Slip Op. 04–38

ALZ N.V., PLAINTIFF, v. UNITED STATES, DEFENDANT, AND ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, *et al.*, DEFENDANT-INTERVENORS.

Court No.: 01–00834

JUDGMENT ORDER

Before: WALLACH, Judge

Upon consideration of the Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("Remand Determination"), filed pursuant to this court's decision and order in *ALZ N.V. v. United States*, Slip Op. 03–81 (July 11, 2003); the parties having filed no comments contesting Commerce's Remand Determination; the court having reviewed Commerce's Remand Determination and all pleadings and papers on file herein, and good cause appearing therefore, it is hereby

ORDERED that Commerce's Remand Determination is in accordance with this court's Remand Order of July 11, 2003; and it is further

ORDERED that Commerce's Remand Determination is sustained.

Slip Op. 04–39

CANADIAN REYNOLDS METALS COMPANY, c/o REYNOLDS METALS COMPANY, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 00–00444

[Defendant's motion to dismiss granted; action dismissed.]

Decided: April 23, 2004

LeBoeuf, Lamb, Greene & MacRae, LLP (*Gary P. Connelly, Melvin S. Schwechter*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney-in-Charge, International Trade Field Office, *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Canadian Reynolds Metals Company ("CRMC" or "Plaintiff") seeks to invoke this Court's jurisdiction pursuant to either subsections (a) or (i) of 28 U.S.C. § 1581 (2000) to challenge the denial of its administrative protest filed pursuant to 19 U.S.C. § 1514 (2000).[1] Defendant United States Bureau of Customs and Border Protection[2] ("Customs" or "Defendant") moves for dismissal claiming lack of subject matter jurisdiction because Plaintiff failed to properly and timely file its protest and failed to follow court rules in filing this case.

In the event that the Court finds jurisdiction lacking, Plaintiff requests transfer of its suit to the United States Court of Federal Claims pursuant to 28 U.S.C. § 1631,[3] asserting that the United States Court of Federal Claims has concurrent jurisdiction under 28 U.S.C. § 1491.[4]

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[1] Because Plaintiff filed its summons in 2000, Summons of CRMC at 2, the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred. The Court notes that subsection (c) of 28 U.S.C. § 1491, *see infra* note 25, was redesignated from subsection (b) to subsection (c) in 1996. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320 § 12, 110 Stat. 3870, 3874 (codified as amended at 28 U.S.C. § 1491 (2000)).

[2] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[3] For the pertinent text of the statute, *see infra* note 21.

[4] For the pertinent text of the statute, *see infra* note 22.

For the reasons stated below, Defendant's motion to dismiss is granted.

I. Background

Plaintiff's administrative protest has a ten-year history, a review of which is necessary background for the motion at issue here. On December 15, 1992, CRMC made a voluntary disclosure to Customs under 19 U.S.C. § 1592(c)(4), admitting that it had failed to pay certain Merchandise Processing Fees ("MPF") on unwrought aluminum products imported into the United States between 1990 and the date of disclosure. Def.'s Mem. Supp. Mot. Dismiss at 1–2 ("Def.'s Mot."); Pl.'s Opp'n to Mot. Dismiss at 1 ("Pl.'s Opp'n"). To perfect its voluntary disclosure, Customs requested that CRMC tender $54,487.69, which CRMC paid on October 6, 1994. *See* Letter from John Barry Donohue, Jr., Assoc. Gen. Counsel, Reynolds Metals Co., to William D. Dietzel, Dist. Dir., U.S. Bureau of Customs & Border Prot., Pl.'s Ex. A at 1, 3 (Oct. 6, 1994) ("October 6 Letter").[5]

Along with its payment, CRMC submitted a letter in which it advised Customs of its intent to appeal the MPF determination, as it considered its entries exempt from the MPF rate demanded by Customs. *Id.* at 1. CRMC argued that the unwrought aluminum products were of Canadian origin, and thus qualified for special treatment pursuant to the United States-Canada Free Trade Agreement ("USCFTA"). Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir., U.S. Bureau of Customs & Border Prot., Pl.'s Ex. D at 4, 4–5 (Feb. 1, 1995) ("February 1 Letter").[6] Customs, on the other hand, had previously concluded that due to a non-Canadian additive, CRMC's entries failed to qualify for the reduced MPF rate provided by the USCFTA. *Id.* at 5. CRMC, in turn, argued that pursuant to the doctrine of *de minimis non curat lex*, the foreign additive in the Canadian entries should be disregarded for country of origin purposes. *Id.* CRMC informed Customs in its payment tender letter that it expected a full refund of the tender amount along with accrued interest in the event that subsequent litigation was successful. October 6 Letter, Pl.'s Ex. A at 1.

Customs responded in a letter dated November 8, 1994, stating that it had received CRMC's tender of MPF, but rejected all conditions imposed by CRMC in connection to this payment. Letter from

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[5] The record shows that all correspondence and documentation referred to in this decision was either addressed to or sent by Reynolds Metals Company, in its capacity as owner of Canadian Reynolds Metals Company. Reynolds Metals Company also owns Aluminerie Becancour, Inc., which is the Plaintiff in a companion case before this Court. *Aluminerie Becancour, Inc. v. United States*, Court No. 00–00445, slip op. ____ (CIT Apr. 23, 2004) (pending).

[6] Barnes, Richardson & Colburn was Plaintiff's legal representative at the time. *See* February 1 Letter, Pl.'s Ex. D at 4.

Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., U.S. Bureau of Customs & Border Prot., to John Barry Donohue, Reynolds Metals Co., Pl.'s Ex. B at 1 (Nov. 8, 1994) ("November 8 Letter"). Subsequently, Customs and CRMC concluded an escrow agreement on December 20, 1994, in which they agreed to let the decision in a designated test case[7] control whether a full refund of CRMC's MPF payment was appropriate. Agreement between Canadian Reynolds Metals Company and U.S. Customs Service, Pl.'s Ex. C at 1 (Dec. 20, 1994) ("Escrow Agreement"). In the event that the test case decision was favorable to CRMC, Customs further agreed to refund the full tendered amount "together with such interest as may be required by law." *Id.* at 1–2.

On February 6, 1995, CRMC filed an administrative protest. *See* Letter from Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, to Dist. Dir., U.S. Bureau of Customs & Border Prot., Pl.'s Ex. D. at 1 (Feb. 6, 1995) ("February 6 Letter"); Protest No. 0712–95–100131, Pl.'s Ex. D at 3 (Feb. 6, 1995) ("Protest Form").[8] In its protest, Plaintiff appeared to make three objections to Customs' actions. First, Plaintiff stated that it objected to the assessment and payment of MPF. February 1 Letter, Pl.'s Ex. D at 4. Second, it protested "contingencies not anticipated in the [escrow] [a]greement[,] or unanticipated frustration" of the same. *Id.* at 5–6. Plaintiff then appears to have made a third objection, referring to Customs' acceptance of payment. *Id.* at 4. In support of this third objection, Plaintiff noted that a copy of Customs' letter dated November 8, 1994, as well

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[7] In subsequent amendments to the escrow agreement, concluded on October 28, 1996, and July 13, 1998, the parties identified the designated test case as *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), originally referred to as St. Albans Protest No. 0201–93–100281 (HQ 955367) and subsequently appealed to the Federal Circuit Court of Appeals. Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 3, 4 (Oct. 30, 1996); Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 5, 6 (July 13, 1998); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

[8] The "protest package" provided as Exhibit D by Plaintiff contains copies of two letters along with a copy of a completed Customs Form 19 (Protest No. 0712–95–100131); the first letter is dated February 1, 1995, and the second letter is dated February 6, 1995. *See* Pl.'s Ex. D. Accordingly, it appears as though Plaintiff first attempted to forward a protest to Customs on February 1, 1995, but that for reasons unclear to the Court, the protest was not filed until February 6, 1995, the date Customs received and stamped the protest form. Protest Form, Pl.'s Ex. D at 3. The implementing regulation for filing of protests confirms that a protest is considered filed on the date it is received by Customs. 19 C.F.R. § 174.12(f) ("The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed."). Additionally, both parties agree that the protest was filed on February 6, 1995. *See* Def.'s Mot. at 2; Pl.'s Opp'n at 3. As the February 6 Letter merely serves as a complement to the original protest attempt on February 1, 1995, however, the Court will treat the letter dated February 1, 1995, as part of the protest filed on February 6, 1995. *See* February 6 Letter, Pl.'s Ex. D at 1 ("[W]e forwarded protests, dated February 1, 1995, in which CRMC . . . protested the assessment and payment of Merchandise Processing Fee ('MPF').").

as a receipt of payment made out by Customs on November 7, 1994, was enclosed with the protest. *Id*.; *see also* Collection Receipt from U.S. Bureau of Customs & Border Prot., to Canadian Reynolds Metals Co., Pl.'s Ex. A at 5 (Nov. 7, 1994) ("Receipt"). Plaintiff clarified in its protest that it did not expect Customs to act in response to its objections until final judgment was rendered in the pending test case. February 1 Letter, Pl.'s Ex. D at 6.

On January 5, 1999, the Federal Circuit Court of Appeals issued its decision in the test case, *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999). The *Alcan Aluminum Corp.* Court held that the foreign additive in question was subject to the principle of *de minimis non curat lex*, and therefore, the entries were considered of Canadian origin. 165 F.3d at 902. The *Alcan Aluminum Corp.* decision became final on April 5, 1999. Pl.'s Opp'n at 4.

Because CRMC's entries qualified for preferential trade status under the USCFTA as a result of the favorable decision in *Alcan Aluminum Corp.*, Customs refunded to CRMC the deposited MPF amount in full "[o]n or about" February 7, 2000.[9] Compl. of CRMC at 3.

Customs, however, failed to tender interest pursuant to the escrow agreement when it made the refund to CRMC. Def.'s Mot. at 2; Pl.'s Opp'n at 4. CRMC claims it then sent, on February 10, 2000, a request for accelerated disposition of its protest.[10] Pl.'s Opp'n at 4. Following what CRMC considered a denial of the original protest by operation of law, it filed a summons with the Court on September 7, 2000. Summons of CRMC at 2. Plaintiff subsequently, on September 30, 2002, filed its complaint seeking relief. Compl. of CRMC at 6. The thrust of Plaintiff's complaint is that Customs failed to pay interest on the refunded MPF. *Id*. at 3–4. Defendant Customs moved to dismiss for lack of subject matter jurisdiction.

II. Standard of Review

Because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction. *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27 CIT ___ , ___ , 273 F. Supp. 2d 1336, 1338 (2003) (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, as Defendant's motion to dismiss challenges the sufficiency of Plaintiff's pleadings (as opposed to the factual basis underlying the pleadings), the Court will accept all facts alleged in Plaintiff's pleading as true. *Corrpro Cos. v. United States*, slip. op. 03–59, at 4 (CIT June 4, 2003).

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[9] No supporting exhibit was provided, but Defendant does not deny this statement. *See* Def.'s Mem. at 2.

[10] Plaintiff failed to provide the Court a copy of this letter. However, as the letter is not a determinative factor in this action, this lack of evidence has no effect on the Court's decision.

III. Discussion

Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a), or alternatively under 28 U.S.C. § 1581(i). Compl. of CRMC at 1. Title 28 U.S.C. § 1581(a) confers jurisdiction over actions based on denials of protests. Title 28 U.S.C. § 1581(i), on the other hand, is a residual provision thatconfers jurisdiction over certain international trade-related disputes not covered by subsections (a)—(h). *Id.* In the event that the Court finds jurisdiction lacking, Plaintiff argues that the Court should transfer this action to the United States Court of Federal Claims, as it considers that court to have concurrent jurisdiction under 28 U.S.C. § 1491. Pl.'s Opp'n at 8–11. The Court first discusses subject matter jurisdiction under § 1581(a) and § 1581(i), and then discusses the prospect of transfer to the United States Court of Federal Claims.

A. Subject Matter Jurisdiction

Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a), or alternatively under 28 U.S.C. § 1581(i). Compl. of CRMC at 1. Defendant makes four arguments in its motion for lack of subject matter jurisdiction. First, it argues that jurisdiction is lacking under 28 U.S.C. § 1581(a), because Plaintiff failed to timely and properly file a protest. Def.'s Mot. at 3–4. Second, Defendant claims that 28 U.S.C. § 1581(i) does not confer jurisdiction, as Plaintiff failed to follow procedural requirements for filing an action under this statutory provision. *Id.* at 6. Third, Defendant argues that subsection (i) of 28 U.S.C. § 1581 cannot confer jurisdiction where a remedy was potentially available under subsection (a). *Id.* at 5. Fourth, Defendant argues that the action under 28 U.S.C. § 1581(i) was untimely commenced. *Id.* at 9. The Court will discuss separately the two statutory provisions involved. First, the Court will discuss jurisdiction under 28 U.S.C. § 1581(a). Subsequently, it will briefly address jurisdiction pursuant to 28 U.S.C. § 1581(i), as well as the prospects for transfer to the United States Court of Federal Claims.

1. 28 U.S.C. § 1581(a)

In its complaint, Plaintiff initially alleges that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(a), which provides as follows: "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." 28 U.S.C. § 1581(a). Section 515 of the Tariff Act of 1930, as amended at 19 U.S.C. § 1515, provides for administrative review of protests. 19 U.S.C. § 1515. Subsection (a) of § 1515 stipulates that Customs "shall review the protest and shall allow or deny such protest in whole or in part" as long as it is filed in accordance with 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). Title 19 U.S.C. § 1514 describes the requirements for filing protests. 19 U.S.C. § 1514. A suit attempting to

invoke the Court's jurisdiction under 28 U.S.C. § 1581(a) must therefore be based on a protest which complies with the requirements of § 1514.

Among other things, § 1514 establishes two requirements for protests: contents and timing. 19 U.S.C. § 1514(c). Title 19 U.S.C. § 1514(c)(1)[11] and title 19 C.F.R. § 174.13(a)[12] of the agency's regulations both govern the contents of protests. The Court liberally construes the requirements of 19 U.S.C. § 1514(c)(1). *Ammex, Inc. v. United States*, 27 CIT ___, ___, 288 F. Supp. 2d 1375, 1382 (2003) (acknowledging that there is a "long line of cases taking a liberal posture as to what constitutes a valid protest"). In *Mattel, Inc. v. United States*, for example, the Court held that a letter requesting reliquidation under the wrong statutory provision constituted a valid protest, despite its error. 72 Cust. Ct. 257, 266, 377 F. Supp. 955, 963 (1974). Further, the *Mattel, Inc.* Court concluded that "however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of [19 U.S.C. § 1514] if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel, Inc.*, 72 Cust. Ct. at 262, 377 F. Supp. at 960.

Directly relevant to this dispute, 19 U.S.C. § 1514 governs the timing of protests. Title 19 U.S.C. § 1514(c)(3) provides as follows:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or

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[11] Title 19 U.S.C. § 1514(c)(1) provides in pertinent part:

A protest must set forth distinctly and specifically—

(A) each decision . . . as to which protest is made;

(B) each category of merchandise affected by each decision . . . ;

(C) the nature of each objection and the reasons therefor; and

(D) any other matter required by the Secretary by regulation.

Id.

[12] The implementing regulation 19 C.F.R. § 174.13(a) specifies in pertinent part that protests must contain:

(1) The name and address of the protestant . . . ;

. . .

(3) The number and date of the entry;

. . .

(5) A specific description of the merchandise affected by the decision as to which protest is made;

(6) The nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal.

Id.

> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3).

Both parties to this action agree that because Plaintiff's entries were never liquidated, subparagraph (B) of 19 U.S.C. § 1514(c)(3) applies. Def.'s Mot. at 3; Pl.'s Opp'n at 5.

As a sovereign entity, the United States is immune from suit unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Title 28 U.S.C. § 1581(a) constitutes an explicit waiver of immunity by the United States. *US JVC Corp. v. United States*, 22 CIT 687, 694, 15 F. Supp. 2d 906, 913 (1998). Previous judicial decisions have therefore held that the statutory timing requirement for protests is a mandatory term of the United States' consent to suit pursuant to 28 U.S.C. § 1581(a). *United States v. Boe*, 64 Ct. Cust. App. 11, 15–16, 543 F.2d 151, 154–55 (1976) (holding that the Customs Court lacked jurisdiction when Plaintiff failed to comply with all terms of consent by the United States mandated by 28 U.S.C. § 1582 (1976), the predecessor to 28 U.S.C. § 1581(a) (2000)). Accordingly, the Court must construe the timing requirement strictly. *Boe*, 64 Ct. Cust. App. at 15, 543 F.2d at 154; *see also Star Sales & Distrib. Corp. v. United States*, 10 CIT 709, 710, 663 F. Supp. 1127, 1128 (1986) (holding that the Court does not have jurisdiction over an action contesting the denial of a protest filed more than ninety days after notice of liquidation).

The Court now considers Plaintiff's protest in light of the provisions of § 1514.

To apply the requirements of 19 U.S.C. § 1514 to this case, it is necessary to review the contents of Plaintiff's protest, and determine whether that protest challenges any decision by Customs made within the ninety-day period prior to its filing, i.e., whether the protest was within the statutory time period.

In its protest, Plaintiff appears to make three objections. *See* February 1 Letter, Pl.'s Ex. D at 4–6. First, Plaintiff protests the assessment and payment of MPF. *Id.* at 4. The MPF tender, however, occurred on October 6, 1994, October 6 Letter, Pl.'s Ex. A at 3, while Plaintiff filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. Because a time period of more than ninety days elapsed between those two events, Plaintiff's protest fails to present a timely challenge to the assessment and payment of MPF.

Second, Plaintiff protests unanticipated frustration of, and contingencies not foreseen in, the escrow agreement. February 1 Letter, Pl.'s Ex. D at 5–6. Title 19 U.S.C. § 1514(c)(3) states, however, that parties must file protests "within ninety days after *but not before* . . . the date of the decision as to which protest is made." *Id.* (emphasis added). The decision the protesting party objects to must therefore occur prior to the filing of the protest. As previously stated,

CRMC filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. To the extent that Plaintiff objects to the unanticipated event of Customs' decision to refund MPF without interest in February 2000, that event had not yet occurred at the time the protest was filed.[13] Accordingly, under a plain reading of 19 U.S.C. § 1514(c)(3), Plaintiff's protective protest was untimely and invalid. *See A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988) (holding that a protest was invalid either because it was filed the day before Customs denied a previous claim for relief or barred by the provision allowing only one protest per entry of merchandise).

Because the escrow agreement stipulated Customs' obligation to refund Plaintiff the MPF tender along with "interest as may be required by law" in the event that the test case decision was favorable to CRMC, Escrow Agreement, Pl.'s Ex. C at 1–2, the subsequent non-payment of interest in February 2000 could qualify as an unanticipated event in light of the agreement.[14] However, for the reasons stated above, Plaintiff should have chosen to wait until after Customs' decision not to pay interest before filing its protest.[15]

Third, Plaintiff appears to object to Customs' acceptance of its MPF tender. *See* February 1 Letter, Pl.'s Ex. D at 4. In its protest, Plaintiff alleges that Customs accepted its payment on November 8, 1994, and specifies that the protest was filed within ninety days of that date. *Id.* Plaintiff's February 1 Letter further states that Plaintiff attached a copy of the November 8 Letter to the protest, as well as a copy of the receipt from Customs. *Id.* The receipt, however, shows that Customs received Plaintiff's MPF payment on November 7, 1994. Receipt, Pl.'s Ex. A at 5. The November 8 Letter, on the

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[13] Plaintiff claims that Customs made the decision not to pay interest as early as November 8, 1994, the day it sent the November 8 Letter. *See* Pl.'s Opp'n at 6. However, the parties subsequently signed the escrow agreement, where Customs agreed to refund the MPF amount and "interest as may be required by law" if related litigation was successful. Escrow Agreement, Pl.'s Ex. C at 1–2. Thus, even presuming that Customs made the decision to deprive CRMC of interest at such an early stage, that decision was later vitiated by the terms of the escrow agreement before the filing of the protest. Moreover, even if the escrow agreement did not vitiate Customs' original rejection of any conditions on the payment of MPF, the language of the protest—objecting to unanticipated frustration of the escrow agreement—clearly refers to decisions which had not yet been made, and not to the November 8 Letter.

[14] Plaintiff argues that Customs' failure to pay interest is in violation of 19 U.S.C. § 1505(c), Pl.'s Opp'n at 10, which in pertinent part holds,"[i]nterest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest." 19 U.S.C. § 1505(c). However, as the Court does not have jurisdiction over this action, it will not discuss the legal basis of Plaintiff's claim.

[15] Title 19 U.S.C. § 1514(c) provides that parties may generally only file one protest per entry of merchandise. Although the Court does not so decide, it may have been possible for Plaintiff, even after filing the untimely protest at issue here, to file a second protest following Customs' non-payment of interest, arguing that, as its previous protest was untimely filed, it was legally invalid, and therefore should not count against the single-protest rule.

other hand, indicates that Customs acknowledged the MPF tender, and that Customs intended not to accept the tender's contingencies. November 8 Letter, Pl.'s Ex. B at 1. Consequently, the Court cannot conclude that Customs' acceptance of Plaintiff's tender took place on November 8, 1994. Rather, acceptance occurred a day prior, when Customs received payment and made out the receipt. Customs therefore, on November 7, 1994, made the decision Plaintiff attempted to protest; November 7 was, however, ninety-one days prior to the filing of the protest in question here. Accordingly, Plaintiff's protest fails to present a timely, valid challenge to Customs' acceptance of MPF tender, as Plaintiff filed that protest more than ninety days after Customs' decision.

Based on the analysis above, the Court concludes that Plaintiff's protest dated February 6, 1995, was untimely filed, as Plaintiff failed to file it within ninety days of the Customs decisions that it seeks to challenge. Plaintiff, however, sets forth one additional argument to support its contentions that it filed a timely protest.

CRMC appears to argue that its subsequent actions cured the defects of the untimely protest. Plaintiff claims that it properly filed, on February 10, 2000, a request for accelerated disposition of protest pursuant to 19 U.S.C. § 1515(b).[16] Pl.'s Opp'n at 4. However, such a request cannot cure a timing defect in the underlying protest. For Plaintiff's claim to be within the Court's jurisdiction, the referenced protest must first be filed in accordance with 19 U.S.C. § 1514. As Plaintiff's protest was untimely, Plaintiff's subsequent request for accelerated disposition could not revive it.[17]

The Court therefore holds that the protest dated February 6, 1995, was untimely and improperly filed. Moreover, Plaintiff's subsequent acts failed to cure or amend its original protest. Because Plaintiff failed to file a valid protest, Customs' decisions are final and this Court lacks jurisdiction under 28 U.S.C. § 1581(a). *New Zealand Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994) (holding that although the jurisdiction limitation also works to make decisions final and conclusive upon the government unless it acts to revise them within the limitations period, there was no such decision that triggered the ninety-day period and consequently a failure to invoke jurisdiction); *Hambro Auto. Corp. v. United States*, 66 Ct. Cust. App. 113, 117, 603 F.2d 850, 853 (1979) (holding that refusal by customs officials to reliquidate entries became final and conclusive upon

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[16] Title 19 U.S.C. § 1515(b) states in pertinent part that "[a] request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed . . . any time after ninety days following the filing of such protest." *Id.*

[17] Additionally, Plaintiff could not have cured the timing defect through an amendment of the protest, as 19 U.S.C. § 1514(c)(1) states that an amendment must take place "any time prior to the expiration of the time in which such protest could have been filed." *Id.* Therefore, because the original protest was untimely, any amendments to the protest were also untimely.

the importer when it failed to file a protest within the previously mandated sixty-day limitations period); *Everflora Miami, Inc. v. United States*, 19 CIT 485, 487, 885 F. Supp. 243, 246 (1995), *aff'd*, 86 F.3d 1174 (Fed. Cir. 1996) (holding that the Court lacked jurisdiction over Customs' allegedly erroneous duty assessments because the importer failed to timely protest liquidation, which thereby made the Customs decision final and conclusive upon the parties).

2. 28 U.S.C. § 1581(i)

In the event that jurisdiction under 28 U.S.C. § 1581(a) fails, Plaintiff argues that 28 U.S.C. § 1581(i) confers subject matter jurisdiction on the Court. Compl. of CRMC at 1. To invoke jurisdiction under 28 U.S.C. § 1581(i), however, Plaintiff must file its summons and complaint at the same time. *See* 28 U.S.C. § 2632(a);[18] USCIT R. 3(a)(3).[19] Plaintiff filed its summons on September 7, 2000, and subsequently its complaint on September 30, 2002. Summons of CRMC at 2; Compl. of CRMC at 6. Because Plaintiff did not file the summons and complaint concurrently, it fails to properly invoke jurisdiction pursuant to 28 U.S.C. § 1581(i).[20]

B. Transfer to the United States Court of Federal Claims

In the alternative, Plaintiff requests transfer of its action to the United States Court of Federal Claims, Pl.'s Opp'n at 8, arguing that, in the interest of justice, 28 U.S.C. § 1631 permits transfer of

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[18] Title 28 U.S.C. § 2632 provides in pertinent part:

> (a) Except for civil actions specified in subsections (b) and (c) of this section, a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint."

Id. Subsections (b) and (c) refer to actions filed under sections 515, 516, or 516A of the Tariff Act of 1930, and therefore are claims pursuant to 28 U.S.C. § 1581(a), (b), and (c). *Cf.* 19 U.S.C. § 1515–16 *with* 28 U.S.C. § 1581(a)—(c). Consequently, because Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(i), subsection (a) of 28 U.S.C. § 2632 applies.

[19] Rule 3 of the Court's rules states:

> (a) *Commencement.* A civil action is commenced by filing with the clerk of the court:
>
> (1) A summons in an action described in 28 U.S.C. § 1581(a) or (b);
>
> (2) A summons, and within [thirty] days thereafter a complaint, in an action described in 28 U.S.C. § 1581(c) to contest a determination listed in section 516A(a)(2) or (3) of the Tariff Act of 1930; or
>
> (3) A summons and complaint concurrently in all other actions.

USCIT R. 3. Accordingly, in order to invoke jurisdiction under 28 U.S.C. § 1581(i), subsection (3) requires that a plaintiff files the summons and complaint concurrently. USCIT R. 3(a)(3).

[20] Defendant also argues that subsection (i) of 28 U.S.C. § 1581 cannot confer jurisdiction when another remedy was potentially available under subsection (a), and that any claim intended under subsection (i) was untimely filed. Def.'s Mot. at 5–9. However, it is not necessary for the Court to reach this issue.

the case where the Court does not have jurisdiction.[21] *Id.* at 9. Citing 28 U.S.C. § 1491(a)(1), Plaintiff argues that because it could have originally brought its action in the United States Court of Federal Claims, the action may now be transferred to that court.[22] Pl.'s Opp'n at 9–10.

Congress, however, has conferred on the United States Court of International Trade exclusive jurisdiction over certain customs-related matters. *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988). Jurisdiction may then lie either in the United States Court of International Trade or in another federal court, but not in both. In *Vivitar Corp. v. United States*, the Federal Circuit laid out the analysis to be followed when it appears that both the United States Court of International Trade and another federal court, may have jurisdiction over a claim, stating:

> "[I]t is faulty analysis to look first to the jurisdiction of the district courts to determine whether the [United States Court of International Trade] has jurisdiction. . . . The focus must be solely on whether the claim falls within the language and intent of the jurisdiction grant *to* the [United States Court of International Trade]."

Vivitar Corp. v. United States, 761 F.2d 1552, 1559–60 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). Accordingly, the correct approach for distinguishing actions invoking the jurisdiction granted exclusively to the United States Court of International Trade is to focus on whether a claim falls within the language of a statute conferring jurisdiction on this Court. ___ Subsection (a) of 28 U.S.C. § 1581 confers exclusive jurisdiction on the United States Court of International Trade over actions involving the denial of a protest. 28 U.S.C. § 1581(a). Consequently, under the jurisdictional scheme established for the United States Court of International Trade, when an action arises under such a provision, that jurisdiction is exclusive and operates to the exclusion of all other courts. *See K Mart Corp.*, 485 U.S. at 182–83; *Orleans Int'l, Inc. v. United States*, 334 F.3d 1375, 1378 (Fed. Cir. 2003); *Vivitar Corp.*, 761 F.2d at 1559–60. Pursuant to 28 U.S.C. § 1581(a), the United States Court of International Trade therefore divests the United States Court of Federal

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[21] Title 28 U.S.C. § 1631 stipulates in pertinent part, "[if a] court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer [the] action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed." *Id.*

[22] Title 28 U.S.C. § 1491(a)(1) provides in pertinent part, "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." *Id.* Plaintiff argues that 28 U.S.C. § 1491(a)(1) confers jurisdiction over its claims, as they arise from the escrow agreement concluded by the parties. Pl.'s Opp'n at 10.

Claims of jurisdiction over all actions involving the denial of a protest.[23]

Although Plaintiff failed to properly invoke this Court's jurisdiction due to procedural flaws, Plaintiff's action arises from the denial of a protest, and remains within the language of 28 U.S.C. § 1581(a). Moreover, although Plaintiff may claim a cause of action in the Court of Federal Claims under the escrow agreement, Customs' refusal to pay interest on Plaintiff's MPF payment was clearly protestable.[24] Accordingly, this Court's jurisdiction continues to operate to the exclusion of all other courts. *See* 28 U.S.C. § 1491(c).[25] Consequently, because the United States Court of Federal Claims lacked jurisdiction over Plaintiff's action at the time it was filed with this Court, the Court denies Plaintiff's request to transfer its action to that Court. *See* 28 U.S.C. § 1631.

IV. Conclusion

For the reasons stated above, Customs' motion to dismiss is granted. CRMC's action is dismissed.

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[23] There is additional support for this conclusion in a previous decision by the United States Court of Federal Claims. *See Macrotel Int'l Corp. v. United States*, 34 Fed. Cl. 98, 99 (1995) (holding that because it fell within the exclusive jurisdiction of the United States Court of International Trade, the United States Court of Federal Claims lacked jurisdiction over a matter that was protested or "protestable").

[24] Title 19 U.S.C. § 1514(a) lists those decisions of Customs' which are subject to protest. *See* 19 U.S.C. § 1514(a). They include all decisions relating to "charges and exactions of whatever character" and "the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein." Even if Customs' refusal to pay interest on the MPF refund did not constitute a charge or exaction under 19 U.S.C. § 1514(a)(3), it was clearly related to reconciliation of the liquidation of an entry under 19 U.S.C. § 1514(a)(5). *See United States v. Universal Fruits & Vegetables Corp.*, No. 02–55340, slip op. at 17 (9th Cir. 2004) (citing *Heller, Ehrman, White & MacAuliffe v. Babbitt*, 992 F.2d 360, 363–64 (D.C. Cir. 1993); *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586–89 (Fed. Cir. 1994); *J.C. Penney Co. v. United States Treas. Dep't*, 439 F.2d 63, 66–68 (2d. Cir 1971).

[25] Title 28 U.S.C. § 1491(c), governing the jurisdiction of the Court of Federal Claims, provides in pertinent part, "[n]othing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade." 28 U.S.C. § 1491(c).

Slip Op. 04–40

ALUMINERIE BECANCOUR, INC., c/o REYNOLDS METALS COMPANY, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 00–00445

[Defendant's motion to dismiss granted; action dismissed.]

Decided: April 23, 2004

LeBoeuf, Lamb, Greene & MacRae, LLP (*Gary P. Connelly, Melvin S. Schwechter*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney-in-Charge, International Trade Field Office, *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Aluminerie Becancour, Inc. ("Aluminerie" or "Plaintiff") seeks to invoke this Court's jurisdiction pursuant to either subsections (a) or (i) of 28 U.S.C. § 1581 (2000) to challenge the denial of its administrative protest filed pursuant to 19 U.S.C. § 1514 (2000).[1] Defendant United States Bureau of Customs and Border Protection[2] ("Customs" or "Defendant") moves for dismissal claiming lack of subject matter jurisdiction because Plaintiff failed to properly and timely file its protest and failed to follow court rules in filing this case.

In the event that the Court finds jurisdiction lacking, Plaintiff requests transfer of its suit to the United States Court of Federal Claims pursuant to 28 U.S.C. § 1631,[3] asserting that the United States Court of Federal Claims has concurrent jurisdiction under 28 U.S.C. § 1491.[4]

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[1] Because Plaintiff filed its summons in 2000, Summons of Aluminerie at 2, the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred. The Court notes that subsection (c) of 28 U.S.C. § 1491, *see infra* note 27, was redesignated from subsection (b) to subsection (c) in 1996. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320 § 12, 110 Stat. 3870, 3874 (codified as amended at 28 U.S.C. § 1491 (2000)).

[2] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

[3] For the pertinent text of the statute, *see infra* note 23.

[4] For the pertinent text of the statute, *see infra* note 24.

For the reasons stated below, Defendant's motion to dismiss is granted.

I. Background

Plaintiff's administrative protest has a ten-year history, a review of which is necessary background for the motion at issue here. On December 15, 1992, Aluminerie made a voluntary disclosure to Customs under 19 U.S.C. § 1592(c)(4), admitting that it had failed to pay certain Merchandise Processing Fees ("MPF") on unwrought aluminum products imported into the United States between 1990 and the date of disclosure. Def.'s Mem. Supp. Mot. Dismiss at 1–2 ("Def.'s Mot."); Pl.'s Opp'n to Mot. Dismiss at 1 ("Pl.'s Opp'n"). To perfect its voluntary disclosure, Customs requested that Aluminerie tender $88,542.87, which Aluminerie paid on October 6, 1994. *See* Letter from John Barry Donohue, Jr., Assoc. Gen. Counsel, Reynolds Metals Co., to William D. Dietzel, Dist. Dir., U.S. Bureau of Customs & Border Prot., Pl.'s Ex. A at 1,[5] 4 (Oct. 6, 1994) ("October 6 Letter").[6]

Along with its payment, Aluminerie submitted a letter in which it advised Customs of its intent to appeal the MPF determination, as it considered its entries exempt from the MPF rate demanded by Customs. *Id.* at 1. Aluminerie argued that the unwrought aluminum products were of Canadian origin, and thus qualified for special treatment pursuant to the United States-Canada Free Trade Agreement ("USCFTA"). Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir., U.S. Bureau of Customs & Border Prot., Pl.'s Ex. D at 4, 4–5 (Feb. 1, 1995) ("February 1 Letter").[7] Customs, on the other hand, had previously concluded that due to a non-Canadian additive, Aluminerie's entries failed to qualify for the reduced MPF rate provided by the USCFTA. *Id.* at 5. Aluminerie, in turn, argued that pursuant to the doctrine of *de minimis non curat lex*, the foreign additive in the Canadian entries should be disregarded for country of origin purposes. *Id.* Aluminerie informed Customs in its payment tender letter that it expected a full refund of the tender amount along with accrued interest in the event that subsequent litigation was successful. October 6 Letter, Pl.'s Ex. A at 1.

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[5] Documents appended to Pl.'s Opp'n are referred to as "Pl.'s Exhibit" followed by the corresponding letter. The document appended to Plaintiff's motion for leave to amend its memorandum of opposition is referred to as "Pl.'s Attachment."

[6] The record shows that all correspondence and documentation referred to in this decision was either addressed to or sent by Reynolds Metals Company, in its capacity as owner of Aluminerie Becancour, Inc. Reynolds Metals Company also owns Canadian Reynolds Metals Company, which is the Plaintiff in a companion case before this Court. *Canadian Reynolds Metals Co. v. United States*, Court No. 00–00444, slip op. ____ (CIT Apr. 23, 2004) (pending).

[7] Barnes, Richardson & Colburn was Plaintiff's legal representative at the time. *See* February 1 Letter, Pl.'s Ex. D at 4.

Customs responded in a letter dated November 8, 1994, stating that it had received Aluminerie's tender of MPF, but rejected all conditions imposed by Aluminerie in connection to this payment. Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., U.S. Bureau of Customs & Border Prot., to John Barry Donohue, Reynolds Metals Co., Pl.'s Ex. B at 1 (Nov. 8, 1994) ("November 8 Letter"). Subsequently, Customs and Aluminerie concluded an escrow agreement on December 20, 1994, in which they agreed to let the decision in a designated test case[8] control whether a full refund of Aluminerie's MPF payment was appropriate. Agreement between Reynolds Metals Company and U.S. Customs Service, Pl.'s Mot. for Leave to Amend Pl.'s Opp'n, Pl.'s Attach. at 1 (Dec. 20, 1994) ("Escrow Agreement").[9] In the event that the test case decision was favorable to Aluminerie, Customs further agreed to refund the full tendered amount "together with such interest as may be required by law." *Id.* at 1–2.

On February 6, 1995, Aluminerie filed an administrative protest. *See* Letter from Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, to Dist. Dir., U.S. Bureau of Customs & Border Prot., Pl.'s Ex. D at 1 (Feb. 6, 1995) ("February 6 Letter"); Protest No. 0712–95–100130, Pl.'s Ex. D at 3 (Feb. 6, 1995) ("Protest Form").[10] In its protest, Plaintiff appeared to make three objections to Customs' actions. First, Plaintiff stated that it objected to the assessment and pay-

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[8] In subsequent amendments to the escrow agreement, concluded on October 28, 1996, and July 13, 1998, the parties identified the designated test case as *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), originally referred to as St. Albans Protest No. 0201–93–100281 (HQ 955367) and subsequently appealed to the Federal Circuit Court of Appeals. Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 3, 4 (Oct. 30, 1996); Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 5, 6 (July 13, 1998); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

[9] Reynolds Metals Company concluded the agreement with Customs on behalf of Plaintiff. *See* Escrow Agreement, Pl.'s Attach. at 1.

[10] The "protest package" provided as Exhibit D by Plaintiff contains copies of two letters along with a copy of a completed Customs Form 19 (Protest No. 0712–95–100130); the first letter is dated February 1, 1995, and the second letter is dated February 6, 1995. *See* Pl.'s Ex. D. Accordingly, it appears as though Plaintiff first attempted to forward a protest to Customs on February 1, 1995, but that for reasons unclear to the Court, the protest was not filed until February 6, 1995, the date Customs received and stamped the protest form. Protest Form, Pl.'s Ex. D at 3. The implementing regulation for filing of protests confirms that a protest is considered filed on the date it is received by Customs. 19 C.F.R. § 174.12(f) ("The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed."). Additionally, both parties agree that the protest was filed on February 6, 1995. *See* Def.'s Mot. at 2; Pl.'s Opp'n at 3. As the February 6 Letter merely serves as a complement to the original protest attempt on February 1, 1995, however, the Court will treat the letter dated February 1, 1995, as part of the protest filed on February 6, 1995. *See* February 6 Letter, Pl.'s Ex. D at 1 ("[W]e forwarded protests, dated February 1, 1995, in which [Aluminerie] protested the assessment and payment of Merchandise Processing Fee ('MPF').").

ment of MPF. February 1 Letter, Pl.'s Ex. D at 4. Second, it protested "contingencies not anticipated in the [escrow] [a]greement[,] or unanticipated frustration" of the same. *Id.* at 5–6. Plaintiff then appears to have made a third objection, referring to Customs' acceptance of payment. *Id.* at 4. In support of this third objection, Plaintiff noted that a copy of Customs' letter dated November 8, 1994, as well as a receipt of payment made out by Customs on November 7, 1994, was enclosed with the protest. *Id.*; *see also* Collection Receipt from U.S. Bureau of Customs & Border Prot., to Aluminerie Becancour, Pl.'s Ex. A at 6 (Nov. 7, 1994) ("Receipt"). Plaintiff clarified in its protest that it did not expect Customs to act in response to its objections until final judgment was rendered in the pending test case. February 1 Letter, Pl.'s Ex. D at 6.

On January 5, 1999, the Federal Circuit Court of Appeals issued its decision in the test case, *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999). The *Alcan Aluminum Corp.* Court held that the foreign additive in question was subject to the principle of *de minimis non curat lex*, and therefore, the entries were considered of Canadian origin. 165 F.3d at 902. The *Alcan Aluminum Corp.* decision became final on April 5, 1999. Pl.'s Opp'n at 4.

Because Aluminerie's entries qualified for preferential trade status under the USCFTA as a result of the favorable decision in *Alcan Aluminum Corp.*, Customs refunded to Aluminerie the deposited MPF amount in full "[o]n or about" February 7, 2000.[11] Compl. of Aluminerie at 3.

Customs, however, failed to tender interest pursuant to the escrow agreement when it made the refund to Aluminerie. Def.'s Mot. at 2; Pl.'s Opp'n at 4. Aluminerie claims it then sent, on February 10, 2000, a request for accelerated disposition of its protest.[12] Pl.'s Opp'n at 4. Following what Aluminerie considered a denial of the original protest by operation of law, it filed a summons with the Court on September 7, 2000. Summons of Aluminerie at 2. Plaintiff subsequently, on September 30, 2002, filed its complaint seeking relief. Compl. of Aluminerie at 6. The thrust of Plaintiff's complaint is that Customs failed to pay interest on the refunded MPF. *Id.* at 3–4. Defendant Customs moved to dismiss for lack of subject matter jurisdiction.

II. Standard of Review

Because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction. *See Former*

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[11] No supporting exhibit was provided, but Defendant does not deny this statement. *See* Def.'s Mem. at 2.

[12] Plaintiff failed to provide the Court a copy of this letter. However, as the letter is not a determinative factor in this action, this lack of evidence has no effect on the Court's decision.

Employees of Sonoco Prods. Co. v. United States Sec'y of Labor, 27 CIT ___ , ___ , 273 F. Supp. 2d 1336, 1338 (2003) (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, as Defendant's motion to dismiss challenges the sufficiency of Plaintiff's pleadings (as opposed to the factual basis underlying the pleadings), the Court will accept all facts alleged in Plaintiff's pleading as true. *Corrpro Cos. v. United States*, slip. op. 03–59, at 4 (CIT June 4, 2003).

III. Discussion

Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a), or alternatively under 28 U.S.C. § 1581(i). Compl. of Aluminerie at 1. Title 28 U.S.C. § 1581(a) confers jurisdiction over actions based on denials of protests. Title 28 U.S.C. § 1581(i), on the other hand, is a residual provision thatconfers jurisdiction over certain international trade-related disputes not covered by subsections (a)–(h). *Id.* In the event that the Court finds jurisdiction lacking, Plaintiff argues that the Court should transfer this action to the United States Court of Federal Claims, as it considers that court to have concurrent jurisdiction under 28 U.S.C. § 1491. Pl.'s Opp'n at 8–12. The Court first discusses subject matter jurisdiction under § 1581(a) and § 1581(i), and then discusses the prospect of transfer to the United States Court of Federal Claims.

A. Subject Matter Jurisdiction

Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a), or alternatively under 28 U.S.C. § 1581(i). Compl. of Aluminerie at 1. Defendant makes four arguments in its motion for lack of subject matter jurisdiction. First, it argues that jurisdiction is lacking under 28 U.S.C. § 1581(a), because Plaintiff failed to timely and properly file a protest. Def.'s Mot. at 3–4. Second, Defendant claims that 28 U.S.C. § 1581(i) does not confer jurisdiction, as Plaintiff failed to follow procedural requirements for filing an action under this statutory provision. *Id.* at 6. Third, Defendant argues that subsection (i) of 28 U.S.C. § 1581 cannot confer jurisdiction where a remedy was potentially available under subsection (a). *Id.* at 5. Fourth, Defendant argues that the action under 28 U.S.C. § 1581(i) was untimely commenced. *Id.* at 9. The Court will discuss separately the two statutory provisions involved. First, the Court will discuss jurisdiction under 28 U.S.C. § 1581(a). Subsequently, it will briefly address jurisdiction pursuant to 28 U.S.C. § 1581(i), as well as the prospects for transfer to the United States Court of Federal Claims.

1. 28 U.S.C. § 1581(a)

In its complaint, Plaintiff initially alleges that the Court has jurisdiction pursuant to 28 U.S.C. § 1581(a), which provides as follows: "[t]he 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." 28 U.S.C. § 1581(a). Section 515 of the Tariff Act of 1930, as amended at 19 U.S.C. § 1515, provides for administrative review of protests. 19 U.S.C. § 1515. Subsection (a) of § 1515 stipulates that Customs "shall review the protest and shall allow or deny such protest in whole or in part" as long as it is filed in accordance with 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). Title 19 U.S.C. § 1514 describes the requirements for filing protests. 19 U.S.C. § 1514. A suit attempting to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a) must therefore be based on a protest which complies with the requirements of § 1514.

Among other things, § 1514 establishes two requirements for protests: contents and timing. 19 U.S.C. § 1514(c). Title 19 U.S.C. § 1514(c)(1)[13] and title 19 C.F.R. § 174.13(a)[14] of the agency's regulations both govern the contents of protests. The Court liberally construes the requirements of 19 U.S.C. § 1514(c)(1). *Ammex, Inc. v. United States*, 27 CIT ____ , ____ , 288 F. Supp. 2d 1375, 1382 (2003) (acknowledging that there is a "long line of cases taking a liberal posture as to what constitutes a valid protest"). In *Mattel, Inc. v. United States*, for example, the Court held that a letter requesting reliquidation under the wrong statutory provision constituted a valid protest, despite its error. 72 Cust. Ct. 257, 266, 377 F. Supp. 955, 963 (1974). Further, the *Mattel, Inc.* Court concluded that "however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of [19 U.S.C. § 1514] if it con-

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[13] Title 19 U.S.C. § 1514(c)(1) provides in pertinent part:

> A protest must set forth distinctly and specifically—
>
> (A) each decision . . . as to which protest is made;
>
> (B) each category of merchandise affected by each decision . . . ;
>
> (C) the nature of each objection and the reasons therefor; and
>
> (D) any other matter required by the Secretary by regulation.

Id.

[14] The implementing regulation 19 C.F.R. § 174.13(a) specifies in pertinent part that protests must contain:

> (1) The name and address of the protestant . . . ;
>
> . . .
>
> (3) The number and date of the entry;
>
> . . .
>
> (5) A specific description of the merchandise affected by the decision as to which protest is made;
>
> (6) The nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal.

Id.

veys enough information to apprise knowledgeable officials of the importer's intent and the relief sought." *Mattel, Inc.*, 72 Cust. Ct. at 262, 377 F. Supp. at 960.

Directly relevant to this dispute, 19 U.S.C. § 1514 governs the timing of protests. Title 19 U.S.C. § 1514(c)(3) provides as follows:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3).

Both parties to this action agree that because Plaintiff's entries were never liquidated, subparagraph (B) of 19 U.S.C. § 1514(c)(3) applies. Def.'s Mot. at 3; Pl.'s Opp'n at 5.

As a sovereign entity, the United States is immune from suit unless it consents to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Title 28 U.S.C. § 1581(a) constitutes an explicit waiver of immunity by the United States. *US JVC Corp. v. United States*, 22 CIT 687, 694, 15 F. Supp. 2d 906, 913 (1998). Previous judicial decisions have therefore held that the statutory timing requirement for protests is a mandatory term of the United States' consent to suit pursuant to 28 U.S.C. § 1581(a). *United States v. Boe*, 64 Ct. Cust. App. 11, 15–16, 543 F.2d 151, 154–55 (1976) (holding that the Customs Court lacked jurisdiction when Plaintiff failed to comply with all terms of consent by the United States mandated by 28 U.S.C. § 1582 (1976), the predecessor to 28 U.S.C. § 1581(a) (2000)). Accordingly, the Court must construe the timing requirement strictly. *Boe*, 64 Ct. Cust. App. at 15, 543 F.2d at 154; *see also Star Sales & Distrib. Corp. v. United States*, 10 CIT 709, 710, 663 F. Supp. 1127, 1128 (1986) (holding that the Court does not have jurisdiction over an action contesting the denial of a protest filed more than ninety days after notice of liquidation).

The Court now considers Plaintiff's protest in light of the provisions of § 1514.

To apply the requirements of 19 U.S.C. § 1514 to this case, it is necessary to review the contents of Plaintiff's protest, and determine whether that protest challenges any decision by Customs made within the ninety-day period prior to its filing, i.e., whether the protest was within the statutory time period.

In its protest, Plaintiff appears to make three objections. *See* February 1 Letter, Pl.'s Ex. D at 4–6. First, Plaintiff protests the assessment and payment of MPF. *Id.* at 4. The MPF tender, however, occurred on October 6, 1994, October 6 Letter, Pl.'s Ex. A at 4, while

Plaintiff filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. Because a time period of more than ninety days elapsed between those two events, Plaintiff's protest fails to present a timely challenge to the assessment and payment of MPF.

Second, Plaintiff protests unanticipated frustration of, and contingencies not foreseen in, the escrow agreement. February 1 Letter, Pl.'s Ex. D at 5–6. Title 19 U.S.C. § 1514(c)(3) states, however, that parties must file protests "within ninety days after *but not before* . . . the date of the decision as to which protest is made." *Id.* (emphasis added). The decision the protesting party objects to must therefore occur prior to the filing of the protest. As previously stated, Aluminerie filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. To the extent that Plaintiff objects to the unanticipated event of Customs' decision to refund MPF without interest in February 2000, that event had not yet occurred at the time the protest was filed.[15] Accordingly, under a plain reading of 19 U.S.C. § 1514(c)(3), Plaintiff's protective protest was untimely and invalid. *See A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988) (holding that a protest was invalid either because it was filed the day before Customs denied a previous claim for relief or barred by the provision allowing only one protest per entry of merchandise).

Because the escrow agreement stipulated Customs' obligation to refund Plaintiff the MPF tender along with "interest as may be required by law" in the event that the test case decision was favorable to Aluminerie, Escrow Agreement, Pl.'s Attach. at 1–2, the subsequent non-payment of interest in February 2000 could qualify as an unanticipated event in light of the agreement.[16] However, for the reasons stated above, Plaintiff should have chosen to wait until after Customs' decision not to pay interest before filing its protest.[17]

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[15] Plaintiff claims that Customs made the decision not to pay interest as early as November 8, 1994, the day it sent the November 8 Letter. *See* Pl.'s Opp'n at 6. However, the parties subsequently signed the escrow agreement, where Customs agreed to refund the MPF amount and "interest as may be required by law" if related litigation was successful. Escrow Agreement, Pl.'s Attach. at 1–2. Thus, even presuming that Customs made the decision to deprive Aluminerie of interest at such an early stage, that decision was later vitiated by the terms of the escrow agreement before the filing of the protest. Moreover, even if the escrow agreement did not vitiate Customs' original rejection of any conditions on the payment of MPF, the language of the protest—objecting to unanticipated frustration of the escrow agreement—clearly refers to decisions which had not yet been made, and not to the November 8 Letter.

[16] Plaintiff argues that Customs' failure to pay interest is in violation of 19 U.S.C. § 1505(c), Pl.'s Opp'n at 11, which in pertinent part holds,"[i]nterest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest." 19 U.S.C. § 1505(c). However, as the Court does not have jurisdiction over this action, it will not discuss the legal basis of Plaintiff's claim.

[17] Title 19 U.S.C. § 1514(c) provides that parties may generally only file one protest per entry of merchandise. Although the Court does not so decide, it may have been possible for

Third, Plaintiff appears to object to Customs' acceptance of its MPF tender. *See* February 1 Letter, Pl.'s Ex. D at 4. In its protest, Plaintiff alleges that Customs accepted its payment on November 8, 1994, and specifies that the protest was filed within ninety days of that date. *Id.* Plaintiff's February 1 Letter further states that Plaintiff attached a copy of the November 8 Letter to the protest, as well as a copy of the receipt from Customs. *Id.* The receipt, however, shows that Customs received Plaintiff's MPF payment on November 7, 1994. Receipt, Pl.'s Ex. A at 6. The November 8 Letter, on the other hand, indicates that Customs acknowledged the MPF tender, and that Customs intended not to accept the tender's contingencies. November 8 Letter, Pl.'s Ex. B at 1. Consequently, the Court cannot conclude that Customs' acceptance of Plaintiff's tender took place on November 8, 1994. Rather, acceptance occurred a day prior, when Customs received payment and made out the receipt. Customs therefore, on November 7, 1994, made the decision Plaintiff attempted to protest; November 7 was, however, ninety-one days prior to the filing of the protest in question here. Accordingly, Plaintiff's protest fails to present a timely, valid challenge to Customs' acceptance of MPF tender, as Plaintiff filed that protest more than ninety days after Customs' decision.

Based on the analysis above, the Court concludes that Plaintiff's protest dated February 6, 1995, was untimely filed, as Plaintiff failed to file it within ninety days of the Customs decisions that it seeks to challenge. Plaintiff, however, sets forth one additional argument to support its contentions that it filed a timely protest.

Aluminerie appears to argue that its subsequent actions cured the defects of the untimely protest. Plaintiff claims that it properly filed, on February 10, 2000, a request for accelerated disposition of protest pursuant to 19 U.S.C. § 1515(b).[18] Pl.'s Opp'n at 4–5. However, such a request cannot cure a timing defect in the underlying protest. For Plaintiff's claim to be within the Court's jurisdiction, the referenced protest must first be filed in accordance with 19 U.S.C. § 1514. As Plaintiff's protest was untimely, Plaintiff's subsequent request for accelerated disposition could not revive it.[19]

Plaintiff, even after filing the untimely protest at issue here, to file a second protest following Customs' non-payment of interest, arguing that, as its previous protest was untimely filed, it was legally invalid, and therefore should not count against the single-protest rule.

[18] Title 19 U.S.C. § 1515(b) states in pertinent part that "[a] request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed . . . any time after ninety days following the filing of such protest." *Id.*

[19] Additionally, Plaintiff could not have cured the timing defect through an amendment of the protest, as 19 U.S.C. § 1514(c)(1) states that an amendment must take place "any time prior to the expiration of the time in which such protest could have been filed." *Id.* Therefore, because the original protest was untimely, any amendments to the protest were also untimely.

The Court therefore holds that the protest dated February 6, 1995, was untimely and improperly filed. Moreover, Plaintiff's subsequent acts failed to cure or amend its original protest. Because Plaintiff failed to file a valid protest, Customs' decisions are final and this Court lacks jurisdiction under 28 U.S.C. § 1581(a). *New Zealand Lamb Co. v. United States*, 40 F.3d 377, 380 (Fed. Cir. 1994) (holding that although the jurisdiction limitation also works to make decisions final and conclusive upon the government unless it acts to revise them within the limitations period, there was no such decision that triggered the ninety-day period and consequently a failure to invoke jurisdiction); *Hambro Auto. Corp. v. United States*, 66 Ct. Cust. App. 113, 117, 603 F.2d 850, 853 (1979) (holding that refusal by customs officials to reliquidate entries became final and conclusive upon the importer when it failed to file a protest within the previously mandated sixty-day limitations period); *Everflora Miami, Inc. v. United States*, 19 CIT 485, 487, 885 F. Supp. 243, 246 (1995), *aff'd*, 86 F.3d 1174 (Fed. Cir. 1996) (holding that the Court lacked jurisdiction over Customs' allegedly erroneous duty assessments because the importer failed to timely protest liquidation, which thereby made the Customs decision final and conclusive upon the parties).

2. 28 U.S.C. § 1581(i)

In the event that jurisdiction under 28 U.S.C. § 1581(a) fails, Plaintiff argues that 28 U.S.C. § 1581(i) confers subject matter jurisdiction on the Court. Compl. of Aluminerie at 1. To invoke jurisdiction under 28 U.S.C. § 1581(i), however, Plaintiff must file its summons and complaint at the same time. *See* 28 U.S.C. § 2632(a);[20] USCIT R. 3(a)(3).[21] Plaintiff filed its summons on September 7, 2000, and subsequently its complaint on September 30, 2002. Summons of Aluminerie at 2; Compl. of Aluminerie at 6. Be-

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[20] Title 28 U.S.C. § 2632 provides in pertinent part:

> (a) Except for civil actions specified insubsections (b) and (c) of this section, a civil action in the Court of International Trade shall be commenced by filing concurrently with the clerk of the court a summons and complaint."

Id. Subsections (b) and (c) refer to actions filed under sections 515, 516, or 516A of the Tariff Act of 1930, and therefore are claims pursuant to 28 U.S.C. § 1581(a), (b), and (c). *Cf.* 19 U.S.C. § 1515–16 *with* 28 U.S.C. § 1581(a)—(c). Consequently, because Plaintiff seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(i), subsection (a) of 28 U.S.C. § 2632 applies.

[21] Rule 3 of the Court's rules states:

> (a) *Commencement*. A civil action is commenced by filing with the clerk of the court:
>
> (1) A summons in an action described in 28 U.S.C. § 1581(a) or (b);
>
> (2) A summons, and within [thirty] days thereafter a complaint, in an action described in 28 U.S.C. § 1581(c) to contest a determination listed in section 516A(a)(2) or (3) of the Tariff Act of 1930; or
>
> (3) A summons and complaint concurrently in all other actions.

cause Plaintiff did not file the summons and complaint concurrently, it fails to properly invoke jurisdiction pursuant to 28 U.S.C. § 1581(i).[22]

B. Transfer to the United States Court of Federal Claims

In the alternative, Plaintiff requests transfer of its action to the United States Court of Federal Claims, Pl.'s Opp'n at 8, arguing that, in the interest of justice, 28 U.S.C. § 1631 permits transfer of the case where the Court does not have jurisdiction.[23] *Id.* at 9. Citing 28 U.S.C. § 1491(a)(1), Plaintiff argues that because it could have originally brought its action in the United States Court of Federal Claims, the action may now be transferred to that court.[24] Pl.'s Opp'n at 9–10.

Congress, however, has conferred on the United States Court of International Trade exclusive jurisdiction over certain customs- related matters. *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 188 (1988). Jurisdiction may then lie either in the United States Court of International Trade or in another federal court, but not in both. In *Vivitar Corp. v. United States*, the Federal Circuit laid out the analysis to be followed when it appears that both the United States Court of International Trade and another federal court, may have jurisdiction over a claim, stating:

> "[I]t is faulty analysis to look first to the jurisdiction of the district courts to determine whether the [United States Court of International Trade] has jurisdiction. . . . The focus must be solely on whether the claim falls within the language and intent of the jurisdiction grant *to* the [United States Court of International Trade]."

Vivitar Corp. v. United States, 761 F.2d 1552, 1559–60 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). Accordingly, the correct approach for distinguishing actions invoking the jurisdiction granted

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USCIT R. 3. Accordingly, in order to invoke jurisdiction under 28 U.S.C. § 1581(i), subsection (3) requires that a plaintiff files the summons and complaint concurrently. USCIT R. 3(a)(3).

[22] Defendant also argues that subsection (i) of 28 U.S.C. § 1581 cannot confer jurisdiction when another remedy was potentially available under subsection (a), and that any claim intended under subsection (i) was untimely filed. Def.'s Mot. at 5–9. However, it is not necessary for the Court to reach this issue.

[23] Title 28 U.S.C. § 1631 stipulates in pertinent part, "[if a] court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer [the] action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed." *Id.*

[24] Title 28 U.S.C. § 1491(a)(1) provides in pertinent part, "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States." *Id.* Plaintiff argues that 28 U.S.C. § 1491(a)(1) confers jurisdiction over its claims, as they arise from the escrow agreement concluded by the parties. Pl.'s Opp'n at 10.

exclusively to the United States Court of International Trade is to focus on whether a claim falls within the language of a statute conferring jurisdiction on this Court. ___ Subsection (a) of 28 U.S.C. § 1581 confers exclusive jurisdiction on the United States Court of International Trade over actions involving the denial of a protest. 28 U.S.C. § 1581(a). Consequently, under the jurisdictional scheme established for the United States Court of International Trade, when an action arises under such a provision, that jurisdiction is exclusive and operates to the exclusion of all other courts. *See K Mart Corp.*, 485 U.S. at 182–83; *Orleans Int'l, Inc. v. United States*, 334 F.3d 1375, 1378 (Fed. Cir. 2003); *Vivitar Corp.*, 761 F.2d at 1559–60. Pursuant to 28 U.S.C. § 1581(a), the United States Court of International Trade therefore divests the United States Court of Federal Claims of jurisdiction over all actions involving the denial of a protest.[25]

Although Plaintiff failed to properly invoke this Court's jurisdiction due to procedural flaws, Plaintiff's action arises from the denial of a protest, and remains within the language of 28 U.S.C. § 1581(a). Moreover, although Plaintiff may claim a cause of action in the Court of Federal Claims under the escrow agreement, Customs' refusal to pay interest on Plaintiff's MPF payment was clearly protestable.[26] Accordingly, this Court's jurisdiction continues to operate to the exclusion of all other courts. *See* 28 U.S.C. § 1491(c).[27] Consequently, because the United States Court of Federal Claims lacked jurisdiction over Plaintiff's action at the time it was filed with this Court, the Court denies Plaintiff's request to transfer its action to that Court. *See* 28 U.S.C. § 1631.

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[25] There is additional support for this conclusion in a previous decision by the United States Court of Federal Claims. *See Macrotel Int'l Corp. v. United States*, 34 Fed. Cl. 98, 99 (1995) (holding that because it fell within the exclusive jurisdiction of the United States Court of International Trade, the United States Court of Federal Claims lacked jurisdiction over a matter that was protested or "protestable").

[26] Title 19 U.S.C. § 1514(a) lists those decisions of Customs' which are subject to protest. *See* 19 U.S.C. § 1514(a). They include all decisions relating to "charges and exactions of whatever character" and "the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein." Even if Customs' refusal to pay interest on the MPF refund did not constitute a charge or exaction under 19 U.S.C. § 1514(a)(3), it was clearly related to reconciliation of the liquidation of an entry under 19 U.S.C. § 1514(a)(5). *See United States v. Universal Fruits & Vegetables Corp.*, No. 02–55340, slip op. at 17 (9th Cir. 2004) (citing *Heller, Ehrman, White & MacAuliffe v. Babbitt*, 992 F.2d 360, 363–64 (D.C. Cir. 1993); *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1586–89 (Fed. Cir. 1994); *J.C. Penney Co. v. United States Treas. Dep't*, 439 F.2d 63, 66–68 (2d. Cir 1971).

[27] Title 28 U.S.C. § 1491(c), governing the jurisdiction of the Court of Federal Claims, provides in pertinent part, "[n]othing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade." 28 U.S.C. § 1491(c).

IV. Conclusion

For the reasons stated above, Customs' motion to dismiss is granted. Aluminerie's action is dismissed.

Slip Op. 04–41

AVENUES IN LEATHER, INC., PLAINTIFF, v. THE UNITED STATES, DEFENDANT.

Court No. 99–09–00603

[On challenge seeking classification of "Presentation Calcu-Folios" as "binders" or "memorandum pads" under heading 4820 of the Harmonized Tariff Schedule of the United States, initially classified upon entry as "similar to" listed exemplars of heading 4202, HTSUS ("trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, and similar containers"), judgment for the plaintiff.]

Decided: April 26, 2004

Fitch, King and Caffentzis, New York, New York (*James Caffentzis*), for the plaintiff. *Peter D. Keisler*, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Amy M. Rubin*); *Karen P. Binder*, Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection, of counsel, for the defendant.

OPINION

The plaintiff, Avenues in Leather (Avenues), invoked this Court's jurisdiction under 28 U.S.C. § 1581(a) to contest denial of its protest on the classification of certain entries of "Presentation Calcu-Folios"[1] under the Harmonized Tariff Schedule of the United States (HTSUS). The government classified the merchandise under heading 4202, specifically under the provision for "trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, and similar containers," subheading 4202.12.20 ("[w]ith outer surface of plastics), which bears customs duties of 20% *ad valorem*. Avenues argues for

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[1] Entered in 1997, these are vinyl- or plastic-covered paperboard and plastic foam, zippered on three sides, and measure 11 1/2″ x 13 1/2″ x 1 1/2″ when closed. Each has one exterior open flat pocket, a padded carrying handle affixed to the exterior spine via two loops of the same exterior material, a three-ring metal binder permanently affixed to the interior spine, a horizontal sleeve in the interior right side into which has been placed the cardboard backing of an included 3-hole lined pad of paper measuring 8 1/2″ x 11″, and a flap pocket in the interior left side (which opens parallel to the spine) on top of which are a zippered pocket, one large slot approximately 4 1/4″ x 11 3/4″, two smaller slots sized to hold computer disks, two loops for writing instruments, and a permanently attached solar-powered calculator measuring 3″ x 5 1/2″ in height. *See* Pl.'s Ex. 4; Def.'s Ex. A.

classification as either "binders" under subheading 4820.30.00[2] ("binders (other than book covers), folders and file covers") or alternatively "memorandum pads" under subheading 4820.10.2020 ("memorandum pads, letter pads and similar articles"), which bear customs duties of 3.7% and 2.8% *ad valorem*, respectively. In accordance with the trial ordered by the appellate opinion on the matter, *Avenues in Leather, Inc. v. United States*, 317 F.3d 1399 (2003),[3] familiarity with which is presumed, judgment enters in favor of Avenues for the following reasons.

I

The imported article in question, a "pad folio," is apparently now recognized in the business jargon. *See, e.g.*, Pl.'s Ex. 8 at 4–17, Pl.'s Ex. 10 at 8–15 & 17–18. As the plaintiff's exhibits indicate, pad folios vary in size and features. They also lack specific *eo nomine* classification in the HTSUS. The Bureau of Customs and Border Protection and predecessor U.S. Customs Service (Customs) apparently have tended to classify them as articles of stationary under heading 4820, but more recently have taken the position that their features may qualify them as containers under heading 4202. *See* Pl.'s Br. at 10–12. *Cf. Avenues I*.[4]

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[2] Heading 4820 covers "registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (looseleaf and other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationary, of paper or paperboard, albums for samples or for collections, and book covers (including cover boards and book jackets) of paper or paperboard."

[3] *Cf. Avenues in Leather v. United States*, 22 CIT 404, 11 F. Supp. 2d 719 (1998), *aff'd* 178 F.3d 1241 (Fed. Cir. 1999) ("*Avenues I*").

[4] *Compare, e.g.*, HQ 964824 (Aug. 12, 2002) (relying on *Avenues in Leather, supra*, 22 CIT 404, 11 F. Supp. 2d 719, to classify under heading 4202 certain pad folios, each with zipper closure around three sides, measuring 10 1/2″ x 13 1/2″ x 1 3/4″ when closed, imported with 8 1/2″ x 11″ note pad inserted into right hand interior pocket, and left interior side with full-size accordion folio with two compartments and two gussets large enough to contain small books or newspapers, front panel fitted with two pen/pencil holders, two pockets, with hook-and-loop flap closure designed for 3 1/2″ computer disks or other small articles, a pocket for business cards, and a zippered utility security pocket 10″ x 5 1/2″, with optional fixed or removable binders and exterior sides fitted with open pocket measuring the full size, height and width of the side of the case, and "leather" padded carrying handle fitted to the exterior spine) *with* HQ 965569 (Aug. 12, 2002) (classifying under subheading 4820.10.2020 a zippered pad folio measuring 8 1/2″ x 11″ imported with note pad inserted into an inside pocket on the right hand interior and left interior side containing various pockets designed to hold pens, pencils, credit cards, loose papers and the like). *See also* HQ 956940 (Nov. 25, 1994) (reclassifying under subheading 4820.10.2020 two types of pad folios described as "portfolios" 13 1/2″ x 10″ x 1″, with outer surface of bonded leather or man-made vinyl coskin, secured by zipper closure, with exterior full-wall flat pocket, containing 8 1/2″ x 11″ note pad in slot of one interior wall, pen holder fixed at the spine, opposite interior wall including pocket with tapered accordion style gusset, a zippered pocket, two open pockets, identification card holder, and five slots for holding business cards); HQ 962030 (May 13, 1999) (leather bifold containers measuring 13 1/2″ x 10″ x 1″ in the closed position, zippered on three sides, exterior front featuring one full-length flat pocket, containing a lined writing

To prove that the articles at bar should be classified under heading 4820, Avenues submitted at trial samples of various pad folios and business cases and presented the testimony of Otniel Shor, Carol Ann Williamson and Sam Goldstein. Mr. Shor, Avenues main witness, has over 28 years' experience with business cases and is the designer of the articles at bar. Ms. Williamson was the Director of Replenishment, Planning and Supply Chain for Staples. Mr. Goldstein was Vice President and General Merchandise Manager for Office Depot. The government presented the testimony of Customs National Import Specialists Carl Abramowitz and Kevin Gorman.

Mr. Shor stated that Avenues is in the business of designing, developing, and distributing business articles and accessories (such as business cases), executive accessories (such as portfolios), and technology-related accessories (such as notebook computer cases) which are contract-manufactured overseas. Avenues sells primarily to U.S. national chain office supply stores such as Office Depot, Staples and Office Max, with some sales to or through "warehouse clubs." Tr. 9–11. He explained that "pad folios" are not briefcases, which are cases designed to carry various business-related as well as personal articles (Tr. 13–14, 70, 97, 133–134, 139), nor are they attache cases, which are hard-sided rectangular cases (Tr. 17). He described them as "covers" and "carriers" designed to hold and organize paper products and flats such as cards, envelopes, photographs, file folders, thin catalogues, *et cetera*, capable of being fit within the pad folio's pockets and sleeves. He further explained that the various pad folio styles evolved to fit various presentation and business interaction needs.

Mr. Shor also averred that the pad folio at bar was specifically designed as an organizational aid for the taking of notes. More precisely, he stated that the article was designed to allow the user to organize and interact with matter bound by the pad folio, *e.g.*, catalogue sheets, price lists, *et cetera*, by using the three ring binder which allows the user to bind, store, or hold paper from the included three-hole memo pad and other three-holed presentations. Tr. 26–29. Mr. Shor explained that the inside sleeve or pocket took six months of design testing to arrive at the desired size, *i.e.*, one that could comfortably hold a standard office folder. Tr. 24, 28. He further stated that the outer material adds durability, protects the cardboard cover, is an important selling feature, and increases the intended thickness of the article at bar to a maximum of only 1 1/2″, but the inside capacity is a maximum of 1″. Tr. 33–34, 74–75. In view of its dimensions, Mr. Shor averred that pad folios may be, and often

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pad 11 3/4″ x 8 1/2″, with cardboard backing slotted into right interior side, left interior side featuring a full-length gusset pocket with limited expansion, a full-length zippered flat pocket, an 8″ flat pocket, a 4″ flat pocket, a 3″ flat pocket, four flat slots for business or credit cards, one pen holder sewn onto the interior spine, and one small solar powered calculator placed in a fitted slot, reclassified under subheading 4820.10.2020).

are, placed inside briefcases, along with other business and personal items carried by such cases. Tr. 18, 24–27, 39–40, 100–101, 109, 140. Further, Mr. Shor stated the presence of the handle on the pad folio at bar is merely a "gimmick" and does not change its intended purpose or use, although it imparts to the product the appearance of a light business case. Tr. 31–33, 96, 106. Thus, Avenues contends the articles are akin to "portfolios," *i.e.*, flat cases designed and intended to hold papers. Tr. 74–75, 194–195.

The government introduced the following lexicographic definitions of the term "briefcase" at trial: (1) "A portable rectangular case used for carrying books or papers," *American Heritage Dictionary of the English Language* (2nd col. ed 1982); (2) "A flat, flexible case for carrying papers or books," *Webster's Ninth New Collegiate Dictionary* (1984); (3) "A flat rectangular case for carrying documents," *The Oxford Modern English Dictionary* (2d ed. 1999). The government argues that imported articles satisfy the lexicographic definitions of "briefcase," are a form of briefcase, and are *ejusdem generis* with the heading 4202 items "trunks, suitcases, vanity cases, attache cases, and school satchels." The government therefore argues that the articles are *prima facie* classifiable in heading 4202 and are expressly provided for under subheading 4202.12.20 because they have an outer surface of plastic.

Emphasizing the "container" aspects of the pad folios at bar, the government introduced evidence on the marketing of pad folios as business travel goods. Staples' website identifies a number of subcategories within the general class of goods referred to as "office supplies." These include "briefcases and travel" and "binders and binder accessories," for which Staples uses different buyers. Staples' binders-and-binder-accessories buyer also purchases paper report covers, indexes and sheet protectors. At the time of trial, the government submitted the fact that pad folios are found on Staples' website under "briefcases and travel," whereas "binders and binder accessories" lists *inter alia* "presentation binders," "reference binders," storage binders," and "binder accessories/specialty binders" but not pad folios. Similarly, the government noted, Office Depot's website lists pad folios under the subcategory of "business cases" and it, too, does not list pad folios in its "binders & accessories" subcategory.[5]

Regarding the pad folio's use, Avenues argues that the designer's intention controls classification, whereas the government's position is that consumers in fact use them however they wish. At trial, counsel for the government removed a variety of personal objects from a pad folio similar to the articles at bar in order to demonstrate that

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[5] Office Depot identifies "business cases" and "binders & accessories" within the general class of "office supplies" and internally refers to pad folios among the "leather goods" (whether or not they are made of or covered with leather) that include luggage, briefcases, and travel accessories. A single buyer is responsible for Office Depot's leather goods.

they are capable of containing and in fact are used to carry non-paper personal and business objects. Avenues describes the government's demonstration as merely theatric and not indicative of what the article was intended for.

II

On a challenge to Customs' classification of imported merchandise, 28 U.S.C. § 2639 presumes the correctness of the government's classification. A plaintiff must therefore overcome such presumption as part of its *prima facie* classification claim, although that may be achieved if it persuades that its own alternative is the "better classification." *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) ("whether the court remands, conducts its own hearing, or simply examines the law and tariff schedules on its own initiative, it is required to reach a correct result").

Determining the proper customs classification involves, first, determining the parameters of any disputed tariff terms in the relevant tariff provisions, and then determining whether the merchandise comes within the description of relevant tariff terms, as properly construed. *See Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The first inquiry is a question of law; the second, a question of fact. *Id.*

The legal text of the HTSUS includes the General Rules of Interpretation (GRI), additional U.S. rules of interpretation, general notes, and section and chapter notes. These are codified by 19 U.S.C. § 1202. *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999). The GRI must be applied in numerical order. *See, e.g., General Electric Co. v. United States*, 247 F.3d 1231, 1234 (Fed. Cir. 2001); *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). If the proper classification is achieved through application of a particular GRI, the Court need not consider successive GRIs. In contrast, the explanatory notes accompanying the HTSUS[6] are not binding, but they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions. *See JVC Co. of America v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000).

GRI 1 states that in order to determine a product's proper classification, one must first look to the heading and section or chapter notes, and then inquire as to the relevant subheading. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998). Towards that end, terms used in the tariff provisions are given their "common and popular meaning." *Medline Indus. Inc. v. United States*, 62 F.3d. 1407, 1409 (Fed. Cir. 1995). A court may therefore

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[6] *See* Harmonized Commodities Description and Coding System Explanatory Notes (3rd ed., World Customs Organization 2002) ("EN").

rely upon its "own understanding, dictionaries and other reliable sources" in order to understand terms used. *Id.*

GRI 2(b) states that reference to a material or substance is to be interpreted to include reference to goods consisting wholly or partly of such material or substance.

GRI 3 governs the classification of goods, including composite goods, which are arguably classifiable under two or more headings.[7] GRI 3(a) codifies the judicial doctrine of relative specificity, GRI 3(b) reflects the "essential character" test, and GRI 3(c), the default rule, provides for classification by "numerical order." The explanatory note reiterates that GRI 3's subsections "operate in the order in which they are set out in the Rule," such that "Rule 3(b) operates only if Rule 3(a) fails in classification, and if both Rules 3(a) and (b) fail, Rule 3(c) will apply." EN, vol. 1, GR 3 (I), p. 3. If resort to GRI 3(a) is necessary, then an imported article is to be classified under "the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp., supra*, 140 F.3d at 1441. As with all interpretive notes, the application of GRI 3(a) is subservient to any relevant section or prior chapter notes. *See* GRI 1; *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 928 (Fed. Cir. 2003) (referencing *Baxter Healthcare Corp. of Puerto Rico v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999) and *Orlando Food, supra*, 140 F.3d at 1440).

In this matter, reference to GRI 1 alone does not resolve the question posed, since both of the disputed headings, 4202 and 4820, are *eo nomine* provisions and their interpretation and application to the article at bar is disputed. *Eo nomine* classification includes all forms of the named article. *See JVC Co. of America, Div. of JVC Corp. v. United States*, 234 F.3d 1348 (Fed. Cir. 2000). Further, since each heading follows a list of particular items with words of general inclusion, *i.e.*, "similar containers" and "similar articles", it is necessary to consider classification *ejusdem generis*, which is appropriate "if the imported merchandise shares the characteristics or purpose and

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[7] GRI 3 provides:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods[,] . . . those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

does not have a more specific primary purpose that is inconsistent with the listed exemplars." *Avenues in Leather, supra*, 178 F.3d 1241 (referencing *Totes, Inc. v. United States*, 69 F.3d 494, 498 (Fed. Cir. 1995).

Ejusdem generis requires consideration of the "specific primary purpose of the imported merchandise" in light of the "common characteristics or unifying purpose of the listed exemplars in a heading[.]" *Avenues in Leather, supra*, 178 F.3d at 1244–45. The "specific primary purpose" equates to the predominant use of the imported merchandise. *Len-Ron Mfg. Co. v. United States*, 24 CIT 948, 118 F. Supp. 2d 1266 (2000). Although additional but not inconsistent characteristics or purposes do not defeat classification under *ejusdem generis*[8], an article's possible use is insufficient to decide its predominate use. *Cf. Len-Ron Mfg., supra*, 24 CIT at 965, 118 F. Supp.2d at 1282 (referencing Additional U.S. Rule of Interpretation 1). Thus, to determine an article's specific primary purpose, the Court must look to all the pertinent circumstances including the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale, and the use of the article. *United States v. Carborundum Co.*, 536 F.2d 373, 377 (CCPA 1976).

As the appellate decision on the instant matter observed, the essential characteristics of the listed exemplars in heading 4202 are to organize, store, protect, and carry (and are *stare decisis*). *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867 (1994), *aff'd* 69 F.3d 495 (Fed. Cir. 1995). *See Avenues in Leather, supra*, 317 F.3d at 1404. According to the government's line of reasoning, all containers with heading 4202 characteristics are classifiable *ejusdem generis* with the named exemplars of heading 4202 even if not expressly named, because the only limitation in the case law on any such article being classifiable *prima facie* under heading 4202 is that it be a "container" either expressly identified or "similar" to the expressly identified containers. *See, e.g., Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867 (1994), *aff'd*, 69 F.3d 494 (1995). But, *all* cases or containers may be said to have the 4202 characteristics of organizing, storing, protecting, and carrying. And yet, not all cases or containers which possess 4202 characteristics are classifiable under heading 4202. For example, a "portfolio"[9] may be said to serve orga-

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[8] *See Avenues in Leather, supra*, 178 F.3d at 1244–45 (referencing *Totes*, 69 F.3d at 498).

[9] The Court takes judicial notice of the following definitions of "portfolio": (1) "A portable case for holding material, such as loose papers, photographs, or drawings[,]" *The American Heritage Dictionary of the English Language*, (4th ed. 2000); (2) "A receptacle or case for keeping loose sheets of paper, prints, drawings, maps, music, or the like; usually in the form of a large book-cover, and sometimes having sheets of paper fixed in it, between which specimens are placed[,]" *The Oxford Modern English Dictionary* (2d ed. 1999); (3) "A por-

nizing, storing, protecting, and porting purposes, thus exhibiting heading 4202 characteristics or functions, but "portfolio" is mentioned as classifiable under heading 4820, according to the explanatory note to that chapter.[10] Hence, the government overstates the claim for heading 4202 classification.

In *SGI Inc. v. United States*, 122 F.3d 1468, 1472 (Fed. Cir. 1997), for example, the appellate panel found that certain portable soft-sided vinyl insulated coolers for storing food or beverages were more appropriately classified as "other household articles" under 3924.1050, HTSUS notwithstanding that the articles unquestionably possessed the 4202 characteristics of "organizing, storing, protecting, and carrying." The case of *Dolly, Inc. v. United States*, 27 CIT ___ n.2, 293 F. Supp. 1340 n.2 (2003) noted that Presidential Proclamation 7515, 66 Fed. Reg. 66,549, 66,619 (Dec. 18, 2001) added the term "insulated food and beverage bags" to the text of Heading 4202. The change does not affect the analysis undertaken in *SGI*, however, and *Dolly* considered insulated "mini bags" intended for storing food and beverage to possess a "different purpose" than merely "organizing, storing, protecting, and carrying" various items.

In determining that those articles were properly classified under heading 3924, *Dolly* confronted Note 2(ij) to Chapter 39, which chapter does not cover ". . . trunks, suitcases, handbags or other containers of heading 4202." This Court confronts a similar situation in note 1(h) to chapter 48, which states that chapter 48 does not cover "[a]rticles of heading 4202 (for example, travel goods)."[11] In light of the language of that note, the government argues that classification under chapter 48 is precluded by operation of law.

The government's interpretation is incorrect for at least two reasons. First, the argument does not address the various Customs rulings which describe pad folios similar to the pad folios at bar and which Customs classified under heading 4820 and not heading 4202. *See, e.g.*, note 4, *supra*. Second, the explanatory note to heading 4202 parallels the exclusionary language of chapter 48's note 1(h) by explaining that heading 4202 does not cover

> [a]rticles which, although they may have the character of containers, are not similar to those enumerated in the heading, for example, book covers and reading jackets, *file-covers*, document-jackets, . . . *etc.*, and which are wholly or mainly *cov-*

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table case for keeping, usually without folding, loose papers, sheets, drawings, or the like[,]" *Webster's New International Dictionary* (2d ed. 1956). Quite literally, then, a portfolio is a "looseleaf carrier."

[10] Subpart (3) thereof states that heading 4820 covers binders designed for holding loose sheets, magazines or the like (*e.g.* clip binders, spring binders, ring binders), folders, file covers, files (other than box files) and, significantly, portfolios. *See* EN, vol. 2, sec. X, p. 895.

[11] Note 1(h) was numbered 1(g) at the time it was considered in *Avenues I*.

> *ered with* leather, sheeting of *plastics, etc. Such articles fall* in heading 42.05 if made of (or covered with) leather or composition leather, and *in other Chapters if made of (or covered with) other materials.*

EN, vol. 2, sec. VIII, p. 792 (italics added). Since file covers, document jackets and the like are specifically "not similar to" the exemplars listed under heading 4202 but instead are covered under heading 4820,[12] the parties propound inapposite classifications. The article at bar is classifiable under either heading 4202 or heading 4820, but it is not classifiable *prima facie* under both. Therefore, consideration of relative specificity pursuant to GRI 3(a) is illogical. *Cf E.T. Horn v. United States*, 945 F.2d 1540 (1991) (relative specificity inapplicable in inapposite TSUS contest between provision for chemicals and provision for waste). Else, the claimed headings must be regarded as equally specific, since neither may be said, facially, to provide the "most specific description" of the article at bar. *See* GRI 3(a). Hence, determining which of the two headings most accurately describes the article at bar requires consideration of GRI 3(b), which inquires whether articles are classifiable as mixtures or composite goods. If so, GRI 3(b) requires that articles "be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

The government argues that heading 4820 articles must, at a minimum, constitute "articles of stationary, of paper or paperboard" in accordance with chapter 48. It contends that there was insufficient testimony by Avenues on this issue, since Mr. Shor was unable to break down the Presentation Calcu-Folio's constituent materials on a cost, weight, or surface area basis in order to establish that the article is "of paper or paperboard" or to offer testimony that such material provide(s) the article with its "essential character." Rather, the government argues, Mr. Shor confirmed that the non-paper materials, particularly the vinyl, served durability (protective) and marketability (aesthetic) purposes which dominate whatever "of paper or paperboard" may be embodied in the pad folio. The government further argues that the binder mechanism does not provide the imported articles with their essential character or evince the article's primary purpose because it is only one of many physical attributes which include five different-size pockets (not including the memo pad slot), a zipper closure, pen loops, a handle and a calculator. The government points out that Avenues' witnesses all agreed that business cases such as briefcases and attache cases are used to hold a variety of paper and non-paper items, and it emphasizes that the article at bar was designed to carry a variety of non-paper items including a calculator, CDs, computer diskettes, and pens. The gov-

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[12] *See supra*, note 10.

ernment contends that the product is in fact versatile and capable of and used by consumers for simultaneously organizing, storing, protecting and carrying any item that fits within it including but not limited to paper matter and the like.[13] The government further argues that Otniel Shor conceded at trial that the articles in issue are not "binders" and it points out that several of Avenues' witnesses conceded that a consumer may use the product in whatever manner they choose. Thus, the government argues, the essential character or primary purpose or of the pad folios at bar is not different from the named exemplars of heading 4202.

In considering GRI 3(b), some support for the government's position is found in explanatory note VIII thereto, which provides that the relevant article's "bulk, quantity, weight or value" is a factor in essential character analysis. *See* EN, vol. 1, GR 3, p. 4. However, "essential character" is not determined solely by reference to the material's or component's constituent size, amount, weight, or monetary value in the composition of the product, it is imparted from the context of the imported article taken as a whole. *See id*. *Cf. Pomeroy Collection Ltd. v. United States*, 336 F.3d 1370, 1372–73 (Fed. Cir. 2003) (observing that "essential character" does not differ from the "whole character" analysis of heading 7013 or the explanatory note thereto; *see* EN, vol. 3, sec. XIII, pp. 1167–68). Indeed, the government's arguments implicitly acknowledge that such consideration, in turn, must depend upon the article's specific primary purpose, or use. *See Avenues I, supra*, 178 F.2d at 1245; *SGI, supra*, 122 F.3d at 1471–1472; *Sports Graphics Inc., supra*, 24 F.3d at 1393 & 1394. *Cf. Len-Ron Mfg., supra*, 24 CIT 948, 118 F. Supp. 2d 1266 (specific primary purpose is the predominant use of the imported merchandise); *Orlando Food Corp., supra*, 140 F.3d at 1441 ("a product described by both a use provision and an *eo nomine* provision is generally more specifically provided for under the use provision").[14]

When asked how he distinguished between pad folios for purposes of classification under either heading 4202 or heading 4820, the government's witness stated that he looked to see if the article "appeared to be a travel good." This is consistent with the description of chapter 42, which states that it covers "travel goods." On the other

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[13] As above indicated, the government demonstrated its point at trial by producing from one pad folio similar to the one at bar a magazine, two compact discs (in their cases), a CD player, several pens, a portable digital assistant, an address book, a wallet, a cell phone, keys, employee identification, a business card holder, a subway/bus card, breathmints, trial exhibits, and aspirin (albeit without offering any to the sitting judge). *See* Tr. at 84–87. Otniel Shor confirmed that a business person would normally carry any or all of these items in a business case.

[14] Avenues further avers that classification of the metal three-ring binder mechanism itself is governed by heading 4820. If that is so, then in this instance "of paper or paperboard" is to be interpreted as "pertaining to" paper or paperboard, not merely "manufactured of" paper or paperboard.

hand, notwithstanding the government's evidence on the marketing of pad folios on office supply companies' internet websites, Avenues' industry witnesses all agreed that the articles in issue were not of a type of product similar to travel bags, cases or carriers. Rather, in their experience, the subject articles are sold and marketed within a class or kind of goods marketed, simply, as "pad folios." Further, Additional U.S. Note 1 to chapter 42 states: "For the purpose of heading 4202, the expression 'travel, sports and similar bags' means goods, other than those falling in subheading 4202.11 through 4202.39, of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers." (Original highlighting omitted.)

Mr. Shor indicated at trial that the pad folio at bar was designed only to accommodate interactive interoffice "travel." *See* Tr. 33. It is, however, readily apparent that the articles at bar arguably evince certain heading 4202 characteristics due to the articles' organizational features, *e.g.*, the interior and exterior pockets, which are features commonly found on or in briefcases and attache cases. Indeed, Avenues' core contention is that the specific primary purpose of the imported merchandise is to function as "an organizational aid." Avenues argues, nonetheless, that classification under heading 4202 is inappropriate because such organizational purpose is limited to paper and similarly flat visual matter, and it emphasizes that, in accordance with *Totes, Avenues I, SGI* and *Dolly*, in order for articles to be classifiable in heading 4202 the relevant articles must "serve[ ] the *essential* purposes of 'organization, holding, storage and protection of articles[,]' " and it contends that the essential purpose of the pad folios at bar should be obvious. Pl's Br. at 7

Considering the evidence, the Court finds as follows. The parties appear to agree that the imported article's calculator is merely incidental to its primary purpose and therefore does not impact classification. Because the article's pockets are essentially flat, the article is suitable only for holding loose papers, files and other flat items such as business cards, floppy discs, *et cetera*. Its three ring binder is obviously for binding and organizing three-hole flat items such as paper from the included three-hole memo pad and other three-holed presentations, and the article comfortably closes if the metal binder is fully packed, or if the left-side pocket is fully packed, but not if both are fully packed at the same time. *See* Pl.'s Ex. 4; Tr. 33–34. In addition to a few business cards, a few standard #10 (9.5″ x 4.35″) or smaller envelopes, one 3″ x 5″ computer floppy disk, and one standard 8.5″ x 11″ cardboard-backed pad of paper, the pad folio at bar is capable of organizing, protecting, storing and carrying at most either about a third of a ream of standard 8.5″ x 11″ three-hole punched paper or up to 1″ of flat items such as standard 9.5″ x 11.75″ file folders

in the interior left-side pocket. Thus, in view of the article's pockets and limited storage space, the article's interior is not sufficiently large or durable enough to hold books, thick newspapers or other personal items for any extended period without damaging itself (or them). Moreover, the presence of the metal binder at the spine impedes the organization, protection, storage and carrying of non-flat items which are not capable of being affixed to it. The Court also notes that the interior pocket of one of the samples deformed over time from placement of pens in the enclosed pen loops, which the Court takes as some confirmation of Mr. Shor's testimony and indication of the article's protection and storage capabilities. *See id.*

Mr. Shor essentially testified that the design of the merchandise was with office or business interactivity in mind, *i.e.*, the pad folio lays flat when unzipped, assists the presentment or organization of flat items such as three-hole punched paper, catalogues, transparent sleeves, *et cetera*, and was not designed to accommodate various personal objects. *See, e.g.*, Tr. 26–29. The Court finds Mr. Shor's testimony credible. Although the government defends its classification on the basis of "actual" (albeit perceived anecdotal) use, the Court considers that the testimony of the product's designer of its intended use is more persuasive in this instance. *See Mast Industries, Inc. v. United States*, 9 CIT 549 (1985); *Novelty Import Co. v. United States*, C.D. 3462, 60 Cust. Ct. 574, 285 F. Supp. 160 (1968). *Cf. Primal Lite, Inc. v. United States*, 182 F.3d 1362 (Fed. Cir. 1999) (discussing principle use versus actual use in the context of Additional U.S. Rule of Interpretation 1). Avenues puts it succinctly:

> The test of design is not what the article CAN hold, but what it is intended to hold. A family automobile is designed to hold five passengers. The fact that you may squeeze nine persons into it does not turn it into an automobile for nine passengers.

Pl.'s Br. at 11 (uppercase in original).

The earlier opinion of this Court on the classification of substantially similar articles considered the significance of the binder mechanism and the memo pad to the articles' classification but concluded that the articles' "other significant attributes" made them "appear to be similar in use to a briefcase." *See Avenues, supra*, 11 F. Supp. 2d at 724. The Court observed that "persons using briefcases commonly carry a memo pad inside[,]" that the three ring binder assembly is capable of being used for any purpose, and that the binder mechanism "in no way prevents or impedes other papers or articles from being carried in the space remaining in the main part of the case without being fastened in the binder." *Id.* On appeal, the CAFC picked up the refrain, and "readily concur[red]" with the lower decision's conclusion "that the folios' large size, numerous and sizable pockets, and external handles speak strongly of the 'organizing, storing, protecting, and carrying' characteristics of the imported mer-

chandise. . . ." 178 F.3d at 1245. Although Avenues argued that the proper consideration should have been the articles' internal features (the three-ring binder and the notepad), the CAFC was unpersuaded, concluding that the " 'organizational aid' purpose that Avenues asserts, as well as the physical characteristics of the internal binder and notepad, are not inconsistent with the essential characteristics of the listed exemplars in Heading 4202." *Id.*

As noted in the earlier decision on the instant matter, Avenues argues that those opinions relied upon findings of fact that were not in evidence on the motion for summary judgment. Whether that is an accurate characterization of the result, in view of those courts' independent consideration of available evidence thereat, Avenues correctly points out that *JVC Co. of America v. United States*, 234 F.3d 1348, 1352 (Fed. Cir. 2000) clarified that judicial doctrine is subservient to the statutory rules of interpretation in the HTSUS. Therefore, to the extent *Avenues I* relied on the "more than" doctrine to decide the case, the decisions are distinguishable from the instant matter. And, since the earlier appellate decision on this matter declared that the only matter of law from *Avenues I* with *stare decisis* impact is that the essential characteristics of the listed exemplars in heading 4202 are to "organize, store, protect, and carry" (albeit as a result of *Totes, Inc. v. United States*, 69 F.3d 495 (Fed. Cir. 1995)), 317 F.3d at 1404,[15] this Court is free to observe that the presence of the memorandum pad, the three-ring binder, and the paperboard core and spine clearly support finding that the essential character of the pad folio at bar is a heading 4820 article of stationary, "of paper or paperboard."

Based upon the evidence and testimony, the article's specific primary purpose is to facilitate the taking of notes as well as aid the organization of print and other visual flat materials capable of being bound by the article's metal binder or fit within its pockets, as illustrated by Plaintiff's Exhibit 5. *See* Tr. 36. The article therefore has the essential character of a binder or a memorandum pad under heading 4820, HTSUS, in accordance with GRI 3(b). The article's "4202" features do not impart the essential characteristics of a "4202" container. Rather, such features assist or complement the article's predominant purpose as an article of stationary. They are therefore subservient to the article's essential character.

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[15] *Cf.* also *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867 (1994). At least, the applicability of *stare decisis* to customs classification matters was reasonably clear following *United States v. Stone & Downer Co.*, 274 U.S. 225, 47 S. Ct. 616 (1927). Whether that is still the case, *cf. Avenues in Leather, supra*, 317 F.3d 1399, *with Schott Optical Glass, Inc. v. United States*, 468 F. Supp. 1318 (Cust. Ct. 1979), *aff'd*, 612 F.2d 1283 (CCPA 1979), *Schott Optical Glass, Inc. v. United States*, 7 CIT 36, 587 F. Supp. 69, 71 (1984), *rev'd and remanded*, 750 F.2d 62 (Fed. Cir. 1984), *and decision on remand*, 11 CIT 899 678 F. Supp. 882 (1987), *aff'd* 862 F.2d 866 (1989).

The Court further agrees with Avenues that either subheading (binders or memorandum pads) accurately describes the article, and that the testimony of the witnesses appears to favor the role of the memorandum pad. Classification of the article is therefore to be in accordance with Customs' apparent policy of not classifying folios imported with memorandum pads under the provision for binders, 4820.30.00, HTSUS.

CONCLUSION

For the foregoing reasons, the plaintiff's importations of Presentation Calcu-Folios are to be classified under subheading 4820.10.2020, HTSUS. Judgment will enter accordingly.

Slip Op. 04–42

YANCHENG BAOLONG BIOCHEMICAL PRODUCTS COMPANY, LTD., PLAINTIFF, v. UNITED STATES OF AMERICA, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, ET AL., DEFENDANT-INTERVENORS.

Court No. 01–00338

[Defendant's Motion to Vacate the Court's Judgment Entered on July 16, 2003, is denied. This Court cannot award Plaintiff damages in the form of attorney fees associated with the contempt proceedings because the United States has not waived its sovereign immunity for such an award; Plaintiff's request for attorney fees is denied.]

Dated: April 28, 2004

deKieffer & Horgan (*J. Kevin Horgan*), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Paul D. Kovac*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Stephen C. Tosini*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Marisa Goldstein*, Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Adduci, Mastriani & Schaumberg, L.L.P. (*Will E. Leonard, Mark R. Leventhal, John C. Steinberger*), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, Judge: There are two matters presently before this Court: 1) Defendant's Motion to Vacate the Court's Judgment Entered on July 16, 2003; and 2) Plaintiff's Memorandum on Damages to be Awarded Based on a Finding of Contempt for Violation of the Injunction Against Liquidation of Subject Entries. For the reasons

set forth below, this Court denies Defendant's Motion to Vacate and does not award Plaintiff attorney fees as damages for Defendant's contempt.

BACKGROUND

Familiarity with this Court's opinion issued on July 16, 2003, is presumed. *See Yancheng Baolong Biochemical Products Company, Ltd. v. United States*, 277 F. Supp. 2d 1349 (Ct. Int'l Trade 2003) ("*Yancheng Contempt Decision*"). This Court incorporates the detailed recitation of the facts as agreed to by the parties at the show cause hearing on June 4, 2003, and as found by this Court in the *Yancheng Contempt Decision*. *See id.* at 1350–52. The facts leading up to the present matters are provided briefly below.

In June 2001, Plaintiff sought judicial review of the United States Department of Commerce's ("Commerce") rescission of the administrative review of an antidumping duty order as to Plaintiff. *See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Administrative Review*, 66 Fed. Reg. 20,634 (Apr. 24, 2001), *amended by* 66 Fed. Reg. 30,409 (June 6, 2001) ("*Final Results*"). In August 2001, on consent of the parties and pursuant to 19 U.S.C. § 1516a(c)(2) (2000), this Court issued a preliminary injunction ("August 2001 Preliminary Injunction") which enjoined the liquidation of any and all unliquidated entries of crawfish tail meat from the People's Republic of China exported by Plaintiff that were covered by the *Final Results*. *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, No. 01–00338 (Ct. Int'l Trade Aug. 2, 2001) (order granting preliminary injunction). The August 2001 Preliminary Injunction specifically stated that Defendant shall be enjoined from liquidating the subject entries "during the pendency of this action," and "that the entries subject to this injunction shall be liquidated in accordance with the final court decision as provided in 19 U.S.C. § 1516a(e).[1]" (*Id.* at 1–2.) The August 2001 Preliminary Injunction

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[1] The full text of 19 U.S.C. § 1516a(e) is as follows:

(e) Liquidation in accordance with final decision

If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit—

(1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and

(2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,

covered thirty-one entries: twenty-eight at the Port of Los Angeles, California; and three at the Port of Norfolk, Virginia. (Def.'s Conf. Submission of 04/09/03.)

In August 2002, this Court denied Plaintiff's Motion for Judgment on the Agency Record and sustained Commerce's rescission of the administrative review of the antidumping duty order as to Plaintiff. *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, 219 F. Supp. 2d 1317 (Ct. Int'l Trade 2002). Plaintiff filed a Notice of Appeal to the United States Court of Appeals for the Federal Circuit ("Court of Appeals") on October 4, 2002. *See id., appeal docketed*, No. 03–1059 (Fed. Cir. Nov. 5, 2002).

While the appeal was pending, Plaintiff filed a request in this Court to clarify or amend the Court's August 2001 Preliminary Injunction. (*See* Pl.'s Mot. to Clarify Or, Alternatively, Extend Inj. Against Liquidation of Entries ("Pl.'s Mot. to Clarify") at 1.) In that motion, Plaintiff asserted that Plaintiff's counsel had been informed by Defendant's counsel that unless Plaintiff obtained an injunction pending appeal, the subject entries would be liquidated. (*Id*. at 3.)

Two days after Plaintiff filed its Motion to Clarify in this Court, Commerce sent instructions to the United States Customs Service, now organized as the Bureau of Customs and Border Protection ("Customs"), directing Customs to liquidate the subject entries at an antidumping duty rate of 201.63% of the entered value, the rate that was determined by Commerce in the *Final Results* and that was sustained by this Court in its August 2002 opinion. *See Yancheng Contempt Decision*, 277 F. Supp. 2d at 1352 (citing Agreed Statement of Facts ¶5).

Defendant and Defendant-Intervenors did not file a response to Plaintiff's Motion to Clarify. *Id*. at 1351–52. The time to respond to Plaintiff's Motion to Clarify expired on December 15, 2002. *Id*. This Court scheduled a telephone conference on January 15, 2003, to discuss the pending motion. *Id*. (citing Agreed Statement of Facts ¶9). After the telephone conference with this Court, Customs issued new instructions to its field offices to stop liquidation of the subject entries. *Id*. (citing Agreed Statement of Facts ¶11). By that time, however, the twenty-eight entries at the Port of Los Angeles had been liquidated; only the three entries at Norfolk, Virginia, remained. *Id*. (citing Agreed Statement of Facts ¶¶7, 8, & 10; Hr'g Tr. At 32, 67). Over the next several months, the parties continued to work together and submitted status reports to the Court regarding the parties' efforts to discover the relevant facts and to reach a settlement resolving this matter. *Id*. (citing Agreed Statement of Facts ¶12–19).

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shall be liquidated in accordance with the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

After repeated efforts to settle this matter between the parties failed, and the facts surrounding the liquidations were revealed to the Court, this Court issued an Order to Show Cause providing Defendant with an opportunity to present evidence why it should not be held in contempt of this Court's August 2001 Preliminary Injunction for issuing instruction to liquidate in November 2002 and for liquidating the subject entries in January 2003. *Id.*; *see also Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, No. 01–00338 (Ct. Int'l Trade May 21, 2003) (order to show cause). Pursuant to Rule 86.2 of the Rules of the United States Court of International Trade, a show cause hearing was held on June 4, 2003. *See* USCIT R. 86.2 (1995) (renumbered Jan. 1, 2004)[2].

At the show cause hearing, Defendant argued that "the August 2001 Preliminary Injunction dissolved when this Court entered judgment in favor of Defendant on August 15, 2002." *Yancheng Contempt Decision*, 277 F. Supp. 2d at 1353 (citing Def.'s Resp. to the Ct.'s Order to Show Cause of May 21, 2003 ("Def.'s Show Cause Br.") at 2, 5). Defendant argued that under the Court of Appeals' precedent, any preliminary injunction issued by this Court dissolved when this Court enters judgment on the merits and liquidation is not suspended during the appeal process absent a new injunction pending appeal. *Id.* at 1354 (citing Def.'s Show Cause Br. at 9–11 (in turn citing *Fundaicao Tupy S.A. v. United States*, 841 F.2d 1101)).

This Court rejected Defendant's arguments and issued an opinion on July 16, 2003, holding the Government in contempt of this Court's August 2001 Preliminary Injunction for issuing liquidation instructions and liquidating the subject entries. *Yancheng Contempt Decision*, 277 F. Supp. 2d at 1364. In holding the Government in contempt, this Court stated that preliminary injunctions issued by the Court of International Trade are essential in preserving a plaintiff's right to judicial review. *Id.* at 1359–60. As developed in this Court's earlier contempt decision, Congress specifically granted the authority to this Court to grant injunctions that suspend liquidation until there has been a "final court decision in the action." *See id.* at 1358–59; *see also* 19 U.S.C. § 1516a(c)(2) ("the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination"). The purpose of this Court's preliminary injunction is to preserve this Court's jurisdiction and to preserve the jurisdiction of the appellate courts. *See Yancheng Contempt Decision*, 277 F. Supp. 2d at 1358. This Court issues preliminary injunctions pursuant to 19 U.S.C. § 1516a(e) requiring the suspension of covered entries through the pendency of the action until all appeals have been exhausted. If such suspension of liquidation did not take place, importers would suffer irreparable harm because

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[2] Pursuant to the renumbering of the USCIT Rules, former Rule 63 is now identified as Rule 86.2.

the Court of Appeals, having no justiciable conflict to resolve, would be constitutionally powerless to remedy any improvident determinations by the trial court. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). The Court of Appeals is without jurisdiction to hear a case if the subject entries have been liquidated prior to appeal. *Id.* Section 1516a(e)(2) specifically states that "[i]f the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or the United States Court of Appeal for the Federal Circuit . . . entries the liquidation of which was enjoined under subsection (c)(2) of this section, shall be liquidated in accordance with the final court decision in the action." 19 U.S.C. § 1516a(e)(2) (emphasis added). It is clear from the statutory scheme of § 1516a that Congress did not intend for the Court of Appeals to be disenfranchised. Based upon the facts that were presented to the Court during the Show Cause hearing, it was evident that if this Court had not intervened at Plaintiff's request, the remaining three entries, upon which the Court of Appeals rested its jurisdiction, would have been liquidated. *See Yancheng Contempt Decision*, 277 F. Supp. 2d at 1352.

The Court of Appeals affirmed this Court's decision in the underlying case on August 4, 2003. *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, 337 F.3d 1332, 1333–34 (Fed. Cir. 2003). Specifically, the Court of Appeals affirmed this Court's holding that Commerce reasonably rescinded the administrative review as to Plaintiff. *Id.* Thus, Plaintiff's entries were held to be subject to the 201.63% antidumping duty rate. The Court of Appeals' mandate issued on September 25, 2003. Before this Court issued a decision regarding damages, Defendant filed its Motion to Vacate the Court's Judgment Entered on July 16, 2003 ("Def.'s Mot. to Vacate").

While the issue of damages and Defendant's Motion to Vacate were under consideration, this Court sent a letter to counsel raising the issue sovereign immunity in the context of this Court awarding attorney fees as damages for contempt pursuant to this Court's Rule 86.2. (*See* Letter from chambers of J. Carman to Counsel of 03/03/04.) The Court specifically brought the Court of Appeals' decision in *M.A. Mortenson Company v. United States*, 996 F.2d 1177 (Fed. Cir. 1993), to the attention of the parties. (*Id.*) The Court provided the parties two-weeks to submit further briefing on this issue. (*Id.*) After this Court granted Defendant's request for an extension of time to file its supplemental brief, both Defendant and Plaintiff submitted additional briefs on the issue of sovereign immunity.

Because the Court of Appeal's decision in *Mortenson* is central to this Court's decision on the issue of sovereign immunity, a brief summary of *Mortenson* follows. In *Mortenson*, the Court of Appeals held

that the United States Claims Court[3] could award attorney fees against the Government for violation of its court rules which authorized attorney fees as sanctions for abuses of discovery. *Mortenson*, 996 F.2d at 1178. The Claims Court procedural rule under examination mirrored the Federal Rules of Civil Procedure ("FRCP") Rule 37, "Failure to Make Disclosure or Cooperate in Discovery; Sanctions." *See id.* at 1183; *see also* FED. R. CIV. P. 37. The Court of Appeals determined that the Equal Access to Justice Act ("EAJA"), Pub. L. No. 96–481, Title II, 1980 U.S.C.C.A.N. 2325 (1980) (codified as amended at various sections of Title 5 and 28 U.S.C.), waived the United States' sovereign immunity for awards of attorney fees under the court's procedural rules. *Id.* at 1180–82. Specifically, the Court of Appeals examined 28 U.S.C. § 2412(b) which states that "[t]he United States shall be liable for such [attorney] fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412. The Court of Appeals reasoned that, based on the legislative history of the EAJA which specifically contemplated awards of attorney's fees for violations of the FRCP, § 2412(b)'s phrase "terms of any statute" should not be narrowly construed. *Id.* at 1181 ("Thus, it is consistent with Congress' intent and the legislative history to interpret 'statute' as including the FRCP."). The Court of Appeals reasoned that because the Claims Court's rule was identical to the FRCP rule, and the Claims Court had been authorized by Congress "to adopt its own rules without the need for supervisory or statutory oversight," the rules of the Claims Court should also be included within the EAJA's "terms of any statute" requirement. *Id.* at 1183. The Court of Appeals asserted that "[i]t is well established that a court's procedural rules promulgated pursuant to statutory authorization are deemed to have the force and effect of law." *Id.* (citing *Weil v. Neary*, 278 U.S. 160, 169 (1929) (additional citations omitted)). Thus, the Court of Appeals held that § 2412(b) of the EAJA waived the Untied States' sovereign immunity for an award of attorney fees under the Claims Court's Rule for violation of discovery orders. *Id.* at 1184.

PARTIES' CONTENTIONS

I. Defendant's Contentions.

A. Motion to Vacate.

First, Defendant seeks relief from this Court's decision of July 16, 2003, wherein this Court held Defendant in contempt of this Court's

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[3] At the time of the *Mortenson* opinion, the court was known as the United States Claims Court. Its name was changed to the United States Court of Federal Claims as part of the Federal Court Administration Act of 1992, Pub. L. No. 102–572, 106 Stat. 4506 (1992).

August 2001 Preliminary Injunction. (Def.'s Mot. to Vacate at 1.) Defendant seeks relief under USCIT Rule 60(b)(1) which states that "the court may relieve a party . . . from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." USCIT R. 60(b)(1). Alternatively, Defendant seeks relief under USCIT Rule 60(b)(6) which allows the Court to grant relief "from a final judgment, order, or proceeding for . . . any other reason justifying relief from the operation of the judgment." USCIT R. 60(b)(6).

At the outset, Defendant notes that "[a]lthough Commerce maintains that its interpretation of the preliminary injunction was reasonable, it did not appeal this issue to the Federal Circuit[ ] because contempt citations cannot be appealed until the order is final and damages are assessed." (Def.'s Mot. to Vacate at 6 (citations omitted).)

Defendant claims that this Court's contempt decision "does not satisfy the required elements for civil contempt" because Plaintiff has not suffered any harm as a result of Defendant's contemptuous liquidations. (*Id.* at 8–9.) Defendant contends that Plaintiff has not been harmed because the duty rate assessed on its entries in violation of this Court's August 2001 Preliminary Injunction was affirmed by the Court of Appeals as the correct rate of duty. (*Id.* at 9.) Defendant stresses that the 28 entries liquidated in violation of this Court's August 2001 Preliminary Injunction were done so "at the same PRC-wide duty rate of 201.63[%] that was affirmed by this Court and the appellate court." (*Id.*) Thus, Defendant contends that this Court's contempt decision is mistaken because damages, a necessary element of contempt, has not been established. (*Id.*) Defendant claims that "permitting [the *Yancheng Contempt Decision*] to stand would constitute a mistake and grounds for vacatur pursuant to Rule 60(b)(1)." (*Id.*) Defendant asserts that there is no remedial purpose to be served by this Court's civil contempt decision. (*Id.*) Defendant contends that Plaintiff "has not suffered any actual losses which require compensation." (*Id.* at 10.) Lastly, Defendant states that if this Court declines to vacate its order under Rule 60(b)(1), Defendant "propos[es], as an alternative, that the extraordinary circumstances (as presented in [its] primary argument) warrant vacatur pursuant to the 'catch-all' provision of Rule 60(b)(6)." (*Id.* at 12.)

B. Sovereign Immunity.

Defendant contends that this Court "does not possess jurisdiction to entertain claims seeking the award of attorney fees against the United States pursuant to [USCIT Rule] 86.2." (Def.'s Supp. Br. Concerning the Court's Jurisdiction to Assess Money Damages Against the United States Pursuant to the Court's Contempt Rule ("Def.'s Supp. Br.") at 4.) Defendant contends that this Court cannot "invalidate the sovereign immunity of the United States by issuing a local

rule that allows the assessment of attorney fees against the United States." (*Id.* at 2, 6–7.) Defendant contends that there is not an express waiver of sovereign immunity present in this case as required by Supreme Court precedents. (*Id.* at 4.) Defendant contends that "[e]ven if there has been some wavier of immunity, the Government is not subject to monetary liability unless the waiver unequivocally expresses consent to such claims." (*Id.* at 5 (citations omitted).) Defendant contends that "[n]o statute waives sovereign immunity by authorizing funds for the payment of attorney fees pursuant to the circumstances presented in this case." (*Id.* at 6.) Defendant asserts that the "sole support proffered" for waiver of sovereign immunity is "local rule" 86.2. (*Id.*) Defendant contends that "this local rule — in addition to lacking an express waiver — is not an act of Congress." (*Id.*)

Defendant contends that this Court should not follow the Court of Appeals' holding in *Mortenson* "because: (1) that case's holding has been invalidated by subsequent Supreme Court precedent; and (2) the facts of this case are inapposite." (*Id.* at 9.) First, Defendant claims that the Court of Appeals relied on the legislative history of the EAJA to hold that "FRCP 37, in conjunction with 28 U.S.C. § 2412(b) operated as a waiver of sovereign immunity." (*Id.* (citing *Mortenson*, at 1181–82).) Defendant contends that the Supreme Court's decision in *Lane v. Pena*, 518 U.S. 187 (1996), "expressly invalidated" the Court of Appeals' reasoning in *Mortenson*. (*Id.* at 10.) Quoting *Lane v. Pena*, Defendant contends that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." (*Id.* at 10 (quoting *Lane v. Pena*, 518 U.S. at 192).) Thus, Defendant asserts that the Court of Appeals' "sole basis for . . . finding [ ] a waiver of sovereign immunity" has been invalidated by the Supreme Court. (*Id.*)

Second, Defendant contends that, even if *Mortenson* "retained any legal force," the reasoning in *Mortenson* is not applicable to this case because "there is no corresponding language in the EAJA's legislative history concerning contempt proceedings." (*Id.*) Further, Defendant contends that unlike the FRCP, this Court's Rule 86.2 does not carry "the force of statutes" because the Court of Appeals has explicitly held that this Court's rules are "'not statutory' even in the presence of an analogous Federal Rule of Civil Procedure." (*Id.* at 11 (citing *Stone Container Corp. v. United States*, 229 F.3d 1345, 1355 (Fed. Cir. 2000)).) Defendant asserts that there is not an analogous rule to this Court's Rule 86.2 in the Federal Rule of Civil Procedure, as there was for the rule considered in *Mortenson*. (*Id.* at 7.)

Defendant concludes that "a court's local rules cannot invalidate the sovereign immunity of the United States. . . . Accordingly, the Court does not possess jurisdiction to entertain claims seeking attorney fees against the United States pursuant to [USCIT Rule] 86.2." (*Id.* at 11–12.)

C. Damages.

Should the Court find a waiver of sovereign immunity, Defendant asserts that Plaintiff is not entitled to attorney fees as damages because "Rule [86.2] does not contemplate or authorize an award of attorney fees in the absence of any other damages." (Def.'s Reply at 3.) Defendant contends that Rule 86.2 allows this Court to "include" attorney fees when awarding damages, but does not permit an award of fees without an award of other damages. (*Id*.) Even if fees were allowed under Rule 86.2, Defendant contends that Plaintiff was not required to initiate these proceedings to preserve its right to judicial review. (*Id*. at 3–4.) Rather, Defendant contends that Plaintiff "could have taken the advice of the Government and requested an extension of the injunction or a stay pending appeal, to which the Government was willing to consent." (*Id*. at 4.) Defendant also argues, as it did in the earlier contempt proceedings, that the proceedings were not necessary because Plaintiff's importer filed protests of the liquidations of some of the subject entries with Customs. (*Id*.) Therefore, Defendant contends that the status quo was preserved because Customs "generally refrains from addressing the [protested] issue until the underlying litigation is resolved." (*Id*.) Defendant asserts that the contempt proceedings, "while instructive to resolve a genuine issue of legal disagreement, were not necessary to preserve any rights to meaningful judicial review of Commerce's determination." (*Id*. at 5.)

Defendant also claims that attorney fees should not be awarded because the Government's position, as detailed in its Response to the Court's Order to Show Cause, for liquidating the subject entries in violation of this Court's August 2001 Preliminary Injunction was "substantially justified." (*Id*. at 5–6.) Finally, Defendant claims that "the amounts claimed by plaintiff are questionable and excessive." (*Id*. at 6.)

II. Plaintiff's Contentions.

A. Motion to Vacate.

___ Plaintiff takes the position that this Court's contempt decision should stand and the Court should award damages to Plaintiff as requested in Plaintiff's Memorandum on Damages to be Awarded Based on a Finding of Contempt for Violation of the Injunction Against Liquidation of Subject Entries ("Pl.'s Mem. on Damages"). (Pl.'s Opp'n to Def.'s Mot. To Vacate Finding of Contempt ("Pl.'s Opp'n") at 3, 5.) First, Plaintiff contends that in its contempt decision, this Court "essentially found that damages in the form of fees and costs had been incurred as a result of defendant's contumacious conduct." (*Id*. at 4.) Plaintiff asserts that this Court "merely postponed its calculation of damages until it could measure the 'full effect of the Government's noncompliance.' " (*Id*. (quoting *Yancheng*

Contempt Decision, 277 F. Supp. 2d at 1364).) Plaintiff contends that this Court was not mistaken in holding Defendant in contempt; thus, Defendant's Motion to Vacate under Rule 60(b)(1) should be denied. (*Id*.) Further, Plaintiff asserts that Defendant "has also failed to articulate any extraordinary circumstances that would support vacatur under Rule 60(b)(6)." (*Id*. at 5.)

B. Sovereign Immunity.

Plaintiff contends that the doctrine of sovereign immunity does not bar this Court from awarding attorney fees as damages for contempt. (Pl.'s Further Briefing on Att'y Fees under Rules 86.2 and Sovereign Immunity as Discussed in *M.A. Mortenson Co. v. United States* ("Pl's Supp. Br.") at 3.) Plaintiff contends that, in considering the issue of sovereign immunity, the questions before this Court are "whether the holding of the Court of Appeals in *Mortenson* should be narrowly construed 1) to apply only to sanctions imposed under the Rules of the Claims Court, as opposed to the Rules of the Untied States Court of International Trade, or 2) to apply only to attorney fees awarded as sanctions for violations of discovery orders, as opposed to fees awarded as sanctions for violations of other orders issued by the Court." (*Id*. at 2.) Plaintiff asserts that the "answer to both questions is no." (*Id*.)

Plaintiff contends that *Mortenson* ruled that the United States' sovereign immunity for an award of attorney fees was waived by § 2412(b) of the EAJA. (*Id*. at 3.) Plaintiff contends that *Mortenson* held that under § 2412(b), in any action in which jurisdiction properly lies in the court, the United States is liable for an award of attorney fees to the same extent that a private party would be liable. (*Id*. at 3–4.) Plaintiff contends that there is no question that this Court has jurisdiction of this action. (*Id*. at 2–3.) Therefore, Plaintiff asserts that the United States should be liable for attorney fees to the same extent that a private litigant would be before this Court. (*Id*. at 3–4.) Plaintiff contends that the waiver of sovereign immunity in § 2412(b) of the EAJA was "for various abuses of the litigation process." (*Id*. at 3 (quoting *Mortenson*, 996 F.2d at 1182).) Plaintiff asserts that in *Mortenson*, the Court of Appeals "repeatedly emphasized [that] the Equal Access to Justice Act was intended to allow federal courts to award attorney fees against the Government to the same extent that fees may be awarded against private litigants." (*Id*. at 3–4.) Plaintiff notes that under 28 U.S.C. § 1585, this Court has all the powers in law and equity that the federal district courts have, and this Court also has the statutory authority to grant any form of appropriate relief in a civil action under 28 U.S.C. § 2643(c)(1). (*Id*. at 3)

Further, Plaintiff contends that *Mortenson* should not be narrowly read to only allow attorney fees in instances of violation of discovery orders. (*Id*.) Plaintiff emphasizes that the injunction that the Gov-

ernment was found to violate in this action "was issued to preserve the Court's jurisdiction," and that this action would have been rendered moot if Plaintiff had not brought the Government's violation of the injunction to the Court's attention. (*Id*. at 4.) Plaintiff urges this Court to "reject the notion that the government can frustrate and undermine the proceedings of this tribunal and leave the Court of International Trade helpless to preclude such conduct on the government's part." (*Id*.)

Plaintiff asserts that *Lane v. Pena* "does not require the Court to disarm itself in the face of misconduct by the Government." (*Id*.) Rather, Plaintiff contends that *Lane v. Pena* merely reiterates "the well-established principle that waivers of sovereign immunity must be clear." (*Id*. at 5.) Plaintiff contends that a later decision by the Supreme Court addressing sovereign immunity concluded that "the statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the [administrative agency] the relevant power, produce evidence of a waiver that satisfies the stricter [narrow legislative construction] standard." (*Id*. (quoting *West v. Gibson*, 527 U.S. 212, 222 (1999)).) Plaintiff contends that the Court of Appeals has already considered "the statutory language, purpose and history of the EAJA and concluded that the United States has waived its sovereign immunity with respect to awards of attorney fees pursuant to the rules of a federal court as a sanction for violations of that court's orders." (*Id*.) Plaintiff urges this Court to reach the same conclusion. (*Id*.)

C. Damages.

Should the Court find a waiver of sovereign immunity, Plaintiff asks this Court to award damages in the form of attorney fees and costs as detailed in Plaintiff's Memorandum of Damages. (*Id*. at 5–6.) In its Memorandum on Damages, Plaintiff cites USCIT Rule 86.2, which provides that if a party is found in contempt of an order of this Court, the Court shall enter an order that "fix[es] the fine, if any, imposed by the court, which fine shall include the damages found, and naming the person to whom such fine shall be payable." (Pl.'s Mem. on Damages at 1 (quoting USCIT R. 86.2).) Plaintiff notes that Rule 86.2 also states that "a reasonable counsel fee, necessitated by the contempt proceeding, may be included as an item of damages." (*Id*. at 2 (quoting USCIT R. 86.2).) Plaintiff requests that this Court order Defendant to pay all attorney fees and costs incurred in connection with counsel's efforts to enforce the Court's injunction and the costs of participating in the contempt proceedings. (*Id*. at 5–6.) Plaintiff asserts that but for Defendant's unlawful liquidations, it would not have accumulated these fees. (*Id*. at 2, 5–6.)

Plaintiff's counsel submitted a declaration in accordance with 28 U.S.C. § 1746, stating that the "total of the fees and costs related only to the plaintiff's efforts to enforce the injunction entered in this

matter is $20,761.25 in fees and $756.15 in costs." (Decl. of J. Kevin Horgan ¶3.) Plaintiff's counsel also submitted billing records detailing the fees and costs associated with Plaintiff's efforts to enforce the injunction. (*Id*.)

ANALYSIS

I. Defendant's Motion to Vacate is Denied.

This Court denies Defendant's Motion to Vacate because this Court's decision of July 16, 2003, was not a final decision as required for relief under USCIT Rule 60. Under USCIT Rule 60(b), a party may seek relief "from a final judgment, order, or proceeding." USCIT Rule 60(b) (emphasis added). "In some circumstances, a court may use the Federal Rules of Civil Procedure as a guide to construe the USCIT Rules." *Gilmore Steel Corp., Or. Steel Mills Div. v. United States*, 652 F. Supp. 1545, 1549 n.5 (Ct. Int'l Trade 1987) (citing *Sumitomo Metal Indus. v. Babcock & Wilcox Co.*, 669 F.2d 703, 705 n.3 (C.C.P.A. 1982) (where language of the USCIT rule and the FRCP rule is identical, the court properly looks to interpretations of the FRCP as an aid to construing the USCIT rule) and USCIT R. 1 ("The court may refer for guidance to the rules of other courts.")). In applying FRCP Rule 60, courts have held that "a 'final' judgment is needed to support a Rule 60(b) motion." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE — CIVIL § 60.23 (3rd ed. 1999). Here, the language of USCIT Rule 60 and FRCP Rule 60 is nearly identical. *Compare* FED. R. CIV. P. 60(b) *with* USCIT R. 60(b). Thus, this Court reasons that USCIT Rule 60, like its FRCP counterpart, allows for relief only from final judgments, final orders, or final proceedings.

Defendant's Motion to Vacate seems to acknowledge that this Court's order of July 16, 2003, is not final. On page six of its Motion to Vacate, Defendant contends that "it did not appeal [the preliminary injunction] issue to the Federal Circuit, because contempt citations cannot be appealed until the order is final and damages are assessed." (Def.'s Br. at 6 (emphasis added) (citing *Seiko Epson Corp. v. Nu-kote Int'l, Inc.*, 190 F.3d 1360, 1369 (Fed. Cir. 1999).) Yet, Defendant seeks relief under Rule 60 which only allows relief from final judgments.

This Court's contempt decision was not a final judgment or a final order, as required under Rule 60(b), precisely because, as Defendant notes, the Court's decision was interlocutory and could not be appealed until damages were assessed. *See Seiko Epson Corp.*, 190 F.3d at 1369 ("A contempt order is final and appealable when the opportunity to purge the contempt has passed and the position of the parties has been affected by the contempt order.") (citing *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1273

(9th Cir. 1976) (contempt order deemed final and appealable when the that were fines assessed were ordered to be paid)).

However, because the issue of damages is addressed below and in the interest of judicial economy, this Court will treat its decision as final for the purposes of addressing the merits of Defendant's Motion to Vacate. Under Rule 60(b), this Court "may relieve a party . . . from a final judgment . . . for . . . mistake, inadvertence, surprise, or excusable neglect." USCIT R. 60(b)(1). The Court may also grant vacatur "for . . . any other reason justifying relief from the operation of the judgment." USCIT R. 60(b)(6). This Court finds that Defendant has failed to present any evidence which would support vacatur under Rule 60(b). For the reasons set forth in the *Yancheng Contempt Decision* and for the reasons herein, this Court holds that Defendant's characterization of this Court's decision as "mistaken" is without merit. Further, this Court holds that the other possible grounds for vacatur under Rule 60(b)(1) are not present in this action. Additionally, this Court holds that Defendant has failed to show any extraordinary circumstances required for relief under Rule 60(b)(6). *See Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993) ("To justify relief under subsection (6), a party must show 'extraordinary circumstances.' " (citations omitted)).

II. This Court Cannot Award Plaintiff Damages in the Form of Attorney Fees Associated with the Contempt Proceedings for Defendant's Violation of this Court's August 2001 Preliminary Injunction Because the United States Has Not Waived its Sovereign Immunity for Such an Award.

In this Court's earlier contempt decision, the Court specifically reserved decision regarding damages stating that "the full effect of the Government's noncompliance with the Court's August 2001 Preliminary Injunction will not be known until the Federal Circuit decides the underlying case on appeal and the parties have had an opportunity to petition for a writ of certiorari." *Yancheng Contempt Decision*, 277 F. Supp. 2d at 1364. Now that the Court of Appeals has issued its decision on the underlying case, *see Yancheng*, 337 F.3d 1332, and the time to petition the Supreme Court for a writ of certiorari has expired, *see* SUP. CT. R. 13, this Court turns to the issue of damages. This Court finds that, but for Defendant's contumacious actions in issuing the liquidation instructions in November 2002 and in liquidating the entries in January 2003, Plaintiff would not have incurred the attorney fees necessary to enforce this Court's August 2001 Preliminary Injunction. Contrary to Defendant's contentions in its Motion to Vacate, this Court finds that Plaintiff suffered damages as a result of Defendant's contemptuous liquidations. Namely, Plaintiff incurred attorney fees as a result of the Government's violation of this Court's August 2001 Preliminary Injunction. Although the

Court of Appeals upheld the duty rate that was applied by Customs when it liquidated Plaintiff's entries in violation of this Court's order, that fact does not relieve Defendant from responsibility for its contumacious behavior in November 2002 and January 2003.

Civil contempt is intended to "compensate for losses or damages sustained by reason of noncompliance." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303–04 (1947); *Penfield Co. of Cal. v. Sec. & Exch. Comm'n*, 330 U.S. 585, 590 (1947); *Maggio v. Zeitz*, 333 U.S. 56, 68 (1948)). Civil contempt may be punished by a remedial fine, which compensates the party protected by the injunction for the effects of the other party's noncompliance. *United Mine Workers*, 330 U.S. at 303–04. In contempt proceedings, under the Rules of this Court, a party may be compensated for reasonable attorney fees "necessitated by the contempt proceeding." USCIT R. 86.2. However, because this is an action against the Government, this Court cannot award money damages, even in the form of attorney fees, unless there has been a waiver of sovereign immunity. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) ("Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees." (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267–68, & n.42 (1975))); *see also Bohac v. Dep't of Agric.*, 239 F.3d 1334, 1339 (Fed. Cir. 2001) ("we cannot allow recovery unless there has been a waiver of sovereign immunity").

The Supreme Court has ruled that "[a] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied." *Lane v. Pena*, 518 U.S. at 192 (emphasis added) (citations omitted). "Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Id*. (citations omitted); *see also United States v. Nordic Village*, 503 U.S. 30, 34 (1992) ("[T]he Government's consent to be sued must be 'construed strictly in favor of the sovereign,' and not 'enlarged . . . beyond what the language requires.' " (citations omitted)).

Defendant characterizes the issue that is before the Court as "[w]hether the Court may invalidate the sovereign immunity of the United States by issuing a local rule[4] that allows the assessment of attorney fees against the United States." (Def.'s Supp. Br. at 2.) Defendant misstates the issue. This Court's Rule 86.2 does not attempt to "invalidate" the sovereign immunity of the United States. There is no language in this Court's Rule 86.2 that addresses sovereign im-

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[4] This Court's rules are procedural rules issued pursuant to 28 U.S.C. § 2633(b); they are not local rules like those issued by district courts. *See* 28 U.S.C. §§ 2071, 2072, 2633; *see also, Mortenson*, 996 F.2d at 1183 ("the United States district courts . . . lack the power to promulgate their own rules").

munity or the Court's ability to award fees against the United States. Rather, Congress has already specifically waived sovereign immunity for an award of attorney fees in certain circumstances under the EAJA. *See* 28 U.S.C. § 2412(b). This Court must examine the circumstances of this case to determine if the requirements under § 2412(b) of the EAJA are met. Thus, the issue before the Court is whether the EAJA waives sovereign immunity for an award of attorney fees as damages for the Government's civil contempt. After careful examination of the language of the EAJA, the Court of Appeals' decision in *Mortenson*, and the relevant Supreme Court precedents regarding sovereign immunity, this Court holds that it cannot award attorney fees as damages for contempt against the Government because the United States has not waived its sovereign immunity for such an award.

Section 2412(b) of the EAJA states:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States . . . in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b). Adhering to the Supreme Court's strict statutory construction requirements for waiver of sovereign immunity, this Court must reach a different result in applying § 2412(b) than that reached by the Court of Appeals in *Mortenson*.

This Court holds that the circumstances of this case prevent this Court from awarding attorney fees to Plaintiff under § 2412(b) of the EAJA for the following reasons: 1) Plaintiff is not the "prevailing party"; and 2) this Court's Rule 86.2 is not "the terms of any statute." First, § 2412(b) specifically allows the court to award attorney fees against the United States "to the prevailing party in any civil action." 28 U.S.C. § 2412(b). Although Plaintiff prevailed in the contempt proceedings, Plaintiff is not the "prevailing party" in the action as required for application of § 2412(b). *See Former Employees of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1364 (Fed. Cir. 2003) (noting that "[t]he Supreme Court has interpreted the phrase 'prevailing party' consistently in all federal fee-shifting statutes" and that "to be a prevailing party, one must 'receive at least some relief on the merits.' " (quoting *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 603 (2001))); *see also A. Hirsh, Inc. v. United States*, 948 F.2d 1240, 1245 (Fed. Cir. 1991). The Court of Appeals has stated that "[a]lthough [the court] recognize[s] that a 'prevailing party' is not limited 'to a victor only after entry of a final judgment following a full trial

on the merits,' winning on a particular point or ground, even if it may result in permanent change in government practice or may clarify muddled law, does not necessarily entitle a party to EAJA fees." *A. Hirsh, Inc.*, 948 F. 2d at 1245 (citation omitted). The Court of Appeals ruled that the court must "look at the claimed 'victory' in the context of the litigation as a whole to discern whether the party has achieved the substantive relief it sought." *Id*. As detailed in the facts above, Defendant prevailed on the merits of the underlying case. *Yancheng Baolong*, 337 F.3d at 1333–34. Thus, Plaintiff is not the "prevailing party" under the EAJA.[5]

Second, even if Plaintiff were the prevailing party, § 2412(b) only waives sovereign immunity for an award attorney fees "to the same extent that any other party would be liable under the common law[6] or under the terms of any statute which specifically provides for such an award." 28 U.S.C. § 2412(b) (emphasis added). This Court cannot award attorney fees to Plaintiff under USCIT Rule 86.2 because Rule 86.2 is not "the terms of any statute" as required for a wavier of sovereign immunity for awarding attorney fees under § 2812(b). In *Mortenson*, the Court of Appeals used the legislative history of the EAJA to infer that "the phrase 'terms of any statute' should not be read narrowly" and should include the Federal Rules of Civil Procedure and the Rules of the United States Claims Court. *Mortenson*, 996 F.2d at 1181, 1184 ("In light of . . . Congress' inten-

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[5] This Court notes that the Court of Appeals did not address the issue of "prevailing party" in *Mortenson*, although the issue was raised in the lower court. *See M.A. Mortenson Co. v. United States*, 15 Cl. Ct. 362, 363 n.2 (1988). In *Mortenson*, attorney fees were awarded at an interlocutory phase of the litigation; it had not yet been determined which side was the "prevailing party" in the action. *Id*. Although the Court of Appeals heard the Government's appeal of the award of attorney fees after the parties had settled their claims, the court did not address the issue. *See Mortenson*, 996 F.2d at 1179.

[6] Recovery under the common law was not raised as an issue in this case. The parties focused their arguments on the availability of recovery under this Court's Rule 86.2. Under the common law "American Rule," each party must bear its own attorney fees and costs. *Alyeska Pipeline Serv. Co.*, 421 U.S. at 247. In listing the limited common law exceptions to the American Rule, the Supreme Court stated that "a court may assess attorneys' fees for the 'willful disobedience of a court order.' " *Alyeska*, 421 U.S. at 258 (quoting *Fleischmann Distilling Corp. v. Maier Brewing*, 386 U.S. 714, 718 (1967)). Although this Court need not address this issue, the Court does note that the circuits are split on whether or not they require a finding of willfulness in order to assess attorney fees for contempt. *Compare Food Lion v. United Food & Commercial Workers Int'l Union*, 103 F.3d 1007, 1017 n.14 (D.C. Cir. 1997) ("[W]e see no reason why a district court should not be authorized to include legal fees specifically associated with the contempt as part of the compensation that may be ordered to make the plaintiff whole, even absent a showing of willful disobedience by the contemnor. Numerous courts have so held." (citing cases from the 8th, 9th, 11th, and D.C. Circuits) and *John Zink Co. v. Zink*, 241 F.3d 1256, 1261–62 (10th Cir. 2001) ("We agree with the district court and conclude that a finding of willfulness is not required to award attorney fees in a civil contempt proceeding.") *with Omega World Travel, Inc. v. Omega Travel Inc.*, 710 F. Supp. 169, 172–73 (E.D. Va. 1989), *aff'd without opinion*, 905 F.2d 1530 (4th Cir. 1990) (stating that the court had "considered *Alyeska*'s use of the phrase 'willful disobedience' and determined that a contemnor's refusal to comply with a court order must rise at least to the level of obstinance or recalcitrance.").

tion that a court be allowed 'in its discretion to award fees against the United States to the same extent it may presently award such fees against other parties,' we find no basis on which to differentiate between the abilities of the federal district courts and the Claims Court to award monetary sanctions for abuse of discovery against the United States pursuant to either the FRCP or the [Rules of the United States Claims Court]."') (quoting H.R. Rep. No. 96–1418, at 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984). Several years after the Court of Appeals' decision in *Mortenson*, the Supreme Court in *Lane v. Pena* held that "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *Lane v. Pena*, 518 U.S. at 192. Following the Supreme Court's analysis, this Court feels constrained to construe § 2812(b)'s phrase "terms of any statute" without looking to the legislative history of the EAJA.[7]

Under the Supreme Court's announced standard in *Lane v. Pena*, this Court cannot use the legislative history of the EAJA to imply a waiver of sovereign immunity for an award of attorney fees for contempt under this Court's Rule 86.2. This Court's rules are not "the terms of any statute." This Court, like the Claims Court in *Mortenson*, has been authorized by Congress to prescribe its own rules of practice and procedure. *See* 28 U.S.C. § 2633(b) ("The Court of International Trade shall prescribe rules governing summons, pleadings, and other papers, for their amendment, service, and filing, for consolidations, severances, suspensions of cases, and for other procedural matters."). Acting pursuant to that authority, this Court promulgated Rule 86.2 which states that this Court may "include[ ] as an item of damage," "[a] reasonable counsel fee, necessitated by the contempt proceedings."[8] USCIT R. 86.2. Despite the fact that this Court's Rules are promulgated pursuant to clear statutory authority and are "deemed to have the force and effect of law,"

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[7] This Court notes that there is some indication in a later Supreme Court opinion that suggests that "statutory language, taken together with statutory purposes, history, and the absence of any convincing reason for denying the [administrative agency] the relevant power [to award compensatory damages against the United States] produce evidence of a waiver [of sovereign immunity]." *West v. Gibson*, 527 U.S. at 222. Indeed, the Court of Appeals has cited this Supreme Court case for the proposition that "it is possible to find support for a waiver of sovereign immunity not only in statutory language, but also in statutory purpose and history." *Ins. Co. of the West v. United States*, 243 F.3d 1367, 1372 (Fed. Cir. 2001) (citing *West v. Gibson*, 527 U.S. at 222)); *see also Bohac*, 239 F.3d at 1339 ("[T]he Supreme Court recently appears to have allowed greater latitude for interpreting the scope of sovereign immunity waivers in the light of 'statutory purposes, history, and the absence of convincing reason for denying' a wavier." (quoting *West v. Gibson*, 527 U.S. at 222)). However, this Court cannot ignore the Supreme Court's clear instructions in *Lane v. Pena* that waivers of sovereign immunity cannot be implied through legislative history.

[8] Although Plaintiff requests both attorney fees and costs, the Court will only consider Plaintiff's request for attorney fees because USCIT Rule 86.2 states that "a reasonable counsel fee . . . may be included as an item of damage." USCIT R. 86.2 (emphasis added). Pursuant to the specific language of the Rule, this Court declines to examine the costs requested by Plaintiff.

Mortenson, 996 F.2d at 1183 (citing *Weil v. Neary*, 278 U.S. at 169), the Rules of this Court are not statutory. *See Stone Container*, 229 F.3d at 1354. Thus, this Court's Rules are not "the terms of any statute" as required for waiver of sovereign immunity under § 2412(b) of the EAJA.

Although the Court cannot use the legislative history to find a waiver of sovereign immunity in this case, it was clearly Congress' intent in passing the EAJA to hold the United States to the same standards for violations of procedural rules and abuses of the litigation process as private litigants. *See, e.g.*, S. REP. NO. 96–253, at 4 (Star Print 1979) (Under the EAJA "[attorney] [f]ees may also be recovered against the United States under Rule 37, [FRCP], which provides for sanctions for failure to make discovery[,] and under the terms of any Federal statute which authorizes awards against private parties unless the statute expressly provides otherwise. There appears to be no justification for exempting the United States in these situations; the change simply reflects the belief that, at a minimum, the United States should be held to the same standards in litigating as private parties."); H.R. REP. NO. 96–1418, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987 ("[A]t a minimum, the United States should be held to the same standards in litigating as private parties. As such, it is consistent with the history of [§] 2412 which reflects a strong movement by Congress toward placing the Federal Government and civil litigants on a completely equal footing."). In spite of this legislative history, this Court holds that the waiver of sovereign immunity in § 2412(b) does not pass the strict statutory construction standard articulated by *Lane v. Pena* for waiver of sovereign immunity as to damages for contempt under this Court's Rule 86.2.

As detailed in Plaintiff's submission to the Court, Plaintiff's counsel worked diligently to discover the facts surrounding the liquidation of the subject entries and to inform the Court of the progress of the parties in resolving this matter. (Pl.'s Mem. on Damages Ex. A.) However, because of the restrictions placed on this Court by the doctrine of sovereign immunity, this Court does not possess jurisdiction to award attorney fees to Plaintiffs as damages for Defendant's contumacious acts.[9]

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[9] The broader question presented by the circumstances of this case, the Government's immunity to monetary sanctions for violation of court orders, continues to be debated among the circuits. One legal commentator has noted that "[c]ourts have given uncertain and varying indications on the applicability of sovereign immunity in the contempt context." Recent Case, 108 HARV. L. REV. 965, 970 n.34 (1995) (comparing *United States v. Horn*, 29 F.3d 754, 765 n.13 (1st Cir. 1994) ("The better reasoned decisions hold that, when [sovereign immunity and the court's inherent supervisory powers] lock horns, contempt is barred by sovereign immunity.") with *Armstrong v. Executive Office of The President*, 821 F. Supp. 761, 773 (D.D.C. 1993) ("The Court is aware that imposition of monetary sanctions against the federal government often is barred by the doctrine of sovereign immunity.

CONCLUSION

Defendant's Motion to Vacate the Court's Judgment of July 16, 2003, is denied. Based on the Court's lack of jurisdiction under the doctrine of sovereign immunity, Plaintiff's request for attorney fees as damages for contempt is denied.

Slip Op. 04–43

UNITED STATES, PLAINTIFF, v. LEONARD GULDMAN AND L&M FIRING LINE, INC., DEFENDANTS.

Court No. 03–00047

[Defendants' motion for summary judgment denied.]

Dated: April 28, 2004

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David Samuel Silverbrand*, *Cristina Carlucci Ashworth*, and *William K. Olivier*), *David Goldfarb*, Assistant Chief Counsel, *Jennifer Stilwell*, Attorney, United States Bureau of Customs and Border Protection, of counsel, for plaintiff.

Law Offices of Charles H. Bayar (*Charles H. Bayar*), *James A. Dubee*, of counsel, for defendants.

However, . . . the Court finds the doctrine inapplicable to the imposition of coercive fines.), *rev'd on other grounds*, 1 F.3d 1274, 1290 & n.13 (D.C. Cir. 1993)). *See also*, *Coleman v. Espy*, 986 F.2d 1184, 1191 (8th Cir. 1993) ("[W]e will not imply into [18 U.S.C. § 401] an express waiver of sovereign immunity for the federal government to be sued for civil compensatory contempt."); *Barry v. Bowen*, 884 F.2d 442, 444 (9th Cir. 1989) (reasoning that the court could not find "anything which suggests that the United States expressly has waived its sovereign immunity with respect to contempt sanctions.")

Additionally, the circuits cannot agrees on whether sovereign immunity bars the courts from imposing sanctions against the Government under the FRCP for violations of court orders. One judge in the Eighth Circuit has noted that "[i]n recent decisions dealing with the government's sovereign immunity against monetary sanctions imposed under various rules of civil and appellate procedure, several circuit courts have condoned awards of attorney fees and costs against the federal government despite the absence of express waivers." *McBride v. Coleman*, 955 F.2d 571, 582 n.8 (8th Cir. 1992) (dissenting opinion of Chief Judge Lay) (citing *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988) (rejecting the Government's claim of sovereign immunity to FRCP Rule 11 sanctions finding a waiver under the EAJA); *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991) (affirming Rule 11 sanctions against the Government despite sovereign immunity objections and explicitly rejecting the EAJA theory relied upon by the Tenth Circuit, grounding its opinion on the FRCP alone); *United States v. Nat'l Med. Enters.*, 792 F.2d 906 (9th Cir. 1986) (upholding compensatory sanctions against the Government under FRCP Rule 37(b)); *In re Good Hope Indus.*, 886 F.2d 480 (1st Cir. 1989) (affirming an award against the Government under Federal Rule of Appellate Procedure 38)).

Such disparate application of the doctrine of sovereign immunity for violations of court orders invites Congressional intervention.

MEMORANDUM OPINION AND ORDER

RESTANI, Chief Judge:

Defendants move for summary judgment in this action, in which the Government seeks to enforce a civil penalty for Defendants' alleged fraudulent, grossly negligent, and negligent importation of a firearm. Defendants' motion presents two issues. First, the court must determine whether the Government's allegedly improper service of the summons and complaint precludes it from exercising personal jurisdiction over Defendants. If personal jurisdiction exists, the court must then determine whether the statute of limitations bars the Government's claims. For the reasons that follow, Defendants' motion is denied.

JURISDICTION AND STANDARD OF REVIEW

The court has subject matter jurisdiction over this penalty recovery action pursuant to 28 U.S.C. § 1582(1) (2000). Summary judgment to Defendants is appropriate only "if 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 that the moving party is entitled to judgment as a matter of law." USCIT R. 56(d).

BACKGROUND

The material facts are not in dispute. Defendants purchased an Express Maxim firearm from S.A.B. Societa Armi Bresciane S.r.L. ("Gamba Italy") in early 1996 for $27,500 and a small credit from Gamba Italy.[1] First National Gun Banque, d/b/a Gamba USA, was the importer of record for the Maxim, which entered into U.S. commerce through the port of Denver, Colorado, on or about March 29, 1996, Entry No. 110–0566524–3. Gamba USA presented an invoice to the United States Customs Service ("Customs"), now known as the United States Bureau of Customs and Border Protection, that grossly understated the firearm's purchase price at $12, which in turn greatly reduced the amount of import duties and other fees collected by Customs. Customs treated the initial declaration as a clerical error and determined that the invoice should have read $12,000, the actual purchase price of the basic weapon. Compl. ¶7, Defs.' Mot. Summ. J. Ex. A. An additional invoice in the amount of $15,500 for

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[1] It is undisputed that the firearm itself cost $12,000, and that defendants paid an additional $15,500 for extensive custom engraving. Plaintiff avers that the credit note taken from Gamba Italy was for $3000, but Defendants maintain that the note was actually for 3,000 Italian lira (approximately $690). Compl. ¶9, Defs.' Mot. Summ. J. Ex. A; Answer ¶8, Defs.' Mot. Summ. J. Ex. B. The parties' factual dispute on this point is not material to the disposition of the present motion.

extensive custom engraving of the Maxim, which was allegedly sent only to Defendants, was never supplied to Customs.[2]

As a result, Customs issued Defendants a Notice of Penalty or Liquidated Damages Incurred and Demand for Payment ("Penalty Notice") in the amount of $52,000 under 19 U.S.C. § 1592 on August 21, 1997. Defs.' Mot. Summ. J. Ex. F. The Penalty Notice advised that, by failing to inform the importer of record and/or Customs of the true value of the firearm, Defendants caused the actual duties, merchandise processing fees, and excise taxes not to be paid, as well as caused the correct Bureau of Alcohol, Tobacco and Firearms license not to be filed. *Id.* The Notice stated that "[t]he penalty is issued at the fraud level for the domestic value of the rifle." *Id.*

In exchange for a mitigated penalty of $16,712.08 and an extension of time in which to pay it, Defendant Leonard Guldman, President of L&M Firing Line, executed a series of one-year waivers of the limitations period in 19 U.S.C. § 1621. Customs prepared the waivers, which Guldman had only to sign and date. The first waiver was signed on August 27, 2000, and waived the statute of limitations for one year, "commencing with the date of execution." Pl.'s Opp. to Defs.' Mot. Summ. J. Ex. 1. The Chief of the Penalties Branch, Charles D. Ressin, acknowledged the waiver "commencing on August 27, 2000 and effective through August 27, 2001," a copy of which was forwarded to Defendants approximately two months later. *Id.* Exs. 2 & 5. Defendants again waived the statue of limitations on April 13, 2001, "for a period of one (1) year, commencing with the date of execution." *Id.* Ex. 3. Chief Ressin again confirmed receipt of the waiver by letter and stated that it was "effective through April 13, 2002." *Id.* Ex. 4. A copy of the acknowledgment was forwarded to Defendants by letter dated May 24, 2001. *Id.* Ex. 6. Guldman executed the third and final waiver on February 5, 2002. Defs.' Mot. Summ. J. Ex. H. It was, in all material respects, identical to the two prior waivers Guldman had signed. Customs again sent a letter to Guldman acknowledging that "the waiver is made for a one-year period commencing on February 5, 2002, and effective through February 5, 2003." *Id.* Ex. I.

Throughout this time, the parties' attempts to resolve the matter were unsuccessful. Customs then filed the summons and complaint in this action on February 5, 2003, one year and one day after Guldman executed the final one-year waiver of the statute of limitations. The complaint alleged that Defendants caused the Maxim firearm to

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[2] In its complaint, Customs alleged that Defendants knew that there were two separate invoices for the firearm, but that they failed to disclose the existence of the invoice for $15,500 to Gamba USA or to Customs. Compl. ¶10, Defs.' Mot. Summ. J. Ex. A. Defendants admitted that they received the two invoices from Gamba Italy, but disclaimed any knowledge of the documentation sent by Gamba Italy to Gamba USA, the importer of record, and the existence of a § 1592(a) violation by Defendants. Answer ¶10, Defs.' Mot. Summ. J. Ex. B.

be entered or introduced into U.S. commerce by means of entry documents containing material and false statements, acts, or omissions as to the Maxim's purchase price in violation of 19 U.S.C. § 1592. Compl. ¶¶5–6, Defs.' Mot. Summ. J. Ex. A. In their answer, Defendants averred, among other things, that the court lacks personal jurisdiction over them as a result of Plaintiff's improper service of process, and that the complaint was untimely filed beyond the period of limitations in 19 U.S.C. § 1621. Answer ¶¶32–33, Defs.' Mot. Summ. J. Ex. B. Defendants filed the instant motion for summary judgment on December 5, 2003, claiming that the action should either be dismissed without prejudice for improper service of process or dismissed as time-barred.

DISCUSSION

A. Whether the Action Should Be Dismissed Without Prejudice for Improper Service of Process

Rule 4(c)(1) of the Rules of the United States Court of International Trade ("USCIT") provides that "[s]ervice of summons and complaint may be effected by any person *who is not a party* and who is at least 18 years of age." USCIT R. 4(c)(1) (emphasis added). Defendants argue that the summons and complaint were improperly served upon them by a Customs agent—a representative of the Government and thus a party in this action—in contravention of the rule. They also maintain that the Government has no "good cause" for its failure to effectuate proper service that would justify an extension of time. *See* USCIT R. 4(m) (providing the court with discretion to "extend the time for service for an appropriate period" upon plaintiff's showing of "good cause").

This argument is without merit. Customs agents are specifically authorized by Congress to "execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States." 19 U.S.C. § 1589a(2) (2000). The rules of this court clearly contemplate that Government agents, such as United States marshals, may serve process. *See* USCIT R. 4(c)(1). Similarly, other courts have recognized that a Government employee may serve process as a representative of the Government in full compliance with the corresponding Federal Rule of Civil Procedure. *See, e.g.*, *United States v. Kahn*, No. 5:02–CV–230–OC–10GRJ, 2003 WL 22384761 (M.D. Fla. Sept. 2, 2003) (rejecting argument that the Government's complaint should be dismissed for improper service of process because defendant was personally served by an IRS officer). Accordingly, the court finds that the Customs agent who served Defendants was merely acting as a representative of the United States and was not a "party" for the purposes of USCIT Rule 4(c)(1).

B. Whether the Action Must Be Dismissed As Untimely Filed

Defendants maintain that, even if service of process was proper, this action is barred by the applicable five-year statute of limitations. *See* 19 U.S.C. § 1621(1) (2000) ("[I]n the case of an alleged violation of section 1592 or 1593a of this title, no suit or action . . . may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud."). Although Defendants admit that they waived the statute of limitations "for a period of one (1) year, commencing with the date of execution" on February 5, 2002, they assert that the waiver expired by its own terms on February 4, 2003, rendering this action, filed the following day, untimely. *See* Defs.' Mot. Summ. J. Ex. H; Defs.' Mem. in Supp. of Mot. Summ. J. at 13. "The party asserting this defense must first establish a prima facie case that the claim is time barred. . . . If a prima facie case is established, the burden then shifts to the plaintiff to show that some exception to the statute of limitations existed." *United States v. Thorson Chemical Corp.*, 16 CIT 441, 444, 795 F. Supp. 1190, 1192–93 (1992).

There is no dispute that the Government's claims are prima facie time-barred.[3] The only issue is whether the one-year waiver Defendants signed on February 5, 2002, bars the instant action, which was filed on February 5, 2003. As an initial matter, the court rejects the Government's claim that Defendants waived their statute of limitations defense by not specifically pleading it in their answer.[4] Never-

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[3] The Penalty Notice seeking to impose penalties "at the fraud level for the domestic value of the rifle" was issued to Defendants on August 21, 1997. Accordingly, the statute of limitations on Count I of the complaint (fraud) began to run, at the latest, on that date, rendering the Government's fraud claim prima facie time-barred after August 21, 2002. Counts II and III of the complaint (gross negligence and negligence) are prima facie time-barred after March 29, 2001, five years after the alleged violations. The summons and complaint herein was filed on February 5, 2003.

[4] Defendants unequivocally asserted in their answer that "[t]his civil action is untimely brought beyond the period of limitations set forth in 19 U.S.C. § 1621." Answ. ¶32, Defs.' Mot. Summ. J. Ex. B. Defendants continued that the action was time-barred because their offer of a waiver of the statute of limitations was not accepted by a Customs official invested with authority to do so. *Id.* In their motion for summary judgment, Defendants argue for the first time that the suit was untimely filed because the waiver, by its express terms, expired the day before the Government filed the summons and complaint. The Government asks the court to find that the affirmative defense was waived because the specific legal argument relied upon in Defendants' motion was not raised in their answer.

Rule 8(d) of this court merely requires Defendants to "set forth affirmatively" their defense of statute of limitations. USCIT R. 8(d). There is no dispute that Defendants have satisfied this basic requirement. The question of whether they are then limited by the specific legal theory advanced in support of the defense in their answer is a closer one, but must also be resolved against Plaintiff. "The purpose of [USCIT Rule 8(d)] is to put opposing parties on notice of affirmative defenses and to afford them the opportunity to respond to the defenses." *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 444 (D.C. Cir. 1994). Because the statute of limitations defense was affirmatively pled in their answer, the Government was clearly put on notice that Defendants intended to assert the defense in this

theless, as discussed *infra*, the court finds that Customs's application of the "anniversary method" in computing the waiver's expiration date[5] was appropriate given the waiver's ambiguity and the applicable law.

The court has long analogized the computation of effective dates of statute of limitations waivers with the computation of the limitation periods themselves. Statutes of limitation are "construed to include the anniversary date of the accrual of the cause of action" under USCIT Rule 6(a). *United States v. Neman Bros. & Assocs.*, 15 CIT 536, 538, 777 F. Supp. 962, 964 (1991). Rule 6(a) provides that, "[i]n computing any period of time prescribed or allowed by these rules, . . . the day of the act, event, or default from which the designated period begins to run shall not be included." USCIT R. 6(a). Thus, an action filed on the anniversary date of the accrual of the cause of action would be timely filed under a statute of limitation running "from" or "after" the date of the alleged violation. *See* 19 U.S.C. § 1621(1) (prescribing the five-year statute of limitations applicable here). In *Neman Brothers*, the court found that the anniversary method was the appropriate tool for computing the effective dates for waivers of the statute of limitations "[b]ecause Rule 6(a) of this Court is analogous to Fed. R. 6(a), and other precedent holds that the time computation method used in Fed. R. 6(a) applies to waivers." 15 CIT at 538, 777 F. Supp. at 964. The *Neman Brothers* court concluded that the waiver at issue—which was valid for "one (1) year commencing August 1, 1988"—was valid through the anniversary date of its execution, so that the Government's action filed on that date was not barred by the statute of limitations. *Id.*

Neman Brothers has remained good law for over ten years and has informed Customs's polices and procedures with respect to § 1621(1) waivers since that time. Just last year, however, the court refused to follow *Neman Brothers* in light of the explicit language used in the waiver at issue, which provided that the waiver period "*commenc[ed] on* December 14, 1999." *United States v. Inn Foods, Inc.*, 264 F. Supp. 2d 1333, 1338 (emphasis added), *reconsideration denied by* 276 F. Supp. 2d 1359 (Ct. Int'l Trade 2003), *appeal docketed* 04–1035 (Fed. Cir. Oct. 23, 2003). The *Inn Foods* court found that such unambiguous language rendered a penalty recovery action untimely when filed

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action. The Government also had the opportunity to—and did—respond to Defendants' specific arguments raised here in its opposition to Defendants' motion for summary judgment. As a result, the court finds that Defendants satisfied both the rule's express requirement and its underlying purpose. *See id.* at 445 ("[W]hile a limitations defense must 'be asserted in a responsive pleading,' it 'need not be articulated with any rigorous degree of specificity,' and is 'sufficiently raised for purposes of Rule 8 by its *bare assertion*.' ") (citation omitted).

[5] The Government defines the "anniversary method" as follows: "Pursuant to this method, a waiver does not expire until the anniversary date of its execution has passed. For calculation purposes, the actual date of commencement is excluded from the one year period." Pl.'s Mem. in Supp. of Opp'n to Defs.' Mot. Summ. J. at 3.

on the waiver's anniversary date. *Id.* Crucial to the court's holding was that, given that waiver's explicit designation of its commencement date, Rule 6(a) was inapplicable. *Id.* at 1337.

Defendants assert that *Neman Brothers* incorrectly analogized USCIT Rule 6(a) to the waiver in question and that the court should follow *Inn Foods*. The court finds, however, that the facts of the present case distinguish it from *Inn Foods* and render it more like *Neman Brothers*, which correctly looked to Rule 6(a) to resolve the ambiguity as to the proper computation of the waiver's effective dates. As previously discussed, Defendants' February 5, 2002 waiver of the statute of limitations was effective "for a period of one (1) year, *commencing with* the date of execution." Defs.' Mot. Summ. J. Ex. H (emphasis added). The waiver did not explicitly state the date that it became operative or the date that it expired, rendering it quite unlike the waiver in *Inn Foods*. Here, the term "commencing with the date of execution" could mean "commencing *on*" that date, or could mean, like the applicable statute of limitations, "commencing *from*" or "*after*" that date.[6] In looking solely at the express terms of the waiver, it is impossible to ascertain whether the parties intended to abandon the established anniversary method for calculating the waiver's effective dates.

Given the waiver's ambiguity, the court has considered the extrinsic evidence related to the parties' intent and understanding of the waiver's terms. *See Julius Goldman's Egg City v. United States*, 697 F.2d 1051, 1058 (Fed. Cir. 1983) (stating that the parties' conduct before a controversy arises is relevant to ascertaining the parties' intent). Over the years, the Government mailed Defendants three different acknowledgment letters explicitly applying the anniversary method to compute the waivers' effective dates. Defendants never disputed Customs's interpretation of the waivers and continued to sign them as written and interpreted by Customs. Even more striking is that Defendants' answer, while pleading the statute of limitations defense, did not argue that the anniversary method was inappropriate. Defendants did not challenge the anniversary method until the subsequent issuance of the *Inn Foods* decision, raising their argument for the first time in this motion. *See supra* n.4. Based on the foregoing, the court concludes that the parties' intent, as evidenced by their conduct, was to compute the waiver's effective dates by applying the established anniversary method. Accordingly, the present action was timely filed.

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[6] Looking to dictionary definitions of the term "with" is not helpful, because such definitions do not shed light on the particular issue presented, where both a procedural rule and court precedent include the anniversary date of the operative event for time computation purposes.

CONCLUSION

The waiver "commencing with the date of execution" is ambiguous, and the extrinsic evidence submitted with the briefs supports the Government's argument that the parties objectively intended to use the anniversary method to compute the effective dates of the February 5, 2002 waiver. Defendants' conduct from the time they received the first acknowledgment in 2000 until the filing of the present motion indicates that they understood the waiver in the same manner as the Government. Because the Defendants' waiver was still in effect on the date the Government filed this action, Defendants are not entitled to summary judgment on the ground that the suit was untimely filed. Accordingly, the Defendants' motion for summary judgment is DENIED.

SO ORDERED.