

# U.S. Customs and Border Protection

Slip Op. 12–155

FORMER EMPLOYEES OF WESTERN DIGITAL TECHNOLOGIES, INC., Plaintiffs,  
v. U.S. SECRETARY OF LABOR, Defendant.

**PUBLIC VERSION**

Before: Donald C. Pogue, Chief Judge  
Court No. 11–00085

[negative determination of eligibility to apply for trade adjustment assistance affirmed]

Dated: December 21, 2012

*James R. Cannon, Jr.* and *Thomas Beline*, Cassidy Levy Kent (USA) LLP, of Washington, DC, for the Plaintiffs.

*Antonia R. Soares*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Jonathan Hammer*, Employment and Training Legal Services, Office of the Solicitor, U.S. Department of Labor.

## OPINION

### **Pogue, Chief Judge:**

Plaintiffs in this action are former employees of Western Digital Technologies, Inc., Hard Drive Development Engineering Group, Lake Forest, California. The Plaintiffs seek review of a negative determination by the United States Department of Labor regarding their eligibility for benefits under the federal Trade Adjustment Assistance program.<sup>1</sup> Plaintiffs petitioned for such benefits on behalf of

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<sup>1</sup> See *Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance*, 75 Fed. Reg. 51,846, 51,849 (Dep't Labor Aug. 23, 2010) (“*Negative Determination*”), *aff'd on reconsideration*, *Western Digital Technologies, Inc., Co[r]porate Headqua[r]ters/Hard Drive Development Division, Lake Forest, CA*, 76 Fed. Reg. 10,403, 10,403 (Dep't Labor Feb. 24, 2011) (notice of negative determination on reconsideration) (“*Negative Determination on Reconsideration*”), *aff'd on remand*, *Western Digital Technologies, Inc.: Hard Drive Development Engineering Group Irvine (Formerly at Lake Forest), CA*, 76 Fed.Reg. 61,746, 61,747 (Dep't Labor Oct. 5, 2011) (notice of negative determination on remand) (“*Negative Determination on Remand*”), *aff'd on 2d remand*, *Western Digital Technologies, Inc., Hard Drive Development Engineering Group Irvine (Formerly at Lake Forest), CA*, 77 Fed. Reg. 8284, 8287 (Dep't Labor Feb. 14, 2012) (notice of negative determination on remand) (“*Negative Determination on Second Remand*”).

workers at their firm who, prior to the termination of their employment in late 2008 to early 2009, were engaged in the supply of engineering functions for the development of hard disk drives. *See* Negative Determination on Remand, 76 Fed. Reg. at 61,746–47.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(d)(1) (2006). As explained below, because the agency’s negative determination is supported by a reasonable reading of the administrative record, the determination will be affirmed.

## BACKGROUND

The Employment and Training Administration of the Department of Labor (“Labor”) will certify a group of workers as eligible to apply for trade adjustment assistance (“TAA”),<sup>2</sup> pursuant to a petition filed under the Trade Act of 1974, if the agency determines that the workers meet the eligibility criteria set out in 19 U.S.C. § 2272. 19 U.S.C. § 2272 (Supp. III 2009).<sup>3</sup> Section 2272 provides that the primary TAA eligibility criteria<sup>4</sup> are met if a “significant number or proportion” of a U.S. firm’s workers have been or are threatened to be “totally or partially separated,” and either increased imports<sup>5</sup> or a shift abroad of production or services<sup>6</sup> “contributed importantly” to the layoffs. *See*

<sup>2</sup> TAA benefits include unemployment compensation, training, job search and relocation allowances, and other employment services. *Former Emps. of Kleinerts, Inc. v. Herman*, 23 CIT 647, 647, 74 F. Supp. 2d 1280, 1282 (1999); *see* 19 U.S.C. §§ 2295–98(2006).

<sup>3</sup> Plaintiffs’ petition, numbered TA-W-72,949, Compl., ECF Nos. 1 & 2, at ¶ c, is governed by the Trade and Globalization Adjustment Assistance Act of 2009, 19 U.S.C. §§ 2252–2401g (Supp. III 2009). *See* Emp’t & Training Admin., U.S. Dep’t of Labor, *Trade Adjustment Assistance for Workers* (comparison of benefits by petition number), available at <http://www.doleta.gov/tradeact/pdf/side-by-side.pdf> (last visited Dec. 20, 2012). Unless otherwise noted, further citation to Title 19 of the U.S. Code is to Supplement III (2009) of the 2006 edition.

<sup>4</sup> Section 2272 additionally provides that, subject to certain conditions, “adversely affected secondary workers” – upstream suppliers or downstream producers of TAA-certified firms – may also be eligible for TAA benefits. 19 U.S.C. § 2272(c). Plaintiffs do not claim to be covered by this subsection.

<sup>5</sup> *See* 19 U.S.C. § 2272(a)(2)(A) (providing that TAA eligibility criteria are met if (i) the sales and/or production of the laying off firm have decreased absolutely; and (ii) there has been a concurrent increase in imports of articles or services “like or directly competitive with” those produced by the laying off firm, or articles like or directly competitive with articles “into which one or more component parts produced by the firm are directly incorporated” or which are “produced directly using services supplied by such firm”, or “articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by [the laying off] firm”; and (iii) “the increase in imports described in clause (ii) contributed importantly to [the] workers’ separation or threat of separation and to the decline in the sales or production of such firm”).

<sup>6</sup> *See* 19 U.S.C. § 2272(a)(2)(B) (providing that TAA eligibility criteria are met if (i) “there has been a shift by such workers’ firm to a foreign country in the production of articles or the supply of services like or directly competitive with articles which are produced or services which are supplied by such firm; or such workers’ firm has acquired from a foreign

19 U.S.C. § 2272(a); *see also Former Emps. of Se. Airlines v. U.S. Sec’y of Labor*, \_\_ CIT \_\_, 774 F. Supp. 2d 1333, 1336 (2011) (“The Trade Act provides for TAA benefits to workers who have been completely displaced as a result of increased imports into, or shifts of production out of, the United States.”) (citing 19 U.S.C. § 2272).

After investigating Plaintiffs’ petition for TAA certification, Labor issued a negative determination, finding that TAA eligibility criteria had not been met. *Negative Determination*, 75 Fed. Reg. at 51,849. Labor affirmed its Negative Determination after conducting additional investigations – first in the course of an administrative proceeding for reconsideration, then in the course of two voluntary remand proceedings subsequent to commencement of this action.<sup>7</sup>

In response to Labor’s inquiry, the subject firm explained that the Plaintiffs’ termination was due to a cost-cutting effort and was not in any way attributable to an increase in imports or a shifting abroad of any production or services. *See Supplemental Admin. R.*, ECF No. 22 (“SAR”) at 27. Labor’s investigations revealed that the subject firm designs new hard drive products in the United States and mass produces those hard drives in Asia, employing U.S.-based hard drive engineers such as Plaintiffs to work as part of the design process and foreign-based engineers to work as part of the manufacturing process. *See SAR* at 30–32. Before the design is approved for mass production, however, the subject firm manufactures prototype hard drives, sometimes in the U.S. and sometimes abroad,<sup>8</sup> to ensure that the new designs are functional. *SAR* at 11. Although prototypes are produced for internal product-development purposes, the subject firm sells a portion of its prototypes after they have been tested. *Id.* Because the subject firm considers the creation of a prototype drive to be a necessary step in the process of designing hard drives, and because the firm considers the design of new hard drives to be the “primary function” of all of its U.S.-based hard disk drive engineers, Plaintiffs’ work at the subject firm was related to the firm’s domestic production

country articles or services that are like or directly competitive with articles which are produced or services which are supplied by such firm,” and (ii) the shift or acquisition of articles or services described in clause (i) “contributed importantly to such workers’ separation or threat of separation”).

<sup>7</sup> *See supra* note 1. Labor explained that, in addition to obtaining supplementary information from the subject firm and soliciting new input from the Plaintiffs, each supplementary investigation confirmed all previously collected information and addressed all of Plaintiffs’ allegations, without altering Labor’s conclusion that the TAA eligibility criteria had not been met. *See Negative Determination on Reconsideration*, 76 Fed. Reg. at 10,403; *Negative Determination on Remand*, 76 Fed. Reg. at 61,747; *Negative Determination on Second Remand*, 77 Fed. Reg. at 8286–87.

<sup>8</sup> The firm explained that “[“  
”] *SAR* at 22.

of hard drive prototypes. *See id.* at 22. However, the subject firm stated that no portion of the firm's domestic production of prototype drives shifted abroad during the relevant time frame. *Id.* at 23.

Labor found that "U.S. aggregate imports of articles like or directly competitive with hard disk drives declined in the relevant time period." *Negative Determination on Remand*, 76 Fed. Reg. at 61,746 (citations to record omitted); *see* 19 U.S.C. § 2272(a)(2)(A)(ii) (requiring an increase in like or directly competitive imports for TAA eligibility pursuant to part (A) of § 2272(a)(2)). In addition, Labor concluded that Plaintiffs' separation from the subject firm was not attributable to any shift of their work abroad. *Negative Determination on Remand*, 76 Fed. Reg. at 61,747; *see* 19 U.S.C. § 2272(a)(2)(B) (requiring a shift to or acquisition from abroad of relevant articles or services for TAA eligibility pursuant to part (B) of § 2272(a)(2)). The agency based this conclusion on its finding that the work of the engineers employed by the firm abroad, as part of the manufacturing process, was not like or directly competitive with the services supplied by U.S.-based engineers like Plaintiffs, who were employed as part of the design process. *See Negative Determination on Remand*, 76 Fed. Reg. at 61,747 ("Because of the stage of production at which the functions are performed, the work performed by the engineers domestically and the engineers abroad is not interchangeable.") (citations to record omitted); *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287 ("Upon review of the facts collected during the earlier investigations and the additional information procured through the second remand investigation, [Labor] has determined that the services provided by engineers at the subject firm's Asian facilities are not like or directly competitive with the services of the engineers located at the subject facility."); 19 U.S.C. § 2272(a)(2)(B) (requiring a shift to or acquisition from abroad of articles or services "like or directly competitive with" those produced or supplied by the firm domestically). Accordingly, the agency affirmed its original negative determination regarding Plaintiffs' eligibility to apply for trade adjustment assistance. *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287.

Plaintiffs now challenge Labor's *Negative Determination on Second Remand*. *See* Cmts. of Pls. Former Employees of Western Digital Technologies, Inc. Regarding the Second Remand Results, ECF Nos. 39 (public) & 40 (confidential) ("Pls.' Br.").

### STANDARD OF REVIEW

The Court will uphold Labor's determination if it is supported by substantial evidence on the record and is otherwise in accordance

with law. See 19 U.S.C. § 2395(b); *Former Emps. of Se. Airlines*, \_\_ CIT at \_\_, 774 F. Supp. 2d at 1335. Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Former Emps. of Barry Callebaut v. Chao*, 357 F.3d 1377, 1380–81 (Fed. Cir. 2004) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). “The reviewing court must take into account contradictory evidence in the record, but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981) (internal quotation marks and citations omitted).

## DISCUSSION

At issue is Labor’s determination that TAA eligibility requirements were not met because neither increased imports nor shifts of production or services abroad contributed importantly to Plaintiffs’ separation from the subject firm. *Negative Determination on Reconsideration*, 76 Fed. Reg. at 10,403. In making this determination, Labor gave credence to the company’s explanation that the termination of Plaintiffs’ employment, which was announced in December of 2008, was part of a cost-cutting effort in response to a global economic downturn. See SAR at 27–31. In the course of its investigation, which included three follow-up inquiries, Labor found no evidence to support Plaintiffs’ claims to the contrary. See *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287. In particular, Labor found no evidence to substantiate Plaintiffs’ claim that their separation was due to a shift abroad of the work that Plaintiffs had performed in the United States. *Id.*

In challenging Labor’s *Negative Determination on Second Remand*, Plaintiffs reiterate their claim that their separation was due to a shift abroad of the work that they had performed domestically. Pls.’ Br. at 9–13.<sup>9</sup> Plaintiffs claim that Labor’s finding that the separation was not attributable to such a shift is not supported by substantial evidence. *Id.* In support of this argument, Plaintiffs challenge Labor’s conclusion that because Plaintiffs’ work was not interchangeable with the work of the engineers that the subject firm employed abroad, changes in the workforce abroad could not have affected Plaintiffs’ worker group, and therefore could not have “contributed importantly”

<sup>9</sup> Plaintiffs do not offer a reading of the record to contradict Labor’s conclusion that no increase in imports contributed importantly to Plaintiffs’ separation from the subject firm. See Pls.’ Br.

to the layoffs at issue. *Id.*; see *Negative Determination on Second Remand*, 77 Fed. Reg. at 8285; 19 U.S.C. § 2272(a)(2)(B). Plaintiffs emphasize record evidence that 1) the subject firm employs engineers in the design and production of prototype hard drives both domestically and abroad; and 2) the engineers employed abroad received training from the domestic engineers, including some of the Plaintiffs. See Pls.' Br. at 10–11.

As Labor explains, however, the conclusion that the subject firm's U.S.- and Asia-based engineers perform functions that are not like or directly competitive with one another is not inconsistent with the evidence emphasized by the Plaintiffs. See *Negative Determination on Second Remand*, 77 Fed. Reg. at 8285–87.

With regard to training, the record reveals that the subject firm's business model is to design new products in the United States and mass manufacture them abroad. *Negative Determination on Remand*, 76 Fed. Reg. at 61,747. Having worked on the product's design through the prototype stage, the domestic engineers routinely provide training to the engineers who will be overseeing the mass production abroad. See *id.* (“[T]he firm states that the foreign engineers . . . must be knowledgeable about the new products [that are developed domestically] in order to carry out their [manufacturing-related] work, so foreign engineers visit the United States to train on the new products to oversee the production at the manufacturing facilities.”). Given this explanation, the evidence of training that Plaintiffs emphasize does not compel the conclusion that the work of the U.S.- and Asia-based engineers is functionally interchangeable. *Id.* (“[T]he training of foreign workers in the U.S. does not show that the roles of the domestic [engineers] and engineers abroad are interchangeable.”) (citations to record omitted). That the subject firm's foreign (manufacturing) engineers appear dependent on training provided by the domestic (design) engineers reasonably supports Labor's conclusion that the foreign engineers cannot function as substitutes for the firm's domestic engineers. See *id.* (“According to the subject firm, the engineering work performed abroad not only requires the engineers to be present at the manufacturing location, but is also different and less complex than the development work performed by the domestic engineers.”).<sup>10</sup>

With regard to the firm's design and production of prototype drives abroad, the investigations revealed that the nature of the company's

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<sup>10</sup> Plaintiffs' reliance on *Elec. Data Sys. Corp., I Solutions Ctr., Fairborn, Ohio*, 71 Fed. Reg. 18,355 (Dep't Labor Apr. 11, 2006) (notice of revised determination on remand), wherein Labor issued a positive determination of TAA eligibility to former employees who showed that foreign-based workers had been trained in the production of the same articles as those



prototype production abroad – and accordingly the function of the engineers employed in such production – substantially differs from the company’s domestic prototype production.<sup>11</sup> Plaintiffs argue that the company’s representations in this regard are contradicted by “numerous exhibits [on record,] including job listings posted in Malaysia by [the subject firm].” See Pls.’ Br. at 11. But Labor conducted a detailed analysis of all such exhibits and concluded that, contrary to Plaintiffs’ assertions, this evidence is consistent with the company’s representations, and the agency’s ultimate conclusion, that the work of the U.S.-based engineers is not like or directly competitive with that of the engineers based abroad. *Negative Determination on Second Remand*, 77 Fed. Reg. at 8285–87.

Thus, for example, Labor noted that “according to the position descriptions [of the Malaysian job listings submitted by the Plaintiffs], none of the vacant positions involved the design or development of hard disk drives.” *Negative Determination on Second Remand*, 77 Fed. Reg. at 8286.<sup>12</sup> Rather, “careful examination of the duties listed for each position establishes that the work of these engineers relates to manufacturing.” *Id.* at 8286 (providing examples and citing to the record).

Plaintiffs also emphasize the record evidence that “failure analysis” is performed by both domestic and foreign engineers employed by the subject firm, arguing that this evidence compels the conclusion that the foreign-based engineering services are like or directly competitive with the services provided by the domestic engineers. Pls.’ Br. at 12. But the subject firm explained that the “failure analysis” performed by the domestic engineers differs from the “failure analysis” performed by the foreign-based engineers. SAR at 12. Whereas the domestic engineers perform failure analysis at the early prototype stages of product development, the foreign-based engineers perform such analysis at the later stages of mass production, prior to market produced by the former employees, *id.* at 18,356, is inapposite. See Pls.’ Br. at 12–13. Unlike the workers in that case, Plaintiffs have not shown here, and Labor’s investigations have not revealed, that the training provided to foreign-based engineers was substantively identical to that required to perform Plaintiffs’ own duties and functions within the firm. See *Negative Determination on Remand*, 76 Fed. Reg. at 61,747.

<sup>11</sup> Specifically, [“

”] SAR at 22.

<sup>12</sup> See also *id.* at 8286–87 (“Close examination of the listings showed that only one position called for ‘co-develop new product and channel feature with U.S. counterpart.’ In any event, the position description does not specify that the ‘co-development’ refers to hard disk drives. None of the other positions listed call for development work of hard disk drives or any other products. Also, out of the 17 listings, only three contain the words ‘develop’ or ‘design’ and these three positions call for the development and design of software and code applications, not hard disk drives, which the subject firm has ascertained is the function of the domestic engineers.”) (citations to the record omitted).

release. *Id.*; see *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287 (addressing Plaintiffs' "failure analysis"-based argument and citing to the record). Accordingly, the record reasonably supports Labor's conclusion that the services provided by the subject firm's foreign-based engineers were not like or directly competitive with those provided by the firm's domestic engineers, including Plaintiffs,<sup>13</sup> notwithstanding the evidence that both groups perform some type of "failure analysis." See *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287; SAR at 12.

Plaintiffs suggest that the court should order Labor to conduct a more thorough investigation. Pls.' Br. at 15–22. But while Plaintiffs appropriately emphasize Labor's affirmative obligation to investigate TAA claims "with the utmost regard for the interests of the petitioning workers,"<sup>14</sup> the agency's authority to act in the workers' interests is cabined by the statutory conditions for TAA eligibility. See 19 U.S.C. § 2272(a).<sup>15</sup> Here, Labor has marshaled the relevant facts<sup>16</sup> and interpreted the evidence to conclude that the statutory conditions for TAA eligibility have not been met. Labor has addressed each of Plaintiffs' claims with specific references to the record, and Plaintiffs' contention that more evidence is required is essentially a disagreement with the agency regarding the conclusions drawn from the record.<sup>17</sup> As discussed above, the record of Labor's investigations

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<sup>13</sup> The court thus needs not, and so does not, address Labor's alternative conclusion that, to the extent that the record could be read to suggest a relevant shift abroad of production, the shift was negligible, and therefore could not serve as a basis for TAA eligibility. See *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287.

<sup>14</sup> Pls.' Br. at 15 (quoting *Former Emps. of Invista, S.a.r.l. v. U.S. Sec'y of Labor*, \_\_ CIT \_\_, 714 F. Supp. 2d 1320, 1336 (2010)); see *Former Emps. of Invista*, \_\_ CIT at \_\_, 714 F. Supp. 2d at 1329 (collecting cases).

<sup>15</sup> See also *Former Emps. of Invista*, \_\_ CIT at \_\_, 714 F. Supp. 2d at 1336 n.22 (citing *United Glass & Ceramic Workers v. Marshall*, 584 F.2d 398, 400 (D.C. Cir. 1978) (quoting legislative history explaining that job losses are not covered by TAA if they "would have occurred regardless of the level of imports, e.g., those resulting from domestic competition, seasonal, cyclical, or technological factors").

<sup>16</sup> See 29 C.F.R. § 90.12 (2009) ("In the course of any [TAA] investigation, representatives of [Labor] shall be authorized to contact and meet with responsible officials of firms, union officials, employees, and any other persons, or organizations, both private and public, as may be necessary to marshal all relevant facts to make a determination on the petition.").

<sup>17</sup> Plaintiffs contend, for example, that the record of Labor's investigations is deficient because Labor's conclusion that Plaintiffs' worker group did not provide the same services as those performed by engineers in Asia was based on a sample of services that "did not include the full range of engineering services provided by the HDD group in the United States and in Asia." Pls.' Br. at 17. But the record reveals that, "although the [employees in the worker group represented by the Plaintiffs] ha[d] different functions and belong[ed] to separately identifiable worker groups, [each of these] workers suppl[ied] services that [were] vertically integrated in the production of hard disk drives . . ." SAR at 29. Thus the record reveals that Labor has already considered the various subgroups within the larger



contains sufficient evidence for a reasonable mind to conclude, as the agency did, that neither an increase in imports nor a shift abroad of production or services contributed importantly to the separation of Plaintiffs' worker group from the subject firm. Moreover, also as discussed, the record as a whole is reasonably consistent with this conclusion.<sup>18</sup> Accordingly, Labor's determination that Plaintiffs' separation from the subject firm was due neither to an increase in imports nor to a shift abroad of production or services is supported by substantial evidence. *See* 19 U.S.C. § 2395(b).

### CONCLUSION

For the reasons stated above, Labor's *Negative Determination on Second Remand*, 77 Fed. Reg. at 8287, is affirmed. Judgment will be entered accordingly.

Dated: December 21, 2012

New York, NY

/s/ Donald C. Pogue

DONALD C. POGUE, CHIEF JUDGE

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worker group and determined that this evidence is consistent with Labor's analysis of this case.

Plaintiffs also contend that the record remains incomplete because it lacks evidence regarding prototype production in the United States and Asia. Pls.' Br. at 18–20. But the record does contain information in this regard. *See* SAR at 23 ([

]), 38–39 (providing Labor's analysis of this information). In any event, the record reasonably supports the conclusion that the firm's domestic prototype production significantly differs from the firm's prototype production abroad. *See id.* at 22 ([

”]).

Finally, Plaintiffs contend that the record is incomplete because “[i]t is unclear from the record whether engineering services were formerly provided by the [worker] group [represented by the Plaintiffs] in support of wafer production or domestic production of other components[,] [and] the record [does not] contain information to determine whether such functions were shifted to engineers in Asia.” Pls.' Br. at 20–21. But the existing record already sufficiently supports the conclusion that Plaintiffs' worker group was not involved in the domestic production of wafers or other components, because such components are designed by a separate group of engineers at a different facility. SAR at 21.

<sup>18</sup> *Compare with Former Emps. of Invista*, \_\_ CIT at \_\_, 714 F. Supp. 2d at 1329 (relied on in Pls.' Br. at 15–16) (“[T]he administrative record in this case was replete with evidence supporting the Workers' claim that their terminations were attributable to . . . the 2004 shift of . . . production to Mexico; and, moreover, . . . the evidence to the contrary (including, in particular, the statement [relied on by the agency]) was not only scant, but also weak.” (internal quotation marks and citation omitted)) (awarding the plaintiffs attorneys' fees and expenses, pursuant to the Equal Access to Justice Act).

## Slip Op. 13-9

US MAGNESIUM LLC, Plaintiff, v. UNITED STATES, Defendant, and  
TIANJIN MAGNESIUM INTERNATIONAL CO., LTD., Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge  
Court No.: 12-00006  
PUBLIC VERSION

**Held:** Plaintiff's motion is granted in part so that Commerce may reconsider its decision not to extend the deadline for USM's untimely submission as well as the surrogate values for labor, financial ratios, and truck freight rates. Plaintiff's motion is denied with regard to TMI's U.S. expenses. The court defers judgment on the issue of retort classification so that Commerce may reconsider its determination following its analysis of the untimely submission on remand.

Dated: January 22, 2013

*King & Spalding LLP*, (Stephen A. Jones and Jeffery B. Denning) for US Magnesium LLC, Plaintiff.

*Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Renee Gerber* and *Ryan M. Majerus*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Melissa M. Brewer*, Of Counsel, for the United States, Defendant.

*Riggle & Craven*, (*David A. Riggle*, *Saichang Xu*, and *David J. Craven*) for Tianjin Magnesium International Co., Ltd., Defendant-Intervenor.

**OPINION and ORDER****TSOUCALAS, Senior Judge:**

Plaintiff US Magnesium LLC ("USM") moves for judgment on the agency record challenging the determination by the Department of Commerce, International Trade Administration ("Commerce") in *Pure Magnesium From the People's Republic of China: Final Results of the 2009-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 Fed. Reg. 76,945 (Dec. 9, 2011) I.A. Access Public Rec. 31 ("*Final Results*").<sup>1</sup> Commerce and defendant-intervenor Tianjin Magnesium International Co., Ltd. ("TMI") oppose USM's motion.

**Background**

The administrative review at issue concerns pure magnesium TMI imported from the People's Republic of China ("PRC") during the period of review ("POR") beginning May 1, 2009 and ending April 30,

<sup>1</sup> Hereinafter all documents in the public record will be designated "P.R." and all documents in the confidential record designated "C.R." without further specification except where relevant. Additionally, the abbreviation "I.A." will refer to portions of the confidential and public records filed in Commerce's electronic filing system, I.A. Access.

2010. *See id.* at 76,945. TMI imports pure magnesium supplied by a sole producer, [[ ]]. P.R. 13 at 11. [[ ]] produces pure magnesium via the “Pidgeon” process. Under the “Pidgeon” process, the producer first treats magnesium-bearing dolomite in a kiln to produce calcined dolomite. The producer then mixes the calcined dolomite with ferrosilicon and fluorite power and presses the mixture into balls or briquettes. In order to purify the magnesium — chemically and physically separate it from the other inputs — the producer places the pressed mixture into retorts, which are “steel tubes placed under a vacuum in a furnace.” Def.’s Opp. Pl.’s Mot. J. Agency R. at 5 (“Def.’s Br.”). The high heat from the furnace vaporizes the magnesium, which travels through the retort and then “condense[s] into a highly purified form.” *Id.* at 5; *See Pure Magnesium from the PRC: Issues and Decision Memorandum for the Final Results of the 2009–2010 Administrative Review* at 7 n.39, Inv. No. A-570–832 (Dec. 5, 2011) (“*I&D Memo*”). TMI reported that [[ ]] rented retorts during the POR. *See* P.R. 45 at 7.

TMI also reported that Mr. James Gammons performed certain “ministerial activities” in the U.S. on behalf of TMI. P.R. 61 at 3. The “activities” focused on [[ ]].” *Id.* TMI claimed that “Mr. Gammons was not a sales agent for TMI” and that he did not take possession of subject merchandise in the U.S. prior to sales to U.S. customers. *Id.*

During the review, Commerce used its nonmarket economy<sup>2</sup> (“NME”) methodology to construct the normal value<sup>3</sup> (“NV”), *Pure Magnesium from the PRC: Preliminary Results of the 2009–2010 Antidumping Duty Administrative Review*, 76 Fed. Reg. 33,194, 33,195 (June 8, 2011) (“*Preliminary Results*”), using surrogate data to value the factors of production (“FOP”). *See* 19 U.S.C. § 1677b(c)(1). Commerce selected India as the surrogate country and used Indian data to value TMI’s FOP. *Preliminary Results*, 76 Fed. Reg. at 33,195. Commerce classified retorts as an indirect material rather than as a direct material, treating them as factory overhead in the FOP calculation. P.R. 64 at 9. Additionally, Commerce determined that “the subject merchandise was sold directly to the unaffiliated customers in

<sup>2</sup> “The term ‘nonmarket economy country’ means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” Section 771(18) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(18) (2006). All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

<sup>3</sup> “Normal value” is “the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country.” 19 U.S.C. §1677b(a)(1)(B)(i).

the [U.S.] prior to importation.” *Preliminary Results*, 76 Fed. Reg. at 33,196. Therefore, Commerce concluded that all of TMI’s U.S. sales were export price<sup>4</sup> (“EP”) sales and did not calculate a separate constructed export price (“CEP”)<sup>5</sup> for TMI’s U.S. sales. *Id.* Commerce did not adjust EP to reflect the expenses TMI incurred in association with services Mr. James Gammons provided for TMI in the U.S. *See I&D Memo* at 3. On June 30, 2010 Commerce issued the preliminary results of the review, assigning TMI a weighted average dumping margin of 0.00%. *Preliminary Results*, 76 Fed. Reg. at 33,200.

On September 1, 2011, nearly eleven months after the October 19, 2010 deadline for the submission of new factual information, USM submitted a Chinese magnesium industry bulletin which allegedly indicated that [[ ]] produced retorts during the POR rather than rented them, as TMI reported. *See I.A.P.R.* 11 at 2. Commerce rejected USM’s submission, concluding that “some of the documents submitted by [USM] were clearly available prior to the deadline for submission of factual information.” *Id.*

On December 9, 2011 Commerce issued the *Final Results*. *See Final Results*, 76 Fed. Reg. at 76,945. Although Commerce made certain changes to the margin calculation, it again assigned TMI a weighted average dumping margin of 0.00%. *Id.* at 76,947.

## JURISDICTION and STANDARD OF REVIEW

This Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c).

This Court will uphold Commerce’s determination unless it is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

## DISCUSSION

USM argues that the *Final Results* are unsupported by substantial evidence and are otherwise not in accord with the law with respect to: Commerce’s classification of retorts as an indirect material; the sur-

<sup>4</sup> “Export price” refers to “the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.” 19 U.S.C. § 1677a(a).

<sup>5</sup> “Constructed export price” refers to “the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter” to an unaffiliated purchaser. 19 U.S.C. § 1677a(b).

rogate values used to calculate financial ratios, labor rates, and truck freight rates; and Commerce's refusal to adjust the U.S. price to reflect movement expenses associated with services Mr. James Gammons provided for TMI. *See* Pl.'s Br. Supp. Mot. J. Agency R. at 2–5 (“Pl.’s Br.”). Additionally, USM argues that Commerce abused its discretion by rejecting USM’s untimely submission. *Id.* at 1–2. Commerce asks for voluntary remand in order to reconsider the surrogate values for labor and financial ratios, but opposes USM’s motion in all other respects. *See* Def.’s Br. at 1–2.

### I. USM’s Untimely Submission

During the review, TMI reported that [[ ]] rented the retorts it used in the production of pure magnesium during the POR and that rental equipment was not treated as a direct expense for accounting purposes in the PRC. *See* P.R. 45 at 7. Commerce classified retorts as an indirect material in the preliminary results of the review. P.R. 64 at 9. USM challenged that determination before Commerce, P.R. 79 at 5–23, and on September 1, 2011, submitted a newly-discovered Chinese magnesium industry bulletin which allegedly indicated that [[ ]] produced retorts during the POR. *See* I.A.P.R. 11 at 2. USM also submitted two pieces of corroborating evidence, a 2006 magnesium industry directory and a website USM alleges belongs to [[ ]]. *Id.* Although USM made the submission almost eleven months after the deadline for submission of new factual information, it insisted that Commerce place the submission on the record because it allegedly demonstrated that TMI deliberately misled Commerce by reporting that [[ ]] rented retorts. *Id.* Commerce rejected USM’s submission because the website and the 2006 directory were “clearly available prior to the deadline for submission of factual information.” *Id.* Commerce continued to classify retorts as an indirect material in the *Final Results*. *See I&D Memo* at 6–9. USM argues that Commerce abused its discretion because it failed to address prima facie evidence of fraud contained in the untimely submission.<sup>6</sup> *See* Pl.’s Br. at 14–16.

Commerce has the discretion to establish and enforce deadlines for the submission of factual information. *See Grobest*, 36 CIT at \_\_, 815

<sup>6</sup> USM also argues that Commerce abused its discretion because the bulletin would have prevented a 20% understatement in the NV by ensuring that Commerce properly classified retorts as a direct material. Pl.’s Br. at 10–14. USM’s argument is unpersuasive as the bulletin would not have negated Commerce’s retort classification in and of itself, but would only be a factor in the classification determination. *Cf. Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT \_\_, \_\_, 815 F. Supp. 2d 1342, 1366–67 (2012) (reversing Commerce’s decision to reject respondent’s untimely submission of separate rate eligibility certification in part because it directly contradicted Commerce’s decision to apply Vietnam-wide rates to respondent).

F. Supp. 2d at 1365 (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206–07 (Fed. Cir. 1995)). Commerce may extend such deadlines where it finds that there is “good cause” to do so. 19 C.F.R. § 351.302(b) (2012). However, “Commerce’s discretion in this regard is not absolute.” *Grobest*, 36 CIT at \_\_, 815 F. Supp. 2d at 1365 (citing *NTN Bearing*, 74 F.3d at 1207). In determining whether Commerce’s rejection of an untimely submission amounts to an abuse of discretion, this Court considers “whether the interests of accuracy and fairness outweigh the burden placed on [Commerce] and the interest in finality.” *Id.*

Here, the court finds that Commerce abused its discretion because it failed to address prima facie evidence of fraud USM raised while the record was still open. Courts have clearly indicated that prima facie evidence of fraud is to be treated differently than other untimely submitted factual information, allowing and even ordering consideration of such evidence after the *closure* of administrative proceedings. See *Home Prods. Int’l, Inc. v. United States*, 633 F.3d 1369, 1381 (Fed. Cir. 2011) (ordering remand where prima facie evidence of fraud was discovered after the close of the administrative review); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1361 (Fed. Cir. 2008) (recognizing that Commerce’s power to reconsider a determination is “even more fundamental when . . . it is exercised to protect the integrity of its own proceedings from fraud”); *Tianjin Magnesium Int’l Co. v. United States*, 36 CIT \_\_, \_\_, 836 F. Supp. 2d 1377, 1381 (2012) (Tsoucalas, Senior J.) (upholding Commerce’s decision to consider prima facie evidence of fraud discovered during remand).<sup>7</sup>

Here, USM discovered evidence that [[ ]] *produced* retorts after TMI reported that [[ ]] *rented* retorts. See I.A.P.R. 11 at 2. However, in dismissing USM submission, Commerce limited its analysis to one factor: some of the documents were available before the deadline. *Id.* Because of this single-minded focus, Commerce overlooked the possibility that TMI deliberately failed to report information to which it also clearly had access. Prima facie evidence of fraud concerning proper classification of FOP undermines the accuracy and fairness of a review. *Grobest*, 36 CIT at \_\_, 815 F. Supp. 2d at 1365. Commerce should have exercised its authority to protect the review from fraud

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<sup>7</sup> In a recent case evidencing the courts’ treatment of untimely discovered evidence of fraud, this Court granted Commerce’s motion to expand the scope of an already ordered remand to consider new evidence that a party provided false information during the review. *Ad Hoc Shrimp Trade Action Comm. v. United States*, 37 CIT \_\_, \_\_, Slip Op. 13–4, at 9 (Jan. 9, 2013). The Court held that Commerce provided compelling justification for considering the untimely discovered evidence: there was “information sufficient to persuade [Commerce] that its determinations in the administrative review at issue may have been based on information that was false or incomplete.” *Id.* at 8.



by addressing that evidence in its analysis. *Tokyo Kikai*, 529 F.3d at 1361.

Additionally, the burden on Commerce and its interest in finality are relatively minimal in the instant case. First, USM submitted the information over two months before Commerce placed information and new comments concerning the surrogate value for truck freight onto the record and three months before Commerce issued the *Final Results*.<sup>8</sup> See *NTN Bearing*, 74 F.3d at 1208 (noting that because preliminary results are subject to change, “the tension between finality and correctness simply [does] not exist” during that stage). Second, USM presented the evidence while the proceedings were *still open* and Commerce did not address the apparent fraud in its determination. See I.A.P.R. 11 at 2. As noted above, Courts approved and even ordered the reopening of proceedings to consider prima facie evidence of fraud discovered after the close of proceedings. See *Home Prods.*, 633 F.3d at 1381; *Tokyo Kikai*, 529 F.3d at 1361; *Tianjin Magnesium*, 36 CIT at \_\_\_, 836 F. Supp. 2d at 1381. Therefore, taking into account the relatively low burden of accepting the late submission in this case, Commerce’s failure to address prima facie evidence of fraud that USM presented during the proceeding was an abuse of discretion.

TMI argues that Commerce’s determination should nevertheless be upheld because the information contained in the bulletin was immaterial to Commerce’s retort classification. See Def. Intervenor Resp. Br. at 4. Specifically, TMI argues that Commerce did not consider whether [ ] rented or produced retorts when classifying them as indirect materials. *Id.* However, TMI’s argument must fail for a three reasons. First, Commerce made its decision without considering the information in USM’s submission because it was not on the record. Second, classifying retorts as a direct material results in a higher NV and, accordingly, alters the dumping margin. See Pl.’s Br. at 12. Finally, should USM’s submission ultimately indicate fraudulent conduct by TMI, Commerce may decide to apply adverse facts available to the issue of retort classification. See 19 U.S.C. § 1677e(b). The information contained in the bulletin is material to the classification of retorts and, as such, Commerce should have considered whether the bulletin contained prima facie evidence of fraud.

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<sup>8</sup> Commerce insists that its decision to solicit and place the information concerning surrogate data for truck freight onto the record is distinguishable from the instant issue because Commerce used that information during the preliminary results stage but “inadvertently failed to place it on the record.” Def.’s Br. at 13. However, this argument is unconvincing because it overlooks Commerce’s decision to place new comments from both parties on the record as well. See Pl.’s Br. at 10 & n.11, 13; I.A.P.R. 23.

Accordingly, the court remands this issue so that Commerce may consider whether the bulletin presents prima facie evidence of fraud. On remand, Commerce is not required to place the bulletin and the associated materials onto the record, but it must provide an adequate explanation addressing the evidence of fraud should it elect not to do so. To guide its decision, Commerce should consider the factors outlined in *Home Products*, including “the interests in finality, the extent of the inaccuracies in the . . . administrative review, whether fraud existed in the . . . administrative review, the strength of the evidence of fraud, the level of materiality, and other appropriate factors.” *Home Prods.*, 633 F.3d at 1381.

## II. Classification of Retorts

Commerce classified retorts as indirect materials because they “are not physically incorporated into the final magnesium product and are replaced too infrequently to be considered a direct material.” See *I&D Memo* at 8. Commerce also determined that [[ ]] classifies retorts as an indirect material in its accounting records. *Id.* at 7. As such, Commerce accounted for retort costs as factory overhead in the FOP calculation. *Id.* at 8.

USM claims that Commerce erroneously reclassified retorts as an indirect material, treating them as factory overhead in the FOP calculation and understating the NV. See Pl.’s Br. at 17. USM insists that retorts should be classified instead as a direct material, *id.*, and offers four arguments in support of its claim: (1) Commerce wrongfully reclassified retorts as an indirect material, ignoring the accounting practices of [[ ]] without showing that those practices were distortive; (2) Commerce limited its analysis to physical incorporation and consumption frequency while ignoring evidence that detracted from its conclusion in violation of this Court’s holding in *Bridgestone Americas, Inc. v. United States*, 34 CIT \_\_\_, 710 F. Supp. 2d 1359 (2010); (3) Commerce failed to articulate a standard for its useful consumption frequency determination; and (4) Industry practice is to treat retorts as a direct material. See Pl.’s Br. at 17–28. Commerce argues that its determination was consistent with both [[ ]]’s accounting records and the holding in *Bridgestone*. See Def.’s Br. at 17–25.

The court cannot now determine whether Commerce’s classification was based on substantial evidence because Commerce may choose to place USM’s untimely submission on the record during the remand proceeding. The results of that determination will potentially impact Commerce’s classification of retorts. Accordingly, the court will defer

further consideration of this issue in order to allow Commerce to revisit its classification of retorts in light of its decision concerning USM's untimely submission. See *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT \_\_, \_\_, 647 F. Supp. 2d 1368, 1379 (2009) (deferring judgment on Commerce's surrogate value selection because it would likely be impacted by remand result of the surrogate country determination).

### III. Surrogate Values

"Commerce ordinarily determines the [NV] of subject merchandise of an exporter or producer from a [NME] country 'on the basis of the value of the [FOP] utilized in producing the merchandise.'" *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT \_\_, \_\_, 815 F. Supp. 2d 1311, 1316 (2012) (quoting 19 U.S.C. § 1677b(c)(1)). This procedure seeks "to assess the 'price or costs' of [FOP]" of subject merchandise in a comparable market economy "in an attempt to construct a hypothetical market value of that product." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999). Because "the process of constructing foreign market value for a producer in a [NME] is difficult and necessarily imprecise," *id.* at 1377 (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997)), Commerce must use the "best available information" to select surrogate values for each of the FOP. 19 U.S.C. § 1677b(c)(1).

When selecting the best available surrogate value, Commerce "normally will use publicly available information to value [FOP]," 19 C.F.R. § 351.408(c)(1), and it prefers to use data "reflect[ing] a broad market average . . . contemporaneous with the period of review, specific to the input in question, and exclusive of taxes on exports." *Fuwei Films (Shandong) Co. v. United States*, 36 CIT \_\_, \_\_, 837 F. Supp. 2d 1347, 1350–51 (2012). Commerce has "broad discretion to determine the 'best available information.'" *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (quoting *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001)). When reviewing Commerce's surrogate value selection, "[t]he Court's role is not to make that determination anew, but rather to decide 'whether a reasonable mind could conclude that Commerce chose the best available information.'" *China First Pencil Co. v. United States*, 34 CIT \_\_, \_\_, 721 F. Supp. 2d 1369, 1375 (2010) (quoting *QVD Food Co. v. United States*, 34 CIT \_\_, \_\_, 721 F. Supp. 2d 1311, 1315 (2010), *aff'd*, 658 F.3d 1318 (Fed. Cir. 2011)).

#### A. Surrogate Value for Truck Freight

Commerce selected Infobanc as the surrogate for truck freight rates in India because "Infobanc data are contemporaneous, countrywide,

and identify the relevant time period, distances, and weights.” *I&D Memo* at 16. Additionally, Commerce noted that it has “traditionally relied on truck freight data published by Infobanc to determine the [surrogate value] for inland freight.” *Id.* Although Commerce acknowledged flaws and omissions in the Infobanc rates, it still considered them to be the best available information because of flaws in the two alternative surrogates suggested by USM, World Bank’s rates from its survey “Trading Across Borders in India” and the rates from Gati, Ltd. (“Gati”), a truck freight company operating in India. *See id.* at 16–18. Specifically, Commerce rejected World Bank’s rates because they included the prices of various means of inland transportation, *id.* at 16–17, and Gati’s rates because it prefers to use rates that “reflect[] numerous transactions between many buyers and sellers” over the rates from a single company. *Id.* at 18. USM argues that Infobanc rates are unreliable and Commerce’s selection was unsupported by substantial evidence in the record. *See Pl.’s Br.* at 31–37.<sup>9</sup>

“Commerce is not permitted to select a surrogate value by default.” *Taian Ziyang Food Co. v. United States*, 35 CIT \_\_, \_\_, 783 F. Supp. 2d 1292, 1328 (2011). When choosing between imperfect data sets, “Commerce’s analysis must do more than simply identify flaws in the data sets it rejects.” *Guangdong Chems. Imp. & Exp. Corp. v. United States*, 30 CIT 1412, 1417, 460 F. Supp. 2d 1365, 1369 (2006). “[T]he law requires Commerce to make a reasoned decision as to the source on which it chooses to rely, and to both adequately explain its rationale and support its decision by reference to substantial evidence in the record.” *Taian Ziyang*, 35 CIT at \_\_, 783 F. Supp. 2d 1292 at 1329. Commerce erred in failing to support its selection of Infobanc rates with substantial evidence and in ignoring contradictory evidence on the record.

First, Commerce does not appear to have supported its determination with reference to substantial evidence in the record. As noted above, Commerce stated that it selected Infobanc rates because they are “contemporaneous, country-wide, and identify the relevant time period, distances, and weights.” *I&D Memo* at 16. Underlying that finding is Commerce’s conclusion that Infobanc rates “represent actual transaction prices reflecting truck freight between a number of Indian cities.” *Def.’s Br.* at 32. However, Commerce does not cite any evidence in the record in support of this claim. *See id.* at 32–33. Instead, Commerce cites earlier reviews where it relied on Infobanc

<sup>9</sup> USM also asks that the court order Commerce to select World Bank rates, Gati’s rates, or both. *See Pl.’s Br.* at 37. However, this Court will not review alternative surrogate value decisions *de novo* in order to replace Commerce’s selection with one of its own. *See China First Pencil Co.*, 34 CIT at \_\_, 721 F. Supp. 2d at 1375 (quoting *QVD Food Co.*, 34 CIT at \_\_, 721 F. Supp. 2d at 1315).

rates. *See id.* (citing *Wooden Bedroom Furniture from the PRC: Final Results and Final Rescission in Part*, 75 Fed. Reg. 50,992 (Aug. 18, 2010) and *Certain New Pneumatic Off-the-Road Tires from the PRC: Final Results of the 2009–2010 Antidumping Duty Administrative Review and Final Rescission, in Part*, 77 Fed. Reg. 14,495 (Mar. 12, 2012)). However, Commerce’s reliance on Infobanc in earlier reviews simply does not support its present conclusion that Infobanc rates reflect real transaction prices throughout India.<sup>10</sup> Moreover, Commerce’s proffered evidence fails to establish a link between the rates and any actual transaction prices. Without record evidence to support the use of Infobanc rates, a reasonable person could not select them as the best available surrogate. *China First Pencil Co.*, 34 CIT at \_\_, 721 F. Supp 2d at 1375.

Second, Commerce’s selection is flawed because the record does not contain any explanatory information indicating the reliability, sources, or methodology behind Infobanc rates. *See Allied Pac. Food (Dalian) Co. v. United States*, 34 CIT \_\_, \_\_, 716 F. Supp. 2d 1339, 1350 (2010) (sustaining Commerce’s decision to reject a proposed surrogate where record evidence indicated that the prices “lack[ed] supporting data on total value and volume and ha[d] deficiencies with respect to count size”); *Wuhan Bee Healthy Co. v. United States*, 31 CIT 1182, 1195 (2007) (not published in the Federal Supplement) (sustaining Commerce’s decision to reject an Indiainfoline article because it contained “no additional information on the author’s qualifications or the sources of his information”). Here, USM specifically points out that “the essential terms of the posted rates are unknown, including whether the rates (1) relate to offers for shipments or reflect actual transactions, (2) apply to containerized or bulk shipments, (3) reflect long term contract or spot prices, and (4) are inclusive of loading and unloading costs.” Pl.’s Br. at 34–35. While Commerce itself recognized this infirmity, admitting that it was “unclear whether Infobanc truck rate data on the record include costs associated with those activities,” *I&D Memo* at 18, it overlooked this flaw because it “assume[d] the surrogate truck freight rate used includes all costs associated with activities relating to truck freight, absent

<sup>10</sup> Commerce argues, by reference to earlier reviews, that Infobanc’s website has a “Directory of Logistics Operators, which would indicate that Infobanc data is likely not from a single logistics company.” *See* Def.’s Br. at 33 (citing *Certain New Pneumatic Off-the-Road Tires from the PRC: Issues and Decision Memorandum for the Final Results of the 2009–2010 Administrative Review of the Antidumping Duty Order* at 18, Inv. No. A-570–912 (Mar. 5, 2012) (emphasis added). However, that Commerce previously found that Infobanc possibly sources its information from multiple companies is not persuasive, especially when the record lacks evidence in support of that conclusion.

evidence to the contrary.” *Id.* In fact, the record contains little information concerning the Infobanc data, as each set of monthly prices merely includes the single explanatory phrase: “Rupees per tonne for nine tonnes.” *See generally* I.A.P.R. 20 Att. 2. Ultimately, Commerce fails to identify evidence in the record sufficient to demonstrate the reliability of Infobanc rates.

Further, record evidence indicates that during the POR there was a significant divergence between Infobanc rates and diesel fuel prices, which comprise a significant portion of truck freight rates. *See* I.A.P.R. 20 Att. 2; P.R. 56 Ex. 1, Att. 8. The record demonstrates that Infobanc rates fell 17% during the POR, I.A.P.R. 20 Att. 2; Pl.’s Br. at 33 n.53, while diesel fuel prices increased by 17%. *See* P.R. 56 Ex. 1, Att. 8; Pl.’s Br. at 32 n.50. Commerce disagreed with USM’s characterization of the price trends, arguing that USM “misconstrue[d] the circumstances” in which the diesel prices were measured by basing its calculations on inflated prices. *See I&D Memo* at 17. Commerce’s conclusion is contradicted by the record, which contains uninflated prices from Indian Oil Corp. during the POR depicting the price increase in diesel fuel. *See* P.R. 56 Ex. 1, Att. 8.

Commerce argues that Infobanc data is still the best available information because of flaws in the alternative data sets. *See I&D Memo* at 18. However, Commerce’s rebuttal of World Bank and Gati data does not cure its failure to adequately explain its reliance upon Infobanc data. *See Guangdong Chems.*, 30 CIT at 1417, 460 F. Supp. 2d at 1369; *Longkou Haimeng Machinery Co. v. United States*, 32 CIT 1142, 1164–65, 581 F. Supp. 2d 1344, 1363–64 (ordering remand where Commerce provided adequate reasoning for rejecting potential surrogate data but failed to adequately “explain its reliance” on the data set it selected) (Tsoucalas, Senior J.). Commerce was still required to provide a reasonable explanation of its selection of Infobanc rates with substantial evidence from the record. *See Taian Ziyang*, 35 CIT at \_\_\_, 783 F. Supp. 2d 1292 at 1329.

For the foregoing reasons, the court must remand Commerce’s determination. On remand Commerce must either adequately explain its rationale for selecting Infobanc data with support from substantial evidence in the record or select a new surrogate for truck freight rates.

## **B. Surrogate Value for Financial Ratios**

Commerce selected the financial statements of Hindalco Industries Ltd. (“Hindalco”) to calculate surrogate financial ratios. *I&D Memo* at 11. USM argues that Hindalco’s financial statements were not the



best available information because the majority of Hindalco's production is dedicated to non-comparable merchandise and Hindalco received countervailable subsidies during the POR. *See* Pl.'s Br. at 28–31. Commerce “requests a remand to reconsider [USM]’s argument concerning Commerce’s selection of Hindalco’s financial statement for calculating surrogate financial ratios and to determine whether Hindalco’s financial statement continues to be the best available information on the record.” Def.’s Br. at 35. Accordingly, USM’s request to remand for reconsideration of the surrogate financial ratios is granted.

### C. Surrogate Value for Labor

USM alleges that “Commerce made two errors when calculating the surrogate value for labor”: (1) Commerce selected the wrong base period for the inflation adjustment, using May 1, 2007 through April 30, 2008 instead of April 1, 2007 through March 31, 2008 and (2) “Commerce derived the inflation adjustment using India’s wholesale price index, when its labor policy bulletin identified the Consumer Price Index as the preferred index.” Pl.’s Br. at 39. Commerce requests that this Court remand the surrogate for labor so that it might “examine these allegations.” Def.’s Br. at 34. Accordingly, USM’s request to remand for reconsideration of the surrogate value for labor is granted.

### III. U.S. Movement Expenses

During the review, TMI reported that Mr. James Gammons engaged in certain “ministerial activities” on behalf of TMI. P.R. 61 at 3. Commerce concluded that TMI incurred “expenses on facilitation” in association with the services Mr. Gammons provided, which included “contact[ing] customhouse brokers, freight forwarders, trucking companies, [and] warehouse companies.” *I&D Memo* at 4. However, Commerce determined that TMI did not incur any selling expenses in the U.S. and that “the record contains no evidence that Mr. Gammons engaged in sales of the subject merchandise on behalf of TMI or took possession of the subject merchandise.” *Id.* Thus, Commerce decided not to adjust the U.S. sales price to reflect the expenses TMI incurred in payment of Mr. Gammons’ services. *Id.* Additionally, Commerce noted that all of TMI’s U.S. sales were EP sales<sup>11</sup> and therefore TMI was not required to report sales expenses incurred in the U.S. be-

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<sup>11</sup> Commerce calculates EP “if the first sale to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for export to the United States is made by the producer or exporter in the foreign market *prior* to the date of importation.” Import Administration, *Antidumping Manual*, ch. 7, p. 3 (Oct. 13, 2009) (emphasis added).

cause generally such expenses “are captured in the surrogate financial ratios under the NME FOP methodology to calculate [NV] for EP sales.” *Id.* USM argues that the expenses at issue were movement expenses and therefore Commerce was required to deduct them from the U.S. price under 19 U.S.C. § 1677a(c)(2)(a) regardless of whether they were associated with CEP or EP sales. *See* Pl.’s Br. at 39.

When calculating EP or CEP, Commerce is directed to reduce the price by “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and [U.S.] import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the [U.S.]” 19 U.S.C. § 1677a(c)(2)(A). When calculating CEP, Commerce makes certain additional adjustments for selling expenses incurred in the U.S., including commissions, credit expenses, guarantees, and warranties. *See* 19 U.S.C. § 1677a(d)(1). However, under the NME methodology, Commerce does not adjust EP for those expenses incurred in the U.S., as they are included in the FOP calculation of NV under selling, general and administrative expenses. *See Antidumping Manual*, ch. 10 at p. 11; *I&D Memo* at 4. The issue before the court is whether the expenses TMI incurred were movement expenses, for which Commerce must adjust U.S. sales price under 19 U.S.C. § 1677a(c)(2)(A).

Here, Commerce’s decision not to adjust EP was supported by substantial evidence because the expenses associated with Mr. Gammon’s services are not movement expenses. *See* 19 U.S.C. § 1677a(c)(2)(A). The services Mr. Gammons provided, which included “contact[ing] customshouse brokers, freight forwarders, trucking companies, [and] warehouse companies,” *I&D Memo* at 4, were too attenuated from the actual movement of subject merchandise to be considered movement expenses. Mr. Gammons did not move or store the goods nor was he compensated for such services. The record supports Commerce’s conclusion that Mr. Gammons “contacted” such service providers on behalf of TMI, but did not enter contracts or act as an agent on TMI’s behalf. *See* P.R. 61 at 3. The prior reviews USM cites are unpersuasive because they are easily distinguishable from the instant case: they concern costs associated with the *actual movement* of goods. *See Issues and Decision Memorandum for the Final Determination in the Antidumping Investigation of Chlorinated Isocyanurates from Spain* at 20, Inv. No. A-469-814 (May 2, 2005) (freight forwarding costs are an element of U.S. movement expenses) and *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicon Metal from*

*the Russian Federation*, 67 Fed. Reg. 59,253, 59,261–62 (Sept. 20, 2002) (U.S. inland freight costs are an element of U.S. movement expenses). The “expenses on facilitation,” *I&D Memo* at 4, associated with Mr. Gammons’ services cannot be considered movement expenses. Therefore, Commerce’s determination regarding Mr. Gammons’ services was reasonable.

### CONCLUSION

For the foregoing reasons the court concludes that the *Final Results* are sustained with regard to the U.S. movement expenses but remanded as to USM’s untimely submission and the surrogate values for truck freight, labor, and financial ratios. The court defers judgment on the issue of retort classification so Commerce has an opportunity to reconsider its chosen classification should Commerce place USM’s untimely submission on the record during remand.

### ORDER

In accordance with the above, it is hereby

**ORDERED** that this case is to be remanded to the United States Department of Commerce, International Trade Administration, to reconsider its findings regarding USM’s untimely submission and the surrogate values for truck freight, labor, and financial ratios; and it is further

**ORDERED** that the *Final Results* are sustained with respect to United States movement expenses; and it is further

**ORDERED** that remand results are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

Dated: January 22, 2013

New York, New York

/s/ NICHOLAS TSOUCALAS

NICHOLAS TSOUCALAS  
SENIOR JUDGE

Slip Op. 13–10

FUWEI FILMS (SHANDONG) CO., LTD., Plaintiff, v. UNITED STATES,  
Defendant.

Before: Leo M. Gordon, Judge  
Consol. Court No. 11–00061

[Remand results sustained.]

Dated: January 24, 2013

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## OPINION

### Gordon, Judge:

This consolidated action involves an administrative review conducted by the U.S. Department of Commerce (“Commerce”) of the antidumping duty order covering Polyethylene Terephthalate (“PET”) Film from the People’s Republic of China. See *Polyethylene Terephthalate Film from the People’s Republic of China*, 76 Fed. Reg. 9,753 (Dep’t of Commerce Feb. 22, 2011) (“*Final Results*”) and accompanying Issues and Decision Memorandum, A-570–924 (Feb. 14, 2011), available at <http://ia.ita.doc.gov/frn/summary/prc/2011–3909–1.pdf> (last visited this date) (“*Decision Memorandum*”). Before the court are the Final Results of Redetermination, Oct. 15, 2012, ECF No. 70, (“*Remand Results*”), filed by Commerce pursuant to *Fuwei Films (Shandong) Co. v. United States*, 36 CIT \_\_\_, 837 F. Supp. 2d 1347 (2012) (“*Fuwei*”). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the <sup>43</sup>Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),<sup>1</sup> and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the *Remand Results* are sustained.

### I. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the

<sup>1</sup>Further citation to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966). Fundamentally, though, “substantial evidence” is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2012). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action “was reasonable given the circumstances presented by the whole record.” Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West’s Fed. Forms, National Courts* § 13342 (2d ed. 2012).

## II. Discussion

Familiarity with the court’s decision in *Fuwei* is presumed. In the *Final Results* Commerce sourced data from the Indian Harmonized Tariff System (HTS) categories 3907.60.10 and 3907.60.20 to derive a surrogate value for the PET chips of respondents, Fuwei Films (Shandong) Co., Ltd., and Shaoxing Xiangyu Green Packing Co., Ltd. (collectively “Respondents”). *Decision Memorandum* at 12–16. In *Fuwei* Respondents persuaded the court that Commerce’s reliance on HTS category 3907.60.20, as opposed to 3907.60.10 alone, was unreasonable given the administrative record (unsupported by substantial evidence). *Fuwei*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1356–57. The court remanded the issue to Commerce to clarify or reconsider its use of Indian Harmonized Tariff System (HTS) category 3907.60.20 in calculating a surrogate value for Respondents’ PET chips. *Id.*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1358–59.

At the same time, the court found wanting the argument of petitioners, DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively “DuPont”), that HTS category 3907.60.20 was the one proper data source. *Id.*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1356–57. During the immediately prior administrative proceeding the “DuPont Group” (consisting of the participating mandatory respondent, DuPont Teijin Films China Limited, together with DuPont Teijin Hongji Films Ningbo Co., Ltd., and

DuPont-Hongji Films Foshan Co., Ltd.—all apparent affiliates of a petitioner here, DuPont Teijin Films), persuaded Commerce that HTS 3907.60.10, not 3907.60.20, was the proper data source by identifying different testing standards in China (ISO) and India (ASTM). *See id.*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1354–55. In *Fuwei* DuPont failed to account for that prior successful litigating position, arguing, unconvincingly, that the administrative record did not support use of the ISO standard in China despite the record containing the same information that DuPont’s affiliates submitted in the investigation. *Id.*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1356–57. The court noted the prior litigating position and concluded DuPont’s argument lacked merit. *Id.* (“At the outset, the court must note that DuPont has assumed a somewhat difficult position by arguing that HTS 3907.60.20 constitutes the only proper dataset (for Respondents PET Chips) shortly after the DuPont Group successfully argued in the investigation that HTS 3907.60.10 is the only proper dataset (for the DuPont Group’s PET chips”).

On remand, Commerce determined that all of Fuwei’s and Green Packing’s PET chips were properly classified under Indian HTS category 3907.60.10. *Remand Results* at 19. Commerce found that the intrinsic viscosity for all of Fuwei’s and Green Packing’s PET chips had been tested using the ISO 1:1 methodology. Commerce based its determination on this Court’s decision that Commerce reasonably inferred from the record that the ISO 1:1 test was used in China. *Id.* (citing *Fuwei*, 36 CIT at \_\_\_, 837 F. Supp. 2d. at 1356). Commerce also inferred that Indian Customs uses the ASTM 3:2 methodology. Commerce determined that all of Fuwei’s and Green Packing’s PET chips would fall within the range for Indian HTS 3907.60.10 once the intrinsic viscosities were converted from ISO 1:1 to ASTM 3:2. Commerce therefore reasonably determined from the administrative record that Indian HTS 3907.60.10 was the best available information for valuing Fuwei’s and Green Packing’s PET chips. *Remand Results* at 11–19, 26–35.

DuPont continues to challenge Commerce’s determination that HTS category 3907.60.10 is the “best available information,” 19 U.S.C. § 1677b(c)(1), for Respondents’ PET chips. DuPont, however, now argues that the administrative record does not support that the ASTM standard is used in India (as opposed to its previous argument that ISO is not used in China). The court again concludes DuPont’s argument lacks merit. In the *Remand Results* Commerce reminded DuPont that it was the Dupont Group who stated in the investigation, “The ASTM test method is the prevailing standard in many countries, including India.” *Remand Results* at 30.



DuPont attempts to explain this away, suggesting that the DuPont Group's statement did not reflect first-hand knowledge and only indicated a litigation position from a prior proceeding with a separate record and separate findings. Def.-Int. Cmts. Objecting to Commerce's First Remand Redetermination at 13–14, ECF No. 85 (“DuPont Br.”). Problematically for DuPont, the administrative record here does not demonstrate that Indian Customs uses any other testing method, such as the ISO 1:1 test used in China. *Id.* at 18. As is the case with many antidumping issues, the record is open to interpretation. DuPont had an additional 18 months between the publication of the *Final Results* and Commerce's remand questionnaires to acquire and submit record evidence that the ISO standard is used in India, as well as to clarify and correct for Commerce, the other interested parties, and the court, the prior successful litigating position of its affiliate the DuPont Group (for example, explaining whether the certifications accompanying the DuPont Group's prior submissions, see 19 C.F.R. § 351.303(g), were valid and made in good faith). It did not.

DuPont also argues that “[n]o reasonable mind could infer from” the record evidence “that the ASTM method is the only testing method used by Indian Customs.” DuPont Br. at 13. Just as it did when challenging Commerce's inference that the ISO standard is generally used in China, DuPont again erroneously assumes that the reasonableness of Commerce's findings with respect to the utilization of ASTM in India depend on absolutes and evidentiary exactitude. See *Fuwei*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1355–56. As the court previously explained, “the statute does not require, nor have the courts imposed, a requirement of evidentiary exactitude for Commerce's surrogate valuations.” *Id.*, 36 CIT at \_\_\_, 837 F. Supp. 2d at 1356. And judicial review of “Commerce's action here does not depend on absolutes like always or never, but instead on whether Commerce's inference about [India's ASTM utilization] is reasonable given the information on the administrative record.” *Id.* Here, it is. Commerce carefully considered and explained the record evidence, as well as the lack of evidence supporting DuPont's other preferred outcomes. *Remand Results* at 26–35. Commerce's determination that Indian HTS 3907.60.10 was the best available information for valuing PET Chips—a result first conceived, argued, and supported by the DuPont Group—is more than reasonable given the facts and circumstances of the administrative record, and therefore must be sustained.


### III. Conclusion

Commerce's *Remand Results* are sustained, and judgment will be entered accordingly.

Dated: January 24, 2013

New York, New York

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



### Slip Op. 13-11

GOLD EAST PAPER (JIANGSU) CO., LTD., NINGBO ZHONGHUA PAPER CO., LTD., and GLOBAL PAPER SOLUTIONS, Plaintiffs, and BUREAU OF FAIR TRADE FOR IMPORTS & EXPORT, MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA, Plaintiff-Intervenor v. UNITED STATES, Defendant, and APPLETON COATED LLC, et alia, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge  
Consol. Court No. 10-00371

[Granting motion for leave to amend 28 U.S.C. § 1581(c) pleading.]

*Daniel L. Porter, James P. Durling, Matthew P. McCullough, and Ross Bidlingmaier*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington DC, for the plaintiffs and plaintiff-intervenor.

*Alexander V. Sverdllov*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant.

*Terence P. Stewart and Wesley K. Caine*, Stewart and Stewart, of Washington DC, and *Gilbert B. Kaplan, Daniel L. Schneiderman, and Christopher T. Cloutier*, King & Spaulding LLP, of Washington DC, for the defendant-intervenors.

### OPINION AND ORDER

#### Musgrave, Senior Judge:

In this consolidated matter challenging aspects of the antidumping methodology utilized in *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China* [,]” 75 Fed. Reg. 59217 (Sep. 27, 2010) (final determination of sales at less than fair value), as administered by the U.S. Department of Commerce (“Commerce”), Plaintiffs now move for leave to amend their pleading a second time in order to clarify a claim that has been fully briefed, to wit: whether Commerce improperly double counted certain rebates used in the calculation of net United States price.

Attached to the motion is a proposed Second Amended Complaint. Facially, this pleading retains the wording of counts One, Two, Seven, and Eleven of Plaintiffs’ first amended complaint, which were previ-

ously dismissed, *see* ECF No. 75, and re-assertion would be contrary to the adjudicated law of the case. Defendant-Intervenors therefore oppose and also argue Plaintiffs provide “no good reason why [their] failure to make a timely allegation should now be excused at this late date” coincident with completion of briefing on their Rule 56.2 motion for judgment.

Addressing those concerns in part, Plaintiffs clarify by letter dated January 10, 2013 that the “motion is not intended to revive counts previously dismissed by this Court.” They include with the letter a revised proposed Second Amended Complaint, to which has been added the following as to each of the four dismissed counts: “This count has been dismissed, pursuant to the Court’s order dated June 25, 2012.” The letter also alleges their motion presents no prejudice to any of the other parties. Defendant-Intervenors complain of none, and Defendant informs via email that it will not file a response in light of Plaintiffs’ letter.

The purpose of the pleadings is provide notice that frames the issues for decision before the court. *See* USCIT R. 8; *see, e.g., Beker Industries Corp. v. United States*, 7 CIT 199, 585 F. Supp. 663 (1984). They do not technically cover any new matter raised by briefing on motion. *See* USCIT R. 7. The mechanism for pleading amendment is addressed in Rule 15, which provides that leave to amend should be “freely” given when justice so requires. USCIT R. 15(a). Such leave is within the court’s discretion. *See, e.g., Fuwei Films (Shandong) Co. v. United States*, 35 CIT \_\_\_, \_\_\_, 791 F. Supp. 2d 1381, 1383 (2011); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (providing that absent dilatory motive, undue cause for delay, repeated failure to cure deficiencies by amendment, futility of amendment, or undue prejudice to the opposing party, freely given leave to amend is a “mandate . . . to be heeded”).

It is questionable whether justice “so requires” the proposed amendment. *See* USCIT R. 15(b)(2). Plaintiffs allege the claim has been fully briefed; by express or implied consent, it is therefore *sub judice*; Rule 15(b)(2) does not require amendment to conform pleading to issues *sub judice*; there is no apparent penalty for failing to amend; and the court has an obligation “to secure the just, speedy, and *inexpensive* determination of every action.” USCIT R. 1 (italics added). *See also Conley v. Gibson*, 355 U.S. 41, 48 (1957) (federal rules of civil procedure “reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits”). Indeed, no formal answer must be

pled in suits brought pursuant to 28 U.S.C. § 1581(c), *see* USCIT R. 7(a)(2) & R. 12(a)(1)(A)(i), and therefore amending Plaintiffs' pleading for this matter, in order to "account" (if that is what would occur) for an issue purportedly fully briefed, would seem to amount to an unnecessary and purely technical papering of the record.

Be that as it may, Plaintiffs remain masters of their complaint, *e.g.*, *Neenah Foundry Co. v. United States*, 24 CIT 202 (2000), and authority on the subject caution that "careful counsel always will amend a pleading if the client will be advantaged by the record clearly showing what actually was litigated[.]" Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, and Richard L. Marcus, 6A *Fed. Prac. & Proc.* § 1493 (3d ed.). Here, although doubt remains on whether the proposed amendment would confer any clearer advantage on what would actually be litigated in view of the parties' commendable briefing to date, careful pleading is to be encouraged, and undue prejudice has not been alleged were the motion allowed.

Now, therefore, in view of the foregoing, and after due deliberation, it is

ORDERED that Plaintiffs' motion to amend be, and hereby is, GRANTED.

Dated: January 24, 2013

New York, New York

/s/ R. Kenton Musgrave  
R. KENTON MUSGRAVE, SENIOR JUDGE



Slip Op. 13-12

JSC ACRON, Plaintiff, v. UNITED STATES, Defendant, and COMMITTEE FOR FAIR AMMONIUM NITRATE TRADE, Defendant-Intervenor.

Before: Timothy C. Stanceu, Judge  
Court No. 11-00496

[Granting defendant's motion to dismiss an action challenging denial of changed circumstances review]

Dated: January 25, 2013

*Daniel J. Cannistra* and *David C. Wolff*, Crowell & Moring LLP, of Washington, DC, for plaintiff JSC Acron.

*Michael D. Panzera*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *Mykhaylo Gryzlov*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Valerie A. Slater and Margaret C. Marsh, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, for defendant-intervenor Committee for Fair Ammonium Nitrate Trade.

## OPINION

### Stanceu, Judge:

Plaintiff JSC Acron (“Acron”) challenges the refusal of the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) to conduct, under section 751(b) of the Tariff Act of 1930 (“Tariff Act”), 19 U.S.C. § 1675(b) (2006),<sup>1</sup> a “changed circumstances” review of an antidumping duty order on imports of solid fertilizer-grade ammonium nitrate (“subject merchandise”) from the Russian Federation. Compl. ¶¶ 12, 17–18, 33 (Dec. 7, 2011), ECF No. 2. Acron, a Russian producer of solid fertilizer grade ammonium nitrate, requested a changed circumstances review to obtain a reduction in the 253.98% cash deposit rate applicable to all imports of subject merchandise, a rate established more than twelve years ago in the less-than-fair-value investigation. *Id.* ¶¶ 12, 17; *Notice of Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation* 65 Fed. Reg. 42,669, 42,673 (July 11, 2000) (“*Final Determination*”). Before the court is defendant’s motion to dismiss this action for lack of subject matter jurisdiction. Def.’s Mot. to Dismiss for Lack of Subject Matter Jurisdiction (Feb. 13, 2012), ECF No. 8 (“Def.’s Mot.”). The Committee for Fair Ammonium Nitrate Trade (“COFANT”), defendant-intervenor, supports defendant’s motion to dismiss. For the reasons stated below, the court grants defendant’s motion and will enter judgment dismissing this action.

### I. BACKGROUND

In response to a petition by COFANT, Commerce initiated the antidumping duty investigation on August 12, 1999. *Initiation of Antidumping Duty Investigation: Solid Fertilizer-Grade Ammonium Nitrate from the Russian Federation*, 64 Fed. Reg. 45,236, 45,239 (Aug. 19, 1999). In its preliminary affirmative less-than-fair-value determination (“Preliminary Determination”), Commerce calculated a preliminary weighted-average dumping margin for only one Russian producer/exporter, JSC Nevinnomyssky Azot (“Nevinka”), which Commerce preliminarily determined to be the only producer/exporter

<sup>1</sup> Unless otherwise indicated, further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

eligible to be assigned a separate rate. *Notice of Preliminary Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation* 65 Fed. Reg. 1139, 1140–44 (Jan. 7, 2000) (“*Preliminary Determination*”). In response to Nevinka’s request for separate rate status, Commerce concluded that Nevinka qualified for such status, *id.* at 1143, having demonstrated “the absence of *de jure* and *de facto* government control over export activities.” *Id.* at 1141. The preliminary rate Commerce calculated for Nevinka was 264.59%, a rate Commerce also applied to the “Russia-wide entity” comprised of all producers or exporters that failed to demonstrate the absence of government control over their export activities. *Id.* (“Because the highest margin on the record is the calculated margin, the Department is assigning this rate as the adverse facts available Russia-wide rate.”). Nevinka’s rate was based on the Department’s nonmarket economy methodology, under which Commerce determined surrogate values for factors of production using Poland as the surrogate country. *Id.* In the Preliminary Determination, Commerce stated that “on September 15, 1999, JSC Acron, which had notified the Department of its shipment quantities and values, submitted a letter to the Department, stating that it would not participate in the antidumping investigation on solid fertilizer grade ammonium nitrate.” *Id.* at 1140. Commerce, accordingly, made Acron subject to the Russia-wide rate. *Id.*

In the Final Determination, Commerce concluded that imports of the subject merchandise were being sold at less than fair value, calculated a weighted-average dumping margin of 253.98% for Nevinka, and, for the same reasons as were stated in the Preliminary Determination, assigned that margin to the Russia-wide entity. *Final Determination*, 65 Fed. Reg. at 42,670–42,673. Commerce noted that it “included Acron in the Russia-wide entity because it failed to establish its entitlement to a separate rate.” *Id.* at 42,670. Subsequently, the U.S. International Trade Commission (“ITC”) determined that the domestic industry had been materially injured by reason of subject imports. *Certain Ammonium Nitrate From Russia*, 65 Fed. Reg. 50,719 (Aug. 21, 2000).

An affirmative ITC determination ordinarily would result in an antidumping duty order and issuance of instructions to U.S. Customs and Border Protection (“Customs”) to collect cash deposits at the rate assigned by Commerce in the less-than-fair-value investigation. See 19 U.S.C. § 1673d(c). Commerce did not issue an antidumping duty order, and did not instruct Customs to collect cash deposits, because the governments of the United States and Russia, on May 19, 2000, had entered into a nonmarket economy “suspension agreement” pur-



suant to 19 U.S.C. § 1673c(l), according to which the Russian government agreed to restrict export volumes and ensure that subject exports were sold at or above agreed reference prices.<sup>2</sup> *Final Determination*, 65 Fed. Reg. at 42,673; see also 19 U.S.C. § 1673c(f)(3)(B) (authorizing Commerce to refrain from issuing an antidumping duty order while a valid suspension agreement is in place).

In 2006 and 2011, Commerce conducted sunset reviews of the Order. In both reviews, the Department reaffirmed the 253.98% cash deposit rate calculated in the *Final Determination* and continued to link the Russia-wide entity to that rate. *Final Results of Five-year Sunset Review of Suspended Antidumping Duty Investigation on Ammonium Nitrate from the Russian Federation*, 71 Fed. Reg. 11,177, 11,178 (Mar. 6, 2006); *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation; Final Results of the Expedited Sunset Review of Antidumping Duty Order*, 76 Fed. Reg. 39,847, 39,848 (July 7, 2011).

On April 27, 2011, Commerce issued a notice (“Termination Notice”) informing the public that the Russian government withdrew from the suspension agreement on March 3, 2011, that an antidumping duty order on solid fertilizer grade ammonium nitrate from Russia (“Order”) would enter into force on May 2, 2011, and that after such date liquidation would be suspended and Customs would begin collecting cash deposits of 253.98% on entries of subject merchandise. *Termination of the Suspension Agreement on Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation & Notice of Antidumping Duty Order*, 76 Fed. Reg. 23,569 (Apr. 27, 2011) (“*Termination Notice*”).

On September 26, 2011, Acron, seeking a reduced cash deposit rate, filed its request that Commerce initiate a changed circumstances review. Compl. ¶ 17 (citation omitted). Plaintiff’s request stated that in light of “Russia’s graduation to market economy status, the original determination [being] based on the absence of factual information and adverse facts available, and Plaintiff’s sales at or above normal value for an extended period of time . . . [,] the cash deposit rate calculated for Plaintiff no longer reflected commercial reality.” *Id.* ¶ 30. Commerce denied this request by letter on November 7, 2011, finding that Acron’s entries during the suspension agreement were not subject to suspension of liquidation or antidumping duties and that Acron’s sales during the intervening 12 years, having been made under the suspension agreement, “were not indicative of Acron’s cur-

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<sup>2</sup> The Department had suspended its investigation due to the suspension agreement but subsequently resumed and completed the investigation, at the request of the petitioner. See *Suspension of Antidumping Duty Investigation: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 Fed. Reg. 37,759 (June 16, 2000).

rent or future commercial behavior.” *Id.* ¶¶ 18, 28–29 (citations omitted).

Plaintiff commenced this action on December 7, 2011. Summons, ECF No. 1; Compl. Plaintiff moved for expedited briefing and disposition of this action on February 1, 2012, Mot. to Expedite, ECF No. 7, but withdrew this motion without explanation on March 1, 2012, Withdrawal of Mot. to Expedite, ECF No. 12. Defendant filed its motion to dismiss for lack of subject matter jurisdiction on February 13, 2012. Def.’s Mot. Plaintiff responded on February 27, 2012, Opp’n to Def.’s Mot. to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 11 (“Pl.’s Opp’n”), and defendant replied on March 19, 2012, Reply to Pl.’s Resp. to Mot. to Dismiss for Lack of Subject Matter Jurisdiction, ECF No. 13.

In March 2012, Acron exported ammonium nitrate to the United States through an affiliated importer; the merchandise was sold to an unaffiliated party in that same month.<sup>3</sup> Joint Submission Ordered by the Ct. (“Joint Submission”), Attach. 4 (Dept. of Commerce’s Jun. 28, 2012 Notice of Intent to Rescind Admin. Review), at 2 (Oct. 23, 2012), ECF No. 15 (“Notice of Intent”). The entry corresponding to the sale occurred on April 25, 2012. *Id.* The entry had an entered value of \$75,000 and, accordingly, required Acron’s affiliate to make a cash deposit of \$190,485. Oral Tr. 21, 31, 43 (Jan. 22, 2013), ECF No. 23.

On April 10, 2012, Commerce issued a notice of opportunity to request an administrative review of the Order, announcing a period of review (“POR”) of May 2, 2011 through March 31, 2012. *Ammonium Nitrate From Russia: Correction of Notice of Opportunity To Request Administrative Review*, 77 Fed. Reg. 21,527. Based on timely requests made by Acron and another Russian producer of ammonium nitrate, MCC EuroChem (“EuroChem”), the Department, on May 29, 2012, initiated the first periodic administrative review of the Order. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 77 Fed. Reg. 31,568, 31,568–70 (“*Initiation Notice*”). Commerce announced in that notice that it “intend[ed] to issue the final results of [the] review[] not later than April 30, 2013.” *Id.* at 31,569.

On June 28, 2012, Commerce issued a notice announcing its intent to rescind the first administrative review in response to information indicating that no merchandise of Acron or of EuroChem had entered the United States during the POR. Notice of Intent at 1. On October 29, 2012, Commerce published a Federal Register notice announcing its decision to rescind the administrative review with respect to Acron

<sup>3</sup> Plaintiff’s attorney publicly disclosed the details of this transaction at a public hearing held on December 20, 2012. Oral Tr. 21–22, 35–36 (Jan. 22, 2013), ECF No. 23.

and EuroChem for the reasons stated in its earlier notice. *Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation: Notice of Rescission of Antidumping Duty Administrative Review*, 77 Fed. Reg. 65,532, 65,533 (citation omitted) (“*Notice of Rescission*”); see Joint Submission, Attach. 8 (Dept. of Commerce’s Oct. 22, 2012 Notice of Rescission of Admin. Review and [A]ccompanying Issues and Decision Mem.), at 1 (Oct. 23, 2012).

On October 23, 2012, the parties, in response to an order of the court, made a joint submission of various documents considered by one or both parties to be relevant to the question of jurisdiction. Joint Submission. On November 21, 2012, the court granted COFANT’s motion to intervene in this action, Order, ECF No. 20, and deemed timely filed COFANT’s reply to plaintiff’s opposition to defendant’s motion to dismiss, COFANT’S Proposed Reply to Pl.’s Opp’n to Mot. to Dismiss, ECF No. 21. The court held a public hearing on December 20, 2012 to ascertain jurisdictional facts and hear arguments on the jurisdictional question. ECF No. 22. At the conclusion of the hearing, plaintiff indicated in response to the court’s inquiry that it would rest upon the existing record compiled by the court for the purpose of ascertaining jurisdictional facts, which consisted principally of the October 23, 2012 joint submission. Oral Tr. 51.

## II. DISCUSSION

Plaintiff contests the Department’s decision not to conduct a changed circumstances review in response to its request.<sup>4</sup> Compl. ¶¶ 27–33. Acron’s objective in seeking such a review is to require Commerce “to re-establish an accurate and meaningful cash deposit rate.” *Id.* ¶ 27. According to Acron, the 253.98% cash deposit rate is no longer representative as it was “(1) calculated in 2000; (2) calculated using the currently inapplicable nonmarket economy methodology and adverse facts available; and (3) based on the data of only one Russian producer.” *Id.* ¶ 31. As relief, plaintiff requests a remand order “with instructions to initiate a changed circumstance review.” *Id.* at 8 (Prayer for Relief).

In 1984, Congress amended Section 516A(a)(1) of the Tariff Act, 19 U.S.C. § 1516a(a)(1), to remove refusals to conduct changed circumstances reviews from the list of final determinations reviewable thereunder. Trade and Tariff Act of 1984, Pub. L. No. 98–573,

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<sup>4</sup> Section 751(b)(1) of the Tariff Act of 1930 provides that “[w]henver the administering authority . . . receives information concerning . . . a final affirmative determination that resulted in an antidumping duty order under this subtitle . . . which shows changed circumstances sufficient to warrant a review of such determination . . . the administering authority . . . shall conduct a review of the determination . . . after publishing notice of the review in the Federal Register.” 19 U.S.C. § 1675(b)(1).

§623(a)(1), 98 Stat. 2948, 3040 (1984). In so amending Section 516A, Congress did not preclude judicial review of such refusals under the “residual” jurisdiction provided by section 201 of the Customs Courts Act of 1980 (“Customs Courts Act”), 28 U.S.C. § 1581(i) (2006).<sup>5</sup> § 1581(i). *Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1352–53 (Fed. Cir. 2010). Paragraph (2) of § 1581(i) provides the Court of International Trade jurisdiction of “any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.” 28 U.S.C. § 1581(i)(2). Paragraph (4) of subsection (i) provides for jurisdiction of “any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)—(3) of this subsection . . . .” *Id.* § 1581(i)(4).

This action would appear to fall within the literal terms of the jurisdictional grant of § 1581(i)(4). However, “§ 1581(i)(4) ‘may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.’” *Trustees in Bankr. of N. Am. Rubber Thread Co.*, 593 F.3d at 1351 (citing *Int’l Custom Prods. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006)) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988)); *see also id.* at 1353 (“§ 1581(i)(4) . . . is not available to circumvent relief that is or could have been available under other portions of § 1581”).

By statute, the real remedy Acron seeks—a redetermined cash deposit rate—would have been available to Acron through participation in the first periodic administrative review of the Order. *See* Section 751(a) of the Tariff Act, 19 U.S.C. § 1675(a)(1) (requiring Commerce to conduct a periodic administrative review “if a request for such a review has been received” and to publish results of such review “together with . . . [the] estimated duty to be deposited”); *id.* § 1675(a)(2)(C) (“The determination under this paragraph shall be the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination *and for deposits of estimated duties.*”) (emphasis added). The court, therefore, must determine whether plaintiff has demonstrated factually that participating in a periodic administrative review and, if necessary, contesting the

<sup>5</sup> Unless otherwise indicated, further citations to the Customs Courts Act of 1980 are to the relevant portions of Title 28 of the U.S. Code, 2006 edition.

final results of that review according to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 28 U.S.C. § 1581(c) would have been a “manifestly inadequate” remedy. *Miller & Co.*, 824 F.2d at 963.

The party invoking a court’s jurisdiction must establish the requisite jurisdictional facts by a preponderance of evidence, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), and must be given an opportunity to do so before dismissal is ordered, *Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citations omitted). The “mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling . . .” *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quotation omitted). Although jurisdictional facts normally are stated in the complaint, the court may consider matters outside the pleadings. See *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); see also *Cedars-Sinai Med. Center v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993). Where, as here, a claim depends upon a waiver of sovereign immunity, a court will strictly construe the jurisdictional statute. *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

The court considers the adequacy of a remedy stemming from the first review from the perspective of the factual circumstances existing as of the date plaintiff filed its action, December 7, 2011. See *Miller & Co.*, 824 F.2d at 963–64. By that date, plaintiff was on notice of various matters. Plaintiff brought this case after the Department’s publication, on April 27, 2011, of the Termination Notice, which established an antidumping duty order that would enter into force on May 2, 2011 and announced a suspension of liquidation of entries of subject merchandise to begin on that date. *Termination Notice*, 76 Fed. Reg. at 23,570. This publication and the Department’s regulations gave Acron notice of the dates that the POR would begin and end. Specifically, the regulations provide, in pertinent part, that an initial periodic administrative review of an antidumping Order “will cover . . . entries . . . during the period from the date of suspension of liquidation . . . to the end of the month immediately preceding the anniversary month.” 19 C.F.R. § 351.213(e)(1)(ii) (2011). Acron, therefore, was on notice that the first POR would begin on May 2, 2011, the date of suspension of liquidation, and end on March 31, 2012.<sup>6</sup> From binding precedent, Acron also was on notice at the time it filed its action that its participation in the first periodic administrative review of the Order required that an entry of its subject merchandise

<sup>6</sup> Because an antidumping duty order, not a suspension of investigation, was in effect at the time this case was brought, the “anniversary month” was the calendar month in which the anniversary of the publication of the Order occurs, *i.e.*, April, and the first period of review of the Order, therefore, would conclude on March 31, 2012. See 19 C.F.R. § 351.102(b)(5) (defining “anniversary month”).

occur during the first POR. *See Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1371–73 (Fed. Cir. 2004).

To demonstrate that participation in the first administrative review (followed by a judicial challenge to the results, if necessary) would have been a “manifestly inadequate” remedy, plaintiff would have to show, as a factual matter, either that (1) it was precluded from pursuing that remedy; or (2) even if it had participated in the first review, the remedy resulting from such a review would have been inadequate. After review of the record the court compiled to resolve the question of jurisdiction, the court concludes that plaintiff has not made either showing.<sup>7</sup>

There is no dispute that as of the time of commencing this action, no entry of Acron’s subject merchandise had occurred. At the December 20, 2012 hearing, Acron claimed that, as a practical matter, it could not have arranged for a sale of its merchandise for exportation to the United States that would have entered by that date or at any other time during the first POR. Oral Tr. 26, 35–37, 45. Acron indicated that the task was not achievable during the first POR due to “logistical” matters, including the difficulty of finding a customer, making financial arrangements, and shipping the merchandise. *Id.* The difficulty with this argument is that plaintiff has introduced no evidence from which the court could make a finding of a jurisdictional fact to that effect. Plaintiff was given the opportunity to submit documentation, which it did in the joint submission, and which the court has considered. Plaintiff also had the opportunity to seek to introduce additional evidence. But at the hearing, plaintiff informed the court that it did not wish to introduce any other evidence on the issue of jurisdiction and instead would rest on the joint submission. Oral Tr. 51. Nothing in the joint submission establishes as a fact that plaintiff could not have arranged a sale of its merchandise that would have resulted in

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<sup>7</sup> Defendant objects to the court’s considering jurisdictional facts apparent from documents included in the joint submission that did not exist at the time Commerce denied Acron’s request for a changed circumstances review and, accordingly, are not part of the administrative record of the changed circumstances review. Joint Submission Ordered by the Ct., Def.’s Attach. (Def.’s Objection to the Submission Ordered by the Ct.), at 1 (Oct. 23, 2012), ECF No. 15 (“Joint Submission”). Defendant submits that those documents are not relevant to whether the court has jurisdiction under § 1581(i)(4) and should not be part of the case record. *Id.* at 2. The court disagrees. The court may determine jurisdictional facts based on a *de novo* record. This is not necessarily the same record as the administrative record the court would consider were it to reach the merits of plaintiff’s claim. The court’s jurisdictional inquiry must consider those facts that go to the availability of the remedy that was or could have been available to plaintiff when the action was brought. *See Miller & Co. v. United States*, 824 F.2d 961, 963–64 (Fed. Cir. 1987). Under Court of Appeals precedent, this Court must give plaintiff the opportunity to offer evidence in support of its assertion of subject matter jurisdiction. *See Reynolds v. Army and Air Force Exchange Service*, 846 F.2d 746, 748 (Fed. Cir. 2011) (citations omitted).



an entry occurring prior to the time it commenced this action or, in any event, on or before March 31, 2012.<sup>8</sup> At the time of bringing suit, more than seven months of the first POR already had transpired and nearly four months remained.

Although the extraordinarily high cash deposit rate of 253.98% is a self-evident financial burden on a sales transaction, plaintiff has not sought to introduce evidence that the deposit rate effectively precluded such a transaction that would have resulted in an entry during the POR, which plaintiff knew, or could have known from the Department's public notices, was ongoing at the time plaintiff filed suit. From the evidence available to the court bearing on jurisdictional facts, the court must conclude that plaintiff has not met its burden of demonstrating that the remedy available through participation in the first review was unavailable to Acron.

Nor can the court conclude that the remedy offered by the first review would have been manifestly inadequate even were Acron to have pursued that course. The first review was rescinded as to Acron, and also as to the other exporter/producer, MCC EuroChem, because no entries of the subject merchandise of either exporter occurred during the first POR. *Notice of Rescission*, 77 Fed. Reg. at 65,533. Had rescission not occurred as to Acron, Commerce would have been required by 19 U.S.C. § 1675(a) to redetermine a cash deposit rate for Acron's subject merchandise. The ordinary statutory deadline for completion of the review would have been April 30, 2013. *See* 19 U.S.C. § 1675(a)(3)(A).<sup>9</sup> The court cannot conclude, as a matter of law, that a new cash deposit rate determined as of that date would have been a manifestly inadequate remedy. Although it is possible that Commerce would have extended the review deadline by invoking its authority under § 1675(a)(3)(A), here the court cannot presume, as a matter of fact, that such an extension would have occurred.<sup>10</sup>

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<sup>8</sup> The joint submission discloses the fact that such a transaction occurred during the first POR (albeit a sale of merchandise that entered the United States just after the close of the first POR). Joint Submission, Attach. 4 (Dep't of Commerce's Jun. 28, 2012 Notice of Intent to Rescind Administrative Review), at 2 (Oct. 23, 2012), ECF No. 15. The court need not consider this fact as it had not occurred as of the time the action was commenced. The salient point is that Acron has failed to produce evidence demonstrating that it could not have arranged for a sale producing an entry that occurred either before this action was commenced or at any other time within the first POR.

<sup>9</sup> The statute provides that Commerce ordinarily must issue preliminary results of the review within 245 days of the last day of the anniversary month and final determination within 120 days after publication of the preliminary determination. 19 U.S.C. §1675(a)(3)(A).

<sup>10</sup> Although Commerce stated in the Initiation Notice that it intended to issue final results of the first periodic administrative review "not later than April 30, 2013," *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocation in Part*, 77 Fed. Reg. 31,568, 31,569 (May 29, 2012), the court disregards this fact in resolving the

Rather than provide specific reasons why a redetermined cash deposit rate obtained by April 30, 2013 is not an adequate remedy, Acron makes the general argument that the imposition of the 253.98% cash deposit rate will “result in Plaintiff’s exclusion from the U.S. market and [the] loss of its entire U.S. business.” Pl.’s Opp’n 13. Alluding to this assertion at the hearing, plaintiff stated that Acron’s revenue in the first year of the Order was less than 1% of its revenue in the final twelve months of the suspension agreement, which plaintiff indicated was in excess of \$10 million. Oral Tr. 27, 50. Plaintiff argues, further, that because potential refunds provide inadequate compensation for the opportunity cost of being unable to participate in the U.S. market, a periodic review, even if hypothetically available, is a manifestly inadequate remedy. *Id.* at 29–30; Pl.’s Opp’n 15. Acron argues that it has never had an opportunity to challenge its cash deposit rate, which was based on Nevinka’s sales and thus “bears no rational relationship to the pricing of Plaintiff’s current imports.” Pl.’s Opp’n 14. It submits that Commerce has an obligation to correct inaccurate cash deposit rates based on outdated methodologies and must do so for Acron within a reasonable period of time upon termination of the suspension agreement. *Id.* at 14–15. At the hearing, plaintiff also argued that the Department has used changed circumstances reviews in the past to recalculate cash deposit rates upon a country’s graduation from nonmarket economy status to market economy status, as Russia had during the pendency of the suspension agreement, and alluded to the instance of the graduation of the German Democratic Republic. Oral Tr. 33–34, 41–42.

These various arguments, which mostly go to the merits of plaintiff’s claim, are not persuasive. It is understandable that Acron would take issue with its being made subject to an extremely high deposit rate Commerce determined in 2000 for another producer using a methodology (the nonmarket economy methodology) no longer applicable to goods from the Russian Federation. However, the narrow issue now before the court is not whether the deposit rate is unreasonable and prejudicial to Acron, nor is it whether Commerce must change that rate. And the court does not *see* the relevance of the question of whether Acron could or could not have challenged that rate prior to bringing the instant action. The issue before the court, rather, is whether plaintiff, in *this* action, may invoke 28 U.S.C. § 1581(i) jurisdiction to challenge that rate when another remedy—one expressly provided for by the Tariff Act and expressly made judicially reviewable by 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c)—was avail-

question of jurisdiction as it refers to a statement of intent by the Department that had not been made as of the time this case was brought.

able at the time plaintiff filed its summons and complaint. For the reasons discussed previously, the court concludes that plaintiff has not met its burden of demonstrating that, as a factual matter, the latter remedy, viewed as of the time of commencement of this action, was manifestly inadequate.

### III. CONCLUSION

In conclusion, the court determines, after considering all relevant jurisdictional facts, that 28 U.S.C. § 1581(i) does not provide it subject matter jurisdiction to hear plaintiff's claim. Accordingly, the court will enter judgment dismissing this action.

Dated: January 25, 2013

New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU JUDGE



Slip Op. 13-13

THE POMEROY COLLECTION, LTD., Plaintiff, v. UNITED STATES,  
Defendant.

Consol. Court No. 02-00150

[Plaintiff's Motion for Summary Judgment is denied; Defendant's Cross-Motion for Summary Judgment is granted]

Dated: January 28, 2013

*Peter J. Fitch*, Fitch, King, LLC, of Moonachie, New Jersey, argued for Plaintiff.

*Beverly A. Farrell*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, New York, argued for Defendant. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of New York, New York.

### OPINION

#### RIDGWAY, Judge:

In this consolidated action,<sup>1</sup> plaintiff The Pomeroy Collection, Ltd. ("Pomeroy") challenges the decision of the United States Customs

<sup>1</sup> Court No. 01-00784 and Court No. 01-01011 were consolidated into the present action based in part on the parties' representation that consolidation will help the parties "resolve all of the remaining issues existing in the Pomeroy cases." See Consent Motion to Consolidate (Feb. 27, 2009); see also Order (March 4, 2009). This action is also designated a test case, with more than 50 actions currently suspended under it. See Order (March 17, 2005) (designating action as test case).

Service<sup>2</sup> denying Pomeroy's protests concerning the tariff classification of certain merchandise imported from Mexico in 1999.<sup>3</sup>

As discussed below, in the course of this litigation the parties have reached agreement on the classification of most of the merchandise identified in Pomeroy's Consolidated Amended Complaint, with virtually all issues resolved in Pomeroy's favor. *See* section I, *infra*. Now pending before the Court are the parties' cross-motions for summary judgment concerning the classification of the 16 articles that remain in dispute, which can be grouped into three basic categories of merchandise – "Pillar Plates," "Floor Articles," and "Wall Articles."

Pomeroy contends that all 16 remaining articles are properly classifiable as "Lamps and lighting fittings" under subheading 9405.50.40 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1999),<sup>4</sup> and are thus duty-free. *See generally* Plaintiff's Brief in Support of Its Motion for Summary Judgment ("Pl.'s Brief") at 3, 6, 21–24; Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Pl.'s Reply Brief") at 1–7, 25. In the alternative, Pomeroy argues that the Floor Articles and the Wall Articles are classifiable as "Other furniture and parts thereof" under either subheading 9403.80.60 or subheading 9403.20.10, and are thus duty-free. *See generally* Pl.'s Reply Brief at 16–24, 25.

The Government maintains that Customs properly classified the contested merchandise as decorative glass articles under various subheadings of HTSUS heading 7013 (which covers "Glassware of a kind used for . . . indoor decoration or similar purposes") – specifically, subheadings 7013.39.50, 7013.99.50, 7013.99.80, and 7013.99.90 (depending on the value of the merchandise) – and assessed duties at rates ranging from 4.3% to 22.8% *ad valorem*. *See generally* Defendant's Cross-Motion for Summary Judgment ("Def.'s Brief") at 6–7, 16–20, 20–25; Defendant's Reply Memorandum of Law in Support of

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<sup>2</sup> The U.S. Customs Service – formerly part of the U.S. Department of Treasury – was transferred to the U.S. Department of Homeland Security as part of the Homeland Security Act of 2002. *See Bull v. United States*, 479 F.3d 1365, 1368 n.1 (Fed. Cir. 2007). The agency is now commonly known as U.S. Customs and Border Protection, and is referred to as "Customs" herein.

<sup>3</sup> The contested items are listed in boldface type in schedules attached to Pomeroy's pleadings and briefs. The most up-to-date schedule – and the one that will be referenced hereinafter – is the schedule appended to Pomeroy's Reply Brief. *See* Pl.'s Reply Brief at attached Schedule ("Pl.'s Final Schedule").

<sup>4</sup> All citations to the HTSUS herein are to the 1999 edition.

All tariff provisions discussed in relation to both the classified and claimed provisions at issue here are properly preceded by the prefix "MX," to indicate that the goods qualify for the duty rate applicable to products of Mexico. However, the prefix is otherwise irrelevant to the analysis here, and is omitted throughout the opinion.

Its Cross-Motion for Summary Judgment and in Response to Plaintiff's Response to Our Cross-Motion ("Def.'s Reply Brief") at 1, 4–5, 8–9.

Jurisdiction lies under 28 U.S.C. § 1581(a) (1994).<sup>5</sup> As discussed below, all items of merchandise that remain in dispute are properly classified as decorative glass articles under the specified subheadings of HTSUS heading 7013. Pomeroy's Motion for Summary Judgment is therefore denied, and the Government's Cross-Motion for Summary Judgment is granted.<sup>6</sup>

### I. BACKGROUND

The parties here are no strangers to the Court. Numerous articles imported by Pomeroy with similarities to the merchandise at issue here have been the subject of classification litigation over the past decade. *See generally The Pomeroy Collection, Inc. v. United States*, 26 CIT 624, 246 F. Supp. 2d 1286 (2002) ("*Pomeroy I*") (finding glass vessels cradled by wrought iron pedestals and lacking candles to be classifiable as decorative glass under heading 7013), *aff'd*, 336 F.3d 1370 (Fed. Cir. 2003); *The Pomeroy Collection, Ltd. v. United States*, 32 CIT 526, 559 F. Supp. 2d 1374 (2008) ("*Pomeroy II*") (finding four pieces of merchandise, all of which included candles, to be classifiable as "Lamps and lighting fittings" under heading 9405); *The Pomeroy Collection, Ltd. v. United States*, 35 CIT \_\_\_\_, 783 F. Supp. 2d 1257 (2011) ("*Pomeroy III*") (classifying somewhat cylindrical, vase-shaped glass structure with opening at top as "part" of lamp under heading 9405).

Indeed, as discussed in greater detail below, one of the Floor Articles at issue here – the Medium Romano Floor Lamp – is identical to the merchandise which was the subject of *Pomeroy I*. *See Pomeroy I*, 26 CIT at 634, 246 F. Supp. 2d at 1287–88 (describing Medium Romano Floor Lamp Rustic in terms similar to Medium Romano Floor Lamp here, and finding it classifiable as glassware under heading 7013); Pl.'s Brief at 9 n.2 (acknowledging that "[o]ne size of the Romano Floor Candles was the subject of [*Pomeroy I*]"); Def.'s Brief at 20; *Pomeroy I*, 26 CIT at 634, 246 F. Supp. 2d at 1287–88 (describing Medium Romano Floor Lamp Rustic in terms similar to Medium Romano Floor Lamp here and finding it to be classifiable as decorative glass under heading 7013).

This latest chapter of the saga – the case at bar – has been the most extensive to date. The various protests subsumed in the three now-

<sup>5</sup> All citations to statutes herein (other than citations to the HTSUS) are to the 1994 edition of the United States Code.

<sup>6</sup> Judgment also will be entered as to the classification of all those articles of merchandise on which the parties have reached agreement.

consolidated actions involved approximately 80 entries of merchandise and at least 90 distinct articles in dispute.

After Court No. 01–00784 and Court No. 01–01011 were consolidated into this action, Pomeroy filed a Consolidated Amended Complaint, which reflected the fact that the parties had reached agreement on Pomeroy’s preferred classification of more than 60 items up to that point in time. *See* Consolidated Amended Complaint (“Consol. Amended Complaint”) at attached Schedule (using boldface type to identify items then in dispute, and regular type to identify items as to which classification had been agreed). The Consolidated Amended Complaint narrowed Pomeroy’s challenge, focusing on 23 assorted articles of different types and sizes then still in dispute, which the Consolidated Amended Complaint divided into six different “groups” of merchandise. *See* Consol. Amended Complaint ¶ 6.

Specifically, “Group I,” which the Consolidated Amended Complaint referred to as “Floor Lighting Articles,” included Pomeroy’s “Stix Floor Candle” (sizes small, medium, and large), “Basics Floor Candle” (sizes small, medium, and large), and “Romano Floor Lamp[]” (sizes medium and large). *See* Consol. Amended Complaint ¶ 6. “Group II,” which the Consolidated Amended Complaint referred to as “Other Floor Goods,” included Pomeroy’s “Talon Floor Vase[]” (sizes small and large) and “Asiatica Floor Vase.” *See* Consol. Amended Complaint ¶ 6. “Group III,” which the Consolidated Amended Complaint referred to as “Wall Lighting Goods,” included Pomeroy’s “Lattice Wall Lighting” and “Romano Wall Lighting.” *See* Consol. Amended Complaint ¶ 6. “Group IV,” which the Consolidated Amended Complaint referred to as “Candle Goods,” included Pomeroy’s “Metropol Pillar Holder w/6” candle and “Metropol Pillar Candle Glass w/candle.” *See* Consol. Amended Complaint ¶ 6. “Group V,” which the Consolidated Amended Complaint referred to as “Metropol Candle Holders,” included two different model numbers of Pomeroy’s “Metropol Pillar Holder,” imported without candles. *See* Consol. Amended Complaint ¶¶ 6, 36–38. And “Group VI,” which the Consolidated Amended Complaint referred to as “Other Candle Holders,” included six assorted styles/sizes of Pomeroy’s “Glass Pillar Plates.” *See* Consol. Amended Complaint ¶ 6.

Since the filing of the Pomeroy’s Consolidated Amended Complaint, the parties have further narrowed their differences. Specifically, the parties have now agreed that — as Pomeroy has maintained — the “Metropol Pillar Holder w/6” candle and the “Metropol Pillar Candle Glass w/candle” are properly classifiable as “Candles, tapers and the like,” under subheading 3406.00.00, and are therefore duty-free. *See* Defendant’s Response to Plaintiff’s Statement of Material Facts As To



Which No Genuine Issue Exists (“Def.’s Response to Pl.’s Statement of Facts”) ¶¶ 3–4 (noting parties’ agreement that two Metropol articles imported with candles (article # 687068 and article # 641053) should be classified under subheading 3406.00.00). Similarly, the parties have now agreed that — as Pomeroy has maintained — the two other Metropol articles (*i.e.*, article # 687051 and article # 687037), which were imported without candles, should be classified as “Lamps and lighting fittings . . . and parts thereof” under subheading 9405.50.40, and thus are also duty-free. *See* Def.’s Response to Pl.’s Statement of Facts ¶¶ 3–4 (noting parties’ agreement that two other Metropol articles, imported without candles, should be classified under subheading 9405.50.40). In addition, Pomeroy has voluntarily withdrawn its claims as to its “Talon Floor Vases” and its “Asiatica Floor Vase.” *See* Pl.’s Brief at 2 n.1.

As a result, of the dozens of items originally at issue in this action, a total of 16 now remain in dispute. Those 16 items are described below, and are grouped for purposes of analysis into three categories of merchandise – the “Pillar Plates,” the “Floor Articles,” and the “Wall Articles.”

Pomeroy contends that all 16 articles are properly classifiable under subheading 9405.50.40, HTSUS, “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included: Non-electrical lamps and lighting fittings: Other: Other,” and thus should be duty-free. *See* Pl.’s Brief at 3, 6, 2124; Subheading 9405.50.40, HTSUS. In the alternative, Pomeroy contends that the Floor Articles and the Wall Articles are properly classifiable under subheading 9403.80.60, as “Other furniture and parts thereof: Furniture of other materials, including cane, osier, bamboo or similar materials: Other.” *See* Pl.’s Brief at 16–24, 25; Subheading 9403.80.60, HTSUS.<sup>7</sup>

#### A. *Pillar Plates*

The Pillar Plates at issue are slightly concave glass plates, each with three small rounded feet on the bottom. *See* Def.’s Brief at 5; Pl.’s Brief at Exhs. 13A-D (samples of frosted and clear models of medium and large Pillar Plates). Three different sizes of plates were imported

<sup>7</sup> As an additional alternative theory, Pomeroy claimed in its Consolidated Amended Complaint that the Floor Articles and Wall Articles were properly classifiable as statuettes and other ornaments of base metal under subheading 8306.29.00, a duty-free provision. *See* Consol. Amended Complaint ¶¶ 22–26. However, Pomeroy has not briefed that claim, and has therefore waived it.

– small (5.5 inches in diameter), medium (7 inches in diameter), and large (9.5 inches in diameter); and each size was imported in two colors (*i.e.*, clear glass and white frosted glass). *See* Def.’s Brief at 5; Pl.’s Brief at Exhs. 13A-D (samples of Pillar Plates).<sup>8</sup>

Pomeroy alleges that the Pillar Plates were designed as candleholders. *See* Pl.’s Brief at 20 (“The ‘pillar plates’ were so named because they are platforms (or plates) for holding arrangements of pillar candles.”). And Pomeroy emphasizes that the boxes in which the Pillar Plates were imported featured photographs depicting candles inserted into the merchandise. *See* Pl.’s Brief at Exhs. 13A-D (samples of Pillar Plates, with boxes); Pl.’s Brief at 20–21. However, the Pillar Plates were not imported with candles, and – as Pomeroy itself concedes – can readily be used to hold a wide range of items, including, for example, “colored glass, fruit, or perhaps a wine bottle.” *See* Pl.’s Brief at 20 (noting that candles were not included with Pillar Plates); Plaintiff’s Response to Defendant’s Statement of Material Facts as to Which No Genuine Issue Exists (“Pl.’s Response to Def.’s Statement of Facts”) ¶ 10; *see also* Defendant’s Statement of Material Facts as to Which No Genuine Issue Exists (“Def.’s Statement of Facts”) ¶ 10 (stating that Pillar Plates “could be used to hold . . . potpourri, flowers, sand, gravel, stones, pebbles, colored glass, fruit, wine bottles”).

Customs classified virtually all of the Pillar Plates as decorative glass articles under HTSUS subheading 7013.99.50, and assessed duties at the rate of 18%. *See* Pl.’s Brief at 2.<sup>9</sup> However, some entries of one type of Pillar Plate (*i.e.*, the large frosted glass Pillar Plate) were instead classified under subheading 7013.39.50 or subheading 7013.99.80, with duties assessed at the rate of 9%. *See* Pl.’s Reply Brief at attached Schedule (“Pl.’s Final Schedule”).<sup>10</sup>

<sup>8</sup> The Pillar Plates include the Small Clear Glass Pillar Plate (article # 687402), the Medium Clear Glass Pillar Plate (article # 687419), the Large Clear Glass Pillar Plate (article # 687426), the Small Frosted Glass Pillar Plate (article # 687457), the Medium Frosted Glass Pillar Plate (article # 687464), and the Large Frosted Glass Pillar Plate (article # 687471). *See* Pl.’s Final Schedule; First Pomeroy Affidavit ¶ 16.

<sup>9</sup> Specifically, subheading 7013.99.50 covers “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Valued over \$0.30 but not over \$3 each.” *See* Subheading 7013.99.50, HTSUS.

<sup>10</sup> Subheading 7013.39.50 covers “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Glassware of a kind used for table (other than drinking glasses) or kitchen purposes other than that of glass-ceramics:

Other: Other: Valued over \$3 each: Other: Valued over \$3 but not over \$5 each.” *See* Subheading 7013.39.50, HTSUS.

Subheading 7013.99.80 covers “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other

## B. Floor Articles

The Floor Articles in dispute include three styles of merchandise – Pomeroy’s “Stix Floor Candle” (sizes small, medium, and large), its “Basics Floor Candle” (sizes small, medium, and large), and its “Romano Floor Lamp” (sizes medium and large). *See, e.g.*, Pl.’s Brief at Exhs. 2 (Medium Basics Floor Candle), 4 (Small Romano Floor Candle), 5 (photograph of three Stix Floor Candles).<sup>11</sup> Each of the Floor Articles consists of two separate components – a glass vessel with a rounded bottom, and a wrought iron pedestal (*i.e.*, stand). *See* Pl.’s Brief at Exhs. 2–6 (physical samples and photographs of Floor Articles). Each glass vessel has a rounded bottom that prevents it from standing on its own (unless it is turned upside down) or from functioning in its intended manner without the pedestal, which is specifically designed to cradle (that is, to hold and support) the glass vessel. *See* Pl.’s Brief at Exhs. 2–6 (physical samples and photographs of Floor Articles).

The pedestals range from in height from approximately 16 inches to approximately 42 inches, depending on the model and size of the Floor Article. *See* Pl.’s Brief at Exh. 7 (Pomeroy price list with descriptions of merchandise). The glass vessels used in the Basics and Romano models are identical, while the glass vessel used in the Stix model is more shallow with a somewhat wider brim at the top. *See* Pl.’s Brief at Exhs. 2–6 (samples and photographs showing differences among models of Floor Articles). Specifically, the glass vessel for the Basics and Romano models is approximately nine inches tall, with an opening that is approximately seven inches wide and a rim approximately two inches wide. *See* Pl.’s Brief at Exh. 2 (Medium Basics Floor Candle, including vessel); Def.’s Brief at 3. Similarly, the glass vessels included with the Stix models are approximately 8.5 inches tall, with an opening that is approximately 7.8 inches wide, and a brim that appears to be a few inches wider than that in the other models. *See* Pl.’s Brief at Exh. 6 (photograph of Stix Floor Candles); Def.’s Brief at 3–4.<sup>12</sup>

Pomeroy asserts that the Floor Articles were “all designed . . . as glassware: Other: Other: Other: Valued over \$3 each: Other: Valued over \$3 but not over \$5 each.” *See* Subheading 7013.99.80, HTSUS.

<sup>11</sup> The Floor Articles include the Small Stix Floor Candle (article # 574962), the Medium Stix Floor Candle (article # 574979 and article # 575914), the Large Stix Floor Candle (article # 574986), the Small Basics Floor Candle (article # 840999), the Medium Basics Floor Candle (article # 841996), the Large Floor Candle (article # 842016), the Medium Romano Floor Lamp (article # 856013 and article # 856037), and the Large Romano Floor Lamp (article # 857010). *See* Pl.’s Final Schedule; First Pomeroy Affidavit ¶¶ 4–6.

<sup>12</sup> No samples of the Stix models were provided. However, as the Government notes, the dimensions of the glass vessel included with the Stix models can be extrapolated from a photograph that Pomeroy provided. *See* Pl.’s Brief at Exh. 6; Def.’s Brief at 3–4.

candle holders.” See Pl.’s Brief at 9. However, candles were not included with any of the Floor Articles as imported. See Pl.’s Brief at 8; Def.’s Brief at 18. Moreover, there is nothing to limit the use of any of the Floor Articles to holding a candle. As even Pomeroy admits, any of the Floor Articles “CAN be used to hold a variety of articles other than candles.” Pl.’s Response to Def.’s Statement of Facts ¶ 9; *see also* Def.’s Statement of Facts ¶ 9 (same).

Customs classified the eight Floor Articles as “Glassware of a kind used for . . . indoor decoration or similar purposes” under subheading 7013.99.90, assessing duties at the rate of 4.3%. See Pl.’s Final Schedule.<sup>13</sup>

### C. Wall Articles

The Wall Articles at issue include two different models of merchandise – Pomeroy’s Romano Wall Lighting and its Lattice Wall Lighting, each of which is comprised of a glass vessel and an iron wall mounting. See Pl.’s Brief at Exhs. 8–9 (boxes in which Wall Articles were imported, featuring photographs of articles).

No samples of the articles were made available, and their exact dimensions are unclear. Pl.’s Brief at 17. However, the depictions on the boxes indicate that the articles’ iron wall mounting supports a glass vessel with a rounded bottom. See Pl.’s Brief at Exh. 8 (box in which Lattice Wall Lighting was imported); Pl.’s Brief at Exh. 9 (box in which Romano Wall Lighting was imported). The glass vessel appears somewhat smaller than – but roughly the same shape as – the vessels used in the Floor Articles. Compare Pl.’s Brief at Exh. 3 (photograph of three Basics Floor Candles) and Pl.’s Brief at Exhs. 8–9 (boxes in which Wall Articles were imported).

Pomeroy states that the Wall Articles “were always advertised and sold as candle holders.” Pl.’s Brief at 18. And Pomeroy emphasizes that the boxes in which the Wall Articles were imported featured photographs depicting the merchandise with candles inserted into the vessels. See Pl.’s Brief at 17–18. However, neither of the Wall Articles was imported with candles. Pl.’s Brief at 17; Def.’s Brief at 4–5, 19. Indeed, as Pomeroy concedes, the Wall Articles can be used to hold a wide variety of items other than candles, including “potpourri, flowers, sand, gravel, stones, pebbles, colored glass, fruit, wine bottles” and more. See Def.’s Statement of Facts ¶ 10 (stating that Wall Articles “could be used to hold . . . potpourri, flowers, sand,

<sup>13</sup> Subheading 7013.99.90 covers “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): Other glassware: Other: Other: Other: Valued over \$3 each: Other: Valued over \$5 each.” See Subheading 7013.99.90, HTSUS.

gravel, stones, pebbles, colored glass, fruit, wine bottles”); Pl.’s Response to Def.’s Statement of Facts ¶ 10 (admitting that the Wall Articles “COULD be so used”).

Customs classified both models of Wall Articles as decorative glass articles under subheading 7013.99.50, and assessed duties at the rate of 18%. See Pl.’s Final Schedule.<sup>14</sup>

## II. STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a). Customs’ classification decisions are reviewed *de novo*, through a two-step analysis. See 28 U.S.C. § 2640; *Faus Group, Inc. v. United States*, 581 F.3d 1369, 1371–72 (Fed. Cir. 2009). The first step of the analysis “addresses the proper meaning of the relevant tariff provisions, which is a question of law. The second step involves determining whether the merchandise at issue falls within a particular tariff provision as construed.” See *Faus Group*, 581 F.3d at 1371–72 (citing *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998)).

Interpretation of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. See *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1364–65 (Fed. Cir. 1998) (citation omitted). Summary judgment is thus appropriate where – as here – the nature of the merchandise is not in question, and the sole issue is its proper classification. See *Bausch & Lomb*, 148 F.3d at 1365 (citation omitted) (explaining that summary judgment is appropriate in customs classification cases “when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is”).

In the case at bar, although the parties argue for classification under different headings of the HTSUS, there are no disputes of material fact. The question presented is limited to the legal issue of the proper classification of the merchandise.<sup>15</sup> This matter is therefore ripe for summary judgment.

<sup>14</sup> The complete text of subheading 7013.99.50 is set forth in footnote 9, above.

<sup>15</sup> The parties argue over whether Customs’ classifications of the merchandise here at issue are entitled to a statutory presumption of correctness. See Def.’s Brief at 9–10; Pl.’s Reply Brief at 1; 28 U.S.C. § 2639(a)(1). As Pomeroy correctly notes, however, the presumption of correctness is irrelevant at the summary judgment stage, where – by definition – there is assertedly no dispute as to any material fact. See, e.g., *Goodman Mfg., L.P. v. United States* 69 F.3d 505, 508 (Fed. Cir. 1995) (holding that, “[b]ecause there was no factual dispute between the parties, the presumption of correctness is not relevant”); see generally *Universal Elec. Inc. v. United States*, 112 F.3d 488, 491–93 (Fed. Cir. 1997); *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483–84 (Fed. Cir. 1997).

### III. ANALYSIS

The proper tariff classification of all merchandise imported into the United States is governed by the General Rules of Interpretation (“GRIs”). The GRIs provide a framework for classification under the HTSUS, and are to be applied in sequential order. *See, e.g., North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Orlando Food*, 140 F.3d at 1439–40.

GRI 1 provides for classification “according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [GRIs 2 through 6].” GRI 1, HTSUS. Thus, the first step in any classification analysis is to determine whether the headings and notes require a particular classification.

Here, Note 1(e) to Chapter 70 of the HTSUS specifically provides that Chapter 70 does not cover lamps or lighting fittings or the other items included under heading 9405. *See* Chapter Note 1(e) to Chapter 70, HTSUS.<sup>16</sup> Similarly, Explanatory Note 94.03 expressly excludes

<sup>16</sup> As explained in *Pomeroy II*, if the subject merchandise here at issue is properly classifiable under heading 9405, its classification under heading 7013 is barred as a matter of law by Chapter Note 1(e), which provides, in relevant part:

1. This chapter does not cover:

. . . . .  
(e) *Lamps or lighting fittings*, illuminated signs, illuminated name-plates or the like, having a permanently fixed light source, or parts thereof of heading 9405;

Chapter Note 1(e) to Chapter 70 (emphasis added); *see* Pl.’s Brief at 8; Def.’s Brief at 7; *see also Pomeroy II*, 32 CIT at 540, 540 n.15, 559 F. Supp. 2d at 1388, 1388–89 n.15 (2008). Unlike Explanatory Notes (which are persuasive, but not binding), Chapter Notes are mandatory and conclusive statutory law for all purposes. *See, e.g., Degussa Corp. v. United States*, 508 F.3d 1044, 1047 (Fed. Cir. 2007) (noting that “chapter notes are integral parts of the HTSUS, and have the same legal force as the text of the headings,” in contrast to “[e]xplanatory notes,” which “are not legally binding but may be consulted for guidance and are generally indicative of the proper interpretation of a tariff provision”) (citation omitted); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (describing chapter notes as “statutory language” of HTSUS).

In addition, pursuant to Explanatory Note 70.13, “Lamps and lighting fittings and parts thereof of heading 94.05” are expressly excluded from classification as “Glassware of a kind used for . . . indoor decoration” under heading 7013. *See* Explanatory Note 70.13.

The Explanatory Notes function as an interpretative supplement to the HTSUS, and are “generally indicative of . . . [its] proper interpretation.” *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 549 (1988), reprinted in 1988 U.S.C.A.N. 1547, 1582). They are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (which served as the basis of the HTSUS) as viewed by the Customs Cooperation Council (now known as the World Customs Organization), the international institution that drafted the international nomenclature. Thus, while the Explanatory Notes “do not constitute controlling legislative history,” they “nonetheless are intended to clarify the scope of HTSUS [provisions] and offer guidance in interpreting [those provisions].” *Mita Copystar Am. v. United*



“[s]tandard lamps and other lamps and lighting fittings” from classification under heading 9403. See World Customs Organization, Harmonized Commodity Description and Coding System: Explanatory Note 94.03 (2d ed. 1996). Thus, if the merchandise at issue is classifiable as “Lamps and lighting fittings” under heading 9405, it is not classifiable as either decorative glassware under heading 7013 or “Other furniture and parts thereof” under heading 9403. Accordingly, the analysis of the classification of all of the articles in question logically must begin with heading 9405.

Where classification is not resolved by GRI 1, the analysis proceeds to subsequent GRIs. GRI 2 instructs, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete . . . , provided that, as entered, the incomplete . . . article has the essential character of the complete . . . article.” GRI 2(a), HTSUS. Further, any reference to “goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance” and “[t]he classification of goods consisting of more than one material or substance shall be according to the principles of [GRI 3].” GRI 2(b), HTSUS. Pursuant to GRI 3, more “specific” heading descriptions “shall be preferred to headings providing a more general description.” GRI 3(a), HTSUS. “However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods . . . , those headings are to be regarded as equally specific,” and goods covered by such headings are to be “classified as if they consisted of the material or component which gives them their essential character.” GRI 3(a)-(b), HTSUS.

As detailed below, the three groups of merchandise here in dispute are properly classified under heading 7013. The Pillar Plates are properly classified under HTSUS subheadings 7013.99.50 or 7013.99.80 through a straightforward application of GRI 1. The Floor Articles are properly classified under subheading 7013.99.90, through the application of GRI 3(b) and its “essential character” analysis. Finally, the Wall Articles are classifiable through a similar GRI 3(b) analysis under subheading 7013.99.50.

### A. Heading 9405

Pomeroy maintains that all items in dispute are properly classifiable under heading 9405, which covers “Lamps and lighting fittings including searchlights and spotlights and parts thereof, not else-

*States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteq*, 976 F.2d at 699). See also *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003); *Rollerblade*, 112 F.3d at 486 n.3 (Fed. Cir. 1997).

All citations herein are to the second edition of the Explanatory Notes, published in 1996.

where specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included.” Heading 9405, HTSUS.<sup>17</sup> As an *eo nomine* tariff provision,<sup>18</sup> heading 9405 generally encompasses all forms of the article. *See, e.g., Pomeroy II*, 32 CIT at 549, 559 F. Supp. 2d at 1396 (concluding that heading 9405 “is clearly identifiable as an *eo nomine* provision,” not a principal use provision); Pl.’s Brief at 6, 15, 16 (stating that heading 9405 is *eo nomine* provision); Def.’s Reply Brief at 5 (same); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (explaining that *eo nomine* provisions ordinarily cover all forms of named article).<sup>19</sup>

Explanatory Note 94.05 defines “Lamps and lighting fittings” to

<sup>17</sup> Pomeroy does not argue that the articles at issue fit within the definition of any terms other than “Lamps and lighting fittings . . . and parts thereof” under heading 9405. Heading 9405, HTSUS. That is, Pomeroy does not contend that any of the articles fit within the meaning of the terms “searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source.” Heading 9405, HTSUS; *see generally* Pl.’s Brief; Pl.’s Reply Brief.

<sup>18</sup> An *eo nomine* provision is “one which describes [a] commodity by a specific name, usually one well known to commerce.” *Casio, Inc. v. United States*, 73 F.3d 1095, 1097 (Fed. Cir. 1996) (quoting *Black’s Law Dictionary* (6th ed. 1990)).

<sup>19</sup> Although Pomeroy repeatedly and unequivocally states that heading 9405 is an *eo nomine* provision, Pomeroy elsewhere argues for application of the *Carborundum* factors in the context of a “principal use” analysis, devoting much ink to assertions concerning matters such as the design, marketing, and sales of its merchandise. *See, e.g.,* Pl.’s Brief at 9 (representing that Floor Articles were “designed . . . as candleholders for use in homes, or offices, in doors or out of doors”), 18 (asserting that Wall Articles “were sold in the candle or lighting section of the stores, and were always advertised as candleholders”), 20 (describing in detail ways in which Pillar Plates were marketed); Pl.’s Reply Brief at 5–6 (discussing nature of packaging for Wall Articles and Pillar Plates), 13 (claiming merchandise to be classifiable “based upon the intent of their designer and the manner in which said articles are marketed and sold”); *see generally* Pl.’s Brief at 4–5, 21–23 (asserting that Pomeroy designed, marketed, and sold its merchandise as candle holders); Pl.’s Reply Brief at 5–7 (same); *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976).

But Pomeroy’s reliance on the *Carborundum* factors is misplaced. As the Court of Appeals recently noted, the *Carborundum* factors are “typically used to establish whether merchandise falls within a particular class or kind for purposes of a principal use analysis.” *BenQ America Corp. v. United States*, 646 F.3d 1371, 1377 (Fed. Cir. 2011). Because (like the other two headings at issue) heading 9405 is an *eo nomine* provision, the “principal use” analysis and the *Carborundum* factors have no application here. *See Pomeroy II*, 32 CIT at 549, 559 F. Supp. 2d at 1396; Def.’s Reply Brief at 7 (explaining that “principal use factors do not govern whether a good is encompassed by an *eo nomine* term”).

The Government also notes that, elsewhere in Pomeroy’s briefs, Pomeroy occasionally seems to lapse into an “actual use” analysis. *See* Def.’s Brief at 13 n.11 (referring to Pl.’s Brief at Exh. 1). But an “actual use” analysis is no more appropriate here than a “principal use” analysis. Heading 9405 is not an “actual use” provision. There is nothing to suggest that heading 9405 is “a tariff classification controlled by the actual use to which the imported goods are put in the United States”; nor has Pomeroy proffered any evidence that it has satisfied the requirements to establish “actual use.” *See* Def.’s Brief at 13 n.11 (quoting Additional U.S. Rule of Interpretation 1(b)).

include items that “use any source of light,” including “candles.” See Explanatory Note 94.05. The Explanatory Note further specifies that heading 9405 “covers in particular . . . [c]andelabra” and “candlesticks,” in addition to “candle brackets” (such as those used on pianos). See Explanatory Note 94.05. Heading 9405 thus covers not only “*Electrical* lamps and lighting fittings,” but also lamps and lighting fittings of other types – including “*Non-electrical lamps* and lighting fittings,” such as those specified in the Explanatory Note. See Explanatory Note 94.05 (emphases added); Subheading 9405.50, HTSUS (emphasis added); Def.’s Brief at 13 (noting that heading 9405 covers candle holders).

Dictionary definitions further emphasize the “illumination” focus of heading 9405 and clarify other relevant terms in Explanatory Note 94.05.<sup>20</sup> A “lamp” is defined as “any of various devices for producing light or sometimes heat.” See Merriam-Webster’s Collegiate Dictionary (10<sup>th</sup> ed. 1997). “Lighting” is synonymous with “illumination,” and “fitting” is defined as “a small often standardized part,” e.g., an electrical fitting. See Merriam-Webster’s Collegiate Dictionary (10<sup>th</sup> ed. 1997).

Dictionary definitions are similarly instructive in interpreting terms such as “candlestick” and “candelabra.” One dictionary defines “candlestick” as “a holder with a socket for a candle” and defines “candelabra” as “a branched candlestick or lamp with several lamps.” See Merriam-Webster’s Collegiate Dictionary (10<sup>th</sup> ed. 1997). Another dictionary defines a “candlestick” as “a holder with a cup or spike for a candle” and a “candelabrum” as “a large decorative candlestick having several arms or branches.” The American Heritage Dictionary of the English Language (4<sup>th</sup> ed. 2000). It is particularly telling that Pomeroy consistently and uniformly refers to the articles in dispute as “candle holders.” See, e.g., Pl.’s Brief at 4, 8, 9, 17, 21, 23; Pl.’s Reply Brief at 2, 5, 6, 7, 16, 23, 24, 15. Yet the dictionary definition of “candleholder” is “candlestick”; and, as noted above, the definition of “candlestick” is “a holder with a socket for a candle.” See Merriam-Webster’s Collegiate Dictionary (10<sup>th</sup> ed. 1997). These definitions, with their references to a “socket” and a “cup or spike,” indicate that a basic function of a candle holder is to hold a candle securely.<sup>21</sup> As the Government puts it, “[i]t is the presence of a securely held candle that permits [an] article to satisfy the plain language purpose of

<sup>20</sup> For guidance in determining the scope of the terms in a heading, “a court may consult dictionaries, scientific authorities, and other reliable information sources and lexicographic and other materials.” *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001); see also *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (noting that “[a] court may rely upon its own understanding of terms used”).

<sup>21</sup> Pomeroy makes no argument that, if its merchandise cannot be classified under heading

articles under Heading 9405: to provide illumination.” Def.’s Brief at 14.

In determining whether the articles in question fall within the scope of heading 9405, it is axiomatic that they must be classified in their condition as imported. *See, e.g., BASF Corp. v. United States*, 497 F.3d 1309, 1314 (Fed. Cir. 2007) (citing *United States v. Citroen*, 223 U.S. 407, 414–15 (1912)). At the time of importation, none of the articles here contained candles. Therefore, at the time of importation, none of the articles were capable of providing illumination, as contemplated by heading 9405.

Nor do any of the articles have physical features that are specifically designed to hold a candle in place – no “sockets,” “cups,” or “spikes,” or anything else remotely akin to the specific features of the items (candelabra, candlesticks, and candle brackets) listed in the Explanatory Notes to heading 9405. *See generally* Def.’s Brief at 7, 15;

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9405 pursuant to GRI 1, it might be so classified pursuant to GRI 2(a). *See* Pl.’s Brief at 6 (arguing only that merchandise is classifiable under heading 9405 pursuant to straightforward application of GRI 1). As the Government explains, such an argument would get no traction in any event. *See* Def.’s Brief at 14–15; *see generally Pomeroy II*, 32 CIT at 537–40, 559 F. Supp. 2d at 1386–88.

GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete . . . , provided that, as entered, the incomplete . . . article has the essential character of the complete . . . article.” GRI 2(a) (emphases added). Accordingly, as the Government notes, the merchandise classifiable under heading 9405 includes not only “complete” merchandise, but also “incomplete” merchandise – provided that such “incomplete” merchandise has the “essential character” of the complete merchandise that is classifiable under heading 9405. *See* Def.’s Brief at 15.

Although both GRI 2(a) and GRI 3(b) employ the term “essential character,” they do so in very different contexts; and there is little authority as to the term’s meaning in the context of GRI 2(a). *See Pomeroy II*, 32 CIT at 539 n.14, 559 F. Supp. 2d at 1387 n.14. But that lack of guidance is of little moment here. By any measure, the merchandise at issue here lacks the “essential character” of “complete” merchandise that falls within the terms of heading 9405.

The Government considers whether – absent candles – the articles in question here can be classified under heading 9405 as incomplete articles possessing the essential character of a completed article (*i.e.*, a candle holder) under GRI 2(a). *See* Def.’s Brief at 15. The Government concludes that the imported articles do not possess – under GRI 2(a) – the essential character of a candle holder classifiable under heading 9405, which is to provide illumination by securely holding a candle. *See* Def.’s Brief at 15. The Government emphasizes that none of the articles incorporate any special design features to securely hold a candle, as do candelabras, candle sticks, and candle brackets. *See id.* Because the articles at issue do not incorporate any design characteristics that would permit them to function like the candelabras, candle sticks, and candle brackets specified in the Explanatory Notes to heading 9405, the Government concludes that the articles could not be classified under heading 9405 as incomplete lamps or lighting fixtures pursuant to GRI 2(a). *Id.*

Def.'s Reply Brief at 6–7.<sup>22</sup> Pomeroy's assertion that candles "can be held by the articles at issue without the benefit of such features" is unavailing. See Pl.'s Reply Brief at 5; see also Pl.'s Reply Brief at 2 (arguing that "the pillar candles used in conjunction with the articles in this case may be supported by any flat surface, without the need for spikes, sockets, inserts or raised edges"). The Pillar Plates may be able to "hold" a candle – or "support [a candle] in a particular position or keep [a candle] from falling or moving." Merriam-Webster's Collegiate Dictionary (10<sup>th</sup> ed. 1997) (defining "hold"). However, the term "candle holder" is synonymous with "candlestick" – an article that not only holds a candle, but holds it securely. If it were otherwise, any relatively flat, non-slippery object could at least theoretically be referred to as a "candle holder" for flat-bottomed candles, and thus would be *prima facie* classifiable under heading 9405 – a patently absurd result.

The items properly classified in heading 9405 are those that are capable of providing illumination and those whose design incorporates features comparable to those of candelabra, candlesticks, and candle brackets. As such, the articles here at issue are not *prima facie* classifiable under heading 9405.

### B. Heading 9403

In its reply brief, Pomeroy claims for the first time that – in the event that they are determined not to be classifiable as "Lamps and lighting fittings" under heading 9405 – the Floor Articles and the Wall Articles are alternatively classifiable as "Other furniture and parts thereof" under heading 9403. See Heading 9405, HTSUS; Heading 9403, HTSUS; Pl.'s Reply Brief at 1624, 25. The Government cries foul, arguing that Pomeroy waived any such claims by not raising them in its opening brief. See Def.'s Reply Brief at 9–10. It is "well established that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319–20 (Fed. Cir. 2006); see also *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002) (same). The doctrine of waiver has even greater force where, as here, it is a new claim (rather than a new argument) that is at issue. Pomeroy contends that *Jarvis Clark* nevertheless mandates consideration of the heading. See Pl.'s Reply Brief at 19. There is no need to resolve either argument, however, because Pomeroy's claim for classification under heading 9403 cannot succeed on the merits. See generally Def.'s Reply Brief at 5, 9–14.

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<sup>22</sup> The articles in dispute are thus distinguishable from the Metropol articles, which have such a socket and raised edge feature and which the parties stipulated as classifiable under heading 9405. See section I, *supra*.

As a threshold matter, Note 2 to Chapter 94 limits classification under the headings of that chapter to articles that are “designed for placing on the floor or ground,” subject only to certain select exceptions that are not relevant here. *See* Chapter Note 2 to Chapter 94, HTSUS; Def.’s Reply Brief at 13. Pomeroy’s Wall Articles are therefore, by definition, expressly excluded from classification under heading 9403.

Even if the Wall Articles were not expressly excluded from classification under heading 9403, they cannot be so classified, just as the Floor Articles cannot be so classified, because they are not used “mainly with a utilitarian purpose.” *See* Def.’s Reply Brief at 14. In relevant part, the General Explanatory Notes to Chapter 94 state:

For purposes of this Chapter, the term “furniture” means: (A) Any “movable” articles (*not included* under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground and which are used, *mainly with a utilitarian purpose*, to equip private dwellings, hotels, theatres, cinemas, offices, churches, schools, cafes, restaurants, laboratories, hospitals, dentists’ surgeries, etc., or ships, aircraft, railway coaches, motor vehicles, caravan-trailers or similar means of transport.

General Explanatory Notes, Chapter 94 (second emphasis added). The Explanatory Notes for heading 9403 further state that the heading “includes furniture for: (1) Private dwellings, hotels, etc., such as: cabinets, linen chests, bread chests, log chests; chests of drawers, tallboys; pedestals, plant stands; dressing-tables; pedestal tables; wardrobes, linen presses; hall stands, umbrella stands; sideboards, dressers, cupboards; food-safes; pedestal ashtrays; music cabinets, music stands or desks; play-pens; [and] serving trolleys . . .” Explanatory Note 94.03.

The Explanatory Note to Chapter 94 emphasizes that items classified as furniture are those “mainly with a utilitarian purpose.” “Utilitarian” is defined as “of, pertaining to, consisting in utility; aiming at utility, as distinguished from beauty, ornament.” *See* Webster’s New International Dictionary (2d ed. 1953). The nature of the items listed in the Explanatory Note for heading 9403 further underscores the seminal notion of utility.

The Government points to *Furniture Import* as an illustration of the longstanding trend of courts, even under prior tariff systems, to construe “furniture” as limited to articles that are “for the use, convenience, and comfort of the house dweller and not subsidiary articles



designed for ornamentation alone.” Def.’s Reply Brief at 11 (*citing Furniture Import Corp. v. United States*, 56 Cust. Ct. 125, 133 (1966)); *see also Sprouse Reitz & Co. v. United States*, 67 Cust. Ct. 209 (1971) (discussing the distinction between utilitarian and decorative articles for purposes of determining whether goods fall within common meaning or TSUS headnote definition of “furniture”). The *Furniture Import* court observed that “furniture” “embraces articles of utility which are designed for the use, convenience, and comfort of the dweller in a house,” as distinguished from articles that are “subsidiary adjuncts and appendages designed for the ornamentation of a dwelling or business place, or which are of comparatively minor importance so far as use, comfort and convenience are concerned.” *Furniture Import Corp.*, 56 Cust. Ct. at 132.

The court in *Furniture Import* considered the classification of a variety of items. Of particular relevance here is that court’s analysis of sconces that were designed to hold either plants or wax candles. The court concluded that the sconces were not classifiable as “furniture” under the applicable tariff system, because the sconces were ornamental rather than utilitarian. *See Furniture Import Corp.*, 56 Cust. Ct. at 133, 136. The mere fact that the sconces were designed to hold other decorative articles – *i.e.*, plants or candles – did not convert the sconces from ornamental articles into utilitarian ones.

By the same token, the Floor Articles and Wall Articles at issue here are not “mainly . . . utilitarian” in nature, because they are not “aiming at utility as distinguished from beauty, ornament.” *See Webster’s New International Dictionary* (2d ed. 1953) (definition of “utilitarian”). As with the sconces in *Furniture Import*, the mere fact that the Floor Articles and Wall Articles here can be used to hold other decorative items does not transform the Floor Articles and Wall Articles into utilitarian articles classifiable as “furniture.” *See Furniture Import Corp.*, 56 Cust. Ct. at 133, 136. Pomeroy seeks to make much of certain language from *Furniture Import* that was quoted in *Sprouse*: “None of the cases since that time [*i.e.*, the early twentieth century] have held that articles which are manifestly ornamental only, as distinguished from ones useful to hold ornaments, are furniture.” *See Pl.’s Reply Brief* at 23 (*quoting Sprouse*, 67 Cust. Ct. at 218). Pomeroy apparently contends that holding ornaments suffices to render an object “furniture.” But Pomeroy misconstrues the quote. *See generally* Def.’s Reply Brief at 11–12. Whatever that language may mean, it can only be read to be consistent with the holding in *Furniture Import* – that the sconces there at issue, although useful to hold ornamental object such as plants and candles, could not be classified as “furniture.”

In a further attempt to support its contention that the Floor Articles and Wall Articles are classifiable as “furniture,” Pomeroy invokes a Customs ruling letter (specifically, NY N087135, dated December 18, 2009). *See* Pl.’s Reply Brief at 21–22. But that ruling letter is inapposite. *See generally* Def.’s Reply Brief at 12–13. In the ruling letter, Customs noted that the imported articles there in question contained spikes for impaling and securing pumpkins and jack-o-lanterns. It was the presence of the spike that rendered those articles primarily utilitarian. The ruling letter referred to the Explanatory Notes to Chapter 94, and observed that heading 9403 includes furniture for “Private dwellings, hotels, etc. such as: cabinets, linen chests, bread chests, log chests . . . pedestals, *plant stands* . . . .” *See* NY N087135 (emphasis in original). Customs determined that the articles in question were “pumpkin stands,” and concluded that “[s]uch utilitarian articles are considered furniture.” *Id.*

As the Government argues, the Floor Articles and Wall Articles at issue here are not like the pumpkin stands in the Customs ruling letter. Among other things, they are conspicuously missing spikes that would render them useful for impaling and securing an item. *See* Def.’s Reply Brief at 13. Because the Floor Articles and Wall Articles – much like the sconces in *Furniture Import* – are not used “mainly with a utilitarian purpose” (and are instead more decorative and ornamental in nature), they are not *prima facie* classifiable as furniture and Pomeroy’s claim to classification under heading 9403 must fail.

### C. Heading 7013

The third of the three competing headings is the tariff provision under which Customs classified the merchandise in dispute – heading 7013, which covers “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes,” with certain exceptions not relevant here. *See* Heading 7013, HTSUS. As discussed below, each of the articles at issue is either wholly made of glass (*i.e.*, the Pillar Plates) or is a composite article (*i.e.*, the Floor Articles and the Wall Articles) where the glass vessel is the component that imparts its “essential character” to the merchandise. As such, all the articles were properly classified under heading 7013.<sup>23</sup>

<sup>23</sup> Highlighting the fact that one of the Floor Articles at issue here (specifically, the Medium Romano Floor Candle) was the subject of *Pomeroy I*, where it was classified under heading 7013, the Government seeks to invoke *stare decisis* to claim that the article must be so classified in this action. *See Pomeroy I*, 26 CIT at 634, 246 F. Supp. 2d at 1296; Def.’s Brief at 7–8, 20–21, 24–25; Def.’s Reply Brief at 4, 8–9. For its part, Pomeroy vigorously contests

### 1. *The Pillar Plates*

The Pillar Plates, which consist only of glass, with three glass feet to allow for display on a table or other similar surface, plainly fall within the scope of “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes,” and thus were properly classified under heading 7013. *See generally* Heading 7013, HTSUS; Def.’s Brief at 7, 16.

Classification at the subheading level is determined by the value of the glassware items. Subheadings 7013.99.50 and 7013.99.80 are differentiated by the value of the glassware items covered by the provision. Subheading 7013.99.50 covers “Other glassware” valued over \$0.30 but not over \$3 each, while subheading 7013.99.80 covers “Other glassware” valued over \$3 but not over \$5 each. *See* Subheading 7013.99.50, HTSUS; Subheading 7013.99.80, HTSUS. The Pillar Plates are properly classified under these “basket” subheadings because they do not fall within any of the other subheadings under heading 7013.

The vast majority of the Pillar Plates were properly classified and liquidated. However, in certain entries, the Large Frosted Pillar Plate (article # 687471) was mistakenly classified under subheading 7013.39.50, which covers “Glassware of a kind used for table . . . or kitchen purposes other than that of glass-ceramics . . . Valued over \$3 but not over \$5 each.” Subheading 7013.39.50, HTSUS (emphasis added). Although the rate of duty is the same (9%) for subheadings 7013.39.50 and 7013.99.80, Customs must reliquidate those articles under the proper subheading – subheading 7013.99.80.

Invoices show that all of the remaining Pillar Plate entries indeed fall within the limits of the subheadings’ value ranges. Accordingly, except as noted above, all other Pillar Plates shall remain classified as assessed by Customs.

### 2. *The Floor Articles and The Wall Articles*

Assuming, for purposes of analysis, that the metal components of the Floor Articles and the Wall Articles preclude their classification as “Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes” under heading 7013 pursuant to GRI 1, the classification analysis proceeds to GRI 2. *See* Heading 7013, HTSUS. GRI 2(a), which addresses incomplete or unfinished goods, is

the applicability of the doctrine under the circumstances presented here. *See* Pl.’s Reply Brief at 7–16. As discussed below, the Government prevails on the merits as to the classification under heading 7013 of all Floor Articles, including the Medium Romano Floor Candle. There is therefore no need to parse the parties’ respective positions on *stare decisis*.

not relevant here. *See* GRI 2(a), HTSUS. GRI 2(b) provides that, if the goods consist of two or more materials and are *prima facie* classifiable under two provisions, classification is governed by GRI 3. *See* GRI 2(b), HTSUS. Here, the Floor Articles and the Wall Articles each consist of a glass component and a metal component, rendering them *prima facie* classifiable under both heading 7013 and heading 8306 (which covers “statuettes and other ornaments, of base metal”). *See generally Pomeroy I*, 26 CIT at 628–29, 246 F. Supp. 2d at 1291; Heading 7013, HTSUS; Heading 8306, HTSUS. Analysis pursuant to GRI 2(b) and GRI 3 is therefore necessary.

Under GRI 3(a), because the competing headings “each refer to a part of the composite article at issue, the exception to GRI 3(a)’s rule of ‘relative specificity’ applies, and the two headings are deemed equally specific.” *Pomeroy I*, 26 CIT at 630, 246 F. Supp. 2d at 1293. The analysis therefore proceeds to GRI 3(b) and the “essential character” test. *Id.* GRI 3(b) provides: “Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to [GRI] 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.” *See* GRI 3(b), HTSUS. Explanatory Note (IX) to GRI 3(b) elaborates that, under this rule, composite goods include goods whose components have been adapted to one another, are mutually complementary, and form a whole that would not normally be offered for sale separately. *See* Explanatory Notes, GRI 3(b), at (IX). Explanatory Note (VIII) to GRI 3(b) provides further guidance: “The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value or by the role of a constituent material in relation to the use of the goods.” *See* Explanatory Notes, GRI 3(b), at (VIII).

Analyzing the Floor Articles at the GRI 3(b) level reveals that each of the articles is a composite of metal (iron) and a clear glass vessel which can be used to hold and display a variety of items. *See* Pl.’s Exhs. 2–6 (physical samples and photographs of Floor Articles). The metal pedestal cannot hold other items without first holding the glass vessel. *Id.* The function of each article as a whole is to hold and display an object or objects; and the glass vessel is the component that gives the article its ability to serve that function. Ruling on the classification of the Medium Romano Floor Lamp (one of the articles at issue here), *Pomeroy I* held exactly that:

The pedestal, while complementary to the glass vessel, is subsidiary to it in the context of the merchandise as an integral whole. The pedestal serves to elevate the glass vessel, and to hold it upright. But it is the glass vessel which is the focal point of the article, and which performs the article's overall function – holding a candle, flowers, a plant, a wine bottle, or some similar object.

*Pomeroy I*, 26 CIT at 629, 246 F. Supp. 2d at 1292. Thus, the essential character of the Floor Articles is imparted by the glass vessels, which can hold – and, because they are clear, also display – any number of items. Because it is the glass vessel that imparts the essential character to each of the Floor Articles, those articles all were properly classified under heading 7013.

Classification at the subheading level, once again, is determined by value. Review of the invoices indicates that all of the entries fall within the value range (*i.e.*, over \$5 each) specified for subheading 7013.99.90, “Glassware of a kind used for . . . indoor decoration,” dutiable at the rate of 4.3%. Accordingly, the Floor Articles shall remain classified as assessed by Customs.

Like the Floor Articles, the Wall Articles too must be subjected to a GRI 3(b) analysis to determine their essential character. Each of the Wall Articles consists of two components – an iron wall mounting and a glass vessel. *See* Pl.’s Exhs. 8–9 (boxes depicting the Wall Articles). The metal wall mounting is specially designed to hold the accompanying glass vessel as an insert. *See id.* Like the Floor Articles, the function of each of the Wall Articles as a whole is to hold and display an object or objects; and it is the glass vessel that is the component that gives the article as a whole its ability to serve that function. *See id.* Thus, much as the glass components of the Floor Articles imparted their essential character to those articles as a whole, so too the essential character of the Wall Articles is imparted by the glass vessels. The Wall Articles therefore were also properly classified under heading 7013.

Classification at the subheading level, once again, is determined by value. Review of the invoices indicates that all of the relevant entries fall within the specified value range (over \$0.30 but not over \$3 each) for subheading 7013.99.50, “Glassware of a kind used for . . . indoor decoration,” dutiable at the rate of 18%. Accordingly, Customs’ classifications of the Wall Articles are sustained.

#### IV. CONCLUSION

For all the reasons detailed above, Pomeroy's Motion for Summary Judgment is denied, and the Government's Cross-Motion is granted. As detailed above, the Pillar Plates were properly classified under HTSUS subheading 7013.99.50 or subheading 7013.99.80, depending on the value of the articles; the Floor Articles were properly classified under subheading 7013.99.90; and the Wall Articles were properly classified under subheading 7013.99.50. Further, the articles as to which the parties have stipulated shall be reclassified under the agreed-upon tariff provisions.

Judgment will enter accordingly.

Dated: January 28, 2013

New York, New York

*/s/ Delissa A. Ridgway*  
DELISSA A. RIDGWAY, JUDGE



Slip Op. 13-14

GIORGIO FOODS, INC., Plaintiff, v. UNITED STATES and UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and L.K. BOWMAN COMPANY, THE MUSHROOM COMPANY, and MONTEREY MUSHROOMS, INC., Defendant-intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 03-00286

[Denying plaintiff's motion to stay action and allowing plaintiff thirty additional days to respond to motions to dismiss]

Dated: January 30, 2013

*Michael T. Shor* and *Sarah Brackney Arni*, Arnold & Porter LLP, of Washington, DC, for plaintiff.

*Courtney S. McNamara*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director.

*Neal J. Reynolds*, Assistant General Counsel for Litigation, and *Patrick V. Gallagher, Jr.*, Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant U.S. International Trade Commission.

*Valerie A. Slater*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, for defendant-intervenors L.K. Bowman Company and The Mushroom Company. With her on the brief were *W. Randolph Teslik* and *Troy D. Cahill*.

*Michael J. Coursey* and *R. Alan Luberda*, Kelley Drye & Warren, LLP, of Washington, DC, for defendant-intervenor Monterey Mushrooms, Inc.



## OPINION AND ORDER

### Stanceu, Judge:

In this action, plaintiff Giorgio Foods, Inc. (“Giorgio”) challenges decisions by the U.S. International Trade Commission (the “ITC”) and U.S. Customs and Border Protection to deny Giorgio benefits under the now-repealed Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA” or “Byrd Amendment”)<sup>1</sup> on the basis of Giorgio’s questionnaire responses during the ITC’s investigation of certain preserved mushrooms from Chile, China, India, and Indonesia.<sup>2</sup> Second Am. Compl. ¶¶ 1–14 (Jun. 7, 2011), ECF No. 150–1. Defendant United States, defendant ITC, and defendant-intervenors L.K. Bowman Company, The Mushroom Company (formerly, Mushroom Canning Company), and Monterey Mushrooms, Inc. move to dismiss this action.<sup>3</sup> The court has jurisdiction over this matter pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4) (2006).

Before the court is plaintiff’s motion requesting a stay of the proceedings pending the outcome of two appeals of CDSOA-related decisions arising from an antidumping duty order on Chinese wooden bedroom furniture that are currently before the Court of Appeals for the Federal Circuit (“Court of Appeals”): *Ashley Furniture Industries, Inc. v. United States*, 36 CIT \_\_\_, 818 F. Supp. 2d 1355 (2012) *appeal docketed*, No. 2012–1196 (Fed. Cir. Feb. 1, 2012) and *Ethan Allen Global, Inc. v. United States*, 36 CIT \_\_\_, 816 F. Supp. 2d 1330 (2012), *appeal docketed*, No. 2012–1200 (Fed. Cir. Feb. 7, 2012) (collectively, the “furniture appeals”). Corrected Mot. to Stay, or in the Alternative, for an Extension of Time to Respond to Mot.’s to Dismiss 1 (Nov. 19, 2012), ECF No. 184 (“Pl.’s Mot.”); Mem. in Supp. of Corrected Mot. to Stay, or in the Alternative, for an Extension of Time to Respond to Mots. to Dismiss 9 (Nov. 19, 2012), ECF No. 184–2 (“Pl.’s Mem.”). All of the defendants and defendant-intervenors oppose the stay. Resp. in

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<sup>1</sup> Pub.L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000), *repealed by* Deficit Reduction Act of 2005, Pub.L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007).

<sup>2</sup> The procedural history of this action can be found in previous opinions of this Court. *See Giorgio Foods Inc. v. United States*, 31 CIT 1261, 1262, 515 F.Supp.2d 1313, 1316 (2007) (“*Giorgio I*”), *Giorgio Foods Inc. v. United States*, 35 CIT \_\_\_, \_\_\_, 755 F.Supp.2d 1342, 1344–45 (2011) (“*Giorgio II*”), *Giorgio Foods Inc. v. United States*, 35 CIT \_\_\_, \_\_\_, 804 F.Supp.2d 1315, 1317–18 (2011) (“*Giorgio III*”).

<sup>3</sup> Def. U.S. Int’l Trade Comm’n’s Mot. to Dismiss Pursuant to R. 12(b)(5) (Oct. 16, 2012), ECF No. 179; Def.’s Mot. to Dismiss for Failure to State a Claim upon which Relief Can Be Granted and Mot. to Dismiss for Lack of Jurisdiction (Oct. 16, 2012), ECF No. 180; Mot. by Def.-Intervenors L.K. Bowman Co. and The Mushroom Co. (Formerly Mushroom Canning Co.) to Dismiss (Oct. 16, 2012), ECF No. 181; Def.-Intervenor Monterey Mushrooms, Inc.’s Mot. to Dismiss Pl.’s Second Am. Compl. Pursuant to R. 12(B)(1) and 12(B)(5) (Oct. 16, 2012), ECF No. 182.

Opp'n to Mot. to Stay the Proceeding (Dec. 17, 2012), ECF No. 191 ("ITC's Resp."); Resp. in Opp'n to Mot. to Stay (Dec. 17, 2012), ECF No. 192 ("Customs' Resp."); Resp. of Def.-Intervenors L.K. Bowman and The Mushroom Co. (formerly Mushroom Canning Co.) to Pl.'s Mot. to Stay, or in the Alternative, for an Extension of Time to Respond to Mot. to Dismiss (Dec. 17, 2012), ECF No. 193 ("L.K. & Mushroom Co.'s Resp."); Resp. of Def.-Intervenor Monterey Mushrooms, Inc. to Mot. of Pl.'s to Stay, or in the Alternative, for an Extension of Time to Respond to Mots. to Dismiss (Dec. 17, 2012), ECF No. 194 ("Monterey's Resp."). Should a stay not be granted, plaintiff requests an additional thirty days from the date of the denial to file its response to defendants' and defendant-intervenors' motions to dismiss. Pl.'s Mot. 2. Defendants and defendant-intervenors do not oppose this request. ITC's Resp. 1 n.1; Customs' Resp. 1; L.K. & Mushroom Co.'s Resp. 1 n.1; Monterey's Resp. 1 n.1. For the reasons stated below, the court denies plaintiff's motion to stay this action but will grant plaintiff the addition time to respond to the pending motions to dismiss.

Plaintiff's second amended complaint brings as-applied constitutional challenges, grounded in the First Amendment and the Fifth Amendment equal protection guarantee, to the CDSOA requirement that parties seeking CDSOA distributions indicate support for an antidumping petition "by letter or through questionnaire response." 19 U.S.C. § 1675c(b)(1)(A), (d)(1) (2000). Second Am. Compl. ¶¶ 89–98. Plaintiff also brings a claim alleging that defendant-intervenors have been "unjustly enriched at the expense of Giorgio," *id.* ¶ 108, and seeks "full restitution to Giorgio of Giorgio's lawful share of all CDSOA disbursements [defendant-intervenors] have received . . .," *id.* ¶ 109(e).

A stay is granted at the court's discretion and must take into consideration the interests of judicial economy and efficiency. *Landis v. North American Co.*, 299 U.S. 248, 257 (1936). The party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Id.*, 299 U.S. at 255.

Plaintiff argues that a stay of this action is appropriate because "[t]he decision in the furniture appeals will clarify the Federal Circuit's constitutional and statutory constructions with regard to the CDSOA's eligibility criteria," Pl.'s Mem. 5, and decide the question of how to apply *PS Chez Sidney, L.L.C. v. U.S. Int'l. Trade Comm'n*, 684 F.3d 1374 (2012) ("*PS Chez Sidney*"), which plaintiff believes controls this action, Pl.'s Mem. 14–15. However, plaintiff's argument that the

outcome of the furniture appeals will bear on this action is mere speculation. Although the decisions on the pending appeals may clarify the law or move the law in a particular direction, such speculation is not, without more, a compelling reason to stay this case.

It is also speculative whether the furniture appeals will provide any clarification on plaintiff's unjust enrichment/restitution claim. Additionally, the recent decision of the Court of Appeals in *PS Chez Sidney* is distinguishable from this case. For these reasons, the court is unable to discern from plaintiff's motion a compelling reason for a stay.

Plaintiff also submits that defendants and defendant-intervenors "will suffer no harm if this case is stayed." *Id.* at 6. Even were the court to assume a lack of any such harm, the court still would not grant plaintiff's motion to stay. Plaintiff has failed to show how a stay at the current time would promote judicial economy and efficiency rather than delay this case.

Accordingly, the court denies plaintiff's request for a stay but grants plaintiff's request for thirty additional days to respond to the motions to dismiss.

### **CONCLUSION AND ORDER**

Therefore, upon consideration of plaintiff's motion, defendants' and defendant-intervenors' responses to plaintiff's motion, and all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiff's motion to stay is denied; and it is further

**ORDERED** that plaintiff shall have thirty (30) days from the date of this Opinion and Order to respond to defendants' and defendant-intervenors' motions to dismiss.

Dated: January 30, 2013

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU

JUDGE

