U.S. Customs and Border Protection

Slip Op. 11–58

BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY, AND UNITED STATES STEEL CORP., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 10–00312

[Denying defendant's motion to dismiss part of plaintiff's complaint.]

Dated: May 26, 2011

Lafave Associates (*Arthur J. Lafave III*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Melissa M. Devine*); Office of the Chief Counsel for Import Administrative, U.S. Department of Commerce (*Sapna Sharma*), of counsel, for the defendant.

King & Spaulding, LLP (*Gilbert B. Kaplan*, *Brian E. McGill*, *Daniel L. Schneiderman*, and *Prentiss L. Smith*), for the defendant-intervenor Wheatland Tube Company.

Skadden Arps Slate Meagher & Flom, LLP (*Jeffrey D. Gerrish*, *Robert E. Lighthizer*, and *Soo-Mi Rhee*), for the defendant-intervenor United States Steel Corporation.

OPINION AND ORDER

Musgrave, Senior Judge:

Introduction

Presently before the court is a motion to dismiss the third count of the plaintiff's complaint with prejudice. *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, Slip Op. 11–30, 2011 WL 1086057 (CIT Mar. 22, 2011), familiarity with which is presumed. The government's primary argument in support of the motion is appeal to the "unequivocal" line of decisions upholding the practice of "zeroing" by the Department of Commerce, International Trade Administration ("Commerce"), in the context of antidumping duty administrative reviews as well as original investigations.

As previously observed, the third count of the complaint alleges Commerce applied an inconsistent construction of 19 U.S.C. §

1677(35) in zeroing the plaintiff's sales in *Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Final Antidumping Duty Administrative Review*, 75 Fed. Reg. 64250 (Dep't Comm. Oct. 19, 2010), after abandonment of that practice in investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722, 77724 (Dep't Comm. Dec. 27, 2006). The government's motion to dismiss has been held in abeyance pending a decision of the Court of Appeals for the Federal Circuit ("CAFC") on *Dongbu Steel Co. v. United States*, 42 CIT ___, 677 F. Supp. 2d 1353 (2010), *appeal docketed*, No. 2010–1271 (Fed. Cir. Mar. 29, 2010), which addressed a similar issue. That decision has now come.

In *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011), the CAFC concluded Commerce had not provided a reasonable explanation for differing interpretations of "weighted average dumping margin" that depend upon whether the context is administrative review or investigation, *see* 19 U.S.C. § 1677(35)(A)&(B), and therefore the matter was remanded to this Court for further instruction to Commerce either to provide a reasonable explanation or "choose a single consistent interpretation of the statutory language." 635 F. 3d at 1373.

Mandate thereof having issued, on May 23, 2011, consistent therewith the instant motion to dismiss with prejudice must be, and it hereby is, denied. Motion and briefing shall proceed accordingly. *See* Order of March 22, 2011, ECF No. 58.

So ordered.

Dated: May 26, 2011
New York, New York

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

Slip Op. 11–59

FORMER EMPLOYEES OF SOUTH EAST AIRLINES, Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS
Court No. 09–00522

[The Department of Labor's Remand Determinations are affirmed.]

Dated: May 26, 2011

Sidley Austin, LLP (*Neil R. Ellis, Jill Caiazzo*) for Former Employees of South East Airlines, plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Jacob A. Schunk*); *Jonathan Hammer*, Office of the Solicitor, United States Department of Labor, of Counsel, for the United States Department of Labor, defendant.

OPINION

TSOUCALAS, Senior Judge:

INTRODUCTION

Plaintiffs, Former Employees of Southeast Airlines ("the Former Employees"), move pursuant to USCIT R. 56.1 for judgment upon the agency record or, alternatively, a remand for further investigation. The Former Employees challenge the United States Department of Labor's ("Labor") determinations denying them eligibility for certification of Trade Adjustment Assistance ("TAA") under the Trade Act of 1974, tit. II, §§ 221-249, 284, *as amended* 19 U.S.C. §§ 2271–2321, 2395 (Supp. II 2008) (the "Trade Act"). *See* Notice of Determination Regarding *Eligibility to Apply for Worker Adjustment Assistance* ("*Negative Determination*"), 74 Fed. Reg. 59,251, 59,255 (Dep't Labor Nov. 17, 2009); *Notice of Negative Determination Regarding Application for Reconsideration* ("*Negative Reconsideration*"), 74 Fed. Reg. 64,736 (Dep't Labor Dec. 8, 2009); *Notice of Negative Determination on Remand* ("*First Remand*"), 75 Fed. Reg. 57,517 (Dep't Labor Sept. 21, 2010); *Notice of Negative Determination on Second Remand* ("*Second Remand*"), 76 Fed. Reg. 4733 (Dep't Labor Jan. 26, 2011). Labor determined that the Former Employees were not entitled to TAA because they did not meet the statutory requirements for certification.

BACKGROUND

The Former Employees were employed by Atlantic Southeast Airlines ("the Airline"), and worked at the Fort Smith, Arkansas airport facility. Under a contract between the Airline and Delta Airlines, the Former Employees provided airport station management, ticketing and baggage services. *See* Second Remand Comments of Plaintiff Former Employees of Atlantic Southeast Airlines at 8, 11, 15. The Former Employees were severed from their employment in May of 2009. Their application for TAA was denied on September 28, 2009. In their request for administrative reconsideration, they asserted that they were eligible to receive TAA as "downstream producers" for various local firms that were certified as eligible for TAA. Upon receiving a negative determination on that request, the Former Em-

ployees sought judicial review in this Court on December 7, 2009. Labor, during both remands, determined that the Former Employees were not entitled to TAA benefits for a number of reasons including that they were not downstream producers within the meaning of the statute.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(d)(1) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Labor's determination of eligibility for TAA, the Court will uphold Labor's determination if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 2395(b) (2000); *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, *Woodrum v. United States*, 737 F.2d 1575 (Fed. Cir. 1984). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *see also* Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). Additionally, the Court's review of Labor's determination denying certification of eligibility for TAA benefits is confined to the administrative record before it. *See* 28 U.S.C. § 2640(c) (2000); *see also Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998).

A court "must accord substantial weight to the interpretation put on the statute by the agency charged with its administration." *Former Employees of Asarco's Amarillo Copper Refinery v. United States*, 11 CIT 815, 817, 675 F. Supp. 647, 649 (1987). Moreover, a court "must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

ANALYSIS

The Trade Act provides for TAA benefits to workers who have been completely displaced as a result of increased imports into, or shifts of production out of, the United States. *See* 19 U.S.C. § 2272. Such benefits include "unemployment compensation, training, job search and relocation allowances, and other employment services . . . ." *Former Employees of Kleinerts, Inc. v. Herman*, 23 CIT 647, 647, 74 F. Supp. 2d, 1280, 1282 (1999) (*quoting Former Employees of Parallel Corp. v. United States Sec'y of Labor*, 14 CIT 114, 118, 731 F. Supp. 524, 527 (1990)). *See* 19 U.S.C. §§ 2295–98.

Here, the issue for Labor to consider is whether the Former Employees qualified for assistance as adversely effected secondary workers under 19 U.S.C. § 2272(c). The statute has three requirements, each of which must be satisfied, before Labor may grant TAA. In relevant part, the Trade Act Provides:

> (c) Adversely affected secondary workers
>
> A group of workers shall be certified by the Secretary as eligible for trade adjustment assistance benefits under this part pursuant to a petition filed under section 2271 of this title if the Secretary 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 is a supplier or downstream producer to a firm 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 or service that was the basis for such certification (as defined in subsection (d)(3) and (4) of this section); and
>
> (3) either–
>
> (A) the workers' firm is a supplier and the component parts it supplied to the firm 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 described in paragraph (2) contributed importantly to the workers' separation or threat of separation determined under paragraph (1).

19 U.S.C. § 2272(c).

As such TAA eligibility hinges on whether the Former Employees have satisfied the three requirements of 19 U.S.C. § 2272(c). The first requirement is clearly satisfied since no one disputes the Former Employees have been totally separated from employment. Labor, however, found that the Former Employees were not downstream producers within the meaning of the statute.

The definition of "downstream producer" is specifically set forth in the Trade Act. It means "a firm that performs additional . . . services directly for another firm for articles or services with respect to which

a group of workers in such other firm has been certified under subsection (a)." 19 U.S.C. § 2272(d)(3)(A). Labor's interpretation of "directly for" was that there "may not be an intervening customer or supplier." *Second Remand* at 4734. The evidence in the record shows that the Former Employees were in contract with Delta Airlines and not directly in contract with the TAA certified firms. Moreover, while the Former Employees may have dealt with individuals who were employed by TAA firms, the Former Employees served the Fort Smith Airport at the pleasure of Delta Airlines and not at the pleasure of these other TAA certified companies. Labor noted this in their *First Remand* and their *Second Remand*. *See First Remand* at 57,519; *Second Remand* at 4734. As such, Labor reasoned that since the Former Employees provided services "directly for" Delta Airlines and not "directly for" TAA certified firms, the Former Employees could not meet the statutory definition of "downstream producer". *See First Remand* at 57,519.

Labor's interpretation of the "directly for" phrase within the definition of "downstream producer" is not arbitrary and capricious. "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Recources Defense Council, Inc., et al.*, 467 U.S. 837, 843–44 (1984). Labor's interpretation is reasonably construed from the clearly stated definition in the statute.

Additionally, to qualify as adversely affected secondary workers, the Former Employees need to show that the services they supplied were "related to the article or service that was the basis" for the TAA certification. *See* 19 U.S.C. § 2272(c)(2). The companies which the Former Employees rely on for TAA did not engage in airline support services as the Former Employees did. Labor correctly noted, therefore, that it was "not necessary to survey Delta's customers because the articles or services those customers produce or provide are not related to the supply of airline customer services that the subject firm provides." *See Second Remand* at 4734. It is not necessary for Labor to investigate every other criteria concerning the application since one of the statutory requirements, specifically, 19 U.S.C. § 2272(c)(2), has not been satisfied. *See Chen v. Chad*, 32 CIT ___, ___, 587 F. Supp. 2d 1292, 1296 (2008); *see also Former Employees of Asarco's Amarillo Copper Refinery*, 11 CIT at 820, 675 F. Supp. at 651 ("Plaintiffs must meet all three requirements of section 222 of the Act before they are

eligible for trade adjustment assistance.") Since at least one of the required elements was not satisfied, the Former Employees are not eligible for TAA benefits.

Moreover, the record supports more than a "mere scintilla" of evidence that the reason for the Airline's closure of operations at Fort Smith Airport was not due to foreign competition but directly due to local competition, to wit: they lost a contract to renew their services with the combined merger of Delta and Northwest Airlines. Labor correctly noted that the Airline "had the same opportunity to bid to win the contract to supply services at the Fort Smith, Arkansas airport as other firms, but did not win the contract." *Second Remand* at 4734. The contract which was not awarded to the Former Employees was connected to local competition, not international competition. Had the Former Employees succeeded in acquiring this contract, they may still be servicing the Fort Smith Airport.

As such, Labor's determination that the Former Employees are not eligible for TAA certification is supported by substantial evidence and is in accordance with law.

CONCLUSION

Based on the foregoing the Court sustains Labor's *Notice of Negative Determination on Remand*, 75 Fed. Reg. 57,517 (Sept. 21, 2010), and the *Notice of Negative Determination on Second Remand*, 76 Fed. Reg. 4733 (Jan. 26, 2011) denying the Former Employees eligibility for certification to receive TAA benefits as being supported by substantial evidence and otherwise in accordance with law. Judgment will be entered accordingly.

Dated: May 26, 2011
New York, New York

/s/ NICHOLAS TSOUCALAS
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 11–60

INTERNATIONAL CUSTOM PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 07–00318

[Defendant's Second Motion in Limine and for Disqualification is granted in part and denied in part, and ruling is deferred as to disqualification.]

Eckert Seamans Cherin & Mellott, LLC (*Gregory H. Teufel* and *Jeremy L.S. Samek*) for Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jason M. Kenner*, *Edward F. Kenny*) for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

INTRODUCTION

Before the Court is Defendant's Second Motion in Limine and for Disqualification, along with a supporting Memorandum, filed on August 25, 2010. (ECF No. 163, *"Def.'s Mem.") Plaintiff opposed the motion. (ECF No. 169, "Pl.'s Opp.") The motion is granted in part and denied in part, and ruling is deferred as to disqualification, as specified below.*

PARTIES' CONTENTIONS

I. *Defendant*

Briefly, Defendant seeks an order precluding Plaintiff from entering at trial a number of proposed exhibits (Pl.'s Exs. 61–64, 66, 68–74, 77–78, 80–81, 85, 88–89, 91, 93–94, 96, 98–107, and 237) consisting primarily of correspondence and sales documents. Defendant claims that Plaintiff failed to disclose these documents before the close of discovery, instead responding to the relevant interrogatories solely with objections.

Defendant also seeks to preclude Plaintiff from introducing the testimony of eight specific fact witnesses, expert testimony by Plaintiff's principal witness, and Schedule X–1 of the Proposed Pretrial Order (consisting of the proposed expert testimony and *curriculum vitae* of Plaintiff's principal witness). Defendant seeks this relief due to Plaintiff's alleged violation of its obligation to produce the names of these witnesses during discovery under USCIT R. 26(a)(1) (requiring initial disclosures) and R. 26(a)(2) (requiring expert disclosure).

Defendant furthermore seeks to preclude all testimony and documents related to (1) reliance by Plaintiff upon Customs Ruling Letter NYRL D86228, (2) imports of Plaintiff's product, white sauce, from 1988 to 1994; (3) lost profits suffered by Plaintiff due to adverse actions taken by Customs in addition to overpayment on the single Entry underlying this case; and (4) collateral damages suffered by Plaintiff. Defendant claims that this evidence is all irrelevant and therefore inadmissible under Fed. R. Evid. 402, and that the lost profits and damages claims furthermore violate USCIT R. 9(g).

Finally, Defendant moves to disqualify Plaintiff's trial counsel, Gregory Teufel, Esq., on the ground that Plaintiff has listed Mr. Teufel as a potential rebuttal and credibility witness in the Proposed Pretrial Order. According to Plaintiff, Model Rule of Professional Conduct 3.7, "Lawyer as Witness," forbids a lawyer to "act as an advocate at a trial in which the lawyer is likely to be a necessary witness," except in certain circumstances that Defendant claims are not pertinent here.

II. *Plaintiff*

Plaintiff points out that the Rules contemplate that the parties hold a conference to plan discovery "as soon as practicable—and in any event at least 21 days before a . . . scheduling order is due under Rule 16(b)." USCIT R. 26(f)(1). The time within which initial disclosures must be produced is defined in the Rules as "at or within 14 days of the parties' Rule 26(f) conference" unless exceptions irrelevant here apply. USCIT R. 26(a)(1)(C). The parties, however, never held a R. 26(f) conference.

Plaintiff argues that the deadline for initial disclosures was therefore never triggered. Plaintiff points out that, regardless, it provided initial disclosures on June 18, 2010 in correspondence in which Plaintiff also offered to provide any additional discovery sought by Defendant, and to join in a motion to reopen discovery should Defendant wish it. (*Pl.'s Opp.*, Ex. 4 at 2.) In another correspondence, dated July 1, 2010, Plaintiff's counsel notes that Defendant rejected Plaintiff's request for a R. 26(f) conference and offer of additional discovery or a joint motion to reopen discovery. *(Pl.'s Opp.*, Ex. 5 at 1.)

As to the exclusion of witnesses, Plaintiff argues that Gerd Stern has been known to Defendant for years, was interviewed more than once during the government's investigation, and was disclosed at the very latest via Dennis Raybuck's September 16, 2008 deposition testimony. (*Pl.'s Opp.* at 17, Ex. 2.) Plaintiff claims the same is true of a witness whose name is confidential. Witness Douglas Winters, Plaintiff claims, only became known to Plaintiff when his name was noted on third-party white sauce test results during preparation of the pretrial order; Plaintiff disclosed his identity to the government promptly, and did not hire him as an expert. Plaintiff claims that the names of Dean Osborn, Kathy Negro, and "Bernard D. Liberati and/or other representative of Morris Friedman & Co." would not have been responsive to any of the government's discovery requests. In any case, Plaintiff states that "it appears likely that the Government and ICP will reach further stipulations" that will render their

testimony unnecessary. (*Pl.'s Opp.* at 18–19.) Plaintiff makes no response regarding witnesses Kenneth Mitchell and Linda Knisley, listed as potential rebuttal or credibility witnesses in the proposed pretrial order.

As to the disqualification of Plaintiff's trial counsel due to Plaintiff listing him as a rebuttal and/or credibility witness, Plaintiff notes that Mr. Teufel has agreed not to testify if Plaintiff must choose between having Mr. Teufel as a trial counsel or witness. Plaintiff "merely asks that the Court defer ruling on this issue until trial," where the issue can be decided in the context of the evidence then on the record.

As to precluding Mr. Raybuck's expert testimony, Plaintiff states that it formally disclosed Mr. Raybuck's expert report on September 13, 2010, which was timely under the "90 days before trial" requirement of R. 26(a)(2)(C)(I). Plaintiff also notes that it first informed the government that it intended to use Mr. Raybuck as an expert witness on February 23, 2010, but that the government never sought to depose him and even rejected Plaintiff's June 18, 2010 offer to make him available for deposition.

Plaintiff also argues that, to the extent that Defendant seeks exclusion of documents and witnesses due to Plaintiff's response to interrogatories with objections, Defendant should have brought complaints about those good-faith objections to the Court's attention long ago if Defendant wished to contest them.

Finally, as to the preclusion of testimony regarding damages and reliance on Ruling Letter NYRL D86228, Plaintiff notes that it has "withdrawn its claim for lost profits, and intends to file revised Schedules C-1 and E-1 to the Proposed Pretrial Order, such that the only damages claimed shall be in the nature of excess duties paid on the Entry at issue, plus interest, expenses, costs, and attorney fees." (*Pl.'s Opp.* at 22.) Plaintiff argues that, while evidence of reliance on the ruling letter is not *necessary* to prove Plaintiff's due process claim, it is still has *relevance* to that claim.

ANALYSIS

The Court notes that the parties never held a R. 26(f) conference, as required by the Court's rules, and that Defendant declined Plaintiff's offer, at the time when the Proposed Pretrial Order was being prepared, to hold a belated R. 26(f) conference or reopen discovery. Meanwhile, many months have passed since that time, during which the government could easily have been conducting further paper discovery stemming from the supposedly late-disclosed documents provided by Plaintiff, and depositions of the witnesses it claims it has

been "sandbagged" by. Instead, the Court is now faced with a motion in limine that is, in essence, a belated discovery motion. The time for such motions is long past; this case is firmly in the pretrial stage. The Court notes that both parties bear partial blame for the improper conduct of discovery, but that only Plaintiff has proposed reopening discovery to cure any potential prejudice from which the government may claim to suffer. Upon consideration of these factors, as well as all other papers and proceedings in this case, Defendant's motion is denied to the extent that it seeks to preclude Plaintiff's Exs. 61–64, 66, 68–74, 77–78, 80–81, 85, 88–89, 91, 93–94, 96, 98–107, and 237, as well as witnesses Gerd Stern, Dean Osborn, Kathy Negro, Bernard Liberati and/or another representative of Morris Friedman & Co., Kenneth Mitchell, Linda Knisley, and the witness whose name is confidential. Defendant's motion is also denied as to Dennis Raybuck's testimony in an expert capacity and as to Schedule X-1 of the proposed pretrial order given that Plaintiff has long since provided expert disclosure as to Mr. Raybuck.

As to witness Douglas Winters, the Court also denies in part Defendant's motion to preclude his testimony, but grants the motion in part as to any testimony by Mr. Winters in an expert capacity. Although Plaintiff states that it does not intend to offer Mr. Winters as an expert, the Court nonetheless wishes to be clear that Mr. Winters will not be allowed to testify as an expert at trial.

The Court notes that, as of this time, no trial date has been set. If Defendant believes it is prejudiced by the denial of this motion, it may, upon consultation with Plaintiff, submit a joint motion to reopen discovery in a manner calculated to efficiently cure that prejudice. Such motion shall be filed no later than June 6, 2011, and shall set forth what additional discovery Defendant seeks and a proposed time line. The Court at this time does not anticipate granting more than 30 days of additional discovery, since a short period of targeted discovery should cure all ills in this case, but will entertain positions to the contrary if it must.

The Court has already indicated to Plaintiff that the Court is disinclined to permit Mr. Teufel to act as trial counsel and to testify as a rebuttal or credibility witness. However, the Court defers ruling on Defendant's motion for disqualification unless Plaintiff requests to call Mr. Teufel at trial, at which time the Court will make such ruling as is appropriate and necessary.

As to Defendant's motion to preclude evidence regarding Plaintiff's reliance on the Ruling Letter NYRL D86228 and regarding imports of white sauce from 1988 to 1994, the Court grants the motion only to the extent that Plaintiff offers such evidence to demonstrate entitle-

ment to lost profits—a claim which Plaintiff states that it has abandoned. Any evidence of lost profits is irrelevant under Fed. R. Evid. 402, since the Court has no jurisdiction under 19 U.S.C. 1581(a) to grant lost profits. However, Defendant's motion to preclude this evidence is denied to the extent that the evidence is otherwise admissible and is offered to prove the existence of and conformance with the ruling letter.

Finally, although Plaintiff states that it has abandoned its claim for lost profits and damages beyond overpayment directly related to the Entry at issue in this case, for the sake of clarity, Plaintiff will not be permitted at trial to admit evidence to prove lost profits or other collateral damages stemming from any alleged illegality in Defendant's treatment of the sole Entry at issue in this case.

The Court notes that Plaintiff has expressed the abandonment of certain claims, the potential that stipulations will obviate the need for certain witnesses, and its intention to file revisions to certain schedules of the proposed pretrial order. In light of this, the Court puts the parties on notice that it expects them to work together in good faith to make any modifications needed to revise the proposed pretrial order. The Court is eager to transmute, with its signature, the leaden working draft of a pretrial order into a golden Order of the Court providing for a streamlined trial and resolution of the issues in this case. To this end, the parties are further encouraged to winnow their schedules to reduce unnecessary evidence by entering into stipulations wherever possible. *All* modifications to the current proposed pretrial order must be submitted via ECF no later than July 6, 2011.

Furthermore, because the Court intends to admit all exhibits into the record at the beginning of trial, all evidentiary objections will be resolved prior to trial. To assist the Court in resolving the evidentiary objections contained in Schedules I–1 and I–2 to the proposed pretrial order, the parties shall submit to the Court a chart with four columns. The first three columns are to contain the following information: (1) the evidence that is subject to objection, (2) the basis for the objection, including citation to the appropriate Federal Rule(s) of Evidence, and (3) the response to the objection. The fourth column shall remain blank as a space in which the Court will note its ruling on each evidentiary objection. The parties shall docket both a print version of the chart on ECF, and simultaneously submit an electronic version in WordPerfect format (".wpd") by email to the Court's case manager, Cynthia Love, no later than July 6, 2011.

CONCLUSION

Upon consideration of Defendant's motion, Plaintiff's response, as well as all other papers and proceedings in this matter, and for the reasons stated above, it is hereby

ORDERED that Defendant's Motion in Limine and for Disqualification is **denied in part**, to the extent that it seeks to preclude the admission of Plaintiff's Exs. 61–64, 66, 68–74, 77–78, 80–81, 85, 88–89, 91, 93–94, 96, 98–107, and 237, as well as Plaintiff's witnesses Gerd Stern, Dean Osborn, Kathy Negro, Bernard Liberati and/or another representative of Morris Friedman & Co., Kenneth Mitchell, Linda Knisley, the witness whose name is confidential, Dennis Raybuck's testimony in an expert capacity, and Schedule X-1 of the proposed pretrial order; and it is further

ORDERED that Defendant's motion is **granted in part and denied in part** as to witness Douglas Winters, who is precluded from testifying in an expert capacity but may otherwise testify as a fact witness; and it is further

ORDERED that Defendant shall, if it believes it necessary, consult with Plaintiff and file a joint motion to reopen discovery no later than **June 6, 2011**, setting forth the specific items of discovery sought and proposing a time line; and it is further

ORDERED that Defendant's motion is **granted in part** to the extent that Plaintiff may not offer evidence of reliance upon Ruling Letter NYRL D86228 or imports of white sauce from 1988 to 1994 to demonstrate entitlement to lost profits or collateral damages and **denied in part** to the extent that the evidence of reliance and historic imports is otherwise admissible and is offered to prove the existence of and conformance with the ruling letter; and it is further

ORDERED that Defendant's motion is **granted** to the extent that Plaintiff is precluded from entering evidence to prove lost profits or other collateral damages stemming from any alleged illegality in Defendant's treatment of the sole Entry at issue in this case; and it is further

ORDERED that any modifications to the current proposed pretrial order must be submitted via ECF no later than July 6, 2011; and it is further

ORDERED that the parties shall submit a chart regarding the evidentiary objections in Schedules I–1 and I–2 to the Proposed Pretrial Order, as described herein, by July 6, 2011; and the Court further

DEFERS RULING on Defendant's motion for disqualification of Plaintiff's counsel unless and until it becomes necessary to do so at trial.

Dated: May 26, 2011
New York, NY

/s Gregory W. Carman/
GREGORY W. CARMAN, JUDGE

Slip Op. 11–61

CARPENTER TECHNOLOGY CORPORATION; VALBRUNA SLATER STAINLESS, INC.; AND ELECTRALLOY CORPORATION, A DIVISION OF G.O. CARLSON, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 07–00366

[Ordering United States Department of Commerce to conduct an individual examination of, at a minimum, two previously unexamined respondents and to redetermine margins for six respondents in an administrative review of an antidumping duty order on stainless steel bar from India]

Dated: May 26, 2011

Kelley Drye & Warren, LLP (*Laurence J. Lasoff*, *Grace W. Kim*, and *Mary T. Staley*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*L. Misha Preheim*); *Sapna Sharma*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

Plaintiffs Carpenter Technology Corporation, Valbruna Slater Stainless, Inc., and Electralloy Corporation, a Division of G.O. Carlson, Inc. (collectively, "plaintiffs") are domestic producers of stainless steel bar who brought this action to contest the final determination ("Final Results") in an administrative review of an antidumping duty order on imports of stainless steel bar from India (the "subject merchandise"). *Notice of Final Results & Final Partial Rescission of Antidumping Duty Admin. Review: Stainless Steel Bar from India*, 72 Fed. Reg. 51,595 (Sept. 10, 2007) ("*Final Results*"). Before the court is the response of the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") to the court's order in *Carpenter Tech. Corp. v. United States*, 33 CIT

__, 662 F. Supp. 2d 1337 (2009) ("*Carpenter*"). *Interim Remand Determination in Carpenter Tech. Corp. et. al. v. United States, Court No. 07–00366* ("*Interim Remand Determination*"). In *Carpenter*, the court held contrary to law the Department's decision to examine individually only two respondents, Bhansali Bright Bars Pvt., Ltd. ("Bhansali") and Venus Wire Industries Pvt., Ltd. ("Venus"), of eight respondents in the administrative review. *Carpenter*, 33 CIT at __, 662 F. Supp. 2d at 1347. The court concluded that this decision "was based on a statutory construction at odds with the clearly expressed intent of Congress" because "Commerce implicitly construed [19 U.S.C.] § 1677f-1(c)(2) such that any number of exporters/producers larger than two was a 'large number of exporters or producers' within the meaning of that term as used in the statutory provision." *Id.* at __, 662 F. Supp. 2d at 1342–43 (citing Tariff Act of 1930 ("Tariff Act" or the "Act"), § 777A(c)(2), 19 U.S.C. § 1677f-1(c)(2) (2006)).

The court ordered in *Carpenter* that Commerce report to the court in an interim decision "whether it will conduct individual examinations of, and calculate individual weighted-average dumping margins for, Isibars Limited, Grand Foundry, Ltd., Sindia Steels Limited, Snowdrop Trading Pvt. Ltd., Facor Steels, Ltd., and/or Mukand Ltd.," the respondents the Department declined to examine individually in the review. *Id.* at __, 662 F. Supp. 2d at 1347. The court further ordered that Commerce, if it decides to proceed with individual examinations, "also shall inform the court of the time period that Commerce will require to complete such examinations and issue an amended final determination of the results of the administrative review . . . ." *Id.* at __, 662. F. Supp. 2d at 1347–48.

The response to the court's order, titled "Interim Remand Determination," announces that Commerce will examine individually on remand two additional respondents, Sindia Steels Limited ("Sindia") and Snowdrop Trading Pvt. Ltd. ("Snowdrop"), which Commerce chose because these two respondents, of the six respondents who remain unexamined, account for the two largest volumes of exports of subject merchandise to the United States. *Interim Remand Determination* 26. Commerce further informed the court that it will require a minimum of 365 days to complete a review of Sindia and Snowdrop and issue amended final results. *Id.* at 2.

Commenting to the court on the Interim Remand Determination, plaintiffs raise two objections. They argue, first, that Commerce improperly refused to rescind the review as to Grand Foundry, Ltd. ("Grand Foundry"), Sindia, and Snowdrop despite plaintiffs' having notified the Department, in comments on a draft version of the Interim Remand Determination (the "Draft Results of Redetermina-

tion") that plaintiffs were withdrawing their request for review of these three respondents. Pls.' Comments on Commerce's Interim Remand Determination Pursuant to Ct. Remand (Slip Op. 09–134) 1–3 ("Pls.' Comments"). Second, they argue that the Department's proposal to examine on remand only Sindia and Snowdrop, rather than all unexamined respondents, is inconsistent with the court's ruling in *Carpenter*, not supported by substantial evidence, and otherwise not in accordance with law. *Id.* at 4–7.

Also before the court is defendant's motion for entry of judgment. Def.'s Mot. for Entry of Final J. ("Def.'s Mot."). Defendant argues that it is appropriate that the court enter a judgment to conclude this litigation rather than issue another remand order, regardless of how the court rules on the Interim Remand Determination.

With respect to plaintiffs' objection that the Department unlawfully refused to allow plaintiffs' withdrawal of the request for review of Grand Foundry, Sindia, and Snowdrop, the court concludes that plaintiffs are not entitled to relief. Second, the court decides that plaintiffs have waived any challenge to the Department's decision to examine individually on remand only Sindia and Snowdrop. Plaintiffs did not exhaust their administrative remedies as to any such challenge, having failed to object to the subject decision in response to the Department's request for comment on the Draft Results of Redetermination, and the futility exception to the exhaustion requirement is unavailable in the circumstances of this case. As a consequence of the unexcused failure to exhaust administrative remedies, plaintiffs are entitled only to a judicial remedy by which Commerce will conduct individual examinations of Sindia and Snowdrop and redetermine the weighted-average dumping margins for all respondents other than Bhansali and Venus. Finally, ruling on defendant's motion, the court declines to order judgment at this time. The court orders Commerce to complete the administrative review on remand and submit amended final results for the court's review prior to publication.

II. BACKGROUND

Background information is presented in *Carpenter*. 33 CIT at __, 662 F. Supp. 2d at 1339–40. Additional background is included below as a summary and to address events that have occurred since *Carpenter* was decided.

During the review, Commerce examined individually only the two highest-volume exporters/producers, Bhansali and Venus. *Id.* at __, 662 F. Supp. 2d at 1339. Because it determined a *de minimis* margin for Venus in the Final Results, Commerce, pursuant to its practice,

assigned the margin it determined for Bhansali, 2.01%, to the six respondents that were not selected for individual examination, which were Facor Steels, Ltd. ("Facor"), Grand Foundry, Isibars Limited ("Isibars"), Mukand Ltd. ("Mukand"), Sindia, and Snowdrop. *Id.* at __, 662 F. Supp. 2d at 1339 n.1, 1339–40.

On March 30, 2010, Commerce released to plaintiffs the Draft Results of Redetermination and invited comment. *Interim Remand Determination* 26. In their written response, plaintiffs expressly declined to comment on the Draft Results of Redetermination at that time, stating that "[w]hile reserving petitioners' right to comment to the Court on the Department's conclusion of what constitutes a large number of respondents, petitioners hereby withdraw their request for review of Grand Foundry, Ltd. ('Grand Foundry'), Sindia, and Snowdrop . . . ." *Letter from Pls. to Sec'y of Commerce* 2 (Apr. 6, 2010) (Admin. R. Doc. No. 4020) ("*Pls.' Withdrawal*"). The request for review that plaintiffs sought to withdraw was the only remaining request for review of any of those three respondents. *Notice of Prelim. Results of Antidumping Duty Admin. Review, Intent to Rescind & Partial Rescission of Antidumping Duty Admin. Review: Stainless Steel Bar from India*, 72 Fed. Reg. 10,151, 10,152 (Mar. 7, 2007). In the Interim Remand Determination, Commerce refused to recognize the withdrawal of plaintiffs' review request, reasoning that "because the Department is not conducting an administrative review at this time, this request is inappropriate." *Interim Remand Determination* 27.

On April 22, 2010, defendant filed the Interim Remand Determination with the court. *Interim Remand Determination*. On the same date, defendant filed its motion that the court enter a judgment either affirming or rejecting the Interim Remand Determination. Def.'s Mot. On May 12, 2010, plaintiffs filed comments objecting to the Interim Remand Determination and requesting another remand. Pls.' Comments. On June 11, 2010, defendant responded to those comments. Def.'s Resp. to Pls.' Comments on Commerce's Interim Remand Determination ("Def.'s Resp."). After obtaining leave from the court, plaintiffs replied to the defendant's response on June 28, 2010. Pls.' Reply to Def.'s Resp. Comments on Commerce's Interim Remand Determination ("Pls.' Reply").

After a telephone conference with the parties on February 7, 2011, the court ordered the parties to file a joint status report with the court within forty-five days "on the results of discussions between the parties concerning the possible settlement of the case." Order (Feb. 7, 2011), ECF No. 71. In the joint response to the order, which defendant filed on March 25, 2011, the parties informed the court that despite considerable discussion they have been unable to reach a settlement

and requested "that the Court issue a decision regarding the remand determination filed by the Department of Commerce, and an order responding to the motion for entry of final judgment filed by the United States." Joint Status Report (Mar. 25, 2011), ECF No. 73.

III. DISCUSSION

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(c) (2006), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, 19 U.S.C. § 1516a, including an action contesting the final results of an administrative review that Commerce issues under section 751 of the Tariff Act, 19 U.S.C. § 1675(a). Upon judicial review, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Below, the court first considers plaintiffs' objection that the Interim Remand Determination unlawfully refused to recognize plaintiffs' withdrawal request pertaining to the review of Grand Foundry, Sindia, and Snowdrop. The court next considers the question of whether plaintiffs may now bring a challenge to the Department's decision, announced in the Interim Remand Determination, to conduct an individual examination of Sindia and Snowdrop and of none of the other unexamined respondents, *i.e.*, Facor, Grand Foundry, Isibars, and Mukand. Plaintiffs attempt to bring this challenge in their comment submission to the court, which states that "Commerce's decision to review fewer than all six of the previously non-examined respondents was not supported by substantial evidence and adequate reasoning and is not in accordance with law." Pls.' Comments 4. This question requires the court to decide, first, whether plaintiffs have exhausted their administrative remedies on their challenge to the decision to examine only Sindia and Snowdrop and, if not, whether any exception to the exhaustion requirement applies in this circumstance. Finally, the court considers defendant's motion for judgment.

A. Commerce Acted Lawfully in Refusing to Recognize Plaintiffs' Withdrawal of the Review Request for Grand Foundry, Sindia and Snowdrop

Plaintiffs' first argument in opposition to the Interim Remand Determination is that Commerce unlawfully refused to rescind the review as to Grand Foundry, Sindia, and Snowdrop upon plaintiffs' withdrawal of their request for review of these respondents. The court does not find merit in this argument.

Plaintiffs' withdrawal request cites the Department's regulation, 19 C.F.R. § 351.213(d) (2010), under which Commerce may rescind a review as to a respondent when the only request for review of that respondent has been withdrawn within ninety days of the date on which Commerce initiated the administrative review. *See Pls.' Withdrawal*. The regulation provides Commerce discretion to extend the ninety-day time period "if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d)(1). Commerce denied the withdrawal request due to timing, concluding that "because the Department is not conducting an administrative review at this time, this request is inappropriate."[1] *Interim Remand Determination* 27.

Plaintiffs argue that "Commerce has the authority to extend the deadline for withdrawal requests and based on that authority can rescind a review at any time." Pls.' Comments 2 (citing 19 C.F.R. § 351.213(d)(1)). Plaintiffs are correct that the regulation afforded Commerce broad discretion, under which Commerce, at least arguably, could have included in its Interim Remand Determination a decision to accept the withdrawal of plaintiffs' request for the review of Grand Foundry, Sindia, and Snowdrop. But plaintiffs offer no convincing argument why the law required Commerce to do so. Plaintiffs assert that "[b]ecause the Court has remanded this case back to Commerce on the issue of respondent selection, the status of this case is essentially equivalent to that of the beginning stages of a review where Commerce begins its respondent selection process," *id.*, and that "[a]lthough Commerce may not be reviewing a specific company at this time, it is nevertheless conducting an administrative review as a result of the Court's remand," *id*. at 2–3.

The court does not agree with either of plaintiffs' assertions. The administrative review already has been conducted, and only certain aspects of that review, as reflected in the Final Results and identified in *Carpenter*, are the subject of the remand proceeding in this litigation. In the administrative review culminating in the Final Results, Commerce examined individually, and determined margins for, the two highest-volume exporters/producers, Bhansali and Venus. Those two margins, which were not challenged judicially, are not at issue in this case. In the Interim Remand Determination, Commerce informed the court that it will examine individually two additional exporters/producers who were respondents in the review, which it also has selected based on export volume. The Department provided

[1] Plaintiffs' withdrawal request was made on April 6, 2010, four years after the review was initiated and two and a half years after the review was completed. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Deferral of Admin. Reviews*, 71 Fed. Reg. 17,077 (Apr. 5, 2006); *Notice of Final Results & Final Partial Rescission of Antidumping Duty Admin. Review: Stainless Steel Bar from India*, 72 Fed. Reg. 51,595 (Sept. 10, 2007).

this answer in response to the court's direction in *Carpenter* to "inform the court whether it will conduct individual *examinations of*, and calculate *individual weighted-average dumping margins for*, Isibars Limited, Grand Foundry, Ltd., Sindia Steels Limited, Snowdrop Trading Pvt. Ltd., Facor Steels, Ltd., and/or Mukand Ltd." *Carpenter*, 33 CIT at __, 662 F. Supp. 2d at 1347 (emphasis added). Thus, the questions the remand proceeding is required to answer are which, if any, of the previously unexamined respondents already in the review will be individually examined and what margins will be assigned to the respondents other than Bhansali and Venus, not the question of which parties will be respondents in the review. In sum, plaintiffs' argument that Commerce was required to accept the withdrawal of the review request is grounded in a misinterpretation of the scope of the remand proceeding. The court concludes that Commerce did not abuse its discretion in rejecting plaintiffs' withdrawal of the request to review Grand Foundry, Sindia, and Snowdrop.

B. Plaintiffs Failed to Exhaust their Administrative Remedies on their Objection to the Department's Decision on Remand to Examine Individually Only Sindia and Snowdrop

In section 301 of the Customs Courts Act, Congress directed that the Court of International Trade "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637. In litigation contesting antidumping determinations, the exhaustion requirement applies to a situation such as that existing in this case, in which the Department invited a party to submit comments on draft remand results. *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008); *AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998).

The record in this case discloses that plaintiffs made no comments on the Draft Results of Redetermination other than their informing Commerce of the withdrawal of the request for review of Grand Foundry, Sindia, and Snowdrop. Commerce sent plaintiffs a letter dated March 30, 2010, soliciting written comments on the Draft Results of Redetermination, which were attached to the letter. *Letter from Program Manager, AD/CVD Enforcement Office 1 to All Interested Parties* (Mar. 30, 2010) (Admin. R. Doc. No. 4005). Plaintiffs' submission in response did not object to the Department's proposal to conduct individual examinations of only Sindia and Snowdrop. What is more, plaintiffs told Commerce that their submission was not to be considered a comment on the Draft Results of Redetermination. In informing Commerce that "[w]hile reserving petitioners' right to comment to the Court on the Department's conclusion on what consti-

tutes a large number of respondents, petitioners hereby withdraw their request for review of Grand Foundry, Ltd. ('Grand Foundry'), Sindia, and Snowdrop," *Pls.' Withdrawal* 2, plaintiffs explained that "[g]iven that this request could potentially alter the Department's remand results, and given that the Department was granted an extension of time to file its remand results, petitioners *will wait to comment on the Department's draft remand results until after the Department responds to this request*," *id.* at 4 (emphasis added). Commerce did not respond to that request prior to issuing the Interim Remand Determination. Nor could plaintiffs reasonably have expected Commerce to do so. Because plaintiffs filed their response to the Department's request for comments on April 6, 2010, the due date specified in the comment request, and did not seek an extension of the due date, there was no apparent way plaintiffs could have waited until after the Department responded to their notice of withdrawal of their review request to comment to the Department on the Draft Results of Redetermination.

Commerce went forward with the proposal stated in the Draft Remand Redetermination, expressly noting that plaintiffs had declined to comment on it. This draft was in all material respects identical to the Interim Remand Determination, except that the latter includes a paragraph at the end stating: (1) that the Department released its draft to plaintiffs ("Petitioners") with comments due on April 6, 2010; (2) that rather than file substantive comments, Petitioners instead filed a letter stating that they are reserving their right to comment to the Court on the Department's conclusion of what constitutes a large number of respondents; (3) that Petitioners withdrew their request for review of Grand Foundry, Sindia, and Snowdrop; (4) that Petitioners' withdrawal request is inappropriate "because the Department is not conducting an administrative review at this time"; and (5) that "because Petitioners have not submitted any additional comments on the draft interim remand determination, there are no additional issues to address." *Interim Remand Determination* 26–27.

In summary, the record facts relevant to the question of exhaustion are that plaintiffs were invited to comment on the Draft Remand Redetermination, that plaintiffs declined to do so, and that the Department presented the previously-proposed decision to examine only Sindia and Snowdrop to the court, in final form, in the Interim Remand Determination. On these facts, the court concludes that plaintiffs failed to exhaust their administrative remedies on their current challenge, as stated in their comment to the court, to the

decision to examine on remand only Sindia and Snowdrop rather than all six of the respondents who have not been examined individually.

Plaintiffs argue that they did not fail to exhaust their administrative remedies, maintaining that "[c]ontrary to the government's claim, Commerce's Interim Remand Determination did not raise a new legal issue that had not previously been briefed by Plaintiffs." Pls.' Reply 2. They direct attention to a brief they submitted to the court on October 9, 2009, prior to the court's decision in *Carpenter*. *Id.*; Letter (Sept. 9, 2009), ECF No. 39; Pls.' Br. Regarding Commerce's Decision Not to Conduct an Individual Review of All Eight Respondents ("Pls.' Supp. Br."). The cited brief argued that Commerce exceeded its authority under section 777A(c)(2) of the Tariff Act, 19 U.S.C. § 1677f-1(c)(2), in declining to conduct an individual examination of all eight respondents in the administrative review. Pls.' Supp. Br. 3–5.

Plaintiffs' citing to arguments made in the October 9, 2009 brief does not address the source of the exhaustion problem in this case, which is the submission plaintiffs made to the Department in response to the Draft Results of Redetermination. That submission fails to maintain plaintiffs' previous litigation position and addresses only plaintiffs' withdrawal of the request for review of Grand Foundry, Sindia, and Snowdrop. *See Pls.' Withdrawal*. Plaintiffs abandoned the litigation position they had taken up to that time–that Commerce unlawfully failed to conduct individual examinations of all respondents in the administrative review–when they failed to assert it in opposition to the proposed decision, stated in the Draft Results of Redetermination, to examine individually on remand only Sindia and Snowdrop. *See Mittal Steel Point Lisas Ltd.*, 548 F.3d at 1384 (concluding that a party failed to raise an issue "at the appropriate time on remand and thus abandoned its argument by failing to exhaust its administrative remedies before Commerce") (citing *AIMCOR*, 141 F.3d at 1111–12). The April 6, 2010 submission to the Department could have, but did not, argue that if Commerce refused to allow the withdrawal of the review request, it must examine individually all six remaining unexamined respondents. Plaintiffs also could have argued to the Department, but did not, that Commerce must examine individually all respondents for which a request for review still would be pending, *i.e.*, Isibars, Facor, and Mukand, should the Department allow withdrawal of the request for review of Grand Foundry, Sindia,

Snowdrop.[2] The most that can be said is that plaintiffs took a position before the Department–specifically, the position that they should be allowed to withdraw their request for review of Grand Foundry, Sindia, and Snowdrop–that was inconsistent with the proposed decision to examine Sindia and Snowdrop individually. Even were the court to speculate from plaintiffs' April 6, 2010 submission to Commerce that plaintiffs disagreed with that proposed decision, despite plaintiffs' having failed to so state, the court could not reasonably infer that plaintiffs' previous legal position, rather than a presumed right to withdraw the review request, was the basis for any disagreement.

Plaintiffs argue in the alternative that the court should excuse any failure to exhaust administrative remedies because it would have been futile for plaintiffs to raise again at the agency level an argument Commerce already had rejected. Pls.' Reply 4 (arguing that "it would also have been futile for Plaintiffs to once again explain why Commerce's decision for not reviewing all eight respondents was not within [the Department's] statutory authority."). Plaintiffs make the related arguments that "if the Department ha[d] properly withdrawn the request for the review of the three respondents, additional comments by Plaintiffs would have been unnecessary," *id.* at 4–5, and that "[b]ecause the Department did not respond to Plaintiffs' withdrawal request until it filed its Interim Remand Determination on April 22, 2010, Plaintiffs properly filed their substantive comments at that time," *id.* at 5.

To qualify for the futility exception, which is to be applied narrowly, "a party must demonstrate that it 'would be required to go through obviously useless motions in order to preserve [its] rights.'" *Mittal Steel Point Lisas Ltd.,* 548 F.3d at 1384 (quoting *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007)) (alterations in original). Because an agency remains free to modify its current position, the mere fact that an agency was unlikely to do so does not excuse the requirement to exhaust. *Corus Staal BV*, 502 F.3d at 1380. In this case, Commerce rejected in the Final Results plaintiffs' argument that it was required to examine individually all eight respon-

[2] Plaintiffs state in their comments to the court that in withdrawing their request for the review of Grand Foundry, Ltd., Sindia Steels Limited ("Sindia") and Snowdrop Trading Pvt. Ltd. ("Snowdrop") they "requested that Commerce conduct an individual examination of the remaining three companies." Pls.' Comments on Commerce's Interim Remand Determination Pursuant to Ct. Remand (Slip Op. 09–134) 1–2. In so stating to the court, plaintiffs mischaracterize their April 6, 2010 submission to the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"). Nowhere in that submission did plaintiffs argue that Commerce, if accepting the withdrawal request, should or must conduct an individual examination of Isibars Limited, Facor Steels, Ltd., and/or Mukand Ltd. *See Letter from Pls. to Sec'y of Commerce* (Apr. 6, 2010) (Admin. R. Doc. No. 4020).

dents, but nevertheless it requested comment on the Draft Results of Redetermination, which proposed, in effect, that the Department issue amended final results setting forth individual margins for four of the eight respondents, Bhansali, Sindia, Snowdrop, and Venus. In soliciting comment, Commerce did not indicate that its determination to examine Sindia and Snowdrop was anything other than a proposal on which plaintiffs could comment. Had plaintiffs commented in opposition to that proposal, Commerce could have changed its position, in any of a number of ways, before filing the Interim Remand Determination with the court.

The court also disagrees with plaintiffs' argument that the futility exception applies because advancing plaintiffs' litigation position to the agency "would have been unnecessary" had Commerce rescinded the review as to Sindia, Snowdrop, and Grand Foundry in response to plaintiffs' withdrawal request. Pls.' Reply 4–5. Even had Commerce decided to accept the withdrawal of the review request for Grand Foundry, Sindia, and Snowdrop in response to plaintiffs' April 6, 2010 submission to the Department, still unresolved would have been the issue of which of the remaining unexamined respondents, *i.e.*, Facor, Isibars, and Mukand, would be examined individually on remand. As noted previously, plaintiffs did not make the point in their April 6, 2010 submission that Commerce, if accepting the withdrawal request, should examine individually these three remaining unexamined respondents. The court therefore must reject the assertion that acceptance of the withdrawal request would have made it unnecessary that plaintiffs advance their litigation position before the agency. Even were that assertion correct, plaintiffs' futility argument would be unavailing. The futility exception excuses failure to advance a litigation position when doing so would have been "obviously useless," *Corus Staal BV*, 502 F.3d at 1379, not when arguing that position would be rendered unnecessary by success on another argument.

Plaintiffs' third argument, that "[b]ecause the Department did not respond to Plaintiffs' withdrawal request until it filed its Interim Remand Determination on April 22, 2010, Plaintiffs properly filed their substantive comments at that time," is untenable. Pls.' Reply 5. As noted above, plaintiffs filed their response to the Department's comment request on the due date specified in that request. Even had Commerce decided to respond separately to the withdrawal request (which it was under no obligation to do), plaintiffs, having left themselves no time, could not reasonably have expected that they would have an opportunity to file additional comments to the Department.

For the various reasons discussed above, the court concludes that plaintiffs failed to exhaust their administrative remedies and that

the futility exception to the exhaustion requirement does not apply in the circumstances presented here. Plaintiffs raised no objection before the Department to the proposed decision to examine individually, and calculate individual weighted-average margins for, Sindia and Snowdrop. Because of the failure to exhaust, which the court declines to excuse on the ground of futility, plaintiffs have waived any objection to that decision as submitted to the court in the Interim Remand Determination. As a consequence, plaintiffs are not entitled to a remedy under which Commerce, on remand, would examine individually respondents other than, or in addition to, Sindia and Snowdrop.

C. The Court Will Deny Defendant's Motion for Entry of Judgment and Issue a Second Remand Order in this Proceeding

Defendant moves pursuant to USCIT Rule 54 that the court enter final judgment in this case instead of issuing a remand order. Defendant argues, first, that Commerce has explained on remand why its original determination to examine two respondents was reasonable, and that if the court agrees with that explanation, it should enter final judgment. Def.'s Mot. 1, 4–5. Second, defendant argues that if, instead, the court concludes that Commerce must examine "some additional number of respondents," it still should enter judgment because "all issues in the case have been resolved," *i.e.*, "there are no margin calculations or adjustments to recalculate, practices to adjust or reconsider, or agency legal conclusions to explain." *Id.* at 2. In either event, defendant argues, "the Court will have granted plaintiffs all the relief requested in their complaint and all of the rights of the parties would be preserved." *Id*. Finally, defendant states in support of its motion that it "files this motion because we respectfully object to the Court's requirement that Commerce file its remand determination as an 'interim' remand determination." *Id.* at 1.

Although citing various decisions of the Court of International Trade which it believes support its motion, defendant cites no statute or binding precedent under which the court is required to enter judgment in this circumstance.[3] Nor is the court aware of any reason

[3] Defendant cites two cases in which the court has entered judgment when Commerce had not yet complied with the court's decision, but neither case indicates that the court must or should enter judgment here. Def.'s Mot. for Entry of Final J. 3–4 (citing *Gilmore Steel Corp., Oregon Steel Mills Div. v. United States*, 11 CIT 684, 672 F. Supp. 1459 (1987), *rev'd sub nom*, *Oregon Steel Mills Inc. v. United States*, 862 F.2d 1541 (Fed. Cir. 1988); *Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*, 32 CIT __, 558 F. Supp. 2d 1367 (2008) ("*NART*")). These cases were not brought under 19 U.S.C. § 1516a (2006), as was the present case, and they involved situations in which no review had been conducted prior to the initiation of the litigation. *Gilmore*, 11 CIT at 684, 672 F. Supp. at 1459; *NART*, 32 CIT at __ 558 F. Supp. 2d at 1368.

why it would be required by law to enter judgment at this time. Moreover, as discussed below, the reasons defendant puts forth as to why the court, in its discretion, should enter judgment at this time are unconvincing, and other considerations dictate that it would be inappropriate to do so.

Defendant's first argument, which is implicitly premised on the court's affirming the Final Results on new reasoning as stated in the Interim Remand Determination, is not persuasive. Contrary to defendant's implied premise, the Interim Remand Determination does not submit for the court's consideration a decision by Commerce on remand not to examine individually any respondents other than two already examined.[4] *See Interim Remand Determination* 1 ("In accordance with the Court's order, the Department has determined to calculate individual dumping margins for an additional two of the eight respondents that were subject to requests for review in the 2005–2006 administrative review."), 26 ("The Department has concluded . . . that it can reasonably review the two additional companies accounting for the largest volume of exports to the United States during the period of review, Snowdrop and Sindia.").

Defendant's second argument, which submits that no margins are left to be determined in this case, is factually wrong and based on an erroneous characterization of plaintiffs' claim in this case. Plaintiffs contested as contrary to law the Department's assignment of Bhansali's 2.01% margin to the unexamined respondents, *i.e.*, Sindia, Snowdrop, Facor, Grand Foundry, Isibars, and Mukand. Compl. ¶¶ 10, 12. In *Carpenter*, the court set aside the assignment of the 2.01% margin to the unexamined respondents, and the Interim Remand Determination does not inform the court how Commerce intends to assign margins to the four respondents it would not examine individually on remand (*i.e.*, Facor, Grand Foundry, Isibars, and

[4] The Interim Remand Determination expresses Commerce's disagreement with the holding in *Carpenter Tech. Corp. v. United States*, 33 CIT __, 662 F. Supp. 2d 1337, 1347 (2009), *see Interim Remand Determination in Carpenter Tech. Corp. et. al. v. United States, Court No. 07–00366*, at 6, but it does not include a remand decision under which no additional respondents would be examined individually. The Opinion and Order issued in *Carpenter*, although setting aside as unlawful the respondent selection decision in the final results of the review based on the Department's erroneous construction of the statute, under which any number larger than two necessarily would be considered a "large number" within the meaning of 19 U.S.C. § 1677f-1(c)(2) (2006), did not expressly preclude a remand redetermination that attempted to justify the original respondent selection decision on different reasoning. *See Carpenter*, 33 CIT at __, 662 F. Supp. 2d at 1347. However, the court's general discussion in *Carpenter* strongly suggested that any such decision was unlikely to be affirmed.

Mukand).[5] As a result, the court's affirmance of the Interim Remand Determination through an entry of judgment would not adjudicate fully the claim plaintiffs have brought in this case. Therefore, entry of judgment at this time would not be appropriate.

Defendant's third point, that it "objects to the Court's requirement that Commerce file its remand determination as an 'interim' remand determination," is misguided. Def.'s Mot. 1. The court did not exceed its discretion in issuing its order of remand in *Carpenter*. *See* Customs Courts Act, § 301, 28 U.S.C. § 2643(c)(1).

For the reasons the court has discussed, the appropriate remedy at this time is a second remand order, not the entry of judgment. In the full remand proceeding, Commerce, at a minimum, must conduct individual examinations of, and assign individual margins to, Sindia and Snowdrop.[6] It also must assign margins to Facor, Grand Foundry, Isibars, and Mukand by a lawful method. The court sets a time period for Commerce to complete this task and prepare amended final results for the court's consideration.

Finally, in crafting a second remand order, the court must "secure the just, speedy, and inexpensive determination" of this "action and proceeding." USCIT R. 1. This goal will be thwarted if these proceedings are permitted to waste the resources of the Department or of Sindia and Snowdrop, parties who are not before the court but whose participation in the further proceedings is essential. Plaintiffs' attempt to withdraw its request for review of Grand Foundry, Sindia, and Snowdrop indicates to the court that plaintiffs may be opposed to the only remedy to which they are now entitled, *i.e.*, amended final results that assign individual margins to Sindia and Snowdrop and redetermined margins for Facor, Grand Foundry, Isibars, and Mukand. The court concludes from these circumstance that plaintiffs must decide within a short time period following issuance of this Opinion and Order whether they choose to receive the remedy to which they are entitled rather than seek dismissal of this action

[5] The court does not hold or imply that Commerce erred in not so informing the court. The Opinion and Order in *Carpenter* did not direct Commerce to address this point. The court is aware that Commerce, as a matter of practice, assigns to unexamined respondents in an administrative review a simple average of the margins assigned to examined respondents, excluding *de minimis* margins and margins based on facts otherwise available. However, this practice is not required by law, and it remains to be seen how Commerce will assign margins to unexamined respondents in this case.

[6] The Department retains the discretion to conduct on remand individual examinations of previously-unexamined respondents in addition to Sindia and Snowdrop but, due to plaintiffs' failure to exhaust administrative remedies, is under no obligation to do so. The court will have the opportunity to review the lawfulness of any decision to select for individual examination previously-unexamined respondents in addition to Sindia and Snowdrop when it receives the results of the second remand order.

pursuant to USCIT Rules 41(a)(2) and 56.2(g). The court will allow twenty-one days for plaintiffs to make this decision. Absent a compelling justification, the court will not order voluntary dismissal of this action after that time.

Upon considering the Interim Remand Determination, the court decides not to grant Commerce the entire 365 day period that it requested. This period of time, which is the statutory period for completion of an administrative review, 19 U.S.C. § 1675(a)(3)(A), is excessive for this remand because Commerce will omit some procedural steps of a review, including, in particular, solicitation of review requests. The court, in its discretion, will allow 300 days from the date of this Opinion and Order for the submission of the results of the remand.[7] The court will consider extending this time only upon a motion showing good cause. Because the remand proceeding is being conducted under the court's jurisdiction, the court's permission is required for any such extension. As a result, the ordinary statutory provisions for extensions of time to conduct a review do not apply to the remand conducted pursuant to this Opinion and Order.

IV. CONCLUSION

Plaintiffs, having failed to exhaust their administrative remedies, are entitled to a remedy under which the Department would conduct, at a minimum, individual examinations of Sindia and Snowdrop and issue, under the court's jurisdiction, amended final results of the administrative review that assign individual margins to Sindia and Snowdrop and redetermined margins to Facor, Grand Foundry, Isibars, and Mukand.

ORDER

Upon review of the *Notice of Final Results & Final Partial Rescission of Antidumping Duty Admin. Review: Stainless Steel Bar from India*, 72 Fed. Reg. 51,595 (Sept. 10, 2007) ("Final Results"), the *Interim Remand Determination in Carpenter Tech. Corp. et. al. v. United States, Court No. 07–00366* ("Interim Remand Determination"), and all other papers and proceedings had herein, and after due deliberation, it is hereby

ORDERED that the parties shall consult with respect to possible dismissal of this action and submit to the court, within twenty-one (21) days of the date on which this Opinion and Order is filed, the outcome of their consultations and any motion or stipulation pertaining to voluntary dismissal; it is further

[7] The respondent selection process phase of the administrative review consumed sixty-three days. *Carpenter*, 33 CIT at __, 662 F. Supp. 2d at 1339 (indicating that the review was initiated on April 5, 2006 and that respondent selection was completed on June 7, 2006).

ORDERED that, if this action is not dismissed pursuant to the above paragraph, the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") shall submit for the court's review a redetermination of the Final Results on remand ("Second Remand Determination") in which its calculates individual margins for, at a minimum, Sindia Steels Limited and Snowdrop Trading Pvt. Ltd., and redetermined margins for Isibars Limited, Grand Foundry, Ltd., Facor Steels, Limited, and Mukand Ltd.; it is further

ORDERED that Commerce shall submit the Second Remand Redetermination within 300 days of the date on which this Opinion and Order is filed; it is further

ORDERED that plaintiffs shall have thirty (30) days from the filing of the Second Remand Redetermination in which to submit comments to the court; it is further

ORDERED that defendant shall have fifteen (15) days from the filing of plaintiffs' comments to file comments; it is further

ORDERED that Commerce shall not publish amended final results for the administrative review absent the direction of the court in a future order or judgment; and it is further

ORDERED that defendant's motion for entry of final judgment be, and hereby is, denied.

Dated: May 26, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
Judge

Slip Op. 11–62

SEAH STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and BRISTOL METALS, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 09–00248

JUDGMENT

Upon consideration of Department of Commerce's Second Results of Redetermination Pursuant to Remand (ECF No. 90), upon comments in which all parties concur with affirmance of that remand determination (ECF Nos. 93, 97, and 98), upon all other pertinent papers, and pursuant to USCIT R. 54, it is hereby

ORDERED that judgment is entered sustaining the Second Results of Redetermination Pursuant to Remand; and it is further

ORDERED that this case is dismissed.

Dated: May 26, 2011
New York, NY

/*s*/*Gregory W. Carman*
GREGORY W. CARMAN, JUDGE