at 2.

⁸ *Cf. Decca Hospitality*, 30 CIT at 366, 427 F. Supp. 2d at 1257–58

cash was provided in lieu of bond for two entries)), the vast majority of the garlic has remained in limbo, accruing demurrage charges⁹ and spoiling. Li Decl., ECF No. 7–2 at Ex. 5, at ¶ 11. Plaintiff also suffers loss of goodwill and damage to his reputation from his domestic customers due to his failure to deliver because of his inability to pay the fully collateralized bond amount. Li Test., ECF No. 40, at 12:6–13:15; Tr. TRO Hr’g (Pl.’s Ex. 3), ECF No. 40 (letter from domestic customer to Plaintiff). Unable to meet either Customs’ or his customers’ demands, Plaintiff faces imminent and immediate bankruptcy, loss of business, and, therefore, loss of access to meaningful judicial review. Accordingly, Plaintiff has sufficiently established irreparable harm for a preliminary injunction.

II. Plaintiff Has Established a Fair Chance of Success on the Merits.

Where, as here, the Plaintiff has made a strong showing of irreparable harm, “the burden to show a likelihood of success is necessarily lower.” *Qingdao Taifa*, 581 F.3d at 1381. He need only establish a “fair chance of success on the merits,” *U.S. Ass’n of Imps. of Textiles & Apparel v. U.S. Dep’t of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005) (internal quotation marks and citations omitted), by raising “questions which are ‘serious, substantial, difficult and doubtful.’” *Timken Co. v. United States*, 6 CIT 76, 80, 569 F. Supp. 65, 70 (1983) (quoting *Cnty. of Alameda v. Weinberger*, 520 F.2d 344, 349–50 n.12 (9th Cir. 1975)).¹⁰

On the merits, Plaintiff challenges Customs’ determination that he must provide enhanced bonding. Am. Compl., ECF No. 19, at ¶ 1. He faces a high burden: Customs has broad authority to protect the revenue of the United States. See 19 U.S.C. §§ 66, 1623. Further, Customs has promulgated extensive bonding regulations, following notice-and-comment rulemaking, pursuant to that authority.¹¹ This includes 19 C.F.R. § 113.13(d) (2014) under which Customs makes enhanced bonding determinations. However, while Customs’ “interpretation of its own regulations is entitled to broad deference from the courts,” *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 400 F.3d 1352, 1363 (Fed. Cir. 2005) (citations omitted), the court must “hold unlawful and set aside agency action, findings, and conclusions found

⁹ That is, money owed to the shipping container company for use of the containers beyond the agreed time. See *id.*; *Black’s Law Dictionary* 526 (10th ed. 2014) (defining demurrage as, inter alia, “[a] charge due for the late return of ocean containers or other equipment”).

¹⁰ See also *Ugine & Alz Belgium v. United States*, 452 F.3d 1289,1295 (Fed. Cir. 2006) (finding sufficient likelihood of success where matter was not “so clear cut” as to deny appeal).

¹¹ See *Customs Bond Structure; Revision*, 49 Fed. Reg. 41,152 (Oct. 19, 1984).

to be[] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).¹²

The arbitrary and capricious standard of review is narrow and deferential. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Nonetheless, the court’s inquiry must still be “searching and careful.” *Id.* Customs must have “articulate[d] a rational connection between the facts found and the choice made.” *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (internal quotation marks and citation omitted). Customs cannot have “relied on factors [that] Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it], or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). “While we may not supply a reasoned basis for the agency’s action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp.*, 419 U.S. at 285–86 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945)).

On the present record, while the court has not reached a final decision as to the reasonableness of Customs’ actions, the Plaintiff has established sufficient likelihood of success on the merits by raising “serious, substantial, difficult and doubtful” questions about the reasonableness of Customs’ actions. *See Timken*, 6 CIT at 80, 569 F. Supp. at 70.

In making its enhanced bonding determination, Customs primarily relies on an alleged deficiency in Plaintiff’s entry documents. Specifically, Customs asserts that Plaintiff’s documents included incomplete or discrepant phytosanitary certificates. Def.’s Br, ECF No. 17, at 8–9; Edert Decl., ECF No. 25–1, at A11 ¶ 8–11; Def.’s App. (Pilipavicius Decl.), ECF No. 25–1 (“Pilipavicius Decl.”), at A15-A16 ¶¶ 6, 9–10; Def.’s App. (Djeng Decl.), ECF No. 25–1 (“Djeng Decl.”), at A22-A24 ¶¶ 3–9. According to Customs, the phytosanitary certificate is issued by the Chinese government and acts as a “birth certificate” of sorts for Plaintiff’s garlic: It is a reliable way to know the identity of the producer, the facility in which the garlic was produced, and when it was produced. Pilipavicius Decl., ECF No. 25–1, at A15 ¶ 8; Djeng Decl., ECF No. 25–1, at A23 ¶ 4. To Customs, flaws in the certificate

¹² The court reviews actions brought under 19 U.S.C. § 1581(i)(such as here) as provided in the Administrative Procedures Act, 5 U.S.C. § 706. *See* 28 U.S.C. § 2640(e).

suggest fraudulent entry documents. Def.'s Br., ECF No. 17, at 26–27; Edert Decl., ECF No. 25–1, at A11 ¶ 8–11; Pilipavicius Decl., ECF No. 25–1, at A16 ¶ 9–11.

However, Plaintiff has produced evidence that indicates that the phytosanitary certificates provided by the Chinese government are unreliable at best, being routinely imperfect and incomplete. Tr. TRO Hr'g, ECF No. 40, at 37:5–8; Add. Decl. of Shuzhang Li (Owner), ECF No. 12, at ¶ 4; Decl. Zhao Zhenqing, ECF No. 31 (“Zhao Decl.”), at ¶¶ 5–6. Further, even when complete, they do not provide the information Customs expects: Phytosanitary certificates indicate storage location and inspection site, not producer. Tr. TRO Hr'g, ECF No. 40, at 30:4–10, 35:24–36:9; Zhao Decl., ECF No. 31, at ¶¶ 2–4 (explaining that provenance data on phytosanitary certificates is based on site of inspection (warehouse or factory), not the companies that use the facility). If true, such evidentiary unreliability could corrupt any rational connection between the facts found (producer identity) and choices made (enhanced bonding), rendering Customs' reliance on the certificates arbitrary and capricious. Moreover, if incomplete and discrepant phytosanitary certificates are as pervasive as Plaintiff would argue, *see* Tr. TRO Hr'g, ECF No. 40, at 36:4–9; Zhao Decl., ECF No. 31, at ¶¶ 2–4; Attach. 1 to Zhao Decl., ECF No. 31–1 (providing a sampling of incomplete and imperfect phytosanitary certificates from various companies), it would be discriminatory (i.e., arbitrary and capricious) for Customs to single out Plaintiff for heightened bonding requirements on this basis and not do the same for similarly situated companies with comparably imperfect phytosanitary certificates.

Further, Plaintiff raises doubts about the secondary “red flags” Customs relied upon in its enhanced bonding determination. Specifically, Plaintiff's sudden high volume of garlic imports was not indicative of planned antidumping duty fraud. *See* Edert Decl., ECF No 25–1, at A9-A10 ¶¶ 4, 7. Rather the Plaintiff was acting on a perceived business opportunity after an increase in the antidumping duty rates for other garlic importers made importation of QTF-produced garlic financially reasonable. *See* Tr. TRO Hr'g, ECF No. 40, at 39:1–14 (offering market opportunity as a possible explanation); Li. Decl., ECF No. 7–2 at Ex. 5, at ¶ 4 (explaining that QTF did not import garlic until 2014 due to “business issues”); *see also* Djeng Decl., ECF No 25–1, at A24 ¶¶ 8–9 (discussing the recent change in antidumping rates for Plaintiff's competitors). Moreover, contrary to Customs' allegations, QTF's garlic shipments were not too large for the time of year and their number of employees, as it was the harvest season when there is an influx of garlic on the market and workers

work around the clock, taking multiple shifts to process this garlic. Edert Decl., ECF No 25–1, at A10 ¶ 7; Tr. TRO Hr’g, ECF No. 40, at 34:12–22. It follows that Plaintiff has established that Customs, by failing to consider important aspects of the problem before it, may have offered an explanation for its decision that runs counter to the evidence.

Plaintiff has also raised concerns about the adequacy of the process accorded by Customs in requiring heightened bonding, particularly the insufficiency of the Information Notice, ECF No. 7–2 at Ex. 3, *see* Tr. TRO Hr’g, ECF No. 40, at 53:8–11, and Customs’ failure to provide a reasoned decision (rendering it arbitrary and capricious). The present record suggests Customs did not provide much, if any process outside the generalized and terse statements in the Information Notice, i.e., that heightened bonding was required “[d]ue to discrepancies found with entry documents, concerns with bond sufficiency[,] and the financial risk associated with the entry of fresh garlic from the PRC.” Information Notice, ECF No. 7–2 at Ex. 3. Customs’ bond determinations are reviewable and Customs is required to provide “sufficient information as to the basis for the change [in bonding requirements] to allow it to be challenged in court.” *Hera Shipping, Inc. v. Carnes*, 10 CIT 493, 496, 640 F. Supp. 266, 269 (1986); *see Nat’l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 33 CIT 1137, 1151–52, 637 F. Supp. 2d 1270, 1284–85 (2009). It is unclear, based on the current record, whether Customs has done so here.

Accordingly, Plaintiff has raised serious and substantial questions as to whether Customs’ decision to require enhanced bonding was arbitrary and capricious, and these questions are sufficient to establish a fair chance of success of the merits.

III. The Balance of the Equities Favors the Plaintiff.

Before granting a preliminary injunction, the court “must balance the competing claims of injury and must consider the effect” that granting or denying relief will have on each party. *Winter*, 555 U.S. at 24 (internal quotation marks and citation omitted). Here, Plaintiff faces the immediate threat of bankruptcy. In the absence of a preliminary injunction, he will suffer the irreparable harms of loss of business and loss of access to meaningful judicial review.¹³ Customs, meanwhile, faces the possible loss of millions of dollars in revenue to the United States, *see* Def.’s Br., ECF No. 16, at 31; 19 U.S.C. § 1623 (directing Customs to protect the revenue of the United States), in an industry that has already posed significant antidumping duty collection problems. Edert Decl., ECF No. 25–1, at A9 ¶¶ 2–3; Pilipavicius

¹³ *See* discussion *supra* Section I.

Decl., ECF No. 25–1, at A14-A15 ¶¶ 3–4. If a preliminary injunction is granted, Customs must risk that, even if it succeeds on the merits, it will not collect the duties owed (given their sheer magnitude and resultant financial impossibility for the Plaintiff). See Def.’s Br., ECF No. 17, at 31–32; see also *Queen’s Flowers*, 20 CIT at 1128, 947 F. Supp. at 508.

But the record reveals that Commerce has previously determined that the Plaintiff’s producer/exporter is not subject to the PRC-wide rate. *Twelfth NSR*, 73 Fed. Reg. at 56,552. Accordingly, there is a possibility that enhanced bonding is unnecessary and that there will be no harm to the revenue of the United States. Moreover, Plaintiff’s exporter will be subject to administrative review and collection of any actual antidumping duties owed.¹⁴ It follows that the balance of the equities favors the Plaintiff in that he faces imminent, irreparable injury while Customs faces only possible, if substantial, injury that is susceptible to both legal remedy and present mitigation (through requiring future cash deposits from the Plaintiff, thereby limiting Customs’ exposure for unpaid duties and through requiring that a bond be filed with the court).¹⁵

IV. The Public Interest will be Served by Granting the Plaintiff a Preliminary Injunction.

The court “should pay particular regard for the public consequences” when “employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). While Customs has a public interest in protecting the revenue of the United States, there is also a strong public interest in the proper execution of and compliance with the law. 19 U.S.C. §§ 66, 1623. The public interest is served by the accurate and effective, uniform and fair enforcement of trade laws. *Union Steel v. United States*, 33 CIT 614, 622, 617 F. Supp. 2d 1373, 1381 (2009); *Ceramica Regiomontana, S.A. v. United States*, 7 CIT 390, 397, 590 F. Supp. 1260, 1265 (1984). While “maintaining a maximum level of security for the unliquidated entries would serve broadly the public

¹⁴ “[T]he United States uses a ‘retrospective’ assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.” 19 C.F.R. §351.212. At entry, importers make a cash deposit of the estimated antidumping duties, *id.* at 351.211(b)(2), but if, as here, the antidumping duty rate is challenged by an interested party, the final antidumping duty rate (and thus amount owed) will be assessed pursuant to an administrative review, *id.* at §§ 351.213, 351.211(b)(1), or, if appealed to this Court, assessed according to the final decision in the action. 19 U.S.C. § 1516a(e)(2).

¹⁵ See *Queen’s Flowers*, 20 CIT at 1128, 947 F. Supp. at 508 (similarly favoring movant in balance of the equities).

interest of revenue collection,” this cannot be done “at the cost of continuing to subject [a plaintiff] to an unlawful, and discriminatory bonding requirement.” *Nat’l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, __ CIT __, 751 F. Supp. 2d 1318, 1325 (2010). Preserving Plaintiff’s access to meaningful judicial review, a public interest in itself, protects against unchecked and unchallenged enforcement by preserving Plaintiff’s opportunity to litigate a potentially meritorious claim. See *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1252, 121 F. Supp. 2d 684, 690 (2000); *Queen’s Flowers*, 20 CIT at 1127, 947 F. Supp. at 508. Accordingly, the public interest will be served by granting the Plaintiff a preliminary injunction.

CONCLUSION

Plaintiff has demonstrated entitlement to a preliminary injunction against Customs’ requirement of enhanced bonding at the PRC-wide rate. Accordingly, Plaintiff’s motion is GRANTED, and it is hereby

ORDERED that Defendant, its officers, delegates, agents, servants, and employees, are enjoined for the pendency of this litigation, including all relevant appeals and remands, until such time as a final court decision is rendered within the meaning of 19 U.S.C. § 1516a(e), from imposing single transaction bond requirements on the entries by Plaintiff, Kwo Lee, Inc., of garlic from the PRC exported by QTF as listed in Appendix A to the TRO, ECF No. 35 (“subject entries”); it is further

ORDERED that Defendant, its officers, delegates, agents, servants, and employees, shall immediately rescind all single transaction bond requirements imposed on the subject entries; it is further

ORDERED that Plaintiff shall continue to provide security in the amount of one million dollars (\$1,000,000.00), as required by the TRO, to indemnify the costs or damages of a finding that the Defendant has been wrongfully enjoined or restrained as a result of this preliminary injunction; it is further

ORDERED that the TRO entered on October 2, 2014, ECF Nos. 35 & 36, is vacated; and it is further

ORDERED that the joint status report and briefing schedule for this action shall be filed with the court by November 7, 2014.

Dated: October 16, 2014

New York, NY

/s/ Donald C. Pogue

DONALD C. POGUE, SENIOR JUDGE

Slip Op. 14–122

ROCKWELL AUTOMATION, INC., F/K/A ROCKWELL AUTOMATION/ALLEN-BRADLEY CO., LLC, Plaintiff, v. UNITED STATES, Defendant.

Court Nos. 05–00269, 05–00582, 06–00054, 06–00348, 07–00110, 07–00294, 10–00230, 10–00245, 11–00018, 11–00250, 12–00001

[Denying Application for Clarification]

Dated: October 20, 2014

John M. Peterson, Neville Peterson LLP, of New York, New York, for Plaintiff.

OPINION

RIDGWAY, Judge:

Before the court is Plaintiff’s Application for Clarification of Court Order Granting Motion to Extend Time (as corrected),¹ in which Rockwell Automation, Inc. requests clarification of certain statements in *Rockwell Automation, Inc. v. United States*, 38 CIT ____, ____, F. Supp. 2d ____, 2014 WL 4071500 (2014). Application for Clarification of Court Order Granting Motion to Extend Time (“Pl.’s Motion”) at 1, 5–6.² *Rockwell* granted Plaintiff’s Amended Consent

¹ As explained in Plaintiff’s Consent Motion to Correct, the caption on Rockwell’s initial Application for Clarification of Court Order Granting Motion to Extend Time misidentified one of the 11 actions at issue. The Consent Motion to Correct is granted and the corrected copy of Rockwell’s Application for Clarification of Court Order Granting Motion to Extend Time is accepted for filing.

² Rockwell has styled its submission as a request for “clarification” of a “court order” and has invoked USCIT Rule 60(b) as the basis for its request. Pl.’s Motion at 1. However, the relief that Rockwell seeks is more accurately described as “modification” or “reconsideration,” rather than to File Out of Time[] and to Extend Time to Remain on Reserve Calendar as to all 11 actions “clarification.” See, e.g., *National Fisheries Institute, Inc. v. U.S. Bureau of Customs and Border Protection*, 33 CIT 1389, 1390 (2009) (noting that, where relief sought involves substantive change to language of opinion or order, motion seeks “modification,” not “clarification”); *United States v. Ford Motor Co.*, 31 CIT 1178, 1180 (2007) (distinguishing between motion for “reconsideration,” which goes to “correctness” of court’s action, and motion for “clarification,” which does not). In addition, the focus of the pending motion is on “the Court’s statements in [*Rockwell*],” not on any court order. Pl.’s Motion at 1. In any event, characterizations of the pending motion have no particular significance here. It is the substance of Rockwell’s request, not the labels, that controls.

Rockwell’s reliance on Rule 60(b) is more problematic. Rule 60(b) applies only to “a final judgment, order, or proceeding.” USCIT R. 60(b) (emphasis added); *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 406 (Fed. Cir. 1989) (noting that relief under Rule 60(b) is available only after the court has “entered a final judgment or issued a final order”); *Union Steel v. United States*, 35 CIT ____, ____, 804 F. Supp. 2d 1356, 1367 (2011); *Atar S.r.l. v. United States*, 35 CIT ____, ____, n.7, 791 F. Supp. 2d 1368, 1378 n.7 (2011); *RHI Refractories Liaoning Co. v. United States*, 35 CIT ____, ____, & n.1, 752 F. Supp. 2d 1377, 1379 & n.1

Motion for Leave identified above, analyzing Rockwell's out-of-time motions for extensions of time under the relevant provisions of USCIT Rule 6 ("Computing and Extending Time; Time for Motion Papers") and Rule 83 ("Reserve Calendar"). See *Rockwell*, 38 CIT at ____, ____, ____ F. Supp. 2d at ____, ____, 2014 WL 4071500 * 1–2, 19.

The focus of the pending motion is language in *Rockwell* to the effect that, under USCIT Rule 83(d), "a request to extend Reserve Calendar time must, in all cases, be submitted no later than thirty days before expiration of the extended time period." Pl.'s Motion at 1; see, e.g., *Rockwell*, 38 CIT at ____, ____ F. Supp. 2d at ____, 2014 WL 4071500 * 2 (explaining that "the second sentence of Rule 83(d) requires that '[a] motion for an extension of time [to remain on the Reserve Calendar] must be made at least 30 days prior to the expiration of the 18-month period [or later, if the 18-month period has been extended pursuant to USCIT Rule 83(d)]'" (all alterations in *Rockwell*)).

Rockwell acknowledges that Rule 83(d) requires a litigant wishing to extend the initial 18 month Reserve Calendar period to file its motion for an extension of time at least 30 days prior to the expiration of the Reserve Calendar period. Pl.'s Motion at 3, 4, 5; USCIT R. 83(a)

(2011); see also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (describing "final order" as one that "ends the litigation on the merits and leaves nothing for the court to do but execute judgment") (quotation marks & citation omitted).

However, Rockwell's motion may be considered under Rule 59 instead. See USCIT R. 59 ("New Trial; Rehearing; Altering or Amending a Judgment"); *NSK Corp. v. United States*, 32 CIT 1497, 1502, 593 F. Supp. 2d 1355, 1362–63 (2008) (explaining that "the Court has the discretion to rehear a motion that results in an interlocutory order pursuant to USCIT Rule 59(a)(2)" and that "Rule 59(a)(2) authorizes the Court to rehear any motion before the court, regardless of whether it concerns a final judgment or an appealable order"); *Union Camp Corp. v. United States*, 23 CIT 264, 270, 53 F. Supp. 2d 1310, 1317 (1999) (stating that Rule 59 "is broad enough to cover a rehearing of any matter decided by the Court"); *Timken Co. v. United States*, 6 CIT 76, 77, 569 F. Supp. 65, 68 (1983) (stating that "the court retains the plenary power to modify or alter its prior non-final rulings"). Although the pending motion was filed 31 days after *Rockwell* issued, and although Rule 59(b) specifies that "[a] motion for a new trial or rehearing must be served and filed not later than 30 days after the entry of the . . . order," that 30-day time limit applies only to final judgments and orders, and therefore is no bar here. USCIT R. 59(b); USCIT R. 6(a)(1)(B) (requiring that, in computing time, "every day" is to be counted, "including intermediate Saturdays, Sundays, and legal holidays"); *Timken*, 6 CIT at 78, 569 F. Supp. at 68 (stating that "the time constraints of rule 59(b) apply only to final judgments or orders") (emphasis added); *Union Camp*, 23 CIT at 270–71, 53 F. Supp. 2d at 1317–18 (same); 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2812, p. 190 & n.22 (3d ed. 2014) (explaining that policy basis for strict time limits in Rule 59 is "to promote finality of judgments," a policy "not applicable to an interlocutory order, which . . . is not final and is subject to modification by the court at any time before judgment is entered"); see also *Union Steel*, 35 CIT at ____ & n.2, 804 F. Supp. 2d at 1367 & n.2 (stating that relief is available under Rule 54(b) even where the time for a motion under Rule 59 has expired).

(stating that an action placed on the Reserve Calendar “may remain on the Reserve Calendar for an 18-month period”). However, Rockwell argues that Rule 83(d) “is silent on whether this 30-day advance filing requirement applies to subsequent motions to extend Reserve Calendar time.” Pl.’s Motion at 3; *see also id.* at 1, 4, 6. According to Rockwell, such subsequent motions “[are] governed by Rule 6(b)(1)(A), which governs extensions of time in the Court generally.” *Id.* at 2; *see also id.* at 4–5, 6. In other words, Rockwell contends that the 30-day advance filing requirement set forth in Rule 83(d) “appl[ies] only to motions to extend the initial 18-month Reserve Calendar period, but not to subsequent extensions.” *Id.* at 1–2.

Rockwell notes that the issue presented in the pending motion “is primarily of practical interest” and that the motion “does not seek a change of [the] result” in *Rockwell* because the decision there granted all of the requested extensions of time. Pl.’s Motion at 5–6. Rockwell does not note that each of the 11 motions for an extension of time at issue in *Rockwell* was filed after the applicable Reserve Calendar period had already expired. *See Rockwell*, 38 CIT at ____, ____ F. Supp. 2d at ____, 2014 WL 4071500 * 4 (explaining that, as to all 11 actions at issue, Reserve Calendar period expired June 23, 2014, but Rockwell motions to extend time to maintain actions on Reserve Calendar were not filed until July 2, 2014). Thus, even by Rockwell’s reading of Rule 83(d), the company’s motions were out-of-time.

A review of the admittedly sparse history of Rule 83 and related developments indicates that the 30-day advance filing requirement sprang from concerns that actions were lingering too long on the Reserve Calendar and that the requirements of the Court’s general rule on extensions of time were not sufficient to address the issue. In that context, it appears that the intent behind the 30-day advance filing requirement set forth in Rule 83(d) was to ensure that a movant could not file a motion to extend the time for an action to remain on the Reserve Calendar on the last day of the Reserve Calendar period and thereby, in effect, grant itself an extension of time so that the subject actions would continue to remain on the Reserve Calendar at least until a ruling was made on its motion. The drafters apparently contemplated that requiring that a motion for an extension be filed 30 days in advance would be sufficient (at least in most cases) to allow the motion to be scrutinized and either granted or denied before the existing Reserve Calendar period expired.³

³ *See generally* USCIT R. 83(c) (“Dismissal for Lack of Prosecution”):

A case not removed from the Reserve Calendar within the 18-month period will be dismissed for lack of prosecution and the clerk will enter an order of dismissal without further direction from the court *unless a motion is pending*. If a *pending motion is denied* [such as one of the motions identified in Rule 83(b) (concerning removal from the

In light of the purpose of the 30-day advance filing requirement, there is no apparent reason why that requirement would apply to initial motions for an extension of time but not to subsequent motions. Indeed, if anything, the 30-day advance filing requirement would seem to be more important with respect to subsequent motions. To the extent that Rockwell contends that the text of Rule 83(d) could more “explicitly” and “directly” reflect the spirit and intent of that rule as summarized above, however, Rockwell will find no disagreement here. *See* Pl.’s Motion at 4.⁴

It is also true that practice at the court has not been consistent over the years and may have sown confusion in the ranks of the bar. As Rockwell points out in the pending motion, other members of the bar

Reserve Calendar), but presumably also a motion for an extension of time] and less than 14 days remain in which the case may remain on the Reserve Calendar, the case will remain on the Reserve Calendar for 14 days from the date of entry of the order denying the motion.

(Emphases added.)

⁴ Rockwell’s reading of the second sentence of Rule 83(d) raises questions about other provisions of the rule that the company has not addressed. As discussed above, Rockwell contends that Rule 83(d)’s reference to “the 18-month period” refers solely to the initial 18-month Reserve Calendar period – not to that period as it may be extended by the Court. However, as indicated in note 3 above, Rule 83(c) – like Rule 83(d) – also refers to “the 18-month period”:

A case not removed from the Reserve Calendar within *the 18-month period* will be dismissed for lack of prosecution and the clerk will enter an order of dismissal without further direction from the court unless a motion is pending. . . .

USCIT R. 83(c) (emphasis added). By Rockwell’s logic, Rule 83(c) permits the Court to automatically dismiss an action for lack of prosecution only if the plaintiff defaulted by failing to remove the action from the Reserve Calendar within the initial 18-month Reserve Calendar period; by Rockwell’s logic, such automatic dismissals for lack of prosecution are not authorized where a plaintiff defaults thereafter by failing to remove the action from the Reserve Calendar within an extension of the Reserve Calendar period.

But, again, there is no apparent reason why the sanction of automatic dismissal for lack of prosecution would be limited solely to the initial 18-month Reserve Calendar period and would not apply to that period as it may be extended, particularly in light of the apparent purpose of Rule 83(c) – to promote active management of the Reserve Calendar and to ensure that actions do not languish there. Thus, if anything, the provision for automatic dismissal for lack of prosecution would seem to be not less but more important where a plaintiff defaults after the initial 18-month Reserve Calendar period has been extended one or more times. In fact, the Court previously exercised its authority under Rule 83(c) in two of the actions at issue here, automatically dismissing those actions for lack of prosecution – and one of those automatic dismissals was in an action (*i.e.*, Court No. 0500269) that was *beyond the initial 18-month Reserve Calendar period*. *See Rockwell*, 38 CIT at ___, ___ F. Supp. 2d at ___, 2014 WL 4071500 * 6; Order of Dismissal (April 20, 2007), entered in Court No. 05–00269. Rockwell made no argument that the automatic dismissal of Court No. 0500269 was not authorized by Rule 83(c). *But see* Pl.’s Motion at 2–3 (generally paraphrasing provisions of Rule 83(c), and stating that “a case not removed from the Reserve Calendar *at the end of the 18-month period* is subject to dismissal for lack of prosecution”) (emphasis added).

have expressed surprise at the language in *Rockwell* indicating that the 30-day advance filing requirement set forth in Rule 83(d) applies to all motions for extensions of time to remain on the Reserve Calendar and is not limited to the extension of the initial 18-month Reserve Calendar period. Pl.'s Motion at 2 & n.1 (stating that, since *Rockwell* issued, "several members of the Bar of the Court" have contacted counsel for Rockwell, advising that "they, too, believed the 30 day requirement to apply only to motions to extend the initial 18-month Reserve Calendar period"); *see also id.* at 4.

It is thus appropriate that the potential need for clarification of Rule 83(d) is now before the Court's Advisory Committee, where the matter can be fully aired and any appropriate revisions to the Rules of the Court can be recommended in due course. Rockwell's request for relief in this forum is accordingly denied.

Dated: October 20, 2014

New York, New York

/s/ Delissa A. Ridgway

DELISSA A. RIDGWAY

JUDGE