(Slip Op. 02–67)

FORMER EMPLOYEES OF MARATHON ASHLAND PIPELINE, LLC, PLAINTIFFS *v.* ELAINE CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 00–04–00171

[Plaintiffs' motion to certify employees for trade adjustment assistance denied, and case remanded for further consideration of whether Plaintiffs "produced" an article within the provisions of the statute and whether increased imports contributed importantly to their separation.]

(Decided July 16, 2002)

Katten, Muchin & Zavis, (Marianne Rowden, James L. Sawyer) for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director; *Lucius B. Lau,* Assistant Director; *(Michele D. Lynch, Delfa Castillo),* Commercial Litigation Branch, Civil Division, Department of Justice; *Gary E. Bernstecker*, Attorney, Office of the Solicitor, Division of Employment & Training Legal Service, U.S. Department of Labor.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* This case is before the court on Plaintiffs' motion for judgment upon the administrative record pursuant to USCIT Rule 56.1(c)(1). Plaintiffs seek judicial review of the Secretary of Labor's (the "Secretary" or "Labor") denial of certification for trade adjustment assistance (TAA) under Section 222 of the Trade Act of 1974, (the "Act"), as amended and codified at 19 U.S.C. § 2272 (1994). *See Notice of Determination Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance ("Determination"),* 64 Fed. Reg. 72690, 72691 (Dep't of Labor Dec. 2, 1999), *reconsideration denied*, 65 Fed Reg. 8743 (Dep't of Labor Feb. 22, 2000). Plaintiffs are former Marathon Ashland Pipeline workers who were employed as gaugers, who state that they performed the functions, *inter alia*, of testing and determining the quality of crude oil to be purchased and transported. The Secretary determined that the Plaintiffs did not satisfy the statutory criteria under 19 U.S.C. § 2272(a)(3). The Secre-

tary then voluntarily asked for remand of her negative determination to acquire additional information regarding the transportation of articles produced by the parent company of Plaintiffs' employer, Marathon Ashland Pipe Line LLC ("Marathon Ashland"). The Secretary's *Notice of Negative Determination of Reconsideration on Remand ("Remand Determination"),* 66 Fed. Reg. 52784 (Dep't of Labor Oct. 17, 2001), again denied plaintiffs' petition for certification. Plaintiffs contend the Secretary's initial Determination and Remand Determination are unsupported by substantial evidence and not in accordance with law. Plaintiffs initially claimed that the Secretary failed to investigate: 1) the actual nature of the work performed by the Plaintiffs; 2) whether Plaintiffs' separations were caused by a reduced demand for their services from their parent firm, or a firm otherwise related, whose workers independently meet the statutory criteria for certification under the Act; and 3) whether increased imports of crude oil contributed importantly to Plaintiffs' separations. Following the Secretary's Remand Determination, Plaintiffs reassert all original arguments and additionally claim that the Secretary failed to request information concerning: 1) Marathon Oil Company's ("Marathon Oil") (Marathon Ashland's parent company) importation of foreign oil between 1997 and 1999; 2) the extent to which the importation of oil by Marathon Oil caused or contributed to Marathon Ashland's decrease in domestic oil production and sales; 3) the basis for Marathon Oil's cessation of purchasing oil from the Illinois Basin Area; and 4) the nexus between Marathon Ashland's activities and the crude oil purchased or produced by its parent or related companies. Plaintiffs ask that the Secretary's determination be reversed or, in the alternative, remanded back to the Department for further investigation.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(d)(1) (1994) to review the Department of Labor's final determination regarding eligibility of workers for TAA under Section 223 of the Trade Act of 1974, as amended, 19 U.S.C. § 2273 (1994).

After reviewing the administrative records and the briefs of the parties, the court again remands the action to the Secretary for further proceedings in accordance with this opinion.

II. BACKGROUND

On October 23, 1999, Plaintiffs filed a petition for TAA with the Department of Labor under Section 221(a) of the Act on behalf of Operations Technicians at Marathon Ashland. *See Administrative Record ("A.R.")* at 1.[1] Marathon Ashland is a [" ."] *A.R.* at 18. Prior to the administrative review of Plaintiffs' petition, some of Marathon Oil Company's workers had been certified for TAA. Plaintiffs worked at Marathon Ashland's Bridgeport, Illinois, location and petitioned the Secretary for TAA after their separation from Marathon Ashland.

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[1] *The Administrative Record* and the *Supplemental Administrative Record* contain confidential information. Therefore, citations to the confidential information will be bracketed.

The Secretary issued a *Notice of Investigation* on November 8, 1999, to determine if Plaintiffs were eligible for TAA. *See* 64 Fed. Reg. 69039. Labor had to ascertain if "increased imports have contributed importantly to actual or threatened decreases in employment and to decreases in sales or production at the petitioning workers' plant."[2] *A.R.* at 12. To facilitate the investigation, Labor sent an information request to Marathon Ashland's Human Resource Representative, Mike Leland, asking him to furnish specific information regarding Marathon Ashland's organizational structure, sales, production, employment, and imports. In Leland's response he stated, *inter alia,* that [ ] *See A.R.* at 16–18. Based on Leland's response and other information compiled from the investigation, the Secretary determined that Plaintiffs did not "produce" an article within the meaning of Section 222(3) and their separation was not "caused importantly by a reduced demand for services from a parent firm * * *."[3] *A.R.* at 24. The Secretary found that because "[t]he Department of Labor has consistently determined that the performance of services does not constitute production of an article, as required by Section 222 of the Trade Act of 1974," Plaintiffs did not qualify for TAA benefits. *Id*.

On December 16, 1999, Plaintiffs requested reconsideration of the negative determination. Plaintiffs asserted that their jobs involved more than merely transporting crude oil. Plaintiffs contended that their work as gaugers constituted "production" of an article pursuant to Section 222 of the Act. Plaintiffs argued that as gaugers they tested the crude oil and determined if the oil "was of such quality as to be purchased by Marathon Oil Company and transported into the pipe line maintained by Marathon Ashland Pipe Line LLC." *A.R.* at 33. Labor reviewed the application and determined: 1) the workers provided a service that was not covered by the Act; 2) although some Marathon Oil workers received TAA certification, Marathon Ashland did not serve the locations under existing certification; and 3) the Plaintiffs were terminated because of the sale of their firm's assets to another company. *Notice of Negative Determination Regarding Application for Reconsideration ("Determination Reconsideration"),* 65 Fed. Reg. 8743. Citing to the 1988 Omnibus Trade and Competitiveness Act amendments to the

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[2] Labor's investigation is guided by the Trade Act of 1974, as amended 19 U.S.C. § 2272, which reads:

(a) The Secretary shall certify a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) as eligible to apply for adjustment assistance under this subpart if he determines—

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

(b) For purposes of subsection (a)(3) of this section—

(1) The term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.

(2)(A) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.

(B) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

[3] [ ] *A.R.* at 18. Therefore, for statutory purposes, Marathon Ashland was a "subdivision" of Marathon Oil Company.

Trade Act of 1974, Labor explained that the amendments "extended coverage to service workers engaged in exploration and drilling for crude oil and natural gas." *Id*. Labor concluded that "[t]he same consideration cannot be given to those workers engaged in employment related to the transmission of crude oil or natural gas after drilling." *Id.* Therefore, Labor denied Plaintiffs' request for administrative review.

On January 24, 2001, Plaintiffs filed their Motion for Judgment on the Administrative Record with this court. On August 7, 2001, Labor sought a voluntary remand of its investigation. Noting that it had failed to conduct a complete investigation, Labor again contacted Leland for additional information regarding whether the gaugers supported crude oil production by Marathon Oil.[4] *Supplemental A.R.* at 5. The investigation on remand revealed that in 1997, 1998 and through March of 1999, Marathon Ashland Pipe Line did not transport via pipeline any articles produced by the parent company, Marathon Oil Company, Inc. *See Supplemental A.R.* at 6. The Secretary's investigation found that in 1997, the parent company purchased crude oil at the Illinois Basin[5] that was transported by Marathon Pipe Line Company. *Id.* "In 1998, Marathon Ashland Petroleum LLC was formed and it purchased crude from the Basin which it transported via the pipeline." *Id.* In 1999, Marathon Ashland Petroleum LLC did not purchase from the lease (Illinois Basin). *See id*. On these findings, the Secretary affirmed her original notice of negative determination of eligibility to apply for TAA benefits for the former workers of Marathon Ashland Pipe Line, LLC.

III. Standard of Review

Cases contesting the denial of trade adjustment assistance filed under 28 U.S.C. § 1581(d) must be upheld if the Department of Labor's determination is supported by substantial evidence and is otherwise in accordance with law. *See* 19 U.S.C. § 2395(b); *Woodrum v. Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, 737 F.2d 1575 (Fed. Cir. 1984). The factual findings of the Secretary must be accepted if supported by "substantial evidence." "Substantial evidence has been held to be more than a 'mere scintilla,' but sufficient enough to reasonably support a conclusion." *Former Employees of Swiss Industrial Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637, 639–40 (1993) (citing *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987)). "Additionally, 'the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis.'" *Former Employees of General Electric Corp. v. U.S. Dep't of Labor*, 14 CIT 608, 610–11 (1990) (quoting *International Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978).

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[4] Responses to the Secretary's investigation on remand were provided by company official, [ ], at Marathon Ashland. *Supplemental A.R.* at 3–4.

[5] The Illinois Basin is one of Marathon Oil's domestic sources for crude oil. *A.R.* at 1.

Furthermore, this court has noted that "'because of the *ex parte* nature of the certification process, and the remedial purpose of the [trade adjustment assistance] program, the Secretary is obliged to conduct his investigation with the utmost regard for the interests of the petitioning workers.'" *Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (quoting *Local 167, International Molders and Allied Workers' Union v. Marshall,* 643 F.2d 26, 31 (1st Cir. 1981).

The court may remand a case and order further investigation if the court finds that the Secretary's investigation was "so marred that [the Secretary's] finding was arbitrary, or that it was not based upon substantial evidence." *Finkel v. Donovan*, 9 CIT 374, 381, 614 F. Supp. 1245, 1251 (1985). Thus, in the event that the Secretary fails to reach a substantiated conclusion, a remand is warranted because the Secretary failed to conduct an adequate investigation. *See Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 469, 715 F. Supp 378, 381 (1989). However, in evaluating the evidence underlying the Secretary's conclusions, the court may consider only the administrative record before it. *See* 28 U.S.C. § 2640(c) (1994); *International Union v. Reich,* 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998).

IV. Discussion

Pursuant to 19 U.S.C. § 2272 (1994) for workers to be certified for trade adjustment assistance the Secretary of Labor must determine:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that the sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. § 2272(a).

To receive trade adjustment assistance benefits, Plaintiffs must satisfy all three eligibility requirements of the statute. *See Former Employees of Keinerts, Inc. v. Herman,* 23 CIT 647, 648, 74 F. Supp. 2d 1280, 1282 (1999); *Former Employees of Bass Enter. Prod. Co. v. United States,* 13 CIT 68, 70, 706 F. Supp. 897, 900 (1989); *Abbott v. Donovan,* 8 CIT 237, 239, 596 F. Supp. 472, 474 (1984) (stating that a court must deny certification if any one of the three statutory conditions does not exist).

At issue in this case is whether there is substantial evidence in the administrative record to support the Secretary's determination that the workers of Marathon Ashland Pipe Line LLC, in Bridgeport, Illinois, are ineligible to apply for adjustment assistance benefits. The Secretary issued a negative determination asserting that Marathon Ashland workers failed to satisfy the two requirements within 19 U.S.C. § 2272(a)(3):

first, the section requires that Plaintiffs must be workers of a firm or an appropriate subdivision of a firm that "produce[s]" articles; second, that in order for Plaintiffs to be eligible for trade adjustment assistance benefits, "increases of imports of articles like or directly competitive with the articles produced by [Plaintiffs'] firm or * * * appropriate subdivision * * * contributed importantly to [their] total or partial separation * * * and to [their firm's or appropriate subdivision's] decline in sales or production." Thus, it follows that the section's certification requirements are satisfied if it is established that a group of workers produces an "article" within the meaning of the statute, and an imported article like or directly competitive with the article produced by the workers' firm or subdivision contributes importantly to the loss of such workers' jobs.

A. The Secretary Failed to Adequately Investigate Whether Plaintiffs Are Workers of a Firm or an Appropriate Subdivision of a Firm That "Produce[s]" Articles.

Labor contends that the petitioning employees fail to satisfy the criteria set forth in 19 U.S.C. § 2272(a) because they [" ."] *Def.'s Resp. to Pls.' First Am. Reply to Def.'s Notice of Negative Determination of Reconsideration on Remand ("Def.'s Resp. to Remand")* at 11. Defendant asserts that this conclusion was affirmed and then re-affirmed by information gathered during the Secretary's initial investigation and the investigation upon remand. Defendant states that this finding is made clear through statements in the administrative record,[6] and thus, the Secretary's determination is supported by substantial evidence and is in accordance with law.

The court finds that the Secretary's negative determination is not supported by substantial evidence, because the Secretary made the unsubstantiated conclusion that the petitioning employees did not "produce" an article within the meaning of Section 2272. "When Labor is presented with a petition for trade adjustment assistance, it has an affirmative duty to investigate whether petitioners are members of a group which Congress intended to benefit from the legislation." *Former Employees of Hawkins Oil and Gas, Inc. v. U.S. Secretary of Labor,* 17 CIT 126, 129, 814 F. Supp. 1111, 1114 (1993) (citations omitted). At best, the administrative record provides limited information discussing whether the Plaintiffs' duties as gaugers place them within the group of eligible import-impacted employees Congress intended to benefit from TAA. As such, this court cannot conclude that Labor has satisfied its requirement of reasonable inquiry, especially when viewed in light of the remedial purpose of the statute.

It is true that the court must grant deference to the Secretary of Labor's determination. *See Woodrum,* 564 F. Supp. at 828 (citations omitted). The court recognizes, however, the well established principle that "[n]o deference is due to determinations based on inadequate investigations." *Former Employees of Hawkins Oil and Gas, Inc.*, 814 F.

[6] Citing information provided by Leland: [" ."] *Def.'s Resp. to Remand* at 12; A.R. at 17.

Supp. at 1115 (citations omitted). Thus, if the court finds that the Secretary's investigation is so marred that it could not be based on substantial evidence, then it is within the court's power to remand the investigation for further evidence and inquiry. *Id.*

Labor's investigation falls below the threshold requirement of reasonable inquiry by failing to offer any explanation of the analysis used to determine that Plaintiffs' work as gaugers did not constitute "producing" an article within the meaning of Section 2272. *See id.* at 1114 (stating that Labor had a duty to provide an explanation of the criterion used to support its conclusion) (citing *Former Employees of Hawkins Oil and Gas, Inc. v. U.S. Secretary of Labor*, 15 CIT 653, 656 (1991)). In the context of TAA cases, this court has held that "conclusory assertions alone are not sufficient for Labor to make an accurate determination." *Bennett v. U.S. Secretary of Labor,* 18 CIT 1063, 1067 (1994); (citing *Former Employees of General Electric Corp.,* 14 CIT at 612–613).

Here, the Secretary based and affirmed her negative determination on conclusory assertions provided by company officials at Marathon Ashland. In doing so, the Secretary incorrectly omitted the requisite reasoned analysis, and instead substituted unsubstantiated statements. During Labor's initial investigation, Leland stated that the subject worker group [" ."] *A.R.* at 23. During Labor's further investigation,[7] the company official stated that during the time period in question, 1997–1999, the workers [" ."] *Supplemental A.R.* at 3. Relying on these responses, the Secretary concluded that the gaugers did not participate in production.

Indeed, as Defendant notes, "'unverified statements from company officials in a position to know about their company's products and business decisions can be relied upon when there is no other evidence in the record to contradict or cast doubt upon those statements.'" *Former Employees of Alcatel Telecommunications Cable v. Herman,* 134 F. Supp. 2d 445, 449 (2001) (quoting *International Union*, 20 F. Supp. 2d at 1297 n.15 (citations omitted)). In the present case, however, evidence presented by the petitioning workers stating that they were involved in more than the mere transportation of crude oil, directly contradicts the company officials' conclusions. The subject workers specifically indicate in their petition that they worked with [" ."] *A.R.* at 1. Plaintiffs' letter requesting administrative reconsideration and detailing the specific duties they performed also conflicts with company officials' statements. Such evidence moves this court to find that it is unclear whether the gaugers were involved in the production of oil. Thus, on these facts, the court cannot affirm Labor's negative determination or find that Labor

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[7] Upon remand Labor asked Marathon Ashland:

1. Did Marathon Pipe Line LLC, transport via pipeline any of the articles produced by the parent company, Marathon Oil Company, in 1997, 1998, or in the January through March months of 1998 and 1999?
2. If the above answer is yes, what percentage of your sales was represented by transporting crude oil or petroleum products for Marathon Oil Company in 1997, 1998, and the January through March months of 1998 and 1999?
3. If the answer to question 1 is yes, where did the Marathon Oil Company production originate? *Supplemental A.R.* at 1.

fulfilled its affirmative duty to conduct its investigation with the utmost regard for the petitioning workers. *See Former Employees of Hawkins Oil and Gas, Inc.,* 814 F. Supp. at 1114 (citations omitted).

By failing to give a reasoned analysis for its determination that the gaugers did not participate in production, Labor neglected its duty to interpret the meaning of "production" under Section 2272. If allowed to stand, the Secretary's negative determination would provide a definition of "production" that excludes those duties performed by gaugers. This definition, however, essentially would be an interpretation of the statute by Marathon Ashland's company officials, and not, as the law requires, by the Secretary. Whether Plaintiffs provided a service and did not participate in the "production" of an "article" within the provisions of Section 2272 is a determination that the Secretary must make based on evidence in the record by discussing the duties performed by the gaugers and how their responsibilities fit into the oil production scheme of their parent company, Marathon Oil.

Even if the Secretary makes a reasoned determination that the gaugers do not participate in the "production" of an "article," then the Secretary must investigate whether they may be eligible for certification as "service" workers. The court agrees that service workers may be certified for TAA benefits "[on] a finding that the petitioning workers were employed by a 'firm' which produced, or had an 'appropriate subdivision' which produced, the import-impacted article." *Woodrum,* 564 F. Supp. at 833. Here, the petitioning gaugers may be eligible for TAA benefits if there exists an "important causal nexus" between increased imports and the loss of their jobs. Labor has deemed this nexus to exist if "at least 25% of the service workers' activity [is] expended in service to the subdivision which produces the import-impacted article.'" *Former Employees of Stanley Smith, Inc. v. U.S. Secretary of Labor,* 20 CIT 201, 204, 967 F. Supp. 512, 516 (1996) (citing *Abbott*, 570 F. Supp. at 49). As the Secretary stated, such service workers may be certified if their separation from employment was caused importantly by a reduced demand for their services from a production facility of the parent firm, *i.e.* one otherwise related to the subject firm by ownership or related by control, whose workers independently meet the statutory criteria for certification. *See A.R.* at 37; *see also Nagy v. Donovan*, 6 CIT 141, 144, 571 F. Supp. 1261, 1263 (1983).

While Labor acknowledges this "causal nexus" test, Labor nevertheless fails to investigate the relevant facts: the nature of the work performed by Marathon Ashland gaugers in relation to production of an article by Marathon Oil.[8] *See Pemberton v. Marshall*, 639 F.2d 798, 801–2 (D.C. Cir.1981) (stating that the facts that are "important * * * are the nature of the work done at the facility and its relation to the pro-

[8] When Labor voluntarily remanded its investigation to further investigate whether the gaugers supported crude oil production of the parent company, Labor focused on whether Marathon Ashland transported articles *already* produced by Marathon Oil during the time periods in question. *See supra* n.7. The court notes that this inquiry is too limited, and points out that the causal nexus test extends to the *general* "production" of import-impacted "articles" by the parent company.

duction of an article.") Instead, Labor argues that the gaugers did not provide a service that is covered within the provisions of the Act. *See Def.'s Mem. in Opp'n to Pls.' Mot. for J. Upon the Administrative Record ("Def.'s Mem.")* at 15–16. Following the Secretary's voluntarily remanded investigation, Labor adds that because Marathon Oil only purchased crude oil at the Illinois Basin and Marathon Oil did not produce oil there, there was "no evidence linking plaintiffs to production of crude oil by the parent company." *Def.'s Resp. to Remand* at 12. Finally, Labor contends that while [ ], Marathon Ashland did not serve these currently certified producers of import-impacted oil. *Id.* at 15–16.

Labor relies on the legislative history of the Omnibus Trade and Competitiveness Act of 1988 to support its assertion that gaugers provide services falling outside of the provisions of the Act.[9] Labor argues that the 1988 amendments "limited the 'workers eligible for benefits to those engaged in exploration and drilling for oil, and not more generally to any workers in related industries who may be adversely affected in some way by oil imports.'" *Def.'s Mem.* at 15 (citing to *Former Employees of Parallel Petroleum Corp. v. U.S. Secretary of Labor*, 14 CIT 114, 120, 731 F. Supp. 524, 528 (1990) (citations omitted)). While the court concedes that Congress did not intend for TAA benefits to compensate all displaced employees, this court noted in *Former Employees of Parallel Petroleum Corp.,* that "[l]imiting benefits to a narrow class of workers engaged only in drilling and exploration would contravene the express language of the statute. * * *" *Former Employees of Parallel Petroleum Corp.,* 731 F. Supp. at 527.

In *Parallel*, this court stated:

> Both § 2272(b)(2)(A) and (B) refer to the "production" of oil and gas as a function that qualifies a firm as "producing an article" within the meaning of § 2272(a)(3). This being so, Congress could hardly have intended to limit the availability of benefits under the amendment to firms engaged *only* in exploration or drilling, when the statute expressly references "production" as a defining term for invoking the benefits of the trade adjustment assistance legislation.

Former Employees of Parallel Petroleum Corp., 731 F. Supp. at 527. Given this expansive treatment and the express language of the statute indicating that firms "otherwise produc[ing] oil or natural gas" may be eligible for TAA benefits, the court questions Labor's conclusion that

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[9] The 1988 Omnibus Trade and Competitiveness Act amendments to the Trade Act of 1974 state in pertinent part:

(b) For purposes of subsection (a)(3) of this section—

(2)(A) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas shall be considered to be a firm producing oil or natural gas.

(B) Any firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, or otherwise produces oil or natural gas, shall be considered to be producing articles directly competitive with imports of oil and with imports of natural gas.

the statute was amended to cover only service workers exclusively engaged in exploration or drilling for crude.[10]

Moreover, while the court does not question Labor's factual findings indicated above, its findings are not determinative of the issues at hand. First, the fact that Marathon Oil only purchased crude oil from the Illinois Basin does not preclude Labor from making an adequate investigation into whether at least 25% of the gaugers' activity was expended in service to production of an article by Marathon Oil, including production occurring outside of the Illinois Basin area. Second, regardless of the fact that Marathon Ashland did not serve Marathon Oil's currently certified facilities, Marathon Ashland still may have served its parent company's other production facilities whose workers independently meet the statutory criteria. Investigation into this issue is critical to determining whether Plaintiffs may be eligible for TAA certification, even if they are determined to be service workers. Without supporting facts and reasoned analysis in the Secretary's determination concerning the work of the employees here, the court cannot affirm the Secretary's finding that Marathon Ashland was only a "service" company and was not linked to production by its parent company, Marathon Oil.

Therefore, this case must be remanded to Labor for further examination into whether the petitioning employees "produce" an "article" within the meaning of the Act, and whether a causal nexus exists between service provided by Marathon Ashland Pipe Line, LLC and production of an import-impacted article by Marathon Oil.

B. The Secretary Failed to Adequately Investigate Whether Imports Contributed Importantly to Plaintiffs' Separation.

Labor additionally argues that there was no need to investigate whether imports contributed importantly to the petitioners' separation, because Marathon Oil only purchased and did not produce oil at the sites that Marathon Ashland served and there was an insufficient relationship between the two companies. Labor maintains that the need for further investigation of the company's imports is unnecessary because information in the record reveals that the petitioning employees' separation was in fact due to [ ]. *See A.R.* at 16. Labor points out that Leland corroborated this finding by indicating that [ ] and [.] *See id.* at 19.

While Plaintiffs acknowledge this [ ], they believe that [" ."] *Pls.' First Am. Reply to Def.'s Notice of Negative Determination on Remand* ("*Pls.' Reply to Remand")* at 8; A.R. at 1. Plaintiffs argue that Labor's further investigation was inadequate because it considered only whether Mara-

[10] Labor relies on *Former Employees of Permian Corp. v. United States*, 13 CIT 673, 718 F. Supp. 1549 (1989), for its position. In *Permian*, this court denied assistance to employees of a firm which transported and marketed crude oil purchased from unaffiliated companies. *See Former Employees of Permian Corp.,* 718 F. Supp. at 1550. Here, the parent corporation of Marathon Ashland did, in fact, engage in production and some of its employees were certified for TAA on that basis.

thon Ashland transported product for Marathon Oil between 1997–1999. Plaintiffs challenge Labor's methodology, stating that:

> [i]f the Department of Labor had inquired with Marathon Ashland about the overall operations of Marathon Ashland's parent companies within the economic climate of the oil industry and its effect on the demand for Marathon Ashland's services, these facts would demonstrate that Plaintiffs were terminated from their jobs as gaugers because of the economic affects [sic] of imported oil by Marathon Oil.

Pls.' Reply to Remand at 8–9.

The court finds Plaintiffs' argument persuasive, and notes that while "this court will defer to [Labor's] choice of reasonable methodologies, Labor must base its determination upon sufficient evidence for a reasonable mind to concur in the result." *Bennett*, 18 CIT at 1068. Here, on the facts at odds in the record, Labor could not have conclusively determined that imports did not contribute to the petitioning workers' separation. Plaintiffs do not dispute evidence showing that company assets were sold to [ ]; however, Plaintiffs submit that these assets were sold because [" ."] *A.R.* at 1. In its negative determination, Labor ignored the issue of whether Marathon Oil's decisions to purchase crude oil imported from Mexico and Canada resulted in the sale of company assets. Such information is crucial in ascertaining the impact of imports on the loss of Plaintiffs' jobs.

An adequate investigation by Labor would have addressed Plaintiffs' claim that imports from Mexico and Canada prompted the sale of Marathon Oil's assets, and as a result, caused the loss of the petitioning employees' jobs. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983) (stating that an administrative determination is arbitrary and capricious if the agency has "entirely failed to consider an important aspect of the problem"). In order to fulfill its duty to conduct an investigation with the utmost regard for the petitioning workers, Labor should conduct a thorough investigation to fully assess both Leland's information and Plaintiffs' claims. The failure to do so would render the Secretary's investigation cursory at best.

V. CONCLUSION

Because the court finds that the Secretary inadequately investigated the petitioning employees' jobs as gaugers, it cannot agree with the Defendant that "there [is] no reason to investigate the parent company regarding other issues which might relate to the statute's third criterion." *Def.'s Resp. to Remand* at 12. Therefore, this case must be remanded for further investigation into Marathon Oil's imports and the reasons behind the sale of the company's assets.

(Slip Op. 02–68)

PRODOTTI ALIMENTARI MERIDIONALI, S.R.L., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 01–00020

[ITA's antidumping duty determination remanded.]

(Dated July 16, 2002)

Riggle and Craven (David J. Craven) for plaintiff.

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OPINION

RESTANI, *Judge:* This matter is before the court on Plaintiff's motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiff Prodotti Alimentari Meridionali, S.r.l. ("Prodotti"), a respondent in the antidumping review, challenges certain affirmative determinations made by the Department of Commerce ("Department" or "Commerce") upon a sunset review. *See Certain Pasta from Italy: Final Results of Antidumping Administrative Review,* 65 Fed. Reg. 77,852 (Dep't Comm. 2000) *("Final Results").* Prodotti primarily challenges Commerce's constructed value methodology arguing that the level of trade adjustment and cost of production analyses were flawed. In addition, Prodotti challenges Commerce's decision to conduct verification. Prodotti also claims that Commerce did not timely release its calculations and that the calculations released were incomplete.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). The court will uphold Commerce's determinations in antidumping investigations 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).

BACKGROUND

On May 12, 1995, three U.S. pasta producers ("petitioners")[1] filed a petition with Commerce alleging that imports of certain pasta from Italy were being, or were likely to be, sold in the United States at less than fair value (LTFV). *See Initiation of Antidumping Duty Investigations: Certain Pasta From Italy and Turkey,* 60 Fed. Reg. 30268–01 (Dep't Comm. 1995). Commerce investigated and, on June 3, 1996, issued a final affirmative determination. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy,* 61 Fed. Reg.

[1] The petitioners were Borden, Inc., Hershey Foods Corp., and Gooch Foods, Inc.

30326–01 (Dep't Comm. 1996). On July 24, 1996, Commerce published the corresponding antidumping duty order. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy,* 61 Fed. Reg. 38547 (Dep't Comm. 1996).

On July 15, 1999, Commerce published notice of the "Opportunity to Request an Administrative Review" of the initial antidumping order. *See Antidumping or Countervailing Duty Orders, Finding, or Suspended Investigation,* 64 Fed. Reg. 38181 (Dep't Comm. 1999). In accordance with 19 C.F.R. § 351.213(b)(2), several producers and/or exporters of pasta from Italy requested an administrative review of their sales, including Prodotti. On August 30, 1999, Commerce initiated the sunset review at issue here. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 64 Fed. Reg. 47167 (Dep't Comm. 1999). The period of review ("POR") was July 1, 1998, through June 30, 1999, and the imports covered by the review include non-egg dry pasta in packages of five pounds or less. *See id.*

Commerce issued questionnaires to all subject importers on August 30, 1999.[2] Prodotti submitted responses to all sections except Section D, the section regarding its Cost of Production ("COP"), by October 29, 1999. *See Notice of Preliminary Results and Partial Recission of Antidumping Duty Administrative Review and Intent To Revoke Antidumping Duty Order in Part:Certain Pasta From Italy,* 65 Fed. Reg. 48467, 48468 (Dep't Comm. 2000). On November 12, 1999, petitioners alleged that Prodotti made sales below the COP during the POR. Pursuant to 19 U.S.C. § 1677b(b)(2)(A)(ii), Commerce initiated its below-COP investigation. Prodotti did not submit its initial Section D response until January 3, 2000. *Preliminary Results,* 64 Fed. Reg at 48468. Prodotti's final response to the COP section of the questionnaire was not submitted until April of 2000.[3]

On or about December 8, 1999, Petitioners requested that Commerce conduct verification of any exporter which had not been subject to verification in the previous two reviews.[4] On or about January 5, 2000, Commerce notified Prodotti that it intended to conduct verification. Prodotti objected on January 6, 2000. *Id.* Commerce subsequently issued a memorandum listing the respondents, including Prodotti, selected for sales verification. On May 3, 2000, Commerce issued verification procedures for Prodotti. Verification of Prodotti's sales data was conducted from May 15, 2000 to May 19, 2000.

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[2] Section A of the questionnaire sought general information relating to a party's corporate structure, and sales of the subject merchandise. Section B and C of the questionnaire required comparison listings of home market and U.S. market sales. Section D related specifically to COP and constructed value of the subject merchandise.

[3] Between January 21 and April 18, 2000, there were several communications between Commerce and Prodotti discussing the questions in Section D and Prodotti's responses. On January 21, 2000, Commerce requested clarification of Prodotti's section D response. On February 3, 2000, Prodotti requested clarification of section D. On February 9, 2000, the parties held a teleconference to discuss revision of Prodotti's Section D response. On February 24, 2000, Prodotti submitted its supplemental response to Section D. On April 3, 2000, Commerce requested clarification of the response. On April 18, 2000, Prodotti submitted its second supplemental response to Section D.

[4] Prodotti objected to petitioner's request arguing that the request was untimely and did not set forth the identities of parties for whom such verification was requested.

On July 31, 2000, Commerce notified Prodotti of its affirmative finding in the *Preliminary Results* and transmitted a copy of the preliminary analysis memorandum to Prodotti, including Commerce's calculation methodology and a copy of the computer program used to calculate the antidumping margin. On August 8, 2000, Commerce published its preliminary affirmative antidumping duty determination. *See Preliminary Results,* 65 Fed. Reg. at 48468. On August 9, 2000, Prodotti requested Commerce's analysis methodology and calculations as well as computer printouts. Commerce responded by letter stating that it already provided the sufficient data but, as a "courtesy," provided additional printouts.

On December 13, 2000, Commerce published its Final Results. On appeal, Prodotti challenges numerous aspects of the Final Results.

DISCUSSION

A. Burden of Proof

The majority of Prodotti's claims challenge the methodology underlying specific determinations without alleging that any flaws adversely affected Plaintiff. In the context of a challenge to an affirmative antidumping determination, it usually is apparent when plaintiffs would be adversely affected by agency error, but in some cases the purpose of the challenge is unclear and the plaintiff/respondent must present a viable claim that the alleged errors in the agency's methodology likely resulted in a higher antidumping margin.

In other contexts, in unfair trade and customs matters, plaintiffs have been required to make a *prima facie* showing that they were likely prejudiced by agency error. *See, e.g., Belton Indus., Inc. v. United States,* 6 F.3d 756, 761 (Fed. Cir. 1993) (requiring showing of prejudice from Commerce's non-compliance with countervailing duty notice provision); *Cummins Engine Co.,* 83 F.Supp.2d 1366, 1378 (Ct. Int'l Trade 1999) (no showing of prejudice due to procedural error as to NAFTA origin verification). While plaintiffs in antidumping duty cases cannot be required to reconstruct all of the agency's calculations, where prejudice is an issue, a plaintiff, at minimum, must explain how it likely would benefit from a particular claimed revision. To allow otherwise would cause undue delay in the enforcement of agency determinations by encouraging plaintiffs to assert broad claims challenging any and all determinations, regardless of whether the alleged error actually affected the margin at issue.

B. Currency Conversion

Prodotti first argues that the Final Results are flawed because Commerce conducted unnecessary currency conversions in constructing the U.S. price of Prodotti's product. To calculate the dumping margin, Commerce calculates the difference between the Normal Value ("NV") of the product and its export price ("EP") or constructed export price. 19 U.S.C. § 1675(a)(i). To make a fair comparison, 19 U.S.C. §1677b–1 re-

quires that the prices and costs of products under review be converted to U.S. dollars.[5]

Prodotti records all transactions in lira. In its Preliminary Determination, Commerce presumed that, because all of the transactions were recorded in lira, Prodotti had transacted all sales in lira. Commerce, therefore, converted all sales to dollars pursuant to §1677b–1. Commerce was later notified by Prodotti that a small number of sales were originally transacted in dollars but converted to and recorded in lira by Prodotti for internal accounting purposes. Once Commerce identified those limited sales originally made in dollars, Commerce reversed its conversions back to lira—that is, back to Prodotti's original figures. Commerce then converted the lira to dollars using the same exchange rate originally applied by Prodotti. *See Issues and Decision Memorandum* at Comment 4. Prodotti argues that this multiple conversion was unnecessary.[6]

The court concludes that Commerce's unique methodology merely corrected an unintentional excess conversion that would not have occurred but for Prodotti's confusing submission. Moreover, Prodotti has not shown how it was prejudiced by the correction. Because the parties agree that Commerce reconverted sales data using the same exchange rate as Prodotti, the court fails to see how the resulting margin was adversely affected. In fact, Prodotti does not even assert that it was incorrect. The court finds no meaningful error in Commerce's currency conversion.

C. Level of Trade Analysis

Section 773(a)(1)(B) of the Tariff Act requires that Commerce establish NV based on home market sales at the same level of trade ("LOT") as the constructed export price or export price. *See* 19 U.S.C. 1677b(a)(1)(B)(i); *see also* Statement of Administrative Action § B.2.c.(4), accompanying H.R.Rep. No. 103–826(I), at 892, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4215 ("SAA"). 19 C.F.R. § 351.412(c)(2) states that Commerce "will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent)." When sales in the U.S. and respondent's home market cannot be compared at the same LOT, an adjustment to NV may be appropriate. SAA § B.2.c.(4) ¶ 3. The statute provides for a LOT adjustment if the difference in level of trade involves the performance of different selling activities. 19 U.S.C. § 1677b(a)(7)(A).

Prodotti reported ten customer categories in its home market as the basis for identifying sales at different levels in the chain of distribution. Rather than adopt Prodotti's grouping, Commerce developed a methodology to analyze the various selling functions of a particular seller by "assigning a ranking factor (i.e. high, medium, low) to a selling function

[5] Commerce Regulation 19 C.F.R. §351.415 tracks this statute and has the same requirements.

[6] The computer program used by Commerce confirms that the agency converted those sales originally transacted in dollars three times: (1) from lira (as recorded in Prodotti's records) to U.S. dollars; (2) from U.S. dollars back to lira (returning to Prodotti's original figures); (3) from lira to U.S. dollars (using the exchange rate provided by Prodotti, presumably what it had originally used to record the dollar sales as lira sales).

(i.e. freight and delivery, or warehousing) solely based upon the number of observations for which a direct expense associated with the selling function actually occurred." *See Issues and Decision Memo,* Comment 5A. The resulting value was used to categorize different levels of trade.[7] Commerce's LOT methodology was based on the premise that different LOTs are characterized by purchasers and sellers at different places in the channel of distribution and performing qualitatively or quantitatively different functions. *See Issues and Decision Memo,* Comment 5A.

Prodotti argues that this analysis is distortive because it ignores qualitative differences in the various selling functions. According to Prodotti, different selling functions were erroneously presumed to have equal value regardless of actual expense or value (i.e. a service that provides minimal value is given the same weight as a service that provides substantial value).[8] This presumption becomes problematic when the seller is categorized solely based on the number of observations. For example, if two sellers employ the same channel of distribution (e.g. broker at a substantial cost) but one employs a second (e.g. local freight transportation at a minimal cost), the seller utilizing the single function is assigned a significantly lower overall value even though the second seller's expenses were only slightly more than the first. At oral argument, Commerce conceded that this quantitative analysis could result in significantly different values for almost identical sellers, but explained that this particular analysis did not determine the final LOT, rather a more general qualitative approach was used.

While the court questions the usefulness of this quantitative analysis for any purpose, Prodotti has not explained how the analysis adversely affected the margin other than to state that the analysis was "distorted." In the absence of any alleged prejudice, the court declines to remand on this issue.

D. Cost of Production

1. Period of Review

To calculate the dumping margin, Commerce compares NV, the price of Prodotti's product in its home market, Italy, to EP, the price of Prodotti's product in the U.S.[9] *See* 19 U.S.C. § 1677b (a). In determining NV, Commerce may disregard home market sales ("HM") below the cost of

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[7] Based upon its analysis of the selling functions associated with Prodotti's customer categories, Commerce developed the following groupings:

Group 1 –	(1) distributors
	(4) hypermarkets
Group 2 –	(2) stores
	(3) wholesalers
	(5) restaurants
	(7) peddlers
	(9) private clubs/others
Group 3 –	[ ] other pasta manufacturers

[8] Prodotti points to Commerce's analysis of "Freight and Delivery" function where Commerce gave more weight to a function that cost [ ] lira than to a function that cost over [ ] lira.

[9] 19 U.S.C. § 1677a (a) provides that the EP is 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 outside of the U.S. to an unaffiliated purchaser * * *"

production ("COP"),[10] if (1) these sales have been made over an extended period of time in substantial quantities; and (2) not at prices which would permit recovery of all costs withing a reasonable period of time. *See* 19 U.S.C. §§ 1677b (b) (1) (A) and (B). With respect to the first prong, the statute states that an "extended period" of time means "a period that is *normally* 1 year, but not less than 6 months." 19 U.S.C. § 1677b (b) (2) (B) (emphasis added); *see also* SAA § B.3. Prodotti argues that Commerce's methodology is flawed because: (1) Commerce erroneously employed a seventeen month POR; (2) Commerce failed to make appropriate allowances for price fluctuations of wheat semolina; and (3) Commerce failed to match the POR for HM total sales and the POR for sales below COP.

Prodotti primarily argues that 19 U.S.C. §1677b(b)(2)(B) does not provide for a POR in excess of one year and, therefore, Commerce's seventeen month POR was not in accordance with law.[11] 19 CFR § 351.406 (b) states that "the extended period of time * * * normally will coincide with the period in which the sales under consideration of the determination of normal value were made." In addition to sales made during the POR, it is common and accepted practice for Commerce to consider sales within 90 days before and 60 days after the POR for comparison. *See AIMCOR v. U.S.,* 86 F.Supp.2d 1248, 1255 n 4 (Ct. Int'l Trade 1999) (quoting *Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand; Final Results of Antidumping Duty Administrative Review,* 61 1,328, 1,332 (1996) ("The Department has implemented the contemporaneous 90/60 window in order to fulfill the statutory requirements in section 773(a)(1) of the Tariff Act that [fair market value] be based on the price of contemporaneous sales of such or similar merchandise.")). Here, Commerce first defined the POR as one year and then included sales within this "90/60 day window of contemporaneity." The resulting analysis of seventeen months of sales is neither prohibited by statute nor inconsistent with Commerce's normal practice.

Prodotti next argues that Commerce failed to make allowances for declines in wheat semolina prices. Commerce generally calculates a single weighted-average cost for the entire POR for respondents in non-high inflationary economies, unless this methodology results in inappropriate comparisons—i.e. when there is a single-primary input product and that input experiences a significant and consistent decline or rise in its cost throughout the reporting period. *See Thai Pineapple v. United*

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[10] 19 U.S.C. § 1677b (b) (3) reads:

> the cost of production shall be an amount equal to the sum of—
>
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and
>
> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

[11] Following oral argument, Prodotti filed a motion for factual correction on the ground that the court mistakenly assumed that a seventeen month POR was "normal." The court specifically addressed Prodotti's concerns at oral argument expressly noting that the seventeen month period included the window of contemporaneity. Prodotti's motion was not to make a factual correction but merely was an attempt to reargue the legitimacy of the POR and therefore is stricken.

States, 273 F.3d 1077, 1084 (Fed. Cir. 2001). Prodotti argues that Commerce did not properly adjust the annual weight-averaged direct material costs to adjust for the decline in wheat semolina prices.

Both parties agree that wheat semolina is a substantial portion of the total cost of manufacture ("TOTCOM"). In fact, Commerce considered wheat semolina a single-primary input product. Commerce determined that there was a consistent decline in wheat semolina prices for only six months and that the market prices decreased by only twelve percent or less. *Issues and Decision Memo* at Comment 8. Prodotti argues that prices declined somewhat more drastically.[12] Not surprisingly, both parties argue that the other's analysis is crafted to calculate the maximum or minimum decline. There is no bright line standard for determining a significant decline. A review of the data provided, however, suggests that the price of wheat semolina was not subject to a substantial decline but was, at best, subject to price fluctuations—decline *and* recovery. Prodotti's claim was largely based on the premise that wheat semolina prices are seasonal,[13] which in itself suggests price fluctuation rather than substantial decline. The court finds that Prodotti failed to show that the price drastically declined so as to require Commerce to deviate from its normal methodology.

Prodotti last argues that the POR for COP does not match the POR for determining volume.[14] Prodotti argues that Commerce reviewed data within the window of contemporaneity for COP purposes but not for volume and, therefore, Commerce did not properly correlate the data. Commerce is not required to match the period for assessing the total volume of sales in the HM to the period of assessing COP. *See Thai Pineapple,* 273 F.3d at 1084 ("We do not read the statutory language as specifying the period to be used when determining costs * * * the statute does not dictate the methodology for calculating costs of production * * *or for matching those costs against sales.").

2. Rounding and Other "Noise"

Prodotti argues that Commerce improperly excluded certain sales as below-COP due to impermissible rounding and truncating. Prodotti points to at least 1000 sales that were found to be below cost by less than 2/10 of a cent, and more than 300 that were below 4/100 of a cent. Prodotti argues that these barely below-COP sales should not have been rejected as below cost because the underselling was so inconsequential that it should be considered *de minimis.*

Commerce maintains that 19 U.S.C. § 1677b(b)(1) establishes a bright-line test to determine whether sales are below cost. The statute does not contain a *de minimis* provision that prohibits Commerce from

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[12] Prodotti claims that the price of wheat semolina fluctuated as much as [ ].

[13] Prodotti contends that Commerce's extended POR resulted in a double-counting of certain "in season" months (May through August), during which agricultural seasonal products like wheat semolina are sold at lower prices. The record does not reveal any evidence as to wheat growing cycles and the court declined Prodotti's invitation to take judicial notice of agricultural cycles in the Northern Hemisphere.

[14] The extended POR for "Sales Below Cost of Production" began May 1, 1998 and ended September 30, 1999 (July 1, 1998 to June 30, 1999 excluding the 60/90 day window of contemporaneity). *See Issues and Decision Memorandum* at 16.

disregarding sales that are only slightly below cost. The statute does, however, contain a moderating provision. Under 19 U.S.C. § 1677b(b)(1)(B), Commerce may disregard below-COP sales only if they "were not at prices which permit recovery of all costs within a reasonable period of time." Despite that provision, Prodotti did not argue or submit data showing that the barely below-COP sales were offset by sufficiently above cost sales so that costs are recovered over time. Absent such a showing, the court can find no alternative statutory or regulatory basis to require inclusion of the contested sales.

Prodotti also argues that Commerce extended certain two-digit data into four-digit data, and later truncated the data thereby distorting the data. Commerce rejects Prodotti's claim that it truncated data as factually wrong. Commerce is bound by neither statute nor regulation in its methodology regarding rounding, i.e. whether it rounds data to two, three or four decimals. Further, Prodotti has not adequately explained how it was prejudiced by any truncation. Prodotti's sole explanation is that the resulting "noise" distorted the analysis. The court declines to remand on this issue.

E. Verification

1. Commerce's Decision to Conduct Verification

Prodotti next argues that verification was inappropriate because Commerce did not show "good cause" sufficient to initiate verification. 19 U.S.C. §1677m(i)(3) provides Commerce with the authority to verify information submitted by respondents in a sunset review. §1677m(i)(3) requires Commerce to conduct verification if timely requested by an interested party and if good cause for verification is shown. *Timken Co. v. United States,* 18 CIT 486, 495–96. (1994) (citing *Torrington Co. v. United States,* 17 CIT 951, 955, 832 F.Supp. 393, 397 (1993)).[15] The statute describes when Commerce must conduct verification. The court does not read §1677m(i)(3) to contain a limitation on Commerce's discretion to voluntarily and in good faith verify data. Commerce is generally given wide latitude in verification procedures. *See Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States,* 102 F. Supp. 2d 486, 495 (Ct. Int'l Trade 2000) ("[Commerce] enjoys broad discretion in allocating investigative and enforcement resources."). The court finds no statutory or regulatory basis to restrict Commerce's ability to verify its own data.[16] Even if a statutory or regulatory restriction existed, Commerce has demonstrated good cause here.

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[15] 19 U.S.C. §1677m(i) reads in relevant part:

> The administering authority shall verify all information relied upon in making—
> * * * * * * *
>
> (3) a final determination in a review under section 1675(a) of this title, if—
> (A) verification is timely requested by an interested party as defined in section 1677(9)(C), (D), (E), (F), or (G) of this title, and
> (B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations under section 1675(a) of this title of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.

[16] 19 C.F.R. § 351.307(b)(4) provides that verification may be refused, but facts available will be used in such instances.

In its *Issues and Decision Memo,* Commerce discusses at length why changes in Prodotti's organizational structure and revisions to its questionnaire responses prompted verification. *See Issues and Decision Memo* at Comment 8. Prodotti argues that there were no organizational changes. The record, however, reveals that Prodotti was operating a new pasta factory owned by another company under review. Prodotti also argues that it did not submit numerous supplemental or revised questionnaires. Prodotti does not dispute, however, that there were some supplemental responses and numerous discussions between Commerce and Prodotti regarding clarification of the questionnaires and Prodotti's proposed revised responses. Both parties agree that, at minimum, there was considerable confusion surrounding Prodotti's submissions. It therefore was reasonable for Commerce to attempt verify the various responses. Because verification was not only reasonable but likely necessary for consideration of the data, the court finds that Commerce had good cause to conduct verification.

Consistent with 19 U.S.C. §1677m(i), Petitioners requested verification of "any exporter that has not been subject to verification in the two immediately preceding reviews." *Verification Request* at 1–2. Prodotti claims that, because the request did not specifically identify Prodotti, it was overly broad and, therefore, defective. The court rejects Prodotti's technical argument. First, there is no statutory requirement that petitioner identify individual respondents by name. Second, there were only seven respondents in this review, therefore, Prodotti was reasonably apprised that it was subject to verification.

2. Program Manager

Prodotti argues that Commerce improperly allowed the program manager to participate in the verification process. Because verification is an investigative tool, Commerce is given wide latitude in verification procedures. *See Micron Tech, Inc., v. United States,* 117 F.3d 1386, 1396 (Fed.Cir. 1997). There is a presumption that Commerce will act in good faith. *See N.E.C. Corp. v. United States,* 958 F.Supp. 624, 631–32 (Ct. Int'l Trade 1997). Commerce maintains that it has the discretion to allow the program manager to participate and that it is customary for the program manager to be involved in verification. Prodotti argues that the program manager is the de facto decision maker and the manager's involvement "raises questions as to the validity of the determination." Prodotti does not explain further but, instead, suggests that it was singled out for participation by the program manager.[17] Even if true, the complications surrounding Prodotti's questionnaire responses would reasonably explain the need for additional oversight. Regardless, Prodotti cites no provision precluding participation of a project manager in verification. The court finds no error in this regard.

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[17] Prodotti cites the *Third Party Verification Reports,* which states that in all other verifications in Italy, the manager did not participate. *Id*.

H. Interest Rate

Prodotti argues that Commerce should have used Italian interest rates in determining its interest expenses for "circumstances of sale" adjustments. In calculating NV, Commerce must take into consideration any differences in the circumstances of sale between the home market and the U.S. market. 19 U.S.C. §1677b (a)(6)(C). Circumstances of sale adjustments include credit expenses. *NTN Bearing Corp. of America v. United States*, 104 F. Supp. 2d 110, 122 (Ct. Int'l Trade 2000). These imputed credit expenses are to be calculated with the short-term interest rate *tied to the currency of sale. Import Administration Policy Bulletin 98.2* at 4. Commerce submits that it used the Italian interest rate for those sales transacted in lira, and the U.S. interest rate for those sales transacted in dollars. Prodotti argues that, because all of entries were in lira, the Italian interest rate should be applied to all sales, even those made in dollars. The court finds that Commerce properly applied the U.S. interest rate to dollar sales and the Italian interest rate to sales in lira. There was no error.

I. Disclosure untimely/incomplete

Prodotti asserts that Commerce did not disclose the calculations of the dumping margins in a timely manner. 19 C.F.R. § 351.224(b) requires that Commerce disclose the calculations performed in connection with a preliminary report within five days of the announcement. Prodotti concedes that Commerce provided the computer program used to calculate the margins within five days and that Commerce later provided additional print-outs of some calculations at Prodotti's request. Prodotti argues that the initial disclosure of the computer program alone was insufficient to satisfy § 351.224(b) and that Commerce's later release of various print-outs were incomplete and untimely. Prodotti claims that this non-disclosure affects its ability to comment effectively on the issue.

Disclosure of a diskette with the margin program is sufficient to satisfy § 351.224(b). *See Sugiyama Chain Co. v. United States*, 852 F. Supp. 1103, 1115 (Ct. Int'l Trade 1994) ("complete computer printouts of Commerce's calculations not required"); *see also Torrington Co. v. United States,* 786 F. Supp. 1027, 1030 (Ct. Int'l Trade 1992). Commerce submitted the diskette to Prodotti within five days and, therefore, submitted the information in a timely manner. Commerce need not provide full print-outs of all calculations. Voluntary disclosures were, at worst, supplements to original disclosure. Regardless, Prodotti was provided sufficient information to respond. Moreover, Prodotti has not demonstrated how it was actually prejudiced by any delinquent disclosure.

J. Pasta Shape Analysis

As a final matter, Prodotti claims that Commerce's analysis of various pasta products was erroneous. Prodotti argues that Commerce improperly separated similar pasta products. After review of Prodotti's claim, Commerce voluntarily requests that this specific issue be remanded for

further analysis. Prodotti requests that the court remand the issue with a special instruction to group particular pasta shapes. The court will not presume, however, that an agency will incorrectly analyze an issue on remand.

> "[A]dministrators 'are assumed to be men of conscious and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *[Withrow v. Larkin,* 421 U.S. at 35, 55 (1975)] (quoting *[United States v. Morgan,* 313 U.S. 409, 421 (1941)]). Were we routinely to accept challenges to the administrative decision-making process based on claims of prejudgment, we would undermine the presumption that administrators fulfill their obligations with the highest level of integrity and honesty.

NEC Corp. v. U.S., 151 F.3d 1361, 1373 (Fed. Cir. 1998). Moreover, Commcrce's assent to reinand without argument implies that it intends to consider the matter in good faith. Prodotti will have sufficient opportunity to challenge the remand results if unhappy with the outcome.

CONCLUSION

For the reasons discussed, the court remands this matter on the sole issue of pasta shape analysis. While some of Prodotti's challenges to Commerce's methodologies inay havc theoretical merit, the court finds that Prodotti has failed to show how it was prejudiced. Other challengcs are simply unsubstantiated. Commerce shall issue its Reinand Determination on or before August 16, 2002. Objections may be made within *30* days thereafter. Parties may submit comments on those objections within 10 days after objcctions are due.

(Slip Op. 02–69)

HOLFORD (USA) LTD., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 95–09–01259, 95–10–01321, 96–01–00010

[Plaintiff's Motion for Summary Judgment Denied; Defendant's Cross-Motion for Summary Judgment Granted.]

(Decided July 18, 2002)

Neville Peterson LLP, George W. Thompson, (Margaret R. Polito), Maria E. Celis, for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office; *(Amy M. Rubin),* Civil Division, United States Department of Justice, Commercial Litigation Branch; *Sheryl A. French*, Attorney, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of Counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* This matter is before the court on Plaintiff's and Defendant's cross motions for summary judgment, pursuant to Rule 56 of the Court of International Trade. The Defendant, the United States Customs Service ("Customs"), refused to classify as eligible for duty free treatment under the United States-Israel Free Trade Agreement ("IFTA") Plaintiff's importation of certain women's cotton jeans. *See* United States-Israel Free Trade Area Implementation Act of 1985, Public Law 99–47, 99 Stat. 82 (1985). Plaintiff filed protests to the classification, which Customs denied. Plaintiff now appeals the denied protests to this court. The court exercises jurisdiction under 28 U.S.C. § 1581(a).[1]

II. BACKGROUND

Plaintiff, Holford (U.S.A.), Ltd, Inc.("Holford"), imported women's cotton denim jeans from an affiliated company Holford Industrial Limited in Israel ("Holford Israel"). The jeans were manufactured in Israel and China to take advantage of the United States-Israel Free Trade Agreement that grants duty free treatment to the jeans if 35% of the "appraised value of the product at the time it is entered into the United States" is from the "cost or value of the materials" produced in Israel "plus the direct costs of processing operations performed in * * * Israel." United States-Israel Free Trade Area Implementation Act of 1985, § 9(a)(3). Holford Israel bought fabric from another associated company, Yiu Fat Company, Ltd. of Kowloon, Hong Kong. *Plaintiff's Statement of Material Facts as to Which No Genuine Issue Exists* ("*Pl.'s St. of Material Facts")* at ¶ 8. The fabric was sent from China to Israel where Holford claims it was cut into components by Holford Israel at a cost of $0.70 per jean. *Id.* at ¶ 10. Holford Israel then contracted out to an inde-

[1] (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

pendent company, Argaman Industries in Israel, the process of assembling the cuttings into jean panels at a cost range of $2.30–$2.60 per jean. *Id.* at ¶¶ 13–19. Holford claims the panels were then shipped back to China for final assembly, and finally returned to Israel for packing and inspecting, at a claimed cost of $.20 per jean. *Id.* at ¶¶ 21–25. From Israel they were shipped to the Port of Newark, New Jersey.[2] The jeans were initially classified under the duty-free provision subheading 6204.62.4010, HTSUS (1993).[3]

Customs officials at the port issued two Customs Form 28 Requests for Information on December 9, 1993 and January 4, 1994. *Defendant's Statement of Additional Material Facts as to Which There Are No Genuine Issues to be Tried* at ¶ 3. The requests specifically asked for supporting documentation for Holford's IFTA claim and a breakdown of costs incurred in China and Israel. Holford did not adequately respond to the request in the opinion of Customs, and Customs, therefore, denied IFTA treatment. *Id.* at 4. The goods were liquidated under the HTSUS subheading 6204.62.40 at 17.7% *ad valorem*. Plaintiff protested the classification. The protest was denied and Plaintiff filed an appeal with this court.

III. STANDARD OF REVIEW

Plaintiff has moved for summary judgment under Rule 56 of the Rules of the Court of International Trade. Generally, summary judgment is appropriate when there are no genuine issues of material fact as to the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this case, Plaintiff contends the documentary evidence and affirmation demonstrate that the requirements for duty-free treatment under the IFTA have been met. *See Mem. of Points and Authorities in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Brief")* at 8.[4] Because Defendant has not come forward with any opposing evidence or a motion for trial, Plaintiff contends that summary judgment in its favor is warranted.

Defendant claims denial of Plaintiff's Motion for Summary Judgment, and support for its Motion for Summary Judgment, is proper because Holford has failed to submit sufficient evidence to support its motion. *Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp. to Pl.'s Mot. for Summ. J. ("Def.'s Br.")* at 7. In addition, the Defendant claims because this case involves a Customs classification decision based on a factual determination, it is accorded a presumption of correctness,

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[2] This opinion covers three different entries.

Entry No.	Date of Entry	Case No.
204–0333394–9	Nov. 5, 1993	95–09–01259
204–0333395–6	Nov. 3, 1993	95–10–01321
204–0334196–7	Dec. 23, 1993	96–01–00010

[3]

6204		Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear) (con.):	
*	*	*	* * * * *
6204.62.40		Other	17.7% Free (IL)
*	*	*	* * * * *
	10	Blue Denim (348)	

[4] Plaintiff and Defendant submitted three series of briefs, one for each of the case numbers. There are only minor differences in content between each of the briefs. All citations to briefs in this opinion are to those for Court No. 95–10–01321, unless otherwise noted.

and Holford has not overcome this presumption. *See* 28 U.S.C. § 2639(a)(1)(1988).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). Moreover, summary judgment is a favored procedural device "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1); *Sweats Fashions, Inc. v. Pannill Knitting Co.,* 833 F.2d 1560, 1562 (Fed. Cir. 1987). Whether a disputed fact is material is identified by the substantive law and whether the finding of that fact "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248. In a classification action once the court has decided that no material facts are in dispute, it is then left with a purely legal question involving the meaning and scope of the tariff provision and whether it includes the imported merchandise. *See National Advanced Systems v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994). However, the "movant bears the burden of demonstrating absence of all genuine issues of material fact." *SRI International v. Matsushita Electric Corporation of America*, 775 F.2d 1107, 1116 (Fed. Cir. 1985)(citations omitted). This burden may be met by submission of affidavits. USCIT R. 56(c). If a party submits an affidavit in support of or in opposition to a motion for summary judgment, the form of the affidavit must comply with USCIT R. 56(e), which requires that it be made on personal knowledge, setting forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein. A lack of sufficient documentation and explanation as to the basis of an affiant's knowledge will constitute a fatal defect on the face of the motion. *United States v. F.H. Fenderson, Inc.,* 10 CIT 758, 761, (1986) (citing *Fortune Star Products Corp. v. United States* 78 Cust. Ct. 184, 188 C.R.D. 77–3 (1977)).

IV. DISCUSSION

In order to overcome the presumption of correctness that attaches to Customs' factual determinations, and make out a prima facie case, Plaintiff must come forward with sufficient evidence. Only if the Plaintiff makes out a prima facie case with supporting documents is it incumbent upon Customs to respond with its own evidence. In this case summary judgment for Plaintiff is appropriate only if Plaintiff's claims are sufficiently supported as a matter of law. If the court must weigh the credibility of evidence, that becomes a fact-finding role, and it is necessary to go to trial. *See E.I. Dupont de Nemours & Co. v. United States*, 24 C.I.T. ____, ____, 123 F. Supp. 2d 637, 643 (2000).

There are five essential facts that need to be established for Plaintiff to prevail on its claim of duty-free treatment under the IFTA. If Holford cannot provide evidence for each of these points, its claim fails: first, the total imported value of the product, which both sides concede to be be-

tween $8.35 and $9.45 (*Pl.'s St. of Material Facts* ¶¶ 4–8); second, that the cutting costs per jean were $0.70 for work done in Israel; third, that the subassembly costs per jean, done by contract with Argaman Industries of Israel, were $2.30–2.50 per jean; fourth, the cost of washing, packing and inspecting the jeans, done in Israel prior to shipment to the United States, was $0.20 per jean; and fifth, that the jeans entered into the Israeli market before being shipped to the U.S.[5]

In support of its motion, Plaintiff submits the following documentation: entry forms for the Port of Newark; Certificate of Origin from Israel; proforma invoices issued by Holford Israel; commercial invoices issued by Yui Fat Company Ltd.; cutting records as to the number of jeans cut in Israel; sub-contracts between Yui Fat Co. Ltd. and Holford Israel stating total cost of cutting in Israel; invoices from Argaman for subassembly work; bills of lading for the jeans from Haifa, Israel to Hong Kong; bills of lading from Haifa to New York; and an affirmation by Glenn Fleisher, former production manager of the Holford Israel plant.

The Fleisher affirmation is the linchpin of Holford's support for its motion for summary judgment. It provides the only evidence accrediting the invoices from Argaman accounting for the $2.30 charge for the assembly work. It is the only evidence offered to establish the $0.20 inspecting and packing charge. Finally, it is the only evidence offered to confirm the cost (as opposed to quantity) of the $0.70 charge for cutting in Israel. Defendant asks that the affirmation be "disregarded in considering these cross-motions for summary judgment," because it "does not provide the type of support contemplated by the Rules of this Court." *Def.'s Br.* at 10. Under Rule 56(e), supporting affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Defendant objects to the whole of the Fleisher affirmation. The court, however, need only inquire as to the affirmation's ability to support the facts at issue in the summary judgment motion.

The affirmation was prepared several years after the process it details occurred. and is dated August 16, 2001. Holford stopped the manufacturing at issue in "late 1993." *Fleisher Aff.* at ¶ 13. Mr. Fleisher claims he was a "resident of Israel and was employed by Holford Industrial Ltd. as the manager of operations at its plant in Kiryat Shemona, Israel." *Id.* at ¶3. Mr. Fleisher is currently a resident of Australia. *Id*.

The Fleisher affirmation claims that the "records * * * submitted * * * with the material statement of facts constitute the business records of Holford Industrial Limited of Israel which were generated and kept in the normal course of business." *Id*. at ¶ 2. Fleisher claims that as part of his job as manager of operations he oversaw importing and exporting of goods, scheduling of production and assignment of work to

[5] Under HTSUS General Note 8(b)(ii) goods are eligible as "products of Israel" only if:
"each article is imported directly from Israel * * * into the customs territory of the United States. * * *"

the employees, keeping of financial records, oversight of the financial staff and related matters. *Id.* at ¶ 3. He also claims that he was responsible for the verification and preparation of shipping documents, certificates of origin and multi-country declarations required by Customs. *Id*.

To support Plaintiff's claim that the cutting was done in Israel at a cost of $0.70 per jean, Holford relies on the affirmation of Glenn Fleisher, a copy of a sub-contract between Yui Fat and Holford Israel, and weekly summary sheets prepared by Holford Israel. Defendant contends this is not conclusive evidence because it does not allow Customs or the court to verify the costs. Customs asked Holford to submit cutting tickets, salary records, workers' time cards or other information, which Customs traditionally looks at to determine cutting costs. A combination of cutting tickets and salary information allows Customs to calculate the cost of cutting per jean. The affirmation of Mr. Fleisher states that following the instruction of Holford's lawyers, he "calculated that the direct cost of production for each pair of jeans was $0.70 each." *Fleisher Aff.* at ¶ 7.

To establish the $0.70 amount, Mr. Fleisher does not indicate any specific documents that he relied on to make this calculation or any subtotals that he used. No documents indicating the subtotals or cost amounts were submitted by Plaintiff to support the Fleisher affirmation. The affirmation indicates only the methodology and final result. Without any of these supporting documents the Fleisher affirmation lacks foundation and offers no facts which would be admissible. *See Tamarin v. Adam Caterers, Inc*., 13 F.3d 51, 53 (2d Cir. 1993) ("Summary evidence is admissible as long as the underlying documents also constitute admissible evidence and are made available to the adverse party")(citations omitted). Careful scrutiny of Mr. Fleisher's affirmation is warranted because the statements he makes are *ex parte* and not subject to cross-examination. "Moreover, they are entitled to little weight, being incomplete and based on unproduced records, and having been executed years after the transaction to which they attest." *Andy Mohan, Inc. v. United States*, 63 C.C.P.A. 104, 107, 537 F.2d 516, 518 (1976). The lack of documentation, cost details, and explanation, as to the basis of the affiant's knowledge of the costs of the stages in the assembly process "is a fatal defect in the affidavit," and as a result his affirmation cannot be given any weight. *Fortune Star*, 78 Cust. Ct. at 188.

The sub-contract (Ex. E) memorializes an agreement between Yiu Fat Company of Kowloon, China and Holford Israel for cutting to be done at $0.70 per jean.[6] Like Mr. Fleisher's affirmation, this document is conclusory, with no supporting material to indicate its source. The document does not specify where the cutting is to take place, though Mr. Fleisher claims it is in Israel, and the sub-contract states that the finished work is to be sent to China via Hong Kong, implying that the cutting will take place in Israel.

[6] This document is not included in the supporting exhibits to Court No. 95–09–01259. Therefore, in that case only Mr. Fleisher's affirmation stands to support the $0.70 cost.

The asserted fact contained in the contract documents, and at one point in Mr. Fleisher's affirmation may be admissible if proper foundation is established. "At the court's discretion, calculations are admissible into evidence if the underlying data upon which they are based is admissible." *Verson, a Div. of Allied Products Corp. v. United States*, 22 CIT 151, 156 n.11, 5 F. Supp. 2d 963, 968 n.11 (1998)(citations omitted). However, Plaintiff does not offer any documents to support the calculations and does not even indicate the existence of such documents. Indeed, Customs repeatedly requested these documents before denying the product duty-free treatment. Without any supporting evidence, the $0.70 calculation is not admissible and cannot serve to advance Plaintiff's claims.

Similar problems exist with Plaintiff's attempt to establish the $0.20 charge per jean for inspection and packing, and the $2.30–2.60 charge for the outsourced subassembly by Argaman Industries in Israel. The only direct evidence to support the $0.20 amount for inspecting and packing in Israel is Mr. Fleisher's affirmation. *See Fleisher Aff.* at ¶ 10. He states:

> Upon return from Israel, the goods were unpacked from the containers, sorted according to the requirements of the order to be shipped, inspected and where necessary, repairs were made. Again we calculated the direct costs of processing the jeans. This included the cost of importing and trucking the jeans to the facility, the opening and sorting of the boxes, the inspection of the goods, the preparation of the necessary packing lists and other documentation for shipment, and the return trucking to the p[ort]. This was calculated to be $0.20 per unit.

Id. As with Fleisher's statements about the $0.70 charge for cutting, there are no receipts, payroll documents, or other supporting documents. While a fact does not have to be in admissible form for summary judgment purposes, it must be shown that it will be admissible. *See* USCIT R. 56(e). A careful examination of Mr. Fleisher's statement shows it does not stand up on its own. First, it claims the goods were inspected and packed upon "return from *Israel*." *Fleisher Aff.* at ¶ 10. The court assumes this is a mistake and Plaintiff meant to say from China. Second, he states "we calculated," but does not state upon which documents or numbers he relied, and how much of the costs were incurred by Holford employees or by outside vendors. *Id.* Finally, he states "[t]his was calculated," without saying he was the one who performed the calculations. *Id.* Without supporting documents or clarification of the affirmation, the $0.20 cost would not be admissible, and Holford does not indicate in any way that it has access to the supporting documents.[7]

To support the $2.30–2.60 cost of subassembly by Argaman Industries, Holford offers two pieces of evidence. Holford first offers invoices

[7] The government has offered to settle this case if Holford provided a sufficient amount of evidence. While the parties may dispute what is a sufficient quantum of evidence, there is no indication that Holford would be able to produce any additional evidence should this case proceed to trial. *See Def.'s Reply to Pl.'s Response to Def.'s Cross-Mot. for Summ. J.* at 4 n.6.

from Argaman, without any supporting documentation. Holford claims that supporting documents are under the control of Argaman, a third party, and it does not have access to them. However, Holford does not provide any of its own documentation, such as proof of payment or accounting records to confirm the amount paid to Argaman. The second piece of evidence offered is the affirmation of Mr. Fleisher. Mr. Fleisher can state only that the bill was received by Holford Israel, but cannot verify the actual costs. Nor does he provide proof of actual payment; documents that should be in Holford's control.

The last of the five elements Holford is required to establish, with facts admissible into evidence, is that the jeans re-entered the commerce of Israel, after final assembly in China, before being shipped to the United States. While Holford does have a bill of lading[8] from Haifa to Newark for the jeans, there is no evidence that the jeans entered Israeli commerce (and therefore met the "shipped from Israel" requirement), other than the Fleisher affirmation. Like many of the other elements of Holford's case, the "directly shipped from Israel" component is supported only by a bald assertion and no supporting documents.

Holford has not come forward with a minimal amount of documentation to establish a claim based on facts that would be admissible. There are serious deficiencies in each element needed to prove duty-free entry. In support of its claims, it offers only conclusory statements of former employees, based on recollection of past events and documents not before the court. Holford has failed to make out a prima facie case supported by facts that would be admissible as required by Rule 56.

V. CONCLUSION

For the foregoing reasons Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted. The case is dismissed. Judgment will be entered accordingly.

[8] Exhibit H in Court No. 95–01–00010 and 95–10–01321. Ex. G in Court No. 95–09–01259.

(Slip Op. 02–71)

HANOVER INSURANCE CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–07–00438

[Upon trial of Customs Service notice to surety of suspension of liquidation, judgment for the plaintiff.]

(Decided July 19, 2002)

Sandler, Travis & Rosenberg, P.A. (Arthur K. Purcell); Neville Peterson LLP (John M. Peterson) for the plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Bruce N. Stratvert);* and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service *(Beth C. Brotman),* of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* As discussed in the slip opinion 01–57, 25 CIT ____ (2001), filed herein, familiarity with which is presumed, this court was unable to resolve all of the issues raised by the parties' pleadings and subsequent cross-motions for summary judgment. That opinion did hold that, as a matter of law, the plaintiff surety for the importer of Entry No. 81–534208–9 was entitled to formal notification by the U.S. Customs Service of the *suspension* of the liquidation of that entry. Customs claims to have provided such notice, which the plaintiff denies, both sides' having submitted affidavits or declarations in support of their respective cross-motions on this issue. The court determined to require the individuals who subscribed to those submissions to appear at a trial and undergo cross-examination upon the long-held belief that that kind of interrogation is the surest test of truth and a better security than the oath. *See, e.g.,* John Henry Wigmore, Treatise on the System of Evidence in Trials at Common Law, vol. 3 (1904); Francis L. Wellman, The Art of Cross-Examination (1903); Sir Matthew Hale, History of the Common Law, ch. 12 (1680).

I

With one exception, excusable *de bene esse*, the original affiants and declarants in this case appeared in open court, where they and other witnesses were subjected to some fine cross-examination by opposing counsel. Their questioning, however, did not transform the sum and substance of the record now more-fully established, and upon which the court makes the following findings of fact[1]:

1. In T.D. 72–161, the U.S. Secretary of the Treasury reported his "finding of dumping" with respect to *Large Power Transformers From Italy,* 37 Fed.Reg. 11,772 (June 14, 1972).

[1] To the extent the court's findings in slip opinion 01–57 are germaine to that which has now been tried, they are hereby incorporated herein by reference.

2. That finding of dumping remained in full force and effect during the administrative dispute underlying this case.

3. In fulfillment of its contract per U.S. Department of the Interior, Bureau of Reclamation Solicitation No. DS–7371, *Power Transformer, Grand Coulee Left Powerplant, Columbia Basin Project, Washington*[2], Industrie Elettriche di Legnano, Italy manufactured and shipped equipment to that electrical facility.

4. The contract equipment entered the United States at the port of Seattle, Washington, Entry No. 81–534208–9.

5. The importer of record was The Legnano Electric Corporation, as consignee for the Bureau of Reclamation.

6. On or about November 25, 1980, Frank P. Dow Co., Inc., as attorney-in-fact for The Hanover Insurance Company, executed an Immediate Delivery and Consumption Entry Bond (Single Entry) on Customs Form 7551 for Entry No. 81–534208–9 in the amount of $358,000.00. *See* Defendant's Exhibit A.

7. F.W. Myers & Company succeeded Frank P. Dow Co., Inc. as the agent for The Hanover Insurance Company, the surety with regard to the consumption entry bond herein.

8. Liquidation of Entry No. 81–534208–9 was suspended pursuant to statute.

9. Suspension of liquidation of an entry subject to an outstanding antidumping-duty order pending administrative review thereof by the International Trade Administration, U.S. Department of Commerce ("ITA") is for an indefinite period of time.

10. Generally, notice of suspension of liquidation pending ITA administrative review was provided only once by the Customs Service.

11. Such notice of suspension of liquidation was provided on Customs Form 4333A.

12. The Customs Form 4333A had space delineated for information encaptioned from left to right "series, type and entry no., date of entry, liquid[ation] code, initial amount, liquidation amount" and below right "importer number, date of liquidation".

13. The parties could not or did not either discover before, or produce at, the trial a Customs Form 4333A bearing any such prescribed information relative to this case.

14. The parties could not or did not either discover before, or produce at, the trial a Customs Form 4333A, or copy thereof, either sent to or received by the plaintiff in this case.

15. The Customs Forms 4333A produced at trial were blank samples, as is the photocopy of one marked and received in evidence herein as Defendant's Exhibit U2.

16. Defendant's Exhibit B in evidence herein is a photocopy of a Customs computer printout extracted on January 27, 1993 from Service data that references six times the entry at issue herein, three of which

[2] Plaintiff's Exhibit P–3.

include the name and address of the Legnano Electric Corporation and three of which include the name and address of the Hanover Insurance Company, and that also references a mail cycle encoded to reflect particular weeks in 1981, 1982, and 1983.

17. In its *Final Results of Antidumping Duty Administrative Review; Large Power Transformers From Italy,* 52 Fed.Reg. 46,806 (Dec. 10, 1987), the ITA set 71.40 percent as the margin of Industrie Elettriche di Legnano's dumping at the time of the entry at issue herein.

18. Pursuant to this ITA final determination, antidumping duties on Entry No. 81–534208–9 were computed to amount to $292,638.12.

19. The Customs Service liquidated Entry No. 81–534208–9 on June 10, 1988.

20. The Legnano Electric Corporation did not remit the antidumping duties or any interest accruing thereon, whereupon the Customs Service made a demand therefor upon the surety.

21. In January 1989, the surety filed a protest with Customs, No. 3001–9–000059, challenging the Service's demand upon it. *See* Defendant's Motion for Summary Judgment, Appendix 6 (Defendant's Exhibit O).

22. In ruling HQ 224397, dated March 1994, the Customs Service denied the surety's protest with respect to payment of the antidumping duties demanded but granted it with respect to payment of interest. *See* Defendant's Motion for Summary Judgment, Appendix 7 (Defendant's Exhibit P).

23. On or about April 7, 1994, the surety tendered and the Customs Service received all of the duties demanded.

24. In its slip opinion 01–57 filed herein, the court held that the affidavits submitted in support of plaintiff's motion for summary judgment, at a minimum, rebutted the presumption that notice to the surety was in fact given, whereupon at the trial the defendant was called upon to adduce its evidence first.

25. The papers for Entry No. 81–534208–9, Defendant's Exhibit A, were timely annotated "S" (for suspension) by the responsible Customs Service officer.

26. The Trade Agreements Act of 1979 went into effect during the calendar year of Entry No. 81–543208–9, at which time the Customs Service was relying on the "old revenue system". Trial transcript ("Tr."), p. 90.

27. The Customs Service's Automated Commercial System or "ACS", upon which the defendant relied at trial, first became operational in 1984. *See, e.g.,* Tr., p. 90.

28. At the time of Entry No. 81–534208–9, Customs Forms 4333A were printed automatically in series and then detached from each other and sealed individually for mailing.

29. Customs Service records reference some 18,000 notices of extensions or suspensions of liquidation to The Hanover Insurance Company during 1981, 1982, and 1983.

30. Most Customs Service notices to The Hanover Insurance Company during 1981, 1982, and 1983 were of extensions, as opposed to suspensions, of liquidation.

31. One employee of The Hanover Insurance Company was responsible for processing all such Customs Service notices during 1981, 1982, and 1983.

32. That one employee of The Hanover Insurance Company responsible for processing all such Customs notices during 1981, 1982, and 1983 was familiar with Service notices of suspension of liquidation on Customs Form 4333A.

33. That one employee of The Hanover Insurance Company responsible for processing all such Customs notices during 1981, 1982, and 1983 has no recollection of having received or reviewed a Service notice of the suspension of the liquidation of Entry No. 81–534208–9.

34. All Customs Service notices to The Hanover Insurance Company of extensions or suspensions of liquidation in 1981, 1982, and 1983 were subject to review and audit by that surety's national underwriting manager.

35. The Hanover Insurance Company's national underwriting manager considered Customs Service notices of suspension of liquidation to be more important than notices of extension of liquidation.

36. The Hanover Insurance Company's national underwriting manager was familiar with Service notices of suspension of liquidation on Customs Form 4333A.

37. The amount of the single entry bond in this case would have made it subject to regular audit by The Hanover Insurance Company.

38. The Hanover Insurance Company established files for bonds and underlying entries subject to its audit.

39. No such audit file was established or later discovered with regard to Entry No. 81–534208–9.

40. F.W. Myers & Company reported monthly to The Hanover Insurance Company on the status of outstanding Customs bonds.

41. F.W. Myers & Company did not inform The Hanover Insurance Company of the Customs Service's suspension of the liquidation of Entry No. 81–534208–9.

42. The Hanover Insurance Company's national underwriting manager was not aware of the outstanding Treasury Department finding of dumping of large power transformers from Italy at the time of Entry No. 81–534208–9.

43. Copies of Customs Service notices of suspension of liquidation involving bonds underwritten by The Hanover Insurance Company were placed in a master file by that surety.

44. No copy of a Customs Service notice of the suspension of the liquidation of Entry No. 81–534208–9 was discovered in the master file for such notices maintained by The Hanover Insurance Company.

45. Customs Service notices of extensions and of suspensions of liquidation involving bonds underwritten by The Hanover Insurance Company were forwarded on a regular basis to F.W. Myers & Company.

46. One employee of F.W. Myers & Company was responsible for receiving and filing all such Customs Service notices forwarded by The Hanover Insurance Company during 1981, 1982, and 1983.

47. That one employee of F.W. Myers Company responsible for receiving and filing all such Customs notices forwarded by The Hanover Insurance Company during 1981, 1982, and 1983 was familiar with Service notices of suspension of liquidation on Customs Form 4333A.

48. That one employee of F.W. Myers Company responsible for receiving and filing all such Customs notices forwarded by The Hanover Insurance Company during 1981, 1982, and 1983 has no recollection of having received from The Hanover Insurance Company a Service notice of the suspension of the liquidation of Entry No. 81–534208–9.

49. That one employee of F.W. Myers Company responsible for receiving and filing all such Customs notices forwarded by The Hanover Insurance Company during 1981, 1982, and 1983 set up files for all Service notices of suspension of liquidation received by her.

50. That one employee of F.W. Myers Company responsible for receiving and filing all such Customs Service notices forwarded by The Hanover Insurance Company during 1981, 1982, and 1983 has no recollection of having established a file for Entry No. 81–534208–9 in conjunction with the suspension of its liquidation.

51. That one employee of F.W. Myers Company responsible for receiving and filing all such Customs Service notices forwarded by The Hanover Insurance Company during 1981, 1982, and 1983 was unable to discover for production in this case any file established for Entry No. 81–534208–9 in conjunction with the suspension of its liquidation.

II

Each of the government's witnesses who appeared and testified at the trial herein lent support to the long-standing judicial presumption that civil servants carry out their official duties in an orderly and regular manner under the law. *Cf. United States v. Chemical Foundation, Inc.,* 272 U.S. 1, 14–15 (1926); *U.S. Postal Service v. Gregory,* 534 U.S. 1, ____, 122 S.Ct. 431, 436 (2001).

A

None of them, however, was able to unrebut the corollary presumption in this case that such expectable regularity resulted in the requisite notice to the surety. *Cf. Int'l Cargo & Surety Ins. Co. v. United States,* 15 CIT 541, 544, 779 F.Supp. 174, 177 (1991). Two of them, namely, Arthur Versich and Roger Odom, also testified from their acquired perspectives at the Customs Service's centralized computer data center with regard

to the matter of *Ford Motor Co. v. United States,* wherein the court found that the

> computer systems in place at Customs for the preparation and mailing of extension notices are sufficient to give rise to the presumption that Customs properly prepared and mailed the notices of extension of liquidation.
>
> These notices are presumed to have been received by the plaintiff, who has the burden of proving non-receipt.[3]

The court held that the plaintiff did not satisfy this burden, essentially because the court was

> not persuaded that Ford's internal record retention and transmittal system could account adequately for all incoming mail so as to preclude the misplacement of extension and suspension notices.

21 CIT at 1001–02, 979 F.Supp. at 889. While that opinion mentions both kinds of notices, in that action *extensions* of liquidation remain the issue, which kind the evidence in this case clearly shows to be much more commonplace and thus numerous and infinitely more difficult to keep track of. Whatever the problems of the Ford Motor Company in fielding such notices (and even of The Hanover Insurance Company), the record now established at bar reflects a concerted, coordinated effort by the plaintiff to husband each and every one of the much-less-frequent notices of suspension of liquidation received by it from Customs. Indeed, an anomaly in this case is that, while defendant's exhibit B lists notices of suspension to Hanover in 1981, 1982, and 1983, the standard Service operating procedure has been to provide but one such notice, doubtless due to the indefinite duration of most, if not all, suspensions.

Once, as herein, the government's presumption of notice has been rebutted, it is incumbent upon Customs to prove mailing. *See, e.g., F.W. Myers & Co. v. United States,* 6 CIT 215, 216–17, 574 F.Supp. 1064, 1065 (1983), citing *Orlex Dyes & Chemicals Corp. v. United States,* 41 Cust.Ct. 168, 170, C.D. 2036, 168 F.Supp. 220, 222 (1958). The Service should best do so by producing an individual involved in delivering its notices to the mail, for example, or having been somehow or -where within the ambit of attempted forwarding to an importer and surety. *See, e.g., United States v. Int'l Importers, Inc.,* 55 CCPA 43, 52–53, C.A.D. 932 (1968), citing *Compass Instrument & Optical Co. v. United States,* 47 Cust.Ct. 10, C.D. 2271 (1961); *Orlex Dyes & Chemical Corp. v. United States, supra; Clayton Chemical & Packaging Co. v. United States,* 38

[3] 21 CIT 983, 1001, 979 F.Supp. 874, 889 (1997), *vacated and remanded for trial,* 157 F.3d 849 (Fed.Cir. 1998), *dismissed after trial,* 24 CIT ___, 116 F.Supp.2d 1214 (2000), *rev'd and remanded,* 286 F.3d 1335 (Fed.Cir. 2002).

Cust.Ct. 617, R.D. 8774, 150 F.Supp. 628 (1957). The defendant has not done so in this case[4], whereupon it became necessary for it to adduce

> proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee, whose duty it was to deposit the mail in the post office, that he either actually deposited that mail in the post office, or that it was his invariable custom to deposit every letter left in the usual receptacle, and that he never failed in carrying out that custom.

United States v. Int'l Importers, Inc., 55 CCPA at 53, quoting *United States ex rel. Helmecke v. Rice,* 281 Fed. 326, 331 (S.D. Tex. 1922).

Again, the defendant has not done so. Essentially, the only document of any moment produced by the defendant is its exhibit B, which is nothing more than a computer abstract derived more than a decade later via a program not in existence at the time notice should have been provided to the surety now at bar. While the faith exhibited by defendant's witnesses in their computerized system(s) may be well-placed, difficult cases such as this should not be decided upon after-the-fact, electronically-based faith alone.

B

To assume, on the other hand, acceptable proof of mailing would raise a presumption of delivery. *See, e.g., Rosenthal v. Walker,* 111 U.S. 185, 193 (1884); *Intra-Mar Shipping Corp. v. United States,* 66 Cust.Ct. 3, 5–6, C.A.D. 4160 (1971). Of course, that presumption is also rebuttable. *See, e.g.,* Francis Wharton, A Commentary on the Law of Evidence in Civil Cases, vol. 2, §1323 (2d ed. 1879). Indeed,

> [p]roof of mailing is not *ipso facto* proof that the notice was given to the importer, where the unrefuted testimony is that no notice was received.

Intra-Mar Shipping Corp. v. United States, 66 Cust.Ct. at 6, citing *United States v. Int'l Importers, Inc., supra.* To be sure, to

> require the government to prove not only mailing, but actual receipt of Form 4333–A by the importer, would erect a virtually unassailable hurdle. Rarely, if ever, would the government possess or elicit proof of receipt from an importer claiming nonreceipt.

A.N. Deringer, Inc. v. United States, 20 CIT 978, 993 (1996). *Cf. Ford Motor Co. v. United States, supra; Prosegur, Inc. v. United States,* 25 CIT ____, 140 F.Supp.2d 1370 (2001). Hence, that has not been the approach taken in this case. Rather, the plaintiff has presented its witnesses in open court for cross-examination by government counsel, which, however skillful, did not diminish their original attestations of nonreceipt. Moreover, their testimony buttressed the appropriateness of accepting,

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[4] Apparently, those particular individual(s) were not Customs officers, rather civilian contractor(s). *See* Tr., p. 137. The one government witness at the trial who could have been a direct participant in the notification process proved not to have been. *See id.* at 18, 21, 39, 40. *Cf. United States v. Getz Brothers & Co.,* 55 CCPA 90, C.A.D. 938 (1968)(Customs Deputy Collector testified that he personally processed entries and notices with regard thereto, including stamping, dating, and mailing, always in the presence of a witness).

de bene esse, the affidavit of the other Hanover witness with integral knowledge of the receipt, review, filing, and forwarding of all Customs notices of suspensions of liquidation by the plaintiff[5]. Finally, plaintiff's counsel were able to elicit upon cross-examination of defendant's witnesses the existence of Service glitches. According to Mr. Versich, for example, Customs discovered in 1989, notwithstanding the operation of its more sophisticated "ACS" by then, that several thousand notices, dating back to 1986, had not been actually printed and thus delivered. *See* Tr., p. 105. On his part, Mr. Odom admitted that the "old"[6] computer revenue system in effect at the time of Entry No. 81–534208–9 was more prone to errors than the one underlying the problem discovered in 1989. *See id.* at 136–37.

C

Be those particular imperfections as they were, whichever side better sustains its burden(s) of proof must be the prevailing party. And a fair preponderance of the evidence has been held to be that standard in a civil suit like this. *E.g., Addington v. Texas,* 441 U.S. 418, 423 (1979); *St. Paul Fire & Marine Ins. Co. v. United States,* 6 F.3d 763, 769 (Fed.Cir. 1993). The court of appeals in *St. Paul* defined preponderance of the evidence in civil actions to mean "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." 6 F.3d at 769, quoting *Hale v. Dep't of Transp.,* 772 F.2d 882, 885 (Fed.Cir. 1985).

Here, the evidence now on the record clearly favors the plaintiff in terms of both weight and content. In fact, there is little left of defendant's position once the legal presumptions appropriately favoring its role and circumstance were rebutted by the plaintiff with regard to notification by the Customs Service of the suspension of the liquidation of Entry No. 81–534208–9.

III

Plaintiff's preponderance on the issue of notice is so clear-cut that the court hereby concludes that its resolution of the other issue reserved by slip opinion 01–57 for the trial, to wit, whether or not the Customs Service failed to follow the ITA's liquidation instructions[7], is not now necessary. Judgment will enter accordingly.

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[5] *See, e.g.,* Tr., pp. 241–43. *Compare A.N. Deringer, Inc. v. United States,* 20 CIT 978, 981 (1996)(the employee in a similar role at Deringer not called to testify and no explanation for her absence from trial offered by the plaintiff) *and Sanford Steel Pipe Products Co. v. United States,* 68 Cust.Ct. 192, 195, C.D. 4359 (1972):

> * * * Neither the mailroom girl nor the export manager, who sometimes got mail destined for the import manager, was called as a witness in the case, and their nonappearance as witnesses in the case remains unexplained[;]

with Orlex Dyes & Chemicals Corp. v. United States, 41 Cust.Ct. 168, C.D. 2036, 168 F.Supp. 220 (1958)(the necessary witnesses in the established path of receipt of Customs Service notices each called to testify, thereby buttressing presumption of nonreceipt).

[6] Tr., p. 90.

[7] *See* Slip Op. 01–57, p. 22 and 25 CIT ___, n. 5.