U.S. Customs and Border Protection

Slip Op. 14–96

ROCKWELL AUTOMATION, INC., F/K/A ROCKWELL AUTOMATION/ALLEN-BRADLEY CO., LLC, Plaintiff, v. UNITED STATES, Defendant.

Court Nos. 05–00269, 05–00582, 06–00054, 06–00348, 07–00110, 07–00294, 10–00230, 10–00245, 11–00018, 11–00250, 12–00001

[Granting out-of-time motions for extensions of time to allow actions to remain on Reserve Calendar]

Dated: August 18, 2014

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OPINION

RIDGWAY, Judge:

In the 11 above-captioned actions, Plaintiff Rockwell Automation, Inc. contests the classification of "certain short-body timing relays (SBTRs) used in manufacturing applications" that Rockwell imported into the United States. Plaintiff's Consent Motion for Leave to File Out of Time and for Extension of Time to Remain on Reserve Calendar ("Pl.'s Out-of-Time Motion") at 1; *see also* Memorandum in Support of Plaintiff's Amended Consent Motion for Leave to File Out of Time, and to Extend Time to Remain on Reserve Calendar ("Pl.'s Supp. Brief") at 2. According to Rockwell, the Bureau of Customs and Border Protection "classified the merchandise in liquidation under HTSUS 9107.00.80 as time switches with a clock or watch movement or synchronous motor, and assessed duties accordingly." *Id*. Rockwell maintains that "the merchandise is properly classified under HTSUS 8536.49.00 as electrical relays, at a lower rate of duty." *Id*. Rockwell advises that, "[t]o date, twenty cases concerning this issue, including the eleven at bar, have been filed" in this court. *Id*. Rockwell further explains that one case, Court No. 03–00007, "was selected as a 'test case' and was litigated on the merits," with summary judgment en-

tered in Rockwell's favor. *Id*.; *see Rockwell Automation, Inc. v. United States*, 31 CIT 692 (2007); *Rockwell Automation, Inc. v. United States*, 31 CIT 788 (2007).

Since the 2007 decision in the test case, according to Rockwell, its counsel has "worked diligently" with counsel for the Government "to attempt to dispose of all of the related cases." Pl.'s Supp. Brief at 2. Rockwell states that "[t]he parties have been able to work out stipulated judgments on agreed statements of fact . . . in seven of the cases, and continue to work toward disposition of [the 11 actions here at issue]," as well as one additional case, Court No. 13–00185, which – according to Rockwell – "is on the Reserve Calendar[] for its original eighteen-month period, through November 30, 2014." *Id*. at 2–3.

Pending before the court is Plaintiff's Consent Motion for Leave to File Out of Time and for Extension of Time to Remain on Reserve Calendar (filed July 2, 2014), filed in each of the 11 actions, as supplemented by Plaintiff's Amended Consent Motion for Leave to File Out of Time, and to Extend Time to Remain on Reserve Calendar, which is, in turn, supported by Plaintiff's Supplemental Brief (both filed July 17, 2014).[1] The Government has weighed in as well. *See generally* Defendant's Response to Plaintiff's Amended Consent Motion for Leave to File Out of Time, and to Extend Time to Remain on Reserve Calendar (filed July 18, 2014) ("Def.'s Response Brief").

As summarized below, Plaintiff's Amended Consent Motion for Leave to File Out of Time, and to Extend Time to Remain on Reserve Calendar is granted as to all 11 actions, qualified by several significant reservations and understandings.

I. *Applicable Legal Standards*

Two rules of the court bear on Rockwell's pending motions – Rule 6 and Rule 83. USCIT Rule 83 (captioned "Reserve Calendar") governs cases on the Reserve Calendar, including the 11 actions here. In general, an action commenced under 28 U.S.C. § 1581(a) or (b) is placed on a Reserve Calendar when a summons is filed. *See* USCIT R. 83(a). The action may remain on the Reserve Calendar for an 18-month period. *Id*. The rules further specify that "[a] case may be removed from the Reserve Calendar on: (1) assignment; (2) filing of a complaint; (3) granting of a motion for consolidation pursuant to Rule 42; (4) granting of a motion for suspension under a test case pursuant

[1] The papers that Rockwell filed on July 17, 2014 also included a document captioned Plaintiff's Response to Court's Order to Show Cause; and Motion to Amend Plaintiff's Consent Motion for Leave to File Out of Time, and to Extend Time to Remain on Reserve Calendar ("Pl.'s Response to Show Cause Order").

to Rule 84; or (5) filing of a stipulation for judgment on agreed statement of facts pursuant to rule 58.1." USCIT R. 83(b) ("Removal").

Of particular relevance here are two other subsections of Rule 83. The first – Rule 83(d), captioned "Extension of Time" – provides that "[t]he court may grant an extension of time for [a] case to remain on the Reserve Calendar for good cause." *See* USCIT R. 83(d). However, the second sentence of Rule 83(d) requires that "[a] motion for an extension of time [to remain on the Reserve Calendar] must be made *at least 30 days prior to the expiration of the 18-month period* [or later, if the 18-month period has been extended pursuant to USCIT Rule 83(d)]." *Id*. (emphasis added).

The second key subsection is Rule 83(c), which is ominously but unambiguously captioned "Dismissal for Lack of Prosecution." In its entirety, that subsection reads:

> A case not removed from the Reserve Calendar within the 18-month period [specified in Rule 83(a), or later if that period has been extended pursuant to USCIT Rule 83(d)] *will be dismissed for lack of prosecution* and *the clerk will enter an order of dismissal without further direction from the court* unless a motion is pending. If a pending motion is denied and less than 14 days remain in which the case may remain on the Reserve Calendar, the case will remain on the Reserve Calendar for 14 days from the date of entry of the order denying the motion.

USCIT R. 83(c) (emphases added). In short, the terms of Rule 83(c) are unequivocal. In relevant part, they mandate the dismissal for lack of prosecution of an action that is not removed from the Reserve Calendar within the 18-month period (as that period may be extended). Rule 83(c) instructs the clerk in no uncertain terms to "enter an order of dismissal without further direction from the court," unless a motion (such as a motion to extend the time to remain on the Reserve Calendar) is pending at the time the clerk otherwise would be required to enter such an order.

USCIT Rule 6 governs "Computing and Extending Time; Time for Motion Papers." Rule 6(b), in particular, addresses "Extending Time." Rule 6(b)(1)(A) governs timely-filed motions for extensions of time, and authorizes a court to grant an extension of time upon a showing of "good cause" – a relatively lenient standard – where an extension is sought before the deadline at issue has expired. *See generally* USCIT R. 6(b)(1)(A); 1 Moore's Federal Practice § 6.06[2], p. 6–32 (3d

ed. 2014) (explaining, *inter alia*, that "[w]hen a party requests an extension before the time period has expired, the [court] usually will be liberal in granting the request"). In contrast, Rule 6(b)(1)(B) concerns untimely (*i.e.*, out-of-time) motions for extensions of time. *See generally* USCIT R. 6(b)(1)(B). Such motions may be granted only where a party makes a showing of "excusable neglect or circumstances beyond the control of the party" – an exacting standard that is much more stringent than the demonstration of "good cause" that is required in circumstances where an extension of time is timely sought. *Id.; see also* 1 Moore's Federal Practice § 6.06[3][a], pp. 6–33 to 6–43 (explaining that party seeking out-of-time extension of time "must show cause and demonstrate that the failure to act was the result of 'excusable neglect'").

As the U.S. Court of Appeals for the Fourth Circuit has succinctly put it, "'[e]xcusable neglect' is not easily demonstrated, nor was it intended to be." *Thompson v. E.I. DuPont de Nemours & Co.*, 76 F.3d 530, 534 (4th Cir. 1996). Findings of excusable neglect should be reserved for "extraordinary cases." *Id*. Similarly, in the words of the Sixth Circuit, "the excusable neglect standard has consistently been held to be strict," *Turner v. City of Taylor*, 412 F.3d 629, 650 (6th Cir. 2005) (citation omitted) (quotation marks omitted), and "requires 'unique or extraordinary circumstances.'" *Duncan v. Washington*, 1994 WL 232397 * 2 (6th Cir. 1994). And the Second Circuit states that, "[i]n [its] cases addressing when neglect is 'excusable,' [the courts] have . . . taken a hard line." *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003).

Moreover, even where "excusable neglect" is demonstrated, the judge retains discretion to deny relief. *See, e.g., McCool v. Bridgestone/Firestone North American Tire, LLC*, 222 Fed. Appx. 847, 857–58 (11th Cir. 2007). An out-of-time extension of time thus "is by no means a matter of right." *See* 4B C. Wright & A. Miller, Federal Practice and Procedure § 1165, pp. 523–32 & n.13 (3d ed. 2014) ("Wright & Miller").

The seminal decision on the definition of "excusable neglect" is the Supreme Court's 1993 decision in *Pioneer*. *See generally Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). The Supreme Court granted *certiorari* in that case to resolve a conflict among the Courts of Appeals as to whether a rule of procedure authorizing the granting of out-of-time extensions of time for "excusable neglect" required a movant to demonstrate that its failure to timely act was due to "circumstances beyond the movant's control" or whether a "more flexible analysis" applied. *See Id.*, 507 U.S. at 386–87 & n.3. The Supreme Court concluded that the "excusable

neglect" standard "is not limited strictly to omissions caused by circumstances beyond the control of the movant" and that it extends beyond such circumstances to certain limited instances of "neglect" that may be "excusable." *Id*., 507 U.S. at 392, 395.[2]

The Supreme Court expressly stated that grounds such as "inadvertence, ignorance of the rules, [and] mistakes construing the rules do not usually constitute 'excusable' neglect," and held that – "at bottom" – a determination as to whether "a party's neglect of a deadline" is "excusable" is an "equitable" determination, "taking account of *all relevant circumstances* surrounding the party's omission." *Pioneer*, 507 U.S. at 392, 395 (emphasis added). Such relevant factors include "the danger of prejudice to the [other party/parties], the length of the delay and its potential impact on judicial proceedings, *the reason for the delay, including whether it* [*i.e., the delay*] *was within the reasonable control of the movant*, and whether the movant acted in good faith." *Id*., 507 U.S. at 395 (emphasis added).[3] Finally, the Supreme Court was quite explicit in *Pioneer* that there is nothing inappropriate in penalizing parties for the conduct of their attorneys, squarely holding that parties must "be held accountable for the acts and omissions of their chosen counsel." *Id*., 507 U.S. at 396–97.

Although Rockwell seeks to cast *Pioneer* as "[t]he most recent authoritative guidance on the meaning of 'excusable neglect,'" courts across the country have had occasion to render hundreds of decisions applying *Pioneer* to a very broad spectrum of fact patterns in the two decades since the Supreme Court issued that decision. *See* Pl.'s Supp. Brief at 9–10; *see generally, e.g.*, 1 Moore's Federal Practice § 6.06[3], pp. 6–33 to 6–47 (surveying law on "excusable neglect"); 4B Wright & Miller § 1165, pp. 523–56 (same). The reasons that Rockwell offers up here in an effort to explain away its failure to timely seek an extension of time have been considered and rejected time and again. When it comes to "excusable neglect," there is virtually nothing new under the sun.

II. *Rockwell's Pending Motions*

Rockwell concedes, as it must, that June 23, 2014 was the Reserve

[2] Unlike the parallel Federal Rule of Civil Procedure, which refers only to "excusable neglect," Rule 6(b)(1)(B) of this Court refers specifically to "circumstances beyond the control of the [moving] party," in addition to "excusable neglect." *Compare* Fed. R. Civ. P. 6(b) (providing for out-of-time extension of time upon showing of "excusable neglect") *and* USCIT R. 6(b)(1)(B).

[3] As Rockwell acknowledges, and as discussed in greater detail below, the weight of the authority holds that "the most important consideration in whether to grant leave to file out of time is the reason for the delay in filing." Pl.'s Supp. Brief at 11–12; *see also* n.7, *infra* (and select representative cases cited there).

Calendar deadline in all 11 of the actions at issue here. *See* Pl.'s Out-of-Time Motion at 1; Order For Leave to File Out of Time, and For Extension of Time to Remain on Reserve Calendar (April 1, 2014) (extending time on Reserve Calendar through June 23, 2014, for 11 actions at bar). Thus, May 27, 2014 was the deadline for Rockwell's filing of timely motions for extensions of time to remain on the Reserve Calendar. Pl.'s Supp. Brief at 9; USCIT R. 83(d) (requiring that any motion for an extension to remain on the Reserve Calendar "must be made at least 30 days prior to the expiration" of the Reserve Calendar deadline). Rockwell nevertheless failed to seek an extension of time until July 2, 2014. *See* Pl.'s Out-of-Time Motion (filed July 2, 2014). As such, Rockwell's motions were filed 36 days out of time, and, indeed, *a full nine days after the actual Reserve Calendar deadline itself had expired*. Because Rockwell had no motion pending on June 23, 2014 (which was the applicable Reserve Calendar deadline), the Office of the Clerk properly should have "enter[ed] . . . order[s] of dismissal [in all 11 actions] without further direction from the court" on June 24, 2014, in accordance with the express terms of USCIT Rule 83(c). *See* USCIT R. 83(c). Had the clerk's office acted promptly in conformity with the court's rules, there would have been no pending actions in which Rockwell could have filed the pending motions.

The extraordinary nature of the relief that Rockwell seeks stands in stark contrast to the bare-bones papers that the company filed with the court on July 2, 2014. *See* Pl.'s Out-of-Time Motion. Incredibly, the motions that Rockwell filed in each of the 11 actions totals only slightly more than a single page of text, excluding caption and signature block. *Id*.[4] Rockwell's motions do not even cite (much less quote) USCIT Rule 6(b), the rule which governs extensions of time, both timely and out-of-time. *Id*. Nor do the motions cite (much less brief) even a single judicial decision. *Id*.; *compare Gadsden v. Jones Lang LaSalle Americas, Inc.*, 210 F. Supp. 2d 430, 436–37 (S.D.N.Y. 2002) (refusing to find "excusable neglect" where movant's papers "contain[] no citations to legal authority and do[] little but offer up a litany of unimpressive excuses" and are otherwise "short on substance").

Moreover, the motions that Rockwell filed on July 2, 2014 assert merely that "good cause exists" for granting the motions, notwithstanding the fact that – as set forth above – "good cause" is the standard applicable to a *timely* motion for an extension of time, and Rockwell's motions are patently *untimely*. *See* Pl.'s Out-of-Time Motion at 1; USCIT Rule 6(b)(1)(A). Rockwell's motions make no attempt

[4] Rockwell filed the exact same motion in each of the 11 actions at issue.

to demonstrate "excusable neglect or circumstances beyond the control of the party," the much more stringent showing that is required for an out-of-time extension of time. *See* Pl.'s Out-of-Time Motion; USCIT Rule 6(b)(1)(B). *Compare Wilkerson v. Jones*, 211 F. Supp. 2d 856, 858 (E.D. Mich. 2002) (rejecting claim of "excusable neglect," where, *inter alia*, party "failed to argue that his failure to file timely . . . was due to excusable neglect," and instead "discusse[d] the more lenient (and irrelevant) standard" applicable to timely motions for extensions of time). This fact alone would have warranted denial of the motions, and the resulting dismissal of all 11 subject actions. *See, e.g., Krantz, Inc., v. Nissan North America, Inc.*, 408 F. Supp. 2d 854, 861–62 (D.S.D. 2005) (rejecting out-of-time submission where "nothing is set forth in [the party's papers] which even claims excusable neglect. The words are not even used."; "No excusable neglect has been shown or even properly alleged."); *Miller v. Bristol Compressors, Inc.*, 2005 WL 3263053 * 3 (W.D. Va. 2005) (rejecting claim of "excusable neglect" where counsel "failed to put forth any justification whatsoever . . . [concerning her] failure to file a timely response," and stated only that "she inadvertently failed (forgot) to file"); *Wild v. Alster*, 2005 WL 1458283 * 2 (D.D.C. 2005) (declining to find "excusable neglect" where party failed to explain reason for its late filing). It is well-established that, in circumstances such as these, a plaintiff is not entitled to a second opportunity to make its case.[5]

Not only were the motions that Rockwell filed on July 2, 2014 extraordinary in their lateness and breath-taking in their brevity, they are exceptional in other respects as well. Thus, for example, although USCIT Rule 6(c) requires that any motion for an extension

[5] A movant for an out-of-time extension of time is required to state with particularity the grounds constituting "excusable neglect." The mere assertion of "excusable neglect" – unsupported by facts – does not suffice. *See generally* 1 Moore's Federal Practice § 6.06[3][a], pp. 6–33 to 6–43 (stating that out-of-time motion for extension of time "must include facts to support the assertion of excusable neglect," and that "[i]t is not enough merely to assert that excusable neglect caused the delay"); 4B Wright & Miller § 1165, pp. 532 n.13, 533 (explaining that movant is required to "allege the facts constituting excusable neglect," and that "the mere assertion of excusable neglect unsupported by facts has been held to be insufficient"); *see also, e.g., Quigley v. Rosenthal*, 427 F.3d 1232, 1237–38 (10th Cir. 2005) (affirming denial of out-of-time motion where movant failed to allege facts necessary to support finding of "excusable neglect"); *Demint v. NationsBank Corp.*, 208 F.R.D. 639, 642–43 (M.D. Fla. 2002) (explaining that "the starting point and common denominator (indeed, the *sine qua non*) in every case employing an analysis of excusable neglect is an explanation of the reason for the delay"; refusing to find "excusable neglect" absent "a candid, straight-forward, and undisputed explanation . . . of the reason for the failure to comply with the pertinent deadline").

If – as indicated immediately above – the mere assertion of the *correct* standard (*i.e.*, "excusable neglect"), without supporting facts, is not sufficient, then it goes without saying that it was patently insufficient for Rockwell's July 2, 2014 motions to refer to the *incorrect* standard ("good cause") and to allege only the most skeletal facts relating to that standard.

of time – *even a timely motion* – set forth, *inter alia*, "the extent to which the time for the performance of the particular act has been previously extended" (*i.e.*, the number of prior extensions), Rockwell's July 2, 2014 motions fail to do so. *See* Pl.'s Out-of-Time Motion. Review of the docket reveals that – of the 22 motions to extend the time to remain on the reserve calendar that Rockwell has filed in Court No. 05–00269 alone – an incredible *19 of those have been out-of-time* (*i.e.*, untimely) motions. *See* Order to Show Cause at 1; Docket Sheet in Court No. 05–00269. Rockwell's motions do not even hint at these facts. Moreover, notwithstanding counsel's duty of candor to the court, in nine instances Rockwell failed to caption its out-of-time motions as such and further failed to otherwise indicate in any way in the text of its motions that they were out-of-time. *See* Order to Show Cause at 1. Similarly, notwithstanding counsel's duty of candor to the court, Rockwell's motions (including the July 2, 2014 motions) fail to indicate in any way Rockwell's long history of requesting *out-of-time* extensions of time in the 11 actions at issue. *See id.* ; Pl.'s Out-of-Time Motion.[6]

In addition, two of the 11 subject actions *have been previously dismissed* – yet another disturbing and highly probative fact that Rockwell's motions failed to disclose. *See* Order to Show Cause at 2; Order of Dismissal (Sept. 13, 2007), entered in Court No. 06–00054; Order of Dismissal (April 20, 2007), entered in Court No. 05–00269. Rockwell's motions further failed to mention that, apparently, the filing of its July 2, 2014 motions (like the filing of most – if not all – of its prior out-of-time motions) was prompted only by a communication from the Office of the Clerk, which alerted Rockwell to the impending dismissal of the subject actions. *See* Order to Show Cause at 2; Pl.'s Supp. Brief at 12–13 (in a remarkably candid, albeit belated, admission, stating that – in "[m]any" instances in which Rockwell has filed out-of-time motions – "the Clerk even issued a reminder to counsel that the Reserve Calendar deadline had passed, and invited counsel to move out of time to extend the deadline before it dismissed the case for failure to prosecute").

Finally, in the motions that Rockwell filed on July 2, 2014, Rockwell refers carelessly to "reinstate[ment] [of] the above-captioned [11] cases to the Reserve Calendar" and elsewhere requests that the court "reinstate these cases to the Reserve Calendar," thus indicating (incorrectly) that the subject actions already have been dismissed. Pl.'s

[6] In its most recent submission, Rockwell represents that it has surveyed the dockets of all 11 cases at issue here. According to Rockwell, in none of the 11 cases has fewer than five out-of time motions been filed. *See* Pl.'s Supp. Brief at 1. And, in fact, according to Rockwell, all five of the motions for extensions of time filed in Court No. 12–00001 have been out-of-time. Each and every one. *Id*.

Out-of-Time Motion at 1. In short, even as Rockwell prepared and filed the pending out-of-time motions in the 11 actions at issue, Rockwell was oblivious to the then-current status of those actions. *See* Order to Show Cause at 2.

III. *Order to Show Cause*

As explained above, because Rockwell had no motions for extensions of time (out-of-time, or otherwise) pending on June 23, 2014 (the applicable Reserve Calendar deadline), the clerk properly should have "enter[ed] . . . order[s] of dismissal [in all 11 actions] without further direction from the court" on June 24, 2014, in accordance with the express terms of USCIT Rule 83(c). *See* USCIT R. 83(c). Had the clerk acted in conformity with the court's rules, there would have been no pending actions in which Rockwell could have filed its motions. Moreover, as detailed above, the out-of-time motions for extensions of time to remain on the Reserve Calendar that Rockwell filed on July 2, 2014 were, in every respect, wholly inadequate. As such, denial of the motions was the clear course of action, with the resulting dismissal of all 11 subject actions. Nothing in the law entitles a plaintiff to "a second bite at the apple," particularly in circumstances as egregious as those presented here. Nevertheless, an Order to Show Cause issued, according Rockwell a final opportunity to "show cause why . . . the pending Motion[s] [for out-of-time extensions of time] should not be denied and the subject actions dismissed with prejudice." *See* Order to Show Cause at 4.

The Order to Show Cause generally summarized the history of the 11 actions at issue, emphasizing in particular Rockwell's pattern of filing out-of-time motions for extensions of time to allow the cases to remain on the Reserve Calendar. *See generally* Order to Show Cause at 1–2. The Order to Show Cause also critiqued both the form and the substantive merits of the out-of-time motions that Rockwell filed on July 2, 2014. *See generally id*. And, in addition, the Order to Show Cause highlighted – for the benefit of Rockwell – numerous salient points of law concerning the "excusable neglect" standard applicable to out-of-time motions. *See generally id.* at 3.

Thus, for example, the Order to Show Cause explained that "excusable neglect or circumstances beyond [its] control" generally does not include a party's "carelessness and laxity," or "inadvertence," or "unfamiliarity with the Rules." 1 Moore's Federal Practice § 6.06[3][c], pp. 6–45 to 6–46; Order to Show Cause at 3; *see also, e.g., Pioneer*, 507 U.S. at 392 (stating that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect"). The Order to Show Cause similarly noted that, while the

Government's consent to the out-of-time motions for extensions of time (interpreted as evidence of lack of prejudice) might well be relevant in determining the existence of "excusable neglect," such consent is by no means determinative of the existence of "excusable neglect," and there is ample authority for the position that the most important factor is the reason for the untimely motion and whether the delay was within the reasonable control of the movant – a proposition that Rockwell itself now acknowledges. *See* Order to Show Cause at 3[7]; Pl.'s Supp. Brief at 11–12 (stating that "the most important consideration in whether to grant leave to file out of time is the reason for the delay in filing"). In addition, the Order to Show Cause noted that "it is well-settled that the mere fact that denial of [Rockwell's] pending Motion[s] (and the resulting dismissal of all subject actions) would penalize [Rockwell] for the actions of its counsel is of relatively little moment." *See* Order to Show Cause at 3.[8] As the

[7] The Order to Show Cause surveyed some of the leading caselaw on point. *See, e.g., Dimmit v. Ockenfels*, 407 F.3d 21, 24 (1st Cir. 2005) (emphasizing that, in evaluating claim of "excusable neglect," "by far the most critical [factor] is the asserted reason" for the failure to timely file); *Silivanch*, 333 F.3d at 366 & n.7 (explaining that, "despite the flexibility of 'excusable neglect' and the existence of the four-factor test [for determining 'excusable neglect'] . . . , we and other circuits have focused on the third factor: 'the reason for the delay, including whether it was within the reasonable control of the movant'") (citation omitted); *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000) (stating that "[t]he four . . . factors do not carry equal weight: the excuse given for the late filing must have the greatest import . . . . [T]he reason-for-delay factor will always be critical to the inquiry. . . . . [A]t the end of the day, the focus must be upon the nature of the neglect."); *Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5–6 (1st Cir. 2001) (same); *Hospital del Maestro v. Nat'l Labor Relations Board*, 263 F.3d 173, 175 (1st Cir. 2001) (*per curiam*) (same); *Hilterman v. Furlong*, 1998 WL 637264 * 2 (10th Cir. 1998) (explaining that "[f]ault in the delay is a 'very important factor – perhaps the most important single factor – in determining whether neglect is excusable'") (quoting *City of Chanute v. Williams Natural Gas Co.*, 31 F.3d 1041, 1046 (10th Cir. 1994)); *Wilson v. Prudential Financial*, 218 F.R.D. 1, 3 (D.D.C. 2003) (explaining that "the key factor" in determining "excusable neglect" is "the reason for the delay, including whether it was within the reasonable control of the movant," and observing that "[c]ourts have noted that 'fault in the delay [is] perhaps the most important single factor,' while the prejudice factor [*i.e.*, whether the untimeliness prejudiced the other party] is of relatively little importance.") (citation omitted).

[8] As authority for this point, the Order to Show Cause directed Rockwell to two well-known, representative cases, *Lastra* and *Link*. *See Lastra v. Weil, Gotshal & Manges, LLP*, 2005 WL 551996 (S.D.N.Y. 2005) (explaining that, "[a]bsent extraordinary circumstances, a client assumes the risk of his attorney's actions and is bound even by the consequences of his negligence," and noting that circumstances such as those present in the 11 cases at bar "may give rise to a claim for malpractice [against the attorney], but do[] not constitute . . . excusable neglect"); *Link v. Wabash R.R.*, 370 U.S. 626, 633–34 (1962) (affirming trial court's dismissal of action based on counsel's failure to prosecute, and rejecting notion that dismissal unjustly penalizes client, explaining that client "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent").

Supreme Court explained in *Pioneer*, in circumstances such as these, it is entirely appropriate to visit the sins of counsel on the client. *See Pioneer*, 507 U.S. at 396–97 (stating that "clients must be held accountable for the acts and omissions of their attorneys").

The Order to Show Cause concluded by directing Rockwell "to review and remedy (as necessary) its calendaring systems to ensure that no further deadlines are missed in this or any other action, particularly in light of [the company's] long history of repeated out-of-time filings and the potentially very grave consequences associated with an untimely filing." Order to Show Cause at 3. The Order to Show Cause further authorized Rockwell to supplement its pending motions, directing that Rockwell's supplemental brief, *inter alia*, "cite the Court rule and the standard applicable to out-of-time motions for extensions of time and . . . fully brief in detail and *in a balanced fashion* (*i.e.*, without cherry-picking the cases cited or attempting to minimize adverse caselaw by drawing frivolous or largely meaningless distinctions) the relevant facts and law (with ample citations to Moore's Federal Practice and Wright & Miller, as well as to caselaw. . . .)." *Id*. at 4.[9]

IV. *Rockwell's Response to the Order to Show Cause*

In its most recent submissions, counsel for Rockwell assures the court that it "has initiated a review of its calendaring system to ensure that no further deadlines are missed" and affirms that counsel is aware that, in the future, Rockwell will be held to the letter of the rules of the court. *See* Pl.'s Response to Show Cause Order.

Rockwell also devotes an inordinate amount of ink to a detailed overview of the Reserve Calendar process, as well as an extended discussion of Rockwell's "management of the Reserve Calendar" and the parties' "behind the scenes" efforts to amicably resolve the subject

[9] The Order to Show Cause directed Rockwell that its research "[should] not be limited to the decisions of this Court and the Court of Appeals for the Federal Circuit," in light of the fact that the "excusable neglect" standard in this court parallels the standard in the Federal Rules of Civil Procedure, and in light of the relative paucity of relevant decisions in the jurisprudence of this Court and the Court of Appeals for the Federal Circuit, as well as the fact that some of that caselaw is difficult to reconcile with the great weight of the authority elsewhere across the country. Order to Show Cause at 4; *see also, e.g., Former Employees of Tyco Elecs. v. U.S. Dep't of Labor*, 27 CIT 380, 382–84, 259 F. Supp. 2d 1246, 1249–50 (2003) (conflating analysis and thus granting *out-of-time* motion for extension of time based on conclusion that movant/defendant agency's resource constraints warranted granting extension of time for filing of remand results, without any rigorous analysis of the reason, if any, for defendant/movant's failure to seek *timely* extension of time for filing of remand results – *i.e.*, failing to analyze (in the words of *Pioneer*) "the reason for the delay [in filing motion for extension of time], including whether [the delay] was within the reasonable control of the movant") (cited in Pl.'s Supp. Brief at 11, 16).

cases. *See generally, e.g.*, Pl.'s Supp. Brief at 2–9. The purpose of these sections of Rockwell's papers apparently is to make it clear that "the continued presence of a case on a [Reserve Calendar], and the need to extend its presence on that calendar, is not indicative of inaction or lack of diligence in processing or prosecuting the cases." *Id*. at 8–9.

It may well be that "[Rockwell's] attorneys have spent hundreds of hours working on the processing of SBTR cases" and that "Government counsel have done the same." Pl.'s Supp. Brief at 9. But the fact nonetheless remains that Rockwell's counsel failed – both in the specific instances at bar, and repeatedly, again and again, in the past – to spend the very modest amount of time that the court's rules obligated them to spend in order to file routine, *timely* motions for extensions of time, to permit the actions at issue to remain on the Reserve Calendar.

The issue presented here is not whether Rockwell is diligently pursuing resolution of the 11 subject actions and thus would be entitled to extensions of time that were *timely* sought. Instead, the issue presented here is whether Rockwell has any legitimate basis to excuse its failure to seek such timely extensions of time. Rockwell's extended discussion of the Reserve Calendar process and the efforts that counsel have expended on the substantive merits of these actions simply have no significant bearing on that issue.

In its most recent submissions, Rockwell also addresses the four factors that the Supreme Court specifically identified in *Pioneer* as among the "relevant circumstances" to be considered in determining the existence of "excusable neglect." *See Pioneer*, 507 U.S. at 395; Pl.'s Supp. Brief at 11–18.[10] Rockwell frames the four factors as: (1)

[10] Rockwell was expressly instructed that its amended/supplemental briefs should include, *inter alia*, "ample citations to Moore's Federal Practice and Wright & Miller, as well as to caselaw, which shall not be limited to the decisions of this Court and the Court of Appeals for the Federal Circuit." Order to Show Cause at 4. Rockwell paid little heed.

Rockwell's most recent submissions cite to only one section of Wright & Miller and to two sections of Moore's Federal Practice – not "ample," by any measure. *See* Pl.'s Supp. Brief at 10, 12, 16. Moreover, one would have thought it superfluous to instruct Rockwell that citations should be to the most current editions of those authorities; but it seems that nothing can be taken for granted here. Inexplicably, Rockwell cites to Wright & Miller "(2d ed. 1987)" and Moore's "(2d ed. 1988)." *See id.* at iii (Table of Authorities), 10. Rockwell thus has chosen to cite and rely on authorities that are hopelessly out-of-date (*by more than two decades*), pre-dating even the Supreme Court's now longstanding ruling in *Pioneer*, which Rockwell itself recognizes as having redefined the pre-existing landscape of the law on "excusable neglect." *See id*. at 9–10 (identifying *Pioneer* as the now-"authoritative guidance" on "excusable neglect," and explaining that decision addressed pre-existing split in the circuits). Further, Rockwell's second citation to Moore's Federal Practice – *i.e.*, "2 Moore's Federal Practice [§] 6.08" – is for a proposition that is at best peripheral to the "excusable neglect" analysis here. *See id.* at 12 (citing referenced section of Moore's for proposition that

"Prejudice to the Defendant"; (2) "Impact on the Court"; (3) "Reason for the Delay in Filing"; and (4) "Good Faith." *See generally id.* As summarized below (and as is typical of movants in "excusable neglect" cases), Rockwell's motions (as amended) demonstrate that its delay has not prejudiced the Government. In addition, in its amended motions, Rockwell makes a reasonable (although not clearly compelling) showing on the length of the delay and the impact of that delay on judicial proceedings and judicial administration. The two remain-

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"ordinarily the granting or withholding of an extension of time is within the court's discretion"). Elsewhere, it is similarly unclear from Rockwell's papers why the referenced provisions of Moore's and Wright & Miller are cited. *See id*. at 16. The combination of Rockwell's reliance on out-dated authorities that are no longer readily accessible to a reader, together with Rockwell's broad, imprecise citations (lacking pinpoint references to specific subsections or page numbers), and Rockwell's failure to provide parenthetical explanations to summarize the purpose and/or substance of the citations renders those citations useless. *See id*. (citing "4A Federal Practice and Procedure § 1165; 2 Moore's Federal Practice [§] 6.08," absent any further specificity or parentheticals).

Rockwell's research, analysis, and briefing of the caselaw are equally unimpressive. Of the 34 cases listed in the Table of Authorities filed with its most recent submissions, only 23 are even arguably relevant to the "excusable neglect" issue – and that figure includes cases that Rockwell cites even for very general, basic propositions, as well as cases that Rockwell cites on ancillary issues such as counsel's unwavering obligation to monitor the status of cases and other similar matters. *See* Pl.'s Supp. Brief at i-ii (Table of Authorities) (The other 11 cases that Rockwell cites are proceedings in the lead *Rockwell* case and related litigation, and cases cited in Rockwell's extended, but irrelevant, discussion of the history and purpose of the Reserve Calendar. *See generally* Pl.'s Supp. Brief at 3–9.) The extent of Rockwell's legal research thus bears little relationship to the high stakes here and suggests that, even now, Rockwell and its counsel fail to appreciate the gravity of their situation. That impression is only reinforced by the remarkable fact that *a mere two* of the 23 referenced cases date from the new millennium. *See Former Employees of Tyco*, 27 CIT 380, 259 F. Supp. 2d 1246 (2003) (cited in Pl.'s Supp. Brief at 11, 16); *Hilton Groups, PLC v. Branch Banking & Trust Co.*, 2007 WL 2022183 * 4 (D.S.C. 2007) (cited in Pl.'s Supp. Brief at 13–14). As with its citations to Wright & Miller and Moore's, so too with its citations to caselaw – Rockwell's legal analysis is seriously out-dated, and ignores a vast (and growing) body of relevant authority.

It appears that Rockwell actually did relatively little, if any, independent legal research, and largely confined itself to a handful of cases with which it apparently began and the decisions that were cited in those cases. The result of this methodology is not only that the caselaw cited is all relatively old, but, in addition, it is skewed, because, *inter alia*, decisions that reach a particular outcome or approach an issue in a particular way are more likely to rely on other decisions that do the same (and are less likely to cite and discuss decisions that reach the opposite outcome or approach an issue differently). This fact further undermines the soundness of Rockwell's research and briefing and limits its utility for the court.

Finally, as discussed above, Rockwell was specifically instructed not to limit its research solely "to the decisions of this Court and the Court of Appeals for the Federal Circuit." Order to Show Cause at 4; *see also* n.9, *supra*. However, only 11 of the 23 referenced decisions (including *Pioneer*) were from other courts; and five of those 11 cases were cited as part of Rockwell's misguided attempt to blame the Office of the Clerk of the Court for Rockwell's failure to seek timely extensions of time in the 11 actions at issue. *See* Pl.'s Supp. Brief at 13–14; *see also* section IV.C, *infra*.

ing *Pioneer* factors weigh very heavily against Rockwell, however. Rockwell's case on the most important of the four factors – *i.e.*, the reason for Rockwell's delay (including whether the reason for the delay was within its control) – is wholly lacking in merit. And, finally, these 11 cases are among those rare "excusable neglect" cases where the movant cannot credibly claim that it has acted in good faith.

Rockwell's showing as to each of the four *Pioneer* factors is analyzed below, in turn.

A. *Prejudice to the Defendant*

Rockwell asserts broadly that "[n]o harm will befall the [Government]" if the company's pending out-of-time motions for extensions of time to permit the 11 subject actions to remain on the Reserve Calendar are granted. *See generally* Pl.'s Supp. Brief at 15–16. It is true that the Government gave its consent to the motions that Rockwell filed on July 2, 2014 (as well as to all prior extensions of time, including all motions for leave to file out-of-time). *See id*. at 15; Pl.'s Out-of-Time Motion at 2. And, more recently, the Government has advised that – although it "understand[s] the concerns expressed" in the Order to Show Cause and "defer[s] to the Court's discretion" as to whether to grant the extraordinary relief that Rockwell seeks – the Government "would not be prejudiced" if the 11 actions at issue were to remain on the Reserve Calendar. *See* Def.'s Response Brief at 1.[11] "In fact," the Government states, "keeping the subject cases on the reserve calendar would provide the parties with an efficient means to [dispose] of these actions without further litigation," to the extent that the merchandise and issues presented in the actions are "sub-

[11] Because the Government is charged with, *inter alia*, protecting the public fisc and yet is here taking the position that granting the relief that Rockwell seeks will work no prejudice on the Government or the public, the Government presumably has determined that the statutes of limitations have not expired in the 11 actions at issue *and* that – if the pending out-of-time motions were denied and the 11 actions were dismissed pursuant to USCIT Rule 83(c) – Rockwell otherwise likely would be able to reinstate or re-file each of those actions. However, that might not be a foregone conclusion, particularly in light of Rockwell's extreme record of neglect in maintaining the 11 actions on the Reserve Calendar, as well as the fact that two of the 11 actions already have been dismissed once before. *See, e.g.*, n.21, *infra* (citing select decisions where court has denied plaintiffs' motions for relief from automatic orders of dismissal entered by clerk's office dismissing actions on Reserve Calendar for lack of prosecution pursuant to USCIT Rule 83(c)).

For purposes of the pending motions, the Government's representations as to lack of prejudice are being accepted at face value. However, no party should assume that the Government will not be expected to detail the basis for its position in similar cases in the future, particularly if the Government contends that granting an out-of-time extension of time will not prejudice the public fisc, where – as here – denying the out-of-time extension of time would result in the automatic dismissal of a plaintiff's action pursuant to USCIT Rule 83(c).

stantially the same as those covered by the test case, *Rockwell Automation, Inc. v. United States*, 31 CIT 692 (2007)." *See id*. at 1–2.

As other courts have observed, this factor (*i.e.*, the risk of prejudice to the non-moving party/parties), and two of the other three *Pioneer* factors, typically "weigh in favor of the party seeking the [out-of-time] extension." *Silivanch*, 333 F.3d at 366. At least as to the factor of prejudice to the non-moving party, this case is no different.

B. *Impact on the Court*

The Supreme Court in *Pioneer* identified "the length of the [movant's] delay" and the "potential impact [of the delay] on judicial proceedings" and "efficient judicial administration" as another factor to be considered in evaluating claims of "excusable neglect." *Pioneer*, 507 U.S. at 395, 398.

Rockwell here is silent on the length of the delay, a consideration to which courts typically accord relatively little weight, because (for a variety of reasons) the length of the delay in most cases is minimal, both in absolute and relative terms.[12] In the 11 cases here at bar, however, the length of the delay is (at least relatively speaking) significant. In these 11 cases, not only did Rockwell fail to seek timely extensions of time, but, in fact, Rockwell delayed action for so long (*i.e.*, 36 days) that the Reserve Calendar deadline itself expired, and – *by court rule* – all 11 cases should have been automatically dismissed by the Office of the Clerk more than a week before Rockwell's out-of-time motions were filed. *See* USCIT Rule 83(c).

In one oft-cited case, the First Circuit sustained a finding of "no excusable neglect" even though "the delay in [the] case was *only one day* and . . . there was little danger of prejudice to the other party," the delay did not negatively impact the proceedings, and the movant acted in good faith, where the reason for the delay was weak. *See Hospital del Maestro v. Nat'l Labor Relations Board*, 263 F.3d 173, 175 (1st Cir. 2001) (*per curiam*) (emphasis added).[13] Here, although the length of the delay (like the other remaining factors) is of rela-

[12] *See, e.g., Silivanch*, 333 F.3d at 366 (explaining that, "[i]n the typical case, the first two *Pioneer* factors [*i.e.*, length of delay and prejudice to the non-movant] will favor the moving party: '[D]elay always will be minimal in actual if not relative terms, and the prejudice to the non-movant will often be negligible . . . . And rarely in the decided cases is the absence of good faith at issue'") (citation omitted).

[13] To be sure, there are numerous cases where courts have refused to find "excusable neglect," even though the delay was but a single day. *See also, e.g., Graphic Communications Int'l Union*, 270 F.3d at 7–8 (sustaining finding of "no excusable neglect," even though "there would be 'little danger of prejudice' to [the non-movant] if the court granted the motion for extra time; . . . '*the length of the delay was minimal* (*one day*), and . . . would not have a serious impact on judicial proceedings'; and . . . there was no evidence the [movants] had acted in bad faith") (emphasis added).

tively little significance compared to the primary factor (*i.e.*, the reason for the delay, discussed below), the length of the delay is nonetheless a consideration that arguably could weigh – at least to some modest extent – against granting the relief that Rockwell seeks. If nothing else, the rules of the court (and Rule 83(c) in particular) reflect the considered expert judgment of the drafters that actions such as the 11 at issue here – *i.e.*, actions where the Reserve Calendar deadline itself has been allowed to lapse – should be dismissed, and the chips allowed to fall where they may.

As to the broader, related issue of the impact of Rockwell's untimeliness on "judicial proceedings," Rockwell asserts that granting the pending motions would not "interfere with the efficiency of judicial administration." Pl.'s Supp. Brief at 16. Rockwell emphasizes that the effect of granting the pending motions would be "to extend the Reserve Calendar deadline, which by definition requires the most minimal amount of judicial supervision" in that it "serv[es] only to preserve the Court's subject-matter jurisdiction over denied administrative protests." *Id*. Rockwell reasons that "granting leave to file out of time will reduce the need to expend judicial resources, whether they be to prosecute these cases, or to appeal or move to reconsider a dismissal of the cases for failure to prosecute." *Id*. Rockwell further claims that denying the pending motions would work an injustice on Rockwell and the Government, by denying them "the opportunity to settle these cases amicably, at this late stage in the broader litigation and after the [parties have] expended time and effort – not to mention the Court's resources in adjudicating *Rockwell I*." *Id*. at 16–17.

Rockwell's claims of its diligence in the prosecution of the instant actions and Rockwell's impassioned protestations about the prospect of potential injustice have a rather hollow ring given Rockwell's unwillingness to invest the very modest resources necessary to take the timely action required to maintain the actions on the Reserve Calendar. Still, Rockwell's analysis of this factor is generally sound – at least as far as it goes. The interest that is typically the focus of this factor is any potential negative effects of a movant's tardiness vis-a-vis ongoing judicial proceedings. By definition, in the context of the Reserve Calendar – where no such judicial proceedings are ongoing – there can be no such potential negative effects. There are, however, other judicial administration interests at stake.

First, there are the judicial resources that have been consumed in the past, and continue to be consumed, by Rockwell's longstanding pattern and practice of filing out-of-time motions for extensions of time to remain on the Reserve Calendar. Contrary to Rockwell's

assertions (*see* Pl.'s Supp. Brief at 3, 12),[14] it is not true that all consent motions for extensions of time in Reserve Calendar cases are disposed of by clerk's office staff, such that judicial resources are spared.

As the records in these 11 actions reflect, contrary to Rockwell's claims, the court's standard practice is that the clerk's office refers all out-of-time motions for extensions of time to a judge for disposition. *See, e.g.*, Order (April 1, 2014) (Eaton, J.) (granting Rockwell out-of-time motion for extension of time), entered in Court No. 05–00269; Order (Sept. 26, 2013) (Carman, J.) (same), entered in Court No. 05–00269.[15] Moreover, out-of-time motions for extensions of time are properly subject to much more stringent standards than are timely motions, and out-of-time motions require significantly greater analysis and deliberation.

Nor is "judge time" the only judicial administration resource that Rockwell continues to tax heavily. Rockwell apparently also is placing demands on the staff of the clerk's office as well. For example, to the extent that Rockwell's motions for extensions of time are not referred to judges, they are disposed of by the clerk's office staff. More importantly, Rockwell's most recent submissions make it clear that the clerk's office staff is expending precious time tracking Rockwell's Reserve Calendar cases and alerting Rockwell to case deadlines – a questionable role for the clerk's office staff to play, and an inappropriate drain on the resources of the court. *See* Pl.'s Supp. Brief at 12–13 (stating that, in one of the 11 cases at issue, where Rockwell has sought 20 out-of-time extensions of time, "[m]any of those times, the Clerk even issued a reminder to counsel that the Reserve Calendar deadline had passed, and invited counsel to move out of time to extend the deadline before it dismissed the case for failure to prosecute").

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[14] Rockwell erroneously asserts that each and every one of the consent motions for extensions of time to remain on the Reserve Calendar that has been granted in the 11 cases at issue – including both timely-filed motions and out-of-time motions – "were granted by the Clerk without judicial intervention." Pl.'s Supp. Brief at 3; *see also id*. at 12 (asserting that, in one of the 11 subject actions, "[t]his . . . is the twentieth time that [Rockwell] has moved out of time to extend the Reserve Calendar deadline, and in each and every case the Clerk has granted leave, without any intervention by the Court itself").

[15] *See also, e.g.*, Order (Sept. 28, 2012) (Musgrave, J.) (granting Rockwell out-of-time motion for extension of time), entered in Court No. 05–00269; Order (June 27, 2012) (Stanceu, J.) (same), entered in Court No. 05–00269; Order (March 29, 2012) (Eaton, J.) (same), entered in Court No. 0500269; Order (Oct. 5, 2011) (Pogue, J.) (same), entered in Court No. 05–00269; Order (April 26, 2007) (Wallach, J.) (granting Rockwell motion to restore action to Reserve Calendar), entered in Court No. 05–00269.

On occasion, when a litigant fails to caption an out-of-time motion as such, that motion may not be referred to a judge and may instead be disposed of by the clerk's office staff.

The long and the short of it is that any claim by Rockwell that judicial resources are being conserved by maintaining these 11 actions on the Reserve Calendar must be weighed carefully against other considerations, including, *inter alia*, the judicial and other court resources consumed by Rockwell's history of repeatedly filing out-of-time motions for extensions of time to maintain the 11 actions on the Reserve Calendar. As a result, it is a close call; but, on balance, this factor tips slightly in Rockwell's favor.

C. *The Reason for the Delay in Filing*

Under *Pioneer*, a critical (and in many, if not most, cases, decisive) consideration in ruling on an out-of-time motion for an extension of time is "the reason for the delay, *including whether it* [*i.e., the delay*] *was within the reasonable control of the movant*." *Pioneer*, 507 U.S. at 395 (emphasis added). Indeed, as Rockwell has acknowledged, the weight of the authority nationwide holds that this factor is the single most important consideration in determining whether, in fact, neglect is "excusable." *See* Pl.'s Supp. Brief at 11–12 (noting that "the most important consideration in whether to grant leave to file out of time is the reason for the delay in filing"); *see also* n.7, *supra* (summarizing select leading cases concerning the primacy, among the four *Pioneer* factors, of "the reason for the [movant's] delay, including whether [the delay] was within the reasonable control of the movant," in evaluating claims of "excusable neglect").

According to Rockwell, its failure to file timely motions for extensions of time in the 11 actions here "reasonably resulted from events both practical and circumstantial." Pl.'s Supp. Brief at 12; *see generally id*. at 11–15. In an unseemly display of chutzpah, Rockwell lays the bulk of the blame for its failure to file timely motions for extensions of time at the feet of the staff of the Clerk of the Court. *See id*. at 12–14. Rockwell argues that "Reserve Calendar practice can, and usually does, take place entirely outside of the oversight of a judge," and argues that "[t]his . . . is the twentieth time [in one of the 11 actions] that [Rockwell] has moved out of time to extend the Reserve Calendar deadline, and in each and every case the Clerk has granted leave, without any intervention by the Court." *Id*. at 12.[16] To drive home its point, Rockwell emphasizes that, "[m]any of those times, the

[16] As discussed above, there is no truth to Rockwell's claim that the clerk's office disposes of all motions for extensions of time (both timely and untimely) in all Reserve Calendar cases. *See* n.15, *supra* (and accompanying text). Thus, to the extent that Rockwell seeks to deflect responsibility away from itself by pointing to the clerk's office, Rockwell actually seeks to blame not only the clerk's office but also the judges of the court – or, at a minimum, those judges who have granted Rockwell's many out-of-time motions for extensions of time in the past.

Clerk even issued a reminder to counsel that the Reserve Calendar deadline had passed, and invited counsel to move out of time to extend the deadline before it [*i.e.*, the Clerk's Office] dismissed the case for failure to prosecute." *Id*. at 12–13. This argument is specious at best.

Even as Rockwell points its finger at the Office of the Clerk, Rockwell concedes that it is not permitted to "rely . . . on reminders from the Clerk's office to meet court deadlines," that it alone bears "responsib[ility] for meeting litigation deadlines," and that it understands that the fault here lies solely with Rockwell and its counsel. *See* Pl.'s Supp. Brief at 13. Rockwell acknowledges that "[a]n attorney has a responsibility to monitor proceedings with some degree of diligence." *Prior Prods., Inc. v. Southwest Wheel-NCL Co.*, 805 F.2d 543, 546 (5th Cir. 1986) (quoted in Pl.'s Supp. Brief at 13).[17] And Rockwell admits that "a party plaintiff has a primary and independent obligation to prosecute any action brought by it – from the moment of commencement to the moment of final resolution. That primary responsibility never shifts to anyone else and entails the timely taking of all steps necessary for its fulfillment." *Caterpillar Inc. v. United States*, 22 CIT 1169, 1170 (1998) (quoting *Avanti Prods., Inc. v. United States*, 16 CIT 453, 453–54 (1992)) (quoted in Pl.'s Supp. Brief at 13). Further, the court has squarely held that counsel is charged with knowledge of the deadline for removal of cases from the Reserve Calendar and the risk of automatic dismissal for failure to prosecute pursuant to USCIT Rule 83(c), whether or not counsel receives any courtesy reminder notice from the office of the clerk. *See, e.g., Washington Int'l Ins. Co. v. United States*, 16 CIT 480, 481 & n.1, 793 F. Supp. 1091, 1092 & n.1 (1992). It is black letter law that "[c]ounsel may not shift that burden [of monitoring the status of counsel's cases]

[17] Rockwell omits the next sentence from the decision that it quotes, *Prior Products*: "Failure to comply with scheduled time targets as a result of inadequate monitoring [by counsel] will only be excused when justified by *something more than alleged neglect on the part of the clerk* [*of the court*]." *Prior Prods.*, 805 F.2d at 546 (emphasis added).

See also, e.g., *Washington Int'l Ins. Co. v. United States*, 16 CIT 480, 482–83, 793 F. Supp. 1091, 1093 (1992) (denying plaintiff's motion for relief from automatic order of dismissal entered by clerk's office dismissing action on Joined Issue Calendar for failure to prosecute, stating that "[an] attorney must exercise diligent efforts in monitoring proceedings in an action" and "*may not shift that burden to the court by relying upon a notice from the court* ") (emphasis added); *Wang Labs., Inc. v. United States*, 16 CIT 468, 471–73, 793 F. Supp. 1086, 1089–90 (1992) (denying plaintiff's motion for relief from automatic order of dismissal entered by clerk's office dismissing action on Reserve Calendar for lack of prosecution, holding, *inter alia*, that "it is counsel's responsibility to exercise diligent efforts in monitoring and ascertaining the status of an action" and that "[c]*ounsel may not shift its burden to the court*, by seeking to excuse a failure to inquire about the status of a consent motion that had been pending for over six months") (emphasis added).

by relying upon a notice from the court." *Id.*, 16 CIT at 482, 793 F. Supp. at 1093.

Yet Rockwell here seeks to rely on a select handful of cases in an effort to argue that its neglect was "excusable," because – according to Rockwell – it assertedly "has been misled by action of the court or its officers," because it "in good faith relied on the actions and representations of the . . . court or its officers," and because it "was lulled into the false sense of security that [it] could delay filing . . . until after the time prescribed by the applicable rules." *See* Pl.'s Supp. Brief at 1314 (citing and/or quoting *Redfield v. Cont'l Casualty Corp.*, 818 F.2d 596, 602 (7th Cir. 1987); *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983); *Hernandez-Rivera v. INS*, 630 F.2d 1352, 1355 (9th Cir. 1980); *Hilton Groups, PLC v. Branch Banking & Trust Co.*, 2007 WL 2022183 * 4 (D.S.C. 2007); *Farthing v. City of Shawnee, Kansas*, 1994 WL 68715 * 1–2 (D. Kan. 1994)), *aff'd*, 39 F.3d 1131 (10th Cir. 1994)).[18]

Suffice it to say that none of the cases cited by Rockwell even remotely parallels the facts of this case.[19] Rockwell does not claim, for example, that there was some sort of *ambiguity* in the court rules governing the deadline for filing timely motions for extensions of time and that it relied on the representations of one particular member of the staff of office of the clerk of the court for clarification that ultimately turned out to be in error.[20] Similarly, Rockwell does not claim

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[18] *See generally E.I. DuPont de Nemours & Co. v. United States, 22 CIT 601, 602–03 & n.4, 15 F. Supp. 2d 859, 861–62 & n.4 (1998) (discussing and distinguishing, inter alia, Redfield and Farthing*).

[19] Virtually all "excusable neglect" cases involve discrete, "one-off" events, which result in a party missing one specific deadline. A wide-ranging survey of the caselaw has identified no "excusable neglect" case with facts that are anywhere close to the facts of this case and counsel's history of repeatedly flouting clear, established court rules and orders.

[20] It is worth noting that – even assuming that Rockwell could claim reliance on specific advice from the Office of the Clerk – it is unlikely in the extreme that Rockwell would prevail, given the crystal clarity of the applicable rules. *See, e.g., Kraft, Inc. v. United States*, 85 F.3d 602, 609 (Fed. Cir. 1996) (rejecting counsel's claim that "its failure to file a timely notice of appeal can be blamed on the clerk's office," where alleged misstatement by clerk's office conflicted with clear language of court rule, and "[a] simple reading of [the applicable rule] by experienced counsel would have made it readily apparent" that any such statement by clerk's office was incorrect); *DuPont*, 22 CIT at 602–03 & n.4, 15 F. Supp. 2d at 861–62 & n.4 (rejecting claim that counsel's reliance on erroneous advice of office of clerk of the court constituted "excusable neglect," where "[c]ounsel could have researched the law" and "the Federal Rules and case law interpreting the rules are clear"); *see also Mirpuri v. ACT Manufacturing, Inc.*, 212 F.3d 624, 629–31 (1st Cir. 2000) (rejecting claim that counsel's reliance on incorrect information concerning case status provided by court clerk's office constituted "excusable neglect," where counsel "could have discovered [the answer] simply by checking the docket"; "The plaintiffs' reliance on a telephonic inquiry, in lieu of checking the docket, constituted neglect – but not excusable neglect."); *cf. Kapral v. United States*, 166 F.3d 565, 568 n.1 (3d Cir. 1999) (refusing to find that counsel reasonably relied on

that some particular member of the clerk's office staff advised the company or its counsel that compliance with the rules of the court (or any particular rule or order) was unnecessary. Nor could Rockwell reasonably make any such claims. Instead, Rockwell claims, in effect, that it believed that it was – for some reason known only to it – exempt from complying with the clear and unambiguous rules and orders of the court. Such a claim cannot be seriously credited. Contrary to Rockwell's assertions, counsel here have repeatedly "demonstrate[d] a [blatant] disregard . . . [for] pertinent rules." *See* Pl.'s Supp. Brief at 14 (quoting *Napp Systems, Inc. v. United States*, 22 CIT 1106, 1107 (1998)).[21]

Distilled to its essence, at least part of Rockwell's argument seems to be that, because Rockwell's actions were not automatically dis-

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misinformation provided by court clerk's office where "[t]he record reflects that . . . counsel is an experienced practitioner who should have known or verified the elementary rules that govern the filing of [the motion at issue]").

Because Rockwell's claim that it was misled by the actions of the clerk's office is so patently lacking in merit, there is no need to further dissect that argument. It is nevertheless worth noting that – in general – parties rarely succeed in arguing that they were entitled to rely on statements (much less actions, or failures to act) of personnel in a court clerk's office. *See, e.g., Osterneck v. Ernst & Whinney*, 489 U.S. 169, 178–79 (1989) (sustaining court of appeals' decision rejecting party's request for relief based on "certain statements made by the District Court, as well as certain actions taken by the District Court, the District Court Clerk, and the Court of Appeals" (which allegedly led party to believe that its notice of appeal had been timely-filed), where Court of Appeals concluded that "[a]t no time has the district court or this court ever affirmatively represented to [the party in question] that their appeal was timely filed, nor did the [party] ever seek such assurance from either court"; emphasizing that limited exception invoked by party "applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and [where the party] has received *specific assurance* by *a judicial officer* [as opposed to a member of the court staff] that this act has been properly done") (emphases added); *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996) (explaining that "[t]he term 'excusable neglect' . . . refers to the missing of a deadline as a result of such things as *misrepresentations by judicial officers*") (emphasis added).

[21] At issue in *Napp* was a plaintiff's Motion for Reconsideration of Order of Dismissal and Reinstatement of Case, where the clerk of the court had automatically dismissed the plaintiff's action on the Reserve Calendar for lack of prosecution in accordance with USCIT Rule 83(c) because the plaintiff had failed either to timely remove the action from the Reserve Calendar pursuant to USCIT Rule 83(b) or to file a timely motion pursuant to USCIT Rule 83(d) to extend the time for the action to remain on the Reserve Calendar. *Napp*, 22 CIT at 1106. The court denied the plaintiff's motion. *Id*., 22 CIT at 1106–07. *See also, e.g*., *Caterpillar Inc.*, 22 CIT at 1170 (denying plaintiff's motion for relief from automatic order of dismissal entered by clerk's office dismissing action on Reserve Calendar for lack of prosecution pursuant to USCIT Rule 83(c), notwithstanding Government's express consent to reinstatement, where plaintiff made no effort to seek timely extension of time to remain on Reserve Calendar); *Telectronics Pacing Systems, Inc. v. United States*, 20 CIT 393, 393–94 (1996) (denying plaintiff's motion for relief from automatic order of dismissal entered by clerk's office dismissing action on Reserve Calendar for lack of prosecution pursuant to USCIT Rule 83(c), notwithstanding Government's express consent to relief

missed for lack of prosecution pursuant to USCIT Rule 83(c) *the very first time* that Rockwell negligently allowed the Reserve Calendar deadline to expire, the court is now *affirmatively* and *permanently estopped* from applying Rule 83(c) in accordance with the specific terms of that rule, which mandate automatic dismissal under the circumstances presented here. But any such argument constitutes "boot-strapping" of the very worst kind. It is similarly impossible for Rockwell to credibly claim on these facts that any conduct of the clerk's office or the court served to "lull[] [the company] into [a] false sense of security." *See* Pl.'s Supp. Brief at 14. As previously noted, two of the 11 actions at issue already have been once dismissed for lack of prosecution. *See* Order to Show Cause at 2; Order of Dismissal (Sept. 13, 2007), entered in Court No. 06–00054; Order of Dismissal (April 20, 2007), entered in Court No. 0500269. The reasonable response to such dismissals would be hyper-vigilance, not complacency.

Curiously, counsel for Rockwell touts the law firm's "robust system for docketing court deadlines," underscoring that "[the firm's] professional liability insurance policy requires, as a condition of coverage, that the firm have two independent monitoring systems." *See* Pl.'s Supp. Brief at 14. According to Rockwell, "[t]he firm's first system, based on the Time Matters software platform, is administered by . . . the firm's Administrator since [the firm's] founding in 1998." *Id*. Rockwell states that the firm's Administrator "is responsible for entering deadlines . . . into Time Matters, which generates deadline reports on demand. These reports are circulated regularly to the attorneys at the firm." *Id*. According to Rockwell, "[the] second system is predicated on feeds from court CM/ECF systems, including this Court's system, which allows the firm to establish a consolidated calendar based on the records of the courts themselves." *Id*. Rockwell adds that "the firm conducts monthly 'tickler meetings' for attorneys, chaired by [the firm's Administrator] and . . . one of the firm's partners." *Id*. According to Rockwell, "upcoming deadlines are reviewed and identified" at these monthly meetings, "and attorneys are tasked with filing necessary motions or taking other required actions." *Id*. But Rockwell fails to explain how the USCIT Rule 83(d) deadlines for

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requested); *Wang Labs.*, 16 CIT at 471–73, 793 F. Supp. at 1089–90 (denying plaintiff's motion for relief from automatic order of dismissal entered by clerk's office dismissing action on Reserve Calendar for lack of prosecution pursuant to USCIT Rule 83(c)); *cf.*, *e.g., Washington Int'l Ins. Co.*, 16 CIT at 482–83, 793 F. Supp. at 1093 (denying plaintiff's motion for relief from automatic order of dismissal entered by clerk's office dismissing action on Joined Issue Calendar for lack of prosecution); *Hamil Textiles, U.S.A. v. United States*, 18 CIT 736, 737–39 (1994) (dismissing for lack of prosecution 12 actions on Suspension Disposition Calendar).

the filing of timely motions for extensions of time to permit actions to remain on the Reserve Calendar have so consistently and so successfully evaded the allegedly "robust" calendaring system on which Rockwell and its counsel assertedly rely. *See* USCIT R. 83(d) (requiring that a motion for an extension of time to remain on the Reserve Calendar "be made at least 30 days prior to the expiration" of the Reserve Calendar deadline itself).

In an apparent effort to explain the failure of the law firm's calendaring system here, Rockwell asserts that "[t]he months of May and June [2014] were tumultuous for counsel," "prevent[ing] the firm from holding its regular Calendar Meetings." *See generally* Pl.'s Supp. Brief at 14–15. However, even if the alleged "tumult" could explain away the *pending* out-of-time motions in the 11 cases at issue here (which it cannot), the recent two months of "tumult" cannot begin to explain the long history of missed deadlines and out-of-time motions in these actions.

According to Rockwell, the "tumultuous" nature of May and June 2014 were due to the mid-June hospitalization of its lead counsel for several days, as well as the relocation of the firm's offices, and the "robust travel schedule" that the firm's attorneys maintain. *See* Pl.'s Supp. Brief at 14–15. As Rockwell itself has noted, however, the deadline for Rockwell's filing of timely motions for extensions of time to remain on the Reserve Calendar was May 27, 2014. *See id.* at 9; USCIT R. 83(d). Lead counsel's hospitalization in mid-June 2014 thus logically can in no way explain Rockwell's failure to file *timely* motions for extensions of time in late May 2014. Moreover, although Rockwell posits illness as "a circumstance most certainly 'beyond the control of the party'" (*see* Pl.'s Supp. Brief at 14–15), the law on "excusable neglect" is not so readily forgiving. *See, e.g., Cordero-Soto v. Island Finance, Inc.*, 418 F.3d 114, 117–18 (1st Cir. 2005) (affirming trial court's denial of out-of-time motion for extension of time, where failure to seek timely extension was based on counsel's six-day hospitalization for "pulmonary infection and other conditions," followed by 20 days of rest on physician's orders); *Fox Indus., Inc. v. Gurovich*, 2006 WL 941791 * 2 (E.D.N.Y. 2006) (denying out-of-time extension of time even though failure to seek timely extension was due to, *inter alia*, counsel's "recent illness, which involved brain surgery").

Moreover, even assuming (notwithstanding all of the above) that Rockwell's failure to timely seek the extensions of time at issue here were – in some fashion, to some minor degree – attributable to the health of its lead counsel, Rockwell fails to explain why another member of the law firm could not have filed timely motions for

extensions of time. Rockwell itself states that, during lead counsel's illness, "a number of his duties were handled on an emergency basis by the other attorneys in the firm." Pl.'s Supp. Brief at 15; *see also, e.g., Beckles v. City of New York*, 2010 WL 1841714 * 3 (S.D.N.Y. 2010) (denying out-of-time motion for extension of time where, *inter alia*, counsel on medical leave could have "asked a colleague in his office to [file a timely motion for an extension of time] if he was unable to do so"); *Knott v. Atlantic Bingo Supply, Inc.*, 2005 WL 3593743 * 1–2 (D. Md. 2005) (denying out-of-time extension of time where counsel who was "incapacitated due to . . . 'sarcoidosis,' which on occasion required bed rest and treatment by steroids," could have asked a colleague in his office to ensure that process was served, "or in the alternative at least timely seek an extension"); *Turner v. Hudson Transit Lines, Inc.*, 1991 WL 123966 * 3 (S.D.N.Y. 1991) (explaining that counsel claiming "excusable neglect" for failure to file timely motion for extension of time "could have readily arranged for another attorney to cover for him" and such other attorney could have sought timely extension).

Similarly, Rockwell never specifies the exact dates of the consolidation and relocation of its counsel's offices, referring only generally to the "tumult" of May and June 2014. *See generally* Pl.'s Supp. Brief at 15. But, even more to the point, such events ordinarily do not constitute "excusable neglect." *See, e.g., In re Harlow Fay, Inc.*, 993 F.2d 1351, 1352–53 (8th Cir. 1993) (holding that relocation of counsel's offices to another state and reduction of firm's staff not sufficient grounds for "excusable neglect"); *Selph v. Council of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979) (holding that "confusion" and associated disruption of "normal calendaring practices" as result of law firm's relocation of offices not "excusable neglect"), *overruled on other grounds, United Artists Corp. v. La Cage Aux Folles, Inc.*, 771 F.2d 1265 (9th Cir. 1985); *Knox v. Palestine Liberation Organization*, 229 F.R.D. 65, 69 (S.D.N.Y. 2005) (rejecting claim of "excusable neglect," holding that "impending move, though it may have caused 'turmoil and disorganization' . . . does not amount to a factor outside of Defendants' 'reasonable control,' . . . justifying their failure to submit a timely request for an extension of time"). To the same end, the Supreme Court in *Pioneer* "[gave] little weight to the fact that counsel [in *Pioneer*] was experiencing upheaval in his law practice" at the time of the out-of-time filing there at issue, due to counsel's "withdrawal from his former law firm." *See Pioneer*, 507 U.S. at 384, 398.

The busy travel schedules of counsel to Rockwell are an even weaker excuse. *See, e.g. Airline Professionals Ass'n v. ABX Air, Inc.*, 109 F. Supp. 2d 831, 834 (S.D. Ohio 2000) (holding that "[a]n attorney's 'travel schedule' . . . [is a] circumstance[] reasonably anticipated

in the legal profession, and the failure of an attorney to keep track of . . . filing deadlines during a lengthy absence from the office does not constitute excusable neglect"), *aff'd*, 19 Fed Appx. 340 (6th Cir. 2001); *see generally, e.g.*, 1 Moore's Federal Practice § 6.06[3][c], p. 6–45 (explaining, *inter alia*, that counsel's "busy schedule" generally "does not qualify as 'excusable neglect'").[22]

It is also significant that the action that Rockwell and its counsel failed to timely take – the filing of routine, *timely* motions for extensions of time to permit the 11 actions at issue to remain on the Reserve Calendar – "does not require much time or deliberation," particularly by comparison to the time that Rockwell contends the parties were devoting to resolving the substantive merits of those cases. *See, e.g., Baker v. Raulie*, 879 F.2d 1396, 1399–1400 (6th Cir. 1989) (reversing district court's finding of "excusable neglect" where attorney was in trial in another matter from August 22 to September 2 deadline for filing notice of appeal, reasoning that "[h]ere, the notice of appeal contains 37 words. Even if [the] attorney was in trial 12 hours a day continuously from August 22 onwards, he could have found a few minutes sometime before September 2 to draft and deliver to the district court such a simple and important document"); *Pinero Schroeder v. Federal Nat'l Mortgage Ass'n*, 574 F.2d 1117, 1118 (1st Cir. 1978) (rejecting claim of "excusable neglect," emphasizing that "[f]iling a notice of appeal does not require much time or deliberation").

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[22] *See also, e.g., Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1048 (8th Cir. 2010) (explaining that fact that counsel is "occupied with other hearings does not constitute excusable neglect"); *Stonkus v. City of Brockton School Dep't*, 322 F.3d 97, 100–01 (1st Cir. 2003) (holding that counsel's "busyness" does not constitute "excusable neglect"); *United States v. Dumas*, 94 F.3d 286, 289 (7th Cir. 1996) (stating that excusable neglect "requires something more than a simple failure to meet the deadline due to a busy schedule"); *Baker v. Raulie*, 879 F.2d 1396, 1399–1400 (6th Cir. 1989) (reversing ruling of trial court, and holding that, where attorney who was busy with trial in another matter failed to timely file notice of appeal – "a simple and important document," a mere 37 words long – in case at bar, "[t]he attorney's failure . . . may well amount to neglect, but it is not excusable"); *Pinero Schroeder v. Federal Nat'l Mortgage Ass'n*, 574 F.2d 1117, 1118 (1st Cir. 1978) (explaining that "the fact that an attorney is busy on other matters" does not "fall within the definition of excusable neglect," and noting that, indeed, "[m]ost attorneys are busy most of the time and . . . must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences"); *Jones v. Giant of Maryland, LLC*, 2010 WL 3677017 * 7 (D. Md. 2010) (stating that "a heavy caseload or a difficult case" does not constitute "excusable neglect"); *Collins v. Midwest Medical Records Ass'n*, 2009 WL 606219 * 9 (E.D. Wis. 2009) (holding that "the demands of [counsel's] practice" did not constitute grounds for finding of "excusable neglect"); *Eagle Fire, Inc. v. Eagle Integrated Controls, Inc.*, 2006 WL 1720681 * 4–5 (E.D. Va. 2006) (stating that "the busy schedule of [a party's] counsel" does not constitute "excusable neglect"); *DuPont*, 22 CIT at 603, 15 F. Supp. 2d at 862 (holding that "an active practice with conflicting demands on counsel's time does not constitute a showing of excusable neglect").

It is worth noting that, although Rockwell expressly acknowledges in the abstract the primacy of the reason for the delay in filing as a factor in evaluating the existence of "excusable neglect" – including, in particular "whether it [*i.e.*, the delay] was within the reasonable control of the movant" – Rockwell never addresses the "control" issue in the context of the specific facts of these 11 cases. *See Pioneer*, 507 U.S. at 395 (highlighting significance of "the reason for the delay, *including whether it* [*i.e., the delay*] *was within the reasonable control of the movant*") (emphasis added).

Here, it is clear that none of the reasons cited by Rockwell precluded the filing of timely motions for extensions of time. Nothing that the Office of the Clerk of the Court did or did not do precluded Rockwell from filing timely motions for extensions of time. By the same token, because May 27, 2014 was the deadline for filing timely motions for extensions of times, there is nothing about the hospitalization of Rockwell's lead counsel several weeks thereafter that prevented Rockwell from seeking timely extensions of time. Moreover, there is nothing about either the relocation of Rockwell's counsel's offices or the travel schedules of those individuals that can be said to have been beyond their reasonable control, as *Pioneer* used the phrase, and to have prevented Rockwell from timely seeking extensions.

Under these circumstances, the most important of the four *Pioneer* factors – *i.e.*, the reason for Rockwell's delay in seeking an extension of time – weighs decisively against a finding that Rockwell's neglect here is "excusable."

D. *Good Faith*

The last of the four factors specifically identified in *Pioneer* to be considered in determining the existence of "excusable neglect" is "whether the movant acted in good faith" in attempting to fulfill its obligations in a timely fashion. *See Pioneer*, 507 U.S. at 395. As discussed immediately above, courts across the country have identified "the reason for the delay, including whether it [*i.e.*, the delay] was within the reasonable control of the movant" as the single most important factor in an "excusable neglect" analysis. In contrast, "rarely in the decided cases is the absence of good faith at issue." *Silivanch*, 333 F.3d at 366. The egregious facts make this one of those rare cases.

Rockwell argues that its good faith "is evidenced primarily by the amount of work it has done, both internally and with counsel for the Government, in seeking to resolve these [11] technically complex

cases." *See generally* Pl.'s Supp. Brief at 17–18. Rockwell's argument completely misses the mark.

Rockwell's diligence in pressing the merits of its actions may be relevant to the "good cause" showing which is the predicate for a timely extension of time. Here, however, Rockwell seeks an out-of-time extension of time, and the issue instead is whether or not "excusable neglect" exists. As such, the relevant "good faith" inquiry here is whether – although Rockwell obviously did not succeed – Rockwell demonstrated good faith either by taking steps to seek to remove the 11 actions at issue from the Reserve Calendar before the June 23, 2014 deadline for doing so, or by taking steps to seek to extend the time for those actions to remain on the Reserve Calendar before the May 27, 2014 deadline for filing timely motions for extensions of time.[23] There is no evidence to indicate that Rockwell made any effort toward either of these ends. And there is compelling evidence that Rockwell did not.

In one typical type of "excusable neglect" case, "good faith" is not at issue, because the movant's claim is that it was mistaken about some fact or about the operation of some particular rule and thus was working in good faith to meet the wrong (mistaken) deadline. *See, e.g., United States v. $39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929, 932 (W.D. Tex. 2002) (finding that Government acted diligently and in good faith where one-day delay in filing document was attributable to incorrect date-stamp on document, which served as basis for Government's calculation of filing deadline). In other "excusable neglect" cases, "good faith" is not an issue because the movant's claim is that it was working in good faith to meet the (correct) deadline but was unable to do so due to some (assertedly unexpected) development.

In contrast, in this case Rockwell's track record speaks for itself, and it speaks volumes. Not only does Rockwell not even allege (much less proffer any proof) that it took steps in good faith to secure timely extensions of time in the 11 actions at issue, but – indeed – the procedural history of these actions belies any suggestion that Rock-

[23] *See generally, e.g., Morrison v. Anadarko Petroleum Corp.*, 2011 WL 2464178 * 1 (W.D. Okla. 2011) (finding no "excusable neglect" where movant fails to "set forth any reason why she did not move to continue the deadline . . . prior to its expiration"); *Knox v. Palestine Liberation Organization*, 229 F.R.D. at 69 (rejecting claim of "excusable neglect" in absence of showing that "impending move" prevented submission of "a timely request for an extension of time"); *Wilson v. David*, 2010 WL 610714 * 4 (N.D.N.Y. 2010) (rejecting claim of "excusable neglect" where movant experienced technology problems but made no effort to request timely extension of time or to file and serve documents using conventional methods); *Tenenbaum v. Williams*, 907 F. Supp. 606, 612 & n.6 (E.D.N.Y. 1995) (finding no "excusable neglect" where movants failed to show "why they did not request . . . an extension" prior to applicable deadline).

well's practice in general has been to make good faith efforts to track and comply with applicable deadlines. As a practical matter, the exercise of good faith by Rockwell and its counsel in this context *could not* yield the abysmal track record of out-of-time motions for extensions of time that Rockwell has amassed. To the contrary, Rockwell's track record smacks of a blatant disregard for the rules of the court governing actions on a Reserve Calendar.

In *Pioneer*, the Supreme Court laid out the "range of possible explanations for a party's failure to comply with a court-ordered filing deadline":

> At one end of the spectrum, a party may be prevented from complying [with a deadline] by forces beyond its control, such as by an act of God or unforeseeable human intervention. At the other [end of the spectrum], a party simply may choose to flout a deadline. In between lie cases where a party may *choose* to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.

Pioneer, 507 U.S. at 387–88. Clearly these 11 cases are not at the end of the spectrum where a movant is prevented from complying with the applicable deadlines "by forces beyond its control, such as . . . an act of God or unforeseeable human intervention." Nor are these in-between cases, where a movant chooses to miss a deadline for a very good reason "such as to render first aid to an accident victim discovered on the way to the courthouse" or where a movant "misses a deadline through inadvertence, miscalculation, or negligence." According to Rockwell, it was basically oblivious to the applicable deadlines (much as it has ignored such deadlines in these cases so frequently in the past, relying heavily (albeit unreasonably) on the clerk's office staff to monitor the dockets in Rockwell's actions and to alert counsel in the event of impending dismissals). These cases thus fall close to the far end of the spectrum outlined in *Pioneer*, near the parties that have made a choice to flout deadlines.

As this court has previously underscored in *Napp* (which – like the 11 actions at issue here – involved USCIT Rule 83(c), concerning the court clerk's entry of automatic orders of dismissal, dismissing actions on the Reserve Calendar for lack of prosecution):

> [Lawyers] . . . have the duty to protect their clients by ensuring that important filing deadlines are met; they may not follow careless procedures that demonstrate a disregard or ignorance

> of pertinent rules. *The concept of a time limitation for filing is basic*. A court may insist upon compliance with its local rules and it may refuse to set aside a judgment or order . . . even when there is no showing of substantial prejudice. *U.S. v. Proceeds of Sale of 3,888 Pounds Atlantic Sea Scallops*, 857 F.2d 46, 49 (1st Cir. 1988). "Neither ignorance nor carelessness on the part of a litigant or his attorney provides grounds for relief under Rule 60(b)(1)." *Avon Products, Inc. v. United States*, 13 CIT 670, 672 (1989) (citations omitted).

Napp, 22 CIT at 1107 (quoting *Wang Labs., Inc. v. United States*, 16 CIT 468, 472, 793 F. Supp. 1086, 1089 (1992)) (emphasis added).

The deadlines that are established in court rules and court orders must mean something. They must be respected and honored by the parties and they must be enforced by the court, unless, of course, they are extended pursuant to a timely-filed motion. As the Second Circuit has sagely observed in one well-known case, "the legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced – where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar." *Silivanch*, 333 F.3d at 368.

To find Rockwell's neglect here to be "excusable" would serve only to condone the company's continued "carelessness and inattention in practice" and would send a message that other litigants might expect comparable treatment at the hands of the court in the future. *See Graphic Communications Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 8 (1st Cir. 2001). Both would be unwarranted results.

Here – as in one leading Seventh Circuit case – "the rule is crystal clear, the error egregious, [and] the excuses so thin as to leave the lapse not only unexcused but inexplicable." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000) (quoting *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132, 134 (7th Cir. 1996)). In such circumstances, the haunting spectre is of a rapid race to the bottom: "If we were to apply the excusable neglect standard to . . . deem [Rockwell's] neglect excusable in this case, it is hard to fathom the kind of neglect that we would not deem excusable." *See Lowry*, 211 F.3d at 464. Where would it end?

Two principles at the heart of the concept of the rule of law are (1) that rules and laws are applied as they are written, and (2) that rules and laws apply with equal force to all. In the grander scheme of things, the conduct of Rockwell and its counsel is fundamentally

unfair to other practitioners before the Court, who undertake the time, effort, and expense required to scrupulously maintain and monitor their calendars, in order to ensure that they comply with all rules and orders of the Court and meet all deadlines, including those applicable to Reserve Calendar actions. So too the conduct of Rockwell and its counsel places judges and the clerk's office staff in the position of either outright denying relief to Rockwell based on the company's unrepentant, wholesale failure to fulfill even its most basic procedural obligations or, alternatively, swallowing hard, holding their collective noses, and joining Rockwell in diminishing and debasing the rule of law (as the court does here) by granting the requested relief notwithstanding the company's systemic, flagrant, and repeated failures and refusals to comply with court orders and court rules.

It is an untenable situation, and one that cannot continue.

V. *Conclusion*

For the reasons set forth above, Plaintiff's Amended Consent Motion for Leave to File Out of Time, and to Extend Time to Remain on Reserve Calendar is granted as to all 11 captioned actions, with the understanding that great significance is being attached to the Government's representations as to its lack of prejudice (notwithstanding the fact that the greatest weight should be accorded to the reason for a movant's delay), with the understanding that judgment is nevertheless expressly withheld as to whether – balancing all applicable factors and circumstances – Rockwell has made (or could make) the requisite showing of "excusable neglect," and with the understanding that – particularly in light of Plaintiff's history of repeated out-of-time motions in these actions – Rockwell should expect no leniency whatsoever in the future.

A separate order will enter accordingly.

Dated: August 18, 2014
New York, New York

/*s*/ *Delissa A. Ridgway*
DELISSA A. RIDGWAY
JUDGE

Slip Op. 14–120

JMC STEEL GROUP, Plaintiff, ALLIED TUBE AND CONDUIT, WHEATLAND TUBE, and UNITED STATES STEEL CORPORATION, Plaintiff-Intervenors, v. UNITED STATES, Defendant, AL JAZEERA STEEL PRODUCTS CO., SOAG, VIETNAM HAIPHONG HONGYUAN MACHINERY MANUFACTORY CO., LTD., UNIVERSAL TUBE AND PLASTIC INDUSTRIES, LTD., KHK SCAFFOLDING & FORMWORK, LLC, UNIVERSAL TUBE AND PIPE INDUSTRIES, LLC, ZENITH BIRLA (INDIA) LIMITED, AND CONARES METAL SUPPLY LIMITED, Defendant-Intervenors.

Public Version

Before: Mark A. Barnett, Judge
Court No. 13–00022

[The court grants in part and denies in part Plaintiff's and Plaintiff-Intervenors' Motions for Judgment on the Agency Record and remands the determination to the International Trade Commission. On remand, the ITC shall reconsider Plaintiff's argument that the structure of the domestic CWP market precluded domestic producers from providing the ITC the lost sales and revenue information which it sought. The ITC also shall further examine the impact of subject imports on the domestic industry within the context of the business cycle. The Commission may collect additional evidence relevant to these issues and reconsider any aspect of the *Final Determination* which relied upon or took into consideration its prior findings on these issues.]

Dated: October 15, 2014

John R. Magnus, Tradewins LLC, of Washington, DC, for plaintiff.

Roger B. Schagrin, Schagrin Associates, of Washington, DC, argued for plaintiff-intervenor Allied Tube and Conduit. With him on the brief was *John W. Bohn*.

Stephen P. Vaughn, *Robert E. Lighthizer*, *James C. Hecht*, and *Luke A. Meisner*, Skadden, Arps, Slate, Meagher & Flom LLP, of Washington, DC, for plaintiff-intervenor United States Steel Corporation.

Gilbert B. Kaplan, King & Spalding, LLP, of Washington, DC, argued for plaintiff-intervenor Wheatland Tube.

Karl von Schriltz, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, argued for defendant. With him on the brief were *Dominic L. Bianchi*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

David L. Simon, Law offices of David L. Simon, of Washington, DC, for defendant-intervenor Al Jazeera Steel Products Co., SAOG.

Donald B. Cameron, Morris, Manning & Martin LLP, of Washington DC, argued for defendant-intervenors Universal Tube and Plastic Industries, KHK Scaffolding & Formwork, LLC, and Universal Tube and Pipe Industries, LLC. With him on the brief were *Julie C. Mendoza*, *R. Will Planert*, *Brady W. Mills*, *Mary S. Hodgins*, and *Sarah S. Sprinkle*.

Max F. Schutzman, *Ned. H. Marshak*, and *Kavita Mohan*, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for defendant-intervenors Zenith Birla (India) Ltd. and Conares Metal Supply Ltd.

Robert F. Gosselink and *Jonathan M. Freed*, Trade Pacific PLLC, of Washington DC, for defendant-intervenor Vietnam Haiphong Hongyuan Machinery Manufactory Co., Ltd.

Barnett, Judge:

Plaintiff JMC Steel Group ("JMC") and Plaintiff-Intervenors Allied Tube and Conduit ("Allied"), United States Steel Corporation ("U.S. Steel") and Wheatland Tube ("Wheatland") (collectively, "Plaintiffs") move, pursuant to USCIT Rule 56.2, for judgment on the agency record, challenging the United States International Trade Commission's ("ITC" or "Commission") negative final injury determinations in the antidumping and countervailing duty investigations concerning certain circular welded carbon-quality steel pipe ("CWP") from India, Oman, the United Arab Emirates ("UAE"), and Vietnam ("subject imports"), published in *Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Vietnam*, 77 Fed. Reg. 73,674 (ITC Dec. 11, 2012) ("*Final Determination*"), and the accompanying *Views of the Commission*, USITC Pub. 4362, Inv. Nos. 701-TA-482–484 and 731-TA-1191–1194 (Final) (Dec. 2012) ("*Views*").[1] For the reasons stated below, the court grants in part and denies in part Plaintiff's and Plaintiff-Intervenors' motions and remands this case to the ITC.

BACKGROUND

On October 26, 2011, Plaintiffs filed a petition with the ITC, alleging material injury and threat of material injury by reason of dumped and subsidized CWP imports from India, Oman, the UAE, and Vietnam. *See Circular Welded Carbon-Quality Steel Pipe from India, Oman, United Arab Emirates, and Vietnam*, 76 Fed. Reg. 68,208 (ITC Nov. 3, 2011) (initiation of antidumping and countervailing duty investigations). In December 2012, the ITC published its final determination, which examined a period of investigation ("POI") of January 2009 through June 2012. The Commission described CWP as:

> [s]tandard pipe . . . . intended for the low-pressure conveyance of water, steam, natural gas, air, and other liquids and gases in plumbing and heating systems, air conditioning units, automatic sprinkler systems, and other related uses. . . .
>
> Other applications for CWP include light load-bearing or mechanical applications, such as conduit shells, and structural applications in general construction.

[1] All citations to the *Views of the Commission* and to the agency record are to their confidential versions.

Views at 9 (footnotes omitted).[2] The Commission determined that subject imports and the domestic like product are "generally fungible," share the same channels of distribution, have a "reasonable overlap" of competition, and that price is a significant factor in CWP purchasing decisions. *Id.* at 15–16, 20. It found a significant increase in the volume of subject imports during the POI, in absolute terms and relative to domestic consumption and production, but concluded that the increase did not have significant adverse effects on the domestic industry. *Id.* at 29. Although the ITC observed that subject imports "pervasively undersold" the domestic like product by significant margins during the POI, it nevertheless found "no evidence" that subject imports significantly depressed or suppressed prices of the domestic like product. *Id.* at 30–31. The ITC also found that the domestic industry's performance improved in "almost every measure [during the POI] despite the weak recovery in CWP demand" following the 2008 economic crisis and that there was no correlation between subject import volume, market share, and underselling, and domestic industry performance. *Id.* at 43. In a 4–2 vote, the Commission determined that cumulated imports of dumped and subsidized subject imports from India, Oman, and the UAE and dumped subject imports from Vietnam neither caused nor threatened to cause material injury to the domestic industry. *Final Determination*, 77 Fed. Reg. at 73,675; *accord Views* at 50.

Plaintiffs now challenge the *Final Determination* on several grounds. (*See generally* Br. JMC in Supp. Mot. J.A.R. ("JMC Mot."); Mem. in Supp. Mot. J.A.R. of Allied ("Allied Mot."); Mem. in Supp. Mot. Pl. U.S. Steel J.A.R. ("U.S. Steel Mot."); Br. Wheatland in Supp. Mot. J.A.R. ("Wheatland Mot.").) Plaintiffs variously contest, as unsupported by substantial evidence or not in accordance with law, the ITC's findings that (1) there was no correlation between the increase in subject import volume and negative price effects; (2) there was no correlation between the increase in subject import volume and declines in the domestic industry's performance; (3) the closure of two domestic CWP mills did not occur due to subject imports and led to increased capacity at other mills; (4) subject producer capacity did not threaten the domestic industry with material injury; and (5) the domestic industry did not anticipate negative effects from subject imports in the imminent future. They also contest the lawfulness of the ITC's (1) alleged conclusion that negative volume effects alone

[2] The complete descriptions of the domestic like product and the formal scope language involve long, technical descriptions of the subject pipe which is not at issue in this litigation. In lieu of that language, this abbreviated description is provided for brevity and convenience.

could not warrant an affirmative injury determination; (2) alleged failure to take into account the business cycle in its analysis; (3) use of pre-POI data in its analysis; (4) refusal to employ the Commercial Policy Analysis System methodology ("COMPAS model"); and (5) reliance on interim 2011 and 2012 data. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c).

STANDARD OF REVIEW

The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)). It "'requires more than a mere scintilla,'" but "'less than the weight of the evidence.'" *Nucor Corp. v. United States*, 34 CIT __, __, 675 F. Supp. 2d 1340, 1345 (2010) (quoting *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004)). In determining whether substantial evidence supports the ITC's determination, the court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.'" *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). That a plaintiff can point to evidence that detracts from the agency's conclusion or that there is a possibility of drawing two inconsistent conclusions from the evidence does not preclude the agency's finding from being supported by substantial evidence. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933, 936 (Fed. Cir. 1984) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966); *Armstrong Bros. Tool Co. v. United States*, 626 F.2d 168, 170 n.3 (C.C.P.A. 1980)). The court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004) (citation omitted).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of the Commission's interpretation of the antidumping and countervailing duty statutes. *See Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005). First, the court must determine "'whether Congress has directly spoken to the precise question at issue.'" *Heino v. Shinseki*, 683 F.3d 1372, 1377 (Fed. Cir. 2012) (quoting *Chevron*, 467 U.S. at 842). If Congress's intent is clear,

"'that is the end of the matter.'" *Id.* (quoting *Chevron*, 467 U.S. at 842–43). However, "[i]f the statute is silent or ambiguous," the court must determine "whether the agency's action is based on a permissible construction of the statute." *Dominion Res., Inc. v. United States*, 681 F.3d 1313, 1317 (Fed. Cir. 2012) (citing *Chevron*, 467 U.S. at 842–43).

DISCUSSION

Two separate, but parallel, provisions of the Tariff Act of 1930, as amended, provide for the ITC to determine whether a domestic industry is materially injured, or threatened with material injury, by reason of unfairly subsidized or dumped imports. *See* 19 U.S.C. §§ 1671d(b), 1673d(b). The Commission will issue an affirmative determination if it finds "present material injury or a threat thereof" and makes a "finding of causation." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006) (citation and quotation marks omitted). In making a material injury determination, the Commission evaluates "(1) the volume of subject imports; (2) the price effects of subject imports on domestic like products; and (3) the impact of subject imports on the domestic producers of domestic like products." *Id.* (citing 19 U.S.C. § 1677(7)(B)(i)(I)-(III)); *accord GEO Specialty Chems., Inc. v. United States*, Slip Op. 09–13, 2009 WL 424468, at *2 (CIT Feb. 19, 2009). The Commission may also consider "'such other economic factors as are relevant in the determination.'" *Hynix Semiconductor*, 30 CIT at 1210, 431 F. Supp. 2d at 1306 (quoting 19 U.S.C § 1677(7)(B)(ii)).

I. Volume

In performing its volume analysis, the ITC must "'consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.'" *Shandong TTCA Biochemistry Co. v. United States*, 35 CIT __, __, 774 F. Supp. 2d 1317, 1322 (2011) (quoting 19 U.S.C. § 1677(7)(C)(i)).

In its *Views*, the ITC found that the volume of cumulated subject imports grew significantly during the POI, both in absolute terms and relative to apparent domestic consumption and production.[3] *Views* at

[3] Pursuant to 19 U.S.C. § 1677(7)(I), the Commission recognized that the petition filings in this case, as well as "the substantial provisional antidumping and countervailing duty margins" imposed on subject imports from India, partially caused a 28.1 percent decline in subject import volume and a 4.7 point drop in subject import market share between the first halves of 2011 and 2012, primarily because subject imports from India collapsed by 90.9 percent. *Views* at 27 n.127 (citing *Staff Report* at Tables IV-2, IV-10, C-1). Non-subject imports, rather than the domestic industry, gained this vacated market share. The domestic

27. However, the ITC found that the increased imports did not cause significant adverse effects to the domestic industry for several reasons. *Id.* at 28. In part, the Commission found that the 20.0 percent increase in apparent domestic consumption of CWP between 2009 and 2011 permitted the domestic industry to increase domestic shipments by 10.2 percent during the same period, despite the simultaneous increase in subject imports. *Id.* (citing *Staff Report* at Table IV-9).

Most of the arguments that Plaintiffs characterize in their briefs as concerning volume are, in fact, rooted in disagreements over subject imports' impact on the domestic industry. The court therefore will address those issues in the impact section, *infra*. Apart from one legal argument by JMC, there is no dispute over the Commission's volume findings.

A. The ITC Did Not Assume that Negative Volume Effects Alone Cannot Warrant an Affirmative Injury Determination

1. Contentions

JMC argues that the Commission unlawfully based its negative material injury determination on the incorrect premise that volume effects alone cannot lead to an affirmative injury determination. It asks the court to remand and order the Commission to explain whether it interprets the statutory scheme to permit an affirmative injury determination based solely on negative volume effects. (JMC Mot. 13 & nn.6–7.)

2. Analysis

In its *Views*, the Commission found a significant increase in subject import volume and market share, and concluded that the increases did not have significant adverse impacts on the domestic industry because (1) the domestic industry increased its U.S. shipments by 10.2 percent during the POI; (2) the domestic industry's market share from 2009 through 2011 exceeded that of any year between 2000 and 2008; and (3) the increase in subject import volume and market share did not coincide with significant adverse price effects or other adverse impacts on the domestic industry. *Views* at 28–29. Nowhere in its *Views* did the Commission indicate that volume effects could not independently warrant an affirmative injury determination, and

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industry's market share fell from 63.8 percent to 62.7 percent during the period, while non-subject imports' market share rose from 21.5 percent to 27.3 percent. *Id.* (citing *Staff Report* at Table IV-10).

JMC does not identify any place in the record where the ITC made such an assumption. Moreover, the fact that the ITC found a significant increase in subject import volume and market share does not compel an affirmative injury determination. The language of the statute is clear that "[t]he presence or absence of any factor which the Commission is required to evaluate . . . shall not necessarily give decisive guidance with respect to the determination by the Commission of material injury." 19 U.S.C. § 1677(7)(E)(ii).

JMC's request for a remand for the Commission to state whether a particular factual scenario could, by itself, support an injury determination must be rejected. The court will only decide the case before it, without requiring the agency to render any hypothetical or advisory opinions. JMC has failed to identify any legal error in the Commission's consideration of volume. Consequently, the court denies JMC's request to remand the ITC's determination for any further consideration of the legal standard applicable to the agency's volume analysis.

II. Price Effects

To determine the effects of subject imports on U.S. prices of the domestic like product, the Commission inquires: (1) whether there has been "significant price underselling by the imported merchandise as compared with the price of domestic like products" and (2) whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(I)-(II); *accord Shandong TTCA Biochemistry*, 35 CIT at __, 774 F. Supp. 2d at 1326.

In the present case, the ITC employed a correlation analysis to discern the price effects of subject imports. After discussing the fungibility of subject imports and the domestic like product, and the importance of price in CWP purchasing decisions, the Commission examined whether the underselling margins of subject imports led to negative price effects on the domestic like product. *Views* at 30–31. The ITC first turned to average quarterly net U.S. f.o.b. price data, from eleven U.S. producers and twenty-eight importers. *Id.* at 30 (citing *Staff Report* at V-4). After determining the quarterly price averages, the ITC found an average underselling margin for each quarter for each of four selected products. *Id*. (citing *Staff Report* at Table V-6). Examining these quarterly underselling margins, the ITC found that subject imports "pervasively" undersold the domestic like product by significant margins throughout the POI – e.g., in 165 of 191 quarterly comparisons, or 86 percent of the time, at margins

ranging from 1.0 to 50.4 percent. *Id*. (citing *Staff Report* at Table V-6).

The ITC concluded, however, that subject imports did not significantly depress prices of the domestic like product, "because U.S. producer prices for sales of three of the four pricing products were higher in the second quarter of 2012 than in the first quarter of 2009." *Id.* (citing *Staff Report* at Table V-5). It also observed no evidence of significant price suppression, "because domestic producers were able to pass higher costs on to purchasers," as demonstrated by improvements in the domestic industry's ratio of cost of goods sold ("COGS") to net sales and the increase in the margin between the domestic industry's raw material costs per unit and net sales value per unit (the "metal margin"). *Id.* at 31–32 (citing *Staff Report* at Table VI-1). The Commission did not find compelling Allied and Wheatland's claims that they could not fully realize several announced price increases in late 2010 and 2011, reflecting increasing raw material costs, and even experienced some price declines. *Id.* at 31 (citing Allied's Prehr'g Br. 15–16). The ITC further noted an absence of confirmed allegations of lost sales and lost revenue. *Id.* at 32–33 (citing *Staff Report* at V-20–21, Table V-7). From these findings, the ITC concluded that while subject imports significantly undersold the domestic like product, they did not depress or suppress the prices of domestic like product during the period of investigation. *Id*. at 33.

A. The ITC Reasonably Used a Price Correlation Analysis

1. Contentions

JMC, Allied, and Wheatland argue that the ITC should have considered the COMPAS methodology in its assessment of the domestic industry's performance because it better accounts for the impact of subject imports in the context of the business cycle than the price correlation analysis that the agency employed. (JMC Mot. 29–30, 32–33; Allied Mot. 15–17; Wheatland Mot. 8.) They describe the correlation analysis as "inadequate," because it "ignor[es] the interaction of the supply and demand functions of domestic, subject and nonsubject imports . . . and their determinants," rendering its results meaningless. (JMC Mot. 32 n.24 (citation and quotation marks omitted); *see* Allied Mot. 10–11, 14–17; Wheatland Mot. 8.)

2. The Legal Standard for Challenges to the ITC's Choice of Methodology

When evaluating challenges to the ITC's choice of methodology, the court will affirm the chosen methodology as long as it is reasonable. *Shandong TTCA Biochemistry Co.*, 35 CIT at __, 774 F. Supp. 2d at

1327 (citing *U.S. Steel Grp. v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996)); *accord Hynix Semiconductor, Inc.*, 30 CIT at 1210, 1215, 431 F. Supp. 2d at 1306, 1310–11. When presented with a challenge to the Commission's methodology, the court examines "not what methodology [Plaintiff] would prefer, but . . . whether the methodology actually used by the Commission was reasonable." *Shandong TTCA Biochemistry Co.*, 35 CIT at __, 774 F. Supp. 2d at 1329 (citation omitted).

3. Analysis

JMC, Allied, and Wheatland have not demonstrated that the correlation analysis used to assess the effects of subject imports on the domestic industry's performance was unreasonable. A correlation analysis entails tracking subject import trends in relation to trends in the domestic industry's performance, *see Altx, Inc. v. United States*, 26 CIT 709, 729 (2002), and the court has approved its use to assess the price effects of subject imports. *See, e.g.*, *Comm. for Fair Coke Trade v. United States*, 28 CIT 1140, 1168 (2004) (affirming use of correlation analysis to determine whether subject import volumes caused injury to domestic industry); *Altx, Inc.*, 26 CIT at 726–29 (affirming use of correlation analysis to evaluate relationship between increased subject import volume and injury to domestic industry). As explained above, it is not enough for Plaintiffs simply to proffer an alternate methodology, even if that alternate methodology is reasonable and not inconsistent with the statute. Plaintiffs must demonstrate that the ITC could not properly rely on its selected methodology, something they have failed to do. In the absence of any error in the Commission's analysis, the court will not disturb the ITC's use of a price correlation analysis in its determination. *See also Altx, Inc.*, 370 F.3d at 1121 (holding that ITC is not required to use COMPAS model).[4]

B. Substantial Evidence Supports the ITC's Finding of No Correlation Between Subject Imports and Domestic Prices

1. Contentions

JMC asserts that record evidence indicates a correlation between subject import volume and price depression and suppression. (JMC Mot. 24.) It notes that in 2011, the volume of subject imports increased to 206,024 short tons – its highest level during the POI – and

[4] In the course of further examining the impact of subject imports within the context of the business cycle on remand, it is within the discretion of the Commission to determine whether to conduct any further examination of the COMPAS model.

subject import market share rose to 13.9 percent. (JMC Mot. 24.) At the same time, U.S. prices fell for all four pricing products, from the second quarter to the third quarter of 2011, despite increasing demand. (JMC Mot. 24.) According to JMC, these events show that subject imports depressed domestic prices. (JMC Mot. 24.) JMC, Wheatland, and Allied also argue that the ITC's correlation analysis failed to account for the fungibility and high price sensitivity of CWP in its price effects analysis. (Wheatland Mot. 9, 12; Allied Mot. 6–7; *see* JMC Mot. 25–26; Allied Mot. 9.) "If the supply of a commodity [such as CWP] increases, this will tend to cause prices to be lower than they otherwise would; and similarly, if new suppliers enter a market at a lower price, they will tend to cause the market price to decline." (Allied Mot. 6–7; *accord* JMC Mot. 23; Allied Mot. 9.)

Additionally, JMC and Wheatland contend that the fluctuation of the domestic industry's operating margin and the domestic industry's cost-price squeeze in 2010–2011 demonstrated the presence of price suppression. (Wheatland Mot. 13; JMC Mot. 24–25.) For example, the domestic industry's operating margin fell from 16.2 percent in 2009 to 2.3 percent in 2011. By comparison, in 2007, when the domestic market absorbed 700,000 tons of unfairly traded imports from China, the domestic industry's operating margin reached a nadir of only 3.3 percent. According to JMC and Wheatland, the domestic industry's performance could not have collapsed to such a level in 2011 without suffering negative price effects caused by subject imports. (Wheatland Mot. 13; JMC Mot. 25.) Similarly, JMC avers that the inelasticity of domestic CWP demand and the growth of U.S. consumption from 2010 to 2011 should have enabled the domestic industry to increase prices sufficiently to stabilize, or at least reduce, its COGS-to-net sales ratio. (JMC Mot. 24.) However, the ratio increased from 2010 to 2011, demonstrating the presence of negative price effects from subject imports. (JMC Mot. 24.)[5]

2. Analysis

The ITC supported, with substantial evidence, its finding that there was no correlation between the increase in volume of subject imports and any negative price effects on the domestic like product. The ITC

[5] In its brief, Allied notes that the Commission previously has found increased CWP imports to suppress or likely to suppress domestic prices and argues that these determinations compel a similar result here. (Allied Mot. 7 (citing *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, USCIT Pub. 4333, at 14 (June 2012) (Third Review); *Circular Welded Carbon-Quality Steel Pipe from China*, Inv. Nos. 701-TA-447 & 731-TA-1116, USCIT Pub. 4019, at 1518 (July 2008) (Final)).) Because each determination is *sui generis*, previous negative price effects findings from CWP imports by the ITC, particularly in the sunset review context, as discussed *infra*, do not bind the present investigation. *Comm. for Fair Beam Imps. v. United States*, 27 CIT 932, 944 (2003), *aff'd* 95 F. App'x 347 (Fed. Cir. 2004).

used its standard correlation analysis to examine the record for evidence of price depression, price suppression, and any link between subject imports and domestic prices. *See, e.g.*, *Am. Bearing Mfrs. Ass'n v. United States*, 28 CIT 1698, 1709–17, 350 F. Supp. 2d 1100, 1112–19 (2004) (affirming ITC's use of correlation analysis to examine price effects).

In its price depression analysis, the ITC first turned to four pricing products and found that domestic producer prices for three of them increased during the POI. *Views* at 30 (citing *Staff Report* at Table V-5). Although the Commission recognized that domestic prices for Products 3 and 4 declined between the first quarter of 2009 and the last quarter of 2011,[6] it reasoned that the declines did not denote significant price depression because (1) the prices for Product 3 dropped only 5.2 percent, and those for Product 4 by only 1.5 percent, *id.* at 30 n.141 (citing *Staff Report* at Tables V-1–4), and (2) domestic price movements exhibited no relationship to subject import volume trends, *id.* at 30–31 (citing *Staff Report* at Tables IV-10, C-1). For example, the average unit value of the domestic industry's U.S. shipments rose 20.0 percent from 2009 through 2011, from $898 per short ton in 2009, to $978 per short ton in 2010, and $1,078 per short ton in 2011, even as subject import volume and market share increased. *Id.* (citing *Staff Report* at Table C-1). Conversely, the ITC found that the average unit value of the domestic industry's domestic shipments fell from the first half of 2011 to the first half of 2012, from $1,099 per short ton to $1,054 per short ton, although subject import volume and market share also fell "substantially" during the same period. *Id.* at 31 (citing *Staff Report* at Tables IV-10, C-1). The fact that Plaintiffs can point to a correlation in domestic price movements in two select quarters of the POI does not call into question the ITC's analysis of the record covering the POI as a whole.

The Commission likewise found that higher volumes of subject imports did not suppress prices of the domestic like product, because domestic producers were able to pass higher costs on to their purchasers during the POI, as evidenced by the change in the domestic industry's ratio of COGS to net sales and the so-called metal margin. *Id.* at 31–32. The Commission found that the domestic industry's ratio of COGS to net sales improved from 105.1 percent in 2009 to 89.1 percent in 2011, a period during which subject import volume and market share increased. *Id.* at 31 (citing *Staff Report* at Table VI-1). Similarly, the ITC noted that from interim 2011 to interim

[6] A rise in the domestic producer prices for Product 3 between the last quarter of 2011 and the second quarter of 2012 left the domestic producer prices for Product 3 overall higher over the course of the POI. *See Staff Report* at Table V-3.

2012, the COGS ratio worsened from 83.5 percent to 88.7 percent, despite significantly lower subject import volume and market share. *Id.* Likewise, over the course of the POI, the domestic industry's metal margin (the difference between the CWP price and the cost of the metal input) increased from $205 in 2009, to $301 in 2010, $306 in 2011, and $308 in 2012. *Id.* at 32 & n.154 (citing CR *Staff Report* at Table VI-1, Figure V-3). Similarly, during a period of increased subject imports and subject import market share, the domestic industry's ratio of raw material costs to net sales improved, from 78.5 percent in 2009 to 71.2 percent in 2011. *Id.* at 32 (citing *Staff Report* at Table VI-1). On the basis of this evidence, the ITC concluded that the domestic industry's ability to raise CWP prices to compensate for increased hot-rolled steel and zinc costs, which comprised approximately three-quarters of production costs, undermined the case for subject imports' causing significant price suppression.

The court rejects JMC, Wheatland, and Allied's argument for a *per se* rule that a growing volume of subject imports which undersell the domestic like product, in the context of a highly competitive market for a fungible good, necessarily must produce negative price effects.[7] The court has repeatedly held that "underselling combined with increasing import volumes does not 'necessarily indicate[ ] injury due to pricing in cases involving fungible products.'" *Coal. for Pres. of Am. Brake Drum & Rotor Aftermkt. Mfrs. V. United States*, 22 CIT 520, 527–28, 15 F. Supp. 2d 918, 925 (1998) (brackets in original) (quoting *USX Corp. v. United States*, 12 CIT 844, 849, 698 F. Supp. 234, 239 (1988)). Substantial evidence supports the ITC's finding that there is no correlation between subject import underselling and domestic industry prices, and Plaintiffs offer no legal basis for requiring the ITC to adopt or apply a *per se* rule in this case.

C. The ITC's Analysis of Domestic Producers' Lost Revenue and Sales Allegations Lacks Substantial Evidence and is Not in Accordance With Law

1. Contentions

JMC and Allied argue that the Commission did not act in accordance with law when it referred to the absence of confirmed lost sales and revenues to bolster its finding of no negative price effects. Spe-

[7] While Plaintiffs' point is consistent with basic economic theory, the court's standard of review requires the Commission's determination to be based on substantial evidence, not theory. There may be various reasons that the record facts appear inconsistent with economic theory (at least on their face), including distortions caused by government intervention and unfair trade practices; however, it is the role of the Commission, not this court, to weigh those factors and reach a reasoned conclusion. *Usinor*, 28 CIT at 1111, 342 F. Supp. 2d at 1272.

cifically, they allege that the Commission failed to acknowledge that the domestic industry's loss of market share demonstrated the existence of lost sales. (JMC Mot. 20–22; Allied Mot. 12–13.) They assert that "in an investigation of a highly interchangeable product, [such as CWP,] evidence of increasing import volumes and consistent underselling," as the Commission found here, "are evidence of lost sales and revenues due to imports and, more particularly, lost sales due to pricing." (JMC Mot. 21 (citation and quotation marks omitted); *accord* Allied Mot. 12–13.) Moreover, Allied contends that the record contained no confirmed lost sales because "most domestic producer sales are made to distributors, which are generally unable to trace lost sales to imports from a particular source." (Allied Mot. 12 (citation and quotation marks omitted).)

2. Analysis

Neither the statute nor case law obliges the ITC to examine lost sales and revenues in a specific manner. *Celanese Chems., Ltd. v. United States*, 31 CIT 279, 301 (2007) ("[T]here is no statutory provision requiring the Commission to analyze lost sales in a particular manner. The Commission may make such an evaluation on whatever rational basis it chooses." (citation and quotation marks omitted)). During the investigation, six of twelve responding producers reported losing sales to subject imports, and four reported reducing prices or rolling back price increases since 2009 due to subject imports. However, the responding producers did not provide the Commission with the detailed information and purchaser contacts that the ITC considered necessary to investigate and confirm any lost sales and revenue allegations. Instead, the industry claimed that "most domestic producer sales are made to distributors, which are generally unable to trace lost sales to imports from a particular source." *Views* at 33 n.157 (citing *Staff Report* at V-20–21; Hr'g Tr. 28, 94–96, Oct. 27, 2012). Thus, only one non-petitioning domestic producer reported three lost sales allegations, and the ITC could confirm only one of those allegations, which concerned an insignificant volume of CWP. *Id.* at 32–33 (citing *Staff Report* at V-21, Table V-7). The ITC could not confirm any lost revenue allegations. *Id.* at 33 (citing *Staff Report* at V-20).

Although the court has held that in markets with fungible goods, such as CWP, "volume rather than anecdotal evidence may be the best indicator of lost sales," *Granges Metallverken AB v. United States*, 13 CIT 471, 481, 716 F. Supp. 17, 26 (1989) (citations omitted), it has never required the Commission to examine volume *in lieu* of anecdotal evidence for such purposes, as JMC and Allied request. *See Copperweld Corp. v. United States*, 12 CIT 148, 169–70, 682 F. Supp.

552, 572 (1988) (noting lack of any statutory provision requiring ITC to perform any particular type of analysis of lost sales or revenue allegations) (citing *Maine Potato Council*, 9 CIT 293, 302, 613 F. Supp. 1237, 1245 (1985)). Thus, the ITC did not err in its reliance on anecdotal evidence of lost sales or revenues.

Once the Commission decided to rely on anecdotal evidence, however, it was still required to address significant arguments of the parties which impacted the reliability of its reasoning and conclusions. *See, e.g.*, *U.S. Steel Corp. v. United States*, 36 CIT __, __, 856 F. Supp. 2d 1318, 1321 (2012) (citation omitted). Here, Plaintiffs stated that they could not provide the lost sales and revenue information in the form and manner requested by the Commission due to the structure of the domestic CWP market. The Commission, however, rejected the argument and simply found that Plaintiffs failed to provide the requested information. *Views* at 33 n.157. The Commission went on to find that the absence of confirmed lost sales and revenue allegations provided further support for its finding that subject imports neither depressed nor suppressed domestic like product prices. *Id*. at 32–33.

Two separate provisions of the statute govern the Commission's handling of situations such as this. First, 19 U.S.C. §1677m(c) provides that if an interested party notifies the Commission that it is unable to submit the information requested in the requested form and manner, the Commission is to consider the ability of the party to submit the information and may modify its requirements to avoid imposing an unreasonable burden on the party when certain additional requirements are met. In certain cases, the Commission also is required to provide such parties any assistance that is practicable. 19 U.S.C. §1677m(c). The record is ambiguous as to whether domestic interested parties took the necessary steps to properly invoke these provisions and, if so, the extent to which the Commission considered modifying its information requests or otherwise assisting these parties in addressing the questions regarding lost sales and revenue.

Moreover, by treating the lack of confirmed lost sales and revenue as support for its determination, the Commission made an inference adverse to the domestic industry without taking any of the steps required by 19 U.S.C. § 1677e. Subsection (a) of that provision permits the Commission to use the facts otherwise available to reach a determination when necessary information is not available on the record or an interested party has withheld or otherwise failed to provide such information. 19 U.S.C. § 1677e(a). The Commission, however, must first find that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information before the Commission may use an inference that is

adverse to the interests of that party. 19 U.S.C. § 1677e(b). The Commission does not appear to have made any determination that domestic interested parties have failed to cooperate by not acting to the best of their ability in failing to provide lost sales or revenue information in the form and manner requested by the Commission. Accordingly, the court remands this determination to the ITC to reconsider its findings with regard to lost sales and revenue. Upon remand, the Commission may collect additional evidence relevant to this issue and reconsider any aspect of the *Final Determination* which relied upon or took into consideration the Commission's prior findings regarding lost sales and revenue.

III. Impact

In evaluating the impact of subject imports on the domestic industry, the Commission evaluates "all relevant economic factors which have a bearing on the state of the industry," including, but not limited to:

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment,
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (V) in a proceeding under part II of this subtitle [concerning the imposition of antidumping duties], the magnitude of the margin of dumping.

19 U.S.C. § 1677(7)(C)(iii). The ITC must analyze these factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." *Id.*

The ITC initially explained that it had to "analyze domestic industry performance in the context of the severe economic downturn in 2009," which included a 37.5 percent collapse in domestic consumption of CWP, and the following weak economic recovery, particularly in the area of nonresidential construction. *Views* at 33 (citing *Staff Report* at II-14, Figure II-2, Table II-3; Hr'g Tr. 33, 49, 231–32). In this

context, the Commission found that the domestic industry's performance "improved markedly" during the POI in "every measure but market share, capacity, and employment." *Id.* at 34. The ITC highlighted domestic industry improvements in production, capacity utilization, domestic shipments, inventories, hours worked, wages, net sales values, and operating income. *Id.* at 34–36. These trends led the Commission to conclude that the domestic industry's recovery would not have been significantly stronger but for the increase in volume and market share of subject imports, "particularly in light of the continued weak demand conditions and substantial nonsubject import competition that also influenced domestic industry performance." *Id.* at 34 (footnote omitted) (citing *Staff Report* at Tables IV-3, IV-10, App. D).

The ITC also observed no correlation between the domestic industry's performance and subject import market share because, during the POI, "the domestic industry's operating income margin generally improved when subject import market share increased at the industry's expense and weakened when subject import market share either declined . . . or increased at the expense of nonsubject imports." *Id.* at 38–39. The Commission similarly saw no correlation between subject import underselling and the domestic industry's performance. *Id.* at 39.

The Commission examined five domestic plant closures during the POI and found that they did not evidence a causal link between subject imports and injury to the domestic industry. *Id.* at 41. It discussed three plants, owned by Allied, Wheatland, and Leavitt, which closed in 2009 because of the economic downturn. *Id.* at 41–42 (citing *Staff Report* at III-4, Tables III-2, IV-10; Allied's Resps. to Comm'r Questions at A-12). The ITC also observed that the domestic industry invested in "numerous" capacity expansions and enhancements during the POI. *Id.* at 42 (citing *Staff Report* at Table III-2). Taking these findings in the aggregate, the Commission concluded that subject imports had no significant adverse impact on, and did not materially injure, the domestic industry. *Id.* at 43–44.

A. The ITC Did Not Explain How It Accounted for the Effects of the Business Cycle on Industry Performance

1. Contentions

Plaintiffs contend that the Commission did not evaluate material injury "'within the context of the business cycle,'" as required by 19 U.S.C. § 1677(7)(C)(iii), and permitted the broader economic recovery

to "mask" the injurious effects of subject imports on the domestic industry. (Wheatland Mot. 5–7, 11 (quoting 19 U.S.C. § 1677(7)(C)(iii)); *accord* JMC Mot. 27–29; *see* U.S. Steel Mot. 8–10; Allied Mot. 10–11, 14–15.) They contend that because the POI began in 2009, in the worst economic recession since the Great Depression, improvements in the domestic industry's performance during the POI reflected the resurgence of demand accompanying the economic recovery, rather than the domestic industry's overall health. (U.S. Steel Mot. 8–9; *accord* JMC Mot. 26–29; Wheatland Mot. 6–7; Allied Mot. 6–7; *see* Allied Mot. 10.) Thus, if the ITC had taken the business cycle into account, it would have found that "the increase in domestic industry shipments d[id] not indicate the absence of volume-related injury by reason of subject imports" and that "pervasive and significant underselling . . . cause[d] price suppression embodied in the domestic industry's poor operating results." (Wheatland Mot. 7; *see* JMC Mot. 28–29.) Because the ITC allegedly failed to disaggregate the beneficial effects of the economic recovery on the domestic industry from the injury inflicted upon it by the surge of subject imports, Plaintiffs ask the court to remand the *Final Determination* for further analysis.

2. Analysis

When assessing the effects of subject imports on a domestic industry, the ITC must "evaluate all relevant factors which have a bearing on the state of the industry in the United States . . . within the context of the business cycle." 19 U.S.C. § 1677(7)(C)(iii); *accord Timken U.S. Corp. v. United States*, 28 CIT 62, 82, 310 F. Supp. 2d 1327, 1344 (2004). Such factors may include, but are not limited to, domestic consumption and demand conditions, the commodity-like nature of domestic and subject imports, and the capital-intensive nature of the industry. *Hynix Semiconductor, Inc.*, 30 CIT at 1219–20, 431 F. Supp. 2d at 1314. This statutory requirement ensures that positive trends in the business cycle do not mask unfair trading practices. *Id*. at 1226–27, 431 F. Supp. 2d at 1320; *Timken*, 28 CIT at 82, 310 F. Supp. 2d at 1344; *CHR. Bjelland Seafoods A/C v. United States*, 16 CIT 945, 956 (1992).

Although the principle underlying the business cycle requirement seems clear, the statute does not specify how the ITC must frame its determination around it. In prior cases, the court has remanded ITC determinations that did not account for, or provided only conclusory statements addressing, the industry business cycle. *See, e.g.*, *Hynix Semiconductor*, 30 CIT at 1227, 431 F. Supp. 2d at 1320; *USX Corp. v. United States*, 11 CIT 82, 86, 655 F. Supp. 487, 490 (1987) (holding

that mere fact that the industry was lifted out of recession cannot automatically trigger conclusion that foreign imports were not affecting domestic market). By comparison, in *United States Steel Corp. v. United States*, the court found that the ITC substantially incorporated the context of the business cycle into its analysis when it discussed the influence of demand trends and fluctuations in the national economy on the domestic industry's performance. 36 CIT at __, 856 F. Supp. 2d at 1329.

In the present case, the Commission's material injury analysis evaluated the conditions of competition in the industry and found that the economic recession of 2009 significantly depressed domestic consumption of and demand for CWP to a level 37.5 percent below that of 2008. *Views* at 16–17, 33 (citing *Staff Report* at Figures II-1–2, Table C-1). It also found that the subsequent languid recovery in CWP demand levels and the nonresidential construction market contributed to the domestic industry's weak performance after 2009 and throughout the POI. *Id*. at 33 (citing *Staff Report* at II-14, Figures II-1–2, Table II-3; Hr'g Tr. 33, 41, 49, 231–32). In its volume discussion, the ITC included staff reports from previous investigations of CWP imports from non-subject countries after the parties requested that the Commission account for a possible distortion in the POI data as a result of the economic recession of 2009. *Id.* at 29 n.134 (citing Allied's Posthr'g Br. 8; Universal's Resps. to Comm'r Questions 1–4). Using data from these earlier investigations, the ITC found that, despite the low levels of domestic industry market share between 2010 and 2011 as compared to 2009, these levels were still higher than domestic industry market share levels between 2000 and 2008. *Id.* (citing *Staff Report* at Table IV-10) (citations omitted). In its impact analysis, the ITC highlighted that "the domestic industry's performance improved markedly" during the POI, "according to every measure but market share, capacity, and employment." *Id.* at 34. It then stated that, "[a]lthough these improvements occurred relative to a base year in which the industry was battered by recession, we find it significant that nearly every measure of industry performance improved irrespective of trends in subject import volume, market share, and underselling." *Id.* It then declared that it "cannot conclude that the domestic industry's recovery would have been significantly stronger but for the increase in subject import volume and market share." *Id.* (citing *Staff Report* at Tables III-3, IV-10, App. D).

While the Commission referenced the dismal economic conditions that affected the industry at the beginning of the POI, it did not clearly address whether the improvements in "nearly every measure

of industry performance" may appear significant because of the broader economic recovery, thereby masking the injurious impact of subject imports on the domestic industry. *Id*. Without expressly discussing the effects of the economic recovery on the domestic industry and explicitly addressing those effects in contrast to the effects of subject imports, the court cannot assume that the Commission has evaluated all relevant factors having a bearing on the state of the industry "within the context of the business cycle." 19 U.S.C. §1677(7)(C)(iii).

The court recognizes that certain other issues discussed in this opinion (e.g., the use of pre-POI data, *see infra*) could be considered part of the Commission's proper consideration of the business cycle; however, in light of the emphasis placed on the distortive effect of the 2009 economic collapse, it was incumbent upon the Commission to be clear about how it evaluated all relevant factors, particularly in the aftermath of the economic collapse, in the context of the business cycle. The court therefore remands the Commission's determination so that the Commission may explain how it has evaluated the relevant economic factors bearing on the state of the domestic industry within the context of the business cycle. The Commission may make additional determinations, including reconsidering issues otherwise addressed and affirmed in this opinion, as are necessary to account for such explanations.

B. Substantial Evidence Supports the Commission's Finding of No Correlation Between Increased Subject Import Volume and the Domestic Industry's Financial Performance

1. Contentions

JMC and Wheatland contend that the ITC lacked substantial evidence for its finding that there was no correlation between the significant increase in subject import volume and the domestic industry's financial performance. (JMC Mot. 17–19; *see* Wheatland Mot. 10.) According to JMC and Wheatland, the fungibility of, and use of identical distribution channels by, subject imports and the domestic like product *per se* demonstrate a strong correlation between increases in subject import volume and the domestic industry's performance. (JMC Mot. 14–19; *see* Wheatland Mot. 8–11.) To support this assertion, they note that in a 2012 sunset review, the ITC concluded that any increase in CWP subject import volume "'would likely be in substantial part at the domestic industry's expense'" because subject imports are "'good substitutes for the domestic like product, the do-

mestic industry supplies the majority of the U.S. market, and there appear to be no significant market segments in which the domestic industry participates exclusively.'" (JMC Mot. 16 (quoting *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701 TA-253 and 731-TA-132, 252, 271, 273, 532–34, 536, USCIT Pub. 4333 (June 2012) (Third Review) at 45); Wheatland Mot. 8–10 (same).) In more concrete terms, JMC and Wheatland assert that the fact that subject imports were responsible for nearly all the domestic industry's market share losses between 2009 and 2011, and that subject imports captured a greater proportion of the market growth than the domestic industry during the POI, demonstrate a sustained correlation between subject import volume and the domestic industry's performance. (Wheatland Mot. 10–11; *accord* JMC Mot. 16–17.)

2. Analysis

Substantial evidence supports the ITC's finding that there was no correlation between subject imports' increased volume and the domestic industry's performance over the course of the POI. Although subject imports significantly increased their domestic market share at the expense of the domestic like product between 2009 and 2010, when subject imports gained 3.9 percent, and the domestic industry lost 5.6 percent, of the domestic market, the ITC found that the domestic industry's performance improved "according to almost every other measure." *Views* at 38 (citing *Staff Report* at Tables IV-10, C-1). In particular, its operating income margin, swung from a loss equivalent to 15.1 percent of net sales in 2009 to a profit equivalent to 3.5 percent of net sales in 2010. *Id.* (citing *Staff Report* at Table VI-1). By contrast, the ITC observed that between 2010 and 2011, subject imports gained an additional 1.4 percent of domestic market share, but primarily at the expense of nonsubject imports, which lost 1.2 percent of domestic market share. *Id.* (citing *Staff Report* at Table IV-10). Although the domestic industry's market share remained stable from 2010 to 2011, declining only 0.1 percent, its operating income margin fell to 2.3 percent of net sales. *Id.* at 38–39 (citing *Staff Report* at Tables IV-10, VI-1). Then, in the first half of 2011, subject import market share hit a POI high of 14.7 percent, and the domestic industry's market share fell to 63.8 percent.[8] *Id.* At that same time, the domestic industry's operating income reached a POI high of 6.2 percent of net sales, which the ITC considered as further support for a lack of correlation between subject import volume and domestic

[8] Similarly, in the first half of 2012, the domestic industry's operating income margin declined to 2.7 percent of net sales, as subject import market share fell to 10.0 percent. *Views* at 38 (citing *Staff Report* at Tables IV-10, VI-1).

industry performance. *Id.* This record evidence led the Commission to conclude that "the domestic industry's operating income margin generally improved when subject import market share increased at the industry's expense and weakened when subject import market share either declined . . . or increased at the expense of nonsubject imports." *Id.* at 38–39. It therefore reasonably found no correlation between subject import volume and the domestic industry's performance. *See, e.g.*, *Altx, Inc.*, 26 CIT at 726–29 (approving ITC's finding of no correlation between subject import volume and domestic industry performance).

The court rejects JMC and Wheatland's argument that the fungibility of CWP and producers' use of identical distribution channels require the Commission to find a correlation between poor domestic industry performance and increased subject import volume. This court has stated that "[v]olume is normally more significant where fungible goods are involved." *Companhia Paulista de Ferro-Ligas v. United States*, 20 CIT 473, 477 (1996) (citing *USX Corp.*, 11 CIT at 85, 655 F. Supp. at 490 (noting that in price-sensitive industries that produce fungible products, "the impact of seemingly small import volumes . . . is magnified in the marketplace") (citation and quotation marks omitted)); *see Altx, Inc.*, 26 CIT at 718. However, the court also has recognized that the ITC "has the discretion – indeed an obligation – to consider and weigh a number of other pertinent economic and factual criteria, and consider all the facts and circumstances, including the health of the domestic industry," when determining whether subject import volume injured the domestic industry, *SCM Corp. v. United States*, 4 CIT 7, 13, 544 F. Supp. 194, 199 (1982); *accord Am. Spring Wire Corp. v. United States*, 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984) ("'No factor, standing alone, triggers a *per se* rule of material injury.'") (citation omitted), *aff'd* 760 F.2d 249 (Fed. Cir. 1985). The Commission fulfilled this obligation in its analysis when it examined the facts specific to the domestic CWP industry during the POI.

The court also declines to adopt JMC and Wheatland's proposition that subject imports *per se* injure the domestic industry if they capture most of the market share lost by the domestic industry or secure a greater portion of the domestic market's growth than the domestic like product. Market share is one of many aspects of the domestic industry's performance that the Commission must analyze to determine whether the domestic industry is being injured. *See* 19 U.S.C. § 1677(7)(C)(iii); *Citrosuco Paulista, S.A.*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1087–88 (1988). To limit the injury inquiry to market

share patterns would contravene the ITC's statutory mandate in performing its investigations.

Prior ITC determinations with respect to CWP from other countries are of limited relevance. First, each determination is *sui generis*, "involving a unique combination and interaction of many variables, and therefore a prior administrative determination is not legally binding on other reviews before this court." *U.S. Steel Corp. v. United States*, 33 CIT 984, 1003, 637 F. Supp. 2d 1199, 1218 (2009) (citing *Nucor Corp.*, 414 F.3d at 1340). More importantly, the ITC determination to which Plaintiffs cite, *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532–34, 536, USCIT Pub. 4333 (June 2012) (Third Review), is not an injury investigation, but a sunset review, which employs a different standard to justify an affirmative determination. In an injury investigation, such as the determination at bar, "'the Commission determines whether there is *current* material injury by reason of imports of subject merchandise,' or alternatively 'under the threat of material injury standard, the Commission decides whether injury is *imminent*, given the status quo.'" *NSK Corp. v. United States*, 32 CIT 966, 973, 577 F. Supp. 2d 1322, 1332 (2008) (quoting Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209 ("SAA")). In a sunset review, however, "the ITC must engage in an analysis that is prospective, focusing on 'the likely impact in the reasonable [sic] foreseeable future of an important change in the status quo—the revocation of an order or termination of a suspended investigation and the elimination of its restraining effects on volumes and prices of imports.'" *Id.* (quoting SAA at 4209) (citing *Neenah Foundry Co. v. United States*, 25 CIT 702, 709, 155 F. Supp. 2d 766, 772 (2001)). In light of these different standards, the Commission's finding of likelihood of continuation or recurrence of material injury to the domestic industry in the sunset review does not demonstrate that the factors discussed therein must be dispositive with respect to the agency's determination of present material injury (or threat thereof) to the domestic industry in these investigations.

C. The Commission Supported Its Findings on Domestic Industry Plant Closures with Substantial Evidence

1. Contentions

Allied contends that the ITC misinterpreted record evidence concerning Welded Tube of Canada's plant closure in South Carolina and

Allied's plant closure in Pennsylvania in 2012. With respect to Welded Tube's plant, Allied argues that subject imports must have played a role in its closure, because Welded Tube's president ascribed the closure to "[[ ]]" at a time when subject imports had lower prices than nonsubject imports during the POI. (Allied Mot. 18.) Turning to its own mill closure, Allied asserts that the Commission drew the wrong conclusions from JMC's distribution of some of the shuttered plant's equipment to other facilities. Instead of using the equipment to expand production elsewhere, as the ITC found, JMC merely "[[ ]]." (Allied Mot. 19.) JMC therefore did not use the parts to restore capacity, but "[[ ]]." (Allied Mot. 19.)

2. Analysis

The ITC has "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." *U.S. Steel Corp.*, 36 CIT at __, 856 F. Supp. 2d at 1321 (citation and quotation marks omitted). The Commission concluded that it could not ascribe the closure of Welded Tube's plant to subject imports because the firm's president, Butch Mandel, attributed the closure to competition from increased low-priced imports, without differentiating between subject and nonsubject goods, from 2010 onward.[9] *Views* at 41 (quoting Mandel Aff.). The Commission reinforced this conclusion with record evidence that [[,]] and [[ ]] during the POI. *Id.* at 41–42 (citing *Staff Report* at Tables IV-3, IV-10, C-1, App. D). Additionally, the ITC highlighted a contemporaneous trade press article about the plant closure, which reported that a weak CWP market[10] and Welded Tube's desire to consolidate its production in Canada led to the closure. *Id.* at 42 (citing Michael Cowden, *Welded Tube of Canada to Close Mill*, American Metal Market). Although subject imports undersold nonsubject imports in the quarter when Welded Tube shuttered the plant, this fact does not undermine the broader record evidence supporting the ITC's conclusion. Notably, Welded Tube's president stressed that the economic conditions that precipitated the plant's closure had taken their toll for years prior to

[9] Allied's counsel stated, during oral argument, that he had helped Mr. Mandel draft the Affidavit in question. (Hr'g Tr. 28:19–29:4, June 26, 2014.) That the affidavit was partially drafted by counsel experienced in trade litigation and well aware of the difference between "imports" and "subject imports" supports the Commission's careful reading of the affidavit.

[10] Allied correctly notes that the ITC misinterpreted the article as stating that a weak construction market, rather than the CWP market, contributed to the plant closure. *See* Michael Cowden, *Welded Tube of Canada to Close Mill*, American Metal Market. This discrepancy, however, does not undermine the Commission's conclusion that subject imports did not cause the closure.

the shuttering of the plant, not just in that quarter. (*See* Mandel Aff.)

With respect to Allied's plant closure, the Commission recognized that Allied closed its plant "in Pennsylvania due in part to subject import competition," but found that record evidence indicated that JMC acquired the plant in 2012 and "restored at least a portion of the mill's capacity by distributing some of the mill's equipment to other JMC mills." *Views* at 42 (citing *Staff Report* at VI-20; Kurasz Aff.; American Metal Market, *JMC to Buy, Gut, and Shut Atkore Plant*, Mar. 14, 2012). Although the record indicates that JMC "[[ ]]" nothing indicates that JMC used these parts only "[[ ]]" as Allied maintains. (Allied Mot. 19.) Regardless of how the equipment was used, the ITC determined that the effect of the mill's closure, a drop in domestic production capacity of 0.9 percent between interim 2011 and interim 2012, "had little impact on the domestic industry." *Views at* 42 (citing *Staff Report* at Table III3). Consequently, substantial evidence supports the Commission's findings concerning Welded Tube of Canada's plant closure in North Carolina and Allied's plant closure in Pennsylvania and, therefore, the court will not disturb these findings.

D. The Commission Acted Within Its Discretion in Its Use of the Interim 2011 and 2012 Data

1. Contentions

JMC and Wheatland assert that the ITC ignored record statements that the distorting effects of an [[ ]] during the first half of 2011 made the domestic industry's contemporaneous financial results an inconsistent and unreliable indicator of industry trends. (JMC Mot. 30; *accord* Wheatland Mot. 13.) Specifically, because the interim 2011 financial data "[[ ]]" the data made concurrent operating margins appear inordinately strong and, therefore, not indicative of the domestic industry's actual performance. (JMC Mot. 31 (citation and quotation marks omitted); *see* Wheatland Mot. 13–14.)

JMC further avers that the ITC should not have used the subject import market share data for interim 2012, because the data was skewed by the present petition's filing, which the ITC found likely to have contributed to a 90.9 percent collapse in subject imports from India between interim 2011 and interim 2012. (JMC Mot. 19–20.) JMC asserts that this decline more than offset the 38.9 percent increase in subject imports from Oman and 5.7 percent increase from Vietnam during the same period, artificially depressing the volume

and market share of subject imports in interim 2012. (JMC Mot. 20.) Therefore, according to JMC, the ITC's use of this distorted data was improper.

2. Analysis

The ITC has "discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis." *U.S. Steel Corp.*, 36 CIT at __, 856 F. Supp. 2d at 1321 (citation and quotation marks omitted). The ITC found that the interim 2011 data did not [[ ]] as JMC and Wheatland allege. The ITC noted that in 2011, [[ ]], which it could have classified as [[ ]] under the Generally Accepted Accounting Principles. *Views* at 36 & n.177 (citing *Staff Report* at VI-15–16 & n.15). By choosing to treat these items as [[ ]]. *Id.* at 36 (citing *Staff Report* at IV-15–16). Moreover, the record shows that the [[ ]] did not pervasively affect domestic producers' operating income in the first half of 2011. In fact, only [[ ]]. *See Staff Report* at VI-12 n.11, Table VI-2. Tellingly, over half of domestic producers indicated that their "other factory costs" remained stable or increased in the first half of 2011, in comparison with 2010. *See id.* at Table VI-2. Therefore, based on its review of industry-wide data, the Commission had substantial evidence for its finding that the interim 2011 data did not overstate the domestic industry's operating margins. The court, therefore, will not disturb the ITC's use of the interim 2011 data. *See U.S. Steel Corp.*, 36 CIT at __, 856 F. Supp. 2d at 1321.

Regarding the Commission's use of the interim 2012 market share data, 19 U.S.C. § 1677(7)(I) states that:

> [t]he Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation . . . is related to the pendency of the investigation and, if so, the Commission *may* reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury, threat of material injury, or material retardation of the establishment of an industry in the United States.

19 U.S.C. § 1677(7)(I) (emphasis added). This provision requires the ITC to consider whether changes to the industry stem from the pendency of the antidumping or countervailing investigation, but simultaneously grants "the Commission discretion in determining

how to assess post-filing information." *Nucor Corp.*, 414 F.3d at 1341. In these investigations, the Commission recognized that the filing of the petitions had "some effect on subject import volume." *Views* at 27 n.127. Subject import volume fell 28.1 percent between interim 2011 and 2012, and subject import market share declined by 4.7 percentage points over the same period. *Id.* (citing *Staff Report* at Tables IV-2, IV-10, C-1).[11] However, the Commission determined that the petition effects did not warrant discounting the interim 2012 data, because most of the market share was lost by Indian subject imports and was captured by nonsubject imports rather than the domestic industry.[12] *Id.* The statute gives the Commission ample discretion to decide whether to discount evidence due to petition-induced volume changes. In this case, the agency provided a reasonable explanation for its decision not to discount the interim 2012 data, and "it is not the court's place to re-weigh the evidence or to suggest that another alternative was the only appropriate choice." *AWP Indus., Inc.*, 35 CIT __, __, 783 F. Supp. 2d 1266, 1282 (2011); *see* 19 U.S.C. § 1677(7)(I); *U.S. Steel Corp.*, 36 CIT at __, 856 F. Supp. 2d at 1321 (holding that as long as Commission provides "an 'adequate basis in support of [its] choice of evidentiary weight,'" the court "'must defer'") (quoting *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006)).

E. The Commission's Use of Pre-POI Data Was in Accordance with Law

3. Contentions

U.S. Steel and Allied argue that the ITC unlawfully used pre-POI data to discount the importance of the domestic industry's loss of market share during the POI by comparing the domestic industry's 2010 and 2011 market share to 2000 through 2008. (U.S. Steel Mot. 11; *see* Allied Mot. 27.) They contend that the relevant inquiry should have simply been "whether the domestic industry . . . lost market share *as a result of subject imports*." (U.S. Steel Mot. 11 (citation omitted); *accord* Allied Mot. 27 (citing 19 U.S.C. §§ 1671(a)(2)(A)(i), 1673(2)(A)(i)).) U.S. Steel and Allied assert that if the Commission had performed this analysis, it would have concluded that the increase in subject imports' market share occurred at the expense of the domestic industry. (U.S. Steel Mot. 12; *see* Allied Mot. 27.)

[11] Most of this decline came from India, and the ITC attributed part of the decline to the filing of the petition. *Views* at 27 n.127 (citing *Staff Report* at Tables IV-2, IV-10, C-1).

[12] While the domestic industry's market share fell from 63.8 percent in interim 2011 to 62.7 percent in interim 2012, nonsubject import market share rose from 21.5 to 27.3 percent over the same period. *Id.* (citing *Staff Report* at Table IV-10).

Allied also alleges that the Commission arbitrarily chose which pre-POI data to use in its analysis. For example, the Commission did not use pre-POI evidence to explain its analyses finding a lack of correlation between domestic industry performance trends, on one hand, and subject import market share and underselling trends, on the other. (Allied Mot. 25–26.) Likewise, the Commission placed domestic industry performance data from 2000 through 2008 on the record, but did not gather data on subject import performance and pricing over most of this period. U.S. Steel similarly contends that the Commission should have included data from 1999, because it would have shown that the domestic industry market share in 1999 was 72.2 percent. (U.S. Steel Mot. 12–13.)

Allied further argues that, even if it is relevant to compare the domestic industry's POI performance to its pre-POI performance, unfairly traded imports from China and the subject countries during the pre-POI period suppressed the domestic industry's market share, rendering the comparison unreliable. (Allied Mot. 27–28.) According to Allied and U.S. Steel, the ITC's failure to place data on the record for imports from the subject countries for most of the 2000–2008 period precluded the Commission from addressing "the possibility that the industry's seemingly improved market share in the POI reflected reductions in the intensity of competition from both subject imports and unfairly traded imports from China." (Allied Mot. 28; *see* U.S. Steel Mot. 13–15.) Thus, they assert that any conclusion derived from the 2000–2008 data was unsupported by substantial evidence.[13]

2. Analysis

During the present investigations, the parties requested that the Commission examine data from previous investigations and reviews involving CWP. *Views* at 29 n.134 (citing Allied's Posthr'g Br. 8; Universal Resps. to Comm'r Questions 1–4). They indicated that the collapse of CWP demand during the economic recession in 2009 would create a distorted view of the domestic industry's market share during the POI. *Id*. (citing Universal Resps. to Comm'r Questions 1–4); *cf. id.* at 33 (noting that domestic CWP consumption in 2009 was 37.5 percent below 2008.) The ITC agreed that 2009 was a highly aberrational year for the domestic industry, and examined certain ITC staff

[13] Contrary to Allied's contention, the ITC did not extend the POI; instead, it used pre-POI data to provide additional context to its POI market share analysis. *Views* at 29 n.134. Allied erroneously claims that the Commission placed the entire record from previous investigations on the record only two days before the deadline for final comments. The record indicates that the 2000–2008 market share data was introduced on October 17, 2012 at the ITC hearing, twenty-three days before the deadline for final comments to the Commission. (*See* ITC Hr'g Materials Ex. 2 (R. Doc. 2–221).)

reports and investigations from 2000–2008 in its analysis. *Id.* at 29 n.134, 33. These reports and investigations were "similar to the scope of [the present] investigations" and had comparable domestic industry definitions. *Id.* at 29 n.134. After putting 2000–2008 data on the record, the ITC found domestic industry market share levels from 2000 to 2008 were lower than in 2010 and 2011, and determined that the increase in subject import volume during the POI did not negatively affect domestic market share levels. *Id.* at 28–29 (citing *Certain Circular Welded Pipe and Tube from Brazil, India, Korea, Mexico, Taiwan, Thailand, and Turkey*, Inv. Nos. 701-TA-253 and 731-TA-132, 252, 271, 273, 532–34, 536 (Third Review), USITC Pub. 4333 (June 2012); *Circular Welded Nonalloy Steel Pipe From China*, Inv. No. TA-421–6, USITC Pub. 3807 (Oct. 2005) (Excerpts); *Circular Welded Carbon-Quality Steel Pipe from China*, Inv. Nos. 701-TA447 and 731-TA-1116 (Final), USITC Pub. 4019 (July 2008) (Excerpts).

In performing this analysis, the ITC accounted for the possibility that the presence of dumped and subsidized Chinese imports[14] could have artificially depressed pre-POI market share levels and, thereby, made the domestic industry's POI market share appear substantially better than it was.[15] *See id.* at 4–6 (citing *Staff Report* at I-58). In its assessment of CWP imports, the Commission found that China was by far the largest source of imported CWP in the U.S. throughout 2000–2007. *Id*. at 19 (citing *Staff Report* at Table I-1). Although Allied and U.S. Steel argue that the domestic industry share was depressed in the pre-POI by these unfairly traded imports, the Commission found that, after the imposition of antidumping and countervailing duty orders in 2007, CWP imports from China declined 98.4 percent and were "virtually eliminated" from the U.S. market in 2008. *Id.* at 19 n.89 (citing *Staff Report* at IV-9, Table IV-3), 29 n.134 (citation omitted). Therefore, the Commission found that Chinese dumped and subsidized imports did not distort the market share data for 2008 and the domestic producers' market share in 2010 and 2011 exceeded that of 2008.

Allied's argument that the court should remand the ITC's material injury analysis, because the use of pre-POI data was arbitrary, is

[14] The ITC also noted the existence of antidumping duty orders on CWP from Brazil, China, India (for all producers except Zenith Steel Pipes and Industries, Ltd.), Korea, Mexico, Taiwan, Thailand, and Turkey, as well as countervailing duty orders on CWP from China and Turkey. *Views* at 4–6.

[15] From 2000 to 2008, CWP imports from India (specifically from Zenith and Gujarat Steel Tubes Ltd.), Oman, the UAE, and Vietnam were not subject to antidumping or countervailing duty orders. *See Views* at 6. Allied and U.S. Steel provide no legal support, and court has found none, for their argument that the ITC must account for possible market share effects by these non-dumped or non-subsidized imports when evaluating the pre-POI evidence.

without merit. The ITC limited its use of pre-POI data to its volume analysis to provide context for the distorted data due to the economic collapse in 2009. The ITC has discretion to use evidence outside of the POI in its investigations, *see AWP Indus., Inc.*, 35 CIT at __, 783 F. Supp. 2d at 1282, and may reasonably interpret the evidence and use these interpretations to determine the significance of any particular factor in its analysis, *Goss Graphics Sys., Inc. v. United States*, 22 CIT 983, 1008, 33 F. Supp. 2d 1082, 1104 (1998). The Commission has "broad discretion in determining the weight to be accorded to data in its analysis" and was not obligated to use pre-POI data for all of its analyses simply because it used it for one. *See Celanese Chems. Ltd v. United States*, 32 CIT 1250, 1263 (2008), *aff'd* 358 F. App'x 174 (Fed. Cir. 2009).

The court also finds U.S. Steel's contention that the ITC arbitrarily ignored U.S. Steel's data on the domestic industry's market share in 1999 without merit. U.S. Steel failed to exhaust its administrative remedies by not raising this argument before the ITC, and the court declines to consider it in the first instance on appeal. *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (citing *Sharp Corp. v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988)) (holding that when administrative remedies have not been exhausted, "judicial review of administrative action is inappropriate"). Moreover, the data on the domestic industry's market share in 1999 is not in the record, and the ITC is limited to making a determination based only on record evidence. *See, e.g., Fl. Tomato Exch. v. United States*, 38 CIT __, __ , 973 F. Supp. 2d 1334, 1338 (2014); *Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 726, 797 F. Supp. 1020, 1022 (1992). Therefore, the court will not further consider this argument.

IV. Threat of Material Injury

To determine whether subject imports pose a threat of material injury to the domestic industry, the ITC considers the following factors (in relevant part):

> (I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy . . . and whether imports of the subject merchandise are likely to increase,
>
> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products, . . .
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i).

In the *Views of the Commission*, numerous factors led the ITC to find that the domestic industry was not threatened with material injury. The Commission assessed the domestic industry's performance during the POI and observed improved performance levels despite the slow post-recession recovery in demand. *Views* at 45. It also concluded that the significant increases in cumulated subject import volume and market share did not show a likelihood of substantially increased imports. *Id.* The Commission next found that the significant excess capacity in India, Oman, the UAE, and Vietnam did not indicate a likelihood of substantially increased subject imports. *Id.* at 46. The Commission additionally found "it unlikely that subject foreign producers will increase their focus on the U.S. market in the imminent future at the rate they did" during the POI and projected healthy demand growth in India and the Gulf Cooperation Council ("GCC"), creating no incentive for the producers to shift sales. *Id.* at 47 (citing *Staff Report* at Tables IV-2, VII-10, C-1; Universal's Resps. to Comm'r Questions 49–50, 53, Exs. 8, 10; Zenith's Resps. to Comm'r Questions 20, Ex. 5; Al Jazeera's Posthr'g Br. 13). The Commission proceeded to determine that subject import prices would not signifi-

cantly depress or suppress domestic prices, or stimulate import demand, and found that subject import inventories in the United States, India, Oman, the UAE, and Vietnam did not indicate an imminent likelihood of substantially higher subject imports. *Id.* at 48. Finally, the Commission found subject imports "have had no significant actual or potential negative effects on the existing development and production efforts of the domestic industry." *Id*. at 49.

A. Substantial Evidence Supports the ITC's Finding that Excess Capacity Did Not Threaten the Domestic Industry

1. Contentions

JMC and Wheatland challenge the Commission's finding that significant excess subject producer capacity did not indicate a likelihood of substantially increased subject imports in the absence of import relief. (JMC Mot. 33; Wheatland Mot. 15–17.) They point to three principal factors to support this argument: (1) that several subject producers understated their excess CWP capacity in their responses to the ITC,[16] and that subject producers (2) had significant excess capacity and (3) increasing focus on the U.S. market. (JMC Mot. 37.)

Addressing subject producers' export orientation and focus on the U.S. market, JMC and Wheatland claim that the ITC's finding that subject importers from Oman and the UAE would increasingly direct their goods to GCC countries lacks substantial evidentiary support. In their view, record evidence revealed that sales to Omani and Emirati producers' domestic markets fell between 2009 and 2011. (JMC Mot. 35 (citing *Staff Report* at VII-7, 11); *accord* Wheatland Mot. 16–17.) In addition, subject foreign producers voiced concern about their ability to compete in the GCC market due to the presence of unfairly traded CWP from China, India, Turkey, and other countries. (JMC Mot. 35 (citing Allied, JMC, Wheatland Posthr'g Br. A-46, 49–50, Ex. 9); Wheatland Mot. 17.)

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[16] JMC and Wheatland claim that one producer only reported [[ ]] tons of CWP capacity in its preliminary questionnaire response, and [[ ]] tons in its final questionnaire, even though its corporate documentation places the number at 800,000 tons. (JMC Mot. 36 (citing Allied, JMC, Wheatland Posthr'g Br., Ex. 11; ADPICO Foreign Producer Questionnaire at II-4, II-10c); *accord* Wheatland Mot. 16.) They also allege that Al Jazeera reported 300,000 metric tons of capacity in its annual report, while providing the ITC with a figure [[ ]]. (JMC Mot. 36 (citing Allied JMC, Wheatland Posthr'g Br. A-29–30, Ex. 9); Wheatland Mot. 16.) Although Al Jazeera maintained that its capacity constraints stemmed from lack of slitter capacity for hot-rolled coil input, JMC and Wheatland argue that Al Jazeera could easily obtain hot-rolled steel on the world market to boost its CWP output. (JMC Mot. 36; *accord* Wheatland Mot. 16.)

Turning to Vietnam, JMC notes that the Commission received questionnaire responses from subject Vietnamese importers which projected that the [[ ]] percent of total Vietnamese shipments that went to the United States in 2009 would grow to [[ ]] percent in 2013. (JMC Mot. 37 (citing *Staff Report* at VII-17).) According to JMC, Vietnamese subject producers therefore would direct significant excess capacity to the U.S. market. (JMC Mot. 37.) Further, Wheatland asserts that the ITC understated the significance of the "huge amount of capacity available" in subject countries because they relied on data provided only by responsive producers. (Wheatland Mot. 15.)

2. Analysis

Subject producers reported excess capacity of 317,739 short tons in 2009, 266,087 short tons in 2010, and 231,474 short tons in 2011. *Views* at 46 & nn.224–25 (citing Tables IV-10, VII-10). The 2011 figure amounted to 15.6 percent of CWP consumption in the United States in that year. *Id.* at 46 (citing *Staff Report* at Tables IV 10, VII-10). Despite this "substantial" excess capacity, the Commission noted that subject producers did not increase their exports to the United States, during the POI, to a level sufficient to injure the domestic industry. *Id.* It further noted that subject producers had increased their production capacity 2.8 percent between 2009 and 2011, but planned a further increase of only 1.6 percent through 2013. *Id.* at 46–47 (citing *Staff Report* at Tables VII-10). Because the subject imports did not injure the domestic industry during the POI, the Commission concluded that the modest 1.6 percent anticipated capacity expansion did not indicate a likelihood of significantly increased imports of subject merchandise. *Id*. at 47; *see also Celanese Chems., Ltd.*, 31 CIT at 311 ("[E]ven firm evidence of increased capacity does not necessarily imply increased exports to the United States.") (citing *Am. Spring Wire Corp.*, 8 CIT at 28, 590 F. Supp. at 1281).

Plaintiffs' allegations that some responding subject producers underreported their CWP production capacity do not undermine this finding. Plaintiffs argue that one producer initially indicated, in corporate documentation, that it possessed a total capacity of 800,000 tons, but reported to the ITC that it had a capacity of [[ ]] tons and a "practical capacity" of [[ ]] tons. However, the producer had based the 800,000 ton figure on its total electric resistance welded pipe capacity, (*see* Allied Tube Posth'rg Br. Ex. 11), while the figures submitted to the Commission were limited to CWP capacity, (*see* ADPICO Revision to Foreign Producer Questionnaire Resp. 1, II-4, II10c). Plaintiffs' argument that Al Jazeera should have reported a practical capacity of 300,000 metric tons of CWP also is unpersuasive. The ITC cited record evidence demonstrating that Al Jazeera's prac-

tical capacity was more than [[ ]] metric tons lower due to a bottleneck in its CWP slitting capacity. (Hr'g Tr. 191–92; Al Jazeera's Posth'rg Br. 13.) The Commission also found that Al Jazeera was unlikely to expand its capacity because purchasing additional hot-rolled coil inputs to bypass the bottleneck was too costly. *Views* at 48–49 n.235 (citing *Staff Report* at Table VII-3 n.4, VII-8).

The ITC also found it unlikely that subject producers would increase their focus on the U.S. market in the imminent future at a rate similar to that during the POI. *Id*.at 47. Although subject producers increased their focus on the U.S. market during the POI, subject exports to the United States, as a share of total shipments, declined between 2010 and 2011, and the rate of subject import volume increases slowed. *Id*. (citing *Staff Report* at Tables IV-2, VII-10, C-1). The ITC also found that projected demand growth in India and the GCC would lead them to divert excess CWP capacity into their domestic markets and diminish subject producers' incentive to shift more sales toward the United States. *Id*. (citing Universal's Resps. to Comm'r Questions 49–50, 53, Exs. 8, 10; Zenith's Resps. to Comm'r Questions 20, Ex. 5; Al Jazeera's Posthr'g Br. 13).[17] Consequently, the ITC concluded that any capacity increases by subject producers likely would not threaten the domestic industry. *See Nitrogen Solutions Fair Trade Comm. v. United States,* 29 CIT 86, 105, 358 F. Supp. 2d 1314, 1332 (2005) (citing *BIC Corp. v. United States*, 21 CIT 448, 464, 964 F. Supp. 391, 405 (1997) (holding that an "affirmative threat determination requires 'positive evidence tending to show an intention to increase levels of importation'")).

JMC's contention that projections that the percentage of total Vietnamese subject merchandise shipments which are exported to the U.S. would increase from [[ ]] percent in 2009 to [[ ]] percent in 2013, (*Staff Report* at VII-17), does not undermine the Commission's finding of likely negative volume effects because Vietnamese imports accounted for a small percentage of total U.S. apparent consumption during the POI. (*See Staff Report* at Table C-1). Moreover, although only two Vietnamese producers responded to the ITC's questionnaire, the ITC found that these producers accounted for [[ ]] of Vietnamese CWP exports to the United States and, therefore, based its findings on the information available, as is its practice. *Views* at 46

[17] For example, home market shipments by Omani and Emirati producers steadily increased after 2010, despite decreased sales prices in their home markets. *Views* at 47 n.230 (citing Universal Resps. to Comm'r Questions 49–50, 53, Exs. 8, 10; Zenith's Resps. to Comm'r Questions 20, Ex. 5; Al Jazeera's Posthr'g Br. 13). The Commission expected this trend to continue through 2013. *Id*. (citing Universal Resps. to Comm'r Questions 49–50, 53, Exs. 8, 10; Zenith's Resps. to Comm'r Questions 20, Ex. 5; Al Jazeera's Posthr'g Br. 13).

n.224 (citing *Staff Report* at VII-15 n.29). In light of these facts, the Commission properly declined to infer the existence of additional excess capacity and based its analysis on these limited responses. *See* 19 U.S.C. § 1677e(a); *Nitrogen*, 29 CIT at 105, 358 F. Supp. 2d at 1332 (finding that "ITC properly declined to consider possible, but undocumented, excess capacity as evidence of a likely increase in imports," and properly relied on information available).

The Commission also examined inventories of subject merchandise. Although increased inventories "can contribute to future material injury by increasing the volume of the product on the market or by suppressing or depressing prices," *see Companhia Paulista de Ferro-Ligas*, 20 CIT at 485, the ITC did not find that inventories in the present investigation would have such a detrimental effect.[18] From this data, the ITC concluded that subject import inventories in the United States, India, Oman, the UAE, and Vietnam did not indicate an imminent likelihood of substantially greater subject imports. *Views* at 48; *see also Am. Bearing Mfrs. Ass'n*, 28 CIT at 1727, 350 F. Supp. 2d at 1126 ("The authority to make a judgment as to the significance of inventory levels or what level of inventories is considered high or low rests with the ITC.") (citing *Chung Ling Co. v. United States*, 16 CIT 843, 846, 805 F. Supp. 56, 61 (1992)).

B. Substantial Evidence Supports the Commission's Conclusion that Subject Imports Had No Significant Actual or Anticipated Negative Effects on the Domestic Industry's Existing Development and Production Efforts

1. Contentions

JMC and Wheatland challenge the Commission's finding that subject imports had no actual or anticipated significant negative effects on the domestic industry's development and production as unsupported by substantial evidence. (JMC Mot. 38; Wheatland Mot. 18.) They contend that the Commission improperly based its conclusion

[18] Responding subject producers' end-of-period inventories declined, as a share of production and total shipments, from 7.8 percent in 2009 to 7.4 percent in 2011, and remained stable between the first half of 2011 and first half of 2012, at 7.8 and 7.9 percent, respectively. *Views* at 49 (citing *Staff Report* at Table VII-10). The ITC projected subject producers' end-of-period inventories would be 7.1 percent of production and total shipments in 2012, and 6.7 percent in 2013. *Id.* at 49 n.240 (citing to *Staff Report* at VII-10). Further, although the ratio of U.S. importers' end-of-period subject import inventories to subject imports grew from 5.0 percent in 2009, to 6.5 percent in 2010, and 9.1 percent in 2011, and was 6.1 percent in the first half of 2011 and 5.6 percent in the first half of 2012, *see id*. at 48 (citing *Staff Report* at Table VII11), they were equivalent to only 1.1 percent of domestic consumption in the latter half of 2012, *see id*. at 48 & n.235 (citing *Staff Report* at Tables IV-10, VII-11).

on the fact that only two responding producers, which accounted for a majority of domestic production in 2011, anticipated negative effects on production operations from subject imports absent relief, even though nine respondents reported that they anticipatednegative effects in general.[19] They also assert that the Commission should have weighted each domestic producer's response in accordance with its production capabilities. (JMC Mot. 39; Wheatland Mot. 18.) Reweighing would show that [[ ]][20] responding domestic producers, accounting for [[ ]] percent of domestic production in 2011, anticipated negative effects from subject imports. (JMC Mot. 38 (citing JMC Mot. Ex. 1), 40 (detailing various firms' responses); Wheatland Mot. 18.) Conversely, only three domestic producers, with [[ ]] percent of U.S. production in 2011, anticipated no negative effects. (JMC Mot. 38.)

2. Analysis

The Commission found that six of fifteen responding domestic producers reported actual negative effects from subject import competition and that only three of those producers reported actual negative effects on their production operations and investments. *Views* at 49–50 (citing *Staff Report* at VI-20–22). While nine of fourteen responding domestic producers reported anticipating negative effects from subject imports absent relief, the Commission found that only two[21] of this group reported anticipated negative effects on their production operations and investments. *Id.* (citing *Staff Report* at VI-20–22). These responses, in conjunction with the domestic industry's stable capital expenditures over the POI and domestic producers' "numerous investments to modernize and enhance their capacity," provided substantial evidence to support the ITC's conclusion

[19] As JMC points out, it appears that the ITC mistakenly indicated that [[ ]] did not report anticipated negative effects from subject imports. *Compare Staff Report* at VI-21, *with* JMC Mot. 38 & n.28, Ex. 1 at 1. If [[ ]] were included as reporting anticipated negative effects, ten domestic producers would have offered affirmative responses.

[20] The parties repeatedly refer to fifteen responding domestic producers. However, record evidence indicates that, while fifteen domestic producers responded to the Commission's inquires about actual negative effects, fourteen responded to the inquiries concerning anticipated negative effects. *See Staff Report* at VI-20–22.

[21] JMC contends that seven additional domestic producers' responses "explicitly or by necessary implication" indicated anticipated negative effects on production operations. (JMC Mot. 40.) After reviewing these responses, the court finds that they are sufficiently ambiguous as to whether they imply anticipated negative effects on production operations that the court will not disturb the Commission's reasonable interpretation of the record evidence. *See Nucor Corp. v. United States*, 28 CIT 188, 232, 318 F. Supp. 2d 1207, 1246 (2004), *aff'd* 414 F.3d 1131; *see Matsushita Elec. Indus. Co.*, 750 F.2d at 933, 936; *Armstrong Bros. Tool Co.*, 626 F.2d at 170 n.3.

that there is "little evidence" that subject imports would likely impede domestic producers from making needed capital investments in the imminent future. *Id.* at 50 (citing *Staff Report* at III-11–12, Table III-2).

Because the Commission's domestic producer poll sought to obtain a qualitative, rather than quantitative, assessment of future CWP market conditions, and because CWP are fungible goods, the Commission "s[aw] no reason that the responses should be weighted based on the size of the producer." *Id.* at 50 n.242. Particularly in light of the fact that domestic producers could respond to the ITC's questionnaire only affirmatively or negatively, and that the ITC could not assess the extent of the respondents' anticipated negative effects, the ITC reasonably chose not to weigh producers' responses according to their production levels. *See Comm. for Fair Beam Imps. v. United States*, 27 CIT 932, 949 (2003) (holding that when statute does not establish method by which ITC must perform analysis, "the court must defer to reasonable and factually supported applications of the ITC's methods"), *aff'd* 95 F. App'x 347 (Fed. Cir. 2004); *see also* 19 U.S.C. § 1677(7)(F)(i)(VIII) (requiring ITC to examine "the actual and potential negative effects on the existing development and production efforts of the domestic industry," but not prescribing method by which to perform analysis). For these reasons, the court rejects the Plaintiffs' claim and finds that substantial evidence supports the Commission's determinations with respect to actual or anticipated negative effects on the domestic industry's existing development and production efforts.

CONCLUSION

For the reasons provided above, the court grants in part and denies in part Plaintiff's and Plaintiff-Intervenors' Motions for Judgment on the Agency Record and remands the *Final Determination* to the International Trade Commission for further proceedings in accordance with this opinion. On remand, the ITC shall reconsider its findings with regard to lost sales and revenue, taking into account Plaintiffs' argument that the structure of the domestic CWP market precludes Plaintiffs from providing the ITC the lost sales and revenue information in the form and manner in which it was sought. The ITC also shall explain how it has evaluated the impact of subject imports on the domestic industry within the context of the business cycle. The Commission, in its discretion, may collect additional evidence relevant to these remanded issues. While the court has considered and affirmed other aspects of the Commission's determination in this opinion, based on the existing record, these affirmations do not pre-

clude the Commission from reconsidering any aspect of the *Final Determination* which relied upon or took into consideration its prior findings on the remanded issues. A separate order will follow.

Dated: October 15, 2014
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, JUDGE

Slip Op. 14–124

PUERTO RICO TOWING & BARGE CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A Restani, Judge
Court No. 11–00438

[Motion to alter or amend judgment denied.]

Dated: October 24, 2014

Peter S. Herrick, Peter S. Herrick, P.A., of St. Petersburg, FL, for plaintiff.

Jason M. Kenner, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Michael W. Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

OPINION

Restani, Judge:

Plaintiff Puerto Rico Towing & Barge Co. ("PR Towing") requests the court to grant a motion to reconsider and alter or amend the judgment entered July 10, 2014, pursuant to USCIT Rule 59(e). "The major grounds justifying a grant of a motion to reconsider a judgment are an intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *Ford Motor Co. v. United States*, 30 CIT 1587, 1588 (2006). "The decision to grant a motion for rehearing rests in the sound discretion of the Court." *Xerox Corp. v. United States*, 20 CIT 823, 823 (1996). PR Towing alleges factual and legal errors that purportedly require the court to grant its motion.

First, PR Towing alleges that the court made a factual error in finding that the December 12, 2007, letter did not include 1) the name and address of the importer of record, 2) the date of entry, and 3) an adequate, specific description of the repairs, along with support for

claiming each as exempt from duty. Pl.'s Mot. to Alter or Amend J. and Mem. of Law in Supp. of the Mot. 1–3, ECF No. 42 ("Pl.'s Mot."). PR Towing's arguments, however, are unconvincing. As the Defendant notes in its memorandum in opposition, PR Towing essentially argues "that each of these facts could have been determined from the December 12th letter because that letter included references to other documents containing this information." Def.'s Mem. in Opp'n to Pl.'s Mot. to Alter or Amend the Ct.'s Op. 2, ECF No. 44 ("Def. Resp."). PR Towing, however, fails to offer any legal support for the argument that simple reference to other documents containing the necessary information meets the statutory requirement that the protest state "distinctly and specifically" the information required. *See* 19 U.S.C § 1514(c)(1) (2013). PR Towing failed to meet the statutory requirements of a protest and, therefore, failed to file a timely protest.

Second, PR Towing argues that the court legally erred in determining that the December 12, 2007, letter was not a protest because "the language of the letters [made] it abundantly clear that PR Towing intended to contest the denial by Customs of its application for relief." Pl.'s Mot. 3. To support this point, PR Towing asserts that the inclusion of the word "protest" has not been required by courts and courts have read purported protests liberally to constitute actual protests. *Id.* at 4–6. According to PR Towing, the absence of "protest" from the December letters is not fatal to its claim and the court should liberally construe the letters to constitute an actual protest. *Id.*

PR Towing ignores the fact that the December 12 and December 17 letters indicated that they were not treated by PR Towing as protests, an important point in the court's ruling. *Puerto Rico Towing & Barge Co. v. United States*, Slip Op. 14–80, 2014 Ct. Int'l. Trade LEXIS 80, *15–16 (CIT July 10, 2014). Taking into account the additional letters sent, which PR Towing ignores, it is clear that PR Towing "never intended [the letters] to serve as protests within the meaning of § 1514." *Id.* at *15 The additional letters indicate that PR Towing was contemplating filing a protest in the future. *See id.* at *15–16. The letters illustrate PR Towing's attempt to arrive at a solution with Customs that did not require the costly process of filing a protest. *See id.* PR Towing cannot assert credibly now that its initial letter was a protest when all evidence clearly indicates that the letter was not intended to serve as a protest. Further, the letter itself is missing information mandated by statute and regulation, which is fatal to PR Towing's claim.

Third, PR Towing asserts the court erred when it found that assuming arguendo the December letters constituted protests, the summons commencing the action was untimely. Pl.'s Mot. 6. It is not

necessary to decide this issue because the court concluded that the December letters were not protests. Further, additional attention to this non-dispositive issue would violate a basic principle of rehearing. *See United States v. Matthews*, 32 CIT 1087, 1089, 580 F. Supp. 2d 1347, 1349 (2008) ("[A]rguments raised for the first time on rehearing are not properly before the court for consideration when prior opportunity existed . . . for the moving party to have adequately made its position known" (internal quotation marks omitted)). Here, PR Towing had an opportunity to address this issue in its response to the Defendant's motion to dismiss. *See* Def.'s Mem. in supp. of its Mot. to Dismiss 7 n.5, ECF No. 25. PR Towing chose not to address the issue. *See* Mem. in Opp'n to Def.'s Mot. to Dismiss, ECF No. 32. "The purpose of a rehearing is to correct instances in which there was a 'significant flaw' in the original proceedings, not to allow a losing party the chance to repeat arguments or to relitigate issues previously before the court." *Matthews*, 23 CIT at 1089, 580 F. Supp. 2d at 1349. PR Towing's argument is too little too late.

For the forgoing reasons, PR Towing's motion to alter or amend the judgment is DENIED.

Dated: October 24, 2014
New York, New York

/s/ Jane A. Restani

JANE A. RESTANI
JUDGE

Slip Op. 14–125

LIFESTYLE ENTERPRISE, INC., EMERALD HOME FURNISHINGS, LLC, and RON'S WAREHOUSE FURNITURE D/B/A VINEYARD FURNITURE INTERNATIONAL LLC, Plaintiffs, and DREAM ROOMS FURNITURE (SHANGHAI) CO., LTD. and GUANGDONG YIHUA TIMBER INDUSTRY CO., LTD., Consolidated Plaintiffs, ORIENT INTERNATIONAL HOLDING SHANGHAI FOREIGN TRADE CO., LTD., Intervenor Plaintiff, v. UNITED STATES and UNITED STATES DEPARTMENT OF COMMERCE, Defendants, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE and VAUGHAN-BASSETT FURNITURE COMPANY, INC., Intervenor Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00378

Judgment

RESTANI, Judge:

The parties agree that in its Final Results of Redetermination Pursuant to Fourth Remand, ECF No. 239 ("*Fourth Remand Results*"), the United States Department of Commerce complied with the court's fourth remand order and the *Fourth Remand Results* are consistent with the opinion of the U.S. Court of Appeals for the Federal Circuit in *Lifestyle Enterprise, Inc. v. United States*, 751 F.3d 1371 (Fed. Cir. 2014). Accordingly the *Fourth Remand Results* are SUSTAINED.

Dated: October 28, 2014
New York, New York

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