(Slip Op. 03–59)

BEFORE: HON. RICHARD W. GOLDBERG, SENIOR JUDGE, CORRPRO COMPANIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT.

Court No. 01–00745

[Plaintiff's motion for summary judgment is denied; Defendant's motion to dismiss for lack of jurisdiction is granted in part and denied in part, and Defendant's cross-motion for summary judgment is granted in part and denied in part.]

(Dated: June 4, 2003)

Simons & Wiskin (*Jerry P. Wiskin* and *Philip Yale Simons*) for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Aimee Lee*); *Beth C. Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel, for Defendant.

OPINION

GOLDBERG, *Senior Judge:* This action arises from the Bureau of Customs and Border Protection's ("Customs") denial of Plaintiff's North American Free Trade Agreement ("NAFTA") claim and protest of classification filed on September 6, 2001. Plaintiff Corrpro Companies, Inc. ("Corrpro") moves for summary judgment pursuant to USCIT R. 12(b) or R. 56. Defendant moves to dismiss for lack of jurisdiction and, in the alternative, cross-moves for summary judgment.

The Court has jurisdiction in this case under 28 U.S.C. § 1581(a). For the reasons that follow, Plaintiff's motion for summary judgment is denied. Defendant's motion to dismiss for lack of jurisdiction is granted in part and denied in part, and Defendant's cross-motion for summary judgment is granted in part and denied in part.

I. BACKGROUND

Plaintiff Corrpro is an importer of magnesium anodes. The subject merchandise was classified by Customs under subheading 8104.19.00 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as "Magnesium and articles thereof, including waste and scrap: Unwrought magnesium: Other" at the rate of 6.5% *ad valorem*. Under this subheading the merchandise was ineligible for NAFTA preferential treatment.

On May 17, 1993, Customs issued Headquarters Ruling Letter ("HRL") 557046 classifying the subject merchandise under subheading 8104.19.00, HTSUS. Under this subheading, the magnesium anodes were ineligible for NAFTA treatment. On August 16, 1999, Corrpro began importing magnesium anodes into the United States under HTSUS 8104.19.00, according to Customs' classification. In the year following the time of entry, Corrpro did not file a claim for NAFTA preferential treatment. On June 30, 2000, Customs liquidated the subject merchandise. On September 12, 2000, Corrpro filed a protest under 19 U.S.C. § 1514(a)(2), asserting that the proper classification of its imported anodes was under HTSUS subheading MX 8543.38.00. Corrpro claims that its protest of September 12, 2000 was a joint protest for NAFTA preferential treatment and protest of classification and duty rates. On August 13, 2001, Customs denied the protest.

Corrpro filed a complaint with the Court of International Trade on September 6, 2001. In its complaint, Corrpro asserted that the Court has jurisdiction under 28 U.S.C. § 1581(a) because its post-entry claim constituted (1) a timely protest of classification, liquidation, and duty rates pursuant to 19 U.S.C. § 1514 and (2) a claim for NAFTA preferential treatment pursuant to 19 U.S.C. § 1520(d) or, in the alternative, 19 U.S.C. § 1520(c).

On October 10, 2001 Customs retracted HRL 557046 and reclassified the subject merchandise under HTSUS 8543.30.00 ("New Classification"). Customs issued its final notice of revocation of HTSUS 8104.19.00 on December 5, 2001. Under the New Classification, the subject merchandise was eligible for NAFTA preferential treatment. Therefore, in response to Corrpro's claim, Customs agreed to stipulate to the classification of the subject merchandise under the New Classification at the applicable general rate of duty. Corrpro refused to agree with Customs' stipulation and proceeded with its complaint.

On June 27, 2002, Corrpro submitted the certificates of origin in connection with its September 6, 2001 claim for NAFTA preferential treatment.

II. STANDARD OF REVIEW

The threshold issue on appeal is whether the Court has jurisdiction to hear this case. *See Everflora Miami, Inc., v. United States*, 19

CIT 485, 885 F. Supp. 243 (1995). In deciding a USCIT R. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court looks to whether the moving party challenges the sufficiency of the pleadings or the factual basis underlying the pleadings. In the first instance, the Court must accept as true all facts alleged in the non-moving party's pleadings. In the second instance, the Court accepts as true only those facts which are uncontroverted. All other facts are subject to fact-finding by the Court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

III. DISCUSSION

Pursuant to 28 U.S.C. § 1581(a), Corrpro claims the Court has jurisdiction over this action commenced to contest the denial of a protest, in whole or in part, under 19 U.S.C. § 1520(d) or, alternatively, 19 U.S.C. § 1520(c).[1]

Customs concedes that the appropriate classification of the subject merchandise was under HTSUS 8543.30.00. Corrpro claims that its protest of September 12, 2000 was a post-entry NAFTA claim of Customs' final decision regarding "classification, rate, and amount of duties chargeable," under § 1520(d). Alternatively, Corrpro claims that the protest met the requirements of § 1520(c) requesting reliquidation based on Customs' mistake of fact or clerical error in reclassifying the magnesium anodes. Thus, under either § 1520(d) or § 1520(c), Corrpro asserts that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

In its motion for summary judgment, Customs argues that the Court lacks § 1581(a) jurisdiction in this matter because Customs made no final decision in the protest denial. Thus, there was no decision for Corrpro to appeal to the Court. Customs also claims that the Court lacks jurisdiction over Corrpro's claim for NAFTA preferential treatment because Corrpro failed to file a timely claim. If the Court finds jurisdiction over Corrpro's NAFTA claim, Customs cross-moves for summary judgment on the basis of Corrpro's failure to comply with the requirements of a NAFTA claim—namely by failing to file certificates of origin with its protest.

The Court addresses Corrpro's § 1520(d) and § 1520(c) arguments individually.

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[1] 19 U.S.C. § 1514(a) grants an importer 90 days from the date of notice of liquidation to file a protest challenging the classification and assessments of duties. In the absence of such a protest within the specified time period, Customs may reliquidate an entry under 19 U.S.C. § 1520(c) or 19 U.S.C. § 1520(d). Corrpro concedes that it was unable to file a claim within the timing requirements of 19 U.S.C. § 1514 and thus invokes the extensions provided by § 1520(d) or, alternatively, § 1520(c).

A. *The Court lacks jurisdiction over Corrpro's § 1520(d) claim due to Corrpro's failure to comply with the procedural requirements for filing a NAFTA preferential treatment claim.*

We first address the issue of whether the Court has jurisdiction to consider the complaint as a protest for NAFTA preferential treatment filed under 19 U.S.C. § 1520(d).[2]

Corrpro claims that the Court has jurisdiction to hear this case because its complaint was a protest for NAFTA preferential treatment filed pursuant to 19 U.S.C. § 1520(d). Corrpro concedes that it did not make its § 1520(d) petition for NAFTA treatment until after the merchandise was imported, nor did it within one year after the time of entry. Corrpro argues that they were precluded by law from claiming NAFTA preferential treatment until two years after the time of entry when Customs reclassified the subject merchandise. It claims that pursuant to a binding Customs ruling, they were required to enter the subject merchandise under HTSUS 8104.19.00, which was ineligible for NAFTA preferential treatment. Thus, it filed a post-liquidation protest pursuant to § 1520(d).

Customs claims that a § 1520(d) petition must precede a protest where no NAFTA claim was made at the time of the entry of the subject merchandise, citing *Power-One, Inc. v. United States*, 83 F. Supp. 2d 1300, Slip Op. 99–133 (Dec. 14, 1999). Customs argues that *Power-One* stands for the proposition that the Court of International Trade ("CIT") lacks jurisdiction if the NAFTA claim was not protested prior to coming to the CIT. *Id.* at 964–65. In the alternative, Customs argues that assuming arguendo that Corrpro filed a NAFTA preferential treatment claim, Corrpro's claim was invalid since it did not include the certificates of origin, as required by § 1520(d). As a result, according to Customs, the Court does not have jurisdiction to hear this claim.

An importer may file a protest contesting the denial of a NAFTA preferential treatment claim at the date of entry pursuant to 19 U.S.C. § 1514(a). If no such claim was filed at the date of entry, the importer may file one within one year of the date of entry pursuant to 19 U.S.C. § 1520(d).

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[2] Section 1520(d) provides in pertinent part that:

> [n]otwithstanding the fact that a valid protest was not filed, the Customs Service may * * * reliquidate an entry to refund any excess duties * * * paid on a good qualifying under the rules of origin set out in section 202 of the North American Free Trade Agreement Implementation Act for which no claim for preferential tariff treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes—
>
> (1) a written declaration that the good qualified under those rules at the time of importation
>
> (2) copies of all applicable NAFTA Certificates of Origin * * * and
>
> (3) such other documentation relating to the importation of the goods as the Customs Service may require.

19 U.S.C. § 1520(d).

Customs reiterates these requirements in 19 C.F.R. § 181.23.[3] This section, which outlines the procedures for filing a claim for NAFTA preferential treatment, also requires the petitioning party to submit a copy of each certificate of origin.

Accordingly, a protest that is filed without the required documents is invalid. *See Audiovox Corp v. United States*, 8 CIT 233 (1984) (dismissing plaintiff's claim for duty-free treatment for lack of jurisdiction.). In *Audiovox*, the court determined that the plaintiff's request for duty-free treatment was invalid since the plaintiff failed to file the certificates of origin. Consequently, the court lacked jurisdiction over an invalid protest. "[T]he requirements of 19 U.S.C. § 1514 are conditions precedent for jurisdiction in this court under 28 U.S.C. § 1581(a)." *Id.* at 237. *See also Power-One*, 83 F. Supp. 2d at 965 (holding that the court lacked jurisdiction over plaintiffs' 19 U.S.C. § 1520(d) claim since the plaintiff's failed to file a valid protest against Customs' denial of their § 1520(d) claim). *Power-One* concluded that the plaintiffs' NAFTA claim was invalid, in part because the plaintiffs failed to respond to requests for specific documentation concerning the origin of the exports in their original claim for NAFTA preferential treatment, and therefore, the court lacked jurisdiction. *Id.*

Corrpro agrees that it did not send the certificates of origin with any of its of its § 1520(d) protests. Indeed, Corrpro filed its last § 1520(d) protest on June 6, 2001 but did not send the certificates of origin until June 27, 2002. Corrpro failed to follow the procedural requirements of 19 U.S.C. § 1520(d) and 19 C.F.R. § 181.23. Accordingly, the Court lacks jurisdiction over Corrpro's § 1520(d) claim because the denials of petitions for NAFTA treatment are not protestable. *See Audiovox*, 8 CIT 236. Accordingly, Plaintiff's NAFTA preferential treatment claim is rejected for lack of jurisdiction.

B. *Customs's reclassification of the subject merchandise was the result of a mistake of law, therefore rendering Corrpro's § 1520(c) claim inapplicable.*

19 U.S.C. § 1520(c) allows an importer to protest an administrative decision of Customs if the decision is predicated upon a "clerical error, mistake of fact or other inadvertence" in any entry, liquidation, or other customs transaction.[4] As stipulated, the protest must be

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[3] Section 181.23(b) provides in pertinent part, that

> A. post-importation claim for a refund shall be filed by presentation of the following:
> (1) A written declaration stating that the good qualified as an originating good at the time of importation and setting forth the number and date of the entry covering the good;
> (2) * * * a copy of each Certificate of Origin pertaining to the goods.

19 C.F.R. § 181.23.

[4] Section 1520(c) provides in pertinent part that:

> Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—
> (1) a clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the im-

made within one year after the date of liquidation. All of Corrpro's protests were filed within one year of the date of liquidation. Therefore, the Court has jurisdiction to hear Corrpro's protest filed under § 1520(c).

Section 1520(c) applies to mistakes of fact and does not apply to mistakes of law. *Sunderland of Scot, Inc. v. United States*, 2001 Ct. Intl. Trade LEXIS 114, Slip Op. 01–112 (Aug. 29, 2001). In *Sunderland*, Customs determined that the subject merchandise, pull-over coats, satisfied a test proving that the coats were waterproof. This determination was contrary to Customs' original determination and warranted reclassification of the merchandise. The *Sunderland* court held that the reclassification of this product constituted an error in the construction of law rather than an error in mistake of fact. The court explained the difference between a mistake of fact and a mistake of law:

> A mistake of fact occurs when a decision is based on a reasonable belief that a fact exists differently than in reality * * * [A] mistake of law occurs when the legal consequences of a given set of facts are incorrectly interpreted or anticipated." *Id*.

Thus, the *Sunderland* court determined that reclassification was a reinterpretation of a given set of facts. This reinterpretation resulted in a newly-determined legal consequence. Therefore, the reclassification was a mistake of law and § 1520(c) was inapplicable.

In the instant case, Customs reclassified the magnesium anodes because they determined that the subject merchandise was not unwrought. This determination was based on the reevaluation of the composition of the subject merchandise rather than any mistake of fact, error, or inadvertence. Therefore, this reclassification, like the reclassification in *Sunderland*, was based on a prior misinterpretation of the contents of the merchandise. The *Sunderland* court determined that this kind of error is an error in the construction of law rather than a mistake of fact. Likewise, we hold here that Customs' reclassification of the subject merchandise was a mistake of law rendering § 1520(c) inapplicable to Plaintiff's case.

Therefore, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted on this issue.

IV. CONCLUSION

Plaintiff's motion for summary judgment on its appeal of Customs' protest denial is denied (1) for lack of subject matter jurisdiction under 19 U.S.C. § 1520(d) due to Plaintiff's failure to timely file certifi-

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porter and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction * * *

19 U.S.C. § 1520(c).

cates of origin and (2) since the reclassification of the subject merchandise was not a clerical error or mistake of fact as required under 19 U.S.C. § 1520(c). Accordingly, Defendant's motion to dismiss for lack of jurisdiction is granted in part and denied in part, and Defendant's cross-motion for summary judgment is granted in part and denied in part.

(Slip Op. 03–60)

BEFORE: MUSGRAVE, JUDGE, DREXEL CHEMICAL COMPANY, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT.

Court No. 98–02–00295–S

[Plaintiff challenged Customs' determination that certain entries of Diuron Technical and Diuron 80–WP herbicides imported from Malaysia were not entitled to duty-free treatment because they did not qualify as products of a beneficiary developing country under the Generalized System of Preferences, 19 U.S.C. § 2463 (Supp. V 1993 & 1994). Trial was held to determine whether a dual substantial transformation took place in the manufacture of the subject merchandise enabling the value of chemicals imported into Malaysia to be included in considering whether 35 percent of the appraised value of the merchandise was derived from materials produced in Malaysia or processing operations performed in Malaysia. Held: The Court finds that a dual substantial transformation took place in the manufacture of Diuron Technical and Diuron 80–WP; thus the subject entries shall be reliquidated duty-free.]

(Decided: June 5, 2003)

Adduci, Mastriani & Schaumberg, L.L.P. (*V. James Adduci, II* and *Maureen F. Brown*) for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*) for Defendant.

OPINION

This action concerns the proper classification of certain entries of Diuron Technical and Diuron 80–WP herbicides imported from Malaysia between March 1993 and March 1994 by Plaintiff Drexel Chemical Company ("Drexel"). The United States Customs Service, now organized as the Bureau of Customs and Border Protection, ("Customs") classified the entries of Diuron Technical under subheading 2924.21.1500 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which specifies a duty rate of 13.5% *ad valorem*, and Diuron 80–WP under HTSUS subheading 3808.30.1000 which specifies a duty rate of $0.18/kg plus 9.7%. Drexel asserts that the Diuron Technical should have been classified under A2924.21.1500 and the Diuron 80–WP under A3808.30.1000, the "A" prefix indicating that the merchandise is eligible for duty-free entry

pursuant to the Generalized System of Preferences ("GSP"), 19 U.S.C. § 2463 (Supp. V 1993 & 1994), as the product of a beneficiary developing country. Resolution of this dispute turns on whether chemicals imported into Malaysia and used in the production of the Diuron Technical and Diuron 80–WP underwent a dual substantial transformation. After trial on this issue, the Court finds that there was a dual substantial transformation and therefore holds that Customs erred in denying the subject merchandise duty-free treatment.

STANDARD OF REVIEW

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a). Customs' classification decisions are reviewed *de novo*. *See Northwest Airlines, Inc. v. United States*, 22 CIT 797, 798, 17 F. Supp. 2d 1008, 1010 (1998). The factual determinations underlying classification decisions are afforded a presumption of correctness by 28 U.S.C. § 2639(a)(1) and the burden of proof is on the party challenging the classification. *Id*. Nevertheless, it is the Court's role to "consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

Title 19, section 2463(b)(1) of the United States Code provides for duty-free treatment of

> any eligible article which is the growth, product, or manufacture of a beneficiary developing country if—
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> (A) that article is imported directly from a beneficiary developing country into the customs territory of the United States; and
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> (B) the sum of (i) the cost or value of the materials produced in the beneficiary developing country * * *, plus (ii) the direct costs of processing operations performed in such beneficiary developing country * * * is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States.

19 U.S.C. § 2463(b)(1) (Supp. V 1993 & 1994). The term "produced in the beneficiary developing country" is defined to mean that "the constituent materials of which the eligible article is composed * * * are either (1) [w]holly the growth, product, or manufacture of the beneficiary developing country; or (2) [s]ubstantially transformed in the beneficiary developing country into a new and different article of commerce. 19 C.F.R. § 10.177(a) (1993 & 1994). A substantial transformation occurs when material undergoes "a processing that results in a new article having a distinctive name, character, or use." *Torrington Co. v. United States*, 8 CIT 150, 154, 596 F. Supp. 1083, 1086 (1984), *aff'd* 764 F.2d 1563 (Fed. Cir. 1985). "All three of these elements need not be met before a court may find a substantial transformation." *SDI Technologies, Inc. v. United States*, 21 CIT 895, 897,

977 F. Supp. 1235, 1239 (1997) (citing *Koru North America v. United States*, 12 CIT 1120, 1126, 701 F. Supp. 229, 234 (1988), *aff'd* 155 F.3d 568 (Fed. Cir. 1998)).

BACKGROUND

Drexel imports herbicides and similar products which it markets under its own label. Trial Record ("TR.") 29–30. Diuron and DCU[1] are common names for dichloro diphenyl dimethyl urea, TR. 136, which acts as an herbicide by inhibiting the Hill Reaction[2] in plants, TR. 114. Diuron Technical is used to formulate other herbicides such as Diuron 4–L and Diuron 80–WP. TR. 33–34. Diuron 80–WP is a dry, powdered herbicide that the end-user mixes and applies with a spray tank. TR. 34–35. The merchandise at issue was purchased from Ancom, a Malaysian company not affiliated with Drexel. TR. 35–36.

At trial, Dr. David Barnes, a chemist who was an official with Ancom during the relevant time period, testified as an expert regarding the production of the Diuron products. The first step in production involves the reaction of imported dichlorophenyl isocynate and dimethylamine along with solvents to produce DCU. TR. 115. This is performed by Polytensides, a separate unit of Ancom. TR. 118–119. The reaction time in this process lasts half an hour and it then takes six to seven hours to remove the solvents. TR. 115–116. Two workers are required to run the DCU production plant. TR. 129. After the reaction, the DCU, which is in a molten state, is drained into 3′ by 3′ stainless steel trays and allowed to cool overnight, forming a crystalline cake weighing 100 to 150 pounds. TR. 103, 116. After cooling, the cake is broken up and stored in drums at the Polytensides plant. TR. 118.

When Ancom receives an order, it requisitions the DCU cake from Polytensides. TR. 119. The DCU cake is then put through a "sugar mill" to grind it into smaller particles to make it easier to handle. TR. 119–120, 132. During this initial grinding process silica and clay are added to the DCU to coat the surface of the particles and prevent them from agglomerating. TR. 120. Grinding would be impossible without the silica and clay. TR. 132. After this, the DCU is in a powder form. TR. 120. The powdered DCU is then placed in a ribbon blender and additional silica and clay are added until the mixture is 97.5 percent DCU. TR. 121. If Diuron 80–WP is being produced a dry surfactant is added during the blending in addition to the silica and clay. TR. 133. After blending, the mixture is air milled in an impact mill and run through a classifier whereby particles five microns or

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[1] The terms "Diuron" and "DCU" are interchangeable. TR. 99. At trial, counsel and the witnesses referred to the initial product as DCU and the finished product as Diuron. To maintain clarity the Court adopts the same use of these terms in this Opinion.

[2] The Hill Reaction is the process through which plants synthesize carbohydrates in the form of sap. TR. 113–114.

less in size are continuously taken off the top and larger particles fall to the bottom and are ground further until all the particles are five microns or less. TR. 122. This process takes eight to nine hours, TR. 134, and requires six to eight workers, TR. 134. The milling process is the final step in the production of Diuron Technical and Diuron 80–WP, and once this is complete the ground material is bagged and placed on pallets. TR. 133–134.

ARGUMENTS

In the present case, there is no dispute that the initial reaction of imported dichlorophenyl isocynate ("DCPI") and dimethylamine ("DMA") to produce the DCU cake was a substantial transformation. Def.'s Proposed Findings of Fact and Conclusions of Law Statement at 1. Nevertheless, since the DCPI and DMA were not from a beneficiary developing country, the DCU cake is not entitled to duty-free treatment under the GSP. *See Torrington*, 8 CIT at 153, 596 F. Supp. at 1085–86. The issue is whether the subsequent air milling of the DCU into fine particles, five microns or less in size, effected a second substantial transformation, thus enabling the value of the DCU cake to be counted toward the requirement set forth in 19 U.S.C. § 2463(b)(1) that 35 percent of the appraised value of the merchandise be derived from materials produced or processing operations performed in the beneficiary developing country.

Drexel's argument that a second substantial transformation did occur is based on Dr. Barnes's testimony that, while the intrinsic structure of the Diuron molecule remained unchanged through the manufacturing process, TR. 136, the properties of the material underwent "enormous changes" which made it an herbicide, TR. 137. Dr. Barnes explained that the grinding process freed valance bonds, thus enabling the Diuron to adsorb to a plant leaf in large enough quantities in order to act as an herbicide. TR. 138–140. Dr. Barnes explained that adsorption is "a chemical phenomenon" involving Van der Waal forces which bond molecules together with ionic and hydrogen bonds. TR. 139. Diuron is very insoluble in water, so without this fine grinding, not enough of the Diuron could be taken into the plant leaf to inhibit the Hill Reaction and kill the plant. TR. 140. Drexel argues that this testimony shows that the final air milled Diuron Technical and Diuron 80–WP products have a different character than the DCU.

Drexel also argues that the DCU is a separate commercial product. At trial, Mr. Robert Shockey, the founder of Drexel and currently its vice-president of finance, testified that between March 1993 and March 1994, Drexel sold a form of DCU to Alpha Chemical for use as an accelerator in making fiberglass. TR. 36. Drexel entered into evidence an office memorandum describing a container of 98 percent Diuron without media being entered in September 1993, a sample of which was acceptable to Alpha. Pl.'s Ex. 8 at 1. Mr. Shockey testified

that 98 percent Diuron without media was "as close to the pure DCU as we can get it." TR. 38. This is consistent with Dr. Barnes testimony that the DCU cake is roughly ground in the "sugar mill" when it first comes to the Ancom plant to make it easier to handle and that a minimum amount of silica and clay have to be added to make the grinding possible. TR. 132. Mr. Shockey further testified that the DCU sold to Alpha was a special shipment with less clay and silica than the Diuron it regularly imported because Alpha was having trouble using the regular Diuron. TR. 38. Although the purchase order from Alpha, dated June 11, 1993, described the product as "Diuron Technical Grade 97% same as sample send to us from lot," Pl.'s Ex. 8 at 6, Mr. Shockey explained that because of Drexel's prior dealings with Alpha they knew to supply it with the 98 percent Diuron without media (*i.e.* without clay and silica). Mr. Shockey speculated that Alpha had described the material incorrectly as Diuron Technical because it did not know what to call it otherwise. TR. 39. In addition to Mr. Shockey's testimony, Dr. Barnes testified that Ancom had sold DCU for use in paint manufacturing and for use in the water treatment industry. TR. 142–143.

Customs argues that there is not a second substantial transformation in the production of the Diuron products at issue, but that the DCU cake is merely an intermediate product. Customs places great emphasis on the fact that the grinding processes do not change the structure of the Diuron molecule, which is present in the initial DCU cake, and argues that this molecule is the essence of Diuron Technical and Diuron 80–WP because it is the component which inhibits the Hill Reaction. Although the grinding process enhances the ability of this molecule to act as an herbicide, it does not "change the intrinsic or inherent properties of the Diuron in the cake form." Def.'s Proposed Findings of Fact and Conclusions of Law Statement at 10.

Customs also argues that the DCU Drexel sold to Alpha was different from both the DCU cake produced at the Polytensides plant and the Diuron Technical and Diuron 80–WP at issue in this case because the product sold to Alpha was described as a fluffy powder but with very little clay or silica added. *Id.* at 6. Customs notes that the DCU cake was a solid rather than a powder, and the Diuron Technical and 80–WP had greater amounts of clay and silica added. *Id.* Customs also notes that Dr. Barnes testified that Ancom sold roughly ground DCU, not DCU cake, to the paint manufacturer and that the DCU that was sold was to be further ground with the paint pigment, similar to the grinding with clay and silica performed by Ancom, and would ultimately act as an algaecide and fungicide in the paint. *Id.* at 12.

ANALYSIS

Prior decisions by this court in *Torrington Co. v. United States*, 8 CIT 150, 596 F. Supp. 1083 (1984), *aff'd* 764 F.2d 1563 (Fed. Cir.

1985), *Azteca Milling Co. v. United States*, 12 CIT 1153, 703 F. Supp. 949 (1988), *aff'd* 890 F.2d 1150 (Fed. Cir. 1989), and *Zuniga v. United States*, 16 CIT 459 (1992), *aff'd* 996 F.2d 1203 (Fed. Cir. 1993), are relevant to the present action. In *Torrington* the court held that there was a dual substantial transformation where wire from a non-beneficiary developing country was processed first into sewing machine needle blanks and then into finished needles in Portugal. 8 CIT at 154, 596 F. Supp. at 1086. The court found that the character of the wire changed in its processing into the needle blanks, noting that it "has been cut to a specific length, beveled to meet specifications, and its circumference has been altered." *Id.* The court also found that the needle blanks were a "new and different article of commerce" based on two sales of the needle blanks by the plaintiff to a related company and instances where other companies imported similar merchandise. Furthermore, the court found that a second substantial transformation took place when the needle blanks were processed into industrial sewing machine needles by having an eye pressed into them, being mill flashed to remove excess material around the eye, and having a point placed on the needle along with identifying information regarding the size, type, and brand. 8 CIT at 155, 596 F. Supp. at 1087.

In *Azteca* the plaintiff alleged that three distinct intermediate products were formed during the production of tortilla and taco shell flour in Mexico. 12 CIT at 1156, 703 F. Supp. at 951. First, corn from the United States was cooked to form a product called nixtamal, which was then ground to form a second product called masa. The masa was then dried to form a third product referred to as tamale flour, which was finally sifted to form the tortilla and taco shell flour. The court found that

> [t]he products resulting at certain steps in plaintiff's patented process may be more refined than the constituent material of corn, but, nevertheless, are clearly recognizable as processed corn * * * * each product has not "lost the identifying characteristics of its constituent material."

12 CIT at 1158–59, 703 F. Supp. at 953 (quoting *Torrington Co. v. United States*, 764 F.2d 1563, 1569 (Fed. Cir. 1985)). Significantly, the court also found that the products formed at each stage of the production process were not "distinct 'articles of commerce' " because the plaintiff had not shown any commercial transactions or a market for them. Thus the court held that there had not been a dual substantial transformation. 12 CIT at 1159, 703 F. Supp. at 954.

Similarly, in *Zuniga* the plaintiff alleged that kiln furniture manufactured in Mexico was entitled to duty free treatment because the raw materials imported from the United States were substantially transformed into three intermediate products during the course of production. *Id.* at 459–60. The court rejected the plaintiff's argu-

ments, finding that the first alleged product, "castable," was never created in the manufacture of the goods at issue and that its functional equivalent was neither commercially recognized nor susceptible of trade. *Id.* at 464. The court found that the second alleged product, "casting slip," was not a new and different article of commerce, holding that "the simple addition of water and dispersing agents did not cause the casting slip to lose the "identifying characteristics" of its components." *Id.* at 465 (quoting *Azteca v. United States*, 890 F.2d 1150 (Fed. Cir. 1989)). Moreover, the court found testimony by the plaintiff's President and Chief Executive Office that he had denied one inquiry to sell casting slip insufficient evidence that this product was an article of commerce. The court was equally unimpressed with the plaintiff's argument that the casting slip was readily susceptible of trade based on testimony that competitors could derive the plaintiff's confidential formula from the slip and testimony that the casting slip was not saleable because it did not remain in suspension and could not be sold at a competitive price. *Id.* at 465–66. Finally, the court found that the plaintiff failed to produce evidence that the third alleged product, "greenware," lost the identifying characteristics of its component ingredients or that it had a different character or use, *id.* at 467 (citation omitted), and also failed to prove that it was a new article of commerce in light of unrebutted testimony that commercially sold greenware had a different formulation, *id.*

In the present action the Court finds the processing of the DCU into the Diuron Technical and 80–WP similar to the processing of the needle blanks into the finished needles in *Torrington*. Customs argues that the present case is more analogous to *Azteca* and *Zuniga* in that the identifying characteristic, namely the Diuron molecule, is equally present in the DCU cake and the final products. Nevertheless, the Court finds that in this instance the final product has gained new identifying characteristics in addition to the diuron molecule. The Court finds that the air milling process causes not only a physical change in the size of the particle, but also a chemical change as valance bonds are freed, enabling the Diuron molecule to adsorb to a plant leaf. TR. 138–139. Moreover, while the Diuron molecule is equally present both before and after the air milling process, the DCU "is useless as a herbicide," but "[t]he final product that comes out is a herbicide." TR. 137. Based on these findings, the Court concludes that there was a change in the character of the DCU in its processing into Diuron Technical and Diuron 80–WP.

The Court also finds that Drexel has demonstrated that the DCU is an article of commerce through the testimony regarding the sales by Drexel to Alpha and Ancom to the paint manufacturer. Although Customs makes much of the fact that the DCU that was sold in these transactions was not in cake form, but had been roughly ground in the "sugar milling" process, the Court is not persuaded

that this matters. Drexel has argued that it is the air milling process, by which the DCU is reduced to particles five microns or less in size, that transforms the DCU into an herbicide. Indeed, Dr. Barnes testified on cross-examination that prior to the time the DCU is air milled and run through the classifier it is not a different article of commerce from the original cake form. TR. 171–172. While Customs also contends that the ultimate use of the DCU in paint manufacturing is to be ground with the pigment and thereby impart its herbicidal properties to the finished paint, the Court finds this immaterial. The needle blanks that were sold in *Torrington* were likewise destined to be finished into needles, but they were found to be separate articles of commerce with a different character from the finished needles. 8 CIT at 154, 596 F. Supp. at 1087. Thus even if "sugar milled" DCU is ultimately sold to a manufacturer for further processing and ultimate use as an herbicide, it is nevertheless an article of commerce with a different character than the finished product.

Finally, the *Torrington* court noted that "the GSP was enacted to promote 'economic diversification, and export development' in less developed countries." 8 CIT at 156, 596 F. Supp. at 1087 (quoting S. Rep. No. 1298, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.C.C.A.N.7186, 7187). Based on the technical nature of the manufacturing operations performed by Polytensides and Ancom in Malaysia and the value of the machinery required, which was at least 1.5 million dollars, *see* TR. 130 and 134, the Court finds that the goals of the GSP have been satisfied in this instance.

CONCLUSION

Taking the record as a whole, upon consideration of the testimony of the witnesses called at trial, the arguments made by counsel during trial, and the papers submitted post-trial, the Court finds that a dual substantial transformation occurred in the manufacture of Diuron Technical and Diuron 80–WP. Customs shall therefore reliquidate the entries at issue duty-free under HTSUS subheading A2924.21.1500 or A3808.30.1000.

(Slip Op. 03–61)

THOMAS J. AQUILINO, JR., JUDGE, ST. EVE INTERNATIONAL, INC., PLAINTIFF *v* UNITED STATES, DEFENDANT.

Court No. 03-00068

JUDGMENT

The plaintiff having commenced this case to contest notices on Customs Form 4647 to redeliver specified women's wear imported via Entry Nos. 655–1146249–5, 655–1151865–0 and 655–115–2655–4, as well as notices of liquidated damages for failure to comply with those redelivery demands; and the plaintiff having prayed for and obtained expedited trial and decision of its complaint; and the court having issued an opinion and order, slip op. 03–54, 27 CIT ____ , ____ F.Supp.2d ____ (May 15, 2003), denying certain requested relief but finding that plaintiff's goods bearing style numbers 65132, 65134, and 27–0180–3 are correctly classifiable under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002), textile category 352, based upon a fair preponderance of the evidence developed on the record, which thereby overcame the presumption of correctness on behalf of the U.S. Customs Service; and the court having ordered the parties to confer and present a proposed form of final judgment in accordance with slip op. 03–54; and counsel having complied with that direction; Now therefore, in accordance with slip op. 03–54, and after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the Customs notices of redelivery (and for liquidated damages in connection therewith) in Entry Nos. 655–1146249–5, 655–1151865–0, and 655–1152655–4 each be, and they hereby are, vacated; and it is further hereby

ORDERED that the U.S. Bureau of Customs and Border Protection reliquidate the merchandise of Entry No. 655–1146249–5 under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002) at a rate of duty of 17.4 percent ad valorem and recover from the plaintiff any additional duties owed plus interest as provided by law.

(Slip Op. 03–62)

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS, FORMER EMPLOYEES OF SONOCO PRODUCTS CO., PLAINTIFFS *v.* UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 02–00579

Defendant, the United States Secretary of Labor ("Labor"), moves to dismiss the action filed by Dorothy Fail ("Ms. Fail"), on behalf of the Former Employees of Sonoco Products Co. ("plaintiffs"), pursuant to USCIT R. 12(b)(1), for lack of subject matter jurisdiction. Plaintiffs commenced this action to appeal the negative determination issued by Labor, and published in the Federal Register on May 17, 2002, regarding plaintiffs' eligibility to apply for transitional adjustment assistance under the North American Free Trade Agreement-Transitional Adjustment Assistance Implementation Act ("NAFTA-TAA"). *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance* ("*Negative Determination*"), 67 Fed. Reg. 35,140 (May 17, 2002). Labor contends that plaintiffs failed to seek judicial review within the sixty-day period prescribed by 19 U.S.C. § 2395(a) (2000) and 28 U.S.C. § 2636(d) (2000), which began to run on the date that the *Negative Determination* was published in the Federal Register and that, accordingly, this case should be dismissed.

Held: For the reasons stated below, Labor's motion to dismiss for lack of subject matter jurisdiction is granted.

[Labor's motion is granted. Case dismissed.]

(Dated June 9, 2003)

Baker & McKenzie (*Lynn S. Preece* and *Bart M. McMillan*) for Dorothy Fail and the Former Employees of Sonoco Products Co., plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Lucius B. Lau*, Assistant Director, and *Victoria L. Strohmeyer*) for the United States Secretary of Labor, defendant.

MEMORANDUM OPINION

TSOUCALAS, *Senior Judge:* Defendant, the United States Secretary of Labor ("Labor"), moves to dismiss the action filed by Dorothy Fail ("Ms. Fail"),[1] on behalf of the Former Employees of Sonoco Products Co. ("plaintiffs"), pursuant to USCIT R. 12(b)(1), for lack of subject matter jurisdiction. Plaintiffs commenced this action to appeal the negative determination issued by Labor, and published in the Federal Register on May 17, 2002, regarding plaintiffs' eligibility to apply for transitional adjustment assistance under the North American Free Trade Agreement-Transitional Adjustment Assistance Implementation Act ("NAFTATAA"). *See Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance*

[1] Dorothy Fail filed this action on behalf of the Former Employees of Sonoco Products Co., *pro se*, on August 26, 2002. The Court, on February 25, 2003, granted plaintiffs' "Motion For Leave to Proceed *In Forma Pauperis*," and appointed Lynn Preece of Baker & McKenzie "to serve without fee and to appear generally on behalf of [the] plaintiff[s]." Order Granting Leave to Proceed *In Forma Pauperis*.

and NAFTA Transitional Adjustment Assistance ("*Negative Determination*"), 67 Fed. Reg. 35,140 (May 17, 2002). Labor contends that plaintiffs failed to seek judicial review within the sixty-day period prescribed by 19 U.S.C. § 2395(a) (2000)[2] and 28 U.S.C. § 2636(d) (2000), which began to run on the date that the *Negative Determination* was published in the Federal Register and that, accordingly, this case should be dismissed.

JURISDICTION

The Court has jurisdiction to resolve this matter pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. §§ 1581(d), 2636(d) (2000).

STANDARD OF REVIEW

The party seeking to invoke this Court's jurisdiction bears the burden of proving the requisite jurisdictional facts. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1935). In this action, the burden of establishing jurisdiction falls on the plaintiffs. The Court will accept as true all facts alleged in the plaintiffs' pleadings. *See Corrpro Cos., Inc. v. United States*, No. 01–00745, slip op. 03–59 at 4 (CIT June 4, 2003) (not yet published in Federal Supplement or CIT reporters). "A party, or the court *sua sponte*, may address a challenge to subject matter jurisdiction at any time, even on appeal." *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) (citations omitted and emphasis in original).

It is well established that the United States, as sovereign, is immune from suit, unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). A waiver of such sovereign immunity "must be unequivocally expressed" by statute and will be "strictly construed * * * in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted). The Court will construe ambiguities concerning the statutory language regarding the waiver of sovereign immunity in favor of immunity. *See United States v. Williams*, 514 U.S. 527, 531 (1995) (citing *United States v. Nordic Vill.*, Inc., 503 U.S. 30, 33 (1992)).

DISCUSSION

I. Background

On February 26, 2002, Sonoco Products Company ("Sonoco"), located in Lincolnton, North Carolina, filed a NAFTA-TAA petition on behalf of seventy-four affected workers for trade adjustment assis-

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[2] Section 2395(a) permits "[a] worker[or] group of workers * * * aggrieved by a final determination of the Secretary of Labor[,] * * * *within sixty days after notice of such determination* [to] commence a civil action in the United States Court of International Trade for review of such determination." 19 U.S.C. § 2395(a) (emphasis added).

tance under Section 221(a) of the Trade Act of 1974, as amended, 19 U.S.C. § 2271(a) (2000). *See* Admin. R. Pub. File ("Admin. R.") at 2–3; *Investigations Regarding Certifications of Eligibility to Apply for NAFTA Transitional Adjustment Assistance*, 67 Fed. Reg. 16,447, 16,448 (Apr. 5, 2002). On May 3, 2002, Labor made a negative determination regarding plaintiffs' eligibility to apply for NAFTA transitional adjustment assistance and notice of such determination was published in the Federal Register on May 17, 2002. *See* Admin. R. at 21–26; *Negative Determination*, 67 Fed. Reg. at 35,142. On August 26, 2002, the Clerk of the Court of the United States Court of International Trade received and deemed filed a letter written by Ms. Fail, on behalf of the Former Employees of Sonoco, requesting an appeal of Labor's *Negative Determination. See* Def.'s Mem. Supp. Mot. Dismiss. ("Def.'s Mem.") at Exs. A & C. This appeal was filed one hundred and one days after Labor's decision was published in the Federal Register. Section 2395(a) of Title 19 of the United States Code requires that an action challenging a determination made by Labor be commenced *within sixty days after notice of such determination is rendered*. *See* 19 U.S.C. § 2395(a) (emphasis added). The sixty-day period begins to run when the final determination is published in the Federal Register. *See* 29 C.F.R. § 90.19(a) (2002); *Kelly v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987) (stating that "where the question is the calculation of the time limitations placed on the consent of the United States to suit, a court may not * * * take a liberal view of that jurisdictional requirement and set a different rule for *pro se* litigants").

II. Contentions of the Parties

Although the procedural facts are uncontested, plaintiffs argue that the Court should consider additional relevant facts and apply the doctrine of equitable tolling. *See* Pls.' Mem. Resp. Def.'s Mot. Dismiss ("Pls.' Resp.") at 1. Such additional facts include the following:

> 1. In January of 2002[,] Sonoco management announce[d] in a meeting with employees that it will close its manufacturing plant in Lincolnton, North Carolina.
>
> 2. In January or February 2002, Sonoco, without informing the affected workers of any details, explains to the workers that it intends to file a NAFTA–TAA petition* * * * [Subsequently, Sonoco files such a petition.] According to Ms. Fail, the workers are never informed by Sonoco (or any other person) that the TAA petition was filed* * * *
>
> * * * * * * *
>
> [3.] During spring and summer of 2002, certain of the displaced Sonoco workers, including Dorothy Fail, understand that Sonoco has filed a petition on their behalf concerning special unemployment and retraining benefits. Dorothy Fail makes regular visits to the local state employment office in or-

> der to, among other things, demonstrate that she is still actively looking for work (in order to continue receiving ordinary state unemployment benefits) and to explore job opportunities. While she is at this office, Ms. Fail regularly inquires whether there is any information concerning the petition filed by Sonoco. Ms. Fail also regularly makes inquiries of other displaced Sonoco workers. Ms. Fail's efforts to keep informed of any developments result in no information.
>
> [4.] In August of 2002, Dorothy Fail, while at the local state employment office, is told that the office has received news that the petition filed by Sonoco was denied by Labor.
>
> [5.] Dorothy Fail, along with certain other former employees of Sonoco, immediately begin to research their rights and obligations. Upon discovering that a negative determination can be appealed to this Court, three former Sonoco employees, [including] Dorothy Fail * * * complete a TAA petition, and Dorothy Fail signs and sends with the petition a cover letter to this Court in which she requests "appeal seeking judicial review of [Labor's] *[N]egative [D]etermination** * * * " The letter [to the Court] is sent within one or two weeks of Dorothy Fail being informed that the NAFTA–TAA petition for the former Sonoco employees has been denied.

Pls.' Resp. at 2–4 (emphasis added). According to plaintiffs, the Court should exercise its ability "to judiciously and fairly employ the doctrine of equitable tolling" in order to save this action from dismissal due to untimeliness. *Id.* at 5.

Plaintiffs analogize the facts of this case to those established in *Former Employees of Quality Fabrication, Inc. v. United States Sec'y of Labor*, No. 02–00522, 2003 Ct. Int'l Trade LEXIS 27, at *2–*6 (CIT Mar. 14, 2003), and argue that equitable tolling is appropriate in this case since "no worker or worker representative was aware of any of the details concerning the petition" filed on their behalf by Sonoco. Pls.' Resp. at 6–7. Specifically, plaintiffs contend that Sonoco never provided them with notice regarding Labor's *Negative Determination*, and that Ms. Fail relied on inadequate information from local, state employment officials. *See id.* at 7. According to plaintiffs, these officials, who are essentially "partners with Labor in administering the NAFTA–TAA program[,] never explained the publication rule to Dorothy Fail, despite her repeated requests for information concerning the petition." *Id.* Instead, Ms. Fail maintains that although state officials repeatedly told her that they would inform her of Labor's decision regarding her petition "during one of her regular visits to the employment office," she was actually notified eighty days "after publication of the decision in the Federal Register." *Id.* "[O]nce Ms. Fail learned of the negative determination, she and certain other former Sonoco workers immediately began their own research to understand and exercise their right to judicial review of

Labor's decision." *Id.* Since the letter initiating this appeal was filed with the Court within sixty days from the date Ms. Fail deems she received notice of Labor's *Negative Determination*, plaintiffs argue that they exercised the necessary due diligence required to apply the doctrine of equitable tolling. *See id. at* 7–8.

Labor contends that plaintiffs have not met their burden of presenting evidence or arguments that would warrant equitable relief. *See* Def.'s Reply Pls.' Opp'n Mot. Dismiss ("Def.'s Reply") at 1. Although Labor recognizes that equitable tolling "will afford a late-filing party an opportunity to file out of time[,]" it is applied "where 'the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.' " *Id.* at 2 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). Since neither of these conditions exist in the case at bar, Labor argues that plaintiffs did not meet the equitable tolling standard. *See* Def.'s Reply at 3–4. Moreover, Labor contends that plaintiffs did not exercise due diligence in requesting the appropriate information regarding their petition and that, accordingly, the Court should deny jurisdiction. *See id.* at 6–7.

III. Analysis

The Court in *Quality Fabrication*, 2003 Ct. Int'l Trade LEXIS 27, at *10 n.8, explained that a plaintiff must "claim equitable considerations [and] exercise due diligence in bringing their claim" in order to preserve their right to have a court review Labor determinations. Applying this two-part test to the facts of the case at bar, the Court finds that plaintiffs failed to meet all the requirements demanded from plaintiffs who pray for equitable remedies. *See Irwin*, 498 U.S. at 96 (stating that "[f]ederal courts have typically extended equitable relief only sparingly * * * [and that the Supreme Court] ha[s] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights").

Notwithstanding plaintiffs' arguments that equitable remedies should be extended in the case at bar in accordance with the test articulated by *Quality Fabrication*, the Court finds that the efforts exhibited by the Sonoco plaintiffs to gather information about their NAFTA–TAA petition fails to approach the level of diligence put forth by the plaintiffs in *Quality Fabrication*, or that of a hypothetical reasonable person who was notified that his company would file a NAFTA–TAA petition on his behalf. *See Former Employees of Siemens Info. Communication Networks, Inc. v. Herman, Sec'y, United States Dep't of Labor*, 24 CIT 1201, 1208, 120 F. Supp. 2d 1107, 1114 (2000) (stating that "[w]hether a plaintiff has acted with due diligence is a fact-specific inquiry, guided by reference to the hy-

pothetical reasonable person") (citing *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993); *Valverde v. Stinson*, 224 F.3d 129, 134 & n.4 (2d Cir. 2000)).

In *Quality Fabrication*, the plaintiffs mailed their NAFTA–TAA petition to Labor, while a former employee of Quality, Margaret Miller continuously checked the DOL website from the time of filing. *See Quality Fabrication*, 2003 Ct. Int'l Trade LEXIS 27, at *2. Miller did so because she was affirmatively instructed by government officials that the DOL website was the appropriate source of information. *See id.* at *13. Miller subsequently emailed her regional Labor office to inquire about her petition. *See id.* at *2. Two days later, Miller received an email response from Labor stating " 'these things take time.' " *Id.* Miller, however, pursued this action pro-actively in that she contacted: (1) two local Representatives from Congress; (2) the State of Pennsylvania Department of Labor Trade Adjustment Representative; (3) a state legislator; and (4) Labor's NAFTA–TAA office located in Washington, D.C. *See id.* at *2–*4. In addition to these extensive efforts, Miller repeatedly contacted her regional Labor office for a period of four months, and received no response. *See id.* at *4. In the case at bar, the plaintiffs' efforts were limited to Ms. Fail's infrequent inquiries with her local employment office and with other displaced Sonoco workers. *See* Pls.' Resp. at 3. The purpose of Ms. Fail's three visits to the state employment office, within the relevant time frame, was never strictly to request information about the Sonoco petition.[3] Therefore, the Court finds that Ms. Fail's inquiries as to the status of the Sonoco petition only with the local state employment office do not meet the due diligence requirement imposed on plaintiffs who seek to argue equitable remedies. *Compare Siemens*, 24 CIT at 1202–05, 120 F. Supp. 2d at 1109–11 (holding that plaintiffs' allegations of inducement and trickery were without merit and rejecting arguments of equitable tolling), *with Quality Fabrication*, 2003 Ct. Int'l Trade LEXIS 27 at *2–*5 (holding that the plaintiff's extensive efforts to inquire as to the status of the relevant NAFTA–TAA petition were sufficient to satisfy the due diligence standard). Plaintiffs, acting in a reasonably prudent manner, should have requested information from additional sources, such as Labor's NAFTA–TAA office, or from Sonoco who filed the NAFTA–TAA petition on their behalf, instead of strictly depending on casual inquiries as to the status of the Sonoco petition with the local employment office. A reasonable plaintiff acting with due diligence would have investigated additional sources of information. *See Siemens*, 24 CIT at 1208, 120 F. Supp. 2d at 1114 (stating that "[w]hether a plaintiff has acted with due diligence is a fact-specific

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[3] The primary reason Ms. Fail visited the local Labor office on May 29, 2002, July 1, 2002, and July 16, 2002, was to search for further employment. *See* Def.'s Reply at Ex. 1; *see also* Pls.' Resp. at 3 ¶ 5.

inquiry, guided by reference to the hypothetical reasonable person") (citations omitted).

Second, and more importantly, there was no misconduct by any government official that can be construed as having induced or tricked Ms. Fail or any other Sonoco employee into missing the sixty-day deadline prescribed by 19 U.S.C. § 2395(a). Although the plaintiffs do not affirmatively state that Labor, in any way, induced or tricked them into missing the deadline, they do suggest that Ms. Fail had to rely on inadequate information provided by officials at the local state employment office who never clarified the publication rule. *See* Pls.' Resp. at 7. However, the fact that plaintiffs relied on the wrong source of information, independent of any affirmative representations from the government, does not shift blame to the government or prove that the plaintiffs were tricked or induced into missing the filing deadline. Unlike the plaintiffs in *Quality Fabrication*, who sought information from a variety of government sources, and received specific assurances from those sources that Labor's website would provide the appropriate notification instead of the Federal Register, the Sonoco plaintiffs simply failed to diligently inquire as to their NAFTA–TAA petition.

CONCLUSION

After weighing the facts of this case, the Court finds that plaintiffs failed to act with due diligence. The government's actions cannot be construed as inducing or tricking Ms. Fail or any other Sonoco employee into missing the relevant sixty-day deadline. The Court will not apply the doctrine of equitable tolling in a situation where the plaintiffs simply did not try hard enough to access the information necessary to file a timely appeal. Judgment will be entered accordingly.

(Slip Op. 03–63)

BEFORE: HONORABLE RICHARD K. EATON, INTERCONTINENTAL MARBLE CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT.

COURT NO. 98–02961

JUDGMENT

Upon considering both plaintiff's and defendant's motions for summary judgment, the memoranda and accompanying materials in support thereof, and the oppositions and replies and supporting materials thereto; upon other papers and proceedings had herein, in-

cluding this court's opinion and order dated April 30, 2003, and the proposed judgment order filed by the parties with the court on May 30, 2003; it is hereby:

ORDERED that plaintiff's motion for summary judgment be, and hereby is, granted in its entirety, and

ORDERED that defendant's motion for summary judgment be, and hereby is, denied in its entirety, and

ORDERED that judgment is hereby entered in favor of plaintiff; and

ORDERED that the subject merchandise at issue in this matter is properly classified as marble slabs under subheading 6801.91.05 of the Harmonized Tariff Schedule of the United States. The United States Bureau of Customs and Border Protection is ordered to take all necessary action to reliquidate the entries involved herein consistent with this order; and

ORDERED that this action is dismissed.