U.S. Court of International Trade

Slip Op. 18–81

TABACOS DE WILSON, INC; TABACCO RAG PROCESSORS, INC.; BROWN-USA, INC.; NIPPON AMERICA GROUP/ OKURA USA INC.; SKATE ONE CORPORATION; ALLIANCE INTERNATIONAL, CHB, INC.; C.J. HOLT & COMPANY, INC.; CUSTOMS ADVISORY SERVICES, INC., Plaintiffs, v. UNITED STATES OF AMERICA, U.S. CUSTOMS & BORDER PROTECTION, STEVEN T. MNUCHIN, in his Official Capacity as Secretary of the Treasury, and KEVIN K. MCALEENAN, in his Official Capacity as Commissioner, U.S. CUSTOMS & Defendants.

Before: Jane A. Restani, Judge
Court No. 18–00059

[Finding jurisdiction and a viable claim in case of failure to issue statutorily required regulations; denying the preliminary relief sought by Plaintiffs.]

Dated: June 29, 2018

John Peterson, Neville Peterson, LLP, of New York, NY, argued for Plaintiffs Tabacos de Wilson, Inc., Tobacco Rag Processors, Inc., Brown-USA, Inc., Nippon America Group/Okura USA Inc., Skate One Corporation, Alliance International, CHB, Inc., C.J. Holt & Company, Inc., and Customs Advisory Services, Inc. With him on the brief were *Richard O'Neill* and *Russell Semmel*, Neville Peterson, LLP, of New York, NY.

Justin Miller, International Trade Field Office, U.S. Department of Justice, of New York, NY, argued for Defendants United States; United States Customs and Border Protection; Steven T. Mnuchin, Secretary of Treasury; and Kevin K. McAleenan, Acting Commissioner of U.S. Customs & Border Protection. Also on the brief were *Alexandra Khrebtukova*, Office of Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY, and *Jamie Shookman*, International Trade Field Office, U.S. Department of Justice, of New York, NY.

OPINION

Restani, Judge:

In this action challenging a guidance document issued by the United States Customs and Border Protection ("CBP") to regulate drawback claims in the interim period while new regulations implementing the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA") are being reviewed, importers: Tabacos de Wilson, Inc., Tobacco Rag Processors, Inc., Brown-USA Inc., Nippon America, Inc., and Skate One Corporation; and brokers: Alliance Customhouse Brokers, Inc., C.J. Holt & Company, Inc., and Customs Advisory Services, Inc. (collectively, "Plaintiffs") request the court hold that the interim guidance document unlawfully amended the existing drawback statute, 19 U.S.C §1313, and its regulations. In response, the United

States; CBP; Steven T. Mnuchin, Secretary of Treasury; and Kevin K. McAleenan, Acting Commissioner of U.S. Customs & Border Protection (collectively, "Defendants") seek a motion to dismiss.

BACKGROUND

I. Drawback Statute

Drawbacks are refunds of a customs duty, fee, or internal revenue tax paid on imported merchandise. 19 C.F.R. § 191.2(i) (2010). Section 313 of the Tariff Act of 1930, as amended, provides the statutory framework for claiming a drawback. 19 U.S.C. § 1313 (2016).[1] Drawbacks are available where, *inter alia*, imported goods are directly used in producing a good for export, *id.* § 1313(a) ("direct identification drawbacks"), imported and substitute goods of the "same kind and quality" are used to produce goods for both domestic use and export, *id.* § 1313(b); 19 C.F.R. § 191.2(x)(1) ("substitution manufacturing drawbacks"), imported goods do not conform to specifications and are exported, 19 U.S.C. § 1313(c) ("rejected merchandise drawbacks"), imported goods are exported without having been used in the United States, *id.* § 1313(j)(1)(A)(i) ("unused merchandise drawbacks"), and "substituted" goods are exported without having been used in the United States, *id.* § 1313(j)(2) ("substitution unused merchandise drawbacks"). Prior to the implementation of CBP's interim guidance document, all drawback claims were filed under the pre-TFTEA version of 19 U.S.C. § 1313, and all claims were processed according to the regulations codified in Part 191 of Title 19 of the Code of Federal Regulations. As part of this, 19 C.F.R. § 191.92 permits CBP to offer qualifying claimants accelerated payment of estimated drawback claims. To receive accelerated payment of drawback claims, the claimant must be approved by the agency and must satisfy additional statutory and regulatory requirements, such as "correctly calculat[ing] the amount of drawback due." *See* 19 C.F.R. §§ 191.51(b)(1), 191.92(a)(1), 191.92(b)(3).

II. The Trade Facilitation and Trade Enforcement Act of 2015

On February 24, 2016, Congress enacted the TFTEA. The Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114–125, 130 Stat. 122 (2016). Section 906 of the TFTEA amended the drawback statute. The key amendments included: (1) changing the test used for substitution manufacturing drawbacks under 19 U.S.C.

[1] Unless otherwise indicated, all citations to the Tariff Act of 1930 are to relevant portions of Title 19 of the U.S. Code, as amended by the TFTEA.

§ 1313(b), TFTEA § 906(b); (2) changing the commercial interchangeability test for substitution unused merchandise drawbacks, *id.* § 906(e); and (3) expanding the period for filing drawback claims under 19 U.S.C. § 1313(j)(2), *id.* § 906(j). These changes were intended to make drawback applications less burdensome on both claimants and CBP. *See* Defendants' Memorandum in Support of its Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction: Defendant's Exhibit 1, ECF No. 23–2, ¶ 5 (Apr. 13, 2018) ("Whittenburg Decl.").

Under the pre-TFTEA framework, claimants typically calculated drawback claims based on the invoice values of the imported merchandise. Whittenburg Decl. ¶ 6. Because invoices are not standardized, this lengthened the review process. *See id.* The TFTEA permitted the U.S. Secretary of the Treasury ("Treasury") to adopt new regulations standardizing the drawback process by migrating from the invoice system to an automated system based on "average per unit duties, taxes, and fees." TFTEA § 906(g)(l)(2)(B)–(C). In addition to improved processing efficiency, Plaintiffs anticipate that drawback claimants "stand[] to benefit from the new substitution rules and expanded time limits contained in the TFTEA . . . ." Motion for Preliminary Injunction: Plaintiffs' Exhibits A–E, ECF No. 13–1, at A ¶ 5, B ¶ 5, C ¶ 5, D ¶ 5, E ¶ 5. (Mar. 23, 2018) ("Pls. Exs."); *see also id.* at F ¶ 5, G ¶ 5, H ¶ 5 (discussing anticipated benefits under the TFTEA).

Congress provided the Treasury two years from the enactment of the TFTEA to promulgate regulations implementing the TFTEA's drawback amendments. TFTEA § 906(g)(l)(2)(A). Treasury was unable to meet the two-year deadline, which lapsed on February 24, 2018. To date, Treasury has yet to publish final regulations implementing the TFTEA's drawback amendments. As of April 6, 2018, however, Treasury has created a draft regulatory package in the form of a Notice of Proposed Rulemaking ("NPRM") and has transmitted that regulatory package to the Office of Management and Budget ("OMB") for interagency review. *See* Defendants' Memorandum in Support of its Motion to Dismiss and Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 23–1, at 3. (Apr. 13, 2018) ("Defs. Br."). The period for interagency review is 90 days, Exec. Order No. 12,866, 58 Fed. Reg. 51,735, at § 6(b)(2)(B) (Sept. 30, 1993) ("Exec. Order No. 12,866"), after which public notice-and-comment will commence, *see* Oral Argument, ECF No. 29, at 19:00–19:07 (May 7, 2018) ("Oral Arg."); Defs. Br. at 10.

Following the two-year rulemaking period, TFTEA provides for a transition year, beginning February 24, 2018, and ending February

23, 2019. TFTEA § 906(q)(1)(B). During this time claimants may elect to file drawback claims under 19 U.S.C. § 1313, as it was pre-TFTEA, or under that statutory provision, as amended by the TFTEA. TFTEA § 906(q)(3).

III. Interim Guidance Document

On February 5, 2018, CBP published the first version of a Guidance Document created to inform the trading community of interim procedures for filing TFTEA drawback claims during the transition year. U.S. CUSTOMS AND BORDER PROTECTION, DRAWBACK: INTERIM GUIDANCE FOR FILING TFTEA DRAWBACK CLAIMS, VERSION 1 (2018) ("Guidance Document: Ver. 1"). The third version of the Guidance Document was published on March 26, 2018. *See generally* U.S. Customs and Border Protection, Drawback: Interim Guidance for Filing TFTEA Drawback Claims, Version 3 (2018) ("Guidance Document").[2] The Guidance Document indicates CBP will neither process nor liquidate transition year drawback claims until new regulations are developed by Treasury, published in a NPRM, subjected to notice and comment, and issued as final rules. Guidance Document at 15. The Guidance Document mentions new filing restrictions that were not in the TFTEA, such as the "first-filed" and "mixed use" rules. Guidance Document at 2, 6, 15–16; *see also* Plaintiffs' Memorandum in Support of its Motion for Preliminary Injunction, ECF No. 14, at 29 (Mar. 23, 2018) ("Pls. Br."). The "first-filed" rule limits drawback claimants to designating goods from an import entry line item to *either* direct identification *or* substitution drawback claims. Guidance Document at 6. Similarly, the 'mixed use' rule provides that claimants can only make substitution-based drawback claims under the TFTEA if the entry summary line on which that claim is based was not previously the subject of a drawback claim filed under the pre-TFTEA statute. Guidance Document at 2, 15–16.

On March 23, 2018, Plaintiffs commenced this case and moved for a preliminary injunction. Motion for Preliminary Injunction, ECF No. 13, at 1 (Mar. 23, 2018). On April 13, 2018, Defendants responded to Plaintiffs' motion and filed a cross-motion to dismiss the action. *See* Defs. Br. at 1. Oral argument on Plaintiffs' motion was held on May 7, 2018, during which Plaintiffs' motion was denied without prejudice. Oral Arg. at 1:02:27–1:02:50. Thereafter, the court permitted parties to file supplemental briefs concerning the merits of Count V of Plaintiffs' Complaint. Plaintiffs' Supplemental Briefing Addressed to Count V of the Complaint, ECF No. 32 (May 21, 2018) ("Pls. Supp. Br."); Defendants' Supplemental Brief, ECF No. 33 (June 4, 2018) ("Defs.

[2] Unless otherwise specified, all citations to the Guidance Document refer to Version 3.

Supp. Br."). This opinion addresses both Plaintiffs' motion for preliminary injunction and Defendants' motion to dismiss.

JURISDICTION AND STANDARD OF REVIEW

Under the Administrative Procedure Act ("APA"), "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702 (1976). The "agency action" implicated in this case is the implementation of CBP's Guidance Document. The alleged legal wrongs resulting from this action are Defendants' failure to provide Plaintiffs with notice and an opportunity to comment upon: (1) suspension of existing drawback regulations; (2) the *de facto* revocation of Plaintiffs' accelerated payment licenses; and (3) newly created drawback "rules." Pls. Br. at 2–3 (citing 5 U.S.C. §§ 551(4), 553, 558(c); 19 C.F.R. § 191.92(f)).

Yet, "the APA is not a jurisdictional statute and . . . does not give an independent basis for finding jurisdiction in the Court of International Trade." *Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1552 (Fed. Cir. 1983) (citing *Califano v. Sanders*, 430 U.S. 99, 107 (1977)). "Thus, the Court of International Trade must have its own independent basis for jurisdiction under 28 U.S.C. § 1581 . . . ." *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004). Here, the court's basis for jurisdiction is 28 U.S.C. § 1581(i)(4), as it relates to 28 U.S.C. § 1581(i)(1). Together, these statutes grant the court "jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—administration and enforcement with respect to[, *inter alia*, import revenues]." 28 U.S.C. § 1581(i)(1), (i)(4). Plaintiffs challenge CBP's "administration and enforcement" of the duty drawback provisions, which are a feature of import revenue collection.

Defendants contend, however, that the action is not ripe for judicial review because the Guidance Document is "a non-final policy statement." Defs. Br. at 19–29.[3] The court does not have jurisdiction over claims that are not ripe. *See, e.g.*, *NSK Ltd. v. United States*, 510 F.3d 1375, 1384–85 (Fed. Cir. 2007). Generally, where the challenged agency action is not final, Plaintiffs claim is not ripe. Two conditions must be satisfied for agency action to be final: first, the action must mark the "consummation" of the agency's decision-making process.

[3] Although Defendants' Motion to Dismiss contended that Counts I through IV were all unripe, Defs. Br. at 19–29, Defendants later indicated at oral argument that their ripeness arguments were primarily aimed at Counts III and IV, Oral Arg. at 3:04–3:56. Regardless, the court's jurisdictional analysis applies to all Counts, as all Counts concern the same action: implementation of the terms of the Guidance Document in lieu of final regulations pursuant to the APA. Counts III and IV, however, have been mooted by post-Complaint concessions. *See infra*, Part II(2).

The action here, promulgation and implementation of the terms of the Guidance Document, "must not be of a merely tentative or interlocutory nature." *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed. Cir. 2008) (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). Second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Id.*

Defendants first argue that the agency action is not final, because it will only remain in place until final regulations are promulgated. *See* Defs. Br. at 28–29. The court disagrees. Although labeled an "interim" measure, the Guidance Document consummates the agency's decision-making process. The Guidance Document prescribes CBP's current approach to all drawback claims under the TFTEA; in other words, its rules are currently in force. *See* Whittenburg Decl. ¶ 14; Guidance Document at 5. That these rules will likely change does not make them "tentative" within the meaning of the test for final agency action. Rather, CBP has already integrated rules laid out in the Guidance Document into its current practice.

Furthermore, these now-effective rules from the Guidance Document impact Plaintiffs' substantial rights. TFTEA Section 906 required that its drawback amendments take effect and implementing regulations prescribing TFTEA drawback calculation methods be promulgated by February 24, 2018. TFTEA § 906(g)(l)(2)(A), (q)(1)(B), (q)(3)(B). As implementing regulations have not yet been promulgated, the Guidance Document operates to indefinitely dictate Plaintiffs' drawback rights under the TFTEA – the *de facto* "legal consequence" being that, despite the TFTEA having taken effect, all processing of TFTEA drawback claims has been suspended.[4] Guidance Document at 9–10; Whittenberg Decl. ¶ 19.

In sum, the agency action at issue is final and affects Plaintiffs' substantial rights. Thus, Plaintiffs' claims are ripe, and the court has jurisdiction over this case. Relevant to this action, the court will uphold Defendants' actions unless they are "found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] (D) without observance of procedure required

[4] Despite now arguing that Plaintiffs can claim no right to have their TFTEA drawback claims processed, Defendants' Reply Memorandum in Support of its Motion to Dismiss, ECF No. 27, at 7–8 (May 3, 2018) ("Defs. Reply Br."), CBP's position prior to this litigation was that TFTEA drawback provisions should have been fully implemented by February 24, 2018, *see, e.g.*, U.S. CUSTOMS AND BORDER PROTECTION, DRAWBACK SIMPLIFICATION NEWSLETTER, at 1 (Nov. 2017), *available at* https://www.cbp.gov/sites/default/files/assets/documents/2017-Nov/TFTEADrawbackNews_November_0.pdf ("The Act provides CBP with two-years from the date of enactment to fully implement the new law. As such, the changes promulgated by the Act will not take effect until Feb. 24, 2018, applying to drawback claims filed on or after that date.") (one of a series of monthly newsletters published between January and November 2017, all featuring similar language).

by law[.]" 5 U.S.C. § 706(2) (1966); *see also Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 18 C.I.T. 754, 758–59, 861 F. Supp. 121, 127 (1994), *aff'd*, 59 F.3d 1219 (Fed. Cir. 1995). The court will furthermore "compel agency action unlawfully withheld or unreasonably delayed[.]" 5 U.S.C. § 706(1).

DISCUSSION

I. Motion for Preliminary Injunction Denied

Pursuant to USCIT R. 65(a), Plaintiffs seek a preliminary injunction to enjoin Customs from suspending or limiting: (1) the operation of 19 C.F.R. § 191.92, which is the regulation governing accelerated payment of drawback claims; and (2) individual drawback claimants' approval to receive accelerated payments pursuant to that regulation.[5] Pls. Br. at 1–2. To obtain a preliminary injunction, Plaintiffs must demonstrate, *inter alia*, that absent a preliminary injunction, Plaintiffs will suffer immediate, irreparable harm. *See Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983). "Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria." *Corus Grp. PLC v. Bush*, 26 C.I.T. 937, 942, 217 F. Supp. 2d 1347, 1353 (2002), *aff'd in part sub nom. Corus Grp. PLC. v. Int'l Trade Comm'n.*, 352 F.3d 1351 (Fed. Cir. 2003). Irreparable harm is potential injury that cannot be redressed by a legal or equitable remedy at the conclusion of the proceedings. *See Weinberger v. Romero–Barcelo*, 456 U.S. 305, 312 (1982). In evaluating irreparable harm, the court considers: "the magnitude of the injury, the immediacy of the injury, and the inadequacy of future corrective relief." *CannaKorp, Inc. v. United States*, 234 F. Supp. 3d 1345, 1350 (CIT 2017).

Both importer Plaintiffs and broker Plaintiffs allege that implementation of the drawback procedures described in CBP's Guidance Document will seriously harm their cash flow and profitability. Broker Plaintiffs contend they will lose revenues derived from drawback commissions, whereas importer Plaintiffs argue that delayed drawback payments, without interest, will tie up excessive funds. *See* Pls. Br. at 37–38. Plaintiffs, however, have provided little evidence to substantiate these allegations. Plaintiffs called no witnesses at the

[5] Aspects of the injunction sought by Plaintiffs which the court finds have been mooted, e.g., those related to the "first-filed" and "mixed use" rules, are fully discussed below. *See* Pls. Br. at 29–36; Part II(2), *infra*. Nevertheless, the evidentiary defects discussed herein apply equally to these mooted grounds. As Plaintiffs have not substantiated their claims of irreparable harm due to the alleged wholesale suspension of accelerated payment for all TFTEA claims, Plaintiffs have *a fortiori* not done so as regards CBP's allegedly improper adoption of certain procedural rules applicable to TFTEA drawback claims.

May 7, 2018, preliminary injunction hearing, during which this motion was first denied, and have supplied no witnesses since. For proof, Plaintiffs rely upon a series of affidavits from Plaintiffs' corporate officers. *See* Pls. Exs. at A–H. Although some broker Plaintiffs' officers suggested a risk of bankruptcy under the interim arrangement, *see id.* at F ¶ 6, G ¶ 7, H ¶ 6,[6] neither broker Plaintiffs' nor importer Plaintiffs' affidavits contain the financial specifics necessary to establish the concrete harm expected from the interim scheme, *id.* at A ¶ 3, B ¶ 3, C ¶ 3, D ¶ 3, E ¶ 3, F ¶ 5–7, G ¶ 5–7, H ¶ 5–7.[7] Bare assertions from interested parties are generally insufficient to justify finding irreparable harm. *See Shandong Huarong Gen. Grp. v. United States*, 24 C.I.T. 1286, 1290 (2000).

Furthermore, CBP is not suspending *all* accelerated payments. Rather, drawback claims filed under the new statute, TFTEA, are being placed on hold until the TFTEA's implementing regulations are passed. Guidance Document 5, 12. During the transition year, claimants with drawback claims that qualify under the old version of 19 U.S.C. § 1313 are free to file their claims under that law, and CBP will continue to provide accelerated payment of those claims. TFTEA § 906(q)(3); Guidance Document 5, 12.

Plaintiffs have not provided sufficient evidence that their respective businesses face imminent, irreparable harm, such that the court should enjoin CBP to immediately allow accelerated payments of TFTEA drawback claims. Given that claimants retain the option to receive drawback claims by filing under the old statute, Plaintiffs have not demonstrated that the delay in processing drawback claims filed under the TFTEA constitutes irreparable harm. Although broker Plaintiffs have arguably presented generalized evidence of economic injury, that alone is insufficient. *See S.J. Stile Assocs. v. Snyder*, 66 C.C.P.A. 27, 30, 646 F.2d 522, 525 (1981). Because Plaintiffs fail to meet their burden to prove irreparable harm, the court need not reach Plaintiffs' other arguments with respect to the preliminary injunction. *See id.; Altx, Inc. v. United States*, 26 C.I.T. 735, 738, 211 F. Supp. 2d 1378, 1381 (2002). Accordingly, Plaintiffs' motion is denied.

[6] Respectively, drawback payments are 100%, 93%, and 50–60% of Alliance Customhouse Brokers, Inc., C.J. Holt & Company, Inc., and Customs Advisory Service, Inc.'s monthly revenues.

[7] For example, two broker Plaintiffs suggest that *if* half their clients opt to file for drawbacks under the TFTEA, which would not allow for accelerated payment under the interim Guidance Document, half of the broker Plaintiffs' commission-based revenue would be severely delayed. Pls. Exs. at G ¶ 7, H ¶ 6. Aside from using the same boilerplate language that each broker is "transitioning many of its clients to filing TFTEA drawback," *id.* at F ¶ 5, G ¶ 6, H ¶ 5, however, the affiants provide no indicia of how likely it is that a large proportion of their clients would opt for TFTEA drawback.

II. The Merits of Plaintiffs' Claims and Defendants' Motion to Dismiss

Plaintiffs contend that CBP, in issuing the Guidance Document, has failed to comply with the rulemaking requirements of the Administrative Procedure Act ("APA") in several respects. Count I alleges that the Guidance Document unlawfully amends 19 C.F.R. § 191.92, which provides accelerated payment privileges. *See* Pls. Br. at 13–24. Count II alleges that approval to accept accelerated payments is a license that cannot be suspended without observing regulatory procedures in 19 C.F.R. § 191.92(f) and APA procedures in 5 U.S.C. § 558. *See* Pls. Br. at 24–29. Counts III and IV allege that CBP unlawfully adopted "first-filed" and "mixed use" rules applicable to TFTEA drawback claims. *See* Pls. Br. at 29–36. Count V alleges that Secretary Mnuchin has unlawfully withheld required agency action, and requests a court order directing Treasury to promulgate regulations for calculating drawback claims under the TFTEA. *See* Pls. Br. at 2; Pls. Supp. Br. at 2.

1. Counts I and II: Plaintiffs Fail to State a Claim against the United States.

In Counts I and II, Plaintiffs allege that, in refusing to process accelerated payments under the TFTEA, Defendants have unlawfully limited Plaintiffs' right to claim accelerated payments and thus partially revoked Plaintiffs' approval to accept accelerated payments under 19 C.F.R. § 191.92. *See* Pls. Br. at 13–29; 19 C.F.R. 191.92(a), (f). The current version of Section 191.92 was created under the pre-TFTEA version of 19 U.S.C. § 1313, but the accelerated payment process is exclusively a creature of regulation. 19 U.S.C. § 1313 has not mandated accelerated drawback payments, either before or after the TFTEA. *See* 19 U.S.C. § 1313(r) (2008); TFTEA § 906(j).

Under the Guidance Document, CBP will apply Section 191.92, unchanged, to drawback claims filed under the old version of 19 U.S.C. § 1313. Guidance Document at 3; Oral Arg. at 5:40–5:48. The Guidance Document does not curtail Plaintiffs' license to seek accelerated payments under that version of the statute. Guidance Document at 5. The Guidance Document does, however, decline to apply Section 191.92 to claims filed under the post-TFTEA version of 19 U.S.C. § 1313. *See* Guidance Document at 9–10. Plaintiffs claim a right to apply Section 191.92 to drawback claims under the TFTEA. Pls. Br. at 21–22. For support, Plaintiffs cite 19 C.F.R. § 191.0, which states that Part 191 "sets forth general provisions applicable to *all* drawback claims." Pls. Br. at 22 (citing 19 C.F.R. § 191.0 (emphasis added)). Assuming, without deciding, that Part 191 generally applies

to TFTEA drawback claims, it is nevertheless the text of the TFTEA and Section 191.92, rather than Section 191.0's generalized scope language, which control the disposition of Counts I and II.

The "Scope" portion of Section 191.92 states: "Accelerated payment of drawback is only available when [CBP's] review of the request for accelerated payment of drawback does not find omissions from, or inconsistencies with *the requirements of the drawback law* and part 191 . . . ." 19 C.F.R. § 191.92(a)(1) (emphasis added). The "drawback law" applicable to TFTEA drawback claims is 19 U.S.C. § 1313, as modified by the TFTEA. The TFTEA required Treasury to newly determine what calculation methods would apply to TFTEA drawback claims, TFTEA § 906(g)(l)(2), but such calculation methods have not yet been determined, Guidance Document at 7. To this extent, Section 191.92 is inconsistent with the post-TFTEA statute, and is thus invalid as applied to TFTEA drawback claims. *See Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) ("regulations, in order to be valid, must be consistent with the statute under which they are promulgated"). Furthermore, as a practical matter, without clear calculation methods, CBP cannot review a claimant's estimations, as required by Section 191.92, prior to the release of accelerated payments. 19 C.F.R. § 191.92(a)(1), (b)(1)(vii); *see also id.* § 191.51(b)(1). Thus, Plaintiffs cannot currently claim a right to accelerated payment of TFTEA drawback claims under Section 191.92. Plaintiffs' right to seek accelerated drawback payments under the old statute, however, remain intact under the Guidance Document. Accordingly, as in these Counts Plaintiffs have not identified the violation of any right, the court holds that Counts I and II fail to state a claim against the United States.

2. Counts III and IV: Plaintiffs Claims are Moot.

In Counts III and IV, Plaintiffs contend that, through the Guidance Document, CBP adopted the "first-filed" and "mixed use" rules in violation of APA notice-and-comment requirements. Pls. Br. at 29–36; *see also* Guidance Document at 15–16, 25–26. Under the APA, before proposed regulations can take effect, "notice of proposed rule making shall be published in the Federal Register" and "interested persons [shall be provided] an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(b), (c). This notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." 5 U.S.C. § 553(b)(A).

Although prior versions of the Guidance Document may have been ambiguous, *see* Guidance Document: Ver. 1 at 2–3, the latest version of the Guidance Document unequivocally indicates CBP will *not* process TFTEA drawback claims until TFTEA regulations have passed the necessary rulemaking procedures. Guidance Document at 25. CBP has explained through a signed declaration that it will not apply the challenged rules to bar any claims filed under the TFTEA until the new regulations for implementing TFTEA are in effect. Whittenberg Decl. ¶ 19. Rather, all TFTEA claims filed "before the effective date of the new implementing regulations will be held for processing until the regulations are effective, and *then permitted to be perfected* and processed in accordance with the requirements of the final effective regulations . . . ." *Id.* (emphasis added).

Plaintiffs concede that these Counts are moot if "CBP will agree to entry of a final injunction or enforceable stipulation specifying that these rules will not be applied or enforced except after APA Rulemaking." Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, and Reply in Support of Plaintiffs' Motion for a Preliminary Injunction, ECF No. 24, at 19 (Apr. 23, 2018) ("Pls. Reply Br."). The court finds an injunction unnecessary, as there is no indication CBP will enforce the challenged rules until the APA notice and comment process is complete.[8] Oral Arg. at 23:25–23:46; *see* Guidance Document at 25. Importantly, there are also indications that CBP will provide drawback claimants an opportunity to amend their drawback claims before enforcing any new rules. Oral Arg. at 20:59–21:46; Whittenberg Decl. ¶ 19; Guidance Document at 7. Regarding the challenged rules, Defendants intend to observe the notice-and-comment requirements of 5 U.S.C. § 553, and will provide Plaintiffs an opportunity to comply with any new regulations prior to enforcement thereof. Accordingly, Counts III and IV are dismissed as moot.

3. Count V: Plaintiff States a Claim Against the United States.

In Count V, Plaintiffs allege that Treasury unlawfully withheld rulemaking mandated by Section 906(g) of the TFTEA, which required new regulations addressing the calculation of TFTEA drawback claims. Pls. Supp. Br. at 2–7. The TFTEA states: "Not later than the date that is 2 years after the date of the enactment of the [TFTEA], the Secretary [of the Treasury] shall prescribe regulations

[8] Since the transition year began, there has been only one instance wherein a named Plaintiff's drawback claim triggered an informational error associated with the "first-filed" or "mixed use" rules. Whittenberg Decl. ¶ 20. That claim, filed by Customs Advisory Services, was ultimately rejected due to errors unrelated to the "first-filed" or "mixed used" rules. *Id.*

for determining the calculation of amounts refunded as drawback under this section." TFTEA § 906(g)(l)(2)(A). The date two years after the TFTEA's enactment was February 24, 2018. Four months later, drawback calculation regulations have still not been published.

Defendants argue that the deadline imposed by TFTEA § 906(g) was "directory," not "mandatory," because the statute provided no penalty for failure to comply. Defs. Br. at 35–38. In another case concerning the consequences of a missed statutory deadline, the Supreme Court stated: "In answering this kind of question, this Court has looked to statutory language, to the relevant context, and to what they reveal about the purposes that a time limit is designed to serve. The Court's answers have varied depending upon the particular statute and time limit at issue." *Dolan v. United States*, 560 U.S. 605, 610 (2010).[9] Here, the statutory language plainly left no room for discretion: "*Not later than* the date that is 2 years after the date of . . . enactment . . . the Secretary *shall* prescribe [drawback calculation] regulations. . . ." TFTEA § 906(g)(l)(2)(A) (emphasis added). Further, in Count V Plaintiffs seek only compliance with the statutory deadline, *see* Pls. Reply Br. at 28, rendering recourse to a separate penalty unnecessary. The "mandatory" versus "directory" distinction does not govern disposition of Plaintiffs' claim where Congress has provided a definite time-limit for regulatory action, and rights related to an entire statutory section, in this case the post-TFTEA version of 19 U.S.C. § 1313, are being deprived due to Defendants' failure to act within that time limit.[10]

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[9] *Dolan* was not brought under the APA, but concerned the consequences of a court's failure to determine a victim's losses and order restitution within a ninety-day statutory deadline. *Dolan*, 560 U.S. at 607–08. The language used by the Court was, however, of general application. *Id.* at 607–08, 610.

[10] Cases cited by Defendants do not compel a different outcome. Supreme Court precedents cited by Defendants did not assess simple deadline compliance, but instead declined to impose *additional* sanctions in certain cases of non-compliance. Defs. Br. at 36 (citing, *e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 171–72 (2003) (considering whether to bar award of retirement benefits due to late assignment thereof); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) (considering whether to order dismissal of a customs forfeiture action where statutory timelines had been exceeded); *United States v. Montalvo-Murillo*, 495 U.S. 711, 721–22 (1990) (considering whether defendant should be released due to late bail detention hearing); *Brock v. Pierce County*, 476 U.S. 253, 265–66 (1986) (considering whether to bar recovery of federal grant funds due to late determination as to their misuse)). The cited Federal Circuit cases likewise weighed the legality of substantive sanctions beyond simply ordering deadline compliance. Defs. Br. at 36–37 (citing *Hitachi Home Elecs. (Am.), Inc. v. United States*, 661 F.3d 1343, 1347–48 (Fed. Cir. 2011) (considering whether a protest which the agency failed to allow or deny within the two-year statutory time period must be deemed allowed); *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 565–66 (Fed. Cir. 1989) (considering whether to eliminate duties on goods which the agency failed to liquidate within the 90-day statutory time period)). Moreover, none of the foregoing cases concerned an agency's wholesale failure to issue regulations and the suspension of a statute's operation.

In failing to promulgate the implementing regulations by February 24, 2018, Defendants have exceeded a legislative deadline imposed by Section 906(g)(l)(2)(A). The implementing regulations required under TFTEA § 906 have been withheld in violation of the law.[11] *See In re Paralyzed Veterans of America*, 392 Fed. App'x 858, 860–61 (Fed. Cir. 2010) (unpublished); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189 (10th Cir. 1999).

4. Remedy

Plaintiffs have suggested a remedy of ordering Defendants to immediately process accelerated payments claims under the new statute. Plaintiffs posit that the bonding requirements will protect the Government pending final liquidation (determination) of the drawback claims. Pls. Reply Br. at 37. But as indicated, *see* Part II(1), *supra*, Plaintiffs have no right to accelerated payment under the new statute. Thus, the court declines to adopt Plaintiffs' suggested remedy.

Plaintiffs also request the court "[d]irect the Secretary of the Treasury to publish, within a reasonable time," such calculation regulations. Complaint at 31. The APA states: "To the extent necessary to decision and when presented, the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Unlike *Veterans of America* and *Forest Guardians*, the court does not find the compulsion of agency action necessary to its decision, at this point. *Veterans of America* involved the Secretary of Veterans Affairs' failure to issue a *proposed* regulation until roughly six months after the deadline for a *final* regulation. 392 Fed. App'x at 859 (unpublished). Forest Guardians concerned the Secretary of Interior's failure to publish a final regulation for over "three-and-one-half years" after the statutorily-imposed deadline. 174 F.3d at 1182. Here, Defendants commenced the regulation promulgation process slightly over one month after the statutory deadline for a final regulation. Defs. Br. at 10.[12] Further, *Veterans of America* did not

[11] The court is not persuaded by Defendants' attempts to recast Plaintiffs' arguments under the APA as seeking a writ of mandamus, Defs. Br. at 35, an argument Plaintiffs expressly disclaimed, Pls. Reply Br. at 29. If, upon reviewing further submissions by the parties, the court concludes that a writ of mandamus provides the only avenue for effecting necessary relief, the court will analyze Count V under the appropriate standard.

[12] The OMB review process currently underway is not statutorily mandated, *see* Executive Order 12,866, and the Federal Circuit has found OMB review subordinate to statutory deadlines, *see* 392 Fed. App'x at 860–61 (unpublished). In this instance, however, the 90-day window prescribed for OMB review by Executive Order 12,866, ending July 5, 2018, will likely have lapsed before any relief ordered could be implemented. Thus, truncation of OMB review is a moot issue.

foreclose the exercise of judicial discretion in such a situation. *See* 392 Fed. App'x at 861 ("to the extent we may have discretion to decline ordering compliance with § 706 . . . .") (unpublished).

Considering the facts currently before the court, the court finds that Treasury is proceeding through the notice-and-comment process as expeditiously as is now possible. If, however, the government fails to promulgate the regulation within a reasonable timeframe, for example, if it is unable to produce the proposed regulation for notice-and-comment on or about July 5, 2018, approximately 90 days after April 6, 2018, the court will consider imposing its own deadline so that the Congressional requirement is not abrogated through excessive delay. If Defendants find themselves unable to promptly issue the entire regulatory package currently under consideration, the government should consider whether parts of the package which satisfy the mandate of TFTEA Section 906 can be promulgated in advance of any unresolved portions of the regulatory package.

Finally, the court may fashion other relief by which to safeguard Plaintiffs' drawback rights under the TFTEA. See 28 U.S.C. § 1585 (1980) ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). As now stated in the Guidance Document, until new regulations are promulgated, Defendants do allow Plaintiffs to file under the old version of 19 U.S.C. § 1313, and obtain accelerated drawback payments under the existing regulations. Guidance Document at 3. Liquidation of the drawback claim occurs sometime in the future. In addition, it appears to the court that where Plaintiffs claims may foreseeably qualify under *both* the old and new versions of 19 U.S.C. § 1313, Plaintiffs might be provided the opportunity to file a protective claim under the Guidance, without forfeiting the right to accelerated payment under the old version of 19 U.S.C. § 1313. For such double filed claims, after new implementing regulations have been adopted and Defendants are able to process claims under the new version of 19 U.S.C. § 1313, Plaintiffs might elect to have final liquidation of the drawback claim proceed under the new statutory scheme, as opposed to the old.

Accordingly, the parties shall consider what remedies are administratively feasible and shall meet to discuss possible remedies. It should soon be apparent whether regulations are forthcoming. On July 27, 2018, Plaintiffs shall advise the court if the relief they seek has been obtained or if further order of the court is necessary. Any government response is due August 10, 2018.

CONCLUSION

Plaintiffs Motion for a Preliminary Injunction is **DENIED**. Defendant's Motion to Dismiss is **GRANTED** as to Counts I through IV, and **DENIED** as to Count V. The parties shall proceed as indicated in this opinion.

Dated: June 29, 2018
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI, JUDGE

Slip Op. 18–82

CHANGZHOU HAWD FLOORING CO., LTD., DUNHUA CITY JISEN WOOD INDUSTRY CO., LTD., DUNHUA CITY DEXIN WOOD INDUSTRY CO., LTD., DALIAN HUILONG WOODEN PRODUCTS CO., LTD., KUNSHAN YINGYI-NATURE WOOD INDUSTRY CO., LTD., KARLY WOOD PRODUCT LIMITED, Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 12–00020

[Sustaining in part Commerce's *Fifth Remand Results*; entering judgment ordering exclusion for certain respondents.]

Dated: July 3, 2018

Gregory S. Menegaz and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, argued for the Plaintiffs Changzhou Hawd Flooring Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Dalian Huilong Wooden Products Co., Ltd., Kunshan Yingyi-Nature Wood Industry Co., Ltd, and Karly Wood Product Limited. With them on the brief was *J. Kevin Horgan*.

Jill A. Cramer, Mowry & Grimson, PLLC, of Washington, DC, argued for Plaintiff-Intervenor Fine Furniture (Shanghai) Limited. With her on the brief were *Kristin H. Mowry, Jeffrey S. Grimson, Sarah A. Wyss, Yuzhe PengLing*, and *James Beaty.*

Craig A. Lewis, Hogan Lovells US LLP, of Washington, DC, argued for Plaintiff-Intervenor Armstrong Wood Products (Kunshan) Co., Ltd. With him on the brief was *H. Deen Kaplan*.

Mark Ludwikowski Clark Hill PLC, of Washington, DC, argued for Plaintiff-Intervenor Lumber Liquidators Services, LLC. With him on the brief were *R. Kevin Williams* and *Lara A. Austrins*.

Claudia Burke, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel was *Shelby M. Anderson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, argued for Defendant-Intervenor Coalition for American Hardwood Parity.

OPINION AND ORDER

Gordon, Judge:

This action involves the final less than fair value determination of the U.S. Department of Commerce ("Commerce") in the antidumping duty investigation covering multilayered wood flooring from the People's Republic of China ("PRC") for the period of April 1, 2010 through September 30, 2010. *See Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 64,318 (Dep't of Commerce Oct. 18, 2011) (final determ.) ("*Final Determination*"), and accompanying Issues & Decision Memorandum, A-570–970 (Oct. 11, 2011), *available at* http://enforcement.trade.gov/frn/summary/prc/2011–26932–1.pdf

("*Decision Memorandum*") (last visited this date); *see also Multilayered Wood Flooring from the People's Republic of China*, 76 Fed. Reg. 76,690 (Dep't of Commerce Dec. 8, 2011) (amended final determ. and antidumping duty order) ("*Order*").

This action returns to the U.S. Court of International Trade from Commerce following a remand redetermination ordered by the U.S. Court of Appeals for the Federal Circuit directing Commerce to revise its determination of the "separate rate" and apply the "expected method" under 19 U.S.C. § 1673d(c)(5)(B), or to justify any departure from the "expected method." *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1008 (Fed. Cir. 2017) ("*Changzhou Hawd VI*"). Commerce "was unable to make the findings necessary to justify departure from the expected method," Final Results of Redetermination at 32 (July 21, 2017) ("*Fifth Remand Results*"), and thus applied the "expected method" for the separate rate, averaging the calculated rates of mandatory respondents, which was zero. The issue before the court is whether Commerce was then obligated also to exclude the separate rate respondents from the *Order* as it did with the mandatory respondents. Familiarity with the history of this action is presumed. *See Fifth Remand Results* at 2–6 (explaining history of case).

Separate rate respondents Changzhou Hawd Flooring Co., Ltd., Dalian Huilong Wooden Products Co., Ltd., Dunhua City Jisen Wood Industry Co., Ltd., Dunhua City Dexin Wood Industry Co., Ltd., Kunshan Yingyi-Nature Wood Industry Co., Ltd, and Karly Wood Product Limited (together, "Changzhou Hawd"); Fine Furniture (Shanghai) Limited ("Fine Furniture"); Armstrong Wood Products (Kunshan) Co., Ltd. ("Armstrong") challenge the *Fifth Remand Results*. *See* Pl.-Intervenor Armstrong's Comments Regarding Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 170 ("Armstrong Cmts."); Comments of Certain Separate Rate Appellants Opp. Fifth Remand Redetermination, ECF No. 171 ("Changzhou Hawd Cmts."); Pl.-Intervenor Fine Furniture's Comments on Commerce's Final Results of Redetermination Pursuant to Court Remand, ECF No. 172 ("Fine Furniture Cmts."); *see also* Def.'s Reply to Pls.' Comments on Remand Redetermination, ECF No. 176 ("Def.'s Reply"); Reply Comments of Def.-Intervenor Regarding Commerce's Final Results of Redetermination Pursuant to Court Order, ECF No. 175 ("Def.-Intervenor Reply"). Plaintiff-Intervenor Lumber Liquidators also challenges Commerce's refusal to exclude the separate rate respondents, but also argues that Commerce should have terminated the *Order ab initio*. *See* Pl.-Intervenor Lumber Liquidators Services, LLC's Comments on Remand Redetermination, ECF No. 173 ("Lumber Liquidators Cmts.").

For the reasons set forth below, the court sustains Commerce's decision (1) denying Lumber Liquidators' request to terminate the *Order ab initio*, and (2) denying exclusion from the *Order* for the separate rate respondents that did not request voluntary examination. For the three separate rate respondents that requested voluntary examination during the investigation (Fine Furniture, Armstrong, and Dunhua City Jisen Wood Industry Co., Ltd., collectively, "Voluntary Applicants"), the court determines that Commerce arbitrarily applied its exclusion regulation, 19 C.F.R. § 351.204(e)(1), and enters judgment ordering Commerce to exclude them from the *Order*.

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence 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). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr. *Administrative Law and Practice* § 9.24[1] (3d ed. 2018). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2018).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."); *see also* Harry T. Edwards &

Linda A. Elliott, *Federal Standards of Review* 273–280 (3d ed. 2018) ("Comparing and Contrasting the Principal Standards of Review").

II. Discussion

The portion of this action now before the court involves Commerce's exclusion regulation, 19 C.F.R. § 351.204(e)(1), adopted in 1997 as part of a comprehensive regulatory update following the statutory amendments made by the Uruguay Round Agreements Act. *See* Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) ("URAA"). Section 351.204(e)(1) provides that Commerce" will exclude from an affirmative final determination . . . , any exporter or producer for which [Commerce] determines an individual weighted-average dumping margin . . . of zero or de minimis." 19 C.F.R. § 351.204(e)(1). Although Commerce assigned the separate rate respondents a dumping margin of zero, which Commerce determined by averaging the individual weighted average dumping margins of the mandatory respondents, Commerce did not exclude the separate rate respondents because they had not been individually examined. *Fifth Remand Results* at 24–25.

During notice and comment for § 351.204, Commerce explained that the regulation "provides that any exporter or producer that is individually examined and that receives an individual weighted-average dumping margin . . . of zero or de minimis will be excluded from an order." *Antidumping Duties; Countervailing Duties: Proposed Rulemaking*, 61 Fed. Reg. 7308, 7315 (Feb. 27, 1996). Commerce further explained:

> As for former §§ 353.14 and 355.14, . . . , these provisions are no longer necessary in light of the amendments to the statute made by the URAA, . .
>
> . . These provisions, notwithstanding their titles, functioned as a mechanism for considering requests by voluntary respondents to be investigated. As stated by the Department when it adopted § 351.14:
>
> > If the Department includes a producer or reseller in its investigation and determines that the producer or reseller had no dumping margin during the period of investigation, the Department would automatically exclude that producer or reseller from the antidumping duty order, even if the producer or reseller did not request exclusion under the procedures described in [§ 353.14]. The purpose of this section merely is to provide an opportunity for producers and resellers that the Department might not otherwise include in its investigation to request that the Department specifically include and investigate them.

> *Final Rule (Antidumping Duties)*, 54 Fed. Reg. 12,742, 12,748 (1989). . . .
>
> Given their original purpose, §§ 353.14 and 355.14 have become superfluous in light of section 782(a) of the Act and § 351.204(d) (which establish new procedures for dealing with voluntary respondents) and § 351.204(e)(3) (which deals with exclusion requests in CVD investigations conducted on an aggregate basis). Under these provisions, decisions on exclusions will be based on a firm's actual behavior, as opposed to assertions regarding its possible future behavior.

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,295, 27,311 (1997) (final rule). In the *Fifth Remand Results* Commerce explained that "the revised statutory language and regulations allowed for companies not selected for individual examination to request participation as voluntary respondents." *Fifth Remand Results* at 13. In this investigation, however, Commerce rejected all voluntary examination requests, foreclosing any path to exclusion for respondents seeking an individual weighted average margin. *See Decision Memorandum* at cmt. 43 ("it was neither necessary nor practicable to individually examine the companies that requested voluntary respondent treatment").

Plaintiffs and Defendant argue that the action should be resolved under the first prong of *Chevron*, contending that the statute mandates one and only one outcome on the issue before the court: whether separate rate respondents—in a resource-constrained, non-market economy investigation-must be excluded from the antidumping duty order if they are assigned a zero percent all-others rate. *See* Armstrong Cmts. at 4 (arguing that the "governing statute is crystal clear" and mandates exclusion of all producers or exporters assigned a de minimis rate); Fine Furniture Cmts. at 5 ("Statute Requires Exclusion Where Commerce Assigns a Zero/De Minimis Rate"); Def.'s Reply at 11–13 ("The Statute Unambiguously Precludes The Relief That The Separate Rate Plaintiffs Seek").[1]

[1] The court finds unpersuasive Defendant and Changzhou Hawd's arguments about Commerce's prior practice for dealing with exclusion from an order (albeit disagreeing about what that practice is). Commerce reaches back to a 28-year old determination in which Commerce did not exclude respondents assigned an "all-others" rate of zero. *See Fifth Remand Results* at 12 (citing *Certain Small Business Telephone Systems and Subassemblies Thereof from Taiwan*, 54 Fed. Reg. 42,543 (Oct. 17, 1989) ("*SBTS from Taiwan*"). Changzhou Hawd identifies one prior determination in which Commerce appears to have treated respondents assigned a de minimis "all-others" rate as though they were excluded despite a final affirmative determination. *See* Changzhou Hawd Cmts. at 5–7 (citing *Certain Automotive Replacement Glass Windshields from the People's Republic of China*, 72 Fed. Reg. 70,294 (Dec. 11, 2007) (Amend. Final Determ.) ("Glass Windshields"). *SBTS from Taiwan* pre-dates all the applicable statutory and regulatory authority. And the issue of exclusion was not expressly litigated in *Glass Windshields*. Therefore, the court has not

The court does not believe Congress had this precise question in mind when it drafted the applicable provisions:

19 U.S.C. § 1673d(a)(4) requires Commerce to exclude *any* weighted average dumping margin that is de minimis:

> (4) De minimis dumping margin
>
> [For a final determination], [Commerce] shall disregard any weighted average dumping margin that is de minimis . . . .[2]

19 U.S.C. § 1677(35)(B) defines the term "weighted average dumping margin":

> The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

19 U.S.C. § 1673d(b)(5) describes the term "all-others rate":

> (5) Method for determining estimated all-others rate
>
> (A) GENERAL RULE
>
> . . . the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely under section 1677e of this title.
>
> (B) EXCEPTION
>
> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely under section 1677e of this title, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated

found either administrative determination to be helpful or informative. The court likewise did not find informative or helpful, Changzhou Hawd's reliance on market economy administrative proceedings that resulted in negative determinations.

[2] The Statement of Administrative Action notes that "{e}xporters or producers with *de minimis* margins will be excluded from any affirmative determination." Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, at 844 (1994), reprinted in 1994 U.S.C.C.A.N. 4040. Additionally, Article 5.8 of the Anti-Dumping Agreement requires that "{t}here shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury is negligible." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 5.8.

> weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d(c)(1)(B)(i) requires Commerce to

> (I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and
>
> (II) determine, in accordance with paragraph (5), the estimated all-others rate for all exporters and producers not individually investigated. . . .

19 U.S.C. § 1677f-1(c) elaborates upon Section 1673d(c)(1)(B)(I):

> (1) GENERAL RULE In determining weighted average dumping margins under section . . . 1673d(c) . . . of this title, [Commerce] shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.
>
> (2) EXCEPTION If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, [Commerce] may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—
>
> . . .
>
> (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

Section 1677f-1(c)(1) obligates Commerce to determine an individual weighted average dumping margin for *all* respondents. This is rare in practice. Here, Commerce did not individually investigate the hundred-some-odd producer/exporters of multilayered wood flooring from the PRC. Resource constrained, Commerce selected the two largest volume producers/exporters as mandatory respondents. Both of them, after court-ordered remands, were assigned *de minimis* dumping margins (zero percent) and were excluded from the *Order*. *See Baroque Timber Indus. (Zhongshan) Co. v. United States*, Court No. 12–00007, Final Results of Redetermination[3] at 52 (Nov. 14, 2013) ("*First Remand Results*").

[3] This action was previously consolidated with an action challenging the *Final Determination* brought by the mandatory respondents. *See Baroque Timber Indus. (Zhongshan) Co. v. United States*, Court No. 12–00007. Commerce's results of the first remand in this matter assigned de minimis rates to the mandatory respondents, and assigned a rate of 6.41 percent to the separate rate respondents based on a simple average of the three zero-percent mandatory respondent margins and a PRC-wide entity margin of 25.62 percent. *See First Remand Results* at 45.

Not so long-ago Commerce's calculation of de minimis margins for all individually investigated respondents would have led to termination of an order *ab initio* because there was no basis for an affirmative less than fair value determination (no evidence of dumping). Things changed with Commerce's adoption of its PRC-wide entity policy, see Import Administration Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (Apr. 5, 2005), which effectively enables Commerce to make an affirmative less than fair value determination even though all individually investigated mandatory respondents receive de minimis margins, which is what happened in this action. *See Final Determination*, 76 Fed. Reg. at 64,322. Non-participating companies were deemed non-cooperative and assumed to be part of a government-controlled PRC-wide entity. *Id.* They were assigned the highest calculated transaction-specific rate among mandatory respondents, 58.84 percent, as total adverse facts available. *Id.* Despite no direct evidence of dumping, Commerce here imposed an antidumping duty order on multilayered flooring from the PRC based on indirect evidence (an adverse inference) against the PRC-wide entity. Lumber Liquidators' argument that Commerce must terminate the *Order ab initio* never comes to terms with this aspect of Commerce's affirmative determination. They fail to challenge either the PRC-wide entity policy or the PRC-wide rate. *See generally* Lumber Liquidators Cmts. The court therefore must sustain Commerce's decision to deny Lumber Liquidators' request that Commerce terminate the *Order ab initio*.

Commerce ultimately did exclude the mandatory respondents from the *Order*. To derive the separate rate, Commerce averaged the zero rates assigned to the mandatory respondents under the "expected method". *See Fifth Remand Results* at 8. The question is whether that zero percent "all-others rate", 19 U.S.C. §§ 1673d(c)(1)(B)(i)(II), 1673d(c)(5), constitutes "any" de minimis weighted average dumping margin that Commerce must "disregard" pursuant to 19 U.S.C. § 1673d(a)(4).

The term "any" is broad, and the "all-others rate" is just a proxy for the individual weighted average dumping margins Commerce, in theory, should calculate for all respondents pursuant to § 1677f-1(c)(1) (which, as noted above, is rare in practice). Article 5.8 of the Anti-Dumping Agreement also speaks in broad terms, requiring "immediate termination in cases where the authorities determine that the margin of dumping is de minimis.." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 5.8. It is entirely possible, therefore, that Congress intended

Commerce to disregard a zero percent all-others rate (and exclude the separate rate respondents from the final affirmative dumping determination). At the same time, however, the "all-others rate" is derivative in nature, and because it has general applicability to all non-examined separate rate respondents, it is not really quite as "specific" as what is contemplated by the "weighted average dumping margin" of § 1677(35)(B), or an "individual" weighted average dumping margin of § 1677f-1(c)(1).

That means there is some free play in the statute. And that, in turn, implicates the second prong of *Chevron*, under which the court must defer to Commerce's permissible construction of the statute. *See Chevron*, 467 U.S. at 842–43; *Eurodif S.A.*, 555 U.S. at 316 (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous."); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1361 (Fed. Cir. 2007) (To determine whether Commerce's interpretation is reasonable, the court "may look to 'the express terms of the provisions at issue, the objectives of those provisions, and the objectives of the antidumping scheme as a whole.'"). The court cannot conclude that Commerce's desire to treat "exclusion as an extraordinary measure, and one that should only be available in limited circumstances to companies that have been subject to individual investigation and all that entails (i.e., providing full and complete questionnaire responses, cooperating with the Department, subject to verification, etc.)", *Fifth Remand Results* at 25, unreasonably resolves ambiguous statutory language, or advances a policy prescription at odds with the antidumping statute.

The separate rate respondents argue that Commerce waited too long over the course of the litigation to apply the exclusion regulation. *See* Armstrong Cmts. at 2–3; Fine Furniture Cmts. at 14–19; *see also id*. at 15–17 (highlighting that plaintiffs expressly requested exclusion from the order as part of their initial Complaint, subsequent motions for summary judgment on the agency record, in their comments and briefing on the prior remand redeterminations, and in oral argument before the Federal Circuit). Defendant acknowledges that plaintiffs raised the issue of exclusion early on, but avers that Commerce was not squarely presented with the issue of whether separate rate plaintiffs should be excluded from the order until the *Fifth Remand Results. See* Def.'s Reply at 9–10 ("We acknowledge that certain separate rate plaintiffs have long taken the position that they should be excluded from the order. But it was not necessary for Commerce to evaluate the merits of plaintiffs' argument until the

Federal Circuit reversed this Court's judgment and Commerce assigned a zero margin to the separate rate plaintiffs." (internal citation omitted)).

The court understands that it would have been preferable if Commerce had raised the exclusion regulation before the Federal Circuit in *Changzhou Hawd VI*, and explained that there would be no substantive effect to assigning the separate rate respondents a zero percent margin. That omission, however inefficient, does not invalidate the regulation or mute its operation. It was duly promulgated in 1997 and carries the force of law. What does give the court pause, however, is Commerce's application of the exclusion regulation to the Voluntary Applicants. Given the history of the exclusion regulation in which concerns about limiting exclusion to selected/mandatory respondents were mitigated through the availability of voluntary examination, there is an inherent arbitrariness in Commerce (1) issuing a blanket refusal to entertain voluntary examination requests, and (2) subsequently denying exclusion to the Voluntary Applicants that were assigned a "representative" separate rate of zero (which again, is just a proxy for the individual weighted average dumping margins Commerce should theoretically calculate for all respondents).

Defendant notes that the Voluntary Applicants did not challenge Commerce's respondent selection. *See* Def.'s Reply at 12, 22 (explaining that Commerce's respondent selection decisions have not been challenged). Although they chose not to appeal Commerce's refusal to conduct any voluntary examinations, the Voluntary Applicants may nevertheless challenge Commerce's separate and distinct decision denying them exclusion from the *Order*. That determination (like many Commerce determinations), just happens to comprise numerous other decisions Commerce made through the course of the proceeding: mandatory respondent selection, treatment of voluntary examination requests, the calculation of each of the mandatory respondents' margins, and the calculation of the separate rate, among others. Commerce's determination that resource constraints precluded voluntary examinations may itself have been reasonable. Having made that decision, Commerce's subsequent decision to refuse to exclude Voluntary Applicants assigned a zero percent margin is not.

Commerce's exclusion regulation requires individual examination for exclusion because, as a policy matter, it wants to confirm that a specific party is not in fact dumping. That policy carries a corresponding inference or assumption that a party is trading unfairly unless it can demonstrate with its own direct evidence that it is not. In explaining the enactment history of the exclusion regulation, Com-

merce acknowledged that "the revised statutory language and regulations allowed for companies not selected for individual examination to request participation as voluntary respondents." *Fifth Remand Results* at 13.

The court believes Commerce's application of its exclusion regulation to the Voluntary Applicants it assigned "representative" zero percent margins has two insurmountable problems. The first is Commerce's refusal to conduct any voluntary examinations, preventing the Voluntary Applicants from demonstrating directly their own evidence of fair trading. The second is Commerce's continuing assumption or inference that Voluntary Applicants denied individual examination and ultimately assigned a "representative" zero percent margin were nevertheless unfairly trading, precluding exclusion. The court questions how a reasonable mind could maintain such an assumption or inference against the Voluntary Applicants. With that said, the court does believe there is a material difference between those separate rate respondents that requested voluntary examination, and those that did not. In the court's view, those that did not cannot overcome the regulation and the underlying inference/assumption that they were unfairly trading despite being assigned the same "representative" zero percent margin.

As for remedy, the court typically remands for further consideration when it identifies unreasonableness or arbitrariness in agency decision-making. *See* Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review* 276–77 (3d ed. 2018) ("When a court finds that an agency action is arbitrary and capricious, it will normally remand the case to the agency for further consideration. . . . Thus when an administrative action is found to be arbitrary and capricious, an agency has an opportunity to revisit its decision and provide an adequate justification or reach a different conclusion."). Here, though, too much time has passed for Commerce to individually examine the Voluntary Applicants. *Cf. Changzhou Hawd Flooring Co. v. United States*, 39 CIT __, __, 44 F. Supp. 3d 1376, 1390 (2015) ("while Commerce retains the discretion to reasonably reopen the record, its decision to conduct a full individual investigation of Changzhou Hawd at such a late date is arbitrary and capricious"). Also, this is the *seventh* court decision, reviewing the *sixth* administrative determination. And there may well be an appeal.[4] A final judgment moves this action toward final resolution. The court does not believe a remand for reconsideration is necessary. Instead, the court believes the proper

[4] After many court decisions and remands, trade cases have a way of taking on the feel of Jarndyce and Jarndyce: "Jarndyce and Jarndyce drones on. This scarecrow of a suit has, over the course of time, become so complicated, that no man alive knows what it means." Charles Dickens, *Bleak House*, Chapter 1 (1852–53).

remedy is entry of judgment declaring Commerce's failure to exclude the Voluntary Applicants arbitrary, and directing Commerce to exclude them from the *Order ab initio.*

III. Conclusion

Based on the foregoing, the court sustains Commerce's decision (1) denying Lumber Liquidators' request to terminate the *Order ab initio*, and (2) denying exclusion from the *Order* for the separate rate respondents that did not request voluntary examination. For the Voluntary Applicants, the court determines that Commerce arbitrarily applied its exclusion regulation, 19 C.F.R. § 351.204(e)(1), and will enter judgment ordering Commerce to exclude them from the *Order*. Judgment will enter accordingly.

Dated: July 3, 2018
New York, New York

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

Slip Op. 18–83

UNITED STATES, Plaintiff, v. GATEWAY IMPORT MANAGEMENT, INC. et al., Defendants.

Before: Claire R. Kelly, Judge
Court No. 17–00232

[Denying the motions to dismiss filed by Defendants Gateway Import Management, Inc. and Good Times USA, LLC.]

Dated: July 3, 2018

Stephen Carl Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

Barry Marc Boren, Law Offices of Barry Boren, of Miami, FL, and *Gerson M. Joseph*, Gerson M. Joseph, P.A., of Weston, FL, for defendants Gateway Import Management, Inc. and Good Times USA, LLC.

Jerry P. Wiskin, Simons & Wiskin, of South Amboy, NJ, for defendant Hanover Insurance Company.

OPINION AND ORDER

Kelly, Judge:

This matter is before the court on Gateway Import Management, Inc.'s ("Gateway") and Good Times USA, LLC's ("Good Times") motions to dismiss Plaintiff's complaint pursuant to USCIT Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *See* Def., [Gateway] Rule 12(b)(6) Mot. Dismiss & Mem. Law at 1–3, Dec. 18, 2017, ECF No. 22 ("Gateway Mot. Dismiss"); Def., [Good Times] Rule 12(b)(6) Mot. Dismiss & Mem. Law at 1–3, Dec. 18, 2017, ECF No. 21 ("Good Times Mot. Dismiss"). Subsequent to Gateway and Good Times filing their motions to dismiss, on March 9, 2018, the court ordered all parties to submit supplemental briefing on the Court's subject-matter jurisdiction. *See* Mem. & Order at 2, Mar. 9, 2018, ECF No. 36 ("Ct.'s Order to Br. Jurisdiction").

Plaintiff, the United States ("Plaintiff"), on behalf of United States Customs and Border Protection ("CBP" or "Customs"), seeks to recover unpaid Federal Excise Tax ("FET"), in various amounts, and prejudgment interest from Defendants, Gateway, Good Times, and Hanover Insurance Company ("Hanover") (collectively, "Defendants") pursuant to section 592 of the Tariff Act of 1930, as amended 19 U.S.C. § 1592 (2012).[1] *See* Summons, Sept. 6, 2017, ECF No. 1; Compl. at ¶¶ 1, 26–29, 32–33, Sept. 6, 2017, ECF No. 2. From Hanover, Plaintiff also seeks mandatory statutory interest pursuant to

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

19 U.S.C. § 580. Compl. at ¶ 31. Plaintiff is also seeking attorney fees, and any further interest, as provided by law, that the court deems just and appropriate from the Defendants. *Id.* at 6. For the reasons that follow, Gateway's and Good Times' motions to dismiss are denied.

BACKGROUND

Gateway and Good Times argue that Plaintiff's complaint merely recites the elements of a cause of action and alleges no "factual enhancement sufficient to withstand dismissal." Gateway Mot. Dismiss at 2; Good Times Mot. Dismiss at 2; *see also* Defs. Reply to Pl.'s Resp. to Defs.' Mots. Dismiss at 5–7, 12–20, Feb. 16, 2018, ECF No. 35 ("Joint Reply"). Gateway and Good Times also argue that Plaintiff fails to plead with particularity a claim of fraud or mistake, *see* Gateway Mot. Dismiss at 4–5, 8; Good Times Mot. Dismiss at 4–5, 8; Joint Reply at 4, and improperly attempts to amend its complaint by adding a previously unpled basis for liability. *See* Joint Reply at 7–12. Further, Good Times argues that Plaintiff fails to plead sufficient facts demonstrating that Good Times had the requisite control over the customs entry process of the subject merchandise, or even participated in the process at all. *See* Good Times Mot. Dismiss at 9–14. Plaintiff responds that its complaint has sufficiently alleged that Gateway and Good Times made material false statements and/or omissions when entering the subject merchandise into United States commerce.[2] *See* Pl.'s Resp. Defs.' Mot. Dismiss at 7–15, Jan. 19, 2018, ECF No. 32 ("Pl.'s Resp."). Further, Plaintiff contends that the false statements and/or omissions came as a result of a scheme between Gateway and Good Times to underpay the FET on the subject merchandise.[3] *See id.* at 1–2, 7–15. As a result, Plaintiff alleges that Gateway and Good Times violated 19 U.S.C. § 1592(a) and are liable for unpaid taxes under 19 U.S.C. § 1592(d).[4] *See id.* at 15.

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[2] Hanover has not submitted any filings in relation to the motions to dismiss filed by Gateway and Good Times. However, Hanover filed cross-claims against both Gateway and Good Times, *see* Answer & Cross-Claims; Third Party Compl. at 1–13, Dec. 18, 2017, ECF No. 19, and a third-party complaint against Joseph Franco and Helen R. Franco. *See id.* at 13–19.

[3] Plaintiff alleges that "Gateway as principal, and Hanover as surety, executed two Continuous Basic Importation and Entry Bonds" for various sums, Compl. at ¶ 6, and that pursuant to the terms of these two bonds Hanover is jointly and severally liable for "payment of all duties, taxes and charges, not in excess of the coverage amount per bond year, due as a result of the entry of merchandise into the United States during each yearly period covered by each bond." *Id.* at ¶ 7.

[4] Plaintiff's complaint does not seek, as part of its request for relief, civil penalties under 19 U.S.C. § 1592(a), (c). Pursuant to 19 U.S.C. § 1592(d), the United States is entitled to recover the full amount of lawfully owed "duties, taxes, or fees . . . whether or not a monetary penalty is assessed."

On March 9, 2018, the court ordered the parties to brief whether the Court has subject-matter jurisdiction to hear Plaintiff's claims against Gateway and Good Times, explaining that it was "incumbent upon the Court to independently assess the jurisdictional basis for each case, regardless of whether any party challenged the Court's jurisdiction." Ct.'s Order to Br. Jurisdiction at 1. The court explained that, although the United States can recover unpaid taxes pursuant to 19 U.S.C. § 1592(d) if a party violates 19 U.S.C. § 1592(a), the relevant jurisdictional statute specifically identifies only suits for penalties, bonds, and customs duties. *Id.* at 2.

In its supplemental brief on jurisdiction, Plaintiff argues that the Court has jurisdiction over its claim against Gateway and Good Times. *See* Pl.'s Corrected Suppl. Br. on Jurisdiction at 3–7, June 7, 2018, ECF No. 44 ("Pl.'s Suppl. Br."). Plaintiff argues that the Court possesses jurisdiction pursuant to 28 U.S.C. § 1582(1), because even though a penalty is not sought in this case, the relief that Plaintiff seeks "flows from [the court determining that Gateway and Good Times violated 19 U.S.C. § 1592(a),] separate and apart from any penalty" that could also be sought for such a violation. *See id.* at 3. Plaintiff also argues that there is jurisdiction pursuant to 28 U.S.C. § 1582(3) because FETs collected on imported tobacco are customs duties for the purposes of jurisdiction. *See id.* at 3–5. Finally, Plaintiff argues that its claim against Hanover, the surety, is proper under 28 U.S.C. § 1582(2), that the surety's claims are within the Court's "exclusive jurisdiction" under 28 U.S.C. § 1583,[5] and that splitting the claims between this Court and a United States district court would not be in accord with Congress' intent behind 19 U.S.C. § 1592. *See id.* at 5–7. Gateway and Good Times argue that jurisdiction is lacking under 28 U.S.C. § 1582(1) because Plaintiff is not seeking a penalty. *See* Defs. Gateway, Good Times, & Joseph & Helen Franco[']s Resp. Br. on Jurisdiction at 1–2, May 14, 2018, ECF No. 41 ("Gateway & Good Times' Suppl. Resp. Br."). Gateway and Good Times also deny that FETs are a type of customs duty that would give rise to a claim reviewable under this Court's 28 U.S.C. § 1582 jurisdiction, *see* Defs. Gateway & Good Times, & Joseph & Helen Franco[']s Opening Br. on Jurisdiction at 4–6, Apr. 23, 2018, ECF No. 39 ("Gateway & Good Times' Suppl. Br."), and argue that the claims against Gateway and

[5] Hanover agrees that pursuant to 28 U.S.C. § 1582(2), the Court has exclusive jurisdiction over Plaintiff's claim against it as surety on Gateway's import bonds. *See* Br. of [Hanover], Def., Cross-Claimant & Third-Party Pl. in Resp. Ct.'s Order Dated Mar. 9, 2018 at 3, Apr. 20, 2018, ECF No. 37 ("Hanover's Suppl. Br.").

Good Times should be transferred to a district court.[6] *Id.* at 7–8.[7] Gateway and Good Times also argue that if the Court determines that it does not have jurisdiction over the non-surety defendants, the Court may have ancillary jurisdiction over Gateway,[8] but not Good Times. *Id.* at 10–11.[9] The parties do not contest that the Court has jurisdiction over Hanover, the surety, pursuant to 28 U.S.C. § 1582(2). *See* Pl.'s Suppl. Br. at 5; Gateway & Good Times' Suppl. Br. at 8.

STANDARD OF REVIEW

"[F]ederal courts . . . are courts of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976), *superseded by statute on other grounds*, Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089, as recognized in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005)). Therefore, the "court may and should raise the question of its jurisdiction sua sponte at any time it appears in doubt." *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) (citations omitted). The Court may dismiss a case for lack of subject-matter jurisdiction on its own motion because the Court must enforce the

[6] However, Gateway and Good Times recognize that it seems illogical for Congress to split claims based on the same factual basis and "divest this Court of jurisdiction," especially because "the recovery of taxes would normally be inextricably interwoven with the ascertainment of facts pertaining to the recovery of duties." Gateway & Good Times' Suppl. Br. at 11.

[7] Hanover likewise challenges the Court's jurisdiction to hear Plaintiff's claims against Gateway and Good Times under 28 U.S.C. § 1582. *See* Hanover's Suppl. Br. at 3–7. Like Gateway and Good Times, Hanover argues that customs duties do not include FET collected on imported tobacco products, *see id.* at 3–5, and that the legislative history of 28 U.S.C. § 1582 does not support this Court having jurisdiction over a claim seeking to recover FET. *See id.* at 5–7. The arguments raised by Hanover challenging the Court's jurisdiction under 28 U.S.C. § 1582 parallel those of Gateway and Good Times and are therefore addressed together by the court.

[8] Gateway and Good Times argue that the Court should not exercise ancillary jurisdiction over Good Times pursuant to 28 U.S.C. § 1367. *See* Gateway & Good Times' Suppl. Br. at 10–11. In contrast to Gateway and Good Times, however, Hanover argues that it would be proper for the Court to exercise its ancillary jurisdiction powers over both Gateway and Good Times. *Compare* Hanover's Suppl. Br. at 7–9, *with* Gateway & Good Times' Suppl. Br. at 10–11. Section 1367 uses the term supplemental jurisdiction rather than ancillary jurisdiction, as does the court. 28 U.S.C. § 1367. The Court has jurisdiction pursuant to 28 U.S.C. § 1582, and therefore, does not address whether it would be proper for the Court to exercise its supplemental jurisdiction.

[9] Gateway and Good Times further assert that if the Court lacks jurisdiction over Gateway and Good Times, Plaintiff's claims against Hanover and, in turn, Hanover's cross-claims and third-party complaint must be stayed, as they are not ripe. *See* Gateway & Good Times' Suppl. Br. at 8–10. They argue that Plaintiff's claims under 19 U.S.C. § 1592(d) will become ripe for review only if and when final judgment is reached in district court holding that Gateway and Good Times violated 19 U.S.C. § 1592(a). *See id.* The Court has jurisdiction and therefore Gateway and Good Times' request for a stay is moot.

limits of its jurisdiction. *See, e.g.*, *Cabral v. United States*, 317 Fed. Appx. 979, 980 n.1 (Fed. Cir. 2008); *Arctic*, 845 F.2d at 1000.

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). However, the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [will] not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citation omitted).

DISCUSSION

I. Jurisdiction

Plaintiff argues that this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1582(1) because the collection of FET flows from conduct warranting a penalty under 19 U.S.C. § 1592 and pursuant to 28 U.S.C. § 1582(3) because FETs are customs duties for the purposes of jurisdiction. *See* Pl.'s Suppl. Br. at 3–5. Gateway and Good Times argue that the collection of the FETs is not a penalty. *See* Gateway & Good Times' Suppl. Resp. Br. at 1–2. Further, they argue that FETs are not customs duties, because 19 U.S.C. § 1528 disallows a tax not explicitly recognized as a customs duty to be a customs duty. *See id.* at 3; Gateway & Good Times' Suppl. Br. at 4–6; *see also* 19 U.S.C. § 1528. For the reasons that follow, the Court has subject-matter jurisdiction over Plaintiff's claim against Gateway and Good Times pursuant to 28 U.S.C. § 1582(1) and (3).

Under 28 U.S.C. § 1582, the Court has jurisdiction to hear "any civil action which arises out of an import transaction and which is commenced by the United States—(1) to recover a civil penalty under[, inter alia, 19 U.S.C. § 1592];" or "(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover customs duties." Here, Plaintiff seeks to recover the unpaid FET pursuant to 19 U.S.C. § 1592(d) which Plaintiff alleges result from Gateway's and Good Times' violations of 19 U.S.C. § 1592(a), but does not seek to recover a penalty pursuant to 19 U.S.C. § 1592(b) for these alleged violations. *See* Compl. at ¶¶ 27, 29.

This Court has jurisdiction to hear claims to collect unpaid FET under 19 U.S.C. § 1592(d) for conduct warranting a penalty under 19 U.S.C. § 1592(a), whether or not a separate penalty is sought pursuant to 19 U.S.C. § 1592(b). Pursuant to 28 U.S.C. § 1582(1), the Court shall have exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under Section 592 . . . of the Tariff Act of 1930." 28 U.S.C. § 1582(1). As amended, section 592 of the Tariff Act of 1930 prohibits material false statements in connection with the entry of goods into the United States. *See* 19 U.S.C. § 1592(a). Section 1592(b) allows for penalties to be assessed where an importer makes such a material false statement. 19 U.S.C. § 1592(b). Furthermore, section 1592(d) provides that the United States may seek to collect any duties, taxes, or fees it was deprived of as a result of conduct giving rise to a violation of 19 U.S.C. § 1592(a), regardless of whether any penalty is sought. 19 U.S.C. § 1592(d). This Court has exclusive jurisdiction over penalty actions arising under 19 U.S.C. § 1592. *See* 28 U.S.C. § 1582(1). If the government sought both penalties and lost taxes under 19 U.S.C. § 1592 together in one civil action, this Court would have jurisdiction over both the claim for penalties and any claim for lost duties, fees, or taxes, as the latter would be part of the civil action arising under 28 U.S.C. 1582(1). *See* 28 U.S.C. § 1582(1) (providing the Court with jurisdiction of any civil action "which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under [19 U.S.C. § 1592]"); 19 U.S.C. § 1592(d) (providing that the United States may recover duties, taxes, or fees it was unlawfully deprived of, regardless of whether a penalty is sought). Congress intended that the government could bring an action to collect lost duties, taxes, or fees without seeking a penalty as well, because section 1592(d) states that "[Customs] shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d). Therefore, pursuant to 28 U.S.C. § 1582(1), the Court has jurisdiction over a civil action to collect lost taxes under 19 U.S.C. § 1592(d), for conduct in violation of § 1592(a) regardless of whether a penalty is sought.[10]

[10] Gateway and Good Times argue that the collection of FET is not a penalty, as required by 28 U.S.C. § 1582(1). *See* Gateway & Good Times' Suppl. Resp. Br. at 1–2. Plaintiff does not allege as much in its complaint nor in any of its subsequent filings with the Court. The Court does not construe the FET as a penalty, but as part of an action arising out of an import transaction that the government has brought under 19 U.S.C. § 1592.

Jurisdiction exists under 28 U.S.C. § 1582(3) because these FETs are customs duties for the purposes of jurisdiction.[11] Importers are liable for FETs on imported tobacco products. *See* 26 U.S.C. § 5703(a)(1) (2012).[12] The amount of the tax is based upon the price for which the imported merchandise is sold. *See* 26 U.S.C. § 5701 In the case of importations, the timing of payment is determined by reference to the date of entry into the customs territory, *see* 26 U.S.C. § 5703(2)(b), and is "collected, accounted for, and deposited as internal revenue collections by the Port Director of Customs in accordance with customs procedures and regulations." 27 C.F.R. § 41.62 (2013).[13] Pursuant to the regulatory framework, "[t]he importer's liability for duties includes a liability for any internal revenue taxes which attach upon the importation of merchandise, unless otherwise provided by law or regulation."[14] 19 C.F.R. § 141.3. Further, until the amount of internal revenue taxes due on imported tobacco products is deter-

[11] Gateway and Good Times argue that this Court has, on multiple occasions, held that it did not have jurisdiction over taxes and charges not specifically demarked as customs duties. *See* Gateway & Good Times' Suppl. Br. at 5–6. This argument oversimplifies the issue, and the two cases Gateway and Good Times cite are distinguishable. In *United States v. Shabahang Persian Carpets, Ltd.*, 22 CIT 1028, 1029–31, 27 F. Supp. 2d 229, 231–233 (1998), the plaintiff sought to join the IRS as a party in a customs case to ensure that the government valued merchandise consistently for both customs and internal revenue purposes. Accepting this request would have required the court to exercise jurisdiction over a separate claim arising from an internal revenue matter which was not statutorily assigned to the Court of International Trade, *see id.* at 1030–33, 27 F. Supp. 2d at 232–234, and otherwise beyond the purview of Customs' administrative authority. Thus, the court held it did not have jurisdiction because the claims involving the IRS were plainly within the province of the district courts. *See id.* at 1032, 27 F. Supp. 2d at 233. It was not a case where Customs was responsible for assessing and collecting revenue prior to the release of the subject goods. Similarly, in *United States v. Biehl & Co.*, 3 CIT 158, 539 F. Supp. 1218 (1982), the issue was whether the Court of International Trade had jurisdiction over suits by the government to collect tonnage duties pursuant to 28 U.S.C. § 1582(2) providing for suits to recover on a bond. The court pointed out that, although 28 U.S.C. § 1581(i) provided for suits against the government involving tonnage duties, it failed to provide for suits brought by the government involving tonnage duties, and the court would not read in that language where Congress had not provided it. *See id.* at 161–163, 539 F. Supp. at 1220–1222. Here, in 28 U.S.C. § 1582 Congress has specifically provided for suits by the government to collect customs duties. The question before the court is whether FETs are to be considered customs duties for the purposes of 28 U.S.C. § 1582(3), a question not confronted in *Biehl*.

[12] Further citations to Title 26 of the U.S. Code are to the 2012 edition.

[13] Further citations to Titles 19, 26, and 27 of the Code of Federal Regulations are to the 2013 edition, the most recent version of the Code of Federal Regulations in effect when the last entry of the subject merchandise at issue here occurred. The entries at issue in this action were imported between the years 2012 and 2013. *See* Compl. at ¶ 1; Gateway Mot. Dismiss at 1; Good Times Mot. Dismiss at 1. The 2012 and 2013 editions of the Code of Federal Regulations are the same in relevant part.

[14] Gateway and Good Times also argue that Customs, by promulgating 19 C.F.R. § 141.3, which lists taxes as part of duties for which an importer is liable, attempts to amend 19 U.S.C. § 1528. *See* Gateway & Good Times' Suppl. Br. at 7; *see also* 19 C.F.R. § 141.3; 19 U.S.C. § 1528. Customs' regulation is consistent with 19 U.S.C. § 1528 because the statutory framework allows taxes to be considered as customs duties for the purposes of jurisdiction, and the regulation imposes liability for payment of taxes that attach at importation.

mined, the subject merchandise is "not eligible for release from customs custody[.]" 27 C.F.R. § 41.41. As evidenced here, the FET amount due on the imported cigars was reported on the entry paperwork. *See* Ex. A [attached to Pl.'s Resp.] at Entry Summary, Jan. 19, 2018, ECF No. 32–1. The importer continues to be liable for taxes unlawfully deprived for a violation of 19 U.S.C. § 1592(a) under 19 U.S.C. § 1592(d). The FETs on tobacco products are imposed on imported merchandise, at the time of entry, collected and administered by Customs and therefore constitute customs duties for the purposes of jurisdiction.

Defendants claim that, pursuant to 19 U.S.C. § 1528, a tax or charge will not be construed as a customs duty "for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty or contains a provision to the effect that it shall be treated as a duty imposed under the customs laws."[15] Gateway & Good Times' Suppl. Br. at 4 (quoting 19 U.S.C. § 1528). However, the statute also indicates that it will not have the effect of restricting or limiting the jurisdiction of this Court or that of the Court of Appeals for the Federal Circuit. 19 U.S.C. § 1528. These seemingly contradictory sentences are clarified by the statute's legislative history, which indicates that Congress implemented 19 U.S.C. § 1528 to clarify that preferences and exemptions applicable to customs duties should not be construed as applying to internal revenue taxes. *See Customs Administrative Bill: Hearings on H.R. 6738 Before the H. Comm. on Ways & Means*, 75th Cong. 112 (1937) ("H. Legis. History"); *Customs Administrative Act: Hearings on H. R. 8099 Before a S. Subcomm. of the Comm. on Finance*, 75th Cong 44–45 (1938) (revised print) ("Senate Legis. History"). Specifically, Congress sought to prevent preferential duty rates granted to specific

[15] Hanover relies on *BMW Mfg. Corp. v. United States* to argue that although it may be proper for Customs to enforce and collect a tax, Customs' responsibility to do so does not transform a tax into a customs duty. *See* Hanover's Suppl. Br. at 4–5; *see also BMW Mfg. Corp. v. United States*, 241 F.3d 1357, 1361–62 (Fed. Cir. 2001). However, it is not that an FET is a customs duty, but that when a civil action alleges a violation of 19 U.S.C. § 1592, but no penalty is sought, an FET is a customs duty for the purposes of jurisdiction. In contrast to the FET at issue here, the plaintiff in *BMW* sought an exemption from having to pay the Harbor Maintenance Tax ("HMT") by alleging that it was a customs duty. *See BMW*, 241 F.3d at 1360–62. The *BMW* court explained that when Congress promulgated 19 U.S.C. § 1528 it sought to clarify that exemptions and preferences applicable to customs duties will not apply to taxes, unless expressly designated, and the HMT statute did not so designate. *See id.* at 1362. Here, no exemption is sought and the inquiry is whether the Court has jurisdiction to hear a civil action seeking to collect FET that was allegedly underpaid as a result of a violation of 19 U.S.C. § 1592(a), but where no penalty is sought.

countries from being applied to internal revenue taxes.[16] *See* H. Legis. History at 112–13. Further, the legislative history reveals that Congress explicitly sought to have the Customs Court retain jurisdiction over controversies regarding excise taxes collected at the time of importation. *See* H. Legis. History at 112; Senate Legis. History at 44–45; *accord Westco Liquor Products Co. v. United States*, 38 CCPA 101, 107, C.A.D. 446 (1951) (affirming the Customs Court's holding that FETs are customs duties for purposes of assessment and collection).[17] Therefore, FETs are customs duties for the purposes of jurisdiction.[18]

II. Failure to State a Claim

Plaintiff claims that Gateway and Good Times are liable for $1,188,631.95 worth of unpaid FET pursuant to 19 U.S.C. § 1592(d), stemming from the companies' violations of 19 U.S.C. § 1592(a).[19] Compl. at ¶ 27; *see also* 19 U.S.C. § 1592(a), (d). For the reasons that follow, the court denies Gateway's and Good Times' motions to dismiss.

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[16] The legislative history to 19 U.S.C. § 1528, in particular, makes clear that Congress was concerned, for example, with preferential rates being granted to imports from Cuba and enacted the language in section 1528 to prevent such preferences from being applied to excise taxes, and not to divest the Customs Court of jurisdiction. *See* H. Legis. History at 112–13.

[17] Gateway and Good Times challenge Plaintiff's reliance on legislative history. *See* Gateway & Good Times' Suppl. Resp. Br. at 6–7. They argue that even though 28 U.S.C. § 1582, the jurisdictional statute, has been amended several times, at no point did Congress add taxes as a basis for jurisdiction. *See id.* at 4–5. Neither, they argue, were taxes specifically enumerated in 19 U.S.C. § 1592 until Congress amended that statute in 1993 and 1996. *See id.* at 4–6. In contrast, they contend that in 28 U.S.C. § 1340 Congress delegated jurisdiction over internal revenue taxes to district courts. *See id.* at 3–4. However, 28 U.S.C. § 1340 specifically states that district courts have original jurisdiction over "any civil actions under any Act of Congress providing for internal revenue," unless the matter is already within this Court's jurisdiction. The FETs at issue here are customs duties for the purposes of jurisdiction, and this Court has jurisdiction under 28 U.S.C. § 1582 to hear civil actions arising under 19 U.S.C. § 1592 and which seek to recover customs duties. The type of claim at issue here is a matter already within the jurisdiction of this Court.

[18] The United States Court of Appeals for the Federal Circuit, sitting en banc, adopted the decisions of the United States Court of Customs and Patent Appeals. *See South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

[19] Plaintiff makes three other claims that are derivative of its main allegation that Gateway and Good Times violated 19 U.S.C. § 1592(a) and, as a result, must pay the full value of the unpaid FETs under 19 U.S.C. § 1592(d). *See* Compl. at ¶¶ 22–33; *see also* 19 U.S.C. § 1592(a), (d). Plaintiff claims that Hanover is liable for $500,000 worth of unpaid FET "[b]ased on Gateway's violations of 19 U.S.C. § 1592(a) and Hanover's agreement to pay any duties, taxes, or fees owed upon entries of merchandise subject to Gateway's continuous entry bonds[.]" Compl. at ¶ 29. Plaintiff also seeks to recover mandatory statutory interest from Hanover pursuant to 19 U.S.C. § 580. *Id.* at ¶ 31. Further, Plaintiff claims that it is owed "prejudgment interest running from the date of entry," from Defendants. *Id.* at ¶ 33.

The United States may recover an unpaid tax under 19 U.S.C. § 1592(d) for violations of 19 U.S.C. § 1592(a). *See* 19 U.S.C. § 1592(a), (d). To allege a violation under 19 U.S.C. § 1592(a), Plaintiff must plead sufficient facts to show that a person entered or introduced, or attempted to enter or introduce, merchandise into United States commerce, by means of either (i) a material and false statement, document or act, or (ii) a material omission. 19 U.S.C. § 1592(a)(1)(A)(i)–(ii). Persons who are not the importer of record may be held liable under 19 U.S.C. § 1592(a) if they introduce or attempt to introduce merchandise into United States commerce. *See United States v. Trek Leather, Inc.*, 767 F.3d 1288, 1296–99 (Fed. Cir. 2014); *see also* 19 U.S.C. § 1592(a). Merchandise is "introduced" into United States commerce when a person takes "actions that bring goods to the threshold of the process of entry by moving goods into CBP custody in the United States and providing critical documents[,]" to the relevant officials. *Trek Leather*, 767 F.3d at 1299. A statement, document, or act is "material" if it has the "tendency to influence [Customs'] decision in assessing duties." *United States v. Thorson Chemical Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190, 1196 (1992) (citations omitted). Plaintiff's allegations cannot merely recite the elements of the claim under 19 U.S.C. § 1592(a), but must demonstrate an entitlement to relief "above the speculative level[.]" *Twombly*, 550 U.S. at 555 (citation omitted).

Pursuant to the statutory framework, the FET on the subject merchandise at issue here is calculated based on the "price for which [the subject merchandise] sold[.]" 26 U.S.C. § 5701(a)(2) (2012). However, when there is no arm's-length transaction between the importer and the domestic producer, the price on which the FET is calculated will be based "on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary [of the Treasury]." *See* 26 U.S.C. § 4216(b)(1)(C). A sale is not arm's length if it is "made pursuant to special arrangements between a manufacturer and a purchaser." 26 C.F.R. § 48.4216(b)-2(e)(2).

Plaintiff alleges that the contract between Gateway and Good Times allowed Gateway to act as a "pass-through" entity, while Good Times financed all the transactions underlying the importation of the subject merchandise. Compl. at ¶¶ 15–19; *see also* Compl. at Agreement to Import Tobacco Products, Sept. 6, 2017, ECF No. 2–2 (referred to as "Exhibit B" in Plaintiff's complaint and the parties' subsequent filings) ("Agreement"). Plaintiff alleges that the Agreement allowed Gateway and Good Times to calculate the FET based on a "purported price," i.e., the sales price from Rolida Investments, Inc.

("Rolida"),[20] the exporter of the subject merchandise, to Gateway, plus one dollar per carton. Compl. at ¶ 15. Plaintiff alleges that, as a result, the sales price was not based on the first sale of the subject merchandise domestically at an arm's-length transaction, *see id.* at ¶¶ 15–19, but instead was the result of a "special arrangement" or scheme between Gateway and Good Times. *Id.* at ¶ 21; *see also* 26 U.S.C. § 4216(b)(1)(C); 26 C.F.R. § 48.4216(b)-2(e)(2). Plaintiff alleges that the Agreement, its terms, and the resulting "special arrangement" between Gateway and Good Times was not disclosed when the subject merchandise was entered, and claims that these failed disclosures constitute "false statements and/or omissions[.]"[21] *See* Compl. at ¶¶ 21, 23. Plaintiff further alleges that "[t]he false statements and/or omissions identified in [its complaint at ¶¶ 12–22] were material because they had the potential to affect determinations made by CBP concerning [Gateway and Good Times'] liability for FET." *Id.* at ¶ 23.

[20] The complaint refers to this corporate entity as "Rolida Investments." *See* Compl. at ¶ 13. However, other submissions filed by the parties provide the company's complete name, "Rolida Investments, Inc." *See* Joint Reply at 5; Attachments [to Pl.'s Resp.]: #1 Exhibit A – sample entry documents, Jan. 19, 2018, ECF No. 32–1 (providing an invoice from Rolida Investments, Inc. and identifying Rolida Investments, Inc. as the "Shipper/Exporter/Remitente" on the Bill of Lading).

[21] Gateway and Good Times also argue that Plaintiff's complaint makes contradictory allegations as to why the sales price used to calculate the FET was incorrect. *See* Joint Reply at 1–4. Gateway and Good Times contend that such contradictions demonstrate that Plaintiff' s complaint fails to state a claim upon which relief can be granted, and against which claims Gateway and Good Times need to defend. *See id.* However, in arguing that Plaintiff makes contradictory statements as to price, Gateway and Good Times point to statements made by Plaintiff in its response, not its complaint. *Id.* at 1–2 (contrasting two statements made by Plaintiff on pages three and one of Plaintiff's response to Gateway's and Good Times' motions to dismiss). In its complaint, however, Plaintiff clearly indicates that a scheme between Gateway and Good Times, *see* Compl. at ¶¶ 15–19, allowed the two companies to use a "purported sales price" not based on an arm's-length transaction, but instead on the pre-importation price, to calculate each entry's FET. *See id.* at ¶ 15. Moreover, Gateway and Good Times are selectively isolating different parts of Plaintiff's response to argue that Plaintiff is contradicting itself. *See* Joint Reply at 1–2. Read as a whole, however, Plaintiff in its complaint and response clearly argues that Gateway and Good Times set up a scheme to avoid paying the proper amount of FET. *See* Compl. at ¶¶ 12–23; Pl.'s Resp. at 7–15. Therefore, Gateway and Good Times' argument is unpersuasive.

Further, Gateway and Good Times' argument that Plaintiff wrongfully focuses on adequacy of profit derived by Gateway under the terms of the Agreement, *see* Joint Reply at 6–7, fails for similar reasons. Plaintiff's complaint relies on the profit structure to support its allegation that "Gateway acted as a pass-through entity for Good Times's purchases of [the subject merchandise] from Rolida[,]" Compl. at ¶ 16, and that the Agreement between Gateway and Good Times allowed the two companies to set up a scheme that allowed for manipulation of the price upon which the FET would be calculated. *See id.* at ¶¶ 15–19. Gateway and Good Times' argument that Plaintiff mischaracterizes the payment structure between Gateway and Good Times in its response by stating that "[Good Times] prepaid to Gateway the Dominican [i.e., Rolida] exporter's price plus a 'fee for each entry[,]'" Joint Reply at 2 (citing Pl.'s Resp. at 2), likewise fails. In its complaint, Plaintiff explains the payment structure and that Gateway derives profit per carton of the subject merchandise, *see* Compl. at ¶¶ 15, 18, and provides a copy of the Agreement that supports this explanation. *See* Agreement at ¶¶ 4–9.

Plaintiff alleges sufficient facts from which a trier of fact could conclude that the sales price of the subject merchandise upon which the FET was calculated was not the result of an arm's-length transaction.[22] As support, Plaintiff provides a copy of the Agreement between Gateway and Good Times, *see* Agreement, and a summary of the payment structure underlying the importation of the subject merchandise into the United States. *See* Compl. at ¶¶ 15–19. Plaintiff alleges that even though, as per the Agreement, Gateway paid Rolida and, in turn, Gateway would sell the merchandise to Good Times, at all relevant times, Good Times controlled the transactions. *Id.* Plaintiff provides several examples of Good Times' control over the transactions. *See id.* at ¶¶ 18–20. First, Plaintiff alleges that, per the Agreement, Gateway would generate two invoices—one, itemizing the subject merchandise and the costs incurred from Rolida, plus one dollar per carton commission for Gateway, and the second, "includ-[ing] FET, [United States Department of Agriculture] tobacco buyout payments, customs broker's fees, and harbor maintenance fees, among other fees incident to entry." *Id.* at ¶ 18. However, Good Times would only pay the balance of the second invoice once it received proof that funds from the first invoice had been wired to Rolida. *Id.* Plaintiff alleges that Good Times financed both transactions, and therefore paid for the subject merchandise before it was entered. *See* Compl. at ¶¶ 18–19 (citing, in support, the payment arrangement set up by Gateway and Good Times as described by the Agreement). Second, Plaintiff alleges that Gateway would only collect one dollar per carton as commission. *Id.* at ¶¶ 15, 18. Third, Plaintiff alleges that at all relevant times, "Good Times owned the trademarks for all imported products and thus controlled all United States importations of the imported merchandise."[23] *Id.* at ¶ 20 (citation omitted). Plaintiff

[22] Here, Plaintiff alleges that Gateway is the importer of record. Compl. at ¶¶ 12, 24. Neither Good Times nor Gateway disagree. *See* Joint Reply at 5, 6; Gateway Mot. Dismiss at 4; Good Times Mot. Dismiss at 4. The statute imposes liability for violations of 19 U.S.C. § 1592(a)(1) on a "person." 19 U.S.C. § 1592(a)(1). An importer of record qualifies as a "person." *See Trek Leather*, 767 F.3d at 1296 (explaining that the term "person" covers importers and consignees); 19 U.S.C. § 1401(d); *see also* 26 U.S.C. § 5703(a)(1) (imposing liability on the importer of tobacco products for the payment of taxes pursuant to 26 U.S.C. § 5701).

[23] Gateway and Good Times argue that trademark ownership is not enough to demonstrate control over import transactions. *See* Gateway Mot. Dismiss at 6–7; Good Times Mot. Dismiss at 6–7. Gateway and Good Times mischaracterize Plaintiff's reliance on trademark ownership. In its complaint, Plaintiff relies on Good Times' ownership of trademark rights over the imported subject merchandise as indicia of control. *See* Compl. at ¶ 20. It is part of Plaintiff's theory that Good Times was the entity in control of the transactions underlying the importation of the subject merchandise, that there was no arm's-length relationship between the two companies, that Good Times was indeed the consignee at the time the subject merchandise was imported, and that omission of such information was material. *Id.* at ¶¶ 15–21, 23.

alleges that neither Gateway nor Good Times disclosed the relationship between them, nor the financial structure created to import the subject merchandise into the United States. Compl. at ¶ 21.[24]

Plaintiff's complaint points to specific facts that cumulatively provide sufficient grounds for a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citation omitted). A trier of fact could find that Gateway and Good Times' failure to disclose the terms of the Agreement was material for determining whether the transactions were conducted on an arm's-length basis and whether the values declared on the entry paperwork adhered to the statutory and regulatory requirements. Therefore, Plaintiff's complaint contains sufficient allegations to plausibly support the claim that Gateway and Good Times entered into a scheme that, furthered by false and material statements and/or omissions, led to Gateway and Good Times violating 19 U.S.C. § 1592(a).[25]

Good Times specifically challenges Plaintiff's allegation that Good Times violated 19 U.S.C. § 1592(a), as it was neither the importer nor consignee for the subject merchandise at the time of importation, *see* Good Times Mot. Dismiss at 9–11, nor the alter ego of Gateway.[26] *Id.*

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[24] Gateway and Good Times also challenge Plaintiff's allegation that there was fraud in the reporting of the sales price. *See* Gateway Mot. Dismiss at 4–5; Good Times Mot. Dismiss at 4–5. Specifically, both argue that Plaintiff has pled no facts demonstrating that the sales price was not the price Good Times paid Gateway for the subject merchandise, or why use of that price was incorrect. *See* Gateway Mot. Dismiss at 4; Good Times Mot. Dismiss at 4. However, Plaintiff's complaint sufficiently establishes that Plaintiff's argument as to "purported price," *see* Compl. at ¶¶ 15–19, is related to its argument that Gateway and Good Times had a special arrangement or scheme that resulted in the declaration of a false price for the subject merchandise for FET purposes. *Id.* at ¶ 21.

[25] Gateway and Good Times also challenge Plaintiff's allegation that the companies undervalued the subject merchandise by using the "transaction value," and therefore violated 19 U.S.C. § 1401a. *See* Gateway Mot. Dismiss at 8; Good Times Mot. Dismiss at 8; Joint Reply at 20–21. Gateway and Good Times contend that "[t]he FET's [sic] calculated and paid by Gateway were [properly] based on a post-importation price determined according to Title 26—not Title 19 [of the United States Code,]" Joint Reply at 21 (emphasis omitted), and that Plaintiff confuses value declared for valuation purposes with value used to calculate FET. *See* Gateway Mot. Dismiss at 8; Good Times Mot. Dismiss at 8. Pursuant to 19 U.S.C. § 1401a(a), imported merchandise may be appraised based on its "transaction value." *See* 19 U.S.C. § 1401a(a). Plaintiff alleges that this violation had the potential to affect CBP determinations regarding the FET owed. *See* Compl. at ¶¶ 22–23. It is possible for a trier of fact to conclude that use of an incorrect method of appraisement could cause CBP to not properly evaluate Gateway and Good Times' statements regarding the FET owed.

[26] Gateway and Good Times argue that Plaintiff misuses *Trek Leather*, *see* Joint Reply at 16–18, and attempts to substitute the objective criteria it established with a "nebulous standard." *Id.* at 16–17. Specifically, Gateway and Good Times argue that Plaintiff fails to allege any specific acts, statements or omissions that Good Times made throughout the entry process. *See id.* at 16–18. However, Plaintiff's allegation is that a scheme existed between Gateway and Good Times. *See* Compl. at ¶¶ 12–21, 23. Pursuant to that scheme, Good Times was able to control the sales price and disposition of the subject merchandise. *See id.* at ¶¶ 15–21. The scheme, according to Plaintiff's allegations, resulted in misrepresentation of the FET actually due on the subject merchandise. *See id.* at ¶ 23. The court in

at 11–14; *see also* Joint Reply at 12–18. Good Times argues that all the relevant transactions were done at Gateway's direction:

> Gateway was the importer; Gateway filed the entry documents; Gateway was the consignee on each import document; Gateway's custom broker filed the entry documents with Customs pursuant to a Power of Attorney executed by Gateway; Gateway paid the Customs duties and fees; and Gateway paid the FET's [sic] at the time of importation based on its sales price to [Good Times] (the first sale in the United States) "as required by law".

Joint Reply at 5 (footnote and citation omitted).[27] However, here, Plaintiff has alleged sufficient facts for a trier of fact to determine that Good Times retained sufficient control of the importation process, and therefore, introduced the subject merchandise into United States commerce.[28] Specifically, Plaintiff alleges: that Good Times financed all the transactions connected with the entry of the subject merchandise, Compl. at ¶ 19; that, upon the release of the subject merchandise from the warehouse, it was sent directly to Good Times, *id.* at ¶ 14; and that the two invoices Gateway generated for the subject merchandise were paid for by Good Times, with the second invoice only being paid upon Good Times' receipt of proof that Rolida had been

Trek Leather held that a person introduces merchandise when it takes "actions that bring goods to the threshold of the process of entry[.]" *Trek Leather*, 767 F.3d at 1299. Here, Plaintiff alleges that Good Times employed the scheme to introduce the subject merchandise into United States commerce.

[27] Gateway and Good Times do not identify the source from which they are quoting the phrase, "as required by law."

[28] Gateway and Good Times also argue that Plaintiff's response in this action is inconsistent with Plaintiff's response in a separate, although similar, case—United States v. Maverick Marketing, LLC, Court No. 17–00174 (USCIT filed July 10, 2017) ("Maverick, Court No. 17–00174"). *See* Joint Reply at 15. Specifically, Gateway and Good Times claim that Plaintiff reaches different conclusions as to when ownership of the goods transferred to Good Times, where "both statements are based on Complaints that mirror the same language." *Id.* (contrasting conclusions drawn by Plaintiff in its response in Maverick, Court No. 17–00174, *see* Pl.'s Resp. Defs.' Mot. Dismiss at 8, Dec. 18, 2017, ECF No. 36, Maverick, Court No. 17–00174, with those drawn by Plaintiff in its response in this action, *see* Pl.'s Resp. at 8). Gateway and Good Times' argument provides a false comparison. Although there is similarity in parties and issues between the present action and Maverick, Court No. 17–00174, they are separate cases. The arguments made by the plaintiff in Maverick, Court No. 17–00174 stand on their own and do not influence the court's opinion in the present action. Further, Plaintiff's argument in the present action that Good Times maintained an ownership interest in the subject merchandise is broader than Gateway and Good Times represent. *See* Pl.'s Resp. at 7–12. Plaintiff claims that Gateway and Good Times, through their Agreement, set up a scheme to underpay FET on the subject merchandise, and present the example Gateway and Good Times quote as representative of how the scheme operated. *See* Pl.'s Resp. at 7–8; *see also* Compl. at ¶¶ 12–21.

paid.[29] *Id.* at ¶ 18. Further, Plaintiff also alleges that "Good Times owned the trademarks for all imported products and thus controlled all United States importations of the imported merchandise." Compl. at ¶ 20 (citation omitted).[30] Therefore, Plaintiff's complaint did not rest on "naked assertions" absent factual support, *see Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 557), and instead sufficiently alleged that Good Times "introduced" the subject merchandise into United States commerce.[31]

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[29] Gateway and Good Times also argue that the paperwork associated with the importation of the subject merchandise into the United States does not refer to Good Times as the consignee, or in some cases, at all. *See* Joint Reply at 12–15; *see also* Attachments [to Pl.'s Resp.]: #1 Exhibit A – sample entry documents at Exs. 1–5, Jan. 19, 2018, ECF No. 32–1. Arguments focusing on whose name was printed on the paperwork are unpersuasive on a motion to dismiss when Plaintiff's claim is that Gateway and Good Times constructed a scheme to import subject merchandise into the United States by which the FET was underreported. To support its allegation of a scheme, Plaintiff looks at the transactions as a whole, and provides examples of how the Agreement between Gateway and Good Times put Good Times in a position where it controlled the disposition of the subject merchandise prior to importation. *See* Compl. at ¶¶ 12–21, 23–24; *see also* Pl.'s Resp. at 7–11, 14–15. Therefore, items such as entry paperwork were all created in furtherance of the scheme and culminated in Gateway and Good Times making false representations to CBP when the subject merchandise was entered. *See* Compl. at ¶¶ 23–24; *see also* Pl.'s Resp. at 7–11. Another variation of Gateway and Good Times' paperwork argument is that Plaintiff has not identified any specific documents that demonstrate that either Gateway or Good Times made materially false statement(s) or omission(s) to CBP. *See* Gateway Mot. Dismiss at 8, 9–10; Good Times Mot. Dismiss at 9–11. On a motion to dismiss, facts are construed in favor of the non-moving party, *see Cedars*, 11 F.3d at 1584 n.13, and Plaintiff has sufficiently alleged facts that could lead a trier of fact to determine that a scheme existed between Gateway and Good Times.

[30] Gateway and Good Times also argue that Plaintiff, in its response to Gateway's and Good Times' motions to dismiss, attempts to improperly amend the complaint and insert an allegation that during all relevant times, Gateway acted as Good Times' agent. *See* Joint Reply at 7–12. However, in its complaint, Plaintiff alleges that "Gateway acted as a pass-through entity for Good Times's purchases of [the subject merchandise] from Rolida[,]" Compl. at ¶ 16, that "the business relationship between Gateway and Good Times was not that of a buyer and seller in an arm's length transaction[,]" *id.* at ¶ 17, and that Good Times financed all transactions relating to the importation of the subject merchandise. *Id.* at ¶¶ 18–19. Therefore, Plaintiff's allegations in its complaint sufficiently support a theory that the relationship between Gateway and Good Times was that of agent and principal.

[31] In the joint reply, Gateway and Good Times also argue that this case should be dismissed with prejudice as to Good Times because Plaintiff fails to allege sufficient facts demonstrating that FET liability transferred from Gateway to Good Times. *See* Joint Reply at 5–6. Gateway and Good Times argue that transfer of FET liability occurs only pursuant to 26 U.S.C. § 5703. *Id.*; *see also* 26 U.S.C. § 5703. However, Gateway and Good Times' argument is not persuasive. Plaintiff's claim arises under 19 U.S.C. § 1592(a), (d), which allows the United States to recover from any person who entered or introduced merchandise into United States commerce a tax unlawfully withheld from it. *See* 19 U.S.C. § 1592(a), (d). Here, Plaintiff's allegations are sufficient such that a trier of fact could find Good Times introduced the subject merchandise into United States commerce by means of a material misstatement and/or omission and thus that Good Times could be held liable for lost FETs under 19 U.S.C. § 1592(d).

CONCLUSION

For the reasons provided above, Gateway's and Good Times' motions to dismiss are denied. In accordance with this opinion, it is

ORDERED that Gateway's and Good Times' motions to dismiss are denied; and it is further

ORDERED that Gateway and Good Times shall file their respective answers to Plaintiff's complaint on or before Wednesday, August 1, 2018; and it is further

ORDERED that the court's Order, Jan. 9, 2018, ECF No. 31, is amended to provide that Gateway and Good Times shall file any response to Hanover's cross-claims on or before Wednesday, August 1, 2018; and it is further

ORDERED that the court's Order, Jan. 9, 2018, ECF No. 31, is further amended to provide that the Third-Party Defendants, Mr. Joseph R. Franco and Mrs. Helen R. Franco, shall file any response to Hanover's cross-claims on or before Wednesday, August 1, 2018; and it is further

ORDERED that the parties shall file a proposed scheduling order that will achieve the purposes of USCIT Rule 16(b) on or before 30 days from the publication of this opinion.

Dated: July 3, 2018
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

Slip Op. 18–84

UNITED STATES, Plaintiff, v. MAVERICK MARKETING, LLC et al., Defendants.

Before: Claire R. Kelly, Judge
Court No. 17–00174

[The United States Court of International Trade possesses subject-matter jurisdiction over a suit to recover unpaid Federal Excise Tax brought pursuant to 19 U.S.C. § 1592(d).]

Dated: July 3, 2018

Stephen Carl Tosini, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff United States. With him on the brief were *Chad A. Readler*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director.

Barry Marc Boren, Law Offices of Barry Boren, of Miami, FL, and *Gerson M. Joseph*, Gerson M. Joseph, P.A., of Weston, FL, for defendants Maverick Marketing, LLC and Good Times USA, LLC.

Thomas Randolph Ferguson, Sandler, Travis & Rosenberg, PA, of San Francisco, CA, for defendant American Alternative Insurance Company.

OPINION AND ORDER

Kelly, Judge:

The United States ("Plaintiff"), on behalf of United States Customs and Border Protection ("Customs"), seeks to recover unpaid Federal Excise Tax ("FET"), in various amounts, and prejudgment interest from Maverick Marketing, LLC ("Maverick"), Good Times USA, LLC ("Good Times"), and American Alternative Insurance Company ("AAIC") (collectively, "Defendants"), pursuant to section 592 of the Tariff Act of 1930, as amended 19 U.S.C. § 1592 (2012).[1] *See* Summons, July 10, 2017, ECF No. 1; Compl. at ¶¶ 1, 26–33, July 10, 2017, ECF No. 2. For the reasons that follow, the Court has subject-matter jurisdiction over this action.

BACKGROUND

The court assumes familiarity with the facts of this case as discussed in *United States v. Maverick Marketing, LLC*, 42 CIT __, __, Slip Op. 18–16 at 2–3 (Mar. 7, 2018) ("*Maverick I*"), and here recounts the facts relevant to the issue of the Court's subject-matter jurisdiction over the claims alleged by Plaintiff. In its complaint, Plaintiff alleges that Maverick and Good Times violated 19 U.S.C. § 1592(a) and are liable for unpaid FET pursuant to 19 U.S.C. § 1592(d). *See* Compl. at ¶¶ 12–27. Specifically, Plaintiff alleges that Maverick and

[1] Further citations to Titles 19 and 26 of the U.S. Code are to the 2012 edition.

Good Times made material false statements and/or omissions when entering the subject merchandise into United States commerce, the result of which was underpayment of FET on the subject merchandise.[2] *See id.* at ¶¶ 15–25. Defendants Maverick and Good Times sought to dismiss Plaintiff's complaint pursuant to USCIT Rule 12(b)(6), claiming that Plaintiff failed to state a claim upon which relief could be granted. *See* Def., [Maverick]'s Rule 12(b)(6) Mot. Dismiss & Mem. Law, Nov. 13, 2017, ECF No. 29; Def., [Good Times]'s Rule 12(b)(6) Mot. Dismiss & Mem. Law, Nov. 13, 2017, ECF No. 30; USCIT R. 12(b)(6). Defendants did not challenge the Court's subject-matter jurisdiction. On March 7, 2018, the Court issued *Maverick I*, denying the motions filed by Maverick and Good Times to dismiss the complaint for failure to state a claim upon which relief can be granted. *Maverick I*, 42 CIT at __, Slip Op. 18–16 at 12.

On March 9, 2018, the court requested supplemental briefing on the Court's subject-matter jurisdiction, explaining that it was incumbent upon the Court to independently assess the jurisdictional basis for each case, regardless of whether any party challenged the Court's jurisdiction. *See* Letter [Requesting Briefing on Jurisdiction], Mar. 9, 2018, ECF No. 46 ("Letter Requesting Jurisdiction Briefing"); *see also* Am. Scheduling Order, Mar. 9, 2018, ECF No. 47. The court explained that, although the United States can recover unpaid taxes pursuant to 19 U.S.C. § 1592(d) if a party violates 19 U.S.C. § 1592(a), the relevant jurisdictional statute specifically identifies only suits for penalties, bonds, and customs duties. Letter Requesting Jurisdiction Briefing at 2 (citing 28 U.S.C. § 1582).

In its supplemental brief on jurisdiction, Plaintiff argues that the Court has jurisdiction over its claim against Maverick and Good Times. *See* Pl.'s Suppl. Br. on Jurisdiction at 3–7, Apr. 13, 2018, ECF No. 51 ("Pl.'s Br."). Plaintiff argues that the Court possesses jurisdiction pursuant to 28 U.S.C. § 1582(1), because even though a penalty is not sought in this case, the relief that Plaintiff seeks "flows from [the court determining that Maverick and Good Times violated 19 U.S.C. § 1592(a),] separate and apart from any penalty" that could also be sought for such a violation. *See id.* at 3. Plaintiff also argues that there is jurisdiction pursuant to 28 U.S.C. § 1582(3) because FETs collected on imported tobacco are customs duties for the pur-

[2] Plaintiff also raises claims against AAIC. *See* Compl. at ¶¶ 29, 31, 33. Plaintiff claims that AAIC is liable for the allegedly unpaid FET on the subject merchandise because AAIC, as surety on the bonds Maverick executed as principal, *id.* at ¶ 6, "agreed with Maverick to jointly and severally guarantee payment of all duties, taxes, and charges," *id.* at ¶ 7, owed in connection with the importation of the entries at issue. *Id.* at ¶ 29. Plaintiff also seeks mandatory statutory interest pursuant to 19 U.S.C. § 580, *see id.* at ¶ 31, and attorney fees and any further interest, as provided by law, that the court deems just and appropriate. *Id.* at 6.

poses of jurisdiction. *See id.* at 4–5. Finally, Plaintiff argues that its claim against AAIC, the surety, is proper under 28 U.S.C. § 1582(2), that the surety's claims are within the Court's "exclusive jurisdiction" under 28 U.S.C. § 1583, and that splitting the claims between this Court and a United States district court would not be in accord with Congress' intent behind 19 U.S.C. § 1592.[3] *See id.* at 5–7. Maverick and Good Times argue that jurisdiction is lacking under 28 U.S.C. § 1582(1) because Plaintiff is not seeking a penalty. Defs. Maverick & Good Times Resp. Br. on Jurisdiction at 1, May 2, 2018, ECF No. 54 ("Maverick & Good Times' Resp. Br."). Maverick and Good Times deny that FETs are a type of customs duty that would give rise to a claim reviewable under this Court's 28 U.S.C. § 1582 jurisdiction, *see* Defs. Maverick & Good Times Opening Br. on Jurisdiction at 4–8, Apr. 16, 2018, ECF No. 53 ("Maverick & Good Times' Br."), and argue that the claims against Maverick and Good Times should be transferred to a district court.[4] *Id.* at 8. Maverick and Good Times also argue that if the Court determines that it does not have jurisdiction over the non-surety defendants, the Court may have ancillary jurisdiction over Maverick,[5] but not Good Times.[6] *Id.* at 10–11. The parties do not contest that the Court has jurisdiction over the surety, AAIC, pursuant to 28 U.S.C. § 1582(2). *See* Pl.'s Br. at 5; Maverick & Good Times' Br. at 3.

DISCUSSION

Plaintiff argues that this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1582(1) because the collection of FET flows from conduct warranting a penalty under 19 U.S.C. § 1592 and pursuant to 28 U.S.C. § 1582(3) because FETs are customs duties for the purposes

[3] AAIC argues that in addition to the jurisdiction provided by 28 U.S.C. § 1582(1), that AAIC's involvement in this action by virtue of 28 U.S.C. § 1583 provides the Court "with the necessary link to obtain jurisdiction" over all claims at issue and all parties involved. *See* Def. [AAIC]'s Br. on Jurisdiction at 2, Apr. 13, 2018, ECF No. 52.

[4] However, Maverick and Good Times recognize that it seems illogical for Congress to split claims based on the same factual basis and "divest this Court of jurisdiction," especially because "the recovery of taxes would normally be inextricably interwoven with the ascertainment of facts pertaining to the recovery of duties." Maverick & Good Times' Br. at 11.

[5] Maverick and Good Times argue that the Court should not exercise ancillary jurisdiction over Good Times pursuant to 28 U.S.C. § 1367. *See* Maverick & Good Times' Br. at 10–11. Section 1367 uses the term supplemental jurisdiction rather than ancillary jurisdiction, as does the court. 28 U.S.C. § 1367. The Court has jurisdiction pursuant to 28 U.S.C. § 1582 and therefore, does not address Maverick and Good Times' argument.

[6] Maverick and Good Times further assert that if the Court lacks jurisdiction over Maverick and Good Times, Plaintiff's claims against AAIC and, in turn, AAIC's cross-claims against Maverick and Good Times must be stayed as they are not ripe. *See* Maverick & Good Times' Br. at 8–10. They argue that Plaintiff's claims under 19 U.S.C. § 1592(d) will become ripe for review only if and when final judgment is reached in district court holding that Maverick and Good Times violated 19 U.S.C. § 1592(a). *Id.* The Court has jurisdiction and therefore Maverick and Good Times' request for a stay is moot.

of jurisdiction. *See* Pl.'s Br. at 3–5. Maverick and Good Times argue that the collection of FET is not a penalty and that Plaintiff has not brought a claim seeking to recover a civil penalty. *See* Maverick & Good Times' Resp. Br. at 1–2. Further, they argue that FETs are not customs duties, because 19 U.S.C. § 1528 disallows a tax not explicitly recognized as a customs duty to be a customs duty. *See id.* at 2–3; Maverick & Good Times' Br. at 4–6; *see also* 19 U.S.C. § 1528. For the reasons that follow, the Court has subject-matter jurisdiction over Plaintiff's claim against Maverick and Good Times pursuant to 28 U.S.C. § 1582(1) and (3).

"[F]ederal courts . . . are courts of limited jurisdiction marked out by Congress." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992) (quoting *Aldinger v. Howard*, 427 U.S. 1, 15 (1976), *superseded by statute on other grounds*, Judicial Improvements Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089, as recognized in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 557 (2005)). Therefore, the "court may and should raise the question of its jurisdiction sua sponte at any time it appears in doubt." *Arctic Corner, Inc. v. United States*, 845 F.2d 999, 1000 (Fed. Cir. 1988) (citations omitted). The Court may dismiss a case for lack of subject-matter jurisdiction on its own motion because the Court must enforce the limits of its jurisdiction. *See, e.g.*, *Cabral v. United States*, 317 Fed. Appx. 979, 980 n.1 (Fed. Cir. 2008); *Arctic*, 845 F.2d at 1000.

Under 28 U.S.C. § 1582, the Court has jurisdiction to hear "any civil action which arises out of an import transaction and which is commenced by the United States—(1) to recover a civil penalty under[, inter alia, 19 U.S.C. § 1592];" or "(2) to recover upon a bond relating to the importation of merchandise required by the laws of the United States or by the Secretary of the Treasury; or (3) to recover customs duties." Here, Plaintiff seeks to recover the unpaid FET pursuant to 19 U.S.C. § 1592(d) which Plaintiff alleges result from Maverick's and Good Times' violations of 19 U.S.C. § 1592(a), but does not seek to recover a penalty pursuant to 19 U.S.C. § 1592(b) for these alleged violations. *See* Compl. at ¶¶ 27, 29.

This Court has jurisdiction to hear claims to collect unpaid FET under 19 U.S.C. § 1592(d) for conduct warranting a penalty under 19 U.S.C. § 1592(a), whether or not a separate penalty is sought pursuant to 19 U.S.C. § 1592(b). Pursuant to 28 U.S.C. § 1582(1), the Court shall have exclusive jurisdiction over "any civil action which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under Section 592 . . . of the Tariff Act of 1930." 28 U.S.C. § 1582(1). As amended, section 592 of the Tariff Act of 1930 prohibits material false statements in connection

with the entry of goods into the United States. *See* 19 U.S.C. § 1592(a). Section 1592(b) allows for penalties to be assessed where an importer makes a material false statement. 19 U.S.C. § 1592(b). Furthermore, section 1592(d) provides that the United States may seek to collect any duties, taxes, or fees it was deprived of as a result of conduct giving rise to a violation of 19 U.S.C. § 1592(a), regardless of whether any penalty is sought. 19 U.S.C. § 1592(d). This Court has exclusive jurisdiction over penalty actions arising under 19 U.S.C. § 1592. *See* 28 U.S.C. § 1582(1). If the government sought both penalties and lost taxes under 19 U.S.C. § 1592 together in one civil action, this Court would have jurisdiction over both the claim for penalties and any claim for lost duties, fees, or taxes, as the latter would be part of the civil action arising under 28 U.S.C. § 1582(1). *See* 28 U.S.C. § 1582(1) (providing the Court with jurisdiction of any civil action "which arises out of an import transaction and which is commenced by the United States . . . to recover a civil penalty under [19 U.S.C. § 1592]"); 19 U.S.C. § 1592(d) (providing that the United States may recover duties, taxes, or fees it was unlawfully deprived of, regardless of whether a penalty is sought). Congress intended that the government could bring an action to collect lost duties, taxes, or fees without seeking a penalty as well, because section 1592(d) states that "[Customs] shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d). Therefore, pursuant to 28 U.S.C. § 1582(1), the Court has jurisdiction over a civil action to collect lost taxes under 19 U.S.C. § 1592(d), for conduct in violation of § 1592(a) regardless of whether a penalty is sought.[7]

Jurisdiction exists under 28 U.S.C. § 1582(3) because these FETs are customs duties for the purposes of jurisdiction.[8] Importers are

[7] Maverick and Good Times argue that the collection of FET is not a penalty as required by 28 U.S.C. § 1582(1). *See* Maverick & Good Times' Resp. Br. at 1. Plaintiff, however, does not allege as much in its complaint nor any of its briefing. The Court does not construe the FET as a penalty, but as part of an action arising out of an import transaction that the government has brought under 19 U.S.C. § 1592.

[8] Maverick and Good Times argue that this Court has, on multiple occasions, held that it did not have jurisdiction over taxes and charges not specifically demarked as customs duties. *See* Maverick & Good Times' Br. at 5–6. This argument oversimplifies the issue, and the two cases Maverick and Good Times cite are distinguishable. In *United States v. Shabahang Persian Carpets, Ltd.*, 22 CIT 1028, 1029–31, 27 F. Supp. 2d 229, 231–33 (1998), the plaintiff sought to join the Internal Revenue Service as a party in a customs case to ensure that the government valued merchandise consistently for both customs and internal revenue purposes. Accepting this request would have required the court to exercise jurisdiction over a separate claim arising from an internal revenue matter which was not statutorily assigned to the Court of International Trade, *see id.* at 1030–33, 27 F. Supp. 2d at 232–34, and otherwise beyond the purview of Customs' administrative authority. Thus, the court held it did not have jurisdiction because the claims involving the IRS were plainly within the province of the district courts. *See id.* at 1032, 27 F. Supp. 2d at 233. It was not a case where Customs was responsible for assessing and collecting revenue prior to the release of the

liable for FETs on imported tobacco products. *See* 26 U.S.C. § 5703(a)(1) (2012). The amount of the tax is based upon the price for which the imported merchandise is sold. *See* 26 U.S.C. § 5701. In the case of importations, the timing of payment is determined by reference to the date of entry into the customs territory, *see* 26 U.S.C. § 5703(2)(b), and is "collected, accounted for, and deposited as internal revenue collections by the Port Director of Customs in accordance with customs procedures and regulations." 27 C.F.R. § 41.62 (2014).[9] Pursuant to the regulatory framework, "[t]he importer's liability for duties includes a liability for any internal revenue taxes which attach upon the importation of merchandise, unless otherwise provided by law or regulation."[10] 19 C.F.R. § 141.3. Further, until the amount of internal revenue taxes due on the imported tobacco products is determined, the subject merchandise is "not eligible for release from customs custody[.]" 27 C.F.R. § 41.41. As evidenced here, the FET amount due on the imported cigars was reported on the entry paperwork. *See* Ex. A [attached to Pl.'s Resp. to Maverick's & Good Times' Mots. Dismiss] at Entry Summary, Dec. 18, 2017, ECF No. 36–1. The importer continues to be liable for taxes unlawfully deprived for a violation of 19 U.S.C. § 1592(a) under 19 U.S.C. § 1592(d). The FETs on cigars are imposed on imported merchandise, at the time of entry, collected and administered by Customs and therefore constitute customs duties for the purposes of jurisdiction.

Defendants claim that, pursuant to 19 U.S.C. § 1528, a tax or charge will not be construed as a customs duty "for the purpose of any statute relating to the customs revenue, unless the law imposing such tax or charge designates it as a customs duty or contains a provision

subject goods. Similarly, in *United States v. Biehl & Co.*, 3 CIT 158, 539 F. Supp. 1218 (1982), the issue was whether the Court of International Trade had jurisdiction over suits by the government to collect tonnage duties pursuant to 28 U.S.C. § 1582(2) providing for suits to recover on a bond. The court pointed out that, although 28 U.S.C. § 1581(i) provided for suits against the government involving tonnage duties, it failed to provide for suits brought by the government involving tonnage duties, and the court would not read in that language where Congress had not provided it. *See id.* at 161–63, 539 F. Supp. at 1220–22. Here, in 28 U.S.C. § 1582 Congress has specifically provided for suits by the government to collect customs duties. The question before the court is whether FETs are to be considered customs duties for the purposes of 28 U.S.C. § 1582(3), a question not confronted in *Biehl*.

[9] Further citations to Titles 19, 26, and 27 of the Code of Federal Regulations are to the 2014 edition, the most recent version of the Code of Federal Regulations in effect when the last entry of the subject merchandise at issue here occurred. The entries at issue in this action were imported between the years 2012 and 2015. *See* Compl. at ¶ 1; *see also* Attachs. [to Compl.]: #1 Ex. A – Entry Worksheet, July 10, 2017, ECF No. 2–1. The 2012 and 2015 editions of the Code of Federal Regulations are the same in relevant part.

[10] Maverick and Good Times also argue that Customs, by promulgating 19 C.F.R. § 141.3, which lists taxes as part of duties for which an importer is liable, attempts to amend 19 U.S.C. § 1528. *See* Maverick & Good Times' Br. at 7–8; *see also* 19 C.F.R. § 141.3; 19 U.S.C. § 1528. Customs' regulation is consistent with the statute because the statutory framework allows taxes to be considered as customs duties for the purposes of jurisdiction, and the regulation imposes liability for payment of taxes that attach at importation.

to the effect that it shall be treated as a duty imposed under the customs laws." Maverick & Good Times' Br. at 4 (quoting 19 U.S.C. § 1528). However, the same statute also indicates that it will not have the effect of restricting or limiting the jurisdiction of this Court or that of the Court of Appeals for the Federal Circuit. 19 U.S.C. § 1528. These seemingly contradictory sentences are clarified by the statute's legislative history, which indicates that Congress implemented 19 U.S.C. § 1528 to clarify that preferences and exemptions applicable to customs duties should not be construed as applying to internal revenue taxes. *See Customs Administrative Bill: Hearings on H.R. 6738 Before the H. Comm. on Ways & Means*, 75th Cong. 112 (1937) ("H. Legis. History"); *Customs Administrative Act: Hearings on H. R. 8099 Before a S. Subcomm. of the Comm. on Finance*, 75th Cong 44–45 (1938) (revised print) ("Senate Legis. History"). Specifically, Congress sought to prevent preferential duty rates granted to specific countries from being applied to internal revenue taxes.[11] *See* H. Legis. History at 112–13. Further, the legislative history reveals that Congress explicitly sought to have the Customs Court retain jurisdiction over controversies regarding excise taxes collected at the time of importation. *See* H. Legis. History at 112; Senate Legis. History at 44–45; *accord Westco Liquor Products Co. v. United States*, 38 CCPA 101, 107, C.A.D. 446 (1951) (affirming the Customs Court's holding that FETs are customs duties for purposes of assessment and collection).[12] Therefore, FETs are customs duties for the purposes of jurisdiction. [13]

CONCLUSION

For the reasons provided above, the Court has subject-matter jurisdiction over a suit to recover unpaid Federal Excise Taxes brought pursuant to 19 U.S.C. § 1592(d). In accordance with this opinion, it is

[11] The legislative history to 19 U.S.C. § 1528, in particular, makes clear that Congress was concerned, for example, with preferential rates being granted to imports from Cuba and enacted the language in section 1528 to prevent such preferences from being applied to excise taxes; not to divest the customs courts of jurisdiction. *See* H. Legis. History at 112–13.

[12] Maverick and Good Times challenge Plaintiff's reliance on legislative history. *See* Maverick & Good Times' Resp. Br. at 3–4. They argue that even though 28 U.S.C. § 1582, the jurisdictional statute, has been amended several times, at no point did Congress add taxes as a basis for jurisdiction. *See id.*at 4. In contrast, they contend that in 28 U.S.C. § 1340 Congress delegated jurisdiction over internal revenue taxes to district courts. *See id.* at 3–4; Maverick & Good Times' Br. at 6. However, 28 U.S.C. § 1340 specifically states that district courts have original jurisdiction over "any civil actions arising under any Act of Congress providing for internal revenue," unless the matter is already within this Court's jurisdiction. The FETs at issue here are customs duties for the purposes of jurisdiction, and this Court has jurisdiction under 28 U.S.C. § 1582 to hear civil actions arising under 19 U.S.C. § 1592 and which seek to recover customs duties. The type of claim at issue here is a matter already within the jurisdiction of this Court.

[13] The United States Court of Appeals for the Federal Circuit, sitting en banc, adopted the decisions of the United States Court of Customs and Patent Appeals. *See South Corp. v. United States*, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

ORDERED that the parties shall file a joint proposed scheduling order that will achieve the purposes of USCIT Rule 16(b) on or before 30 days from the publication of this opinion.

Dated: July 3, 2018
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE