U.S. Court of International Trade

Slip Op. 15–79

RUBBERMAID COMMERCIAL PRODUCTS LLC, Plaintiff, v. UNITED STATES, Defendant.

Court No. 11–00463

[Sustaining Commerce's remand results revising interpretation of exclusions from scope of antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China]

Dated: July 22, 2015

Daniel J. Cannistra and *Alexander H. Schaefer*, Crowell & Moring LLP, of Washington, D.C., for Plaintiff.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant. With her on the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, and *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director, Commercial Litigation Branch. Of counsel on the brief was *Jessica M. Link*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Rubbermaid Commercial Products LLC ("Rubbermaid") – a U.S. importer of certain cleaning system components – contested the determination of the U.S. Department of Commerce ("Commerce") that 13 of the company's products were within the scope of the antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China. *See* Final Scope Ruling on Certain Cleaning System Components (Oct. 25, 2011) ("Scope Ruling"); Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order, 76 Fed. Reg. 30,650 (May 26, 2011) ("Antidumping Duty Order"); Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order, 76 Fed. Reg. 30,653 (May 26, 2011) ("Countervailing Duty Order").

Each of the 13 Rubbermaid products at issue consists of one or more aluminum extrusions, along with other components. The products include a variety of mop frames and handles, as well as mopping kits. The mop frames and handles are specially designed to be inter-

changeable, and feature swiveling mounts that allow users to connect any mop frame, for instance, to any handle in Rubbermaid's cleaning system. The products' interchangeable design also gives users the ability to attach a variety of damp or dry mops and cleaning cloths to any frame.

Rubbermaid argued that its 13 products should be excluded from the coverage of the Antidumping and Countervailing Duty Orders based on language defining the scope of the Orders to exclude "finished merchandise" and "finished goods kits." The Orders state:

> The scope . . . excludes *finished merchandise* containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels. The scope also excludes finished goods containing aluminum extrusions that are entered unassembled in a "*finished goods kit*." A finished goods kit is understood to mean a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, such as cutting or punching, and is assembled "as is" into a finished product. An imported product will not be considered a "finished goods kit" and therefore excluded from the scope of the investigation merely by including fasteners such as screws, bolts, *etc.* in the packaging with an aluminum extrusion product.

Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphases added); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (emphases added).

In sum and substance, Commerce's Scope Ruling stated that the bulk of the Rubbermaid products at issue (*i.e.*, the mop frames and handles)[1] were no different from the retractable awnings and the baluster kits that the agency had previously ruled to be within the scope of the Orders. *See generally* Scope Ruling at 9 (discussing Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Aluminum Extrusions from the People's Republic of China at 27–28 (Comment 3.H) (April 4, 2011) ("Baluster Kits Scope Determination"); Final Scope Ruling on Certain Retractable Awning Mechanisms (Oct. 14, 2011) ("Retractable Awnings Scope Ruling")).

[1] Rubbermaid's mop frames and handles were entered into the United States as fully assembled merchandise, but the mopping kits were not. Rubbermaid therefore argued that the mop frames and handles were subject to the "finished merchandise" exclusion, and that the mopping kits were subject to the exclusion for "finished goods kits."

Commerce's Scope Ruling here explained that, in its Retractable Awnings Scope Ruling, the agency concluded that imported awnings "lacked the integral components necessary to assemble full and complete finished goods kits" because they did not include the fabric covers, and, thus, the awnings "did not constitute a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good." *See* Scope Ruling at 9 (quoting Retractable Awnings Scope Ruling). The Scope Ruling here also noted that Commerce had similarly concluded that baluster kits "were within the scope of the Order[s] because they represented a 'packaged collection of individual parts, which comprised a single element of a railing or deck system, and, therefore, did not represent a finished product.'" *Id*. (quoting Baluster Kits Scope Determination).

The Scope Ruling further stated that, like the retractable awnings and the baluster kits, Rubbermaid's products are designed to function only when used in conjunction with other products (here, mop heads) that are not included at the time of importation. *See* Scope Ruling at 9. The Scope Ruling therefore concluded that the Rubbermaid merchandise at issue did not constitute "finished merchandise" and thus did not satisfy the criteria for the "finished merchandise" exclusion. *Id*.

As to Rubbermaid's mopping kits, the Scope Ruling similarly stated that a complete mopping kit would require inclusion of a mop head. Scope Ruling at 9. Because the mopping kits lack the interchangeable, disposable mop heads at the time of importation, the Scope Ruling concluded that the mopping kits did not constitute "finished goods kits" and thus fell within the scope of the Orders. *Id*.

Rubbermaid prevailed on its Motion for Judgment on the Agency Record challenging the Scope Ruling, and this matter was remanded to Commerce for further consideration. *See generally Rubbermaid Commercial Products LLC v. United States*, 38 CIT ____, 2014 WL 4723733 (2014). Now pending are Commerce's Final Results of Redetermination Pursuant to Court Remand, and the parties' comments on those results. *See generally* Final Results of Redetermination Pursuant to Court Remand ("Remand Results"); Comments on Results of Redetermination ("Pl.'s Comments on Remand Results"); Defendant's Response to Plaintiff's Comments on the Remand Redetermination ("Def.'s Response to Pl.'s Comments on Remand Results").

In the Remand Results, Commerce "clarified [the agency's] interpretation of the exclusion[s] . . . for 'finished merchandise' and 'finished goods kits.'" Remand Results at 13. Based on those clarifications, the Remand Results concluded that all of the Rubbermaid

merchandise falls within one or the other of the two exclusions and is therefore beyond the scope of the Antidumping and Countervailing Duty Orders. *See id*. at 2, 14–15, 16–17, 24, 28; *see also id*. at 11–12 (summarizing Draft Remand Results).

For the reasons summarized below, the Remand Results must be sustained.

Overview and Analysis

As to the mop frames and handles, *Rubbermaid* concluded, *inter alia*, that the Scope Ruling failed to adequately explain Commerce's determination that – because they are designed to function in conjunction with other products (not included at the time of importation) to form a complete cleaning device – the mop frames and handles did not fall within the "finished merchandise" exclusion. *Rubbermaid*, 38 CIT at ____, 2014 WL 4723733 * 9–10. In particular, *Rubbermaid* noted that the Scope Ruling did not address why the fact that the mop frames and handles must work in conjunction with other goods precluded the mop frames and handles from falling within the finished merchandise exclusion, when each of the exemplars of "finished merchandise" listed in the Orders – such as "finished windows with glass" and "doors with glass or vinyl" – also must work in conjunction with other goods in order to fulfill its intended function. *Id*., 38 CIT at ____, 2014 WL 4723733 * 9–10. Commerce was therefore directed on remand to reconsider its analysis of the finished merchandise exclusion and its application to products that are designed to work in conjunction with other goods. *Id*., 38 CIT at ____, 2014 WL 4723733 * 10. Commerce was also instructed to give further consideration to Rubbermaid's argument distinguishing "finished goods" (which are excluded from the Orders) from "intermediate goods" (which are within the scope of the Orders). *Id*., 38 CIT at ____, 2014 WL 4723733 * 10–11.

In addition, *Rubbermaid* directed Commerce to reconsider the line drawn by the agency between merchandise that is permanently assembled and merchandise that is specifically designed to be adaptable, interchangeable, and replaceable/disposable, in light of the agency's Banner Stands Scope Ruling and its EZ Fabric Wall Systems Scope Ruling. *Rubbermaid*, 38 CIT at ____, 2014 WL 4723733 * 12–14 (discussing Final Scope Ruling on Banner Stands and Back Wall Kits (Oct. 19, 2011) ("Banner Stands Scope Ruling"); Final Scope Ruling on EZ Fabric Wall Systems (Nov. 9, 2011) ("EZ Fabric Wall Systems Scope Ruling")).

With respect to the mopping kits, *Rubbermaid* similarly ordered Commerce to reconsider its interpretation of the exclusion for "finished goods kits," taking the Banner Stands Scope Ruling and the EZ Fabric Wall Systems Scope Ruling into account. *Rubbermaid*, 38 CIT at ____, 2014 WL 4723733 * 15–17.

A. *The "Finished Merchandise" Exclusion*

In analyzing whether Rubbermaid's mop frames and handles constitute "finished merchandise" for purposes of the "finished merchandise" exclusion, Commerce on remand focused first on the language defining the scope of the Orders which describes finished merchandise as "containing *aluminum extrusions as parts*. . . ." *See* Remand Results at 13 (quoting Antidumping Duty Order, 76 Fed. Reg. at 30,651 (emphasis added); Countervailing Duty Order, 76 Fed. Reg. at 30,654 (emphasis added)). The Remand Results interpreted the italicized language to mean that – to be excluded from the scope of the Orders as "finished merchandise" – a product must "contain aluminum extrusions 'as parts' plus an additional non-extruded aluminum component." Remand Results at 13.[2]

[2] Throughout the Remand Results, Commerce placed great emphasis on this asserted requirement that merchandise must contain some component made of a material other than extruded aluminum in order to be covered by either the "finished merchandise" exclusion or the exclusion for "finished goods kits." *See, e.g.*, Remand Results at 11, 13, 14, 18, 19 (discussing "finished merchandise" exclusion); *id*. at 11, 15–16, 18 (discussing exclusion for "finished goods kits").

In the context of the finished merchandise exclusion, Commerce argued that, absent such a requirement, "this specific language [*i.e.*, the phrase "as parts"] would be read out of the [language defining the scope of the Orders], resulting in the phrase 'containing aluminum extrusions that are fully and permanently assembled and completed at the time of entry.'" Remand Results at 13. Commerce continued: "Thus, to give effect to this 'as parts' language, . . . to qualify for the finished merchandise exclusion[,] the product must contain aluminum extrusions as parts, and therefore must include some non-extruded aluminum component." *Id*. Commerce added that its interpretation "is supported by the illustrative examples of 'finished merchandise' contained in the [language describing the scope of the Orders], all of which contain extruded and non-extruded aluminum components (finished windows with glass, doors with glass or vinyl, etc.)." *Id*. Commerce further stated that "those products specifically included in the Orders, such as window frames and door frames, do not constitute finished merchandise because they cannot be considered to 'contain[] aluminum extrusions *as parts* that are fully and permanently assembled and completed at the time of entry.' Rather, the in-scope window frames and door frames are *the only parts* of the product." *Id*. at 13–14.

There is room for doubt as to the soundness of Commerce's reasoning on this point. *See generally*, *e.g.*, *Meridian Products, LLC v. United States*, 39 CIT ____, 2015 WL 3853684 (2015) (addressing claim that imported refrigerator/freezer trim kit – consisting of aluminum extrusions, as well as brackets, screws, hinge covers, a hexagonal wrench andinstallation kit, and a booklet of assembly instructions (all of which were made of materials other than aluminum extrusions) – is excluded from scope of Orders by exclusion for "finished

goods kits"); *Plasticoid Mfg. Inc. v. United States*, 38 CIT ____, 28 F. Supp. 3d 1352 (2014) (addressing claim that "cutting and marking straight edge" used in drafting and cutting applications in industry and the arts, which consists of a single hollow aluminum extrusion, is excluded from scope of Orders by "finished merchandise" exclusion).

The gravamen of Commerce's position is that, because the finished merchandise exclusion refers to merchandise that "contain[s] aluminum extrusions as parts," merchandise can be covered by that exclusion only if the merchandise is made up of parts that are aluminum extrusions as well as parts that are not. But, at least at first blush, such a reading seems to be clearly at odds with the plain meaning of the word "parts." There is nothing in the definition of the word "parts" that inherently goes to the *material composition* of the "parts" (much less requires that "parts" must be made of at least two *different* materials). A product can be made entirely of plastic "parts."

To the extent that Commerce asserts that it is necessary for the agency to re-define the word "parts" in order to give effect to other text in the language describing the scope of the Orders, it is worth noting that any such problems are of Commerce's own making (since, as a practical matter, Commerce and petitioning domestic industries generally work in concert to define the scope of antidumping and countervailing duty orders). *See generally*, *e.g.*, *Plasticoid*, 38 CIT at ____ n.11, 28 F. Supp. 3d at 1364 n.11 (and authorities cited there) (highlighting interplay between Commerce and petitioners in defining scope of draft orders, and emphasizing that, "in exercising [Commerce's] authority to define or clarify [the] scope of [an] order[,] [the] agency must do so 'in a manner which reflects the intent of the petition'" (quoting Retractable Awnings Scope Ruling at 5 n.6)); *see also*, *e.g.*, *Fedmet Resources Corp. v. United States*, 755 F.3d 912, 921 (Fed. Cir. 2014) (emphasizing that "[a] petitioner has an obligation to be explicit and precise in its definition of the scope of the petition").

In addition, a fundamental tenet of interpretation is the principle of *contra proferentum*– that is, that any ambiguities are to be construed against the drafter (here, the petitioning domestic industry and Commerce). *See generally*, *e.g.*, *Mesa Air Group, Inc. v. Dep't of Transportation*, 87 F.3d 498, 506 (D.C. Cir. 1996) (discussing principle of *contra proferentum* in case involving interpretation of subsidy agreements between U.S. Department of Transportation and private air carriers); Restatement (Second) of Contracts § 206 (1981) ("Interpretation Against The Draftsman") (setting forth black letter rule that "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds"). The Restatement (Second) of Contracts explains the basic policy rationale that undergirds the principle:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

Restatement (Second) of Contracts § 206, Comment *a*. To be sure, the Orders here are not contracts; but neither are they statutes (or even regulations). Particularly in light of the role of Commerce and domestic producers in drafting – and, specifically, in defining the scope of – antidumping and countervailing duty orders, the policy rationale for the principle of *contra proferentum* is illuminating.

Commerce's reliance on the interpretive canon *expressio unius est exclusio alterius* (*i.e.*, the expression of one is the exclusion of the others) and Commerce's reference to exemplars listed in the language defining the scope of the Orders would appear to add little or nothing to its case. *See generally Meridian Products*, 39 CIT at ____ n.19, 2015 WL 3853684 * 6 n.19 (in context of exclusion for "finished goods kits," stating that "the [Orders'] listing of

Commerce next analyzed whether "a product that is 'fully and permanently assembled and completed at the time of entry' in its own right, but missing some other component to function as a final downstream product," is within the finished merchandise exclusion. *See* Remand Results at 14. The Remand Results took note of *Rubbermaid*'s observation that any interpretation of that exclusion must account for the fact that the language defining the scope of the Orders describes windows with glass and doors with glass or vinyl as "finished merchandise" even though such windows and doors could properly be characterized as "building parts" and "house parts." *Id*. (referring to *Rubbermaid*, 38 CIT at ____, 2014 WL 4723733 * 10).

Commerce therefore reconsidered its position that products could not fall within the exclusion for finished merchandise if "they are merely parts of a larger whole" and "function collaboratively with other components in order to form a completed product," and determined that such a position "may lead to absurd results." Remand Results at 14. Accordingly, Commerce articulated a "revised interpretation," such that "a product . . . that contains aluminum extrusions as parts along with additional non-aluminum components[] may meet the exclusion criteria for 'finished merchandise' provided that the good is 'fully and permanently assembled and completed at the time of entry,' regardless of whether it is later incorporated with other components, or assembled into a larger downstream product (*i.e.*, a subassembly)." *Id*.

Applying its new interpretation on remand to Rubbermaid's mop frames and handles, the Remand Results reasoned that, because each

'windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material' as excluded 'finished merchandise'[] does not imply that only goods that contain some non-aluminum part may qualify for the 'finished goods kit' exclusion"). Indeed, the *expressio unius* canon has been described as a "feeble helper in an administrative setting." *Id*., 39 CIT at ____ n.19, 2015 WL 3853684 * 6 n.19 (quoting *Adirondack Medical Center v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014)).

The bottom line is that, even if other language in the Orders in fact is inconsistent with the plain meaning of "parts" (as Commerce claims it is), there is no apparent authority for Commerce to resolve that inconsistency by the expedient of re-defining the word "parts," any more than Commerce could re-define "black" to mean "white" or "day" to mean "night." If Commerce is not permitted to "interpret an *order* in a manner contrary to its terms" (*see*, *e.g.*, *Eckstrom Industries, Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (emphasis added)), then surely Commerce is not permitted to interpret a *word*– *i.e.*, "parts" – to mean something other than its plain meaning.

Fortunately, there is no need to decide this question here. As Commerce acknowledges, each of the 13 Rubbermaid products at issue is made of both aluminum extrusions and other (non-extruded aluminum) materials. *See* Remand Results at 6 (stating that all Rubbermaid products at issue in this proceeding "contain aluminum extrusions as well as other non-aluminum components at the time of entry").

of the products in question is "comprised of extruded aluminum as well as non-extruded aluminum components," the products "meet the portion of the finished merchandise exclusion for goods 'containing *aluminum extrusions as parts*.'" Remand Results at 15.[3] The Remand Results further explained that, because the mop frames and handles "enter the United States ready to be attached to other components without any further assembly or modifications," they are (in the words of the exclusion) "fully and permanently assembled and completed at the time of entry." *Id*. And, on the basis of Commerce's new interpretation (outlined above), the Remand Results concluded that it was of no moment that the mop frames and handles "constitute parts of a larger system." *Id*. Commerce thus determined on remand that Rubbermaid's mop frames and handles constitute "finished merchandise" and are therefore excluded from the scope of the Orders. *Id*. at 14–15.

The Remand Results' revised interpretation of the "finished merchandise" exclusion is vehemently opposed by the Aluminum Extrusions Fair Trade Committee, which represents the interests of domestic producers of aluminum extrusions. *See* Remand Results at 21–23 (summarizing Letter to Commerce from Counsel for Aluminum Extrusions Fair Trade Committee (Jan. 29, 2015) (comments filed on Commerce's Draft Remand Results)); *see also id*. at 9–11 (summarizing Letter to Commerce from Counsel for Aluminum Extrusions Fair Trade Committee (Nov. 14, 2014) (comments filed in advance of Commerce's Draft Remand Results)).[4] However, as *Rubbermaid* explained, although the Committee initially intervened as a defendant-intervenor in this action, it subsequently withdrew from the litigation. *See Rubbermaid*, 38 CIT at ____ n.2, 2014 WL 4723733 * 1 n.2. The Committee therefore was not entitled to file comments on the Remand Results in this forum, and did not seek to do so. For its part, predictably, Rubbermaid concurs in the Remand Results. *See* Pl.'s Comments on Remand Results at 2. The Government similarly states

[3] *See* n.2, *supra* (questioning Commerce's asserted requirement that, to fall within either of the two exclusions, merchandise must be made of both aluminum extrusions *and* some other material). Because Commerce repeats this asserted requirement throughout the Remand Results, the asserted requirement will necessarily be repeated in summarizing the agency's analysis here. The reservations expressed in note 2 above apply across the board, but will not be reiterated with respect to each of the Remand Results' numerous references to the asserted requirement.

[4] Although the Aluminum Extrusions Fair Trade Committee withdrew from this litigation, the Committee nevertheless sought, and was granted, Commerce's authorization to file comments with the agency in the course of the remand proceeding. *See* Memorandum to File from E. Greynolds, Program Manager, Office III, Operations, re: Deadline for Parties to File Comments in Advance of Draft Remand Results (Nov. 7, 2014). Rubbermaid did not object.

that the Remand Results should be sustained. *See* Def.'s Response to Pl.'s Comments on Remand Results at 2.

B. *The Exclusion for "Finished Goods Kits"*

The Remand Results also analyzed whether Rubbermaid's mopping kits fall within the exclusion for "finished goods kits," even though (like the mop frames and handles discussed above) the mopping kits do not include the interchangeable, replaceable mop heads at the time of importation. *See generally* Remand Results at 15–17; *see also id*. at 11–12 (summarizing analysis of exclusion for "finished goods kits" in Draft Remand Results).

In the Remand Results, Commerce first looked to the language governing the scope of the Orders which states that "[a]n imported product will not be considered a 'finished goods kit' and therefore excluded from the scope . . . merely by including fasteners such as screws, bolts, etc. in the packaging with an aluminum extrusion product." *See* Remand Results at 15 (quoting Antidumping Duty Order, 76 Fed. Reg. at 30,651; Countervailing Duty Order, 76 Fed. Reg. at 30,654). The Remand Results interpreted the quoted language to mean that – to be excluded from the scope of the Orders as a "finished goods kit" – a product must "contain aluminum extrusions plus an additional non-extruded aluminum component[] which goes beyond mere fasteners." Remand Results at 15–16.[5] Noting that Rubbermaid's mopping kits include "non-extruded aluminum components (such as a trigger handle and refillable reservoir)," the Remand Results concluded that the mopping kits "satisfy this aspect of the finished goods kit exclusion." *Id*. at 16.

Commerce next examined whether a product can fall within the exclusion for finished goods kits if the product "facially meets the finished goods kit exclusion ('a packaged combination of parts that contains, at the time of importation, all of the necessary parts to fully assemble a final finished good and requires no further finishing or fabrication, . . . and is assembled "as is" into a finished product'), but is missing some other component to function as a final downstream product" – *i.e.*, the mop heads. Remand Results at 16. In its Scope Ruling, Commerce had concluded that Rubbermaid's mopping kits were not covered by the exclusion for finished goods kits because the mopping kits "lacked the integral components necessary" (*i.e.*, interchangeable, disposable mop heads) "to assemble full and complete

[5] Commerce's position on this point cannot be reconciled with *Meridian Products*, which squarely holds that "there is nothing in the [Orders'] language [concerning the exclusion for finished goods kits] that indicates that the parts in an otherwise qualifying [finished goods] kit cannot consist entirely of aluminum extrusions." *Meridian Products*, 39 CIT at ____, 2015 WL 3853684 * 5; *see generally* n.2, *supra*.

finished goods kits." *Id*. (quoting Scope Ruling at 9).

On remand, Commerce revisited that rationale in light of its Banner Stands Scope Ruling and its EZ Fabric Wall Systems Scope Ruling. Although the merchandise in each of those two cases was missing a component (respectively, graphic material and fabric walls), Commerce concluded in both cases that the merchandise nevertheless was covered by the exclusion for finished goods kits, because the missing components were due to the merchandise's interchangeable design. *See* Remand Results at 16–17 (discussing Banner Stands Scope Ruling and EZ Fabric Wall Systems Scope Ruling). The Remand Results here analogized the "interchangeable" and "disposable" mop heads missing from Rubbermaid's mopping kits to the graphic material and the fabric walls that were missing from the merchandise at issue in the Banner Stands Scope Ruling and the EZ Fabric Wall Systems Scope Ruling, and concluded that – as in those cases – the mopping kits here are excluded from the Orders as finished goods kits. Remand Results at 17.

The Aluminum Extrusions Fair Trade Committee takes strong exception to Commerce's determination on remand that Rubbermaid's mopping kits constitute "finished goods kits" and are therefore beyond the scope of the Orders. *See generally* Remand Results at 21–23 (summarizing Committee's comments on Commerce's Draft Remand Results); *see also id*. at 9–11 (summarizing Committee's comments filed in advance of Commerce's Draft Remand Results).[6] As explained above, however, the Committee withdrew from this litigation and thus has not sought to file comments on the Remand Results with the court. On the other hand, Rubbermaid has filed comments, and advises that it concurs in the Remand Results. *See* Pl.'s Comments on Remand Results at 2. The Government also urges that the Remand Results be sustained. *See* Def.'s Response to Pl.'s Comments on Remand Results at 2.

C. *Summary*

As outlined herein, Commerce has determined on remand that all Rubbermaid merchandise at issue is excluded from the scope of the Antidumping and Countervailing Duty Orders, because Rubber-

[6] As Commerce observed in the Remand Results, the comments that the Aluminum Extrusions Fair Trade Committee filed with the agency focused principally on the issue of subassemblies. *See* Remand Results at 27. In its analyses, the Committee generally did not distinguish between Rubbermaid's mop frames and handles (and the "finished merchandise" exclusion), on the one hand, and the company's mopping kits (and the exclusion for "finished goods kits") on the other. *But see*, *e.g.*, Letter to Commerce from Counsel for Aluminum Extrusions Fair Trade Committee at 4 (Jan. 29, 2015) (comments filed on Commerce's Draft Remand Results) (discussing exclusion of "kits that will be assembled to form a 'final finished good'").

maid's mop frames and handles fall within the "finished merchandise" exclusion and its mopping kits are covered by the exclusion for "finished goods kits." Further, the Remand Results comply with the court's instructions in *Rubbermaid*, 38 CIT ____, 2014 WL 4723733, and are supported by both parties.

Conclusion

For all the reasons set forth above, the Department of Commerce's Final Results of Redetermination Pursuant to Court Remand must be sustained. Judgment will enter accordingly.

Dated: July 22, 2015
New York, New York

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

Slip Op. 15–80

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

Before: Leo M. Gordon, Judge
Court No. 14–00104

[Motion for summary judgment granted in part and denied in part.]

Dated: July 24, 2015

Daniel B. Volk, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, D.C. for Plaintiff United States. On the brief with him were *Joyce R. Branda*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director. Of counsel on the brief was *Claire J. Lemme*, Attorney, Office of the Associate Chief Counsel for U.S. Customs and Border Protection of Miami, Florida.

Peter S. Herrick, Peter S. Herrick, P.A. of St. Petersburg, Florida for Defendant Horizon Products International, Inc.

OPINION AND ORDER

Gordon, Judge:

Before the court is Plaintiff United States' ("the Government") motion for summary judgment. Pl.'s Mot. for Summ. J. (Nov. 14, 2014), ECF No. 14 ("Pl.'s Mot."); *see also* App'x (Nov. 14, 2014), ECF No. 14 ("Pl.'s App'x I"); Defendant, Horizon Prods. Int'l's Response to Plaintiff, United States' Mot. for Summ. J. (Jan. 20, 2015), ECF No. 22 ("Def.'s Resp."); Pl.'s Reply in Supp. of its Mot. for Summ. J. (Feb. 9, 2015), ECF No. 25 ("Pl.'s Reply"); Remainder of Pl.'s Summ. J. App'x (Feb. 23, 2015), ECF No. 27 ("Pl.'s App'x II"); Def.'s Proposed Sur-

Reply to Pl's Reply in Supp. of its Mot. for Summ. J. (Feb. 20, 2015), ECF No. 30; Nonconfidential App'x – Redacted Version (Mar. 3, 2015), ECF No. 31 ("Def.'s App'x"). The Government seeks $394,794 in unpaid duties and penalties from Defendant Horizon Products International, Inc. ("Horizon") under Section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (2012),[1] plus equitable prejudgment interest on the unpaid duties. Pl.'s Mot. at 1. The court has jurisdiction pursuant to 28 U.S.C. § 1582 (2012).

For the reasons set forth below, the court grants the Government's motion with respect to the unpaid duties and pre-judgment interest, but denies the Government's motion in all other respects.

I. Undisputed Facts

Between 2006 and 2007, Horizon entered or attempted to enter various types of plywood into the United States under inapplicable duty-free provisions of the Harmonized Tariff Schedule of the United States ("HTSUS"). The majority of Horizon's plywood contained at least one outer ply of non-coniferous wood other than birch, Spanish cedar, or walnut. As a consequence, the correct classification for this plywood was either HTSUS 4412.14.31 or HTSUS 4412.32.31 (the latter becoming effective on February 3, 2007 after the reorganization of HTSUS heading 4412). The original and renumbered provisions are identical in substance, and both carry an 8% duty rate. Defendant's remaining plywood contained an outer ply of sapele, a tropical wood. The correct classification for that plywood was either HTSUS 4412.13.40 (2006) or 4412.31.40 (2007). Again, the substance of those provisions and the applicable 8% duty rate did not change between the 2006 and 2007 versions of the HTSUS. *See generally* Pl.'s App'x II at A528–661 (invoices, packing lists, entry forms, and other associated documentation); Pl.'s App'x I at A17–34 (relevant provisions of the 2006 and 2007 HTSUS).

In late 2007, U.S. Customs and Border Protection ("Customs") issued several notices of action indicating that it would rate-advance (liquidate at a higher rate) 21 of Horizon's plywood entries. Horizon subsequently paid $42,016, representing the full rate-advanced 8% duty on those entries. Customs liquidated the remaining 43 entries at the inapplicable duty-free rate. Pl.'s App'x I at A1–8.

In September 2009, Customs sent Horizon a pre-penalty notice and demand for payment. Customs identified a $162,270 total revenue loss. Of that, Customs specified $42,016 in potential revenue loss relating to the rate-advanced entries and $120,254 actual revenue

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

loss relating to the entries liquidated at the inapplicable duty-free rate. Customs proposed a culpability level of negligence and a corresponding penalty of $324,540, twice the $162,270 total revenue loss. Customs thereafter issued a penalty notice demanding payment of $120,254 in outstanding duties and the $324,540 penalty. Customs eventually recovered $50,000 from Defendant's surety, leaving $70,254 in duties still owed. Pl.'s App'x I at A5–13. *See generally* Def.'s App'x at Hor. 85-Hor. 87 & n.1 (describing administrative procedural history).

Horizon requested mitigation of the $324,540 penalty. Defendant argued it did not have the means to pay, and provided Customs with supporting documentation, including financial statements and tax filings. Def.'s App'x at Hor. 1–84. In finding that Horizon could not pay the full amount, Customs determined that Defendant had sufficient equity to pay up to $200,000 combined duties and penalty. As a result, Customs mitigated the penalty to $85,278 conditioned on full payment of the duties owed within 60 days. Def.'s App'x at Hor. 85–89.

Horizon countered with an offer in compromise requesting to pay the outstanding duties in two installments within 60 days as well as a mitigated penalty of $1,000. *Id.* at Hor. 101–19. Customs rejected Horizon's offer, along with each of Defendant's subsequent requests to pay a lower penalty. *See id.* at Hor. 120–21. On December 20, 2012, after the mitigated penalty's 60-day deadline passed without any payment from Horizon, Customs again demanded the outstanding duties and the full penalty amount. *Id.* at Hor. 124.

This enforcement action followed. The Government seeks $70,254 in duties plus equitable pre-judgment interest, as well as the full $324,540 penalty without any interest.

II. Standard of Review

The U.S. Court of International Trade reviews all issues in actions brought for the recovery of a monetary penalty under § 1592 *de novo*, including the amount of any penalty. 19 U.S.C. § 1592(e)(1); *see United States v. ITT Indus., Inc.*, 28 CIT 1028, 103435, 343 F. Supp. 2d 1322, 1329 (2004), *aff'd*, 168 Fed. App'x 942 (Fed. Cir. 2006). Rule 56 of the Rules of this Court permits summary judgment when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

The U.S. Court of International Trade reviews all issues in actions brought for the recovery of a monetary penalty under § 1592 *de novo*, including the amount of any penalty. 19 U.S.C. § 1592(e)(1); *see United States v. ITT Indus., Inc.*, 28 CIT 1028, 103435, 343 F. Supp. 2d 1322, 1329 (2004), *aff'd*, 168 Fed. App'x 942 (Fed. Cir. 2006). Rule 56 of the Rules of this Court permits summary judgment when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering whether material facts are in dispute, the evidence must be considered in the light most favorable to the non-moving party, drawing all reasonable inferences in its favor. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson*, 477 U.S. at 261 n.2.

On materiality, "the substantive law will identify which facts are material." *Anderson*, 744 U.S. at 248. On the question of genuineness, the standard for determining whether there is a genuine issue "mirrors the standard for a directed verdict[,] . . . which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. . . . In essence, . . . the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 248–52; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."). On a motion for summary judgment, "[t]he Court should credit the nonmovant's evidence and must draw all justifiable inferences from the evidence in the nonmovant's favor." *Netscape Commc'ns Corp. v. Konrad*, 295 F.3d 1315, 1319 (Fed. Cir. 2002) (citing *Anderson*, 477 U.S. at 255); *see also Wanlass v. Fedders Corp.*, 145 F.3d 1461, 1463 (Fed. Cir. 1998) ("In determining the propriety of summary judgment, credibility determinations may not be made . . . .").

III. Discussion

A. Duties

Horizon concedes that it misclassified the entries at issue in this action and that it is therefore liable to the Government for $70,254 in unpaid duties. Def.'s Resp. at 16; 19 U.S.C. § 1592(d) ("[I]f the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of [§ 1592(a)], the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary

penalty is assessed."). Accordingly, the court will order Horizon to pay the Government $70,254 in unpaid duties.

B. Interest

The Government also seeks an award of pre-judgment interest on the outstanding duty amount. This Court has discretion to award pre-judgment interest. *United States v. Imperial Food Imps.*, 834 F.2d 1013, 1016 (Fed. Cir. 1987). Pre-judgment interest "compensate[s] for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987); *see United States v. Goodman*, 6 CIT 132, 140, 572 F. Supp. 1284, 1289 (1983) (Pre-judgment interest "is awarded to make the wronged party whole."). Factors considered include "[1] the degree of personal wrongdoing on the part of the defendant, [2] the availability of alternative investment opportunities to the plaintiff, [3] whether the plaintiff delayed in bringing or prosecuting the action, and [4] other fundamental considerations of fairness." *United States v. Great Am. Ins. Co. of N.Y.*, 738 F.3d 1320, 1326 (Fed. Cir. 2013) (quoting *Osterneck v. Ernst & Whitney*, 489 U.S. 169, 175–76 (1989)) (internal quotation marks omitted). In determining whether to award equitable prejudgment interest, though, "full compensation should be the court's overriding concern." *United States v. Am. Home Assurance Co.*, ___F.3d ___, ___, 2015 WL 3756837, at *15 (Fed. Cir. June 17, 2015) (quoting *United States v. Am. Home Assurance Co.*, 38 CIT ___, ___, 964 F. Supp. 2d 1342, 1356 (2014) (internal quotation marks omitted)).

Pre-judgment interest is appropriate here on the outstanding duty amount. The Government did not unreasonably delay bringing or prosecuting this action. The Government filed its complaint roughly 16 months after the close of administrative proceedings and has not been the source of unreasonable delay during litigation. Horizon never paid the outstanding duties despite Customs' numerous requests.

The court will award pre-judgment interest on the outstanding duty amount from the date of Customs' final demand for payment, December 20, 2012, to the date of judgment, *see United States v. Yuchis Morality Co.*, 26 CIT 1224, 1240 (2002), at the rate provided in 28 U.S.C. § 2644 and in accordance with 26 U.S.C. § 6621, *see United States v. Golden Gate Petroleum Co.*, 30 CIT 174, 182–83 (2006) (citing *Goodman*, 6 CIT at 140, 572 F. Supp. at 1290).

C. Negligence

Under 19 U.S.C. § 1592(a), "no person, by . . . negligence[,] . . . may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of . . . any document or electronically transmitted data or information, written or oral statement, or act which is material and false." 19 U.S.C. § 1592(a)(1). A document, statement, or act is material if it has the "potential to alter [Customs'] appraisement or liability for duty." 19 C.F.R. Pt. 171, App'x B(A) (2015); *see also United States v. Modes, Inc.*, 16 CIT 879, 884–85, 804 F. Supp. 360, 365–66 (1992) (discussing materiality). In enforcement actions before the Court of International Trade, "if the monetary penalty is based on negligence, the United States [has] the burden of proof to establish the act or omission constituting the violation [of § 1592(a)], and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4). In other words, the alleged violator must "affirmatively demonstrate that it exercised reasonable care under the circumstances." *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006).

Horizon's entry documentation misstates that the imported plywood contains at least one outer ply made from a species of tree that would entitle it to duty-free importation. The invoices associated with those entries demonstrate that the plywood contained outer ply made from species of trees that are instead subject to an 8% duty rate. *See* Pl.'s App'x II at A528-A661 (invoices, packing lists, entry forms, and other materials). For example, among the 64 misclassified entries, Horizon selected a duty-free classification indicating that its plywood had at least one outer ply made of birch when the plywood actually had an outer ply made of non-birch species, like maple, red oak, white ash, hickory, and cherry, subject to an 8% duty. *E.g.*, *id.* at A530-A622. Horizon's entry documents therefore made a false written statement that altered Customs' assessment of Horizon's liability for duties. *See United States v. Optrex Am., Inc.*, 32 CIT 620, 631 (2008) ("[T]he classification of merchandise as presented in customs entry documentation has the tendency to influence Customs' decision in assessing duties and therefore constitutes a material statement under the statute.").

Horizon concedes that it misclassified the entries at issue, but argues that there remains a genuine factual issue as to whether it exercised reasonable care. The court agrees. Horizon offers the declaration of Kelsey Quintana, Horizon's co-owner and manager, in which Ms. Quintana states that the "64 entries were filed by an authorized custom[s] broker using the best possible tariff classifica-

tion to his knowledge." *See* Decl. of Kelsey Quintana ¶ 1, 4. Horizon also offers documents from the underlying administrative proceeding in which Horizon's counsel noted that Horizon had used a customs broker. *See* Def.'s App'x at Hor. 10. "Consult[ation] with a customs broker" is one possible "aid[] to establish evidence of proper compliance." H.R. Rep. No. 103–361, at 120 (1993), *reprinted in* 1993 U.S-.C.C.A.N. 2552, 2670.

The Government argues that the involvement of a customs broker does not shield Horizon because it has "not offer[ed] a shred of documentary evidence to demonstrate that it actually consulted with its broker in a good faith effort to ascertain the correct classification." Pl.'s Reply at 6. Horizon has, however, offered the declaration of Ms. Quintana, who states that Horizon used a customs broker to file the entries. The Government argues that "the only communications between Horizon and its broker evidenced in the record are facsimiles from Horizon to its broker in which Horizon instructed the broker to use one of the inapplicable, duty-free classifications." *Id.* (citing Pl.'s App'x II at A636, A653–54).

These facsimiles, however, raise more questions than they answer, especially about the extent of the customs broker's involvement with the entries. The facsimiles are terse, covering a small set (not all) of the subject entries. They direct somebody named "Henry" to classify Horizon's merchandise under an incorrect duty-free heading. *See* Pl.'s App'x at A636, A653–54. Ms. Quintana's declaration states that a customs broker was used to file Horizon's entries, which contained misclassifications. The facsimiles do appear to indicate that, at least for a portion of the entries, Horizon requested that its customs broker use an incorrect duty-free classification. What is not clear is why the customs broker went ahead with the incorrect classifications.

The Government would like the court to infer that all the responsibility for the erroneous entries rests on the shoulders of Horizon, but the court could just as easily infer that the customs broker shares a portion (if not all) of the responsibility. Customs brokers, after all, have statutory and regulatory responsibilities to classify merchandise correctly. *E.g.*, 19 C.F.R. § 111.29 (requiring customs brokers to "exercise due diligence . . . in preparing or assisting in the preparation and filing of records relating to any customs business matter"); *see also* 19 C.F.R. § 152.11 ("Merchandise shall be classified in accordance with the [HTSUS] . . . ."); 19 U.S.C. § 1641(d) (allowing Customs to penalize a broker who "has violated any provision of any law enforced by [Customs] or the rules or regulations issued under any such pro-

vision"); *United States v. Santos*, 36 CIT ___, ___, 883 F. Supp. 2d 1322, 1327–30 (2012) (sustaining as reasonable a § 1641 penalty on a motion for default judgment against broker who allegedly misclassified imported goods).

Drawing all reasonable inferences in Horizon's favor, the court determines that genuine issues remain about whether Horizon exercised reasonable care in making its entries. Accordingly, the Government's request for summary judgment on this issue is denied.

D. Penalty

The maximum penalty for negligent misclassifications of imported merchandise under 19 U.S.C. § 1592(c)(3) is the lesser of the domestic value of the merchandise or "two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3)(A). "[T]he law requires the court to begin its reasoning on a clean slate. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight." *United States v. Menard, Inc.*, 17 CIT 1229, 1229, 838 F. Supp. 615, 616 (1993), *rev'd in part on other grounds*, 64 F.3d 678 (Fed. Cir. 1995); *United States v. Nat'l Semiconductor Corp.*, 547 F.3d 1364, 1370 (Fed. Cir. 2008) ("Not only do past cases state that nothing requires the court to grant Customs' request for the maximum penalty, they also explain that the court should not presume that the maximum is warranted.").

In the event that the Government prevails on the negligence issue at trial, the Government seeks a $324,540 penalty, representing twice the $162,270 in total duties Horizon should have paid on entry of the subject merchandise. Horizon argues that there is a genuine issue of material fact as to whether the court should waive the penalty entirely, or in the alternative, impose a penalty lower than the maximum.

1. Waiver of the Entire Penalty

Horizon argues that there is a genuine issue as to whether the penalty should be waived in accordance with the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). As a matter of policy adopted in conformance with the SBREFA, Customs allows small businesses to request waiver of a penalty assessed under 19 U.S.C. § 1592. Under this policy:

> [A]n alleged violator which has been issued a pre-penalty notice under 19 U.S.C. § 1592(b)(1) may assert in its response to the pre-penalty notice that it is a small business entity . . . and that all of the following circumstances are present: (1) The small

> entity has taken corrective action within a reasonable correction period, including the payment of all duties, fees and taxes owed as a result of the violation within 30 days of the determination of the amount owed; (2) the small entity has not been subject to other enforcement actions by Customs; (3) the violation did not involve criminal or willful conduct, and did not involve fraud or gross negligence; (4) the violation did not pose a serious health, safety or environmental threat, and (5) the violation occurred despite the small entity's good faith effort to comply with the law.

Policy Statement Regarding Violation of 19 U.S.C. § 1592 by Small Entities, 62 Fed. Reg. 30,378, 30,378 (U.S. Cust. Serv. 1997) ("*Waiver Policy*"). Horizon argues that it qualifies for waiver in this case because it "is precisely the type of small, independent, family-owned business that SBREFA was designed to protect," and identifies evidence, such as financial statements and tax returns, supporting that description. Def.'s Resp. at 9–13; *see* Def.'s App'x at Hor. 14–84.

The court does not agree that waiver under the SBREFA applies here. Customs has set forth five conditions that a small entity must satisfy to obtain a penalty waiver. Among those conditions is "the payment of all duties, fees and taxes owed as a result of the violation." *Waiver Policy*, 62 Fed. Reg. at 30,378. Horizon has not paid the duties owed, and therefore does not qualify for waiver under the policy. *See id.*

2. Mitigation of the Penalty

19 U.S.C. § 1592 does not set forth any criteria for assessing a penalty other than setting different maximum amounts for each level of culpability. *See* 19 U.S.C. § 1592(c). In *United States v. Complex Machine Works Co.*, 23 CIT 942, 83 F. Supp. 2d 1307 (1999), the court identified14 non-exclusive factors for considering the appropriate amount of a penalty:

1. the defendant's good faith effort to comply with the statute,
2. the defendant's degree of culpability,
3. the defendant's history of previous violations,
4. the nature of the public interest in ensuring compliance with the regulations involved,
5. the nature and circumstances of the violation at issue,
6. the gravity of the violation,

7. the defendant's ability to pay,
8. the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business,
9. that the penalty not otherwise be shocking to the conscience of the Court,
10. the economic benefit gained by the defendant through the violation,
11. the degree of harm to the public,
12. the value of vindicating the agency authority,
13. whether the party sought to be protected by the statute had been adequately compensated for the harm, and
14. such other matters as justice may require.

Id. at 947–50, 83 F. Supp. 2d at 1312–15 (footnote omitted); *see, e.g.*, *Optrex*, 32 CIT at 639–42, 560 F. Supp. 2d at 1342–44 (applying *Complex Machine* factors).

Horizon argues that there is a genuine question of material fact as to the amount of the penalty under the *Complex Machine* factors. The court agrees. Specifically, Horizon offers a statement from Ms. Quintana indicating that Horizon "has carried almost no profit for these past years" and that imposition of the full penalty amount will require it "to cease operations and file for bankruptcy." Decl. ¶¶ 9, 12. Horizon also provides financial exhibits it submitted to Customs to corroborate these statements. *See* Def.'s App'x at Hor. 14–84. Additionally, Customs itself cited Horizon's lack of prior violations as a mitigating factor in assessing Horizon's initial request for a reduced penalty. *See id.* at Hor. 88–89. This evidence, as Horizon argues, raises a genuine issue as to whether a lower penalty is appropriate.

The ultimate determination on the amount of a penalty is a question committed to the court's discretion. 19 U.S.C. § 1592(e)(1); *Nat'l Semiconductor*, 547 F.3d at 1367–68; *ITT Indus, Inc.*, 28 CIT at 1052, 343 F. Supp. 2d at 1343–44. The 14-factor *Complex Machine* analysis requires the court to "weigh evidence, make credibility determinations, and draw inferences from the facts, functions strictly delegated to a fact-finder or jury." *ITT Indus.*, 28 CIT at 1052, 343 F. Supp. 2d at 1343–44; *see, e.g.*, *Optrex*, 32 CIT at 63942, 560 F. Supp. 2d at 1342–44 (evaluating *Complex Machine* factors as part of the court's finding of facts and conclusions of law following a bench trial). Depending on the specific factual findings (which the court cannot make

within the summary judgment context), including whether Horizon exercised reasonable care, the record may support a penalty lower than the maximum or no penalty at all. The court must therefore deny the Government's motion for summary judgment on this issue.

As a final note, the Government argues that Horizon improperly relies on certain exhibits that Horizon failed to disclose during discovery or the administrative proceeding below, including recent tax returns, financial statements, and a letter from an accounting firm regarding Horizon's financial condition. Pl.'s Reply at 10. That may well be the case. *See* USCIT R. 26(a)(1)(A)(i)-(ii) (requiring disclosure of certain materials a party "may use to support its defenses"); *id.* 37(c)(1) (If a party fails to comply with USCIT R. 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."); *see also United States v. Horizon Prods. Int'l Inc.*, Court No. 14–00104, 2–6 (CIT Dec. 24, 2014), ECF No. 21 (order denying Defendant's out of time motion to amend the scheduling order) (describing Defendant's "inaction . . . in the discovery process"). Nevertheless, at this stage of litigation, other evidence on the record presents a genuine factual issue as to the appropriate penalty, if any, to be assessed after full consideration of the *Complex Machine* factors. *See* Def.'s App'x at Hor. 14–84.

IV. Conclusion

For the foregoing reasons, the Government's motion for summary judgment is granted with respect to the unpaid duties and prejudgment interest, but is denied in all other respects.

Dated: July 24, 2015
New York, New York

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