Slip Op. 08–102

FORMER EMPLOYEES OF BMC SOFTWARE, INC., *Plaintiffs*, v. UNITED STATES SECRETARY OF LABOR, *Defendant*.

Court No. 04–00229

[Defendant's Motion for Partial Reconsideration denied.]

Dated: September 26, 2008

Miller & Chevalier Chartered (*James B. Altman* and *Daniel P. Wendt*); *Kathleen T. Wach*, Of Counsel; for Plaintiffs.

Gregory G. Katsas, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jane C. Dempsey*); *Stephen R. Jones*, Office of the Solicitor, U.S. Department of Labor, Of Counsel; for Defendant.

MEMORANDUM OPINION

RIDGWAY, Judge:

In this action, former employees of Houston, Texas-based BMC Software, Inc. ("the Workers") successfully challenged the determination of the U.S. Department of Labor denying their petition for certification of eligibility for trade adjustment assistance ("TAA") benefits. *See generally Former Employees of BMC Software, Inc. v. U.S. Sec'y of Labor*, 30 CIT ___ , 454 F. Supp. 2d 1306 (2006) (*BMC I*). The Workers were subsequently awarded attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), in *Former Employees of BMC Software, Inc.*, 31 CIT ___ , 519 F. Supp. 2d 1291 (2007) (*BMC II*).[1] Following supplemental submissions by the par-

[1] Relying on the Court of Appeals' decision in *Richlin*, *BMC II* permitted counsel to the plaintiff Workers to recover for paralegal/legal assistant time not as part of fees, but only "as expenses *at the cost to the attorney*." *See BMC II*, 31 CIT at ____ , 519 F. Supp. 2d at 1343–45 (*quoting Richlin Sec. Serv. Co. v. Chertoff*, 472 F.3d 1370, 1381 (Fed. Cir. 2006)) (emphasis added in *BMC II*). The Supreme Court has since reversed the Court of Appeals' decision, holding that paralegal/legal assistant services are reimburseable at prevailing market rates. *See generally Richlin Sec. Serv. Co. v. Chertoff*, ____U.S. ____ , 128 S. Ct. 2007 (2008).

ties, the precise amount of the award was calculated and an appropriate order entered. *See Former Employees of BMC Software, Inc.*, 31 CIT ___ , 2007 WL 4181696 (2007) (*BMC III*).

Now pending before the Court is Defendant's Motion for Partial Reconsideration ("Def.'s Motion"), in which the Government urges that the language of *BMC II* be modified in three places, to delete criticism of positions taken by the Government.[2] For the reasons outlined below, Defendant's Motion is denied.

I. *Standard of Review*

Rule 59(a)(2) of the Rules of this Court permits rehearing or reconsideration for any of the reasons for which rehearing or reconsideration has been granted in suits in equity in the courts of the United States. *See* USCIT R. 59(a)(2).[3] The disposition of such a motion for rehearing or reconsideration is committed to "the sound discretion of the court." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 336, 601 F. Supp. 212, 214 (1984) (citations omitted).

The purpose of rehearing or reconsideration is not to allow a losing party to relitigate the merits of a case. *Belfont Sales Corp. v. United States*, 12 CIT 916, 917, 698 F. Supp. 916, 918 (1988), *aff'd*, 878 F.2d 1413 (Fed. Cir. 1989). Rather, rehearing or reconsideration is granted only to "rectify[ ] a significant flaw in the conduct of the original proceeding." *Gold Mountain Coffee*, 8 CIT at 336, 601 F. Supp. at 214 (quotation marks and citation omitted). Thus, "[t]he

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[2] The plaintiff Workers did not participate in the briefing on Defendant's Motion. *But see* Plaintiffs' Application for Fees and Expenses Pursuant to the Equal Access to Justice Act at 7–11, 21–22 (criticizing Government for duplicity and lack of candor, as discussed in section II.A., *infra*).

Further, the current counsel of record representing the Government in this matter did not participate in the prior proceedings – either on the merits of the case or the fee litigation. Counsel advises that the instant motion was filed at the request of the Director of the National Court Section of the Civil Division of the U.S. Department of Justice. *See* Def.'s Motion at 2 n.1.

[3] "On its face, Rule 59 provides for rehearing in actions which have been tried and gone to judgment. . . . Nevertheless, it has been held that the 'concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by the court without a jury.' " *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 585, 623 F. Supp. 1262, 1274 (1985) (*quoting Timken Co. v. United States*, 6 CIT 76, 77, 569 F. Supp. 65, 67 (1983) (*quoting* Wright & Miller)), *rev'd on other grounds*, 840 F.2d 1547 (Fed. Cir. 1988). *See also Gainey v. Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716, 718 (3d Cir. 1962) (noting that courts "have experienced no difficulty in concluding that a motion for rehearing or reconsideration made . . . after the entry of an appealable order is within the coverage of Rule 59"); *In re Ionian Shipping Co.*, 49 F.R.D. 334, 336 (S.D.N.Y. 1969) (noting that "[i]t is clear that the concept of a 'new trial' used in Rule 59 has been interpreted to encompass the rehearing of a motion").

major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (quotation marks and citations omitted). As the court has previously put it, the purpose of rehearing or reconsideration is "to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result." *Target Stores v. United States*, 31 CIT ___, ___, 471 F. Supp. 2d 1344, 1349 (2007) (*quoting Agro Dutch Indus. Ltd. v. United States*, 29 CIT 250, 253–54 (2005), *rev'd on other grounds*, 167 Fed. Appx. 202 (Fed. Cir. 2006)).

In sum, a court ordinarily will not disturb its prior decision unless it is "manifestly erroneous." *Gold Mountain Coffee*, 8 CIT at 337, 601 F. Supp. at 214 (*quoting Quigley & Maynard, Inc. v. United States*, 61 C.C.P.A. 65, 496 F.2d 1214 (1974)). Rehearing or reconsideration is fundamentally "a means to correct a miscarriage of justice." *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 585, 623 F. Supp. 1262, 1274 (1985).

II. *Analysis*

In its Motion for Reconsideration, the Government takes exception to language in three parts of *BMC II*, which criticized positions taken by the Government and referred generally to the potential for sanctions in certain circumstances. *See* Def.'s Motion at 1–2, 4–5 (*referring to BMC II*, 31 CIT at ___ n.50, ___ n.99, ___ & n.108, 519 F. Supp. 2d at 1326 n.50, 1354 n.99, 1364 & n.108).

Of course, as the Government properly notes, the Court in fact did not impose sanctions. *See* Def.'s Motion at 1. Indeed, neither the Government nor its counsel was ever even threatened with sanctions. *Cf. NISUS Corp. v. Perma-Chink Systems, Inc.*, 497 F.3d 1316, 1320 (Fed. Cir. 2007) (holding that judicial statements criticizing a lawyer – no matter how harshly – but which are not accompanied by a sanction or findings are not directly appealable). The Government nevertheless expresses concern that *BMC II*'s "citations to Rule 11 and other allusions to potentially sanctionable conduct . . . may have significant repercussions beyond this individual case and detrimentally affect both the attorneys' reputations and potentially the vigor and creativity of advocacy by other members of the bar." *See* Def.'s Motion at 1–2. The Government therefore asks that the language at issue be deleted from the opinion.

To be sure, counsel for the Government – like private counsel – must be free to zealously represent the interests of their clients. However, all lawyers must balance that obligation against other (sometimes competing) ethical obligations. Thus, for example, coun-

sel must take care to "properly temper[ ] enthusiasm for a client's cause with careful regard for the obligations of truth, candor, accuracy, and professional judgment that are expected of them as officers of the court." *Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2d Cir. 1986); *see also, e.g.*, ABA Model Rules of Professional Conduct (2008), Rule 3.3 ("Candor Toward the Tribunal"), Comment [4] (emphasizing that "[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case"); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (criticizing counsel's "fail[ure] to cite, much less distinguish, clearly governing case law" as potential violation of Rule 3.3).[4]

Each of the Government's three objections is addressed in turn below. For the reasons set forth there, the Government's Motion for Reconsideration is denied.

A. *Foonote 50*

The Government first takes exception to footnote 50 of *BMC II*, which appears in a section of the opinion addressing the Government's objections to the plaintiff Workers' claims for fees for legal services rendered after the Workers had filed their comments on the

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[4] Indeed, government lawyers play a unique role in the administration of justice, and therefore have some special duties. "A government lawyer 'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.' " *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (Mikva, C.J.) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935), and emphasizing that the solemn duty to do justice applies "with equal force to the government's civil lawyers"). *See Trout v. Garrett*, 780 F. Supp. 1396, 1421 n.60 (D.D.C. 1991) (noting inscription above entrance to Office of the Attorney General of the U.S.: "The United States wins its point whenever justice is done its citizens in the courts.").

See generally, e.g., New York Code of Professional Responsibility (2007), Ethical Consideration 7–14 (stating that "[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results") (mirroring ABA Model Code of Professional Responsibility EC 7–14); *In re Lindsey*, 158 F.3d 1263, 1273 n.4 (D.C. Cir. 1998) (citing EC 7–14, and noting that "the government lawyer in a civil action must 'seek justice' and avoid unfair settlements or results"); *Williams v. Sullivan*, 779 F. Supp. 471, 472 (W.D. Mo. 1991) (explaining that government lawyer "has a duty beyond just zealously representing her client"; "there is a special duty imposed on government lawyers to 'seek justice and to develop a full and fair record' "); *Bonanza Trucking Corp. v. United States*, 10 CIT 314, 321 n.18, 642 F. Supp. 1170, 1176 n.18 (1986) (noting that EC 7–14 mandates "that a government lawyer in an administrative proceeding has the responsibility to develop a full and fair record"); *Jones v. Heckler*, 583 F. Supp. 1250, 1256 n.7 (N.D. Ill. 1984) (quoting EC 7–14, and emphasizing that "counsel for the United States has a special responsibility to the justice system"). *See also, e.g., City of Los Angeles v. Decker*, 18 Cal.3d 860, 871, 558 P.2d 545, 551 (1977) (explaining that "[o]ccupying a position analogous to a public prosecutor, [a government lawyer in the civil arena] is possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice") (internal quotation marks omitted).

Labor Department's remand determination (which certified the Workers as eligible to apply for TAA benefits). *See generally* Def.'s Motion at 5–7; *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1321–26.

The Government had opposed an award of fees for services rendered late in the proceeding, arguing that the efforts of the Workers' counsel "only protracted the litigation after certification." *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1321 (*quoting* Defendant's Response to Plaintiffs' Application for Attorney Fees and Expenses ("Def.'s EAJA Opposition")). According to the Government, the Workers' counsel had "engage[d] the Court and the Government in a needless colloquy regarding the hypothetical circumstance of a miscalculation of benefits," which the Government argued "[the] Court lacks jurisdiction to determine in any event." *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1321 (*quoting* Def.'s EAJA Opposition).

However, *BMC II* pointedly observed that "the Government . . . [had] no one but itself to blame for the post-certification briefing" to which it objected. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1321. As *BMC II* explained at some length, the post-certification briefing was spawned by the Government's seeming attempts to distance itself from representations that its counsel made early in these proceedings to induce the Workers to consent to a lengthy extension of time for the filing of the results of the Labor Department's remand investigation. *See generally BMC II*, 31 CIT at ___ , ___ , ___ , 519 F. Supp. 2d at 1322, 1325–26, 1363–64.

Specifically, "[c]ounsel for the Government induced the Workers' consent to the requested extension of time – and the Court's entry of an order granting that extension – with express, unequivocal assurances that 'in the event petitioners are certified in this case, the petitioners would be entitled to receive full TRA benefits [*i.e.*, income support payments, known as "Trade Readjustment Allowance" payments] regardless of the date they are certified.' " *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1322 (quotations omitted). But, when the Labor Department's remand results eventually issued, there was no language reflecting the unconditional assurances that the Government had previously given. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1322.

As *BMC II* explained, when the Workers urged the Court to "expressly order[ ], in accordance with Defendant's representation, that Plaintiffs, having been certified, are entitled to receive full TRA benefits, regardless of the date of their certification," the Government refused to amend the certification and responded (in essence) that the Court lacked jurisdiction to enforce the representations that the Government's counsel had made to the Court and to the Workers. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1322 (quotation omit-

ted).[5] The Workers nevertheless ultimately succeeded in obtaining all benefits to which they were entitled. *See BMC II*, 31 CIT at ___ , ___ n.50, 519 F. Supp. 2d at 1299, 1326 n.50; *see also BMC I*, 30 CIT at ___ , 454 F. Supp. 2d at 1350.

Against this backdrop, footnote 50 of *BMC II* observed:

> Fortunately, [because the Workers succeeded in obtaining full benefits,] there was ultimately no need here to test the limits of the Court's jurisdiction *vis-a-vis* that of the state courts. *See generally BMC*, 30 CIT at ___ , 454 F. Supp. 2d at 1347 (acknowledging that "the statutory scheme generally vests the state courts with jurisdiction over disputes concerning the specific TAA benefits to which individual members of a certified group of former employees are entitled") (citations omitted). *Nor was it ultimately necessary to consider the need for sanctions, contempt proceedings, or other action against the Government or its counsel.* As noted above, the Workers advised the Court that – armed with the post-certification memoranda filed by the Government in this action interpreting the complex provisions of the TAA statute and regulations and confirming that the delay in the Workers' certification would have no effect on the benefits to which they were entitled – they no longer foresaw any insurmountable obstacles to their receipt of the full measure of TAA benefits. *See id.*, 30 CIT at ___ , 454 F. Supp. 2d at 1349–50 (citation and footnote omitted).

See BMC II, 31 CIT at ___ n.50, 519 F. Supp. 2d at 1326 n.50 (emphasis added). The italicized sentence is the focus of the Government's objection.

The Government devotes the bulk of its brief on reconsideration of this point to arguing the metes and bounds of the Court's jurisdiction in TAA cases. The gravamen of the Government's motion is that it was "entirely reasonable in arguing that the Court lacks authority to dictate whether plaintiffs would receive 'full' trade readjustment allowance[ ] benefits." *See* Def.'s Motion at 5–7. But the Government's argument is wide of the mark.

As a full and fair reading of *BMC II* makes clear, the potential risk of "sanctions, contempt proceedings, or other action against the Government or its counsel" was not attendant to the Government's posi-

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[5] As *BMC II* emphasizes, the Workers' concerns that their receipt of benefits would be negatively affected by the Government's protracted delays in certification were by no means "trumped up." *See BMC II*, 31 CIT at ____ & n.43, 519 F. Supp. 2d at 1322–23 & n.43 (and authorities cited there); *BMC I*, 30 CIT at ____ n.63, 454 F. Supp. 2d at 1341 n.63 (explaining in detail the potentially devastating effects of delayed certification on benefits received by workers); *see also BMC I*, 30 CIT at ____ n.69, 454 F. Supp. 2d at 1349 n.69; *Former Employees of Tyco Elecs. v. U.S. Dep't of Labor*, 28 CIT 1571, 1575–76, 350 F. Supp. 2d 1075, 1080–81 (2004).

tion on the Court's jurisdiction *per se*. Indeed, *BMC I* acknowledged that "the statutory scheme generally vests the state courts with jurisdiction over disputes concerning the specific TAA benefits to which individual members of a certified group of former employees are entitled." *BMC I*, 30 CIT at ___ , 454 F. Supp. 2d at 1347 (citations omitted).[6]

Thus, contrary to the Government's implication, the concern here was not the Government's position on the jurisdiction of the Court. The concern was the Government's arguably duplicitous conduct – its seeming attempt to "have its cake and eat it too." In order to secure a benefit for the Government (*i.e.*, the Workers' consent to a lengthy extension of time for the filing of the Labor Department's remand results), the Government's counsel expressly represented to the Workers and to the Court – in writing – that, if the Workers were ultimately certified, "[they] would be entitled to receive full TRA benefits regardless of the date they are certified." But then, after the Workers were certified, the Government sought to renege on that warranty, taking the position that – notwithstanding its earlier representations – the level of benefits to be received by the Workers was a matter for state authorities and state courts.[7] As the Workers emphasized, however:

> Plaintiffs . . . have a reasonable expectation as litigants to have a measure of reliability in their dealings with the government [as does the Court]. . . . The Government should not have assured Plaintiffs of their entitlement to full benefits if the Government knew it would ultimately take the position that its representation (designed to induce an extension [of time]) could not be enforced. In such a scenario, the Court must have the authority to hold the Government to its words.

See BMC II, 31 CIT at ___ , 519 F. Supp. 2d at 1325–26 (*quoting* Plaintiffs' Reply to Defendant's Response to Plaintiffs' Comments on Remand Results).

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[6] Although *BMC I* acknowledged that – as the Government maintains – "the statutory scheme generally vests the state courts with jurisdiction over disputes concerning the specific TAA benefits to which individual members of a certified group of former employees are entitled" (*see BMC I*, 30 CIT at ____ , 454 F. Supp. 2d at 1347 (citations omitted)), BMC II further pointed out that "it is far from clear that the extent of the benefits available to a *group* of petitioning workers pursuant to a Labor Department TAA certification is a matter for the state courts (rather than the Court of International Trade)." *See BMC II*, 31 CIT at ____ n.49, 519 F. Supp. 2d at 1325 n.49. Of course, it was this latter issue which was of concern to the plaintiff Workers in this case.

[7] *See, e.g., BMC I*, 30 CIT at ____ n.70, 454 F. Supp. 2d at 1349 n.70 (*quoting* Defendant's Memorandum of Law in Response to the May 12, 2005 Order, which argued: "[I]t is inappropriate for the Court to inquire into matters beyond its jurisdiction. To the extent that any petitioners experience perceived difficulties in the receipt of benefits after certification has issued, any such grievance would be a matter for state courts.").

The Government cites no authority for the proposition that a litigant is free to make representations to the Court and to other parties to secure something of benefit, and then to later disavow them – particularly where other parties have relied on them to their detriment.

It may be – as the Government has insisted in this case, and elsewhere – that the Court could not have ordered the Labor Department to certify that, notwithstanding the delay in their certification, the Workers were "entitled to receive full TRA benefits." But it is beyond cavil that a court has the inherent authority, where necessary, to hold litigants and counsel responsible for their statements made in the course of litigation, whether through "sanctions, contempt proceedings, or other action." *See generally BMC I*, 30 CIT at ___, 454 F. Supp. 2d at 1348 (and authorities cited there) (discussing court's inherent powers); *Precision Specialty Metals, Inc. v. United States*, 315 F.3d 1346, 1357–58 (Fed. Cir. 2003) (discussing "the inherent power of the court to control and specify the standards of lawyers who appear before it") (citation omitted).[8] To the extent that footnote 50 of *BMC II* may operate to "chill . . . enthusiasm or creativity" by constraining counsel from promising what they cannot deliver, and by ensuring that they are both crystal clear and completely candid in all communications with opposing counsel and with the Court, that will be all to the good. *See* Def.'s Motion at 7 (arguing that "Rule 11 'is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.' ") (citation omitted).

In short, contrary to the Government's assertions, nothing in footnote 50 of *BMC II* was "undeserved and manifestly unjust." The Government's motion to strike that language from the opinion is therefore denied.

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[8] In this case, the Government sought to portray federal authorities as powerless (relative to state authorities) in the administration of TAA benefits, even if federal authorities' delays in certification threatened the benefits to which the Workers would otherwise be entitled.

But, in other similar cases, under pressure from the court as well as the workers' counsel, federal authorities have taken affirmative action to ensure that their delays did not negatively affect the TAA benefits received by the workers in those cases. *See BMC I*, 30 CIT at ____ n.63, 454 F. Supp. 2d at 1341 n.63 (discussing *Tyco, Oxford Automotive,* and *Ericsson*, where federal officials granted so-called "*Tyco* Waivers" to assure full benefits for workers in those cases); *see also Tyco*, 28 CIT at 1575–76, 350 F. Supp. 2d at 1080–81 (discussing issuance of "*Tyco* Waiver" in that case). This suggests that the Government recognizes that it is, in fact, accountable to the court in such situations.

Moreover, in at least one critical respect, this case is even stronger than those other cases. In this case, counsel for the Government made express representations – in writing – to the Court and to the Workers' counsel. In the other cases, the Government had made no such representations, written or otherwise. *See BMC I*, 30 CIT at ____ n.69, 454 F. Supp. 2d at 1349 n.69 (discussing Government's failure in other cases to "affirmatively alert the court and all parties in advance to the potentially devastating effect of litigation delays on the benefits ultimately awarded").

B. *Footnote 99*

The Government also challenges footnote 99 of *BMC II*,[9] which appears in a section of the opinion addressing the plaintiff Workers' claim for a "special factor" enhancement of their award of attorneys' fees – a claim which the Government opposed. *See generally* Def.'s Motion at 7–9; *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1346–55.

As *BMC II* observed, "[t]he 'special factor' most commonly invoked in an attempt to justify enhanced attorneys' fees is that specified in the EAJA itself – 'the limited availability of qualified attorneys for the proceedings involved.' " *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347 (*quoting* 28 U.S.C. § 2412(d)(2)(A)(ii)). *BMC II* noted that, in *Pierce v. Underwood*, the Supreme Court explained that the "special factor" of "the limited availability of qualified attorneys" "must refer to attorneys 'qualified for the proceedings' in some specialized sense, rather than just in their general legal competence." *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347 (*quoting Pierce v. Underwood*, 487 U.S. 552, 572 (1988)).

In addition, *BMC II* observed that *Pierce v. Underwood* narrowly construed the EAJA's reference to "the limited availability of qualified attorneys" as concerning only situations where an attorney possesses "some distinctive knowledge or specialized skill needful for the litigation," and that the Supreme Court further held that "an extraordinary level of the general lawyerly knowledge and ability useful in all litigation" does not suffice to warrant a "special factor" enhancement. *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347 (*quoting Pierce v. Underwood*, 487 U.S. at 572). *BMC II* pointed out that *Pierce v. Underwood* suggested that the requisite "distinctive knowledge or specialized skill" might include "an identifiable practice specialty such as patent law, or knowledge of foreign law or language." *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347 (*quoting Pierce v. Underwood*, 487 U.S. at 572).

As *BMC II* emphasized, "[a]nalysis of the caselaw reveals that Courts of Appeals across the country have taken divergent approaches to the 'limited availability of qualified attorneys' as a special factor." *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347 (citations omitted). *BMC II* observed that "[m]uch of the debate surrounds whether technical specialties within the field of administrative law constitute 'distinctive knowledge or specialized skill[s]' within the meaning of *Pierce v. Underwood*." *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347–48 (citations omitted). *BMC II* then carefully surveyed the state of the existing law on point, concluding that "[a]ny attempt to synthesize the jurisprudence on point compels the conclusion that the courts are truly 'all over the map,' and that *some*

9The Government's Motion for Reconsideration at one point erroneously identifies the footnote at issue as "footnote 91." *See* Def.'s Motion at 9; *but see id.* at 5 (referring to "footnote 99").

precedent can be mustered to support almost *any* position – particularly if one draws on the early caselaw." *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1351 (citations omitted).

BMC II also analyzed the relevant caselaw of the U.S. Court of Appeals for the Federal Circuit, as well as the pertinent decisions of courts subject to review by that court. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1352–53. In one of the cases discussed, the Court of Appeals directly (albeit succinctly) addressed the issue of legal expertise as a "special factor," granting an enhancement based specifically on counsel's "*capability* and willingness" to handle appeals of adverse decisions by the Merit Systems Protection Board. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1352–53 (*analyzing Gavette v. Office of Personnel Management*, 788 F.2d 753, 754 (Fed. Cir. 1986) (emphasis added)).

In its EAJA Opposition, the Government asserted that it is "well-settled that . . . where knowledge of general administrative law enables an attorney [to] prosecute a case, courts have denied EAJA fees above the statutory cap." *See BMC II*, 31 CIT at ___ n.99, 519 F. Supp. 2d at 1354 n.99 (*quoting* Def.'s EAJA Opposition). The Government there urged the Court to follow the *Tyco* decision, a TAA case in which another judge of this Court denied a "special factor" enhancement. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1353–54 (*citing* Def.'s EAJA Opposition); *Tyco*, 28 CIT at 1578–79, 1582–83, 1589–92, 350 F. Supp. 2d at 1083, 1086, 1092–93.[10] The Government's EAJA Opposition did not cite, much less discuss or seek to distinguish, the caselaw of the Court of Appeals for the Federal Circuit.

> Against that backdrop, footnote 99 of *BMC II* observed:
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> The Government asserts that it is "well-settled that . . . where knowledge of general administrative law enables an attorney [to] prosecute a case, courts have denied EAJA fees above the statutory cap.". . . . The Government's strategic use of the phrase "well-settled" could be read to be calculated to convey an impression of unanimity (or, at least, near-unanimity) – the impression that the law on legal expertise and "special factors" is a good deal more uniform and consistent than it actually is. . . . [H]owever, counsel have a duty of candor toward the court; and misrepresenting the state of the law is potentially sanctionable conduct.

BMC II, 31 CIT at ___ n.99, 519 F. Supp. 2d at 1354 n.99.

In its Motion for Reconsideration, the Government emphasizes that the key word in its statement concerning "well-settled" law is

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[10] As *BMC II* acknowledged, *Tyco* was then "the sole decision addressing a claim for a 'special factors' enhancement in a TAA case." *See BMC II*, 31 CIT at ____ , 519 F. Supp. 2d at 1353–54 (*discussing Tyco*, 28 CIT at 1589–92, 350 F. Supp. 2d at 1092–93).

the word "general" (as in "knowledge of *general* administrative law"). *See* Def.'s Motion at 8. But nowhere in its opposition to the plaintiff Workers' request for attorneys' fees did the Government address the fact that – as *BMC II* noted – the real debate in such cases "surrounds whether technical specialties *within the field of administrative law* constitute 'distinctive knowledge or specialized skill[s]' within the meaning of *Pierce v. Underwood*." *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1347–48.[11]

More to the point, to support its assertion that it is "well-settled" that – "where knowledge of general administrative law enables an attorney to prosecute a case" – no "special factor" enhancement is appropriate, the Government's opposition cited two cases. *See* Def.'s EAJA Opposition at 35 (*citing Atlantic Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 492 (1st Cir. 2000); *Truckers United For Safety v. Mead*, 329 F.3d 891, 895 (D.C. Cir. 2003)). But, in fact, neither of the two cases stands for the proposition that the Government claims.

Nowhere in either case did either court state that a "special factor" enhancement should be denied "where knowledge of general administrative law enables an attorney to prosecute a case." Indeed, neither case even involved a claim of mere expertise in *general* administrative law. In *Atlantic Fish Spotters*, counsel claimed special expertise in "fisheries law"; and in *Truckers United*, counsel claimed special expertise in "the safety aspects of the trucking industry." *See Atlantic Fish Spotters*, 205 F.3d at 491; *Truckers United*, 329 F.3d at 892. Thus, as the Government itself noted in its EAJA Opposition, the denial of a "special factor" enhancement in both cases was actually based on court findings that the particular special expertise at issue was not required for the litigation in question. *See* Def.'s EAJA Opposition at 35 (noting that *Atlantic Fish Spotters* denied "special factor" enhancement "where expertise in fisheries law was not 'essential' to challenge constitutionality of a Department of Commerce regulation prohibiting certain means of harvesting tuna," and that *Truckers United* denied "special factor" enhancement because "specialized expertise in safety aspects of trucking industry . . . was 'nei-

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[11] The Government's EAJA Opposition identifies no case in which a party has sought a "special factors" enhancement based solely on expertise in – to use the Government's words – "*general* administrative law." (Emphasis added.) Nor did the Court's extensive independent research locate any such case.

Rather, as explained in one of the three cases that the Government cited in the relevant section of its EAJA Opposition, "lawyers practicing administrative law typically develop expertise in a particular regulated industry, whether energy, communications, railroads, . . . firearms," or some other field. *See Truckers United for Safety v. Mead*, 329 F.3d 891, 895 (D.C. Cir. 2003) (*cited in* Def.'s EAJA Opposition at 35–36). Thus, the battleground in EAJA cases is typically whether counsel's expertise in some specialized field of administrative law justifies an enhancement to the fee award – *not* whether an enhancement is warranted by counsel's "knowledge of general administrative law." *Compare* Def.'s EAJA Opposition at 35.

ther needful nor critical' in action challenging authority of Department of Transportation Inspector General to engage in compliance investigation").[12]

The third case on which the Government's opposition relied – *Tyco* – similarly did not involve a "special factor" enhancement claim based on mere "knowledge of general administrative law." To the contrary, the *Tyco* plaintiffs sought a "special factor" enhancement based on lead counsel's "specialized skills in the field of international trade law." *See Tyco*, 28 CIT at 1579, 1590, 350 F. Supp. 2d at 1083, 1092. Thus, again, as the Government itself here acknowledged, the *Tyco* Court denied a "special enhancement" because "counsel's expertise in the field of international law was 'not needed for this litigation.' " *See* Def.'s EAJA Opposition at 35 (*quoting Tyco*, 28 CIT at 1590, 350 F. Supp. 2d at 1092).

Accordingly, contrary to the Government's claims in its EAJA Opposition, this Court has *never* "specifically held" that TAA cases "do not require any specialized skills or knowledge." *See* Def.'s EAJA Opposition at 35 (original emphasis omitted). Under the circumstances, the *Tyco* Court's statement that "[t]he basic litigation skills needed for these types of cases apply 'to a broad spectrum of litigation and thus are considered to be covered by the baseline statutory rate' " was mere dicta. *See Tyco*, 28 CIT at 1591, 350 F. Supp. 2d at 1092–93 (quotation omitted).

In sum, contrary to the Government's implication, none of the cases on which it relied actually held that a "special factor" enhancement should be denied "where knowledge of general administrative law enables an attorney to prosecute a case" – the proposition which the Government identified as "well-settled." Contrary to the Government's statements, *Tyco* certainly did not "specifically *h[o]ld* that TAA cases do not require any specialized skills or knowledge." *See* Def.'s EAJA Opposition at 35 (initial emphasis added; original emphasis omitted). Moreover, although each of the three cases on which the Government relied – *Atlantic Fish Spotters*, *Truckers United*, and *Tyco* – involved a claim of some specialized expertise, the Government elected not to brief that issue. Nor did the Government cite, much less discuss or seek to distinguish, the caselaw of the Court of Appeals for the Federal Circuit – including, in particular, *Gavette*, a case in which the Court of Appeals granted a "special factor" enhancement based specifically on counsel's "*capability* and willingness" to handle appeals of adverse decisions by the Merit Systems Protection Board. *See Gavette*, 788 F.2d at 754 (emphasis added).

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[12] In *Atlantic Fish Spotters*, the court actually went even further, adding that "even if a fisheries expert *had* been shown to be 'necessary' to litigate this case competently, there is no finding nor any evidence to show that lawyers so skilled were unavailable at the presumptive statutory rate of $125 per hour." *Atlantic Fish Spotters*, 205 F.3d at 492–93.

In short, particularly in the context of the cases that it cited, the Government's characterization of the law as "well-settled" was ill-considered. Under the circumstances, it simply cannot be said that the Government's EAJA Opposition fairly summarized the relevant law. Nothing about the language of footnote 99 is "clearly erroneous and manifestly unjust." The Government's motion to strike that language from the opinion is therefore denied.

C. *Footnote 108 and Related Text*

The Government's third and final challenge is to footnote 108 of *BMC II*, and related text in the main body of the opinion, which appear in the section of the opinion addressing the plaintiff Workers' claim for a cost of living adjustment ("COLA") to the statutory hourly rate for attorneys' fees. *See generally* Def.'s Motion at 9–11; *BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1364–67.

As *BMC II* explains, the Government opposed the request for a COLA, asserting that such an adjustment was "not warranted," and pointing to two cases – *Phillips v. General Services Administration* and *Baker v. Bowen*. *See BMC II*, 31 CIT at ___ & n.108, 519 F. Supp. 2d at 1364–65 & n.108 (*citing Phillips v. General Services Administration*, 924 F.2d 1577 (Fed. Cir. 1991); *Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988)).

> The entirety of the Government's argument on this point read:
>
> Plaintiffs' arguments and requests for a cost of living adjustment should be rejected because the policy of the statute is to pay non-enhanced fees for legal services actually rendered. *Phillips v. General Services Administration*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). The statute "is not designed to reimburse reasonable fees without limit." *Id.* at 1584. In addition, the Federal Circuit explained that:
>
> > [i]n *Pierce*, the Supreme Court also rejected as "special factors" (1) the limited availability of attorneys with an extraordinary level of general lawyerly knowledge and ability useful in all litigation, (2) the novelty and difficulty of the issues, (3) the work and ability of counsel, and (4) the results obtained, because all of these factors are applicable to a broad spectrum of litigation and thus are considered to be covered by the baseline statutory rate of [then] $75 per hour, plus a cost of living increase. . . .
>
> *Id.* at 1584 (*quoting Pierce*, 487 U.S. at 571–73). "The Supreme Court, in *Pierce*, concluded that Congress did not intend the EAJA to completely cover attorney fees. 'To the contrary, the special factor formulation suggests Congress thought that [the statutory rate] was generally quite enough public reimburse-

> ment for lawyers' fees, *whatever the local or national market might be*.' " *Id.* (*quoting Pierce* at 572) (emphasis added).
>
> Therefore, we respectfully request that the Court adhere to the statutory rate and deny an upward adjustment to attorney fees here. *See Baker v. Bowen*, 839 F.2d 1075, 1084 (5th Cir. 1988) (noting that Congress intended for a cost of living adjustment in the EAJA, but that the statute does not "absolutely require" it).

Def.'s EAJA Opposition at 39–40.

BMC II explained at some length why the Government's citation to *Phillips* is "misleading." *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1364–65. As *BMC II* observed, for example, the Government's use of italics to highlight the phrase "whatever the local or national market might be" conveys the impression that the holding of *Phillips* was anti-COLA. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1364. But, as *BMC II* explains, a review of *Phillips* reveals that – in the excerpt on which the Government relies – the Court of Appeals was actually emphasizing the limited circumstances in which *special factors adjustments* are appropriate. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1364–65 (*discussing Phillips*, 924 F.2d at 1584). Indeed, as *BMC II* noted, the Court of Appeals expressly held that the *Phillips* plaintiff's fee award should be calculated by using the statutory rate *increased to reflect a COLA*. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1365 (*discussing Phillips*, 924 F.2d at 1583–84).

In its Motion for Reconsideration, the Government states that it "neither misquoted the *Phillips* decision, nor attempted to hide the fact that this statement [*i.e.*, the quote that "the special factor formulation suggests Congress thought that [the statutory rate] was generally quite enough public reimbursement for lawyers' fees, *whatever the local or national market might be*"] was made in relation to 'special factors' adjustments." *See* Def.'s Motion at 10. But the Government's contentions in its Motion for Reconsideration simply cannot be squared with the argument that it made in its EAJA Opposition, which is quoted above in its entirety.

The Government's EAJA Opposition began with its assertion that "Plaintiffs' arguments and requests for a cost of living adjustment should be rejected *because the policy of the statute is to pay non-enhanced fees for legal services actually rendered*" – a proposition for which the Government cited *Phillips*. *See* Def.'s EAJA Opposition at 39 (emphasis added). Any reader would be left with the clear and unmistakeable understanding that the holding of *Phillips* was anti-COLA (or, read most favorably to the Government, silent on the granting of a COLA). But, in fact, as discussed above, the *Phillips* Court actually granted a COLA – a fact that the Government failed to even acknowledge, much less address.

Nothing in the remainder of the discussion of *Phillips* in the Government's EAJA Opposition did anything to clarify the misimpression left by the Government's first sentence. *See* Def.'s EAJA Opposition at 39–40 (quoted above). Indeed, as *BMC II* noted, the Government's italicization of the phrase "whatever the local or national market might be" served only to reinforce the misimpression. *See BMC II*, 31 CIT at ___ , 519 F. Supp. 2d at 1364–65.

What is most telling is that, although the issue being briefed was the request for a COLA, and although *Phillips* in fact addresses the award of a COLA, the Government ignored the COLA section of the Court of Appeals' opinion, and instead quoted only select excerpts from the section of *Phillips* addressing "special factor" enhancements. *Compare Phillips*, 924 F.2d at 1583 (addressing COLA) and at 1583–84 (addressing claim for "special factor" enhancement) *with* Def.'s EAJA Opposition at 39–40 (citing only *Phillips*, 924 F.2d at 1584). Simply stated, it was – and is – disingenuous for the Government to suggest that anything in the reasoning (much less the holding) of *Phillips* supported the Government's opposition to a COLA in this case.

The Government similarly seeks to defend its citation to *Baker v. Bowen* as purported support for its argument (quoted above) that "the Court [should] adhere to the statutory rate and deny an upward adjustment to attorney fees here." *See* Def.'s EAJA Opposition at 39–40 (*citing Baker v. Bowen*, 839 F.2d at 1084). However, as *BMC II* observed, the Government's EAJA Opposition effectively misrepresented that case. *See BMC II*, 31 CIT at ___ n.108, 519 F. Supp. 2d at 1364 n.108 (noting that Government's selective quotation of *Baker v. Bowen* "borders on the sanctionable"). The Government emphasizes that the quotation in its parenthetical accompanying *Baker v. Bowen* – which noted that "Congress intended for a cost of living adjustment in the EAJA, but . . . the statute does not 'absolutely require' it" – is "entirely true," and argues that it "neither misquoted nor mischaracterized the current law on this issue." Again, however, any reader of the Government's EAJA Opposition would be left with the clear and unmistakeable understanding that *Baker v. Bowen* denied a COLA (or, at a minimum, was anti-COLA). In fact, however, the two sentences immediately following the sentence that the Government quoted belie any such reading, and make it clear that *Baker v. Bowen* contemplates that a COLA is to be granted as a routine matter of course, "except in unusual circumstances":

> Clearly, by mentioning it in the statute, Congress intended that the cost of living be seriously considered by the fee-awarding court. *Except in unusual circumstances*, therefore, if there is a significant difference in the cost of living . . . in a particular locale that would justify an increase in the fee, *then an increase [i.e., a COLA] should be granted.*

Baker v. Bowen, 839 F.2d at 1084 (emphases added). The Government conveniently failed to quote those two latter sentences. Moreover, the Government made no effort to demonstrate "unusual circumstances" to preclude the award of a COLA here.

In short, the Government's quotations from *Phillips* and *Baker v. Bowen* were selective, to say the least. Contrary to the plain implication of the Government's EAJA Opposition, neither of the two cases denied a COLA. Indeed, *Phillips* granted a COLA, and *Baker v. Bowen* stands for the proposition that a COLA should be awarded "[e]xcept in unusual circumstances."[13] It is of little moment that the Government may have accurately quoted the snippets on which it relies. In the context in which the Government used them, the quotes are nonetheless misleading. The Court and opposing parties should not be required to read every word of every case cited by the Government in its briefs to ascertain whether it has taken a quotation out of context and, in effect, distorted the facts of the case, the law of the case, or its holding. *See* n.4, *supra*; *Precision Specialty Metals*, 315 F.3d at 1354–57.

Nothing in *BMC II*'s analysis of the Government's opposition to the COLA is either "unwarranted" or "manifestly unjust." Accordingly, the Government's motion to strike footnote 108 and related text from that section of the opinion is also denied.

III. ***Conclusion***

For all the reasons set forth above, Defendant's Motion for Partial Reconsideration must be, and hereby is, denied.

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[13] In its Motion for Reconsideration, the Government cites for the first time *May v. Sullivan*, 936 F.2d 176, 177–78 (4th Cir. 1991), which affirmed a trial court's denial of a COLA "when presented with nothing except an increase in the Consumer Price Index," and when "even 'need for a cost of living increase' was not asserted." *See* Def.'s Motion at 10.

Several points are relevant here. First, it is now much too late for the Government to cite authority to support its position. Moreover, the true problem with the Government's EAJA Opposition is not the position that it took, but – rather – that the cases that it cited not only failed to support that position, but, indeed, essentially controverted it. (Further, the Government gave no substantive reason for refusing a COLA, stating only that one was "not required"). Finally, as *BMC II* makes abundantly clear, *May v. Sullivan* is largely an outlier, and is not reflective of the current general state of the law on this point. *See BMC II*, 31 CIT at ____ , 519 F. Supp. 2d at 1365–66.

Slip Op. 08–103

MIGUEL A. DELGADO, Plaintiff, v. UNITED STATES, Defendant.

Before: MUSGRAVE, Senior Judge

Court No. 06–00030

[Sustaining DHS' decision to revoke the plaintiff's Customs broker's license.]

Decided: September 29, 2008

The Mooney Law Firm (*Neil B. Mooney*) for the plaintiff.

Gregory G. Katsas, Assistant Attorney General; *Barbara S. Williams*, Attorney In Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Marcella Powell*); *Ilena Pattie*, Office of the Associate Chief Counsel, United States Customs and Border Protection, of counsel, for the defendant.

OPINION AND ORDER

This matter returns to the Court following a remand to the Secretary of the U.S. Department of Homeland Security ("the Secretary" or "DHS") pursuant to the Court's order in Slip Op. 07–177, *Delgado v. United States*, 31 CIT ___ , 536 F. Supp. 2d 1328 (2007). On May 15, 2008, the Secretary reissued its decision to revoke plaintiff Miguel A. Delgado's Customs broker's license on the ground that Mr. Delgado was convicted of felonies that involved importation and exportation and that arose out of the conduct of customs business. *Reissued Decision* at 2. Mr. Delgado filed objections arguing that the Secretary's decision is erroneous because the crimes for which he was convicted neither "involve[d] import or export" nor "arose out of the conduct of customs business." *Plaintiff's Objections* at 1–3. This Court has jurisdiction over this matter pursuant to Section 641(e) of the Tariff Act of 1930, 19 U.S.C. § 1641(e)(1) and 28 U.S.C. § 1581(g)(2000). For the reasons set forth below, the court will sustain the Secretary's decision to revoke Mr. Delgado's license.

I. Background

The facts of this case were extensively summarized in the court's previous opinions on this matter and need not be fully repeated here. *See Delgado v. United States*, 31 CIT ___ , 491 F. Supp. 2d 1252 (2007) and Slip Op. 07–177. In April 2001 Mr. Delgado was convicted on twenty-eight felony counts stemming from his involvement in a scheme to illegally divert liquor into the commerce of the United States without the payment of federal liquor taxes. *See Judgment, United States v. Miguel Delgado*, Ct. No. 00682 (S. Dist. Fla., Sept. 6, 2001) ("*Judgment*") R. at 165. Evidence of record indicates that the general scheme can be understood as thus: A co-conspirator by the

name of Kumar purchased approximately fifteen shipments of liquor from the McCormick distillery and designated them for export so that no taxes would be due[1]. Each of the fifteen shipments was then shipped to Mr. Delgado's care as manager at a company known as "Inversions Sula, S.A. de CV" in Honduras. Upon arrival in Honduras, the liquor was consigned to Lancer Honduras, a brokerage company 50% owned by Mr. Delgado. Mr. Delgado then "sold" the liquor back to Kumar and shipped it back to Miami, where it was stored in Mr. Delgado's bonded warehouse or Mr. Delgado's container freight station. Hearing Transcript ("Tr.") at 118–123. At that point, Customs forms were then prepared that designated the liquor for export to Venezuela; however, except for one shipment, none of the liquor was exported to Venezuela, but was instead diverted back into the United States. *See* Tr. at 117–27; *United States v. Delgado,* 321 F.3d 1338 (11th Cir. 2003).

For his involvement in the scheme, Mr. Delgado was convicted on fourteen violations of 26 U.S.C. § 5601(a)(11) ("knowingly receiv-[ing] distilled spirits knowing and having reasonable grounds to believe that any tax due on such spirits had not been paid"); thirteen violations of 26 U.S.C. § 5601(a)(12) ("knowingly removing, other than authorized by law, distilled spirits on which the tax had not been paid, from the place of storage and from an instrument of transportation"); and one count of 18 U.S.C. § 371 ("conspiracy to commit offenses against the United States."). *Id.* The specific offenses contained in the section 371 conspiracy charge included (1) conspiring to violate 26 U.S.C. 5601(a)(11) *supra*; (2) conspiring to violate 26 U.S.C. 5601(a)(12) *supra*; and (3) conspiring to violate 26 U.S.C. § 5608(b) ("Unlawful relanding" of "distilled spirits which had been shipped for exportation and on which federal excise taxes had not been paid"). The Jury found Mr. Delgado guilty of conspiracy on all three counts. *See Verdict Form, United States v. Miguel Delgado,* Ct. No. 00682 (S. Dist. Fla., Sept. 6, 2001); 26 U.S.C. §§ 5601(a)(11), (12) (2000); 18 U.S.C. § 371 (2000); 26 U.S.C. § 5608(b) (2000). That verdict was affirmed on appeal. *Delgado*, 321 F.3d 1338.

In March 2004, the U.S. Department of Customs and Border Protection ("Customs" or "CBP") commenced proceedings against Mr. Delgado for the possible revocation of his Customs broker's license. Customs charged Mr. Delgado with several violations of CBP regulations, including (1) 19 C.F.R. §§ 111.53(c) and 111.32 (violating Customs law or regulation by filing false documentation); (2) 19 C.F.R. § 111.53(b) (having been convicted of a felony either involving importation or exportation of merchandise or arising out of customs

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[1] *See* 26 U.S.C. § 5214(a)(1)(A).

business); and (3) 19 C.F.R. § 111.53(d) (aiding and abetting violation of Customs law). *Notice and Statement of Charges*, R. at 153–54.

Mr. Delgado was afforded a formal hearing on the matter before an Administrative Law Judge ("ALJ") on May 18, 2004. *See generally*, Tr., Vols. I & II. On December 17, 2004, the ALJ issued a decision recommending license revocation. *Recommended Decision*, R. at 34. That recommendation was reviewed by the Secretary, who issued a decision revoking Mr. Delgado's license on December 3, 2005. Upon review, this court remanded the Secretary's revocation decision back to DHS on two separate occasions; the third version of that decision was reissued by the Secretary on May 15, 2008 and is now before the court.

In the May 15, 2008 decision on review, the Secretary adopted several portions of the ALJ's *Recommended Decision* and concluded that, pursuant to 19 U.S.C. § 1641(d)(1)(B)(i),(ii) and 19 C.F.R. § 111.53(b), license revocation was warranted because the felonies for which Mr. Delgado was convicted "involved importation and exportation" and "arose out of the conduct of customs business." *May 15, 2008 Reissued Decision* at 2–3.

Mr. Delgado asserts that the Secretary's findings are erroneous because pursuant to the definition of "exportation" set forth in *Swan v. Finch*, 190 U.S. 143 (1902), the liquor involved in this matter "cannot be considered imported or exported . . . ." *Plaintiff's Objections* at 1–2. Similarly, Mr. Delgado contends that Customs failed to connect his crimes to "Customs business" because, *inter alia*, "Customs own mitigation guidelines relating to the doing of 'Customs Business' without a license" indicate that the in-bond movement of merchandise and the filing of a Customs Form 7512 are not considered to be Customs business. *Plaintiff's Objections* at 3.

II. Standard of Review

In accordance with 5 U.S.C. § 706(2)(A), the court reviews the Secretary's revocation decision to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See also Barnhart v. U.S. Treasury Dep't*, 9 CIT 287, 290 613 F. Supp. 370, 373 (1985) (finding that the court need only "assure itself the decision was rational and based on consideration of relevant factors").

The factual findings of the Secretary must be based on substantial evidence. 19 U.S.C. § 1641(e)(3) (2000). *See also* 5 U.S.C. § 706(2)(E) (2000) and *Anderson v. United States*, 16 CIT 324, 324 799 F. Supp. 1198, 1199–1200 (1992). Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fusco v. United States Treasury Dep't*, 12 CIT 835, 838–39, 695 F. Supp. 1189, 1193 (1988) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Less than the weight of the evidence, the possibility of drawing two inconsis-

tent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Barnhart*, 9 CIT at 290, 613 F. Supp. at 373.

III. Discussion

Title 19, section 1641 of the United States Code provides, in pertinent part, that the Secretary may "revoke or suspend a license or permit of any customs broker, if it is shown that the broker –

> **(B)** has been convicted at any time after the filing of an application for license under subsection (b) of this section of any felony or misdemeanor which the Secretary finds –
>
> **(i)** involved the importation or exportation of merchandise;
>
> **(ii)** arose out of the conduct of its customs business . . . .

19 U.S.C. § 1641(d)(1)(B) (2000); *see also* 19 C.F.R. § 111.53(b) (2008).

A. Mr. Delgado's Crimes Involved the Importation or Exportation of Merchandise

Pursuant to caselaw and Customs regulations, "exportation" is defined as "a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country." *Swan*, 190 U.S. at 145; 19 C.F.R. § 101.1. Mr. Delgado argues that the Secretary's finding that his crimes "involved importation or exportation" is unsupported by substantial evidence because no "exportation" occurred as a matter of law, according to the definition thereof announced in *Swan* and found in the Customs regulations. More precisely, Delgado contends that the crime for which he was convicted did not "involve" exportation because "[p]remeditatedly shipping merchandise rapidly into and back out of bonded warehouses in Honduras certainly does not indicate an 'intention to unite the merchandise into the mass of things belonging to that country.' " *Plaintiff's Objections* at 2. Mr. Delgado essentially argues that, although the liquor had been designated for exportation and then shipped out of the country, no actual exportation occurred because he and his co-conspirators only wanted to give the appearance that the alcohol was exported in order to avoid paying liquor taxes; their true intent had always been to illegally divert the alcohol back into this country for illegal tax-free sales.[2] *See* Record (R.) at 244; *Respondent's May 5, 2004 Reply to*

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[2] Mr. Delgado contends further that in Slip Op. 07–177, this court made a finding that "the merchandise at issue was neither imported nor exported," *Plaintiff's Objections* at 2. As such, he argues, the crime for which he was convicted could not possibly "involve import or export." However, nowhere in Slip Op. 07–177 did this court make a finding that the mer-

Agency's Response at 2. Mr. Delgado's argument is flawed for two reasons.

First, the argument ignores that Mr. Delgado was found guilty of a conspiracy to violate the "unlawful relanding" statute, which, for the record, necessarily means that a jury had found, beyond a reasonable doubt, that Mr. Delgado had "knowingly relanded or received within the jurisdiction of the United States distilled spirits which had been shipped *for exportation*." 26 U.S.C. § 5608(b) (emphasis added). Further, by statute, merchandise that is "relanded" is considered to have been "*imported*":

> **§ 544 Relanding of goods[3]**
>
> If any merchandise entered or withdrawn for exportation without payment of the duties thereon, or with intent to obtain a drawback of the duties paid, or of any other allowances given by law on the exportation thereof, is relanded at any place in the United States without entry having been made, *such merchandise shall be considered as having been imported into the United States contrary to law*, and each person concerned shall be fined under this title or imprisoned not more than two years, or both; and such merchandise shall be forfeited.
>
> . . . .

18 U.S.C. § 544 (2000) (emphasis added).

Second, as this action demonstrates, the Secretary interprets "involved" in section 1641(d)(1)(B) to mean "closely related to" and not as "include." *See also "Customs Regulations Amendments Relating to Customs Brokers; Correction*," 51 Fed. Reg. at 32209 (discussing CBP's penalty guidelines and stating that, pursuant to § 1641(d)(1)(B), the "unlawful conduct" underpinning the crime for which a broker is convicted "must *relate* to . . . [i]mportation or exportation of merchandise") (emphasis added). The court cannot conclude that the Secretary's interpretation is unreasonable. *See Webster's Third New International Dictionary* 1191 (1993) (defining "involve" to mean "to relate closely" as well as to "contain" or "include"). The Secretary's interpretation is therefore to be accorded deference. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*,

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chandise at issue was neither imported nor exported. The statement contained in Slip Op. 07–177 to which Mr. Delgado apparently refers is the court's observation that "it may be true that – technically speaking – the liquor itself was not imported or exported . . . ." Slip Op. 07–177 at 20. That statement does not constitute a finding of the court; stating that something that "may be true" necessarily implies that it also may *not* be true. The court's statement reflects the opinion that such a finding was unnecessary to decide the issue. Furthermore, such a determination would constitute a finding of fact, which this court may not make when sitting in an appellate status.

[3] Formerly 19 U.S.C. § 1589.

467 U.S. 837 (1984). In other words, actual importation or exportation is not a precondition for finding whether a crime "involved" importation or exportation, and substantial evidence of record supports the Secretary's finding. Inspector Cox and special agent O'Keefe testified that the alcohol was designated for exportation and shipped out of the country; that the alcohol was reimported into the United States under the direct control of Mr. Delgado; that the alcohol was then entered into Mr. Delgado's bonded warehouse and again designated for export; and that one shipment of alcohol was exported to Venezuela but the remaining shipments were instead diverted illegally into the commerce of the United States. In essence, the Secretary could reasonably conclude from the record that Mr. Delgado and his co-conspirators used importation and exportation[4] or the appearance thereof to create confusion and disguise the ultimate destination of the liquor, which was illegal reimportation into the commerce of the United States.

B. Mr. Delgado's Crimes Arose Out of the Conduct of Customs Business

Pursuant to section 1641(a)(2), "Customs business" is defined as:

> those activities involving transactions with the Customs Service concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by the Customs Service upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof. It also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with the Customs Service in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such preparation, but does not include the mere electronic transmission of data received for transmission to Customs.

19 U.S.C. § 1641(a)(2) (2000). The above definition of "Customs business" is very broad: Customs business not only includes "transactions with the Customs Service" it includes "activities involving transactions with the Customs Service." It not only includes "preparation of documents . . . intended to be filed with the Customs Service," but includes any "activities relating to such preparation." The standard for brokers license revocation found in section

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[4] It appears undisputed that one shipment of liquor was not diverted, but instead exported to Venezuela as indicated on Customs form 7512. Tr. at 124. Because that exportation was arguably part of the conspirators' "shell game" to prevent detection of the scheme by law enforcement, that valid exportation could reasonably be considered a part of the overall diversion scheme.

1641(d)(1)(B) theoretically encompasses an even wider array of actions because it is not necessary that the crime for which the broker was convicted *include* the activities listed in section 1641(a)(2); it is enough that the crime "arose out of the conduct of" those activities.

Hence, in reviewing the Secretary's determination that Mr. Delgado's crimes "arose out of the conduct of its Customs business," the court must determine whether the record contains substantial evidence to show that those crimes (1) arose from any activity involving "transactions with the Customs Service concerning the entry and admissibility of merchandise . . . [or] the payment of duties, taxes, or other charges assessed or collected by the Customs Service upon merchandise by reason of its importation"; (2) arose from the preparation of any documents, forms, invoices, bills, or parts thereof that are intended to be filed with the Customs Service in furtherance of such activities; or (3) arose from activities relating to the preparation of such documents.

The court finds that the Secretary's determination is supported by substantial evidence of record. Although there is some question as to whether the filing of Customs form 7512 qualifies as Customs business, it is unnecessary to decide that issue here because the record demonstrates that other actions undertaken in the diversion scheme do qualify as Customs business. In the *Reissued Decision*, the Secretary points to evidence of record indicating, *inter alia*, that prior to diversion into the commerce of the United States, Mr. Delgado entered or arranged for the entry of at least two of the liquor shipments into a bonded warehouse that he operated. *See* Tr. 107, 123, 127. The operation of a bonded warehouse "involves the entry and admissibility of merchandise and therefore involves '[C]ustoms business.' " *Customs Ruling Letter HQ 223845*, 1992 WL 533145 (September 11, 1992). Moreover, further evidence of record indicates that entry into a bonded warehouse requires the filing of Customs Forms 7501 and 3461, which also qualifies as "Customs business." *See* Tr. at 121–122.

Mr. Delgado argues that it was Lancer, not he, that had a permit to operate the bonded warehouse, and that any Customs business undertaken in the matter was performed by Lancer International (the company of which Mr. Delgado was president and sole owner) using the Customs brokerage license number that was issued to Lancer International as a corporation. Because it is his personal license that is now subject to revocation, Mr. Delgado contends that it would be a miscarriage of justice to attribute to him Customs business undertaken pursuant to Lancer's Customs brokers license. Mr. Delgado asserts further that the issue of reasonable supervision is now moot, arguing that:

> [I]f Lancer voluntarily surrendered its license without ever being accused of a single wrongdoing many years ago, then no disciplinary proceedings against it can now be started. Without

> those proceedings the issue of responsible supervision is moot because there certainly can not now be imaginary imputations of Lancer's wrongdoing to Delgado in the *absence* of finding of wrongdoing by Lancer in the first place.
>
> It is plain error, circular reasoning, and misses the entire point of this litigation if this Court were to now agree that since Delgado is a felon his license should be revoked on account of things the separately licensed broker Lancer International did: things which Customs never objected to. In one fell swoop, the Agency eliminates due process, convicts the long-dissolved Lancer of wrongdoing without allowing it to hear and object to charges, and the[n] imputes those unilaterally declared findings to Delgado without allowing him to answer to charges regarding responsible control and supervision! Allowing this would be plain error as well.

Plaintiff's Objections at 3–4.

The court cannot accept this reasoning. Lancer has not been accused of wrongdoing; Lancer has only been accused (by Mr. Delgado himself) of being the entity that undertook the Customs business in this matter. However, the fact that Mr. Delgado is held strictly responsible for the actions of Lancer is not an "imaginary imputation." As the Secretary points out, Mr. Delgado, as a broker and president of Lancer, is responsible for supervision and control of his employees as a matter of law. *Recommended Decision* at 17, n. 15. Pursuant to 19 C.F.R. 111.28(a), "every licensed officer of an association or corporation that is a broker must exercise responsible supervision and control over the transaction of the customs business of . . . [the] corporation." 19 C.F.R. 111.28(a) (2008). As a result of the duty of responsible supervision and control, Mr. Delgado is "held strictly responsible for the acts or omissions of the employee within the scope of his employment . . ." 19 C.F.R. 111.2(a)(2)(ii)(B). Accordingly, it makes no difference whether the Customs business in this matter was performed by Lancer or Mr. Delgado personally; either way, Mr. Delgado is strictly responsible for those actions.

Moreover, the record is replete with evidence from which the Secretary could reasonably conclude that Lancer acted under the direct control of Mr. Delgado. For example, evidence suggests that Mr. Delgado's primary purpose in the diversion scheme was to provide brokerage services. Tr. at 118–32, 270. The indictment before the district court indicates that Mr. Delgado's part of the relanding conspiracy (of which Mr. Delgado was found guilty) was through his company, Lancer. *See Indictment*, Agency Exh. 1–A at 4. Further evidence of record indicates that Mr. Delgado personally operated the container freight station where the liquor was received and stored, and the bonded warehouse where two of the liquor shipments were entered. R. at 72,¶ 2; R. at 73 ¶14; Tr. at 107, 127. As noted above,

the fact that Mr. Delgado was operating the warehouse under a permit issued to Lancer cannot dissolve the connection between himself and the Customs business conducted there. Although Mr. Delgado testified at the administrative hearing that he had no knowledge of the liquor shipments until well after they occurred, Tr. at 176–77, that testimony is contradicted by the fact that a jury found, beyond a reasonable doubt, that he was a willing conspirator in a scheme to illegally divert alcohol, and that on fourteen different occasions he "knowingly received" distilled spirits upon which the tax had not been paid. *See* Verdict form, *Delgado*, Ct. No. 00682 (S. Dist. Fla.).

Lastly, the court observes that, if the liquor had been entered correctly into the United States instead of illegally diverted, the alcohol excise tax would have been due upon that entry, and the taxes would have been collected by the director of Customs. *See* 26 U.S.C. § 5006(d) (2000) (providing that "[d]istilled spirits smuggled or brought into the United States unlawfully shall, for purposes of this chapter, be held to be imported into the United States, and the internal revenue tax shall be due and payable at the time of such importation.") and 27 C.F.R. 27.48 (2008) (providing that "taxes payable on imported distilled spirits . . . are collected . . . and deposited as internal revenue collections by directors of [C]ustoms . . . ."). Because the object of the alcohol diversion scheme was to avoid paying the required taxes by clandestinely diverting the alcohol and "relanding" it instead of properly entering it into United States commerce, it would not be unreasonable for the Secretary to further conclude that the scheme itself was connected to the "entry and admissibility of merchandise" and "the payment of duties, taxes, or other charges assessed or collected by the Customs Service upon merchandise by reason of its importation."

The court has considered all other arguments raised by Mr. Delgado and finds them without merit.

IV. Conclusion

Upon consideration of the foregoing, the court finds that the Secretary's decision is not arbitrary and capricious, and is supported by substantial evidence. Accordingly the court will sustain the Secretary's May 15, 2008 reissued decision, and dismiss as moot Mr. Delgado's motion for mediation. Judgment will be entered accordingly.

SO ORDERED.

Slip Opinion 08–104

TRAVELERS INDEMNITY CO., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 06–00151

[Plaintiff's Motion for Summary Judgment is DENIED; Defendant's Cross-Motion for Summary Judgment is GRANTED.]

Dated: September 29, 2008

Akin Gump Strauss Hauer & Feld LLP (*Warren E. Connelly*), and (*Anne K. Cusick*), Co-Counsel for Plaintiff Travelers Indemnity Co.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Edward B. Ackerman*), Co-Counsel for Plaintiff Travelers Indemnity Co.

Gregory G. Katsas, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy Rubin*); *Edward N. Maurer*, Deputy Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, and *William J. Kovatch, Jr.*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

OPINION

Wallach, Judge

I

INTRODUCTION

This case establishes that publication of a case in the *Customs Bulletin Weekly* ("the *Bulletin*") is not sufficient notice to the United States Bureau of Customs and Border Protection ("Customs")[1] to invoke the deemed liquidation rule of 19 U.S.C. § 1504(d) ("Section 1504(d)"). Plaintiff Travelers Indemnity Company, ("Travelers") has filed a Motion for Summary Judgment claiming *Bulletin* publication leads to deemed liquidation. Defendant United States has cross-moved. This court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a). Because publication of a case in the *Bulletin* did not constitute "notice" under Section 1504(d),[2] the deemed liquidation rule

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[1] The United States Customs Service is now called the Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 116 Stat. 2136 (2002); and Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108–32 (2003). This opinion will refer to Customs rather than the Customs Border Patrol, because the facts occurred during a period (1981–1995) when Customs administered the deemed liquidation rule of Section 1504(d).

[2] 19 U.S.C. § 1504(d) ("Section 1504(d)") provides in relevant part:

> when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal from

of Section 1504(d) does not apply. Accordingly, Plaintiff's Motion for Summary Judgment is denied and Defendant's Cross-Motion for Summary Judgment is Granted.

II

BACKGROUND

On December 29, 1986, the United States Department of Commerce ("Commerce") published the final results of the first administrative review of imports from producers of certain Taiwanese color television receivers "CTV's" that entered the United States between October 19, 1983, and March 31, 1985. *See Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results of Antidumping Duty Admin. Review*, 51 Fed. Reg. 46895 (December 29, 1986) ("the 1983–1985 Review"); Plaintiff's Brief in Support of Its Motion for Summary Judgment ("Plaintiff's Motion") at 2. One of the Taiwanese producers that participated in the initial review was AOC International ("AOC"). Plaintiff's Motion at 2. In the 1983–1985 Review, Commerce established a cash deposit rate of 1.38% for CTVs that AOC exported to the United States and that had entered American customs territory after December 29, 1986. *Id.* Between November 1987 and March 1988, a company called Funai USA imported 17 entries of AOC-manufactured CTVs into the United States and paid cash deposit of 1.38% ad valorem antidumping duties on the 17 entries. *Id.*

On December 16, 1991, Commerce published the final results of a subsequent administrative review of CTV's exported by various Taiwanese producers for the period April 1, 1987 through March 31, 1988. *See Color Television Receivers, Except for Video Monitors. From Taiwan; Final Results of Antidumping Duty Admin. Review*, 56 Fed. Reg. 65218 (December 16, 1991) ("the 1987–1988 Review"). The 1987–1988 Review results covered the 17 Funai USA entries at issue. *See id.*; Plaintiff's Motion at 3. Commerce imposed an antidumping duty margin of 7.43% for the 17 Funai USA entries from the 1987–1988 Review period. Plaintiff's Motion at 3. Upon notification of the results of the 1987–1988 Review, AOC appealed Commerce's final results. *Id.* While the appeal to this court was pending, liquidation remained suspended on the 17 Funai USA entries pursuant to a preliminary injunction under 19 U.S.C. § 1516a(c)(2). This court affirmed both Commerce's original determination and the remand determination decision. *Zenith Elecs. Corp., v. United States*, 18 CIT 1105 (1994), *appeal after remand*, 19 CIT 602 (1995). AOC

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the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

appealed that affirmation to the Court of Appeals for the Federal Circuit ("Federal Circuit"). *See Zenith Elecs Corp., v. United States*, 99 F.3d 1576 (Fed. Cir. 1996), ("*Zenith II*").[3]

The Federal Circuit affirmed and held that Commerce had correctly calculated the antidumping duty margin in the 1987–1988 Review. *Id.* at 1579. *Zenith II* was issued by the Federal Circuit on November 7, 1996, but a petition for rehearing with a suggestion for rehearing *en banc* was filed. *Id.* at 1576; Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and In Support of Cross-Motion for Summary Judgment, ("Defendant's Response and Cross-Motion") at 3. The petition was denied in an unpublished order on February 26, 1997. Defendant's Response and Cross-Motion at 3. The time for petitioning for a writ of certiorari expired on May 27, 1997, without a petition being filed. *Id.* At that point, *Zenith II* became final, and suspension of the liquidation was removed. Defendant's Response and Cross Motion at 3; *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364 (Fed. Cir. 2002).

In *Zenith II* the Federal Circuit determined that substantial evidence supported the final results of Commerce's 1987–1988 Review. *Zenith II*, 99 F.3d at 1577; Defendant's Response and Cross Motion at 3. On October 22, 1997, after the Federal Circuit had rejected AOC's cause of action in *Zenith II*, Customs published the *Zenith II* decision in its *Bulletin* publication. Plantiiff's Motion, Exhibit 4.

On March 18, 2005, Customs liquidated the 17 Funai USA entries, in accordance with electronic message No. 5035206 which was issued by Commerce on February 4, 2005. *Id.* Customs assessed the increased antidumping duties at the 7.43% rate, plus interest, for a total bill of $615,767.17. Defendant's Response and Cross-Motion at 4. The figure equaled the difference between the cash deposit calculated using the entered rate of 1.38% and the higher final rate of 7.43%, plus accrued interest. Plaintiff's Motion at 5; *id.* Customs sent the bills to Funai USA's business address in Tetersboro, New Jersey, but upon learning that Funai USA had dissolved, Customs issued a demand upon Funai USA's surety, Travelers. Plaintiff's Motion at 5. Defendant's Response and Cross Motion at 4. Travelers timely filed a protest on September 12, 2005 and the protest was denied on November 10, 2005. Defendant's Response and Cross Motion at 4. On May 8, 2006, Travelers paid $90,000 to Customs, which was the limit of its liability as surety on Funai USA's bond. Plaintiff's Motion at 6.

Travelers claims that the October 22, 1997 publication of *Zenith II* in the *Bulletin* constituted notice to Customs of removal of suspension of the 17 Funai USA entries of CTVs. Plaintiff's Motion at 5. Ad-

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[3] *Zenith Elecs. Corp., v. United States*, 99 F.3d 1576 (Fed. Cir. 1996). In this opinion when the court uses "*Zenith II*" it is referring to the 1996 Federal Circuit opinion and not the earlier Court of International Trade decision.

ditionally, Travelers asserts the 17 Funai USA entries were deemed liquidated on April 22, 1998, (six months after the publication of the *Zenith II* decision in the *Bulletin*) using an antidumping rate of 1.38%. *Id*. at 5–6. Customs disagrees. Both parties have moved for summary judgment and maintain that there are no genuine issues of material fact to be resolved by a trial on the merits. Plaintiff's Motion at 1–2, 6; Defendant's Reply and Cross-Motion at 4. The sole issue is whether Customs received notice of the liquidation suspension removal for purposes of Section 1504(d) more than six months before it liquidated the entries at issue. *See* Plaintiff's Motion at 1–2, 6; Defendant's Response and Cross-Motion at 6.

III

STANDARD FOR DECISION

Summary judgment is appropriate if the court determines that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact, and that the moving party is entitled to a judgment as a matter of law." USCIT R.56(d); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). Under 28 U.S.C. § 2640(a)(1), this court reviews *de novo* the denial of an administrative protest under 19 U.S.C. § 1515.

IV

DISCUSSION

A

The Deemed Liquidation Rule Requires Notice to Customs

Travelers bases its entire case upon application of the "deemed liquidation" doctrine. Section 1504(d) provides that when a suspension of liquidation required by statute or court order is removed, Customs shall liquidate the entry within six months after receiving notice of the removal from Commerce, another agency or a court with jurisdiction over the entry. Section 1504(d). Any entry not liquidated by Customs within six months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record. *Id*. Because Section 1504(d) provides that an entry will be deemed liquidated by operation of law if Customs does not liquidate the entry within six months of receiving notice, it is "critical to determine . . . what constitutes notice of the removal [of liquidation] suspension to Customs." *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1271 (Fed. Cir 2002).

For deemed liquidation to occur: "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu*, 283 F.3d at 1376. The notice Customs must receive to remove suspension is the central issue here. The Federal Circuit has held that specific liquidation instructions from Commerce via email or mailed notice, and publishing notice of a decision in the *Federal Register* are adequate forms of "notice" under Section 1504(d). *NEC Solutions (Am.), Inc. v. United States*, 411 F.3d 1340, 1347 (Fed. Cir. 2005); *Fujitsu*, 283 F.3d 1364 at 1382; *Int'l Trading*, 281 F.3d at 1275. These methods of notice are acceptable, but they are not exclusive. Thus, publication in the *Bulletin* must be analyzed as a potential additional method of adequate notice.

B

Publication in the *Bulletin* Does Not Initiate the Deemed Liquidation Rule

1

The *Bulletin* Is Not a "Familiar Manner of Providing Notice"

In *Int'l Trading*, the Federal Circuit held that publication in the *Federal Register* and direct email to Customs are both sufficient notice under Section 1504(d). *Int'l Trading*, 281 F.3d at 1275. Contrary to Travelers' arguments (Plaintiff's Motion at 9–10), however, *Int'l Trading* does not hold that any publication of a judicial decision affirming the results of an antidumping duty order provides Customs with adequate notice.

Travelers attempts to equate the publishing of *Zenith II* in the *Bulletin* to publication of final results in the *Federal Register* as "a familiar manner of providing notice to parties" in antidumping proceedings. *Int'l Trading*, 281 F.3d at 1275. Travelers believes *Int'l Trading* refers to any general publication of an administrative review or a decision affecting a review, (Plaintiff's Motion at 10), although the case only addresses publication in the *Federal Register* when it says "publication in the *Federal Register* is a familiar manner of providing notice to parties in antidumping proceedings." *Int'l Trading*, 281 F.3d at 1275.

Timing also distinguishes *Int'l Trading*. There, the results were final when published; the results in *Zenith II* were not.[4] In fact, the *Bulletin* publication of *Zenith II* is not the unambiguous and familiar notice described by *Int'l Trading*.

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[4] *Zenith II* was not final when issued because *Zenith II*'s petition for rehearing was pending and the time for seeking a writ of certiorari had not expired.

2
Publication in the *Bulletin* Does Not Impute Knowledge to Customs Employees

In *Fujitsu*, the Federal Circuit held that publication of a court decision does not necessarily result in notice to Customs of removal of liquidation suspension.[5] *Fujitsu*, 283 F.3d at 1383. Commerce published notice of a case in the *Federal Register*. *Id.* at 1369. Commerce then sent Customs an e-mail instructing it to liquidate pertinent entries at the affirmed rate. *Id.* Customs liquidated the entries within six months after the email was sent. *Id.* at 1370. Fujitsu sued claiming Customs received notice before the email was sent because the earlier decision was available commercially in a variety of print and electronic media.[6] *Id.* at 1379–80.

The Federal Circuit determined that the availability of the earlier case in a "variety of commercially available print and electronic media" did not constitute public and unambiguous notice. *id.* It rejected the notion that because the decision was widely available through that media, Customs was provided with notice for purposes of Section 1504(d). *Id.* at 1380. The court further stated that "there is no evidence that in fact Customs received general media notice. . . ." *Id.*

Travelers is not relying on service of *Zenith II* on Government's counsel or on its general media publication (*see supra* n.6). Rather, it relies on the *Bulletin*'s status as a Customs publication. Plaintiff's Motion at 12. The fact alone, however, does not prove that the publication in the *Bulletin* constituted unambiguous and public notice; Travelers has offered neither positive evidence to support its conclusion, nor rebuttal evidence to contest the contrary testimony offered by Defendant. *See* discussion *infra* Part IV D 1a–d, 2.

Rather, Travelers has asserted that because the *Bulletin* is a Customs publication, the entire agency had notice when *Zenith II* appeared in the *Bulletin*. Plaintiff's Motion at 15; Defendant's Response and Cross Motion at 14–15. Imputing knowledge to all Customs employees because of a publication in the *Bulletin* too broadly defines notice. That supposition of implied notice is both factually incorrect and it directly contradicts *Fujitsu*'s holding that publication of a court decision does not necessarily result in receipt by Customs of notice that a suspension of liquidation had been removed. *Fujitsu*, 283 F.3d at 1383. Indeed, Travelers' argument implicitly seeks to impute knowledge of any Customs employee to the entire Agency and by extension, to hold *all* Customs employees re-

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[5] *Fujitsu* also involves certain jurisdictional questions not at issue here. *See Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1370–76 (Fed. Cir. 2002).

[6] Fujitsu claimed in an earlier case the Clerk of the Federal Circuit served counsel for the Department of Justice ("DOJ") and service upon him constituted notice. *Id.* at 1379. The Federal Circuit disagreed. *Id.*

sponsible for knowing the information available to *each* employee. Such omniscience may not be implicated by law.

3
Publication in the *Bulletin* Does Not Constitute Unambiguous Notice to the Reasonable Customs Official

Travelers also relies on *NEC Solutions*, 411 F.3d at 1340. That case considered whether an email message Commerce sent to Customs provided unambiguous and public notice that suspension of liquidation had been removed after dumping margins case had become final.[7] *Id.* at 1341–1342. The court held that for notice from Commerce to trigger the six month period within which Customs has to liquidate entries, the notice must be unambiguous that suspension of liquidation has been lifted but does not need to include specific liquidation instructions. *Id.* at 1344. Here, Travelers has not proved the *Bulletin* is unambiguous notice that would be recognized by a "reasonable Customs official" (*id.* at 1346; *see infra* Part IV D 1a–b), nor has it proven that reading the *Bulletin* is a required task for Customs workers, a position Customs has contradicted by direct evidence.

C

Customs' Administrative Policies Do Not Require Reading the *Bulletin*

Travelers argues that the manner by which Customs proceeds to liquidate entries (OTO3 message board) is irrelevant to the issue of whether Customs has received adequate notice of removal of suspension of liquidation because the OTO3 message board is also used for accepted forms of notice such as *Federal Register* notices announcing final court decision (*Fujitsu*) or the final results of an administrative review (*Int'l Trading*). Plaintiff's Response to Defendant's Memorandum in Opposition for Summary Judgment and Opposition to Defendant's Cross-Motion for Summary Judgment ("Plaintiff's Response") at 10–13. Travelers cannot however, ignore the reality that publication in the *Federal Register* is an acknowledged, unambiguous and public notice recognized by Customs, this court, and the Federal Circuit. The *Bulletin* is not an unambiguous and public form of notice, particularly because the Customs employees who are charged with liquidation are not: 1) responsible to read the *Bulletin*, 2) do not receive the *Bulletin* on a regular basis, and 3) receive notice only

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[7] *NEC Solutions*, also addresses whether service of an opinion on DOJ is service on Customs because DOJ represented Commerce. *NEC Solutions, (Am.), Inc. v. United States*, 411 F.3d 1340, 1346 (Fed. Cir. 2005). The court ruled that DOJ receipt of court opinions lifting the suspension of liquidation did not give Customs notice of such lifting. *Id.*

through the OTO3 message board where the *Bulletin* is never posted. (*See infra* Part IV, D, 1a–d, 2).

D

While Genuine Issues of Material Fact Defeat Travelers' Motion, CustomsHas Submitted Sufficient Competent Evidence to Support Its Position

CIT Rule 56 standards require that a party seeking summary judgment must on, an issue by issue basis, submit admissible evidence properly cognizable by the court, which supports each element of that party's claim or defense. *See* USCIT R. 56. On a Motion for Summary Judgment, the movant has the burden of propounding evidence to support the factual allegations in its claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986)(quoting Fed. R. Civ. P. 56(c)) ("a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.") A party opposing summary judgment may do so *inter alia*, by demonstrating the incompetence of a witness, the inadmissibility of evidence, or the failure of the evidence to conclusively establish a necessary fact.

In this case, the key contested element is whether *Bulletin* publication constitutes notice to Customs. Defendant has submitted to the court competent declarations demonstrating that, in fact, its employees who are concerned with liquidation neither necessarily regularly read nor rely upon, the contents of that publication.[8] Travelers has not responded to Defendant's evidence with competent countervailing evidence. *See* Plaintiff's Response at 2, 11. It failed to do so at its legal peril.

1

Customs Has Demonstrated the *Bulletin* Is Not an Unambiguous Form of Notice

Defendant has submitted to the court four Customs employee declarations[9] to demonstrate the ambiguous nature of the *Bulletin*.

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[8] *See* Defendant's response and Cross Motion, Attachment A: Declaration of Karen Biehl ("Biehl Declaration"); Attachment B: Declaration of Dirik J. Lolkus ("Lolkus Declaration"); Attachment C: Declaration of David Genovese ("Genovese Declaration"); Mr. Genovese is the Chief of the Antidumping/Countervailing Duty Policy and Programs Branch. Genovese Declaration at 1 ¶ 1.

[9] Customs submitted the factual Biehl Declaration, Lolkus Declaration, and Genovese Declaration as well as a legal/factual analysis. Attachment D: Declaration of Edward Maurer. ("Maurer Declaration").

Each declaration provides relevant factual information on personal knowledge about the way the *Bulletin* interplays with everyday work at Customs.

a
Declaration of Dirik Lolkus

In essence, Defendant argues that its employees actually charged with liquidation simply do not necessarily read each copy of the *Bulletin*, and that in any case, they are trained and instructed not to rely on its contents. Central to Customs' argument is the Lolkus Declaration.

Mr. Lolkus is a Senior Import Specialist at the Port of Los Angeles. Defendant's Response and Cross Motion, Attachment B: Declaration of Dirik Lolkus ("Lolkus Declaration") at 1 ¶ 1. Lolkus was the team leader of Team 737, the team which handled the entries at issue and he has no recollection of noticing the 1997 *Zenith II* decision in the *Bulletin*. *Id.* at 2 ¶ 4. More importantly, however, he sets out clearly, the general practices in which he and his team are trained:

> [I]mport specialists are instructed to stay current on information relating to their work, and providing a copy of the *Bulletin* is one way that import specialists are encouraged to stay current. However, reading the *Bulletin* is not required. It is up to each specialist, to the extent he or she believes necessary to appropriate to review the *Bulletin* for information that may be relevant.

Lolkus Declaration at 1–2 ¶¶ 2–5 (emphasis in original).

He goes on:

> [I]mport specialists are specifically instructed that the *only* source for instructions upon which they are to take action with respect entries subject to antidumping or countervailing duties . . . are the instructions contained in messages that are posted to what is known as the OTO3 bulletin board.

Id. ¶¶ 5, 7 (emphasis in original).

Defendant has offered probative evidence that the *Bulletin* is not the unambiguous notice of *Int'l Trading*. Import specialists are not required to read the *Bulletin*, and the amount of time an import specialist might spend on reading the *Bulletin* varies widely. Lolkus Declaration at 2–3 ¶¶ 3, 5–7. Given its failure to refute Lolkus's testimony, Travelers has not proved that the *Bulletin* is a "familiar manner of providing notice" as described in *Int'l Trading*, 231 F.3d at 1275.

The Lolkus Declaration is evidence that the *Bulletin* is not unambiguous notice to the "reasonable Customs official." *NEC Solutions*,

411 F.3d at 1346. Defendant has given unchallenged evidence from a "reasonable Customs official" (Lolkus) that illustrates that publication in the *Bulletin* was not unambiguous notice. *Id.*

The Lolkus Declaration is relevant to the core question here,[10] and is made upon personal knowledge, it is properly submitted under CIT Rule 56(c), and to the extent it might represent hearsay, it would qualify for a business records exception under Fed. R. Evid. 803(6). *See United States v. Emenogha*, 1 F.3d 473, 485 (7th Cir. 1993); USCIT R. 56(c). The Lolkus Declaration factually demonstrates that Customs' employees may properly fulfill their duties without reading the *Bulletin*, that the *Bulletin* is specifically not regarded as a proper source for liquidation information, and that it may well have no significance at all to a Customs officer doing his or her routine liquidation duties. Lolkus's Declaration is supported by other competent evidence.

b
Declaration of David Genovese

Defendant argues that: (1) customs employees who actually liquidate are not required to read each copy of the *Bulletin*, (2) the Los Angeles antidumping duty branch employees did not likely know about *Zenith II*, and (3) that Customs workers may only receive liquidation messages from the OTO3 electronic *Bulletin* board. Defendant's Response and Cross Motion at 9; Defendant's Reply at 4–5; Defendant's Response and Cross Motion, Attachment D: Declaration of David Genovese ("Genovese Declaration") ¶¶ 3–7.

Genovese addresses those issues. The Branch he heads[11] acts as a liaison between field offices (the ports) and Commerce concerning the liquidation of entries, *id.* at 2 ¶ 3, and as part of its duties it actually prepares the liquidation instructions for the OTO3 message board which it checks with Commerce before posting. *Id.* at 2 ¶ 5.

Mr. Genovese states that import specialists at the ports are "instructed that the OTO3 electronic bulletin board is the *only* source they are to rely upon for processing any affected entries." *Id.* (emphasis added). He adds that "reading the *Bulletin* is not required of personnel in this Branch." *id.* at 2 ¶ 5.

The "Branch does not receive a copy of the [*Bulletin*]," and it does "not have any record of the [*Zenith II*] opinion having been pointed

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[10] Plaintiff argues "we submit that, to experienced Customs personnel the significance of the publication of (*Zenith II*) in the *Bulletin* was absolutely clear." Plaintiff's Motion at 17.

[11] Mr. Genovese is the Chief of the Antidumping/Countervailing Duty Policy and Programs Branch, Office of Trade Policy & Programs, Office of International Trade, United States Customs and Border Protection. Genovese Declaration at 1 ¶ 1.

out to us for purposes of reading or reviewing or for taking action up to and including the time we received the instruction which we subsequently disseminated at Message 5035206 dated February 4, 2005." Genovese Declaration at 2 ¶ 7.

Because it provides factual evidence tending to prove that reading the copy of *Zenith II* in the *Bulletin* was neither necessary to prepare the OTO3 notice, nor that it was actually read by his Branch, the Genovese Declaration supports Defendant's contention that the *Zenith II* publication in the *Bulletin* did not constitute unambiguous notice of the sort required by the deemed liquidation rule. *See* discussion *infra* Part IV, D, 1a. That is not to say that the OTO3 posting board is the only notice to Customs, *see Fujitsu*, 283 F.3d at 1364, just that the *Bulletin* publication here was not notice under the facts provided.

c
Declaration of Karen Biehl

One of Traveler's central assumptions is that publication in the *Bulletin* is equivalent to notice to all Customs employees. "There is no question that each *Bulletin* is circulated widely within Customs because the Government Printing Office 'currently prints approximately 2,700 copies of each issue' ". Plaintiff's Motion at 15 citing *id.* Ex. 9 at 6, Defendant's Response to Plaintiff's First Interrogatory and Request for Production (April 26, 2007), Answer to Interrogatory No. 15. As a factual proposition Defendant attacks this assumption through the Declaration of Karen Biehl, Defendant's Response and Cross Motion. Attachment A: Biehl Declaration ("Biehl Declaration").

Biehl notes that under current practice 2,421 copies of the *Bulletin* are printed and that "about 2000" copies are sent to Customs offices where, according to Defendant, it currently employs approximately 43,000 people. Biehl Declaration at 2 ¶ 6; Defendant's Response and Cross Motion at 15 n. 16 (citing *Performance and Accountability Report*, Fiscal Year 2006, at 2, *available at* http://nemo.cbp.gov/of/customs_report.pdf.) Neither party seems to be aware of the numbers for 1997, though Ms. Biehl asserts the practices are the same. Biehl Declaration at 2 ¶ 7.

Ms. Biehl's statements, while not dispositive since they deal with an unrecorded past, tend to indicate that Customs followed its current practice of distributing the *Bulletin* to its employees at a ratio of less than twenty to one. Plaintiff has not even attempted to refute that factual assertion. Thus, the evidence presented in the Biehl Declaration tends to disprove Plaintiff's assertion that publication in the *Bulletin* necessarily reached all Customs employees.

d
Declaration of Edward Maurer

In its Motion for summary Judgment, Plaintiff relies on discovery responses where Defendant states that: (1) the *Bulletin*'s purpose "is generally, to educate and inform the public of matters concerning Customs and related subjects"[12] (Plaintiff's Motion at 15 Ex. 9 at 2 ¶ 3) and (2) the subtitle of the *Bulletin* including the language "Weekly Compilation of Decisions . . . Concerning Customs and Related Matters of the . . . U.S. Court of Appeals for the Federal Circuit . . . " (*id.*), to prove that "one or more of the members of Team 737 generally reviews the *Bulletin*"[13] (*id.* Ex. 10 at 2 ¶ 4) and that a Customs' employee may read "one or more of the items in the *Bulletin* quite carefully"[14] (*id.* Ex. 10 at 2 ¶ 3).[15]

Even without further contradiction, Plaintiff's reliance upon these Responses for the propositions stated is, at best, attenuated. Defendant has not, however, chosen to rest on that failure. Edward Maurer, a lawyer at Customs, provided a declaration stating that he reviewed publication of the *Bulletin* for the years 1995 through 2000[16] and determined that publication of Federal Circuit opinions during that time "did not seem to follow any consistent pattern." Defendant's Response and Cross Motion, Attachment D: Declaration of Edward N. Maurer at 1 ¶ 3. His analysis of the timing of case publication supports that conclusion. *id.* at 2 ¶¶ 4a–6.

Thus, because publication of Federal Circuit opinions is not consistent, the *Bulletin*, according to Defendant, cannot be relied upon for notice, and therefore there was no reason any Customs employee should have been expected to take notice from it. The argument is persuasive, not least, because Plaintiff provides no *facts* to refute it. Rather, Plaintiff continues in its (Response and Opposition) to either attempt to apply the facts demonstrated by Defendant to its version of the law, (*see, e.g.* Defendant's Response and Cross Motion at 15 n.

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[12] Defendant's response to Plaintiff's First Interrogatory and Request for Production, (April 26, 2007), Answer to Interrogatory No. 3.

[13] Defendant's Response to Plaintiff's Second Interrogatory and Request for Production, (June 2, 2007), Answer to Interrogatory No. 4.

[14] *Id.*, Answer to Interrogatory No. 3.

[15] In its reliance on these responses, Plaintiff fails to note both Defendant's objections and, more importantly its full response to Interrogatory No. 3 in the Second Interrogatory which notes that ". . . the degree of attention an employee may pay to the *Bulletin* may vary from week to week, and may run the gamut from paying no attention to reading one or more items in the *Bulletin* quite carefully." *Id.* It is difficult to assess the validity of the objections, or indeed the full intent or impact of the responses, since neither party provided the court with the interrogatory questions to which the documents respond.

[16] Except for certain minimal missing issues, *id.* at 1 ¶ 2.

16), or to ignore them entirely. The failure to assert genuine issues of contravening material facts is, when taken with the law, fatal to Plaintiff's case.

2
Plaintiff Has Not Refuted Customs' Declarations and Has Not Adequately Proven That the *Bulletin* Is Unambiguous Notice

Defendant relies on the factual information submitted in the Customs workers' declarations[17] to prove its summary judgment argument that the publication of *Zenith II* in the *Bulletin* did not constitute unambiguous notice and that Travelers has not met its burden of proving that there are no genuine issues of fact. The declarations offer proof that the Customs employees who liquidated the entries had: (1) no responsibility to read the *Bulletin*; (2) were not aware of the publishing of the *Zenith II* decision in the *Bulletin*; and (3) did not rely on the *Bulletin* to liquidate the entries. *See* Lolkus Declaration at 2–3 ¶ 3, Genovese Declaration at 2 ¶¶ 5–7. Travelers argues that the Customs workers' declarations are irrelevant. Plantiff's Response at 2. Travelers however, does not provide any evidence to contradict the proof provided through the declarations because it claims the issue to address is solely "whether Customs, as an agency, received legally adequate notice that the suspension of liquidation had been removed, not whether a particular individual actually read the *Zenith [II]* decision in the *Bulletin*." *Id.*

When the party moving for summary judgment supplements its Motion for Summary Judgment by affidavit or other material, the non-moving party "cannot respond with mere allegations." (*see First Nat'l bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575 20 L. Ed. 2d 569 (1968)), nor may the non-moving party rest on mere assertions made in pleadings, legal memoranda, or oral argument. *See Berckley Inv. Group Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006); USCIT R. 56(e). Customs has submitted proof that the *Bulletin* is not unambiguous notice. Travelers has neither refuted Customs' evidence nor does it provide any case law, statutes, affidavits, declarations, or otherwise to demonstrate that the declarations are irrelevant or inadmissible. *See* Plaintiff's Response at 10–11. Travelers' assertions of fact, unreinforced by evidence, are only unfounded assertions. A "non-moving party is required to provide opposing evidence under [CIT] Rule 56(e)[18] only if the moving party has provided

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[17] *See* Biehl Declaration; Lolkus Declaration Genovese Declaration; Maurer Declaration.

[18] CIT Rule 56(e) provides in part,

> When a motion for summary judgment is made and supported as provided in of the adverse party's pleading, but the adverse party's pleading by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial.

evidence sufficient, if unopposed, to prevail as matter of law." *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1369 (Fed. Cir. 2006). *See e.g., Sweats Fashions, Inc. v. Pannill Knitting Co., Inc. 833 F.2d 1560, 1562 (Fed. Cir. 1987)* ("where a movant has supported its motions with affidavits or other evidence *which, unopposed, would establish its right to judgment*, the non-movant . . . must proffer countering evidence") (emphasis added). The Customs declarations prove that the *Bulletin* is not unambiguous notice and provide evidence that reinforces Customs' summary judgment claim. Travelers' failure to offer countervailing evidence: 1) it fatal to its claim that the *Bulletin* constitutes unambiguous notice, and 2) renders its motion for summary judgment untenable.

V

CONCLUSION

Plaintiff has not proven on the basis of law or fact that publication in the *Bulletin* is unambiguous notice, nor has Plaintiff responded to or refuted Defendant's factual declarations. Additionally, Plaintiff has not proven that publication in the *Bulletin* is the same sort of unambiguous notice as publication in the *Federal Register*. Given that ambiguity, the deemed liquidation rule does not apply. For the foregoing reasons, Plaintiff's Motion for Summary Judgment is DENIED, Defendant's Motion for Summary Judgment is GRANTED. The antidumping duty rate 7.43% that was applied to the 17 Funai USA entries of CTVs from November 1987 to March 1988 is AFFIRMED.

If the adverse party does not so respond, summary judgment, if appropriate shall be entered against the adverse party.