U.S. Customs and Border Protection

Slip Op. 13–148

BEST KEY TEXTILES CO. LTD., Plaintiff, v. UNITED STATES, Defendant,

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00367

[Dismissing for lack of subject matter jurisdiction.]

Dated: December 13, 2013

John M. Peterson, *Maria E. Celis*, *Richard F. O'Neill*, *George W. Thompson*, and *Russell A. Semmel*, Neville Peterson LLP of New York, NY, for the plaintiff.

Marcella Powell and *Beverly A. Farrell*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for the defendant. With them on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Amy M. Rubin*, Acting Assistant Director, International Trade Field Office. Of counsel on the brief were *Claudia Burke* and *Tara K. Hogan*, Department of Justice, and *Paula S. Smith*, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection.

OPINION

Musgrave, Senior Judge:

The plaintiff, Best Key Textile, Inc., seeks pre-importation declaratory judgment that U.S. Customs and Border Protection's ("Customs") Headquarters Ruling Letter HQ H202560 dated Sep. 17, 2013 and published at 47 Cust. Bull. & Dec. 41 (Oct. 2, 2013) at 20 ("Revocation Ruling"), is arbitrary and capricious, an abuse of discretion, or not in accordance with law. *Cf.* Slip Op. 13–145 (Dec. 4, 2013). The Revocation Ruling revoked New York Customs Ruling N187601 (Oct. 25, 2011), which had ruled the plaintiff's proprietary "BKMY"[1] yarn statutorily classifiable under heading 5605, Harmonized Tariff Schedule of the United States ("HTSUS"), as "metalized" yarn dutiable at 13.2% *ad valorem* (the "Yarn Ruling"). The Revocation Ruling concluded the yarn is "of polyesters" dutiable under heading 5402 at

[1] The plaintiff avers that "BKMY" is produced by mixing aluminum, zinc or other metal in nanopowdered form together with titanium dioxide (as delusterant) into a polyester slurry prior to extrusion of the yarn through a spinneret.

8% *ad valorem*.[2] The plaintiff argues the Yarn Ruling provides the correct classification under heading 5605. For the following reasons, the court must conclude subject matter jurisdiction is lacking in this action.

Discussion

The plaintiff contends jurisdiction exists under 28 U.S.C. § 1581(h) or alternatively 28 U.S.C. § 1581(i)(4). The plaintiff explains that it sought and obtained the pre-importation Yarn Ruling in 2011 pursuant to 19 C.F.R. part 177 upon representing that it contemplated a "specifically described transaction". *See* 19 C.F.R. §177.1(a)(1).[3]

The plaintiff also avers that in seeking to confirm the "duty rate benefits" of the Yarn Ruling, it made, or ordered made, a garment, the "Johnny Collar" shirt, comprised of BKMY, and it requested from Customs a ruling concerning the garment's classification. The plaintiff contended the garment was classifiable under subheading 6105.90.8030, which provides for "Men's or boys' shirts, knitted or crocheted: Other: Subject to man-made fiber restraints . . . 5.6%". In NY N196161 (Apr. 13, 2012), Customs initially ruled that the garment was classifiable as a polyester shirt under subheading 6110.30.3053, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: of wool or fine animal hair: Of man-made fibers: Other: Other: Other: Other: Men's or boys': Other: . . . 32%". However, upon reconsideration, in HQ H226262, dated Sep. 16, 2013, Customs revoked this ruling as

[2] Specifically, the Yarn Ruling had found the yarn classifiable under subheading 5605.00.90, HTSUS, which provides for "metalized yarn whether or not gimped, being textile yarn, combined with metal in the form of thread, strip or powder or covered with metal: Other . . . 13.2%", whereas the Revocation Ruling ruled the yarn classifiable under subheading 5402.47.90, HTSUS, which provides for "Synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 47 decitex: Other, of polyesters: Other . . . 8%".

[3] *See also* §177.1(d)(3) ("[a] 'prospective' transaction is one that is contemplated or is currently being undertaken and has not resulted in any arrival or the filing of any entry or other document, or in any other act to bring the transaction, or any part of it, under the jurisdiction of any Customs Service office"); §177.2(b) (content of a ruling request shall include, if known, "the name of the port or place at which any article involved in the transaction will arrive or be entered . . . and a description of the transaction itself"); §177.5 ("[e]ach person submitting a request for a ruling in connection with a Customs transaction shall immediately advise Customs in writing of any change in the status of that transaction, as defined in §177.1(d)(3)"). As indicated by the foregoing, Customs contemplates for purposes of a pre-importation ruling that a "contemplated" transaction is one that is not merely hypothetical. *See* 19 C.F.R. § 177.7(a) ("no ruling letter will be issued with regard to transactions or questions which are essentially hypothetical in nature or in any instance in which it appears contrary to the sound administration of the Customs and related laws to do so"). There was, however, no representation in this proceeding that the yarn has been or would actually be imported.

contrary to NY N187601, and ruled that the Johnny Collar shirt remained classifiable in subheading 6110.90.90, HTSUS, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of other textile materials: Other . . . . 6%". 47 Cust. Bull. & Dec. 41 (Oct. 2, 2013) at 15. Be that as it may, the plaintiff does not explain how the Johnny Collar ruling or its revocation affects its "contemplated transaction" of an importation of its *yarn* into these United States, which is the essence of the 28 U.S.C. §1581(a) standing requirement referenced in 28 U.S.C. §2631(h).

I

An action brought for declaratory judgment under 19 U.S.C. §1581(h) may only be commenced "by the person who would have standing to bring a civil action under section 1581(a) of this title if he imported the goods involved and filed a protest which was denied, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 2631(h). The Court of Appeals for the Federal Circuit has explained the requirements for invoking jurisdiction under section 1581(h) as follows: (1) judicial review must be sought prior to importation of goods; (2) review must be sought of a ruling, a refusal to issue a ruling, or a refusal to change such ruling; (3) the ruling must relate to "certain subject matter"; and (4) it must be shown that irreparable harm will occur unless judicial review is obtained prior to importation. *Am. Air. Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551–52 (Fed. Cir.1983), *cert. denied*, 466 U.S. 937 (1984). The plaintiff has the burden of demonstrating that jurisdiction exists by clear and convincing evidence. 28 U.S.C. § 2639(b). *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936).

It is with that "certain subject matter" of condition (3), as well as the harm alleged with respect to condition (4), that this court must address, as the defendant has moved to dismiss for lack of subject matter jurisdiction. The plaintiff apparently satisfies conditions (1) and (2), but with regard to (3), the plaintiff conflates the Johnny Collar ruling with the Yarn Ruling when it avers, with respect to (4), that it suffered irreparable harm as a result of the Johnny Collar ruling by experiencing an immediate and negative impact upon its business, and it also avers, based on supporting affidavits, that when Customs proposed the Revocation Ruling for comment the situation created "additional uncertainty" among its customers and caused further irreparable harm via curtailment of contemplated orders for its BKMY yarn. *See*, *e.g.*, Complaint ¶¶ 5 & 6.

The plaintiff asserts it has standing as a party, which, if it imported "the goods involved" as a non-resident importer and filed a protest that was denied in whole or in part, would have standing to bring a civil action under 28 U.S.C. §1581(a) to challenge a denial of its protest. However, the plaintiff's customers for its yarn are foreign garment manufacturers. *See* Yu Aff. ¶ 11; Lee Aff. ¶ 3, Ex. A. The court fails to discern how the "contemplated transaction," of an importation of the plaintiff's *yarn* into the United States, has been harmed in any way by the Revocation Ruling.

The plaintiff contends that the Revocation Ruling, which resulted in a lower tariff for the yarn at issue in this action, has caused it harm because strangers to this action -- garment manufacturers -- may no longer purchase its yarn unless the garments they make from it can be imported under the "favorable" duty rate accorded to importations of garments made of "metalized" yarn by other strangers to this action -- garment importers. Hence, the defendant argues that the plaintiff seeks to litigate "on behalf of" potential importers of garments, who are not presently before this court and are remote from the core of this case. Thus, the defendant argues the plaintiff does not have standing here as a result of the Revocation Ruling. Def's Resp. & Mot. to Dismiss at 2. *Cf.* 19 C.F.R. § 177.7(a), *supra*. The plaintiff counters that 28 U.S.C. §2631(h) confers prudential standing to any person who, if he imported the subject merchandise at some point in the future and received a denied protest from Customs, could challenge Custom's decision here; such a person would have standing to protest an adverse liquidation and the question then becomes one of remedy. *See* Pl's Reply at 4. That may be true, but it presumes a decision adverse to a specific imported good. *See generally Heartland By-Products, Inc. v. United States*, 26 CIT 268, 272–81, 223 F. Supp. 2d 1317, 1323–31 (2002) (discussing the history behind and scope of §1581(h)).

Under the current *status quo* resulting from the Revocation Ruling, if the plaintiff were to import the yarn into these United States, the yarn would benefit from the lower duty rate resulting from the Revocation Ruling. It is therefore plain that the importance to the plaintiff here is not the U.S. duty rate on the yarn, but the duty rate on garments made of it. The plaintiff implies that an Article III "case or controversy" exists over the classification of the yarn, but the harm that it pleads is not the type of cognizable injury that relief pursuant to section 1581(h) was intended to address. The aggrieved litigants in the cases to which the plaintiff cites for support on its irreparable harm argument all had prudential standing to challenge specific,

identifiable importations of merchandise directly impacted by a particular ruling,[4] but that is not the case here. The proper consideration here is the "harm" that flows from the Revocation Ruling to a *direct* importation of the yarn versus importation under the Yarn Ruling. As the plaintiff acknowledges, "[n]o Article III justiciable 'case or controversy' exists under section 1581(a) when prosecution of a protest will not result in a duty refund." Pl's Br. at 15, citing *Vanderhoof Specialty Wood Prods. v. United States*, 28 CIT 354, 355 (2004); *3V, Inc. v. United States*, 23 CIT 1047, 1049 (1999); *Acrilicos v. Regan*, 9 CIT 442, 446 (1985); *Carson M. Simon & Co. v. United States*, 55 Cust. Ct. 103, 108 (1965) (dismissing claims as to entries that were entered at a rate lower than the claimed rate). On the other hand, garment importers are, of course, free to import and challenge any classification of garments made of BKMY in accordance with *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927).

II

The plaintiff alternatively claims jurisdiction pursuant to the "administration and enforcement" provision of 28 U.S.C. §1581(i)(4). But typically, "if jurisdiction does not lie under § 1581(h), a plaintiff must import the merchandise in question, file a protest with Customs regarding the classification decision, and fully exhaust its administrative remedies." *Connor v. United States*, 24 CIT 195, 200 (2000). Section 1581(i) was not intended to create new causes of action or meant to supersede more specific jurisdictional provisions, *e.g., Asociacion Colombiana de Exportadores de Flores (Asocoflores) v. United States*, 13 CIT 584, 586, 717 F. Supp. 847, 849–50 (1989) (citations omitted), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990), and it is well-settled that "to prevent circumvention of the administrative processes crafted by Congress, jurisdiction under subsection 1581(i) may not be invoked if jurisdiction under another subsection of 1581 is or could have been available, unless the other subsection is shown to be manifestly inadequate." *Hartford Fire Ins. Co. v. United States*, 544 F.3d 1289, 1292 (Fed. Cir. 2008), citing *Int'l Custom Prods., Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006). In other words,

> "where a litigant has access to [the Court of International Trade] under traditional means, such as 28 U.S.C. § 1581(a), it must

[4] *E.g.*, *Holford U.S.A. Ltd. v. United States*, 19 CIT 1486 (1995) (applicability of URAA grandfather clause to importer's textile contracts); *CPC Int'l, Inc. v. United States*, 19 CIT 978 (1995) (importer's pre-importation ruling as to country of origin marking); *Nat'l Juice Prods. Ass'n v. United States*, 10 CIT 48 (1986) (country-of-origin marking requirements' impact on juice product association's imports); *Manufacture de Machines du Haut-Rhin v. von Raab*, 6 CIT 60 (1983) (manufacture's challenge to exclusionary ruling affecting importation of its merchandise).

> avail itself of this avenue of approach by complying with all the relevant prerequisites thereto. It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i)" unless such traditional means are manifestly inadequate.

Hartford, 544 F.3d at 1292, quoting *Am. Air. Parcel Forwarding Co.*, *supra*, 718 F.2d at 1549. If "another remedy is or could have been available, the party asserting § 1581(i) jurisdiction has the burden to show how that remedy would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (citations omitted), *cert. denied*, 484 U.S. 1041 (1988).

The plaintiff cannot argue that the "traditional approach" of section 1581(a) to the classification claims it would attempt to assert here under the guise of section 1581(h) provides a manifestly inadequate remedy. As indicated above, it has no standing to assert such claims. The plaintiff's actual injury complaint here is that garment makers will not buy its yarn because importers of those garments will not get a more favorable duty rate for items made of the plaintiff's yarn. But the duty rate charged to those importers is beyond any of the plaintiff's interests that the provisions of section 1581 are meant to protect. The essence of the argument the plaintiff attempts to put forth amounts to a request for the protection of others' interests, namely those of importers of garments manufactured by purchasers of the plaintiff's yarn. Even if the plaintiff is protecting its own financial interests by extension, it has no authority or standing to assert the claims of those remote parties under 1581(i) in its action here, as that statute to be strictly construed.

Conclusion

For these reasons, the court must conclude there is no Article III case or controversy over this matter as contemplated under 28 U.S.C. §1581(h), nor does jurisdiction alternatively lie in 28 U.S.C. §1581(i)(4). The court will therefore grant the defendant's motion to dismiss this action, which in turn will moot certain outstanding motions on the docket. Judgment will enter accordingly.

So ordered.

Dated: December 13, 2013
New York, New York

/s/ R. Kenton Musgrave

R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–149

QINGDAO MAYCARRIER IMPORT & EXPORT CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, et al., Defendant-Intervenors.

Before: Nicholas Tsoucalas,
Senior Judge
Court No.: 13–00142
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record is denied.]

Dated: December 13, 2013

Robert T. Hume, Hume & Associates, LLC, of Ojai, CA for plaintiff.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *George H. Kivork*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Michael J. Coursey and *John M. Herrmann II*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors.

OPINION

Tsoucalas, Senior Judge:

Plaintiff Qingdao Maycarrier Import & Export Co., Ltd. ("Maycarrier"), moves for judgment on the agency record contesting defendant United States Department of Commerce's ("Commerce") determination in *Fresh Garlic From the People's Republic of China: Final Rescission of Antidumping Duty New Shipper Reviews; 2010–2011*, 78 Fed. Reg. 18,316 (Mar. 26, 2013) ("*Final Rescission*"). Commerce and defendant-intervenors Fresh Garlic Producers Association, *et al.*, oppose Maycarrier's motion. For the following reasons, Maycarrier's motion is denied.

BACKGROUND

In 1994, Commerce issued an antidumping duty order covering fresh garlic from the People's Republic of China ("PRC"). *See Antidumping Duty Order: Fresh Garlic From the PRC*, 59 Fed. Reg. 59,209 (Nov. 16, 1994). Maycarrier made three entries of subject merchandise during 2011. *See* Request for Antidumping New Shipper Review (Nov. 30, 2011), A-570–831, Public Rec. 2 at 1–2.[1] In November 2011, Maycarrier requested a new shipper review ("NSR") to

[1] Hereinafter, documents in the public record will be designated "PR" and documents in the confidential record designated "CR" without further specification except where relevant.

obtain an individual rate for its entries. *Id.* at 1. Commerce initiated the NSR in January 2012. *See Fresh Garlic From the PRC: Initiation of NSRs*, 77 Fed. Reg. 266, 267 (Jan. 4, 2012).

In March 2013, Commerce rescinded Maycarrier's NSR. *Final Rescission*, 78 Fed. Reg. at 18,317. Commerce found that Maycarrier was actually the same entity as Weifang Naike Foodstuffs Co., Ltd. ("Naike"), an exporter that entered subject merchandise prior to the period of review. *See Issues and Decision Memorandum for the Final Rescission of the Antidumping Duty NSRs of Fresh Garlic from the PRC* (Mar. 19, 2013), A-570–831, PR 194 at 3–6. Commerce's analysis centered on three pieces of evidence: (1) mutual links between the two companies Commerce discovered on numerous business-to-business websites and Maycarrier's own website; (2) Maycarrier's business registration form; and (3) Maycarrier's tax records. *See Analysis of Maycarrier* (Mar. 19, 2013), A-570–831, CR 108 at 1–8.

Commerce placed evidence onto the record from business-to-business websites and Maycarrier's own website indicating that Maycarrier and Naike shared contact information and personnel in their sales and management departments. *See* CR 108 at 4–7. Specific evidence included: several websites listed a telephone number for Naike's sales department that is identical to the number Maycarrier listed for its sales department on its own website; Maycarrier's general manager, Eileen Chen, "manage[d] online sales for both Maycarrier and Naike," and shared a mobile number with Naike's chairman; Maycarrier's profiles on "tradezz.com" and on "tradekr.com" list Maycarrier's phone number but direct users to "naikefood.com"; Maycarrier and Naike are both listed as members of a "Weifang Naike Group"; several websites list Naike's employees as contacts for Maycarrier; and Lily Pan, an employee of Naike, posted sales information to Maycarrier's profiles on several websites. *See id.* Given this evidence, Commerce concluded that Maycarrier and Naike "appear indifferent to which of the two companies makes a sale and receives the associated sales revenue." PR 194 at 5–6.

During the review, Maycarrier provided Commerce with copies of its tax returns and those of Yishi Hengshun Food Co., Ltd. ("Hengshun"), a company operating in Shandong Province that produces subject merchandise. *See* Maycarrier's Supplemental Questionnaire Response, Exhs. 3, 13 (Jul. 20, 2012), A-570–831, CR 44, 45. Commerce located Hengshun's records in the Shandong Province National Taxation Bureau's online database, but could not locate Maycarrier's records. *See* Analysis of Maycarrier's New Shipper Sales (Oct. 18, 2012), A-570–831, CR 73 at 6. Maycarrier explained that the "Confidential Administration Provision on Tax Payers" ("CAP") for Qingdao

City provided that its records were confidential and therefore unavailable by internet search. Maycarrier's Second Supplemental Questionnaire Response (Dec. 13, 2012), A-570–831, CR 94 at 1. Commerce determined that the terms of the CAP conflicted with Maycarrier's argument. *See* CR 108 at 2. Specifically, Commerce found that Article 4 of the CAP stated that certain information was confidential, but did not define what information qualified as confidential. *Id.* Furthermore, Article 2, which defined confidential information, did not list the tax payer's name, identification number, or the existence of its record as confidential. *Id.* at 3. Commerce concluded that Maycarrier's failure to explain the absence of its tax records was further evidence that it was not an independent entity. *See* PR 194 at 5.

Maycarrier also provided Commerce with a copy of its business registration form with an accompanying translation. CR 94, Exh. 2. Although it originally translated the "enterprise status" portion of the form as "[[ ]]," *id.*, Maycarrier subsequently amended the translation to "[[ ]]." Maycarrier's Third Supplemental Questionnaire Response (Jan. 22, 2013), A-570–831, CR 100 at 2. Commerce determined that a more accurate translation was "[[ ]]" or "[[ ]]," indicating that Maycarrier was "connected to another entity." CR 108 at 8.

Given the record as a whole, Commerce concluded that "the companies are essentially the same." PR 194 at 5. Commerce rescinded the review because Maycarrier did not report Naike's earlier sales of subject merchandise in violation of 19 C.F.R. § 351.214(b)(2)(iv).[2] *Final Rescission*, 78 Fed. Reg. at 18,317. Because it was no longer reviewing Maycarrier's sales, Commerce declined to assign Maycarrier a separate rate, PR 194 at 8–9, and noted that Maycarrier's entries would continue to be assessed at the PRC-wide rate. *See Final Rescission*, 78 Fed. Reg. at 18,317.

Maycarrier raises several challenges to the *Final Rescission*: (1) Commerce erroneously rescinded the NSR; (2) Commerce erroneously declined to assign Maycarrier a separate rate; and (3) Commerce erroneously imposed an adverse facts available ("AFA") rate of $4.71/kg that was unsupported by substantial evidence and contrary to law. *See* Pl.'s Br. at 25–46.

[2] Commerce also upheld its finding in the preliminary results that Maycarrier's NSR request was untimely under 19 C.F.R.351.214(c). *See* PR 194 at 4.

JURISDICTION and STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006) and section 516A(a)(2)(B)(iii) of the Tariff Act of 1930,[3] as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).

"The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). It is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). In determining whether a decision was supported by substantial evidence, the Court's role is to "assess[] whether [Commerce's] action is reasonable given the record as a whole." *Since Hardware (Guangzhou) Co. v. United States*, 37 CIT __, __, 911 F. Supp. 2d 1362, 1365 (2013) (citing *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006)).

Additionally, "an agency's construction of its own regulations is entitled to substantial deference." *Lyng v. Payne*, 476 U.S. 926, 939 (1986).

DISCUSSION

I. Legal Framework

Commerce shall, upon request, conduct a review of a exporter or producer who did not export subject merchandise to the U.S. during the period of investigation or is not affiliated with an entity that exported subject merchandise to the U.S. during that period to determine whether that exporter or producer is eligible for an "individual" rate. 19 U.S.C. § 1675(a)(2)(B)(i). Section 1675(a)(2)(B) "enables a new shipper 'to demonstrate that it should be accorded a dumping rate specific to itself, and not the 'all-others' rate.'" *Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 604, 374 F. Supp. 2d 1333, 1335 (2005) (citing *Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 256, 366 F. Supp. 2d 1246, 1247 (2005)).

Commerce's regulations set out requirements for an exporter or producer to obtain an individual rate through a NSR. First, the

[3] Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition, and all applicable amendments thereto.

exporter or producer must certify that it neither exported subject merchandise during the period of investigation nor is affiliated with an entity that did so. *See* 19 C.F.R. § 351.214(b)(2)(i)–(iii) (2012). It must also certify the date of first entry of subject merchandise, the volume of that entry and all later entries, and the date of first sale to an unaffiliated customer in the U.S. *Id.* at § 351.214(b)(2)(iv). Commerce explained that "[t]he purpose of these certifications is to ensure that new shipper status is not achieved through mere restructuring of corporate organizations or channels of distribution," and that "parties will not be granted new shipper status merely because they were not individually examined during the investigation." *Antidumping Duties*, 61 Fed. Reg. 7308, 7318 (Feb. 27, 1996).

Finally, the exporter or producer must request the NSR within one year after the date of first entry of subject merchandise. *See* 19 C.F.R. § 351.214(c). Commerce included this provision to clarify that "the statute is intended to provide a new shipper an opportunity to obtain its own rate on an expedited basis, and not to permit shippers to request expedited reviews long after the first shipment has taken place." *Antidumping Duties*, 61 Fed. Reg. at 7318.

II. The *Final Rescission* was Supported by Substantial Evidence and Otherwise in Accordance with Law.

Maycarrier argues that the *Final Rescission* must be remanded because Commerce lacked authority to rescind the NSR under 19 C.F.R. § 351.214(b) or (c); Commerce did not determine that Maycarrier was "affiliated" with Naike; and record evidence established that Maycarrier was independent from Naike. *See* Pl.'s Br. at 25–36.

A. Commerce's Authority to Rescind the NSR

First, Maycarrier argues that Commerce lacked authority to rescind the NSR under 19 C.F.R § 351.214(b) or (c). *See* Pl.'s Br. at 29. According to Maycarrier, Commerce may rescind an NSR only under the situations prescribed in 19 C.F.R. § 351.214(f): either the party requesting the NSR voluntarily withdraws its request or there was not a sale to an unaffiliated customer during the review period. Pl.'s Reply at 7. Because neither of these situations occurred during the NSR, Maycarrier argues that the *Final Rescission* violated Commerce's regulations. *Id.* at 10.

The Court expressly rejected this argument in *Marvin Furniture (Shanghai) Co. v. United States*, 36 CIT __, 867 F. Supp. 2d 1302 (2012) (Tsoucalas, J.), *appeal docketed* No. 13–1156 (Fed. Cir. Jan. 11, 2013). In that case, Commerce rescinded the NSR because Marvin Furniture (Shanghai) Co., Ltd. ("Marvin"), did not accurately report

the date of first entry of subject merchandise. *Id.* at __, 867 F. Supp. 2d at 1306. Marvin contested Commerce's authority to rescind the NSR, but the Court held that "the rescission was based on an application of the express provisions of the relevant statutes and regulations." *Id.* at __, 867 F. Supp. 2d 1308. The Court found that a NSR request "provides the basis upon which Commerce can undertake the review," and therefore Commerce cannot engage in a NSR "[i]f a new shipper request does not provide Commerce with accurate information regarding an exporter or producer's entries." *Id.*, 867 F. Supp. 2d at 1308.

As noted above, the regulations ensure that NSRs are available to qualified new shippers only and prevent entities from attempting to obtain a lower rate by obscuring earlier sales. *See Antidumping Duties*, 61 Fed. Reg. at 7318. Given the deference accorded to Commerce's interpretation of its own regulations, *Lyng*, 476 U.S. at 939, the court continues to find that Commerce properly rescinds a NSR where the request is inaccurate or infirm. *See Marvin*, 36 CIT at __, 867 F. Supp. 2d at 1308.

B. "Affiliate" Standard

Maycarrier also argues that "Commerce failed to apply the proper standard of 'affiliation'" when analyzing Maycarrier's relationship with Naike. Pl.'s Reply at 10–11; *see* Pl.'s Br. at 27. According to Maycarrier, "Congress determined . . . that 'affiliated' is the operative relationship to disqualify a new shipper in the case of a connection to a company involved in sales of subject merchandise during the [period of investigation]." *Id.* Maycarrier continues that "[a] similar relationship must exist in respect to a 'connection' for reporting sales within the one-year limit specified in Commerce's regulations." *Id.* Because Commerce did not conclude that Maycarrier was affiliated with Naike, Maycarrier insists that the *Final Rescission* is contrary to statute and regulation. *Id.* at 29.

Maycarrier's argument is incorrect. Maycarrier borrows the "affiliation" standard from 19 U.S.C. § 1675(a)(2)(B), which applies to sales during the period of investigation. 19 U.S.C. § 1675(a)(2)(B). However, Commerce did not rely on section 1675(a)(2)(B) when rescinding the review. Rather, Commerce determined that Maycarrier failed to report its first sale, in violation of 19 C.F.R. § 351.214(b)(2)(iv), and did not timely file its NSR request. *Final Rescission*, 78 Fed. Reg. at 18,317; PR 194 at 4. As noted above, these regulations require that an exporter or producer certify certain information about its first entry and sale, and request a review within one year of its first sale. 19 C.F.R. § 351.214(b)(2)(iv), (c). They do not mention "affiliation" with

another exporter or producer who made earlier sales, *id.*, and Maycarrier does not cite any authority supporting its position. *See* Pl.'s Br. at 27; Pl.'s Reply at 10–11. Because it is inconsistent with the plain text of the regulations, Maycarrier's argument must fail. 19 C.F.R. § 351.214(b)(2)(iv), (c).

C. Record Support for Commerce's Determination

Finally, Maycarrier alleges that Commerce's determination that Maycarrier was the same entity as Naike was not supported by substantial evidence. *See* Pl.'s Br. at 25–36. Maycarrier insists that Commerce unreasonably relied on information it obtained from its "cyber investigation" of the two companies and erroneously interpreted evidence regarding Maycarrier's tax returns and registration form. *See id.* Ultimately, Maycarrier insists that Commerce did not have sufficient evidence to define the relationship between the two entities and therefore the *Final Rescission* must be remanded. *See id.*

As noted above, the Court reviews Commerce's conclusions to determine whether they were supported by substantial evidence and in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i). Here, Commerce's finding was reasonable given the record as a whole.

(i) Business-to-business Websites

Maycarrier insists that Commerce erroneously relied on the information it discovered on business-to-business websites. Pl.'s Br. at 28–31. To illustrate that the information was not reliable, Maycarrier identifies three individual errors in its brief: (1) "Nobodybuy.com" listed Eileen Chen as a contact for Naike but does not mention garlic or Maycarrier; (2) "allbiz.com" inconsistently translated Naike and Weifang Naike Group from the Chinese characters; and (3) "B2B77.com" noted that Maycarrier did not provide a company introduction on its company profile. *Id.* at 30–31. Maycarrier also insists that Naike or another entity fraudulently posted this information because, as it explained to Commerce, "companies such as Naike make exaggerated and inaccurate claims on websites." *Id.* at 28. Neither of these arguments is sufficient to undermine Commerce's decision.

The record includes over two-dozen websites listing information indicating that the companies share contact, management, and personnel information, as well as direct sales to one another. *See* CR 108 at 4–7 (detailing the instances of overlapping information). Commerce acknowledged that the websites contained certain errors, but concluded that, taken as a whole, they represent a consistent pattern in which Maycarrier and Naike represented themselves interchange-

ably. *Id.* Given the repeated instances of overlapping information, the relatively minuscule errors Maycarrier identifies on individual web pages do not render Commerce's decision erroneous. *See Hoogovens Staal BV v. United States*, 24 CIT 242, 247, 93 F. Supp. 2d 1303, 1307 (2000) (citing *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984)) ("[T]hat plaintiff can point to evidence . . . which detracts from . . . [Commerce's] decision and can hypothesize a . . . basis for a contrary determination is neither surprising nor persuasive.") (alterations in original).

Furthermore, Maycarrier's claim that Naike fraudulently posted the information to exaggerate its own business is unavailing. Maycarrier insists that it is common in the PRC for companies to misrepresent themselves on the internet, and therefore the information Commerce obtained is inaccurate. Pl.'s Br. at 31. However, Maycarrier does not identify any evidence in the record that supports this claim, *see id.*, and its explanation is actually contradicted by the record: Commerce found that Naike's profile on certain websites directed potential customers to Maycarrier, indicating that the Naike actually promoted Maycarrier's business. *See* CR 108 at 6. Maycarrier's alternative explanation of the evidence, by itself, is an insufficient basis upon which to overturn Commerce's determination. *See Consolo*, 383 U.S. at 620.

(ii) Registration Form

Maycarrier also argues that Commerce mistranslated the "enterprise status" section of its business registration form as "[[ ]]" or "[[ ]]." *See* Pl.'s Br. at 32–33. According to Maycarrier, the proper translation is "[[ ]]," which indicates that it is an independent entity. *Id.* at 33. As evidence, Maycarrier points to the translation on the record of the Company Law of the PRC ("Company Law"), in which the same characters as those in Maycarrier's enterprise status are translated as "[[ ]]." *Id.* Maycarrier insists that "[c]learly this translation affirms Maycarrier's translation." *Id.*

Maycarrier's argument is unpersuasive. The translated section of the Company law reads: "[[

]]." *Id.* (emphasis in Pl.'s Br.). Contrary to Maycarrier's insistence, this section of the Company Law does not "clearly" establish that "[[ ]]" is the proper translation. Maycarrier posits an alternative interpretation of the quoted language, but does not provide any evidence demonstrating that Com-

merce's interpretation was erroneous. Again, an alternative interpretation of the evidence, by itself, is insufficient to undermine Commerce's conclusion. *See Consolo*, 383 U.S. at 620.

(iii) Tax Records

Finally, Maycarrier alleges that Commerce's analysis of its tax records was unsupported by substantial evidence. Pl.'s Br. at 33–36. According to Maycarrier, Commerce's translation of the CAP provisions was unreasonable because it is not qualified to interpret Chinese law. *See id.* at 35 (comparing Commerce's translation to "the Chinese government interpreting U.S. tax laws and how they are administered"). Maycarrier argues that, under the CAP in Qingdao City, its tax records are confidential and undiscoverable by internet search, and therefore it was unreasonable for Commerce to expect to discover its tax records in the online database. *See* Pl.'s Reply at 19. Maycarrier insists that Commerce should have verified this argument by consulting the U.S. Embassy in Beijing, searching for the tax records of another company registered in Qingdao City, or requesting information from the Chinese government. *See* Pl.'s Br. at 35.

This argument is unavailing. Maycarrier does not provide any authority supporting its position that Commerce is unqualified to analyze the operation of foreign laws. *See id.* at 35. Regardless, Commerce analyzed the terms of the CAP because Maycarrier placed them onto the record to support its position. CR 108 at 1–4 (analyzing the terms of the CAP). Based on this evidence, Commerce found that it should have been able to confirm the existence of Maycarrier's records on the online database. *Id.* at 2–4. Maycarrier contests this interpretation, but it fails to identify any record evidence supporting its argument other than its own interpretation of the CAP. Pl.'s Br. at 35; Pl.'s Reply at 19. Such an argument is inadequate to justify overturning Commerce's determination. *See Consolo*, 383 U.S. at 620. Furthermore, Maycarrier's insistence the Commerce was required to consult non-record sources to produce evidence supporting Maycarrier's interpretation of the CAP is inapposite.[4] *See Qingdao Sea-line Trading Co. v. United States*, 36 CIT __, __, Slip Op. 12–39 at 19 (Mar. 21, 2012) ("[I]t was simply not Commerce's duty to help [Plaintiff] create an adequate record to support its position.").

[4] Maycarrier also argues that Commerce's translation of the CAP and the business registration certificate constituted new information on the record to which Commerce did not allow Maycarrier a response. *See* Pl.'s Br. at 33, 35. However, Maycarrier's claim lacks merit because it originally translated its enterprise status at "[[ ]]" and placed the untranslated sections of the CAP onto the record. *See* CR 94 at 1 & Exh. 2.

Because Maycarrier fails to demonstrate that Commerce's determination was unsupported by substantial evidence, the court finds that Commerce reasonably concluded that Maycarrier was "essentially the same" as Naike. *See Since Hardware*, 37 CIT at __, 911 F. Supp. 2d at 1365 (citing *Nippon Steel*, 458 F.3d at 1350–51).

III. Maycarrier was not Eligible for a Separate Rate

Maycarrier also challenges Commerce's decision not to assign a separate rate. Pl.'s Br. at 24–25, 36–37. According to Maycarrier, it satisfied the requirements for a separate rate, having timely submitted its section A questionnaire addressing its independence from the Chinese government. *Id.* at 24. Accordingly, Maycarrier insists that Commerce should have assigned a separate rate or transferred the evidence to the seventeenth administrative review of fresh garlic from the PRC ("17th AR"), which covered the period of Maycarrier's sales. *Id.* at 36.

In antidumping duty proceedings, Commerce establishes an individual rate for mandatory respondents and a country-wide rate for all others. 19 U.S.C. § 1673d(c)(1)(B)(i). When merchandise is from a non-market economy, as it is here, Commerce presumes that all non-mandatory respondents are government controlled and therefore those respondents are subject to the country-wide rate. *See Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). Commerce does allow a non-mandatory respondent to overcome this presumption, however, if it can establish the absence of both *de jure* and *de facto* government control. *Id.* If the non-mandatory respondent makes such a showing, Commerce assigns a separate rate, normally calculated by weight-averaging the individually-calculated rates. *See Changzhou Wujin Fine Chem. Factory Co. v. United States*, 37 CIT __, __, Slip Op. 13–127 at 3–4 (Oct. 2, 2013).

Here, Commerce determined that it had no basis to assign Maycarrier a separate rate because it rescinded the review and was no longer reviewing Maycarrier. PR 194 at 8–9. Maycarrier's insistence that Commerce was required to review its section A questionnaire and assign a separate rate is not consistent with the statutory framework for NSRs. The statute states that Commerce shall conduct a NSR to "establish an *individual* weighted average dumping margin." 19 U.S.C. § 1675(a)(2)(B)(i) (emphasis added). Once Commerce determined that Maycarrier was not a new shipper eligible for an individual rate, the review ended and Maycarrier's goods remained subject to the rate already in place, the PRC-wide rate. *See Final Rescission*, 78 Fed. Reg. at 18,317. Therefore, Commerce properly determined that there was no basis to consider Maycarrier's separate rate eligibility. *See* 19 U.S.C. § 1675(a)(2)(B)(i).

Alternatively, Maycarrier insists that Commerce erred in failing to exercise its authority to transfer the record of the NSR to the 17 th AR. *See* Pl.'s Br. at 36–37. Maycarrier relies on *Fresh Garlic From the PRC: Final Rescission of NSRs of Jining Yifa Garlic Produce Co., Ltd., Shenzhen Bainong Co., Ltd., and Yantai Jinyan Trading Inc.*, 76 Fed. Reg. 52,315 (Aug. 22, 2011) ("*Jinyan NSR* "), in which Commerce rescinded Yantai Jinyan Trading Inc.'s NSR and transferred its record to the concurrent administrative review. *See* Pl.'s Br. at 37. Commerce responds that Maycarrier failed to exhaust its administrative remedies with regards to this claim because it did not request that Commerce transfer the record during the NSR. Def.'s Resp. Opp. Pl.'s Mot. J. Agency R. at 39 ("Def.'s Resp."). Accordingly, Commerce insists that the court should not consider Maycarrier's argument on the merits. *Id.*

As a general rule, the Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Luoyang Bearing Corp. v. United States*, 28 CIT 733, 760, 347 F. Supp. 2d 1326, 1351 (2004) (citing *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946)). However, the Court recognizes certain exceptions to the rule: (1) where raising the claim would be futile; (2) where there has been an intervening court decision that may materially affect Commerce's determination; (3) where the question is one of law and did not require further factual development; and (4) where there was no reason to believe Commerce would refuse to adhere to applicable precedent. *See id.* at 761 n.11, 347 F. Supp. 2d at 1352 n.11.

There is no dispute that Maycarrier did not request to have the record transferred during the NSR. Def.'s Resp. at 39; Pl.'s Reply at 25. Additionally, Maycarrier neither alleged that Commerce failed to transfer evidence during the review, nor raised the *Jinyan NSR* before Commerce in support of such a claim. *See* Case Brief of Maycarrier (Feb. 11, 2013), A-570–831, CR 104. Maycarrier instead argues that Commerce previously rejected its request to participate in the 17th AR, and therefore would not have accepted a transfer request. Pl.'s Reply at 25.

The futility exception arises where, if the exhaustion requirement was enforced, "parties would be required to go through obviously useless motions in order to preserve their rights." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007) (internal quotation marks omitted). A party may not rely on this exception, however, simply because "an adverse decision may have been likely." *Id.*

Here, there is no evidence that the transfer request would have been "obviously useless." Maycarrier requested that Commerce transfer certain documents to the NSR from the 17th AR. *See* Request for Clarification of Case Brief Schedule and Request for Department to Place Surrogate Country and Surrogate Values Data from the Garlic 17th AR on the Record of this NSR (Jan. 9, 2013), A-570–831, PR 160. If Maycarrier wanted Commerce to transfer its section A questionnaire or any other evidence to the concurrent administrative review, it was aware of its right and had the opportunity to do so. Accordingly, the futility exception does not apply. *Corus Staal*, 502 F.3d at 1379. Because Maycarrier did not request that Commerce transfer evidence to the 17th AR, it failed to exhaust administrative remedies with regards to this claim. *See* 28 U.S.C. § 2637(d).

IV. Commerce did not Make an AFA determination

Finally, Maycarrier argues that in refusing to assign a separate rate, Commerce effectively imposed an AFA rate without first meeting the statutory requirements. Pl.'s Br. at 37. Specifically, Maycarrier notes that Commerce did not find that it failed to cooperate to the best of its ability during the review. *Id.* Moreover, Maycarrier adds that the AFA rate is wrongful because Commerce failed to corroborate the $4.71/kg rate during the sixteenth administrative review of fresh garlic from the PRC ("16thAR"). *Id.* at 38–46.

Where Commerce "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information," it "may use an inference that is adverse to the interests of that party." 19 U.S.C. § 1677e(b). If it "relies on secondary information rather than on information obtained in the course of an investigation or review" when making such an inference, Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.* at § 1677e(c).

Maycarrier's argument is based on the mistaken belief that Commerce "imposed" the AFA rate in the *Final Rescission*. As noted above, Commerce rescinded the NSR and, as a result, Maycarrier's entries remained subject to the PRC-wide rate. *Final Rescission*, 78 Fed. Reg. 18,317. Commerce did not make a decision on the merits concerning the assessment rate on Maycarrier's entries. *See* PR 194 at 8–9. Accordingly, Commerce neither made an AFA determination nor imposed an AFA rate.[5] *See Huaiyang Hongda Dehydrated Vegetable Co.*

[5] Commerce argues that Maycarrier failed to exhaust its administrative remedies with regards to its AFA claim. *See* Def.'s Resp. at 30–34. As Commerce did not make an AFA determination the court need not reach a decision on this issue.

v. United States, 28 CIT 1944, 1953–54 (2004) (not published in the Federal Supplement) (Commerce did not impose an AFA rate where it rescinded an administrative review and the AFA rate from an earlier review remained in place).

Furthermore, the only review currently before the court is the *Final Rescission*. Because Commerce did not make an AFA determination and did not impose any rate based upon secondary information, PR 194 at 3–9, there was no information that Commerce was required to corroborate in the NSR. *See* 19 U.S.C. § 1677e(c). Maycarrier's corroboration claim concerning the 16th AR is not properly before the court and the court lacks jurisdiction over this claim. *See Huaiyang Hongda*, 28 CIT at 1954 (finding that the Court lacks jurisdiction over plaintiff's claim that Commerce failed to corroborate an AFA rate that was not imposed during the proceeding before the Court).

CONCLUSION

The *Final Rescission* was supported by substantial evidence and otherwise in accordance with law. Because Commerce rescinded the review, Maycarrier was not entitled to a separate rate. Additionally, Commerce did not impose an AFA rate and the court lacks jurisdiction over Maycarrier's claim concerning corroboration of the assessment rate. Plaintiff's motion for judgment on the agency record is denied and judgment will be entered accordingly.

Dated: December 13, 2013
New York, New York

/*s*/ *Nicholas Tsoucalas*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 13–150

SNAP-ON, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Donald C. Pogue,
Chief Judge
Court No. 13–00238

[granting the Defendant's motion for summary judgment and denying Plaintiff's motion for summary judgment]

Dated: December 16, 2013

Bruce J. Casino and *J. Scott Maberry*, Sheppard Mullin Richter & Hampton, LLP, of Washington, DC. for Snap-on, Inc.

Tara K. Hogan, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC for Defendant. Also on the brief were *Stuart*

F. Delery, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades*, Jr., Assistant Director. Of counsel on the brief was *Joanna Theiss*, Office of Import Trade Administration, Department of Commerce, of Washington, DC.

OPINION

Pogue, Chief Judge:

In this action, Plaintiff, Snap-on, Inc. ("Snap-on"), a U.S. importer of goods containing aluminum extrusions manufactured in China, seeks an order enjoining the Department of Commerce from requiring, and U.S. Customs and Border Protection from collecting, 374.15% "all others" cash deposits and countervailing duties for Plaintiff's entries. Plaintiff contends that the "all others" rate applicable to its entries should be 137.65% (the "revised rate") in accordance with this court's judgment in *MacLean-Fogg v. United States*, 36 CIT _, 885 F. Supp. 2d 1337 (2012)("*MacLean-Fogg IV*").[1]

The court has jurisdiction over Plaintiff's claim under 28 U.S.C. § 1581(i)(2006).

Currently before the court are Defendant's Motion to Dismiss and for Summary Judgment, ECF No. 16, and Plaintiff's Motion for Summary Judgment, Motion for Writ of Mandamus, Declaratory Relief, or Preliminary Injunction, ECF No. 18. By its motion, Defendant asserts that, as a matter of law, Plaintiff cannot establish entitlement to the revised 137.65% rate. In its cross-motion, Plaintiff asserts that it is entitled to the revised rate and thus the court should grant its request for a writ of mandamus, declaratory judgment, and permanent injunction.

As explained below, because there was no injunction suspending the liquidation[2] of Plaintiff's entries in the litigation challenging the 374.15% rate, or any subsequent administrative review, and because Plaintiff did not participate in any of these proceedings, Section 561A(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(c)(1)(2006),[3] requires that Defendant's motion be granted.

BACKGROUND

The duty rates at issue stem from Commerce's April 27, 2010 initiation of antidumping ("AD") and countervailing duty ("CVD") investigations of certain aluminum extrusions from the People's Republic of China ("China" or "PRC"). Statement of Stipulated Facts

[1] This case is currently on appeal.

[2] Liquidation is "the final computation or ascertainment of duties on entries [. . .]" 19 C.F.R. §159.1 (defining liquidation).

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

("Stipulated Facts"), ECF No. 15 at ¶¶ 6–7; *see also Aluminum Extrusions from the People's Republic of China*, 75 Fed. Reg. 22,114 (Dep't Commerce Apr. 27, 2010) (initiation of countervailing duty investigation); *Aluminum Extrusions from the People's Republic of China*, 75 Fed. Reg. 22,109 (Dep't Commerce Apr. 27, 2010) (initiation of antidumping duty investigation). In that investigation, Commerce, on April 4, 2011, issued a final CVD determination that set the CVD rate for those exporters and producers not individually investigated (the "all others" rate)[4] at 374.15%. Stipulated Facts at ¶ 12; *see also Aluminum Extrusions from the People's Republic of China*, 76 Fed. Reg. 18,521 (Dep't Commerce Apr. 4, 2011) (final affirmative countervailing duty determination).

Snap-on's merchandise was entered after Commerce's final CVD determination –-- between May 31, 2011, and March 12, 2012. Stipulated Facts at ¶¶ 14, 16–24, 30. The merchandise constitutes ten entries of goods manufactured by Zhangjiagang GuPai Aluminum Industry Co. ("GuPai"). Although Commerce's final affirmative countervailing determination was challenged in this court, neither GuPai nor Snap-on participated in the investigation as a named respondent or otherwise qualify for a separate rate for entries of subject merchandise, Stipulated Facts at ¶ 9, nor was either a party to the court review.

Snap-on also did not deposit estimated countervailing duties on their entries. Stipulated Facts at ¶ 24. Rather, the entries were designated as CBP Entry Type 01. *Id.*[5] Customs did not accept the Type 01 designation[6] and instructed Snap-on to obtain a scope ruling from Commerce for their aluminum extrusion imports. *Id.* at ¶ 29.[7]

Fifteen months after its final determination, on July, 10, 2012, Commerce initiated the first administrative review of the CVD and

[4] *See* 19 U.S.C. §§ 1673b(d), 1673d(c)(5).

[5] Entry Type 01 is the designated category for "free and dutiable" goods. *Tianjin Tiancheng Pharm. Co. v. United States*, 29 CIT 256, 273, 366 F. Supp. 2d 1246, 1261 (2005). Entry Type 03 is the category for goods subject to antidumping duties. *Tak Yuen Corp. v. United States*, 29 CIT 543, 547 (2005). It is unclear whether Snap-on chose to enter the goods as Type 01 on the basis of a good faith belief that the goods were not subject to the AD and CVD orders on aluminum extrusions.

[6] Addressing these entries, on February 14, 2012, CBP emailed Snap-on's customs broker, UTi, to request that entries with aluminum extrusions be filed as paper entries because such entries were potentially subject to antidumping and countervailing duties. Stipulated Facts at ¶ 27. CBP further specified on February 15, 2012, that they were in the process of confirming the classification and AD/CVD determination for Plaintiff's entries and hence, would "allow for type 01 entries and the furniture parts classification." Id. at ¶ 29 (citing email from Senior Import Specialist Michael Carriere on February 15, 2012).

[7] Snap-on, however, did not seek a scope ruling on its merchandise.

AD orders on aluminum extrusions from China. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 77 Fed. Reg. 40,565 (Dep't Commerce July 10, 2012) (initiation of antidumping and countervailing duty administrative reviews and request for revocation in part).[8] Consistent with its initiation notice, Commerce instructed Customs to "assess countervailing duties on merchandise entered, or withdrawn from warehouse, for consumption at the cash deposit or bonding rate in effect on the date of entry," for all firms for whom no review request was made.[9] Stipulated Facts at ¶ 34 (citing *Automatic Liquidation Instructions for Aluminum Extrusions from the People's Republic of China for the Period 09/07/2010 through 12/31/2011*, Message No. 2209305, C-570–968, POR Sept. 07, 2010-Dec. 31, 2011 (July 27, 2012), *available at* http://addcvd.cbp.gov/detail.asp?docID=2209305&qu=2209305 (last visited Dec. 10, 2013)). Because no request was made for review of GuPai, the GuPai entries entered prior to initiation of the first administrative review became subject to

[8] The U.S. system for assessing AD and CVD duties is described as retrospective. (The process for collection of cash deposits and liquidation of entries is essentially the same for entries subject to AD and CVD duties. For a more complete discussion of the process for assessing AD duties, *see Sioux Honey Ass'n v. Hartford Fire Ins. Co*., 672 F.3d 1041, 1046–48 (Fed. Cir. 2012).) Briefly, an AD or CVD margin is established during the investigation, and that margin becomes the cash deposit rate for the year following the conclusion of the investigation, as published in the AD or CVD order. On the first year anniversary of the order, interested parties may request an administrative review. The review establishes a new margin based on actual entries during the prior year. This margin becomes the assessment rate for merchandise entered during the year prior to the review and the cash deposit rate for merchandise entered during the year following the review. Entries entered during the previous year are then liquidated at the assessment rate established in the review. If the assessment rate is lower than the cash deposit rate for the entries liquidated, then the importer receives a refund. If the assessment rate is higher than the cash deposit rate, then the importer owes additional duties. On the one-year anniversary of the first review, a second review can be requested and the process is repeated. *See* 19 U.S.C. § 1675(a)(1)-(2).

[9] The entries from GuPai are also subject to antidumping duties which are not at issue in this case. Stipulated Facts at ¶ 34. Consistent with the initiation of the first administrative review of the AD order, Commerce issued instructions to CBP to liquidate entries for firms listed in the instructions. GuPai was not listed and therefore, was not subject to the liquidation. *Id*. (relying on *Non-Review liquidation Instruction for Aluminum Extrusions from the People's Republic of China for the Period 11/12/2010 through 4/30/2012*, Message No. 2212302, A-570–967, POR Nov. 12, 2010–Apr. 30, 2012 (July 27, 2012), *available at* http://addcvd.cbp.gov/detail.asp?docID=2212302&qu=2212302 (last visited Dec. 10, 2013)). Because the GuPai entries are suspended under the AD administrative review, they are effectively suspended from liquidation for purposes of the CVD order. In addition, a July 16, 2013 order, ECF No. 12, granted a preliminary injunction suspending all liquidation pending the decision in this case.

liquidation at the 374.15% rate that was in effect on the date of entry.[10]

Prior to any liquidation, however, on December 20, 2012, Commerce notified CBP that it had amended its final CVD determination consistent with *MacLean-Fogg IV* and instructed CBP to collect an all others cash deposit rate of 137.65% for all shipments of aluminum extrusions from the PRC entered on or after December 10, 2012. *Id*. at ¶ 39 (citing *Notice of an Amended Final Determination in the Countervailing Duty Investigation of Aluminum Extrusions from the People's Republic of China*, Message No. 2355304, C-570–968, POR Jan. 01, 2009-Dec. 31, 2009 (Dec. 20, 2012), *available at* http://addcvd.cbp.gov/detail.asp?docID=2355304&qu=2355304 (last visited Dec. 10, 2013)).

Also, on June 10, 2013, Commerce issued the preliminary results of its Countervailing Duty Administrative Review of the First Review Period, which stated that CBP would be instructed to collect cash deposits of estimated countervailing duties at the "most recent" applicable "all others" rate. *Id*. at ¶ 43 (citing *Aluminum Extrusions from the People's Republic of China*, 78 Fed. Reg. 34,649, 34,652 (Dep't Commerce June 10, 2013) (preliminary results of the countervailing duty administrative review for the period Sept. 7, 2010 through Dec. 31, 2011).

Thereafter, Commerce, on June 28, 2013, initiated the second administrative review of the CVD order in effect on aluminum extrusions from the PRC for the period of January 1, 2012, to December 31, 2012 and the AD order in effect on aluminum extrusions from the PRC for the period of review May 1, 2012 through April 30, 2013. *Id*. at ¶ 45–46. Consistent with the initiation of the second administra-

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[10] *See* 19 C.F.R. § 351.212(c):

Automatic assessment of antidumping and countervailing duties if no review is requested.

(1) If the Secretary does not receive a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) To continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1)of this section. . . .

tive review, on July 16, 2013, Commerce issued liquidation instructions for entries made by all firms except those subject to the review. *Id*. at ¶ 48 (citing *Automatic Liquidation instructions for Aluminum Extrusions from the People's Republic of China for the Period 01/01/2012 through 12/31/2012*, Message No. 3197305, C-570–968, POR Jan. 01, 2012–Dec. 31, 2012 (July 16, 2013), *available at* (last visited Dec. 10, 2013)). Once again, no request was made for review of the entries from GuPai, and the GuPai entries became subject to liquidation under the CVD order.[11]

However, as referenced above, Commerce amended the final determination in the CVD investigation, reducing the all others rate from 374.15% to 137.65% in response to *MacLean-Fogg IV*. That decision followed several rounds of litigation. First, in *MacLean-Fogg I*, importers of aluminum extrusions from China challenged the all others CVD rate. *MacLean-Fogg v. United States*, 36 CIT _, 836 F. Supp. 2d 1367 (2012). To calculate the all others rate, Commerce had excluded the weighted average of voluntary respondents' rates and used the weighted average adverse facts available rate of the uncooperative mandatory respondents.[12] *Id.* at 1375 (explaining Commerce's authority to use sampling to calculate all others rate under 19 U.S.C. § 1677f-1(e), as limited by the reasonableness criterion under 19 U.S.C. § 1671d(c)(5)(A)(ii)). The court held that Commerce's choice of methodology was reasonable but its calculation process was not and remanded the case for recalculation or further explanation. *Id*. at 1376. In *MacLean-Fogg II*, on a motion to seek reconsideration of the court's opinion in *MacLean-Fogg I*, the Plaintiffs claimed that the court should also address Commerce's preliminary rate determination. *MacLean-Fogg v. United States*, 36 CIT _, 853 F. Supp. 2d 1253 (2012). The motion was granted in part, holding that the preliminary rate determination would be reviewed for reasonableness upon consideration of the remand results. *Id.* In *MacLean-Fogg III*, the Court reviewed Commerce's remand results. Finding that Commerce used the same method in calculating the all others CVD rate, the court remanded again for recalculation or for further explanation as to whether the rate was punitive. *Maclean-Fogg v. United States*, 36 CIT _, 853 F. Supp. 2d 1336, 1343 (2012). In *Maclean-Fogg IV*, Commerce recalculated the all others CVD rate, finding the preliminary rate of

[11] Plaintiff's entries again remained unliquidated because of a suspension order by Commerce in the parallel AD case. Stipulated Facts at ¶ 35.

[12] Commerce calculated the all others rate by using the weighted average of the rates for the three mandatory respondents, which Commerce in turn had calculated by resorting to adverse facts available. *MacLean-Fogg I*, 836 F. Supp. 2d at1371. *See* 19 U.S.C. § 1677e (authorizing resort to adverse facts available for respondents' lack of cooperation).

137.65% to be the appropriate rate. The CIT affirmed. *MacLean-Fogg IV*, 885 F. Supp. 2d at 1343. The Court found that the application of this rate was reasonable and remedial given the lack of information on the record that Commerce could use in making the all others calculation. *Id.* at 1342.

Subsequent to the court's decision in *Maclean-Fogg IV*, on May 31, 2013, Snap-on received a Notice of Action from CBP indicating that Snap-on owed CVD duties at a rate of 374.15% for the ten entries at issue. Stipulated Facts at ¶ 42. Because all of the entries were entered prior to December 10, 2012 – the date on which the amended final determination rate of 137.65% went into effect – the Notice of Action indicates that the 137.65% rate affirmed in *MacLean-Fogg IV* would not be applied to entries entered prior to the effective date. Specifically, the Notice of Action apprises Snap-on of the duties owed on its entries and of the fact that interest will accrue so long as such duties go unpaid. In response to the Notice of Action from CBP, Snap-on filed its complaint in this action, claiming that the 374.15% rate could not be applied to its entries because the rate had been held contrary to law. Verified Compl., ECF No. 2.

Specifically, Plaintiff's Amended Complaint challenges Commerce's failure to instruct Customs to collect cash deposits at a rate of 137.65% for entries entered prior to December 10, 2012. First Am. Compl. ¶¶ 39–40, ECF No. 21. This cause of action can be read as a claim for declaratory judgment regarding the valid cash deposit rate for Snap-on's entries or, alternatively, as a claim for an injunction or writ of mandamus requiring Commerce to instruct Customs to apply the 137.65% rate. *Cf. Jilin Henghe Pharm. Co. v. United States*, 28 CIT 969, 342 F. Supp. 2d 1301 (2004), *judgment vacated as moot*, 123 Fed. App'x 402 (Fed. Cir. 2005); *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT, 357, 427 F. Supp. 2d 1249 (2006).[13] In brief, Plaintiff claims that the 374.15% rate is contrary to law following *MacLean-Fogg IV*, and that its entries should be subject to the 137.65% rate.

[13] Although Defendant challenged the Court's jurisdiction over the first count in Plaintiff's original complaint, Plaintiff's First Amended Complaint omits that count. *See* Defendant's Motion to Dismiss and Motion for Summary Judgment, at 9–11; First Am. Compl. Several cases discuss this court's jurisdiction in this context. *See, e.g. Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002–03 (Fed. Cir. 2003) ("[A]n action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results. Thus, Consolidated challenges the manner in which Commerce administered the final results. Section 1581(i)(4) grants jurisdiction to such an action."); *Canadian Wheat Bd. v. United States*, 32 CIT 1116, 1125, 580 F. Supp. 2d 1350, 1360 (2008) (noting that the Federal Circuit has "instructed [the CIT] to 'look to the true nature of [an] action'" when considering jurisdiction) (quoting *Norsk Hydro Can. Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (alteration in original)).

STANDARD OF REVIEW

Where the Court has jurisdiction pursuant to 28 U.S.C. § 1581(i), it will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* 28 U.S.C. § 2640(e).

DISCUSSION

I. *Suspension of Liquidation*

In general, when a dumping margin established in a CVD investigation or review is challenged in this court, a preliminary injunction is entered suspending liquidation of entries subject to the challenged margin. *See* 19 U.S.C. § 1516a(c)(2); *SKF USA Inc. v. United States*, 28 CIT 170, 316 F. Supp. 2d 1322 (2004).[14] If litigation results in court approval of a revised rate, all entries for which liquidation was suspended pursuant to court order and section 1516a(c)(2), and all entries that occur after publication of notice of the court decision in the Federal Register, are subject to liquidation at the revised rate. *See* 19 U.S.C. § 1516a(e). The same is not true, however, for other entries prior to notice of the court decision. Rather, the statute specifically provides that "[u]nless liquidation is enjoined by the court under [§ 1516a(c)(2)] entries of merchandise . . . shall be liquidated in accordance with the determination of [Commerce], if they are entered . . . on or before the date of publication in the Federal Register by [Commerce] of a notice of a decision of the [CIT] . . . not in harmony with that determination." 19 U.S.C. § 1516a(c)(1). These provisions have led to some confusion regarding when Commerce may liquidate entries at a rate that has been held contrary to law by the court, and this issue has been addressed in the "*Laclede* line"[15] of cases, to which we now turn.

II. *The Laclede line of Cases*

The *Laclede* line of cases "stand[s] for the established principle that an invalid antidumping determination cannot serve as a legal basis for the imposition of antidumping duties." *Andaman Seafood Co. v. United States*, 34 CIT _, 675 F. Supp. 2d 1363, 1369 (2010).

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[14] Suspension of liquidation preserves litigants' right to judicial review by preventing Customs's action which could moot a dispute. *Zenith Radio Corp. v. United States*, 710 F.2d 806,810–11 (Fed. Cir. 1983).

[15] The *Laclede* line includes *Laclede Steel Co. v. United States*, 20 CIT 712, 928 F. Supp. 1182 (1996); *Jilin*, 28 CIT 969, 342 F. Supp. 2d 1301 (2004); and *Tembec, Inc. v. United States*, 30 CIT 1519, 461 F. Supp. 2d 1355 (2006), *judgment vacated*, 31 CIT 241, 475 F. Supp. 2d 1393 (2007).

In *Laclede Steel*, 928 F. Supp. 1182, the plaintiff had challenged a 6.21% rate and the court had found that rate contrary to law, approving a revised rate on remand; however, while the challenge to the 6.21% rate was underway, Commerce initiated an administrative review that did not include the plaintiff. Therefore, the plaintiff's entries became subject to liquidation at the 6.21% rate pursuant to 19 U.S.C. § 1516a(c)(1) and 19 C.F.R. § 353.22(e) (1995). *Laclede Steel*, 928 F. Supp. at 1184–85. The plaintiff sought an injunction to prevent liquidation at the 6.21% rate. *Id*. Commerce asserted that it had implemented the court's decision invalidating the 6.21% rate for all future entries, pursuant to *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990), but that merchandise entered or withdrawn during the pendency of appeal was subject to the original rate pursuant to 19 U.S.C. § 1516a(a)(1). *Laclede Steel*, 928 F. Supp. at 1186–87. The court disagreed with Commerce, finding that the court's judgment had established the plaintiff's rate and, the plaintiff was "simply asking that this Court's judgment be given its full effect with respect to it." *Id*. at 1187. Therefore, the court held that with regard to a party for whom a judgment was final and conclusive – i.e., not subject to appeal to the court of appeals – the entries should be liquidated pursuant to 19 U.S.C. § 1516a(e), in accordance with the court's decision. *Id*. at 1188.

Jilin, 342 F. Supp. 2d 1301, contained very similar facts to *Laclede Steel*. The plaintiff had participated in a challenge to a dumping margin that resulted in the court's invalidation of the original margin. *Id.* at 1303. Though plaintiff was originally a party to the third administrative review, the request for review was withdrawn, and Commerce rescinded the review as to plaintiff. *Id*. at 1304. Commerce subsequently issued liquidation instructions for those entries entered between the second and third administrative reviews, which instructed Customs to liquidate at the cash deposit rate in effect at the time of entry. *Id*. The cash deposit rate in effect at the time of entry was the original rate invalidated by the court.

The *Jilin* court relied on *Laclede Steel* to hold that the decision invalidating the original rate was "final and conclusive as to whether [plaintiff] was properly included in the antidumping order on bulk aspirin from China; [sic] once that decision became final. Commerce was bound to follow it." *Id.* at 1309. The *Jilin* court went on to state that "[o]nce Commerce's final antidumping determination has been invalidated, it cannot serve as a legal basis for the imposition of antidumping duties on [plaintiff's] entries." *Id*. at 1309–10.

Finally, in *Tembec*, 461 F. Supp. 2d 1355, a three judge panel of this court applied reasoning similar to *Laclede Steel* and *Jilin* in the context of an appeal to a North America Free Trade Agreement ("NAFTA") panel. In particular, the *Tembec* court read the statutes related to suspension of liquidation upon appeal to a NAFTA panel, 19 U.S.C. § 1516a(g)(5)(B)–(C), to preclude liquidation of entries entered prior to a NAFTA panel review in a way that was inconsistent with the panel decision. *Tembec*, 461 F. Supp. 2d at 1364–67.

Thus, the court has consistently held that when a party secures a right to a revised rate through judicial review, all unliquidated entries of that party which are subject to the revised rate must be liquidated at that rate regardless of whether entry occurred before or after judicial review. Furthermore, as noted above, a determination that is found to be contrary to law cannot be the basis of a duty assessment with respect to the prevailing litigant.

III. *Plaintiff's Waiver Issue*

Here, however, the *Laclede* line of cases does not support Plaintiff's argument that the 374.15% rate, because it is contrary to law following the date of the court's decision, cannot be a valid assessment or cash deposit rate with respect to Plaintiff's prior entries. This is true because, before applying the *Laclede* reasoning, the Plaintiff must show that it has a right to the 137.65% revised rate affirmed in *MacLean-Fogg IV*. On the facts of the *Laclede* line, the plaintiffs suing to enforce the court's decision had an established right to the revised rate because they were parties to the litigation in which the revised rate was affirmed. *See, e.g.*, *Jilin*, 342 F. Supp. 2d at 1309 ("The decision in *Rhodia II* was final and conclusive as to whether Jilin was properly included in the antidumping order on bulk aspirin from China; [sic] once that decision became final."); *Decca*, 427 F. Supp. 2d 1249 (ordering Commerce to collect the plaintiff's revised cash deposit, as affirmed by the CIT, while the case was pending before the CAFC). Therefore, the *Laclede* line of cases turned on the fact that the court had adjudicated the rights of the plaintiff in a prior case, and Commerce was bound to uphold those rights.

In this case, the Government asserts that Snap-on does not have any right to the 137.65% margin. Thus, unlike the *Laclede* line, this case does not present the question of whether the plaintiff should receive the benefit of an earlier judgment rendered in its favor. Rather, this case raises the prior, threshold question of whether a recipient of the all others rate should receive the retrospective benefit of a judgment rendered in a case to which the recipient was not a party. If the answer to this threshold question is yes, then the *Laclede*

line is relevant, but a *Laclede* analysis cannot be conducted without answering the logically prior question. A consideration of that prior question reveals that the Plaintiff has waived any right to the 137.65% rate.

Plaintiff has waived any right to the 137.65% rate because it did not participate in the litigation challenging the investigation rate or any subsequent administrative reviews or assert a private right of action in any manner contemplated by the statute. The statute specifically provides that Commerce will liquidate entries at the cash deposit rate in effect at the time of entry for those entries entered prior to notice of a decision, if such entries are not suspended by court order. 19 U.S.C. § 1516a(c)(1); *see* 19 C.F.R. § 351.212(c)(1). As a result of this statutory provision, when a respondent does not join litigation, and where liquidation of its entries is not suspended by court order,[16] such entries may be liquidated in accordance with instructions that are not affected by the notice of a revised rate pursuant to a court decision.

The statute provides two pathways for importers in Plaintiff's situation to challenge a CVD order in a way that insures retrospective application of a correct rate — a challenge to the investigation and a challenge to the administrative review — and it is the failure of Plaintiff to properly use these mechanisms that undermines both the legal and equitable arguments offered in favor of its motion. While this case derives from a challenge to an investigation, the extent of a party's private right to a rate has been clearly articulated in the context of administrative reviews.

The benefit from lower CVD rates calculated in an administrative review or subsequent judicial review must be obtained by participating in the review processes, which is intended as the proper forum for challenging erroneous rate determinations. *See* 19 U.S.C. § 1675(a)(2)(C) (authorizing periodic administrative reviews); 19 C.F.R. § 351.213(b) (permitting a domestic interested party to request review); *see also* 19 U.S.C. § 1677(9)(A) (defining "interested party" to include U.S. importer of affected merchandise). Barring such participation in an administrative review, the relevant regulation provides for automatic assessment of the importer's entries "at rates equal to the cash deposit of . . . estimated . . . countervailing duties required on that merchandise at the time of entry." 19 C.F.R. § 351.212(c)(1)(i).

Plaintiff argues that 19 U.S.C. §§1516a(c)(2) and (e)(2) entitle it to the lower rate because the contested entries were covered by the Department's determination that was challenged and invalidated in

[16] Contrary to Plaintiff's argument, suspension pursuant to court order in this action does not cure Plaintiff's failure to obtain suspension by court order under *MacLean-Fogg*. But the suspension here does not render Plaintiff a party to *MacLean-Fogg*.

MacLean-Fogg IV. Pl's Reply at 9, ECF No. 24. This misconstrues what it means for an entry to be "covered" by a determination and ignores the Plaintiff's failure to avail itself of the proper administrative remedy by challenging the all others rate or participating in the administrative review. It is well established that a party who does not participate in an administrative review does not have a right to any rate calculated in the review. *See Consol. Bearings*, 348 F.3d at 1005–06 ("[19 U.S.C. § 1675(a)(2)(C)] requires Commerce to apply the final results of an administrative review to all entries covered by the review. If the review did not examine a particular importer's transaction, then that importer's entries enjoy no statutory entitlement to the rates established by the review. The 'entries' must be 'covered by the determination' to gain entitlement to the review's results as the 'basis for the assessment' of duties.") (quoting 19 U.S.C. § 1675(a)(2)(C) (2000)); *United States v. ITT Indus., Inc.*, 28 CIT 1028, 1030, 343 F. Supp. 2d 1322, 1325 (2004) ("If an interested party fails to request an administrative review, Commerce generally directs Customs to liquidate merchandise at the cash deposit rates in effect at the time the merchandise entered the United States, which rate is published in the Federal Register as the 'all others' cash deposit rate, unless the party received an individual rate in the original investigation." (internal citations omitted)).

Thus, because Snap-on did not participate in a challenge to the investigation rate as applied to its entries when it had the opportunity to do so, or during any administrative review,[17] it cannot benefit from the revised rate established for those entries that are the subject of the litigation regarding those rates.[18] Contrary to Plaintiff's assertion, *see* Plaintiff's Motion for Summary Judgment at 12–13, the *Laclede* line of cases does not extend the applicability of the automatic assessment regulation under 19 C.F.R. § 351.212(c) to import-

[17] *See* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 78 Fed. Reg. 25,423, 25,424 (Dep't Commerce May 1, 2013) (announcing opportunity to seek review of entries for the period of January 1, 2012, to December 31, 2012); Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 77 Fed. Reg. 25,679, 25,680 (May 1, 2012) (announcing opportunity to seek review of entries for period of September 7, 2010, to December 31, 2011).

[18] Plaintiff relies on the court of appeals decision in *Shinyei Corp. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), for the proposition that participation in an administrative review is not a necessary prerequisite for its section 1581(i) challenge to Commerce's liquidation instructions in this action. But *Shinyei's* recognition of this court's jurisdiction to hear an Administrative Procedure Act challenge to Commerce's liquidation instructions – like this Court's recognition of its jurisdiction over Plaintiff's challenge here – does not establish Snap-on's substantive right to the revised rate established in *MacLean-Fogg* for entries prior to judgment in that case.

ers who do not participate in the administrative review or litigation addressing the CVD investigation, and Plaintiff does not question the validity of 19 C.F.R. § 351.212(c).[19] It follows that Plaintiff is not entitled to the 137.65% revised rate in accordance with this court's judgment in *Maclean-Fogg IV*, and Commerce did not act contrary to law by instructing Customs to liquidate Plaintiff's entries at the 374.15% all others CVD rate.[20]

Plaintiff also argues that equity strongly supports granting its motion, since failing to do so would allow the application of a CVD rate known to be unlawful as a result of the Department's own determinations in response to MacLean-Fogg *III* and *IV*. Pl's Reply at 10. This argument ignores the fact that a CVD rate can only be challenged by the process laid out in 19 U.S.C. § 1675(a)(2)(C) and 19 C.F.R. § 351.213(b). Retrospective relief for a CVD rate that is later found to be improper is only available to parties for whom liquidation has been properly suspended by participation in this process. The fact that Snap-on's entries were not liquidated for other reasons unrelated to the *MacLean-Fogg* challenge places Snap-on in the same legal position as any other importer during this period that did not challenge the CVD and was therefore subject to the 374.15% rate.[21] Granting Snap-on's motion would offer the Plaintiff a benefit that its conduct – in failing to participate in either MacLean-Fogg or the administrative review – suggests it did not expect or believe it deserved. Doing so might also reduce the incentive for parties to participate in administrative reviews and actively engage with the Department's procedures by holding out the prospect of free riding on challenges brought by others. These considerations – both of fairness

[19] Plaintiff's citation of *Asociación Colombiana de Exportadores de Flores v. United States* ("*Ascoflores*"), 916 F.2d 1571 (Fed. Cir. 1990), is also unavailing. In that case, the plaintiff successfully challenged in the CIT the dumping margin in the underlying AD order. Id. at 1575–76. The subsequent administrative review would not have addressed the issue in dispute, i.e., the validity of the calculated dumping margin in the AD order, but rather would have addressed only the rates calculated for the subsequent period of review. *Id*. Accordingly, the Federal Circuit found that the futility exception to the exhaustion requirement permitted the plaintiff to seek a reduced dumping margin in the AD order even though the plaintiff did not request an administrative review of its subsequent entries. *Id*. By contrast, Plaintiff did not participate in *MacLean-Fogg IV*, which is the principal case in which the *Ascoflores* rule could have applied to allow Plaintiff to seek relief. Thus, *Ascoflores* is inapposite to Plaintiff's situation.

[20] Contrary to the implication of Plaintiff's argument, collateral estoppel does not apply here because the issue in this case – whether Snap-on is entitled to a lower rate despite its non-participation in the investigation and subsequent litigation and despite automatic assessment under 19 C.F.R. § 351.212(c) – was not presented in *MacLean-Fogg IV*. *Cf. Consol. Textiles, Inc. v. United States*, 28 CIT 1304, 1307–08, 346 F.Supp. 2d 1290, 1293 (2004) (listing factors required for collateral estoppel).

[21] See note 15, above.

to other parties similarly situated and of protecting the statutory design of the review process – weigh heavily against Snap-on's argument that it alone should benefit retrospectively from the ruling in *MacLean-Fogg IV*. Like the other parties that failed to participate in the review or properly challenge the all others rate, Snap-on will be subject to the proper rate on future entries, but will not gain disproportionately simply because its past entries were not liquidated for other reasons.

CONCLUSION

Accordingly, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied. Judgment will be entered accordingly.

It is so ORDERED.

Dated: December 16, 2013
New York, NY

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