Decisions of the United States Court of International Trade

Slip Op. 09–12

KAHRS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant

Court No. 07–00343
Before: Gregory W. Carman, Judge

[*Held: Defendant's motion for withdrawal of deemed admissions pursuant to USCIT R. 36 is GRANTED.*]

Law Offices of George R. Tuttle, A.P.C. (*Carl D. Cammarata*, *George R. Tuttle*, and *Stephen P. Spraitzar*) for Plaintiff.
Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Cottet*) for Defendant.

February 19, 2009

OPINION & ORDER

CARMAN, JUDGE: Before the Court is Defendant United States' motion to withdraw its "deemed admissions" pursuant to Rule 36(b) of the Rules of the U.S. Court of International Trade. Plaintiff Kahrs International, Inc. ("Kahrs") opposes this motion.

PROCEDURE & BACKGROUND

Kahrs filed its law suit against the United States Customs and Border Protection ("CBP" or the "Government") on September 12, 2007 alleging seven causes of action concerning the denial of its protest over the "liquidation, classification, duties, and fees assessed on the pre-finished, veneered, hardwood, flooring strips," which were imported by Kahrs. (Complaint ("Compl.") 1.) The Government filed its Answer to the Complaint on February 14, 2008 denying, *inter alia*, many of the allegations contained in the first two causes of action.

Shortly thereafter,[1] Plaintiff filed its First Motion For Summary Judgment On The First Cause of Action on March 10, 2008. Included with its submission, Plaintiff annexed a USCIT R. 56(h) statement attesting that there are no genuine issues of material fact in dispute concerning Plaintiff's first cause of action. However, many of the allegations alleged in Plaintiff's R.56(h) statement were the same as, or similar to, Plaintiff's Complaint, which were denied, in whole or in part, in the Government's Answer on the grounds of lack of information or knowledge sufficient to form a belief as to the allegations' truthfulness. *Compare* Compl. & Def.'s Answer ¶¶ 2, 7, 10, 13, 16, 19, 20, 22 *with* Pl.'s First Request for Admission (Def.'s Motion to Withdraw at Ex. 1) pp.7–10, ¶1; 10–11, ¶2; 11, ¶3, *et seq*.

The parties then entered into discussions regarding scheduling, which yielded no accord. As a result, on April 14, 2008, Defendant filed a motion for a scheduling order and an order to stay its response to Plaintiff's Summary Judgment motion pending limited discovery as to the first cause of action. Plaintiff opposed this motion and separately requested that the Court order Defendant to expeditiously file a response to its Motion for Summary Judgment. Plaintiff contended that there would be no need for discovery because its motion on its first cause of action was dispositive of the entire matter. After deciding that Defendant was entitled to discovery, the Court granted the Government's motion, ordered limited discovery, and established a scheduling order. *See Order*, dated May 1, 2008 (Docket No. 18.). Ultimately, discovery was to be completed by September 1, 2008.

On May 8, 2008, Plaintiff served upon the Government certain requests for admission, interrogatories and requests for production of documents related to the first cause of action ("Pl.'s First Request for Admission"), which consisted of 52 separately numbered paragraphs. (*See* Def.'s Amd. Mot. To Withdraw Deemed Admissions ("Def.'s Motion to Withdraw") at Exhibit ("Ex.") 1.) Subject to the rules of this court, Defendant's responses were due on June 13, 2008. (*Id.* at 4.) However, as the Government concedes, its responses were served by mail on June 27, 2008, some two weeks late. (*Id.*) Because the Government had failed to respond to Plaintiff's requests to admit on the first cause of action within 30 days of service, the matters therein were deemed admitted under USCIT R. 36(a).

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[1] The Parties consented to a scheduling order enlarging the time for Defendant's response to the Complaint to February 14, 2008, which this Court granted on January 11, 2008. (Docket No. 11.) Curiously, on January 24, 2008, Plaintiff proceeded to file its First Motion For Summary Judgment On The First Cause of Action, notwithstanding having consented to enlarging Defendant's time to file an Answer. (Docket No. 12.) On January 29, 2008, the Clerk of the United States Court of International Trade issued a Notice of Rejection of Plaintiff's motion as premature and in excess of the Court's page limitations. (Docket No. 13.) Following the filing of Defendant's Answer (Docket No. 14), Plaintiff re-filed its First Motion For Summary Judgment On The First Cause of Action. (Docket No. 15.)

On May 29, 2008, Plaintiff served upon the Government certain requests for admission, interrogatories and requests for production of documents related to the second cause of action ("Pl.'s Second Request for Admission"), which consisted of 16 separately numbered paragraphs. (Pl.'s Resp. To Def.'s Amd. Mot. To Withdraw Admissions ("Pl.'s Resp.") at Ex. 1.) The Government's responses were due on July 3, 2008, however "as a result of inadvertence," its responses were served on July 8, 2008, some five days late. (*See* Def.'s Motion to Withdraw at 5n.4.) Because the Government had failed to respond to Plaintiff's requests to admit on the second cause of action within 30 days of service, the matters therein were deemed admitted under USCIT R. 36(a).

Plaintiff then served discovery requests on the Government pertaining to causes of action three through seven, which consisted of 113 separately numbered paragraphs. (*Id.*) Responses to these request were timely served by the due date of September 2, 2008. (*Id.*)

On July 9, 2008, Plaintiff served a "reply" on the Government pertaining to the Government's responses to its discovery requests related to the first cause of action. This document consisted of some 77 pages of material challenging each of the Government's responses, item by item. (*See* Def.'s Mot. to Withdraw at Ex. 2.)

Subsequently, on July 25, 2008, Plaintiff served the Government with its second request for admissions pertaining to the first cause of action, revised to consist of 62 separately numbered paragraphs. (*See id.* at Ex. 3.) Thought the Government's responses to this request were due on August 29, 2008, the Government "objected to Kahrs' second set of discovery requests on the first cause of action and did not further respond to it." (Def.'s Mot. to Withdraw at 5.)

The Government now moves this Court for an order, pursuant to USCIT R. 36(b) to permit it to withdraw the "deemed" admissions arising from Kahrs' requests for admissions, interrogatories, and requests for production of documents related to the first and second causes of action. (*Id.* at 1.)

DISCUSSION

I. ***USCIT Rule 36***

Rule 36(a) of the U.S. Court of International Trade provides, in relevant part, that a matter is deemed admitted "unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney." USCIT R. 36(a). Once the assertion is admitted, the matter "is *conclusively established* unless the court on motion permits withdrawal or amendment of the admission" pursuant to Rule 36(b). USCIT R. 36(b) (emphasis added); *cf. Avanti Prod., Inc.*, 16 CIT 453 (1993). Notwithstanding, this Court

> *may* permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

USCIT R. 36(b) (emphasis added).

USCIT Rule 36(b) is a permissive rule and this Court is certainly not required to grant the Government's withdrawal of admissions.[2] *See Conlon v. United States*, 474 F.3d 616, 621 (9th Cir. 2007). The Court may, exercising its discretion, grant relief from an admission made under Rule 36(a) where (1) "the presentation of the merits of the action will be subserved," and (2) "the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." USCIT R. 36(b); *Conlon*, 474 F.3d at 621; *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995); *see also* 7 JAMES WM. MOORE, FED. PRAC. § 36.13 (Matthew Bender 3d ed.).[3] The two-prong test of Rule 36(b) directs the Court to focus on the effect of granting withdrawal upon the litigation and prejudice to the opposing party, "rather than focusing on the moving party's excuses for an erroneous admission." *F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994).

As an important litigation tool, admissions are sought to narrow the issues before trial by eliminating those that can be dispensed with. *See Conlon*, 474 F.3d at 622; *Beker Indus. Corp. v. United States*, 7 CIT 361, 362 (1984). Rule 36 admissions are "not to be used in an effort to 'harass the other side' or in the hope that a party's adversary will simply concede essential elements." *Conlon*, 474 F.3d at 622 (*quoting Perez v. Miami-Dade County*, 297 F.3d 1255, 1268 (11th Cir. 2002)). Thus, the rule is meant to serve two vital purposes in litigation: "truth-seeking in litigation and efficiency in dispensing justice." *Id.* (*citing* Fed. R. Civ. P. 36(b) advisory committee note); *see also In re Manley*, 3B.R. 97, 98 (S.D.N.Y. 1980) (Fed. R. Civ. P. 36 dis-

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[2] USCIT R. 36 is practically indistinguishable from rule 36 of the Federal Rules of Civil Procedure. Therefore, federal cases interpreting Fed. R. Civ. P. 36 are helpful in explicating USCIT R. 36.

[3] Plaintiff advocates a rigid application of Rule 36. However, "[t]he sanctions expressed by Rule 36(a) are *not* mandatory: The Rule expressly provides that the court may shorten or lengthen the time a party is allowed to respond." *Local Union No. 38 v. Tripodi*, 913 F. Supp. 290, 293 (S.D.N.Y. 1996) (emphasis added). Accordingly, because a court has the power to permit a longer time period, many commentators and courts have interpreted this to mean that a court, in exercising its discretion, may permit the filing of an answer that would otherwise be untimely. *See id.* (*quoting Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1312 (8th Cir. 1983) (citation omitted)); *accord Manatt v. Union Pacific R.R. Co.*, 122 F.3d 514, 517 (8th Cir. 1997); 8A C. WRIGHT, A. MILLER & R. MARCUS, FEDERAL PRACTICE & PROCEDURE ("WRIGHT & MILLER") § 2257 (1994). "Therefore, the failure to respond in a timely fashion does not require the court automatically to deem all matters admitted." *Local Union No. 38*, 913 F. Supp. at 294.

covery is not necessarily meant to obtain information, but to narrow issues for trial and establish certain material facts as true, thus narrowing the range of issues.).[4] This Court, therefore, should bear in mind these policy consideration as it considers the Defendant's motion in light of the rule's mandatory factors.

A. Presentation of the Merits

The first prong of Rule 36(b) requires this Court to determine whether granting Defendant's motion for withdrawal will have subserved the presentation of the merits of Plaintiff's first and second causes of action. This part of the test "emphasizes the importance of having the action resolved on the merits." *Smith v. First Nat'l Bank of Atlanta*, 837 F.2d 1575, 1577 (11th Cir. 1988). It is satisfied "when upholding the admissions would practically eliminate any presentation of the merits of the case." *Conlon*, 474 F.3d at 622; *accord Hadley*, 45 F.3d at 1348.

In this case, Plaintiff's first and second causes of action are statutory claims alleging that CBP violated various aspects of 19 U.S.C. §§ 1625(c) and 1315(d) respectively. (*See* Compl. ¶¶ 1–29; 30–39.) The particular admissions that the Government seeks to withdraw "essentially admit the necessary elements of plaintiff's first and second causes of action, in contravention of the Government's answer to plaintiff's complaint . . . ." (Def.'s Motion to Withdraw at 9; *see also* Def.'s Answer ¶¶ 1–39.) Indeed, outside of the rote operation of Rule 36, the Government has nowhere abandoned its denial of Plaintiff's first two counts in its complaint as recorded in its Answer. The Court finds that the Government would not have admitted these essential elements of Plaintiff's first two claims but for its failure to timely respond to the requests to admit.

Plaintiff responds that the Government is required to show "good cause for the untimely responses" or that "the material facts asserted [in the deemed admission]. . . are not true." (Pl.'s Resp. at 10.) However, these points are unavailing because they are neither required by Rule 36(b) nor the weight of the relevant case law. *Cf., e.g., Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1391 (E.D. Cal. 1991) ("[T]he [Court's] discretion should not be exercised in terms of the defaulting party's excuses, but in terms of the effect upon the litigation and prejudice to the resisting party.").

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[4] The Court notes that a significant number the Plaintiff's admission requests appear to ask the Government to admit to Plaintiff's claims (*i.e.*, questions of law). *See*, *e.g.*, Pl.'s First Request for Admission (Def.'s Motion to Withdraw at Ex. 1) pp.7–10, ¶1; 10–11, ¶2; 11, ¶3, etc. It is generally inappropriate to employ requests for admission for questions of law. *Lakehead Pipe Line Co. v. Am. Home Assurance*, 177 F.R.D. 454, 458 (D. Minn. 1997). Moreover, strictly speaking, a Rule 36 request is not a discovery device. *Bouchard v. United States*, 241 F.R.D. 72, 75–76 (D. Me. 2007). Plaintiff is encouraged to bear these rules in mind when proceeding through discovery. *See also* 8A WRIGHT & MILLER §§ 2253 n.1 and 2255 n.8 (Pocket Part 2008).

Accordingly, denying withdrawal of the Government's deemed admissions would eliminate the need for a presentation on the merits as to Plaintiff's first two causes of action. *See Perez*, 297 F.3d at 1266 (Permitting withdrawal where "[d]eeming this element [of a claim] admitted took the wind out of the defendants' sails and effectively ended the litigation."). Thus, the first prong of the Rule 36(b) test is met because withdrawal of the admissions will subserve the presentation of the merits of Plaintiff's first and second causes of action.

The Plaintiff, however, argues that withdrawal of the admissions would result in prejudice to the Plaintiff's case. Therefore the Government's motion turns on the second prong of the Rule 36(b) test.

B. Prejudice to the Plaintiff

The second prong of Rule 36(b) requires this Court to determine that the party who obtained the admission will suffer "prejudice . . . in maintaining the action" should the admissions be withdrawn. USCIT R.36(b). The party relying on the deemed admissions bares the burden of persuasion and must satisfy the court that they will indeed suffer prejudice. *Id.*; *Conlon*, 474 F.3d at 622. The prejudice contemplated by Rule 36(b)

> "is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence"

concerning issues previously deemed admitted. *Brook Village N. Assocs. v. General Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982); *accord Hadley*, 45 F.3d at 1348; *Conlon*, 474 F.3d at 622. In other words, there is no prejudice if granting the motion to withdraw would merely result in the Plaintiff now having to prove its underlying case. *See F.D.I.C.*, 18 F.3d at 640. Similarly, having to "prepar[e] a summary judgment motion in reliance upon an erroneous admission" does not constitute prejudice. *Id.*; *accord Raiser v. Utah County*, 409 F.3d 1243, 1246 (10th Cir. 2005).[5] The prejudice that is contemplated by Rule 36(b) "relates to the difficulty a party may face in proving its case, *e.g.*, caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously deemed admitted." *Hadley*, 45 F.3d at 1348 (internal quotes omitted); *see also Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 106 (D. Del. 1988) ("Generally, courts have defined the prejudice as relating to the difficulty a party may face in proving its case because of the sudden need to obtain evidence re-

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[5] Awarding costs, however, under appropriate circumstances not present here, might be warranted. *See*, *e.g.*, *Mid Valley Bank*, 764 F. Supp. at 1391.

quired to prove the matter that had been admitted.") (internal quotes omitted).

Plaintiff contends that it would be "severely prejudiced" because its reliance on the deemed admissions had obviated its need to seek the depositions of certain CBP employees involved in the examinations of the entries of pre-finished, veneered, hardwood, flooring strips at the heart of this matter. (Pl.'s Resp. at 17–18.) Moreover, Plaintiff would be required to seek the re-opening of discovery in order to accomplish this feat. (*Id.*) Plaintiff also argues that it prepared its summary judgment papers based upon these deemed admissions "spen[ding] considerable time and expense" in their preparation. (*Id.* at 20.) Additionally, Plaintiff is alleging that it has incurred added expenses in responding to the Government's motion here, *id.*, as well as will have to incur expenses in order to submit a revised Rule 56(h) statement. (*Id.* at 20–21.)

The Court finds that Plaintiff has not met its burden under Rule 36(b). First, analyzing the amount of time that the Government was tardy in its responses to Plaintiff's request for admission as a predicate for Plaintiff's supposed prejudice amounts to a *de minimus* error.[6] The Government responded to Pl.'s First Request for Admission 14 days late (Def.'s Motion to Withdraw at 4) and responded to Pl.'s Second Request for Admission five days late (Def.'s Motion to Withdraw at 5). It is well within this Court's discretion to excuse the Governments neglect here where no prejudice flowed from the act of the tardy responses. *See*, *e.g.*, *Novopharm Ltd., v. Torpharm, Inc.*, 181 F.R.D. 308, 310 (E.D.N.C. 1998) (court found no prejudice where responses were served only 12 days after due date); *United States v. Branella*, 972 F. Supp. 294, 301 (D. N.J. 1997) (no prejudice found where response was merely two weeks late).[7] Second, notwithstanding that the case was filed in September 2007, and notwithstanding the abundance of motion practice, this case is still in an early stage (*i.e.*, before trial) whereby a court is more likely to find no prejudice from granting a motion for withdrawal. *See Hadley*, 45 F.3d at 1349. *See also Am. Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991); 7 MOORE'S FED. PRAC. § 36.13, at pp. 44–45 (Mat-

[6] Plaintiff argues that the Government's default stemmed from its blatant failure to comply with the court rules. (*See* Pl.'s Resp. at 1, 20.) The Court disagrees with Plaintiff's characterization. Nevertheless, counsel is reminded that "[t]hese rules govern the procedure in the United States Court of International Trade. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." USCIT. R. 1.

[7] Additionally, this Court generally disfavors defaults against the United States and prefers resolving disputes on the merits. *See* USCIT R. 55(e) ("No judgment by default shall be entered against the United States . . . unless the claimant establishes a claim or right to relief by evidence satisfactory to the court."); *AutoAlliance Int'l, Inc. v. United States*, 28 CIT 1856, 1858, 350 F. Supp.2d 1244, 1245–46 (2004) ("default judgment against the government cannot be granted based simply on the failure to file within a prescribed deadline.") (internal quotes and cites omitted).

thew Bender 3d ed.) ("Courts are more likely to find prejudice from the withdrawal of an admission when the motion for withdrawal of the admission is made in the middle of trial."). Finally, the cases relied upon by Plaintiff to demonstrate prejudice vis-à-vis the depositions it may have to take if the admissions are withdrawn are inapposite. Plaintiff's attempts to recast its objection to the Government's motion as "prejudice" in order to merely avoid the effort of proving the merits of its case, is not the same as a showing that it will endure significant difficulties "in proving its case, *e.g.*, caused by the unavailability of key witnesses." *Brook Village N. Assocs.*, 686 F.2d at 70. "Cases finding prejudice to support a denial generally show a much higher level of reliance on the admissions." *Hadley*, 45 F.3d at 1349. Any inconvenience to the Plaintiff occasioned by a petition for the reopening of discovery is minimal and is certainly not the type of prejudice contemplated that would preclude the withdrawal of the subject deemed admissions under USCIT R. 36(b).

In the analysis of the second prong of R.36(b), Plaintiff has not met its burden in demonstrating prejudice to its case, and this Court finds none. Because a presentation on the merits would be subserved and because the government would not have been prejudiced by the withdrawal, this Court holds that the Government's motion to withdraw its deemed admissions is hereby GRANTED, and those admissions are deemed withdrawn.

SO ORDERED.

SLIP OP. 09–13

GEO SPECIALTY CHEMICALS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 08–00046

Public Version

[Plaintiff's motion for judgment on the agency record denied.]

Dated: February 19, 2009

Thompson Hine LLP (*Matthew R. Nicely*, *Gregory Husisian*, and *Jennifer L. Stein*) for the plaintiff.

James M. Lyons, General Counsel, *Neal J. Reynolds*, Assistant General Counsel, U.S. International Trade Commission (*Charles A. St. Charles*) for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on plaintiff GEO Specialty Chemicals, Inc.'s ("GEO") motion for judgment on the agency record pursuant to USCIT Rule 56.2. Plaintiff, a domestic producer of glycine, challenges the final determination of the U.S. International Trade Commission ("Commission") in the antidumping investigations of glycine from India, Japan, and Korea. *See Glycine From India*, USITC Pub. No. 3997, Inv. No. 731–TA–1111 (May 2008), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3997.pdf ("*Final India Determination*"); *Glycine From Japan and Korea*, USITC Pub. No. 3980, Inv. Nos. 731–TA–1112–1113 (Jan. 2008), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3980.pdf ("*Final Japan & Korea Determination*"). For the reasons stated below, the court finds that the Commission's determination that the domestic glycine industry was not materially injured or threatened with material injury by reason of imports was supported by substantial evidence and is in accordance with law, and the court denies GEO's motion.

BACKGROUND

Glycine is an amino acid that is manufactured and sold in three grades: United States Pharmacopeia ("USP"), pharmaceutical, and technical. *Final Japan & Korea Determination* at 3. USP grade glycine, which is used as a sweetener/taste enhancer or buffering agent primarily in pet food, animal feed, and antiperspirants, *id.*, accounted for [[ ]] of reported U.S. shipments of subject imports from India, Japan, and Korea from 2005 through June 2007, *Glycine from India, Japan, and Korea*, Inv. Nos. 731–TA–1111–1113, at IV–10, Table IV–3 (ITC Dec. 2007) (final staff report to the Commission)

(confidential version), *available at* App. in Supp. of Mem. of Law in Supp. of Rule 56.2 Req. for J. Upon the Agency R. ("GEO's App.") Tab 3 ("*Confidential Staff Report*"). Pharmaceutical grade glycine is sold at a price premium over USP grade glycine. *Final Japan & Korea Determination* at 3–4. Technical grade glycine, which is used in industrial applications, is sold at a price discount to USP grade glycine. *Id.* Typically, glycine is sold as a commodity grade product, and domestic and imported glycine of the same grade are interchangeable. *Id.* at 9. The only domestic producers of glycine are GEO and Chattem Chemicals, Inc. ("Chattem"). *Id.* at 3. GEO is the larger of the two.[1] *Id.* at 6.

In March 2007, GEO filed a petition for the imposition of antidumping duties on glycine imports from India, Japan, and Korea. *Id.* at 3. After an investigation, the U.S. Department of Commerce determined that glycine imports from India, Japan, and Korea were being sold at less than fair value. *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 Fed. Reg. 16640, 16640 (Dep't Commerce Mar. 28, 2008); *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan*, 72 Fed. Reg. 67271, 67271 (Dep't Commerce Nov. 28, 2007); *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from the Republic of Korea*, 72 Fed. Reg. 67275, 67275 (Dep't Commerce Nov. 28, 2007). In January 2008, however, the Commission issued a final negative determination regarding glycine from Japan and Korea. *Glycine from Japan and Korea*, 73 Fed. Reg. 3484, 3484 (ITC Jan. 18, 2008) (final determination). In May 2008, the Commission issued a final negative determination regarding glycine from India. *Glycine from India*, 73 Fed. Reg. 26413, 26413 (ITC May 9, 2008) (final determination). The Commission determined that the domestic glycine industry was not materially injured by reason of imports from India, Japan, and Korea because although the volume of subject imports increased significantly, the imports did not significantly undersell, depress, or suppress prices for domestic glycine and did not have a significant adverse impact on the domestic industry. *Final Japan & Korea Determination* at 17–22.[2] The Commission found that the domestic industry's performance declined because purchasers decided to diversify suppliers after GEO and its predecessor experienced supply problems. *Id.* at 18, 21–22. The Commission further deter-

[1] GEO "account[ed] for [[ ]] percent of domestic production in 2006, while Chattem accounted for [[ ]] percent." *Glycine from Japan and Korea*, Inv. Nos. 731–TA–1112–1113, at 8 (ITC Jan. 2008) (final Commission opinion), *available at* GEO's App. Tab 1 ("*Confidential Final Japan & Korea Determination*").

[2] The India determination adopted by reference the Japan and Korea determination's reasoning. *Final India Determination* at 3–9. Commissioners Irving A. Williamson and Dean A. Pinkert dissented from both determinations.

mined that the domestic glycine industry was not threatened with material injury by reason of the subject imports. *Id.* at 26. GEO challenges the negative determinations, claiming that the Commission's price, impact, and threat of material injury determinations were not supported by substantial evidence and that the Commission applied the wrong causation standard. (GEO's Mem. of Law in Supp. of Rule 56.2 Req. for J. Upon the Agency R. ("GEO's Br.") 6–39.)

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court must uphold a final determination by the Commission unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Negative Material Injury Determination

GEO argues that the Commission's conclusion that the domestic glycine industry was not materially injured by reason of imports was unsupported by substantial evidence. (GEO's Br. 1–2.) In making a material injury determination, the Commission must consider: (1) the volume of subject imports, (2) the effect of subject imports on prices in the United States for domestic like products, and (3) "the impact of [subject] imports . . . on domestic like products, but only in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i). Here, the Commission found that the volume of subject imports increased significantly, but the domestic industry was not injured by reason of imports because the imports did not have a significant effect on prices of domestic glycine in the United States and did not have a significant adverse impact on the domestic industry. *Final Japan & Korea Determination* at 17–22. GEO challenges the Commission's findings regarding the effect of the imports on domestic glycine prices, the impact of the imports, and causation.[3] (GEO's Br. 7–31.) GEO's challenges fail.

A. The effect of the imports on prices

> In evaluating the effect of imports . . . on prices, the Commission shall consider whether—
> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and

[3] As expected, GEO does not challenge the Commission's finding that the volume of subject imports increased.

> (II) the effect of imports . . . otherwise depresses prices to a significant degree or prevents price increases . . . to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). The Commission determined that "[s]ubject imports undersold the domestic like product in 35 of 42 comparisons," but found "this underselling not to be particularly significant" because the price comparisons included data from Chattem, which did not attempt to compete with subject imports on price, and because the increase in subject imports was attributable to the domestic industry's inability to satisfy domestic demand reliably. *Final Japan & Korea Determination* at 18. The Commission found that subject imports did not depress domestic glycine prices because prices increased overall during the period of investigation ("POI"). *Id.* at 19. The Commission found that subject imports did not suppress domestic glycine prices because the "[u]nit cost of goods sold ("COGS") fluctuated over the [POI], and ended only somewhat higher in 2006 than in 2004," and the ratio of COGS to net sales decreased between 2004 and 2006, indicating that the domestic industry was not faced with a significant cost-price squeeze. *Id.* GEO challenges these findings.

1. Chattem data

GEO argues that the Commission improperly discounted data showing that subject imports undersold Chattem's products. (GEO's Br. 12–16.) The Commission found that "subject imports undersold Chattem by significant margins in every available quarterly comparison," but did not find the underselling significant because "Chattem concentrates on pharmaceutical grade glycine and, to the extent it sold glycine in competition with subject imports . . . , it did not attempt to compete on price." *Final Japan & Korea Determination* at 18.

The Commission must "examine the domestic producers, as a whole, of the like product." *Timken Co. v. United States*, 913 F. Supp. 580, 586 (CIT 1996). Here, the Commission analyzed the pricing data from both domestic glycine producers. *See Final Japan & Korea Determination* at 17–18. Because GEO accounted for a larger proportion of domestic glycine production, *id.* at 6, the Commission's decision not to rely heavily on data indicating underselling of Chattem's products was reasonable, *cf. Tropicana Prods., Inc. v. United States*, 484 F. Supp. 2d 1330, 1341–42 (CIT 2007) (holding that the Commission's decision to rely more heavily on data from domestic orange processors than from growers was reasonable). Additionally, Chattem primarily produces pharmaceutical grade glycine, *Final Japan & Korea Determination* at 18, whereas few or none of the subject imports consisted of pharmaceutical grade glycine from 2004 through June 2007, *Confidential Staff Report* at IV–10, Table IV–3. Chattem ships only domestic USP grade and technical grade glycine to "end

users willing to pay higher unit values than are available for similar product through imports" or GEO. *Glycine from Japan and Korea*, Inv. Nos. 731–TA–1112–1113, at III–4 (ITC Dec. 2007) (final staff report to the Commission), *available at* http://hotdocs.usitc.gov/docs/pubs/701_731/pub3980.pdf ("*Staff Report*"). Therefore, the Commission's decision to discount the underselling of Chattem because Chattem does not attempt to compete with subject imports on price was reasonable. *See Timken*, 913 F. Supp. at 590 (holding that evidence of underselling is less significant where the domestic product has a price premium).[4]

2. Importance of reliable supply

GEO also challenges the Commission's finding that underselling was not significant because U.S. purchasers sought subject imports to diversify their sources of supply after GEO and its predecessor, Hampshire Chemical Corporation, a subsidiary of DOW Chemicals, Inc. ("Hampshire/DOW"),[5] experienced supply problems. (GEO's Br. 18–23.) GEO argues that pervasive underselling prompted the increases in imports because glycine is a fungible commodity and purchasers also reported supply problems with imports.[6] (*Id.*)

Even in a commodity market, however, domestic supply problems may be significantly more responsible for increases in imports than underselling. *See Tropicana*, 484 F. Supp. 2d at 1343–47. Here, U.S. purchasers reported significant supply problems from GEO and indicated that they increasingly purchased imports to diversify their sources and ensure a reliable supply.[7] Six purchasers reported allocations or delayed deliveries by GEO or Hampshire/DOW, and two purchasers reported that GEO or Hampshire/DOW broke supply

[4] GEO also argues that subject imports regularly undersold GEO, unlike the usual mixed pattern of over- and underselling for a commodity, which indicates that subject imports had a substantial negative price effect. (GEO's Br. 15–16.) This argument may have some merit. [[ ]] *Confidential Final Japan & Korea Determination* at Supplemental Table 7. Nevertheless, the Commission's finding that the harm to GEO arose from GEO's unreliable supply, rather than underselling, was substantially supported, as discussed *infra*.

[5] GEO purchased its glycine processing facility from Hampshire/DOW on November 1, 2005. *Final Japan & Korea Determination* at 11.

[6] Although, as GEO states, Chattem suffered losses even though it did not have supply problems (GEO's Br. 22–23), data as to Chattem is not particularly probative, for the reasons stated above.

[7] For example, Nestle Purina PetCare Company ("Nestle"), [[ ]] U.S. purchaser of glycine, *see Confidential Final Japan & Korea Determination* at 18 n.69, reported in its questionnaire response that it had to diversify its supply to include higher-priced imports [[ ]] (Mem. of Def. in Opp'n to Pl.'s Mot. for J. on the Agency R. App. ("Def.'s App.") Tab CD 133 at 5–6, 18–19). According to GEO's data, Hampshire/DOW delayed [[ ]] shipments from November 2004 to October 2005, and GEO delayed [[ ]] shipments from November 2005 to December 2006 and [[ ]] shipments between January and September 2007. (Def.'s App. Tab CD 172.).

contracts. *Staff Report* at II–2 to –3. Because of GEO's supply problems, four purchasers had to slow or shut down production, and at least three purchasers had to buy imported glycine at higher prices. *Id.* at II–2. Additionally, U.S. glycine purchasers reported that reliability of supply was more important than lowest price.[8] *See id.* at II–9, Table II–3. Although four purchasers reported allocations or delayed deliveries by foreign suppliers, and three purchasers reported that foreign suppliers broke contracts, *id.* at II–2 to –3, such evidence of foreign supply problems does not undermine the Commission's finding that U.S. purchasers attempted to diversify their sources of supply. Thus, while one could debate the relative importance of the sources of harm, substantial evidence supported the Commission's final conclusion that purchasers increased their imports because of GEO's unreliable supply, rather than underselling.[9]

3. Data showing increased domestic prices

GEO contends that the Commission misleadingly used average unit values ("AUVs") to determine that domestic glycine prices increased during the POI because AUVs are not appropriate where products of different grades have different prices. (GEO's Br. 16–18.) GEO further contends that the Commission should have relied on prices of USP grade glycine, which is more competitive with imports. (*Id.*) AUV data may not be reliable where prices are "strongly influenced by a few orders of particular grade or size." *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1374 (Fed. Cir. 2002). There is no evidence, however, that a few aberrant orders significantly affected the AUVs, and here the Commission relied on both AUVs and the weighted-average prices of USP grade glycine to determine that domestic glycine prices increased overall.[10] *See Final Japan & Korea*

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[8] Sixteen purchasers rated reliability of supply very important, and one rated reliability of supply somewhat important; fifteen purchasers rated delivery time very important, and two rated delivery time somewhat important; and sixteen purchasers rated availability very important, and one rated availability somewhat important. *Staff Report* at II–9, Table II–3. By contrast, only seven purchasers rated lowest price very important, and ten rated lowest price somewhat important. *Id.*

[9] GEO asserts that the Commission's reliance on a post-hearing letter from Nestle was improper. (GEO's Br. at 18–21.) The letter was [[ ]]. (Def.'s App. Tab CD 160.) The letter stated that Nestle considers GEO [[ ]] and detailed Nestle's problems with GEO. (*Id.*) There is no technical bar to acceptance of the letter and although this information might have been more reliable if it had been presented as testimony at the hearing, the purchaser questionnaire responses and other record evidence corroborate GEO's supply problems. (*See* Def.'s App. Tabs CD 106, CD 107, CD 110, CD 133.)

[10] The AUVs of domestic glycine increased from [[ ]] in 2004 to [[ ]] in 2005 to [[ ]] in 2006, and ended at [[ ]] in January–June 2007. *Confidential Staff Report* at I–16, Table I–3, C–4, Table C–1. The weighted-average prices of USP grade glycine fluctuated from [[ ]] in January–March 2004 and [[ ]] in April–June 2004 to [[ ]] by January–March 2005 to [[ ]] by October–December 2006, and ended at [[ ]] in January–June 2007. *Id.* at V–7, Table V–2. The latter data, upon which GEO

Determination at 19 & n.114 (citing *Confidential Staff Report* at Table C–1 (AUV data); *id.* at Table V–2 (weighted-average product pricing data)). Accordingly, substantial evidence supported the Commission's finding that subject imports did not depress domestic glycine prices.

4. The negative price suppression determination

GEO argues that subject imports suppressed glycine prices because the ratio of COGS to net sales was poor, indicating that the domestic industry experienced a cost-price squeeze. (GEO's Br. 23.) GEO argues that the Commission's analysis did not account for the domestic producers' operating losses during the POI, the significant decrease in depreciation costs after Hampshire/DOW stopped depreciating its assets in 2005, or the impact of sharply rising demand in 2005. (*Id.* at 24–26.) These arguments are unavailing.

When the COGS "exceeds price, the producer is unable to sell the product for more than what it costs to produce the product; if the producer is unable to raise prices, the industry finds itself in . . . a cost-price squeeze." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1354 n.4 (Fed. Cir. 2006). The Commission found that unit COGS fluctuated between 2004 and interim 2007 and that the ratio of COGS to net sales decreased between 2004 and interim 2007.[11] *Final Japan & Korea Determination* at 19. The Commission "thus [found] no consistent evidence that the industry is faced with a significant cost/price squeeze, and thus no consistent evidence [of] significant price suppression." *Id.*

Although the record provides some evidence of a modest cost-price squeeze, the Commission could conclude that the price suppression caused by subject imports was not significant. "Such a determination does not mean that price . . . suppression was nonexistent; rather, the . . . suppressive effects of subject imports did not rise to an actionable level under the antidumping statute." *Nitrogen Solutions Fair Trade Comm. v. United States*, 358 F. Supp. 2d 1314, 1326 (CIT 2005). The domestic industry faced operating losses during the POI, but those losses decreased overall.[12] *Final Japan & Korea Determination* at 21. Additionally, although the Commission's *Final Determination* did not mention that COGS decreased in 2005 partly because

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relies (*see* GEO's Br. 16–18; GEO's Reply Br. 8–10), is not strikingly different from the AUV data and does not clearly demonstrate price depression.

[11] Specifically, unit COGs fluctuated from [[ ]] in 2004 to [[ ]] in 2005 to [[ ]] in 2006 to [[ ]] in January–June 2007, and the ratio of COGS to net sales decreased from [[ ]] in 2004 to [[ ]] in 2005, [[ ]] in 2006, and [[ ]] in January–June 2007. *Confidential Staff Report* at C–4, Table C–1.

[12] The domestic industry's operating losses decreased from [[ ]] in 2004 to [[ ]] in 2005, and ended at [[ ]] in 2006. *Confidential Staff Report* at VI–2, Table VI–1.

Hampshire/DOW stopped depreciating its assets in anticipation of the transfer of its facility to GEO, *see id.* at 33 (Commissioners Williamson & Pinkert, dissenting), the Commission calculated COGS based on the information provided by GEO, which could have estimated its own depreciation costs after acquiring the Hampshire/DOW facility in November 2005.[13] Finally, GEO's argument that sharply rising demand in 2005 reduced costs by allowing more efficient production and higher capacity utilization (GEO's Br. 26 & n.96) is consistent with the Commission's conclusion that the industry did not face a significant cost-price squeeze.

B. The impact of the imports

GEO challenges the Commission's impact analysis, arguing that the Commission ignored evidence that imports caused lost sales and lost revenues for the domestic glycine industry. (GEO's Br. 27–28.) In examining the impact of subject imports on the domestic industry, the Commission must "evaluate all relevant economic factors which have a bearing on the state of the industry in the United States," including lost sales and revenues.[14] 19 U.S.C. § 1677(7)(C)(iii). Here, the Commission determined that subject imports did not cause GEO's problems, which were "mostly self-inflicted," and that subject imports did not cause the lost sales and revenues that GEO alleged, "as [[ ]] of the allegations were confirmed."[15] *Confidential Final Japan & Korea Determination* at 34 n.140 (internal quotations and citation omitted). Substantial evidence therefore supported the Commission's determination that subject imports did not cause lost sales and lost revenue. In any event, "lost sales alone do not mandate an affirmative finding of injury; rather the Commission must determine whether lost sales, together with other factors, indicate a

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[13] The Commission adopted GEO's report that its total unit COGS, including depreciation, fluctuated between [[ ]] in 2004, [[ ]] in 2005, [[ ]] in 2006, and [[ ]] in January–June 2007. *See Confidential Staff Report* at VI–4, Table VI–2; GEO's Economic Analysis for the Final Investigation Table 4, GEO's App. Tab 8.

[14] Such factors include:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (II) factors affecting domestic prices,
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, . . . and
> (V) . . . the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii).

[15] The *Confidential Staff Report* addressed all of the allegations of lost sales in GEO's petition to the Commission. *See Confidential Staff Report* at V–14 to –19; GEO's Petition at 27–32, *available at* GEO's App. Tab 7. [[ ]] *Confidential Staff Report* at V–15, Table V–7. [[ ]] *Id.* at V–15 to –16.

causal nexus between the imports at less than fair value and material injury to the domestic industry." *Maverick Tube Corp. v. United States*, 687 F. Supp. 1569, 1575 (CIT 1988). Because lost sales and other factors did not indicate such a causal nexus, *see Final Japan & Korea Determination* at 22 & n.140, the Commission's overall impact determination was substantially supported.[16]

C. Causation

GEO contends that the Commission applied the wrong causation standard. (GEO's Br. 29–30.) GEO asserts that because there are multiple potential causes of injury, the Commission should have analyzed whether the subject imports contributed to the U.S. industry's material injury in a legally significant way. (*Id.*) Contrary to GEO's assertion, the Commission applied the correct standard.

The Commission must determine whether a domestic injury has suffered material injury "by reason of" the subject imports. 19 U.S.C. § 1673d(b)(1). The Commission must examine other possible causes of the injury, and the evidence must show "that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way." *Taiwan Semiconductors Indus. Ass'n v. ITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001). The subject imports, however, may only be a substantial factor and "need not be the sole or principal cause of injury." *Nippon Steel Corp. v. ITC*, 345 F.3d 1379, 1381 (Fed. Cir. 2003).

Here, the Commission concluded that "the subject imports are not contributing significantly to the domestic industry's poor financial condition" and that "the record does not demonstrate the requisite causal nexus between the subject imports and the condition of the domestic industry." *Final Japan & Korea Determination* at 22. After examining other possible causes of the domestic industry's condition, particularly GEO's supply problems, the Commission decided that the subject imports were not a substantial factor contributing to the domestic industry's condition. *Id.* at 21–22. The Commission did not reach a negative injury determination based on a finding that imports were a significant cause among other causes. It simply found that imports were not a significant cause. Such a causation analysis is appropriate.

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[16] GEO also argues that the Commission's impact analysis was flawed because the Commission determined that factors other than subject imports accounted for the domestic industry's performance during the POI , as detailed in the Commission's price effects discussion. (GEO's Br. 27.) Because substantial evidence supported the Commission's determination that factors such as GEO's supply problems accounted for the domestic industry's performance, this argument also lacks merit.

II. Negative Threat of Material Injury Determination

Finally, GEO challenges the Commission's determination that the domestic industry was not threatened with material injury by reason of subject imports. (GEO's Br. 31–39.) GEO claims that the Commission drew improper adverse inferences against the domestic industry when foreign producers did not submit complete data regarding such economic factors as their capacity, unused production capacity, and anticipated future exports, contrary to the Commission's usual practice of drawing adverse inferences against nonresponsive producers. (*Id.* at 32–33.) GEO further claims that substantial evidence did not support the Commission's conclusion that there would be only "some" increase in subject imports based on the Commission's estimate of foreign producers' excess capacity.[17] (*Id.* at 34–39.) These claims also fail.

In determining whether subject imports threaten the domestic industry with material injury, the Commission must consider relevant economic factors, including "any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States."[18] 19

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[17] The Commission also concluded that there was no strong correlation between domestic prices and import volumes during the POI, noting that "[t]he highest domestic prices for [USP grade glycine] were observed in 2005, a year in which subject imports' share of U.S. consumption (by volume) increased . . . and the domestic producers' share fell." *Final Japan & Korea Determination* at 25. GEO asserts that a sharp increase in demand in 2005 caused the rise in prices. (GEO's Br. 34–35.) Assuming this assertion is true, it is consistent with the Commission's conclusion that factors other than import volumes drove the price changes during the POI. Additionally, the volume of subject imports of USP grade glycine increased over the POI from [[ ]] pounds in 2004 to [[ ]] pounds in 2005 to [[ ]] pounds in 2006, *Confidential Staff Report* at IV–4, Table IV–2, and the total volume of imports increased from 5,233,000 pounds in 2004 to 7,915,000 pounds in 2005 to 8,971,000 pounds in 2006, *Staff Report* at IV–3, Table IV–2, while domestic prices of USP grade glycine fluctuated and ended at a slightly higher level than prices at the beginning of the POI, *see Confidential Staff Report* at V7, Table V–2. Because prices did not decline as the volume of subject imports increased, the Commission could conclude that there was no strong correlation between domestic prices and import volumes.

[18] Other relevant factors include:

> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
> (V) inventories of the subject merchandise,
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products, . . .
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry . . . , and
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of [subject] imports.

U.S.C. § 1677(7)(F)(i)(II). Here, the Commission found that "the total exports to the United States projected by the Indian and Japanese producers combined will not exceed their combined volume of exports in 2006" but concluded that "some increase in the volume of subject imports . . . is likely" because the Indian and Japanese industries have substantial unused capacity and are increasingly export-oriented. *Final Japan & Korea Determination* at 24–25.

The Commission did not draw any adverse inferences; the Commission merely made projections from the information available. Based on information from the responding Japanese producer and exporters,[19] the Commission estimated the Japanese firms' capacities, expected future capacities, and anticipated future exports.[20] *See Confidential Staff Report* at VII–8, Table VII–4. Although the Commission never received any responses to Korean producer questionnaires, the Commission reasonably concluded "based on the available evidence" that Korea Bio-Gen Co. Ltd., the principal Korean producer, has the capacity to export at least [[ ]] million pounds "and likely also has some unused capacity." *Confidential Final Japan & Korea Determination* at 37 n.147. GEO concedes that Indian producers provided complete data.[21] (GEO's Br. 32.) The Commission rejected the foreign producers' projections that imports would decrease. *See Final Japan & Korea Determination* at 25.

GEO's assertion that the Commission usually draws adverse inferences against non-responsive parties is incorrect. The Commission is not required to draw an adverse inference against a party who "has failed to cooperate by not acting to the best of its ability to comply with a request for information," although it may do so. 19 U.S.C. § 1677e(b). The Commission prefers to "strive [for] the most reasonable estimate" and rely upon the most accurate data available.

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19 U.S.C. § 1677(7)(F)(i).

[19] According to U.S. importers' questionnaire responses, all U.S. glycine imports from Japan are produced by Showa Denko and Yuki Gosei. *Staff Report* at VII–4. Yuki Gosei and three firms that export Japanese glycine to the United States responded to questionnaires, but Showa Denko did not. *Id.*

[20] Japanese producers had a capacity of [[ ]] million pounds each year in 2004, 2005, and 2006, and the producer and exporters projected capacity to remain at that level in 2007 and 2008. *Confidential Final Japan & Korea Determination* at 37 n.147. Japanese exports to the United States increased from [[ ]] pounds in 2004 to [[ ]] pounds in 2005 to [[ ]] pounds in 2006. *Confidential Staff Report* at VII–8, Table VII–4. The Japanese producer and exporters projected that they would export [[ ]] pounds to the United States in 2007 and [[ ]] pounds to the United States in 2008. *Id.*

[21] Based on questionnaire responses, Indian producers had a capacity of [[

]]. *Glycine from India*, Inv. No. 731–TA–1111, at I–11, Table 8 (Apr. 2008) (final staff report to the Commission) (confidential version), *available at* GEO's App. Tab 4. Indian producers reported that exports to the United States increased [[

]]. *Id.* Indian producers projected that they would export [[ ]] pounds to the United States in 2007 and [[ ]] pounds to the United States in 2008. *Id.*

Asociacion De Productores De Salmon y Trucha De Chile AG v. ITC, 180 F. Supp. 2d 1360, 1368 (CIT 2002) (internal quotations and citation omitted); *see Lawn and Garden Steel Fence Posts from China*, USITC Pub. No. 3598, Inv. No. 731–TA–1010, at n.96 (June 2003), *available at* 2003 WL 21494593 ("While the Commission has the discretion to take adverse inferences against all of the non-responding Chinese producers, we have frequently stated that the ability to take adverse inferences does not relieve the Commission of its obligation to consider the record evidence as a whole in making its determination and to draw reasonable inferences from all the record evidence."). Unlike the Department of Commerce, which often draws adverse inferences against particular non-cooperative companies when calculating dumping margins, *see, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan*, 72 Fed. Reg. at 67272; *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from the Republic of Korea*, 72 Fed. Reg. at 67275, the Commission rarely draws adverse inferences because its decisions affect all industry participants, *see* Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4198–99.

Further, GEO does not challenge the Commission's determination that other economic factors relevant to an affirmative finding of threat of material injury were not satisfied. Because the Commission must consider economic factors indicating threat of material injury "as a whole," and the presence or absence of any particular factor is not dispositive, 19 U.S.C. § 1677(7)(F)(ii), substantial evidence supports the Commission's threat of material injury determination.

CONCLUSION

For the foregoing reasons, the Commission's determination that the domestic industry was not materially injured or threatened with material injury by reason of subject imports was supported by substantial evidence and in accordance with law. Accordingly, GEO's motion for judgment on the agency record is denied and judgment will be entered for defendant.

Slip Op. 09–14

FORMER EMPLOYEES OF WARP PROCESSING CO., INC., Plaintiffs, v. UNITED STATES DEPARTMENT OF LABOR, Defendant.

Court No. 08–00179

[Motion for voluntary remand to defendant regarding plaintiffs' eligibility for trade-adjustment assistance granted.]

Dated: February 20, 2009

Steptoe & Johnson LLP (*Joel D. Kaufman* and *Michael T. Gershberg*) for the plaintiffs.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Christopher L. Krafchek*) for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: This action pursuant to 19 U.S.C. §2395 and 28 U.S.C. §1581(d) has been brought by former employees of Warp Processing Co., Inc. of Exeter, Pennsylvania, seeking judicial review of the *Negative Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance And Alternative Trade Adjustment Assistance* (Feb. 19, 2008) of the Employment and Training Administration ("ETA"), U.S. Department of Labor, No. TA–W–62,655, and of its subsequent *Notice of Negative Determination Regarding Application for Reconsideration* (March 18, 2008). Upon the filing of the ETA administrative record ("AR"), answer to the complaint, and motion by the plaintiffs for judgment on that record, comes now the Defendant's Consent Motion for Voluntary Remand "to enable Labor to state with greater clarity and accuracy the bases for its determination in a way that would facilitate this Court's review."

I

Suffice it to state that such review, albeit limited to date, leads to the conclusion that defendant's motion is well-taken. Whatever the impact of increased imports from China and other countries on domestic textile manufacturing, "adversely affected secondary workers" shall be certified as eligible to apply for trade adjustment assistance ("TAA") benefits if the Secretary of Labor determines that

> (1) a significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;
>
> (2) the workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a

group of workers who received a certification of eligibility under subsection (a) of this section, and such supply or production is related to the article that was the basis for such certification (as defined in subsection (c)(3) and (4)[1] of this section); and

(3) either –

(A) the workers' firm is a supplier and the component parts it supplied to the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation determined under paragraph (1).

19 U.S.C. §2272(b).

A

According to ETA's *Negative Determinations* herein, the agency's investigation revealed that foregoing subsection 3 had not been met:

> Petitioners allege that job losses were due to their firm losing business as a supplier firm, producing components for trade certified firms. The investigation revealed the subject firm did supply component parts utilized by customers engaged in textile manufacturing; however, workers at these textile manufacturing firms have not received a primary certification making them eligible to apply for adjustment assistance.

AR, p. 112. Without any supplementation of the administrative record, ETA's negative determination regarding the petitioners' application for reconsideration explains that the investigation revealed that Warp's only customer was Brawer Brothers, Inc. *See id*. at 142. That determination also reports that the agency considered three companies, which the petitioners claimed to have been supplied with component products by Warp and which had currently TAA-certified worker groups. The agency found that such certifications in re Cortina Fabrics and Guilford Mills, Inc. had expired prior to the period at issue in this matter. As for Native Textiles, Inc., while its workers were certified as eligible to apply for benefits under 19 U.S.C. §2272(a) during the relevant period, ETA found that circumstance to be

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[1] Section 2272(c)(3) of Title 19, U.S.C. defines "downstream producer" as "a firm that performs additional, value-added production processes for a firm or subdivision, including a firm that performs final assembly or finishing" and (c)(4) defines a "supplier" as "a firm that produces and supplies directly to another firm (or subdivision) component parts for articles that were the basis for a certification of eligibility".

> irrelevant because the subject firm did not conduct business with that company during the relevant period and because warped synthetic fiber is not a component part of the warp knit synthetic tricot fabric produced by Native Textiles.

Id.

II

In an action such as this, the Secretary of Labor's findings of fact are conclusive, if supported by substantial evidence. However, the court, "for good cause shown, may remand the case to such Secretary to take further evidence, and . . . make new or modified findings of fact". 19 U.S.C. §2395(b). Moreover, since the governing Trade Act of 1974 is remedial legislation, the Secretary is "obliged" to conduct an investigation with the utmost regard for the interests of the petitioning workers. *E.g*., *Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F.Supp. 1438, 1442 (1984).

A

As the court reads the administrative record, such as it is, there is actually a finding by ETA of failure to satisfy 19 U.S.C. §2272(b)(2), *supra*, as opposed to (b)(3), per its report that the

> investigation revealed the subject firm did supply component parts utilized by customers engaged in textile manufacturing; however, workers at these textile manufacturing firms have not received a primary certification making them eligible to apply for adjustment assistance.

AR, p. 112. Although not stated, the record does indicate that Brawer Brothers, Inc. did not employ a group of workers who received a certification of eligibility under 19 U.S.C. §2272(a) during the relevant period of investigation. *See id*. at 55. However, there is not sufficient evidence on the record to support a finding that Brawer Brothers, Inc. was Warp Processing Co.'s only customer. *Cf. Former Employees of General Elec. Corp. v. U.S. Dep't of Labor*, 14 CIT 608 (1990) (no deference is due to determinations based on inadequate investigations).

This view appears to be shared now by the parties. *See* Defendant's Consent Motion for Voluntary Remand, p. 3:

> . . . [P]laintiffs refer[ ] to supplemental evidence allegedly showing that Warp and Brawer Bros. may have operated as one entity. A remand would enable Labor to place this information on the record and determine the scope of the relationship between Warp and Brawer Bros.

Whether or not Warp was a downstream producer for Native Textiles, Inc., a product of which was warp knit synthetic tricot fabric, evidence currently on the record does not provide the dispositive answer. With regard to ETA's survey of Brawer Brothers' customers, there appears only to have been an inquiry into whether there were increased imports, and not whether that firm's customers were certified within the meaning of 19 U.S.C. §2272(b)(2), *supra*.

III

In view of the foregoing, defendant's motion for remand should be, and it hereby is, granted. On remand, ETA should supplement the record in this matter as necessary to reach a determination supported by substantial evidence. Specifically, before deciding eligibility for adjustment or alternative adjustment assistance, the defendant is directed to determine the relationship between Warp Processing Co., Inc. and Brawer Brothers, Inc.; to determine the degree, if any, Native Textiles, Inc. was or is a customer of Warp Processing Co., Inc.; to determine the degree, if any, the firms on the lists provided by petitioner Keith Thieman (AR, p. 75) and the firms presumably provided by Brawer Brothers, Inc. as a listing of its Major Declining Customers (*id*. at 102) were or are customers of Warp Processing Co., Inc.; and, in that regard, to determine if any workers of customers of Warp Processing Co., Inc. were certified as eligible under 19 U.S.C. §2272(a) to apply for adjustment assistance at a relevant time.

The defendant may have until May 22, 2009 to carry out this remand and report the results thereof. The plaintiffs may file any comments thereon on or before June 19, 2009.

So ordered.