U.S. Customs and Border Protection

Slip Op. 12–105

UNITED STATES, Plaintiff, v. NITEK ELECTRONICS, INC., Defendant.

Before: Judith M. Barzilay, Senior Judge
Court No. 11–00078

[Motion for reconsideration denied.]

Dated: August 7, 2012

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; *Delisa M. Sanchez*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Eric P. Delmar*, U.S. Customs and Border Protection, Of Counsel, for Plaintiff United States.

Baker & McKenzie, LLP (*William D. Outman, II*, *Michael E. Murphy*, *Kevin J. Sullivan*) for Defendant Nitek Electronics, Inc.

MEMORANDUM & ORDER

BARZILAY, Senior Judge:

Plaintiff United States ("Plaintiff") moves under USCIT Rule 59 for reconsideration of the court's opinion dismissing in part its action to recover penalties and lost duties on entries of gas meter swivels and gas meter nuts from the People's Republic of China. *See United States v. Nitek Elecs., Inc.*, 36 CIT __, 844 F. Supp. 2d 1298 (2012) ("*Nitek I*").[1] Specifically, Plaintiff argues that the court erred in dismissing its penalty claim for negligence for failure to exhaust the administrative remedies enumerated in 19 U.S.C. § 1592. For the reasons below, the court denies Plaintiff's motion.

I. STANDARD OF REVIEW

Granting a motion for reconsideration pursuant to USCIT Rule 59 rests within the sound discretion of the court. *Target Stores, Div. of Target Corp. v. United States*, 31 CIT 154, 156, 471 F. Supp. 2d 1344, 1346–47 (2007). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injus-

[1] The court presumes familiarity with the facts and procedural background of this case.

tice." *E.g.*, *Royal Thai Gov't v. United States*, 30 CIT 1072, 1074, 441 F. Supp. 2d 1350, 1354 (2006) (citation omitted). A motion for reconsideration serves as "a mechanism to correct a significant flaw in the original judgment . . . ." *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT __, ___, 714 F. Supp. 2d 1296, 1301 (2010) (citation omitted). It does not, however, afford a losing party an opportunity "to repeat arguments or to relitigate issues previously before the court." *Id.* "Importantly, the court will not disturb its prior decision unless it is 'manifestly erroneous.'" *Starkey Labs., Inc. v. United States*, 24 CIT 504, 505, 110 F. Supp. 2d 945, 947 (2000) (citation omitted).

II. DISCUSSION

Plaintiff bases its motion primarily on the grounds of clear error. Plaintiff begins by noting that § 1592(e)(1) subjects penalty actions brought under that section to de novo review. Pl.'s Mot. 4–8. From this, Plaintiff concludes that

> this Court does not review whether [Customs] complied with its statutory or regulatory requirements during the administrative proceedings. Again, whether [Customs] complied with its statutory or regulatory obligations is immaterial, so long as this Court possesses jurisdiction to review the claims *de novo*, which it does here.

Pl.'s Mot. 12. Therefore, according to Plaintiff, the court was not empowered to dismiss its penalty claim for negligence on exhaustion grounds. Pl.'s Mot. 8.

Plaintiff raised this same argument in its response to Nitek's motion to dismiss. In requesting reconsideration, Plaintiff elaborates upon its belief that § 1592(e) renders the Court powerless to review Customs' obligation to state in the pre-penalty notice and penalty claim "whether the alleged violation occurred as a result of fraud, gross negligence, or negligence." *See* § 1592(b)(1)(A)(v); § 1592(b)(2). The court, however, sees nothing of substance in this argument that was not already addressed in *Nitek I*. A party's disagreement with a ruling does not always equate to "clear error" warranting reconsideration. More to the point, mere repetition of unsuccessful arguments is an improper use of Rule 59 and a needless delay to finality. The court cannot grant Plaintiff's motion on this basis.

In a sense, Plaintiff's position reflects an understandably confounding dichotomy in the Court's role in § 1592 actions. On the one hand, as Plaintiff notes, the statute directs that "all issues, including the

amount of the penalty, shall be tried de novo." § 1592(e)(1). This provision allows the Court to decide the appropriate remedy[2] without being tethered to the claim imposed below, *see* S. Rep. No. 95–778, at 20 (1978), and indicates the lack of deference the Court affords Customs' penalty determinations, *see United States v. Optrex Am., Inc.*, 29 CIT 1494, 1499 (2005) (not reported in F. Supp.). De novo review must, however, be viewed in context. As discussed in *Nitek I*, § 1592 creates a cause of action for the government not to impose a penalty claim but to *recover* a penalty already imposed at the administrative level. *See* § 1592(e); *see also* 28 U.S.C. § 1582(1). In other words, for the Court to have any role, there must exist a claim for a specified violation of § 1592(a) – namely, a material false statement or omission amounting to "fraud, gross negligence, or negligence" – for which the government is seeking recovery, thereby limiting the scope of the government's § 1592 action to the administrative claim Customs imposed below. The precise penalty claim Customs imposed for one of these three levels of culpability is thus central to the Court's review, de novo though it may be. *See United States v. Ford Motor Co.*, 463 F.3d 1286, 1298 (Fed. Cir. 2006) ("[T]he Court of International Trade in *Optrex* effectively limited the *de novo* review provided for in § 1592(e) to those issues considered in the proceedings before Customs. Although we are not bound by the Court of International Trade's decision in *Optrex*, we conclude that it correctly defines the proper scope of § 1592(e)."). Therefore, Plaintiff's argument does not demonstrate manifest error in the court's ruling.

Plaintiff doubles down on its argument, however, by stating that "we are aware of no legal authority that imposes an exhaustion requirement upon the Government in a *de novo* proceeding where, as here, the jurisdictional prerequisites are satisfied." Pl.'s Mot. 6. This claim does not withstand scrutiny. Section 2637(d) clearly prescribes that, "[i]n *any* civil action not specified in [§ 2637(a)-(c)], the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (emphasis added). The Federal Circuit has clarified that "[t]here is no doubt that the

[2] Notably, the Court's power to determine the proper penalty amount is not absolute. The "Court 'possesses the discretion to determine a penalty within the parameters set by the statute,'" *United States v. Trek Leather, Inc.*, 35 CIT __, ___, 781 F. Supp. 2d 1306, 1312 (2011) (citation omitted), which itself sets a maximum penalty amount for each of the three levels of culpability, § 1592(c). It is uncontroverted that the de novo review that § 1592(e) provides thus does not render the penalty amount maximums in § 1592(c) immaterial. Indeed, reading § 1592(e) as rendering any other subsection essentially advisory would likely run afoul of controlling canons of statutory interpretation. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).

doctrine of exhaustion of administrative remedies applies to an agency seeking enforcement of administrative action prior to the completion of the administrative process," but that "[e]xhaustion of administrative remedies is not strictly speaking a jurisdictional requirement . . . ." *United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) (citation omitted). Additionally, this Court has long applied this (non-jurisdictional[3]) exhaustion requirement to penalty actions. *See, e.g.*, *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT __, ___, 686 F. Supp. 2d 1337, 1346 (2010) ("To demonstrate that a penalty has been properly imposed under § 1641(d)(2)(A), Plaintiff must establish both that the broker committed a violation of Customs law as the predicate for the penalty, and that all formal requirements of the procedure for imposing the penalty were properly followed by Customs." (footnote omitted)); *United States v. Jean Roberts of Cal., Inc.*, 30 CIT 2027, 2030 (2006) (not reported in F. Supp.) ("Before seeking to recover a penalty in the Court of International Trade, Customs must perfect its penalty claim in the administrative process required by Section 592 . . . ."); *United States v. Bavarian Motors, Inc.*, 4 CIT 83, 86 (1982) ("The administrative review by Customs of an importer's protest is obviously a condition precedent to his commencement of a judicial proceeding. This requirement is no less applicable to the Government. Although the situation . . . of an agency seeking enforcement of administrative action prior to completion of the administrative review process, is much less common, there is no reason for a different standard to prevail." (citations and internal quotation marks omitted)).[4] As in all actions, Plaintiff is free to distinguish purportedly binding authority or to urge departure from persuasive precedent. But Plaintiff is simply incorrect in asserting lack of any controlling law on the issue of exhaustion in de novo proceedings.

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[3] Plaintiff does not contest the court's finding in *Nitek I* that the exhaustion required by § 2637(d) is not a jurisdictional prerequisite to suit. Pl.'s Mot. 4.

[4] The Federal Circuit and this Court have analyzed compliance with § 1592(b) under the rubric of the discretionary exhaustion requirement in § 2637(d) and the court does so in this case as well. The issue at bar, however, is terminologically and metaphysically somewhat more difficult. Section 1592(b) provides certain administrative procedures that Customs must follow, comparable to the administrative protest provisions required prior to § 1581(a) actions. Under the predominant approach, Customs' failure to abide by this articulated procedure is best viewed as a failure to perfect its claim by exhausting crucial administrative remedies prior to seeking relief in this Court. Under a different lens, though, the issue of failing to properly impose a penalty below presents a far more intrinsic defect in Plaintiff's cause of action: There simply is no negligence penalty claim for which the government could possibly recover. Failure to adhere to § 1592(b) would, in this alternative view, render any subsequent recovery action not an affront to § 2637(d)-mandated exhaustion but rather an impossibility. Allowing the government's case to proceed would then put the court in the position of *imposing* a claim on the importer in the first instance – a clear departure from the Court's statutory role.

Plaintiff argues that, in any case, Customs satisfied the statutory requirements by placing Nitek on notice of its penalty claim for negligence by imposing a claim for gross negligence – a level of culpability that (by definition, Plaintiff writes yet again) includes the elements necessary to establish negligence. Pl.'s Mot. 8–11. Plaintiff avers that Nitek was able to resolve the claim below as it must have been fully aware that Customs viewed it as culpable of negligence in addition to gross negligence. Pl.'s Mot. 11. Again, this argument was squarely presented to and rejected by the court in *Nitek I* and has no business arising in a motion for reconsideration. The court will not repeat its reasoning for rejecting this argument here. Suffice it to say that Plaintiff continues to cite no authority that demonstrates that the criminal doctrine of lesser-included culpability applies to the (vastly distinguishable) context of civil penalties imposed pursuant to § 1592. Indeed, Plaintiff has yet to identify a single case in which this Court entertained a § 1592 recovery action for a level of culpability that Customs did not impose below. In § 1592(b)(1)(A)(v) and § 1592(b)(2), Congress directed Customs to specify certain applicable level(s) of culpability and mandated that the Court "*shall*, where appropriate, require the exhaustion of administrative remedies." § 2637(d) (emphasis added). The court will not ignore this clear instruction.

Plaintiff next argues that even if the doctrine of exhaustion applies in § 1592 actions, Nitek was required to demonstrate that it suffered prejudice as a result of Customs' lapse. Pl.'s Mot. 11–13. Absent this showing, Plaintiff contends, the court could not properly dismiss the penalty claim for failure to exhaust. Pl.'s Mot. 11–13. Yet again, the proper vehicle for this argument was Plaintiff's response to Nitek's motion to dismiss, not a motion for reconsideration.

> Even if it were properly before the court, Plaintiff's argument misses the mark. True, it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party.

Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 539 (1970) (citation and quotation marks omitted) ("*American Farm Lines*"). The Federal Circuit has applied this principle to find that the Court may not void certain agency actions for failure to comply with regulatory timing and notice requirements absent a showing of substantial prejudice. *See Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353

(Fed. Cir. 2006); *PAM, S.p.A. v. United States*, 463 F.3d 1345 (Fed. Cir. 2006); *Intercargo Ins. Co. v. United States*, 83 F.3d 391 (Fed. Cir. 1996). In *United States v. UPS Customhouse Brokerage, Inc.*, however, the Federal Circuit found that Customs must nevertheless abide by its own regulation, 19 C.F.R. § 111.1, and consider all factors enumerated therein when determining whether a customs broker violated 19 U.S.C. § 1641. 575 F.3d 1376, 1382–83 (Fed. Cir. 2009) ("*UPS*"). On remand, the court in *UPS* applied this ruling by distinguishing § 111.1 from the regulations at issue in *Dixon Ticonderoga*, *PAM, S.p.A.*, and *Intercargo*, noting that § 111.1 "cuts to the core of Customs' penalty case against UPS by partially defining the manner in which Customs may decide whether UPS is liable." *UPS Customhouse Brokerage, Inc.*, 34 CIT at __, 714 F. Supp. 2d at 1306.

In this case, Customs' lapse was not a failure of proper notice or timing. As in *UPS*, failure to perfect its claim by articulating the applicable level of culpability (or culpabilities) cuts to the core of Customs' penalty claim against Nitek. Moreover, the prerequisite at issue was not one of Customs' own procedural rules, as in *American Farm Lines* and the Federal Circuit precedent upon which Plaintiff relies, but a statutory mandate that Customs perfect claims for the applicable level(s) of culpability prior to seeking recovery. Accordingly, a showing of prejudice was not required for the court to dismiss on exhaustion grounds. *See United States v. Tip Top Pants, Inc.*, Slip Op. 10–91, 2010 WL 3199884, at *6 (CIT Aug. 13, 2010) (*PAM, S.p.A.* and *Dixon Ticonderoga* not applicable to exhaustion requirements in § 1592).[5]

[5] Plaintiff also suggests that it would be an inefficient use of judicial resources to allow the government to recover lost duties under § 1592(d) but not penalties. Pl.'s Mot. 13–14. In particular, Plaintiff contends that it would be manifestly unjust to prevent a hearing on its penalty claim for negligence as § 1592(d) similarly requires the government to demonstrate one of the aforementioned levels of culpability. Pl.'s Mot. 13–14. Applicable case law appears to support Plaintiff's reading of the statute, *see United States v. Pan Pac. Textile Grp., Inc.*, 29 CIT 1013, 1019, 395 F. Supp. 2d 1244, 1250 (2005) ("[I]n order for liability for unpaid duties to accrue under 19 U.S.C. § 1592(d), a violation of 19 U.S.C. § 1592(a) must have been committed through either fraud, gross negligence, or negligence."), though the court need not opine on this now. It is sufficient to note that the statute makes clear that recovery of lost duties is an independent cause of action. *See* § 1592(d) (providing that Customs shall recover lost duties "whether or not a monetary penalty is assessed"). This provision extends to those "cases where Customs may not wish to assess a penalty but duty is still lost." *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1348 (Fed. Cir. 2009) (citation and internal quotation mark omitted). Plaintiff fails to explain how an element of one cause of action (demonstrating culpability for § 1592(d)) could negate the prerequisite for another (compliance with § 1592(b)). Though the court's inquiry regarding culpability might serve a dual purpose in an action where Customs is properly seeking both lost duties and a penalty, there is nothing inherent in this fact that can cause the court to ignore statutory preconditions to a § 1592 penalty action.

Finally, Plaintiff argues that the court's decision in *Nitek I* impermissibly infringes on the authority of the Department of Justice ("DOJ") to independently evaluate Customs' penalty claim prior to instituting § 1592 actions. Pl.'s Mot. 14–16. Specifically, Plaintiff asserts that it is DOJ's prerogative to determine whether it can ethically allege the level of culpability specified in the administrative penalty claim. Pl.'s Mot. 14–16. Plaintiff asserts that DOJ undertook such a review of the claim Customs imposed on Nitek and "concluded that the evidence was more consistent with negligence than with gross negligence, and we filed a complaint reflecting that assessment." Pl.'s Mot. 14.

The court appreciates that Customs and DOJ have their respective roles to play in the administration of the § 1592 penalty scheme and is wary of intruding on these challenging tasks. It seems, however, that the predicament DOJ faced could have been avoided had Customs imposed a claim for gross negligence *and* negligence, thereby perfecting each claim. Indeed, the Court has entertained § 1592 actions to recover penalties Customs imposed for alternative levels of culpability. *See, e.g.*, *United States v. Maxi Switch, Inc.*, 22 CIT 778, 18 F. Supp. 2d 1040 (1998); *see also United States v. F.A.G. Bearings, Ltd.*, 8 CIT 294, 296 n.5, 598 F. Supp. 401, 403 n.5 (1984) (interpreting newly enacted § 1592 as requiring Customs to "allege 'fraud,' 'gross negligence,' or 'negligence,' or a combination thereof"). Regardless, § 1592 places the responsibility for determining § 1592(a) violations and imposing penalty claims squarely on the shoulders of Customs and does so with detailed guidelines. In turn, DOJ must, if called upon, seek recovery through litigation. Plaintiff's concern regarding DOJ's ability to independently determine levels of culpability is not supported by the applicable statutory regime. In any case, it is insufficient to overcome the statute's unambiguous requirements.

III. CONCLUSION

Plaintiff's position, viewed in isolation, might be appealing. When viewed through the lens of criminal law, as Plaintiff's argument seems to request, imposing a claim for the greater infraction of gross negligence could pave the way for recovery for the lesser one of negligence. The attractive simplicity of this argument, however, cannot overcome the detailed and unambiguous penalty regime Congress created in § 1592. This court must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. School Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). Accordingly, it is hereby

ORDERED that the motion for reconsideration is denied.

Dated: August 7, 2012
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE

Slip Op. 12–106

SEARS HOLDINGS MANAGEMENT CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 11–00027

[Motion to dismiss granted.]

Dated: August 10, 2012

Robert J. Leo, Meeks, Sheppard, Leo & Pillsbury, of New York, NY for Plaintiff Sears Holdings Management Corp.

Aimee Lee, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY for Defendant United States. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney-In-Charge. Of counsel on brief was *Paula S. Smith*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Gordon, Judge:

In this action Plaintiff, Sears Holdings Management Corp., challenges the classification of imported merchandise within the Harmonized Tariff Schedule of the United States ("HTSUS") by U.S. Customs and Border Protection ("Customs"). Defendant moves to dismiss pursuant USCIT Rule 12(b)(1) for lack of subject matter jurisdiction, contending that Plaintiff failed to timely commence its action "within one hundred and eighty days after the denial of a protest." 28 U.S.C. § 2636(a) (2006). For the reasons set forth below, Defendant's motion to dismiss is granted.

BACKGROUND

Upon liquidation Customs classified Plaintiff's imported boots under subheading 6404.19.20, HTSUS, as "Footwear with outer soles of rubber, plastics, leather, or composition leather and uppers of textile materials." Plaintiff protested this decision, arguing that the proper classification is subheading 6402.91.40, HTSUS, as "Footwear with outer soles and uppers of rubber or plastics." With its protest Plaintiff included invoices and sketches of the merchandise, as well as a copy

of ruling NYRL N050140 (July 6, 2009), *available at* 2009 WL 427215, which appears to classify comparable merchandise under subheading 6402.91.40.

Customs denied the protest on November 16, 2009. Plaintiff then submitted a voidance request pursuant to Section 515(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1515(d) (2006),[1] which Customs rejected on August 13, 2010. Sears attempted to protest Customs' rejection of its voidance request, which Customs rejected, explaining that the statute and regulations do not contemplate or authorize the protest of a rejected voidance request. Plaintiff commenced this action on February 9, 2011, within 180 days of the rejection of voidance request, but more than 180 days after Customs' denial of the original protest.

DISCUSSION

"Plaintiffs carry the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a motion to dismiss for lack of subject matter jurisdiction, the court assumes "all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

Defendant's motion to dismiss raises a simple issue: whether Plaintiff's voidance request tolls the statute of limitations for the commencement of an action under 28 U.S.C. § 1581(a). *See generally*, *Stone v. I.N.S.*, 514 U.S. 386, 392, (1995) ("As construed in [*I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987)] both the APA and the Hobbs Act embrace a tolling rule: The timely filing of a motion to reconsider renders the underlying order nonfinal for purposes of judicial review. In consequence, pendency of reconsideration renders the underlying decision not yet final, and it is implicit in the tolling rule that a party who has sought rehearing cannot seek judicial review until the rehearing has concluded."). Unfortunately for Plaintiff, it does not.

Although one might assume that tolling the statute of limitations would advance the purpose of 19 U.S.C. § 1515(d) by enabling Customs "to rectify erroneous denials of applications for further review and protests without recourse to the judicial system," H.R. Rep. No. 103–361(I) at 118 (1993), such an assumption is definitively foreclosed by the clear Congressional direction that "[a]ll denials of protests are effective from the date of original denial for purposes of [the

[1] Further citation to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

statute of limitations]." 19 U.S.C. § 1515(c); *see also* H.R. Rep. No. 103–36(I) at 118 ("[A]ll administrative action pertaining to a protest or application for further review will terminate when an action is commenced in the Court of International Trade arising out of such protests or applications and that any administrative action taken subsequent to the commencement of an action shall be null and void."). Congress therefore provided a non-tolling 180 days for parties to contest the denial of a protest in the Court of International Trade. During the 180 days following the protest denial, parties are free to seek administrative remedies under section 1515 that may resolve their issues and obviate the need for judicial review, but they need to proceed quickly because if Customs has not provided the desired relief within 180 days of the original protest denial, they need to commence their actions in the Court of International Trade. In this case Plaintiff failed to heed the 180-day time period, and the court therefore lacks jurisdiction to hear Plaintiff's claim.

Plaintiff advances an alternative theory for jurisdiction predicated on its failed attempt to protest Customs' rejection of its voidance request. The court does not believe this alternative basis for jurisdiction has any merit. It appears instead to be an effort to skirt the clear requirements and time periods required for review under 28 U.S.C. § 1581(a). When rejecting Plaintiff's attempted protest of Customs' rejection of Plaintiff's voidance request, Customs correctly explained that the statute and regulations do not contemplate such a protest. As a non-protestable decision under 19 U.S.C. § 1514(a), it is unreviewable under 28 U.S.C. § 1581(a). *Playhouse Imp. & Exp., Inc. v. United States*, 18 CIT 41, 44 (1994); *see also*, *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994) ("Section 1581(a) provides no jurisdiction for protests outside [the exclusive categories of 19 U.S.C. § 1514(a)].").

Without a direct statutory claim under 28 U.S.C. § 1581(a), Plaintiff argues that the court's residual jurisdiction provision, 28 U.S.C. § 1581(i), supplies jurisdiction to review Customs' rejection of Plaintiff's voidance request. Plaintiff, in essence, asserts an Administrative Procedure Act ("APA") claim challenging "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704 (2006). This APA provision is reflected in the court's residual jurisdiction case law, which prescribes that section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or "manifestly inadequate." *Miller & Co. v. United States ,* 824 F.2d 961, 963 (Fed. Cir. 1987). Although Plaintiff does not have an available remedy under section 1581(a) to challenge Customs' rejection of the voidance request, Plaintiff's APA claim nevertheless must fail because Cus-

toms' rejection of Plaintiff's voidance request (which Plaintiff predicated on material error in the original protest decision) constitutes nonreviewable agency action. *See I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, at 278–279 (1987) (agency's denial of party's reconsideration request predicated on material error in the original decision is unreviewable agency action committed to agency discretion). Plaintiff's APA claim therefore challenges "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2), a jurisdictional limitation for APA claims that applies to the general grant of jurisdiction contained in 28 U.S.C. § 1581(i). *Cf. Bhd. of Locomotive Eng'rs*, 482 U.S. at 282, (noting that the limitation of 5 U.S.C. § 701(a)(2) applies to "the general grant of jurisdiction contained in 28 U.S.C. § 1331").

CONCLUSION

Plaintiff failed to commence its action within 180 days of the original protest decision. The court therefore does not have jurisdiction over this action. The court will enter judgment accordingly.

Dated: August 10, 2012
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 12–107

HARTFORD FIRE INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Chief Judge
Court No. 07–00067

[Granting Defendant's motion to dismiss without prejudice, in part, and with prejudice, in part]

Dated: August 13, 2012

Frederic D. Van Arnam, *Eric W. Lander*, and *Helena D. Sullivan*, Barnes, Richardson & Colburn, of New York, NY for the Plaintiff.

Justin R. Miller, Trial Attorney, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the Defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, and *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC. Of counsel on the briefs was *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION

Pogue, Chief Judge:

In its Amended Complaint, ECF No. 29, Plaintiff Hartford Fire Insurance Company ("Hartford") asks the court to void or, in the alternative, to discharge certain bonds securing duties on entries of frozen cooked crawfish tailmeat from the People's Republic of China ("China"). Defendant U.S. Customs and Border Protection ("Customs") moves, pursuant to Rule 12(b)(5) of this Court, to dismiss Plaintiff's Amended Complaint for failure to state a claim.

As explained below, the first and second causes of action stated in Plaintiff's complaint will be dismissed without prejudice for failure to state a claim; the third and fourth causes of action will be dismissed with prejudice because Plaintiff cannot state a claim for relief on the facts of this case.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i) (2006).

BACKGROUND

This action arises from Sunline Business Solution Corporation's ("Sunline") importation into the United States of eight entries of freshwater crawfish tailmeat from Chinese producer Hubei Qianjiang Houho Frozen (the "Hubei entries"), between July 30, 2003, and August 31, 2003. Am. Compl. ¶¶ 2–3. The Hubei entries were subject to an antidumping duty order covering freshwater crawfish tailmeat from China, Am. Compl. ¶ 4, and were permitted to enter following Customs' approval of eight single entry bonds designating Hartford as the surety. Am. Compl. ¶¶ 7–9. The eight single entry bonds, which secured payment of the antidumping duties, were executed on July 27, 2003; August 6, 2003; August 7, 2003; and August 27, 2003. Am. Compl. ¶ 8 & app. 1.

Customs liquidated the Hubei entries, in July 2004 and March 2005, at the 223% country-wide rate for China, pursuant to the Department of Commerce's final results in the relevant administrative review. Am. Compl. ¶¶ 10–12. Following Sunline's failure to pay the duties owed, Customs made a demand on Hartford, on June 22, 2005, for payment on the eight single entry bonds. Am. Compl. ¶ 13.[1]

Hartford asserts that it learned the following facts, on which it premises its challenge to the enforcement of the eight single entry bonds, after receiving the demand for payment from Customs. On or around June 19, 2003, Shanghai Taoen International Trading Co. informed Customs of its belief that crawfish tailmeat from China was

[1] Customs also sought payment from Hartford on a continuous bond securing the entries, Am. Compl. ¶ 13, but Hartford is not challenging enforcement of the continuous bond.

being imported illegally into the United States. Am. Compl. ¶ 14. This information led Customs to investigate Sunline, beginning sometime prior to August 15, 2003. Am. Compl. ¶ 15. Following the investigation, on November 25, 2003, two of Sunline's officers were indicted for importing crawfish tailmeat in violation of U.S. import laws. Am. Compl. ¶ 16. Customs did not, at any time, inform Hartford about its investigation of Sunline. Am. Compl. ¶¶ 20–24. Nor did Commerce inform Hartford that it was returning to Sunline, on August 27, 2003, and December 19, 2003, cash deposits unrelated to the Hubei entries. Am. Compl. ¶¶ 25–26.

STANDARD OF REVIEW

When reviewing a motion to dismiss for failure to state a claim, the court "must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Bank of Guam v. United States*, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To be plausible, the complaint need not show a probability of plaintiff's success, but it must evidence more than a mere possibility of a right to relief. *Id.* at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

DISCUSSION

In its Amended Complaint, Hartford alleges four causes of action, or counts, all of which Customs moves to dismiss for failure to state a claim. In counts one and two, Hartford asserts that the eight single entry bonds are voidable under the common law theory of material misrepresentation. In counts three and four, Hartford claims, in the alternative, that its obligation on the bonds should be discharged in the amount of $270,256.92, the value of cash deposits that Customs, without Hartford's knowledge, returned to Sunline. The court will first address Hartford's claims for voidability and then Hartford's claims for discharge.

I. Hartford's Amended Complaint Fails to State a Claim for Material Misrepresentation

A. Material Misrepresentation by Customs

A bond is voidable by a surety, "[i]f the [surety or] secondary obligor's[2] assent to the [bond] is induced by a fraudulent or material misrepresentation by the obligee[3] upon which the [surety or] secondary obligor is justified in relying . . . ." Restatement (Third) of Suretyship and Guaranty § 12(1) (1996).[4] An obligee's failure to disclose facts unknown to the surety is defined as a material misrepresentation if: (1) such facts "materially increase the risk beyond that which the obligee has reason to believe the [surety] intends to assume"; (2) the obligee "has reason to believe that these facts are unknown to the [surety]"; and (3) the obligee "has a reasonable opportunity to communicate [these facts] to the [surety]." *Id.* § 12(3); *see also United States v. Martinez*, 151 F.3d 68, 73 (2d Cir. 1998).

In its first cause of action, Hartford asserts a material misrepresentation claim against Customs. In particular, Hartford claims that (1) Customs failed to disclose to Hartford the investigation of Sunline; (2) such failure to disclose materially increased Hartford's risk on the bonds; and (3) Customs knew or should have known that failure to disclose the information would cause Hartford to assume a level of risk beyond that it intended in issuing the bonds. Am. Compl. ¶¶ 34–35.

Customs argues for dismissal of Hartford's first count on three grounds: (1) Customs could not have made a timely disclosure because it did not become aware of the surety's identity until after the bonds were executed; (2) Hartford failed to plead its exercise of due diligence and, therefore, cannot claim justifiable reliance on disclosures from Customs; and (3) Customs was prohibited by law from disclosing the Sunline investigation. Mem. Supp. Def.'s Mot. to Dismiss at 7–18, ECF No. 63 ("Def.'s Mot. to Dismiss"). We consider in turn each of Customs' arguments.

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[2] An obligor is "[o]ne who binds oneself to another bycontract or legal agreement." *The American Heritage Dictionary of the English Language* 1212 (4th ed. 2000).

[3] An obligee is "[o]ne to whom another is bound by contractor legal agreement." *Id.*

[4] "This Court has relied upon suretyship law principles explained in the *Restatement (Third) of Suretyship and Guaranty* in determining the rights and obligations of parties under customs bonds." *United States v. Great Am. Ins. Co. of N.Y.*, 35 CIT __, 791 F. Supp. 2d 1337, 1359–60 (2011) (citing *Wash. Int'l Ins. Co. v. United States*, 25 CIT 207, 224, 138 F. Supp. 2d 1314,1330 (2001)).

1. Customs Had a Timely Opportunity to Disclose Material Facts before the Bonds Became Effective

Customs first argues that any lack of disclosure could not have been a material misrepresentation because the bonds were executed without its involvement; therefore, there was no "reasonable opportunity to communicate" with Hartford prior to the execution of the bonds. Def.'s Mot. to Dismiss at 15. Customs argues, in essence, that a customs bond is a contract solely between the importer and the surety, with Customs functioning as a third party beneficiary. *See* Restatement (Third) of Suretyship and Guaranty § 2(d).

Customs' argument is unpersuasive because, pursuant to its own regulations, bonds must be approved by Customs prior to entry of the merchandise. 19 C.F.R. § 113.11 (2012) ("The port director will determine whether the bond is in proper form and provides adequate security for the transaction(s)."); Antidumping or Countervailing Duties; Acceptance of Cash Deposits; Bonds, or Other Security to Obtain Release of Merchandise; Revision of T.D. 82–56, T.D. 85–145, 19 Customs Bull. 331, 332 (1985) ("[T]he U.S. Customs Service will accept cash deposits, bonds or other security, as specified below, prior to releasing for consumption in the customs territory of the United States merchandise that is or may be subject to the assessment of antidumping or countervailing duties . . . ."). Without Customs' approval of the bond, merchandise does not enter the United States, no duty is assessed, and no obligation exists for the surety to assume upon default.

Thus, Customs' acceptance of the surety's offer is necessary to the formation of the surety agreement. *See* Restatement (Third) of Suretyship and Guarantee § 8 cmt. a ("An offer to become a secondary obligor commonly invites the offeree to accept by advancing money, goods, or services on credit."). Because Customs' approval functions as an acceptance necessary to formation of the contract, Customs would have the opportunity at any point prior to approval of the bond to inform the surety of material facts.[5] For this reason, Customs may have had an opportunity to disclose information to Hartford prior to approving the bond, and dismissal is not warranted on this ground.

[5] Customs argues in its Reply Brief that formation of the bond contract occurs prior to entry of merchandise because 19 C.F.R. § 113.26(b) makes the effective date of the bond the date of the transaction, as listed on Customs Form 301. Def.'s Reply Mem. Supp. Mot. to Dismiss at 11, ECF No. 85 ("Def.'s Reply Br."). However, the effective date of the bond instrument is not the same as formation. The effective date tells Customs that a bond offer is outstanding and invites Customs acceptance by entering the goods, thereby creating the obligation that is the subject matter of the bond.

2. Hartford's Failure to Plead Due Diligence Does Not Undermine Its Material Misrepresentation Claim

In its second argument for dismissing the first cause of action, Customs argues that Hartford has failed to plead exercise of due diligence in issuing the bonds to Sunline. Customs contends that because Hartford has not pled any facts relating to its due diligence, it cannot claim that Customs had reason to believe Hartford was unaware of the relevant facts relating to the investigation of Sunline.

The Restatement notes that "[f]or purposes of subsection (3), whether the obligee has reason to believe that . . . such facts are unknown to the secondary obligor, shall be determined in light of the obligee's reasonable beliefs as to . . . the secondary obligor's ability to obtain knowledge of such facts independently in the exercise of ordinary care." Restatement (Third) of Suretyship and Guaranty § 12(4). Furthermore, "the surety bears the burden of making inquiries and informing itself of the relevant state of affairs of the party for whose conduct it has assumed responsibility," *Cam-Ful Indus., Inc. v. Fid. & Deposit Co. of Md.*, 922 F.2d 156, 162 (2d Cir. 1991) (quoting *State v. Peerless Ins. Co.*, 492 N.E.2d 779, 780 (N.Y. 1986)), and "[t]he policy behind surety bonds is not to protect a surety from its own laziness or poorly considered decision," *id.*

However, considering the facts pled in the light most favorable to the plaintiff, *Bank of Guam*, 578 F.3d at 1326, Hartford's claim that it was unaware of the investigation and that Customs should have known it was unaware is plausible. In this case, Hartford has pled — and Customs has not disputed — that the investigation of Sunline was confidential. Taken in the light most favorable to Hartford, the confidential nature of the investigation suggests both that Hartford was unaware of the investigation and that Customs had reason to know that the investigation was unknown to Hartford. Thus, Hartford's pleading on this issue is plausible and dismissal is not warranted on this ground.[6]

3. Hartford's Right to Disclosure of the Sunline Investigation under a Material Misrepresentation Theory is Preempted by Statute

In its final argument in favor of dismissing the first cause of action, Customs contends that it was prohibited by law from revealing the existence of the Sunline investigation to Hartford. To support its contention, Customs cites case law concerning both the Freedom of

[6] The court does not determine whether Hartford exercised due diligence in issuing the single entry bonds to Sunline. The court's finding is limited to the narrow question of whether the facts as pled state a plausible claim for relief.

Information Act ("FOIA") and the law enforcement investigatory privilege. Def.'s Mot. to Dismiss at 9–12. Hartford responds that neither FOIA, nor the law enforcement investigatory privilege, can be used as a shield in this case. Pl.'s Resp. to Def.'s Mot. to Dismiss at 14–18, ECF No. 70 ("Pl.'s Resp. Br.").

If Customs is prohibited from disclosing the investigation or permitted to withhold the relevant information, then dismissal may be appropriate. If Customs' disclosure is prohibited by law, then a material misrepresentation claim premised on such a disclosure would be foreclosed as a matter of law because Custom's would have no reasonable opportunity to communicate material facts. Restatement (Third) of Suretyship and Guaranty § 12(3)(c). Furthermore, if Custom's had a right to withhold relevant information, which preempts Hartford's right to disclosure under the common law, then there would be no cause of action for material misrepresentation. Accordingly, we will consider first the law enforcement investigatory privilege and then FOIA.

Hartford is correct that the law enforcement investigatory privilege is inapplicable in this case. The law enforcement investigatory privilege is a judge-made evidentiary privilege that permits the government to withhold certain evidence related to law enforcement investigations from discovery. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997). Permitting the government to exercise this privilege is within the sound discretion of the trial court. *Id.* ("The balancing of that need — the need of the litigant who is seeking privileged investigative materials — against the harm to the government if the privilege is lifted is a particularistic and judgmental task."). As a discretionary, judge-fashioned, evidentiary privilege, the law enforcement investigatory privilege has, at best, limited application outside the realm of discovery. In a case such as this, Customs cannot shield itself with a privilege so limited in scope, particularly when the exercise of the privilege is not Customs' prerogative but the special province of the court.

On the other hand, Hartford is mistaken when it argues that FOIA is inapplicable to this case. FOIA is a comprehensive statute governing the rules of agency disclosure; therefore, as this case centers on Customs' obligation to disclose, FOIA cannot be avoided. *See* 5 U.S.C. § 552 (2006); *see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 936–37 (D.C. Cir. 2003) (holding the common law right of access to public records preempted by FOIA).

FOIA establishes a three-part disclosure requirement for all federal agencies: § 552(a)(1)[7] requires federal agencies to proactively disclose certain information through publication in the Federal Register; § 552(a)(2)[8] requires federal agencies to make certain information available for public inspection and copying; and § 552(a)(3)[9] requires federal agencies to disclose all records not covered under § 552(a)(1) & (2) upon request. FOIA also sets out exemptions in § 552(b) that are applicable to all disclosures made pursuant to § 552(a). Particularly relevant in this case is the § 552(b)(7)(A) exemption for "records or information compiled for law enforcement purposes . . . [that] could

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[7] 19 U.S.C. § 552(a)(1) reads:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —
>
> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
> (E) each amendment, revision, or repeal of the foregoing.

[8] 19 U.S.C. § 552(a)(2) reads:

> Each agency, in accordance with published rules, shall make available for public inspection and copying —
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
> (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
> (E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale.

[9] 5 U.S.C. § 552(a)(3)(A) reads:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

reasonably be expected to interfere with enforcement proceedings," and the § 552(c)(1)[10] limitations on when an investigation qualifies for a § 552(b)(7)(A) exemption.

Thus, the FOIA disclosure scheme is comprehensive: a limited category of records must be proactively disclosed; a second, limited category of records must be available for public inspection; and *all other records* are to be available upon request unless exempted from disclosure. Furthermore, all exemptions to the disclosure regime are statutorily enumerated.

Because FOIA establishes a comprehensive statutory framework for disclosure of agency records, when it conflicts with existing common law rights to disclosure, such rights are preempted. *See Ctr. for Nat'l Sec. Studies*, 331 F.3d at 936–37. In *Center for National Security Studies*, plaintiffs argued that a common law right of access to public records required the Department of Justice to disclose the names of detainees arrested in the wake of the September 11th attacks and their attorneys. *Id.* at 936. The Court of Appeals for the District of Columbia Circuit acknowledged that the Supreme Court had recognized a common law right of access to public records. *Id.* (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978)). However, as early as *Nixon*, the Supreme Court also recognized that the common law right could be abrogated by statute. *Nixon*, 435 U.S. at 602–06. Thus, the D.C. Circuit concluded that with FOIA "Congress has provided a carefully calibrated statutory scheme, balancing the benefits and harms of disclosure. That scheme preempts any preexisting common law right." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 937; *see also United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) ("The appropriate device [for access to the record] is a Freedom of Information Act request addressed to the relevant agency.").

The D.C. Circuit's decision in *Center for National Security Studies* instructs our analysis here. Hartford is invoking a common law right to disclosure through its material misrepresentation claim. Though it is not the same common law right of access that the D.C. Circuit discussed in *Center for National Security Studies*, for its claim to stand, Hartford must have a right to disclosure of the information.

[10] 5 U.S.C. § 552(c)(1) reads:

> Whenever a request is made which involves access to records described in subsection (b)(7)(A) and (A) the investigation or proceeding involves a possible violation of criminal law; and (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

But, insofar as Hartford seeks disclosure of Customs' law enforcement investigation of Sunline, its common law right is preempted by FOIA.

As a law enforcement investigation, the Customs investigation of Sunline is decidedly within the purview of FOIA. As the D.C. Circuit noted in *Center for National Security Studies*, "[i]n enacting the [5 U.S.C. § 552(b)(7)(A)] exemption, 'Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations.'" 331 F.3d at 926 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). As Customs was investigating Sunline for violation of U.S. import laws, any record of the investigation falls squarely within the § 552(a)(3) provision for disclosure upon request and is potentially barred from disclosure by § 552(b)(7)(A).[11]

Furthermore, with regard to law enforcement investigations, FOIA creates a presumption of confidentiality, thereby foreclosing prior common law disclosure obligations. FOIA presumes that an agency may withhold information about a law enforcement investigation unless and until a request for disclosure is made and such request is determined not to fall within the § 552(b)(7)(A) exception. Therefore, it cannot coexist with the common law's obligation to affirmatively disclose material facts, insofar as material facts include information regarding law enforcement investigations. Where a statute conflicts with the common law, the statute controls. *See City of Milwaukee v. Ill. and Mich.*, 451 U.S. 304, 314 (1981) ("Federal common law is a 'necessary expedient,' and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." (citation omitted)).

This does not mean that sureties are foreclosed from bringing all material misrepresentation claims against the government due to the disclosure rules of FOIA. Rather, our holding is limited to the facts pled in this case. Here, the disclosure sought by Hartford — the existence of a law enforcement investigation — is one clearly contemplated under the statutory structure of FOIA, reserved to the request procedures of § 552(a)(3), and possibly subject to exception pursuant

[11] The court is not in a position to decide if Customs must disclose the investigation of Sunline pursuant to § 552(a)(3) or whether the investigation would be excepted from disclosure under § 552(b)(7)(A). It is irrelevant in this case because no request was ever made. In order for Hartford's claim to succeed, Customs must have had an obligation to disclose the investigation — which Hartford claims Customs had under a theory of material misrepresentation — but any such obligation, on the facts of this case, is preempted by the disclosure requirements of FOIA.

to § 552(b)(7)(A).[12] Therefore, any common law right Hartford may have to disclosure of Custom's law enforcement investigation under the theory of material misrepresentation is preempted by FOIA. The court makes no decision regarding material misrepresentation claims premised on other facts.

In lieu of disclosing the investigation itself, Hartford argues that Customs could have met its common law obligation to avoid material misrepresentation by rejecting the bonds and requiring cash deposits from Sunline for the Hubei entries. Hartford's theory rests on Customs' discretionary capacity to accept a cash deposit in lieu of a bond. *See* 19 C.F.R. § 113.40(a) (2012) ("In lieu of sureties on any bond required or authorized by any law, regulation, or instruction . . . the port director is authorized to accept United States money, United States bonds (except for savings bonds), United States certificates of indebtedness, Treasury notes, or Treasury bills in an amount equal to the amount of the bond."); *see also* Section 623(e) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1623(e) (2006).[13]

However, Hartford has failed to adequately plead this alternative theory. When reviewing agency action pursuant to its 28 U.S.C. § 1581(i) jurisdiction, the court will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (2006); *see Gilda Indus., Inc. v. United States*, 622 F.3d 1358, 1363 (Fed. Cir. 2010); *Candle Artisans v. U.S. Int'l Trade Comm'n*, 29 CIT 145, 149, 362 F. Supp. 2d 1352, 1355 (2005). As the action Hartford wishes to challenge — the decision to accept the bond rather than a cash deposit — is a discretionary decision by the agency,[14] Hartford must show, at a minimum, that such decision was an abuse of discretion. Therefore, in order to survive a motion to

[12] In this regard, the Court of Appeals for the Fifth Circuit's decision in *St. Paul Fire and Marine Insurance Co. v. Commodity Credit Corp.*, 646 F.2d 1064 (5th Cir. 1981), is distinguishable from the facts of this case. *St. Paul Fire and Marine* concerned bonds issued by the plaintiffs as assurance on a line of credit given by the Community Credit Corporation ("CCC"), a federal government agency, to the United Farmer's Marketing Association ("UFMA"). *Id.* at 1066–67. One of the bonds, issued in January 1964, followed a shortage of funds by UFMA in December 1963 that was known to CCC but not to the sureties. *Id.* at 1068–70. The Fifth Circuit held that the plaintiffs were released from liability on the January 1964 bond because CCC knew of the December 1963 shortage by UFMA and did not inform plaintiffs prior to issuance of the 1964 bond. *Id.* at 1074–75. While the Fifth Circuit released plaintiffs from liability on a material misrepresentation theory, unlike in this case the material fact to be disclosed was not the existence of a law enforcement investigation; therefore, the facts in *St. Paul Fire and Marine* do not raise the same FOIA preemption issues that are relevant in this case.

[13] All subsequent citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[14] Actions "committed to agency discretion by law" are beyond the scope of judicial review

dismiss for failure to state a claim, Hartford must plead a plausible allegation that Customs' decision was an abuse of discretion.

Because Hartford has not pled a plausible claim for abuse of discretion, the first cause of action cannot be sustained on the basis of Hartford's alternative theory. However, when appropriate, a dismissal pursuant to Rule 12(b)(5) will be made without prejudice, thereby permitting the plaintiff to file an amended complaint. *See Totes-Isotoner Corp. v. United States*, 32 CIT 739, 750–51, 569 F. Supp. 2d 1315, 1328 (2008). Therefore, the first cause of action is dismissed without prejudice. If Plaintiff's complaint is not so amended within thirty (30) days of this opinion, the dismissal will become final.

B. Material Misrepresentation by Sunline

In its second cause of action, Hartford asserts fraudulent and material misrepresentation by Sunline. According to the Restatement (Third) of Suretyship and Guaranty § 12(2):

> If the [surety's] assent to the secondary obligation is induced by a fraudulent or material misrepresentation by either the principal obligor or a third person upon which the secondary obligor is justified in relying, the secondary obligation is voidable by the secondary obligor unless the obligee, in good faith and without reason to know of the misrepresentation, gives value or relies materially on the secondary obligation.

However, Hartford has failed to plead facts sufficient to render plausible a claim of fraudulent or material misrepresentation by Sunline. *Iqbal*, 556 U.S. at 678. In the Amended Complaint, Hartford asserts only that "[t]hrough means of fraudulent and material misrepresentation, Sunline induced Hartford . . . to issue the single entry bonds covering the Hubei entries." Am. Compl. ¶ 44. Such a "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

As in a recent case before the Court of Appeals for the Federal Circuit, in this case Hartford has asserted a troubling result but no particular facts to explain why that result occurred. *Cf. Sioux Honey Ass'n. v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1062–64 (Fed. Cir. 2012). In *Sioux Honey*, the plaintiff claimed that Customs failed to take statutory and regulatory actions resulting in uncollected duties. *Id.* at 1063. The complaint contained a factual allegation that Commerce had not collected $723 million in duties under the four chal-

under the Administrative Procedures Act. 5 U.S.C. § 701(a)(2) (2006); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The court does not decide whether the action challenged here does or does not fall within the purview of 5 U.S.C. § 701(a)(2).

lenged antidumping orders, but "contain[ed] no facts indicating that the conduct alleged . . . actually occurred and caused the duties to be uncollected and undistributed." *Id.* The Court of Appeals found that this conclusory allegation — $723 million in uncollected duties must mean Customs had failed to fulfill its obligations — was possible but fell short of the *Twombly* requirement of plausibility, because plausibility requires the plaintiff to plead some specific facts that draw a connection between the alleged wrongdoing and the harm. *Id.* at 1063–64 ("In providing so few facts in support of their allegations, Plaintiffs have done nothing to separate the conduct alleged . . . from a whole host of other possible alternatives.").

Similarly, Hartford's statement that it was unaware of any investigation or fraudulent behavior by Sunline, though possible, is not enough to support a plausible claim of fraudulent or material misrepresentation. Without pleading any facts regarding the relationship or negotiations between Sunline and Hartford, Hartford has failed to make a plausible case that its ignorance was Sunline's responsibility, let alone due to behavior amounting to fraudulent or material misrepresentation. However, as with the first cause of action, dismissal is without prejudice, and Hartford may amend the complaint. Again, if Plaintiff's complaint is not so amended within thirty (30) days of this opinion, the dismissal will become final.

II. Hartford Cannot State a Claim for Impairment of Suretyship or Equitable Subrogation on the Facts of this Case

A. *Impairment of Suretyship / Pro Tanto Discharge*

Hartford's third cause of action is for impairment of suretyship or *pro tanto* discharge. The Restatement describes impairment of suretyship as "[a]n act that increases the secondary obligor's risk of loss by increasing its potential cost of performance or decreasing its potential ability to cause the principal obligor to bear the cost of performance . . . ." Restatement (Third) of Suretyship and Guaranty § 37(1). When an impairment of suretyship occurs, the surety may be discharged from its obligation in an amount equal to the loss suffered by the surety. *Id.* § 37 cmt. f. Hartford argues that by returning cash deposits totaling $270,256.92 to Sunline, Customs impaired collateral that Hartford could have applied to the debt owed on the bonds.

Hartford's claim is barred by sovereign immunity. Claims against the United States may be barred by sovereign immunity unless there exists "a clear statement from the United States waiving sovereign immunity . . . together with a claim falling within the terms of the waiver." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 498 (2006) (quoting

United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (internal quotation marks omitted)).

In *Lumbermens Mutual Casualty Co. v. United States*, 654 F.3d 1305 (Fed. Cir. 2011), the Court of Appeals for the Federal Circuit held that the government had not waived sovereign immunity for implied-in-law contract claims such as impairment of suretyship. In *Lumbermens*, the plaintiff brought an impairment of suretyship claim in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. § 1491. *Id.* at 1307. The Court of Appeals recognized that, while impairment of suretyship originated as a defense, state law had evolved to accommodate such an affirmative cause of action, which "stems not from an equitable assignment of rights (like equitable subrogation), but rather is based on an implied-in-law contract theory – i.e., a recovery in the nature of quantum meruit or quantum valebant." *Id.* at 1314–15. Although the Tucker Act addresses "'implied contract[s],' the Supreme Court has long held that the scope of the Tucker Act's waiver of sovereign immunity 'extends only to contracts either express or implied in fact, and not to claims on contracts implied in law.'" *Id.* at 1316 (quoting *Hercules Inc. v. United States*, 516 U.S. 417, 423 (1996)). Since impairment of suretyship was determined to be an implied-in-law contract claim, the Court of Appeals held that the Court of Federal Claims lacked subject matter jurisdiction over that claim. *Id.* at 1317 ("Thus, because Lumbermens' impairment of suretyship/*pro tanto* discharge claim is based on a non-contractual state law cause of action, or at most an implied-in-law contract theory, we hold that the Claims Court lacked jurisdiction to consider Lumbermens' claim.").

Hartford argues that limitations on the waiver of sovereign immunity under either the Tucker Act or the Administrative Procedures Act ("APA")[15] are inapplicable here because 28 U.S.C. § 1581 effectuates its own waiver of sovereign immunity. *See Humane Soc'y of the U.S. v. Clinton*, 236 F.3d 1320, 1328 (Fed. Cir. 2001) (concluding that "§ 1581 not only states the jurisdictional grant to the Court of International Trade, but also provides a waiver of sovereign immunity over the specified classes of cases"). While Hartford is correct that the applicable waiver of sovereign immunity is to be found in 28 U.S.C. § 1581, the court is hard pressed to find that § 1581 waives affirmative suits for impairment of suretyship.

As the Court of Appeals noted in *Humane Society*, § 1581 waives sovereign immunity "over the specified classes of cases" contained

[15] Customs argues that the waiver of sovereign immunity in a 28 U.S.C. § 1581(i) case is found in the APA, and that the limited waiver of sovereign immunity in the APA cannot be read to waive sovereign immunity in this case. Def.'s Mot. to Dismiss at 21–22.

therein. *Id.* The Court of Appeals has held that this court has jurisdiction in this case pursuant to 28 U.S.C. § 1581(i), *Hartford Fire Ins. v. United States*, 648 F.3d 1371 (Fed. Cir. 2011), but this is not the same as holding that sovereign immunity has been waived for all claims asserted.[16] Rather, Hartford is now arguing that 28 U.S.C. § 1581, which grants jurisdiction and waives sovereign immunity for suits brought pursuant to the tariff and trade laws, waives sovereign immunity for a state common law claim sounding in contract that is not waived by the Tucker Act.

Construing the § 1581 waiver of sovereign immunity strictly in favor of the United States, *United States v. Idaho ex rel. Director, Idaho Dep't of Water Res.*, 508 U.S. 1, 6–7 (1993) (quoting *Ardestani v. INS*, 502 U.S. 129, 137 (1991)), § 1581 should not be read to waive sovereign immunity for a claim that is barred in other contexts. This is particularly true where, as here, an impairment of suretyship claim is not one specifically contemplated under the trade laws and, therefore, under § 1581. A claim for impairment of suretyship is more at home in the context of the Tucker Act — where Congress waived sovereign immunity for contract suits against the federal government — but the Court of Appeals has held that affirmative impairment of suretyship claims are specifically excluded from that waiver. To permit such a claim under § 1581 would be an overbroad reading of the § 1581 waiver of sovereign immunity, and the courts "should not take it upon ourselves to extend the waiver beyond that which Congress intended." *Smith v. United States*, 507 U.S. 197, 203 (1993) (quoting *United States v. Kubrick*, 444 U.S. 111, 117–18 (1979)). Therefore, the impairment of suretyship claim must be dismissed.[17]

B. Equitable Subrogation or Setoff

In its final cause of action, Hartford asserts that any liability it owes on the bonds should be offset by the amount of the cash deposits returned to Sunline. Customs styles this claim as one for common law equitable subrogation, while Hartford in its response brief portrays the claim as one for setoff pursuant to 19 C.F.R. § 24.72 (2012).

However styled, Hartford's claim must fail because it can neither setoff nor subrogate funds that are no longer in the possession of Customs. *Wash. Int'l Ins. Co. v. United States*, 25 CIT 207, 227, 138 F. Supp. 2d 1314, 1333 (2001) ("In order for the court to compel setoff,

[16] Nor was the question of sovereign immunity before the Court of Appeals when it decided the jurisdictional question in this case.

[17] The court does not reach the issue of whether Hartford may raise impairment of suretyship as a defense to a collection action instituted by Customs for recovery on the bonds.

Customs must be *in possession of excess cash deposits* or other form of collateral posted by the insolvent principal."). Customs no longer possesses any money owed to Sunline because the cash deposits in question were returned.

Implicitly recognizing this fact, Hartford argues that it should receive a setoff because Customs did not timely inform Hartford either that Sunline was a bad credit risk or that Customs was returning the cash deposits. However, this line of argument is not a claim for equitable subrogation or setoff; it is a reiteration of Hartford's claim for impairment of suretyship. As discussed above, an affirmative claim for impairment of suretyship must be dismissed as barred by sovereign immunity but may remain open to Hartford as a defense to the enforcement action on the bond.

CONCLUSION

In light of the foregoing analysis, and consistent with this opinion: the first and second causes of action are dismissed without prejudice, and the third and fourth causes of action are dismissed with prejudice.

Plaintiff has until September 12, 2012 to submit an amended complaint. If Plaintiff's complaint is not amended by that date, the court will enter a final judgment of dismissal.

It is **SO ORDERED**.

Dated: August 13, 2012
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 12–108

UNITED STATES STEEL CORPORATION, Plaintiff, and NUCOR CORPORATION AND ARCELORMITTAL USA LLC, Plaintiff-Intervenors v. UNITED STATES, Defendant, and COMPANHIA SIDERURGICA NACIONAL, JFE STEEL CORPORATION, KOBE STEEL, LTD., NIPPON STEEL CORPORATION, NISSHIN STEEL CO., LTD., AND SUMITOMO METAL INDUSTRIES, LTD., Defendant-Intervenors.

Before: The Honorable Nicholas Tsoucalas, Senior Judge
Consol. Court No. 11–00228

[The Plaintiffs' Motions for Judgment on the Agency Record are denied. The United States International Trade Commission's Determination is affirmed. The case is dismissed.]

Dated: August 14, 2012

Skadden, Arps, Slate, Meagher & Flom, LLP, (*James C. Hecht*, *Robert E. Lighthizer*, *Stephen P. Vaughn*, and *Stephen J. Narkin*) for Plaintiff, United States Steel Corporation.

Wiley Rein, LLP, (*Tessa V. Capeloto*, *Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*) for Plaintiff-Intervenor, Nucor Corporation.

Kelley Drye and Warren, LLP, (*Kathleen W. Cannon*, *Paul C. Rosenthal, R. Alan Luberda*, and *Grace W. Kim*) for Plaintiff-Intervenor, Arcelor Mittal USA LLC.

James M. Lyons, General Counsel; *Neal J. Reynolds*, Assistant General Counsel; Marc A. Bernstein, Office of the General Counsel, U. S. International Trade Commission; Carrie A. Dunsmore, U.S. Department of Justice, Commercial Litigation Branch, Civil Division, for Defendant, United States.

Hogan Lovells US LLP, (*Craig A. Lewis*, *Jonathan T. Stoel*, and *Brian S. Janovitz*), for Defendant-Intervenor Companhia Siderurgica Nacional.

Gibson, Dunn & Crutcher, LLP, (*J. Christopher Wood*, *Donald Harrison*, *Andrea Fraser-Reid Farr*, *Daniel J. Plaine*, and *DeLisa L. Lay*) for Defendant-Intervenors JFE Steel Corporation, Kobe Steel, Ltd., Nippon Steel Corporation, Nisshin Steel Co., Ltd., Sumitomo Metal Industries.

OPINION

TSOUCALAS, Senior Judge:

This matter comes before the Court upon the Motions for Judgment on the Agency Record filed by United States Steel Corporation ("U.S. Steel"), Nucor Corporation ("Nucor") and ArcelorMittal USA LLC ("AMUSA") (collectively "Plaintiffs") pursuant to United States Court of International Trade Rule 56.2. Plaintiffs challenge the final determination of the United States International Trade Commission ("ITC") revoking antidumping and countervailing duty orders on hot-rolled flat-rolled steel products from Japan and Brazil. *See Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, 76 Fed. Reg. 34101 (June 10, 2011). Plaintiffs argue that the final sunset determination is not supported by substantial evidence and otherwise not in accord with the law. Plaintiffs seek a remand of this matter for further proceedings before the ITC. Defendant, United States, and Defendant-Intervenors, Companhia Siderurgica Nacional, JFE Steel Corporation, Kobe Steel, Ltd., Nippon Steel Corporation, Nisshin Steel Co., Ltd. and Sumitomo Metal Industries (collectively "Defendants"), argue that the ITC conducted a proper analysis and that its determination was supported by substantial evidence and in accord with the law. They oppose remand of this matter.

Based on the record and oral arguments held on August 7, 2012, and for the reasons set forth below, the Court finds that the ITC's final determination was supported by substantial evidence and in accord with the law. This matter is dismissed.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I).

STANDARD OF REVIEW

The Court is required to "hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence, or otherwise not in accord with the law." 19 U.S.C. §§ 1516a(a)(2)(B)(iii), 1516a(b)(1)(B)(i). However, the decision of the ITC is presumed to be correct and the burden of proving otherwise rests on the party challenging the decision. 28 U.S.C. § 2639(a)(1).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted).

As long as there is an "adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade, and [the Federal Circuit], reviewing under the substantial evidence standard, must defer to the Commission." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006). The ITC has the "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." *Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1008, 33 F.Supp.2d 1082, 1104 (1998), *aff'd* 216 F.3d 1357 (Fed. Cir. 2000). "Certain decisions, such as the weight to be assigned a particular piece of evidence, lie at the core of [the] evaluative process." *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996). "[T]he possibility of drawing two different conclusions does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). The Court may not "displace the [ITC's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Nor may the Court "reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004).

The ITC "must address significant arguments and evidence which seriously undermines its reasoning and conclusions." *Altx, Inc. v. United States*, 25 CIT 1100, 1117–18, 167 F. Supp.2d 1353, 1374

(2001). However, the ITC is not "required to explicitly address every piece of evidence presented by the parties, and . . . is presumed to have considered all of the evidence on the record." *Nucor Corp. v. United States*, 28 CIT 188, 234, 318 F. Supp. 2d 1207, 1247 (2004), *aff'd* 414 F.3d 1331 (Fed. Cir. 2005).

BACKGROUND

Under review are the ITC's negative determinations in the second sunset review of the antidumping and countervailing duty orders on hot-rolled steel imports from Japan and Brazil. *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, 76 Fed. Reg. 34101 (June 10, 2011).

This matter arose out of the Department of Commerce's ("Commerce") various suspension agreements, antidumping orders, and countervailing duty orders on hot-rolled steel from Brazil, Japan, and Russia. *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 Fed. Reg. 34778 (June 29, 1999); *Suspension of Antidumping Duty Investigation: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 Fed. Reg. 38792 (July 19, 1999); *Suspension of Antidumping Duty Investigation: Hot-Rolled* Flat-Rolled Carbon-Quality Steel Products from the Russian *Federation*, 64 Fed. Reg. 38642 (July 19, 1999); *Certain Hot-Rolled Steel Products from Brazil and Russia*, Inv. Nos. 731-TA-384, 731TA-806, 808, USITC Pub. 3223 (Aug. 1999).

In 2005, the ITC completed its first five-year administrative review, sunset review, of the orders and agreements relating to imports of hot-rolled steel from Brazil, Japan, and Russia. The ITC issued affirmative determinations for subject imports from all three countries. *Certain Hot-Rolled Steel Products from Brazil, Japan, and Russia*, Inv. Nos. 731-TA-384, 731-TA-806–808, USITC Pub. 3767 (Apr. 2005).

The ITC instituted its second sunset review on April 1, 2010. *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, 75 Fed. Reg. 16504 (Int'l Trade Comm'n) (Apr. 1, 2010). The ITC reached an affirmative determination regarding subject imports from Russia, but reached negative determinations with respect to subject imports from Japan and Brazil and revoked the antidumping and countervailing duty orders previously imposed on hot-rolled steel from those countries. *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, 76 Fed. Reg. 34101 (Int'l Trade Comm'n) (June 10, 2011).

In its findings, the ITC concluded that imports from Japan, Brazil, and Russia were "not likely to have no discernible adverse impact" on

the domestic industry in the event of revocation. *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, USITC Pub. 4237, Inv. Nos. 701-TA-384 and 731TA-806–808 (June 2011) at 12–13 ("*Pub. Views*"). The ITC further found there to be a likely reasonable overlap of competition between all subject sources and between those imports and domestic like products. *Id.* at 14–15. The ITC exercised its discretion and chose not to analyze subject imports cumulatively because it deemed imports from each subject country likely to compete under different conditions in the United States market upon revocation. *Id.* at 18. The ITC distinguished the Brazilian industry as "significantly less export oriented" and noted that imports from Brazil "historically have had a much smaller and more stable presence in the United States market than imports from the other two subject countries." *Id.* at 16–17. Japanese imports displayed different pricing patterns and a much heavier focus on the Asian market than imports from Brazil or Russia. *Id.* at 17–18.

With respect to Japan, the ITC determined that the revocation of the antidumping order would not result in any significant increase in the volume of its imports to the United States. *Id.* at 44. The ITC cited the Japanese industry's consistent and overwhelming focus on Asian markets, which are larger than the United States market and projected by the ITC to grow more quickly. *Id.* at 41. The ITC also emphasized Japan's long-term relationships with these Asian customers. *Id.* at 41–42. It noted that increases in exports from Japan to non-Asian markets during the period of review had been gradual. *Id.* at 42. The only export surge, during the time of the original injury determination, was attributed to a financial crisis that devastated demand in East Asia and remains unlikely to recur. *Id.* Additionally, although United States prices have typically exceeded those in other markets, the ITC determined that the price differences were neither sufficiently, nor consistently, large enough to provide a strong incentive for Japanese producers to divert significant quantities of exports to the United States from Asian markets. *Id.* at 43. Due to the insignificant likely volume increases, as well as the lack of any history of pervasive underselling, the ITC dismissed the likelihood of any adverse price effects or adverse impact on the domestic industry resulting from the revocation of the antidumping order on Japanese imports. *Id.* at 44–45.

The ITC also determined that, upon revocation of the orders from Brazil, the subject imports were likely to be modest because of Brazil's strong home market orientation and the related economic incentives of directing shipments to their home market rather than to the

United States. *Id.* at 38. They also noted a "lack of any history of import surges either to any market during the period of review or to the United States at any time since 1996." *Id.* The ITC dismissed the likelihood that revocation of the order on Brazil would result in "significant price-depressing and -suppressing effects," or have any significant adverse impact on the condition of the domestic industry. *Id.* at 39–40. The ITC also relied on its determination that the domestic industry was not vulnerable despite its recent lackluster financial performance, because demand was expected to recover as business cycle conditions improved. *Id.* at 35.

On July 6, 2011, U.S. Steel commenced this action by filing a summons with the Court. Their complaint, filed on August 4, 2011, alleges that the ITC's negative determinations regarding imports of hot-rolled steel from Japan and Brazil were unsupported by substantial evidence and otherwise not in accord with the law. *See* Compl. at 8–11. On September 26, 2011, the Court consolidated the case initiated by U.S. Steel with those initiated by AMUSA and Nucor.

DISCUSSION

Statutory Framework

The ITC must review antidumping and countervailing duty orders every five years. 19 U.S.C. § 1675(c)(1). During a sunset review, the ITC "shall determine whether revocation of an order . . . is likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked." 19 U.S.C. § 1675a(a)(1).

1. Cumulation

A. Parties' Arguments

Nucor challenges the ITC's decision not to exercise its discretion to cumulatively analyze the effect of subject imports on the domestic industry. Mem. in Support of Nucor's Rule 56.2 Mot. for J. on the Agency R. at 7 ("Nucor Mem."). Nucor notes that the ITC determined that Japan's focus on Asian markets and Brazil's focus on its home market constituted different conditions of competition between the producers. Nucor Mem. at 12. Nucor characterizes their respective orientations as sales to "non-U.S. markets," a similarity which they allege favors cumulation. Nucor Mem. at 13. Nucor also argues that the imports from each country should be analyzed cumulatively because the ITC found that they are unlikely to have no discernible impact. Nucor Mem. at 16.

Defendants support the ITC's decision not to undertake a cumulative analysis. They maintain that reliance on differences in conditions of competition among importers from various countries is a valid justification for the exercise of the ITC's discretion in choosing not to cumulate under 19 U.S.C. § 1675a(a)(7). *See* Def.'s Mem. in Opp'n. to Mot. of Pls. for J. on the Agency R. at 12–13 ("Def.'s Mem."); Resp. of Japanese Producers in Opp'n to Pls.' Mots. for J. on the Agency R. at 7 ("Japanese Def.'s Resp."); Resp. of Companhia Siderurgica Nacional in Opp'n to Pls.' Mots. for J. on the Agency R. at 19–20 ("CSN Def.'s Resp.").

Defendants add that Nucor incorrectly collapses two conditions of competition into one. Japanese Def.'s Resp. at 8. Specifically, they argue that Nucor conflates export orientation and a heavy focus on Asian markets into a focus on non-United States markets, whereas the ITC considered these factors separately. *See* Japanese Def.'s Resp. at 8–9; CSN Def.'s Resp. at 15.

B. Cumulation Analysis

When assessing imports from several countries to determine if material injury exists, the ITC has the statutory discretion to cumulate the volume and effect of such imports. 19 U.S.C. § 1675a(a)(7). However, "even if the subject imports meet the statutory elements of cumulation, the ITC has discretion not to cumulate them in a sunset review." *See Nucor Corp. v. United States*, 601 F.3d 1291, 1293 (Fed. Cir. 2010). Pursuant to statutory authority, the ITC has wide latitude in selecting the types of factors it considers relevant in undertaking its cumulation analysis, and in each sunset review the ITC retains its discretion not to cumulate its analysis. *See* 19 U.S.C. § 1675a(a)(7).

The ITC may exercise its discretion not to cumulate imports where it finds imports likely to operate under differing conditions of competition. *See Nucor Corp. v. United States*, 601 F.3d 1291, 1296 (Fed. Cir. 2010). Nucor categorizes Brazil's home-market focus and Japan's Asian market focus as "sales to non-U.S. markets" in an attempt to convert what the ITC deemed a distinguishing condition of competition into a similarity which, they argue, strongly favors cumulation.

However, the ITC thoroughly examined and identified potential differences in conditions of competition relating to export orientation, historic volume trends, export market focus, and historic pricing patterns. *Pub. Views* at 16–18. Nucor's interpretation of each country's non-U.S. export focus does not, on its own, require cumulation. The Court may not "displace the [ITC's] choice between two fairly conflicting views, even though the court would justifiably have made

a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Therefore, the ITC's discretion not to cumulate is supported by substantial evidence and in accord with the law.

2. Likely Volume of Subject Imports from Japan and Brazil

A. Parties' Arguments

Plaintiffs allege that the ITC's determination that Japan would maintain its focus on home and Asian markets and would not export to the United States in significant quantities is unsupported by substantial evidence. Mot. of Pl. United States Steel Corp. for J. on the Agency R., 10–11 ("U.S. Steel Mot."). They allege that Japanese producers have the ability, substantial export orientation (due to a weak home market), and excess capacity to significantly increase exports to the United States *Id.* at 10. Plaintiffs further claim that the ITC has presented insufficient evidence that the Asian market will be able to absorb Japan's excess capacity and note that Asian production is exceeding consumption. *Id.* at 10, 20. Plaintiffs also contest the ITC's determination that Japanese producers will maintain their focus on Asian markets after revocation because of their long-term relationships with Asian customers. *Id.* at 13–15.

Additionally, U.S. Steel argues that the ITC's findings were predicated on erroneous projections that steel consumption in Asia would continue to grow. *Id.* at 20–21. Japanese producers' export history to Latin America, they allege, indicated a high likelihood that these producers would shift exports to the more attractive United States market upon revocation. *Id.* at 24. AMUSA adds that the Japanese industry's moderate growth in non-Asian markets is not evidence that imports to the United States will be moderate, since the United States market is more comparable to a region like Asia and has historically higher prices than Latin America. ArcelorMittal USA's Mem. of Law in Support of Mot. for J. on the Agency R., 20–21, ("AMUSA Mem."). Nucor adds that Japanese producers were targeting new export markets outside of Asia not gradually but suddenly and aggressively. Nucor Mem. at 31.

With respect to Brazil, Nucor argues that revocation will result in dumping because Brazilian production capacity was imminently projected to increase beyond demand growth and Brazilian producers consistently undersold a portion of their production during the period of review. *Id.* at 33.

Defendants characterize Plaintiffs' challenges as mere attempts to relitigate contested factual issues that have already been appropri-

ately decided by the ITC. Defendants allege that the ITC provided substantial evidence to support its projection that Japanese producers remain likely to focus predominantly on Asian export markets because the ITC specifically referenced that Asian consumption has exceeded that of North America and is also projected to grow rapidly. Def.'s Mem at 18. Defendants also note that the ITC justifiably relied on Japan's significant long-term commercial relationships within Asia because the ITC is "not required to find the existence of 'binding contracts' as a predicate to determining that the agreements and relationships in question would continue to be the strategic focus." Japanese Def.'s Resp. at 15. Moreover, they argue that these relationships are "significant investments," "pervasive and central" to the Japanese industry, and the ITC's judgment regarding the weight given to them as evidence of market focus should not be second-guessed by the Court. Japanese Def.'s Resp. at 15–17. Lastly, Defendants note that Asian demand is stronger today than it was in 1998, which increases the likelihood of Japan's continued focus on exports to Asia. Def.'s Mem. at 19.

Defendants do not believe that Japan's excess capacity will result in increased exports to the United States upon revocation. *See* Japanese Def.'s Resp. at 22. They argue that Plaintiffs have erroneously assumed that Japanese producers will prioritize full capacity utilization regardless of market conditions, and that the mere existence of unused capacity is equivalent to an increased likelihood that such excess will be used to increase shipments to the United States. *Id.* at 23–24. Defendants note that the ITC never found that Asia would absorb all Japanese capacity nor that Japan would likely operate at full capacity. Def.'s Mem. at 20. Historically, increases in Asian production and excess capacity have not displaced Japanese exports from Asian markets, even when those markets have continued to grow. Japanese Def.'s Resp. at 26.

Defendants further allege that Plaintiffs fail to show a significant and consistent history of price discrepancies favoring the United States market. *See id.* at 27–28. While conceding that United States prices have at times been higher than those of Japan's or other Asian markets, defendants argue that prices have not been higher with enough consistency to increase the likelihood that Japanese producers would shift their export focus to a significant extent. Def.'s Mem. at 28–29. Since Japanese producers have not demonstrated a pattern of sudden export shifting, the price differential between American and Japanese markets would have to be considerably greater than the differential recorded during the period of review in order to

incentivize a significant export shift to the United States. *Id.* As such, defendants argue the relative attractiveness of United States prices would not necessarily result in significant increases of subject imports from Japan. *Id.*

Defendants also address Plaintiffs' analogies to Latin American markets in order to discredit Plaintiffs' increased volume projections. Def.'s Mem. at 19; Japanese Def.'s Resp. at 29. Defendants emphasize the reasonableness of the ITC's finding that Japanese producers have exhibited no recent propensity to move significant import volumes from less attractive to more attractive export markets. Def.'s Mem. at 19; Japanese Def.'s Resp. at 29. Defendants also note that the ITC found that not all markets in Latin America were less attractive than the United States market. Def.'s Mem. at 27. Additionally, Defendants support the ITC's dismissal of these comparisons on the grounds that Plaintiffs cite to an undefined and vast region described as "Latin America" and give no evidence of that region's common conditions of competition. *Id.* at 26–27. Defendants support the ITC's statutory discretion to use evidence of historical export shifting trends rather than Plaintiffs' data relating to absolute volumes. *Id.* at 29.

With respect to Brazil, Defendants dispute Nucor's demand projections in that they neglect to account for the temporarily diminished capacity of up-start steel mills opening in Brazil. Def.'s Mem. at 39; CSN Def.'s Resp. at 35. Defendants also support the ITC's reliance on factors weighing against increased volume projections, including Brazil's home market orientation, strong local demand, and historically stable export behavior. Def.'s Mem. at 37–38; CSN Def.'s Resp. at 35–37.

B. Volume Analysis

The ITC provided substantial evidence in support of its findings, with respect to global projections for production and consumption, as well as each country's export orientation, pricing trends, and market focus. *See Pub. Views* at 36–38, 40–43. The ITC emphasized Japan's overwhelming export focus on the Asian market, which is already the world's largest market and is experiencing robust and continuing growth. *Id.* at 41. In addition to its emphasis on that market's "size, projected dynamic growth, and proximity to Japan", the ITC analyzed Japanese producers' long-term relationships in the region, growth in exports to the region during the period of review, lack of sudden export shifting or product shifting, as well as significant changes in conditions of competition that transpired during the period of review.

Pub. Views at 41–42. Most notably, Asian demand has increased significantly since the financial crisis that occurred during the time of the original injury determination. *Id.* at 42. Although Asian production has increased in kind, there has been no history of displacement of Japanese imports to such markets. *Id.* at 42 n.263. Additionally, the ITC reviewed world market prices and determined that prices in the United States were not consistently higher and provided insufficient motivation for Japan to shift its export orientation. *Id.* at 43.

Regarding the likelihood of import volume increases from Brazil, the ITC first noted that Brazilian producers directed at least 87.9% of shipments to the home market during each year of the period of review. *Id.* at 37. In 2010, the last year of the period of review, the home market absorbed 92.7% of the industry's capacity. *Id.* The ITC next noted that steel prices were consistently and often substantially higher in Brazil than in North America, and that steel consumption is projected to increase in Brazil. *Id.* The ITC also analyzed Brazil's inventories, history of shipments to different export markets, and potential product shifting, and found the industry unlikely to increase a significant volume of subject imports to the United States upon revocation. *Id.* at 37–38.

As long as there is "adequate basis in support of the Commission's choice of evidentiary weight, [the Court], reviewing under the substantial evidence standard must defer to the Commission." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Air Prods. & Chems., Inc. v. United States*, 22 CIT 433, 442, 14 F. Supp. 2d 737, 746 (1998) (quoting *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd* 894 F.2d 385 (Fed. Cir. 1990)). The Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (internal quotations omitted). Here, the ITC acted within its discretion to determine which data to rely upon. Furthermore, the ITC reasonably explained its conclusions regarding likely volume imports and pointed to substantial record evidence in support of each. *Pub. Views* at 36–38, 40–43. As such, the ITC's determinations regarding likely import volumes from Japan and Brazil were both supported by substantial evidence and otherwise in accord with the law.

3. Likelihood of Price Effects

A. Parties' Arguments

Plaintiffs allege that the ITC's price effects determinations are flawed because they are predicated on faulty volume determinations. Nucor Mem. at 38. AMUSA alleges that the price effects determination for Japan was erroneous because it compared products of mismatched price and quality. AMUSA Mem. at 28. Nucor adds that "pernicious price effects" can stem from a mixture of overselling and underselling. Nucor Mem. at 37. They dispute the ITC's position that underselling by Japanese producers must be pervasive in order to cause significant adverse price effects. *Id.* Nucor alleges that Brazil has the ability to undersell in the United States by considerable margins. *Id.* at 39.

Defendants support the ITC's findings that imports from Japan and Brazil are unlikely to result in any significant price effects. Def.'s Mem. at 30, 39. Defendants concur with the ITC's findings that insignificant volume increases were based on substantial evidence. *Id.* at 30–31, 39. Defendants emphasize that the legal standard only requires consideration of "significant price underselling" and "significant depressing or suppressing effect[s]" on domestic prices, and that the ITC need not consider the possible effects of mixed overselling and underselling. Japanese Def.'s Resp. at 33; *see also* 19 U.S.C. §§ 1675a(a)(3)(A)-(B). Defendants allege that the ITC reasonably relied on all available data. Japanese Def.'s Resp. at 33; Def.'s Mem. at 31. The statute only requires the ITC to consider pricing data for United States imports and not pricing data for Japanese producers' import activities in other countries. Japanese Def.'s Resp. at 33; Def.'s Mem. at 31. Lastly, Defendants dismiss Plaintiffs' arguments regarding product mismatching as non-dispositive, given that the product comparison represented only a portion of the ITC's pricing analysis. Japanese Def.'s Resp. at 32–33. The ITC also examined historic pricing patterns and found no consistent underselling. Def.'s Mem. at 31.

B. Price Effects Analysis

Plaintiffs contend that the ITC's pricing determinations are flawed because of their reliance on the related volume determinations. However, the Court concluded above that the ITC's volume determinations were supported by substantial evidence. Therefore, this argument is moot.

Additionally, AMUSA's mismatching argument does not warrant remand because the ITC's analysis of potential underselling was broad-based. The ITC analyzed both historic and likely pricing trends

in addition to the product comparison to which AMUSA objects. *See Pub. Views* at 44; *see also* 19 U.S.C. § 1675a(a)(3).

The ITC's assessments of the pricing evidence with respect to imports from Japan and Brazil are reasonable and adequately explained. *Pub. Views* at 39, 44. The ITC specifically discussed its conclusions regarding insignificant price effects with reference to data reflecting insignificant underselling during the original period of investigation. *Id.* at 39, 44–45. The ITC distinguished between present market conditions in the related countries and those existing at the time of the original injury investigation. *Id.* Here, the evaluation of the evidence is more than mere conjecture and the ITC's "decision is reasonably discernible to the Court." *NMB Singapore Ltd. v. United States*, 557 F.3d. 1316, 1319–20 (Fed. Cir. 2009). Therefore, the ITC's pricing determination was supported by substantial evidence and otherwise in accord with the law.

4. Vulnerability of the Domestic Industry

A. Parties' Arguments

Plaintiffs argue that the ITC's vulnerability analysis was flawed because it only discussed the industry's financial performance. U.S. Steel Mot. at 29. They allege that the ITC failed to consider other impact factors such as employment conditions, production, shipments, capacity utilization, and growth. U.S. Steel Mot. at 29–30; AMUSA Mem. at 37. Plaintiffs also contest the ITC's assessment of the relationship between weak demand and industry vulnerability. U.S. Steel Mot. at 33; AMUSA Mem. at 35. They argue that the ITC should have treated weak demand as a strong indicator of industry vulnerability. U.S. Steel Mot. at 36; AMUSA Mem. at 35. AMUSA adds that the ITC failed to explain its finding with reference to the original injury determinations and the relative trade and financial conditions of 1998. AMUSA Mem. at 38. In addition, Nucor emphasizes that the ITC's failure to address evidence from industry questionnaires severely undermines its conclusion that United States demand was likely to improve. Nucor Mem. at 20.

Defendants rebut Plaintiffs' contentions that the ITC's assessment focused exclusively on financial performance with reference to the ITC's discussion of "other factors" including employment, wages, and productivity within its analysis of the Russian suspension agreement. Def.'s Mem. at 33; Japanese Def.'s Resp. at 36; CSN Def.'s Resp. at 30. They also argue that the ITC's determinations would not be presumptively invalid even if they considered only financial performance. CSN Def.'s Resp. at 31. Defendants further argue that the ITC did not equate weak demand with lack of vulnerability, and that the "lack-

luster" performance of the domestic industry reflected demand conditions in the context of the business cycle rather than structural vulnerabilities of the industry itself. Def.'s Mem. at 33–34. Furthermore, defendants maintain that the restructured domestic industry was healthier during the second sunset review than during the original injury determination. Japanese Def.'s Resp. at 38. Defendants also note that the domestic industry is poised to grow in tandem with projected United States demand increases in the foreseeable future. Japanese Def.'s Resp. at 38; CSN Def.'s Resp. at 33.

B. Vulnerability Analysis

The ITC explained its interpretation that the lackluster performance of the domestic industry reflected demand conditions in the context of the business cycle rather than structural vulnerabilities of the industry itself. *Pub. Views* at 26–27. The ITC provided substantial evidence that steel demand has been historically tied to broad demand trends in the national economy, and that the industry is poised to experience a recovery with projected increases in demand. *Id.* "[W]hen the totality of the evidence does not illuminate a black-and-white answer to a disputed issue, it is the role of the [ITC] . . . to decide which . . . evidence to believe." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006).

The ITC also relied on projections of increased demand. They contrasted this demand with the demand of the original injury determination during which unique market conditions existed due to the Asian financial crisis. *Pub. Views* at 44. The vulnerability determination did not conflict with the original injury determination because the ITC considered changes in market conditions and projections for increased demand. The ITC also considered industry factors beyond those strictly related to financial performance. For example, the ITC's discussion of revocation of the suspension agreement with Russia considered "other factors" such as employment, wages, and productivity, and was incorporated by reference into the ITC's discussion of revocation for Japan and Brazil. *Id.* at 34.

The ITC is "not required to explicitly address every piece of evidence presented by the parties" during a sunset review. *See, e.g.*, *Nucor Corp. v. United States*, 28 CIT 188, 234, 318 F. Supp. 2d 1207, 1247 (2004), *aff'd* 414 F.3d 1331 (Fed. Cir. 2005). As long as "there is adequate basis in support of the Commission's choice of evidentiary weight, [this Court], reviewing under the substantial evidence standard, must defer to the Commission." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006). Such adequate basis was

provided here in the ITC's views. Therefore, the ITC's vulnerability analysis was supported by substantial evidence and in accord with the law.

5. Likelihood of Adverse Impact

A. Parties' Arguments

Plaintiffs contend that the ITC's impact determinations are flawed because they relied on faulty volume, pricing, and vulnerability determinations. AMUSA Mem. at 39–40; Nucor Mem. at 39. Defendants believe that the volume and pricing determinations were reasonable. Def.'s Mem. at 32, 40.

B. Analysis

Plaintiffs' objections to the ITC's impact determinations are entirely predicated on their objections to the ITC's volume, pricing, and vulnerability analyses. However, the volume, pricing, and vulnerability determinations are supported by substantial evidence and in accord with the law. "[Given that] the Court has already sustained the Commission's volume and price effects analyses, . . . the Court finds that the likely impact analysis is supported by substantial evidence and is otherwise in accordance with law." *Nucor Corp. v. United States*, __ CIT __, 675 F.Supp.2d 1340, 1363 (2010). Therefore, reliance on these determinations to support an adverse impact analysis gives Plaintiffs no support for their argument.

CONCLUSION

In accordance with the foregoing, Plaintiffs' motion for judgment on the agency record is denied, and this matter is dismissed.

Dated: August 14, 2012
New York, New York

/s/ NICHOLAS TSOUCALAS
NICHOLAS TSOUCALAS SENIOR JUDGE