

UNITED STATES COURT OF INTERNATIONAL TRADE

SUNPOWER CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Before: Donald C. Pogue,
Senior Judge

Consol. Ct. No. 15-00067

SUNPOWER CORPORATION,

Plaintiff,

v.

UNITED STATES,

Defendant.

Ct. No. 15-00090

OPINION and ORDER

[motions to amend complaints granted; motions to amend preliminary injunctions granted; motion to amend preliminary injunction motion granted; motion for preliminary injunction granted; motions to dismiss denied]

Dated: December 30, 2015

Daniel J. Gerkin and Jerome J. Zaucha, K&L Gates, LLP of Washington, DC, for the Plaintiff.

¹ This action is consolidated with Court Nos. 15-00071, 15-00083, 15-00087, 15-00088, and 15-00089. Order, July, 1, 2015, ECF No. 31.

Melissa M. Devine, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the Defendant. With her on the briefs were Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Jeanne E. Davidson, Director, and Reginald T. Blades, Jr., Assistant Director. Of counsel were Rebecca Cantu, Senior Attorney, and Shelby M. Anderson, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

Timothy C. Brightbill, Laura El-Sabaawi, and Usha Neelakantan, Wiley Rein, LLP of Washington, DC, for Defendant-Intervenor SolarWorld Americas, Inc.

Pogue, Senior Judge: In these cases, Plaintiff SunPower Corp. ("SunPower") contests aspects of the final affirmative determinations made by the U.S. Department of Commerce ("Commerce") in its antidumping and countervailing duty ("AD" and "CVD," respectively) investigations of solar cells and panels from the People's Republic of China.² The court has jurisdiction over these actions pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19

² Compl., Consol. Ct. No. 15-00067, ECF No. 16; Compl., Ct. No. 15-00090, ECF No. 9; see Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, 79 Fed. Reg. 76,970 (Dep't Commerce Dec. 23, 2014) (final determination of sales at less than fair value) ("AD Final Determination"); Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, 79 Fed. Reg. 76,962 (Dep't Commerce Dec. 23, 2014) (final affirmative countervailing duty determination) ("CVD Final Determination").

U.S.C. § 1516a(a)(2)(B)(i) (2012),³ and 28 U.S.C. § 1581(c) (2012).

Currently before the court are ten motions, all of which concern the standing of SunPower and that of its wholly owned subsidiary, SunPower Corporation, Systems ("Systems") in these matters.⁴

As explained below, both SunPower and Systems were interested parties who participated in the underlying administrative proceedings at issue here, and therefore each has standing to challenge the administrative determinations in its own right. Accordingly, Plaintiff's motions to amend the

³ Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

⁴ [SunPower's] Mot. for Leave to Amend, Consol. Ct. No. 15-00067, ECF No. 34 ("Pl.'s Mot. to Amend"); [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00083], Consol. Ct. No. 15-00067, ECF No. 35; [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00088], Consol. Ct. No. 15-00067, ECF No. 36; Def.'s Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 15-00067, ECF No. 37 ("Def.'s Mot. to Dismiss Count VI"); Def.-Intervenor's Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 15-00067, ECF No. 39 ("Def.-Intervenor's Mot. to Dismiss Count VI"); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 17; [SunPower's] Mot. for Leave to File Am. Compl., Ct. No. 15-00090, ECF No. 30 ("Pl.'s Mot. to Amend"); SunPower's Mot. to Amend Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 31; Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15-00090, ECF Nos. 32 (conf.) & 33 (pub.); Def.-Intervenor's Mot. to Dismiss, Ct. No. 15-00090, ECF No. 35.

complaints⁵ and extend the preliminary injunctions to cover its wholly owned subsidiary are granted, while Defendant's and Defendant-Intervenor's motions to dismiss are denied.

BACKGROUND

The two cases currently under review are Consolidated Court Number 15-00067 ("15-67"), which concerns challenges to Commerce's antidumping duty investigation, and Court Number 15-00090 ("15-90"), which concerns challenges to the countervailing duty investigation.

Both cases arise from petitions filed by Defendant-Intervenor SolarWorld Americas Incorporated ("SolarWorld").⁶ SunPower participated in both investigations.⁷

⁵ Since SunPower's amendments to its complaint relate back to its original filing, as explained below, *see infra* Section IIIA, Systems is not time-barred from entering this litigation.

⁶ See Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China and Taiwan, 79 Fed. Reg. 4661, 4661 (Dep't Commerce Jan. 29, 2014) (initiation of antidumping duty investigations); Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, 79 Fed. Reg. 4667, 4668 (Dep't Commerce Jan. 29, 2014) (initiation of countervailing duty investigation).

⁷ In 15-67, SunPower entered an appearance in Commerce's antidumping duty investigation, claiming interested party status pursuant to 19 U.S.C. §§ 1677(9)(A) and (9)(C) as an importer and United States producer of a domestic like product. *See* SunPower Corp.'s Entry of Appearance & Appl. for Admin. Protective Order, Certain Crystalline Silicon Photovoltaic Products from China, A-570-010, Investigation (Feb. 12, 2014), reproduced in Pl.'s Mot. to Amend, Ct. No. 15-00067, ECF No. 34 at Ex. 1 ("SunPower AD Entry of Appearance"), at 1. Thereafter, SunPower responded to Commerce's Quantity and Value (Q&V)

(footnote continued)

Plaintiff timely filed a summons and complaint in 15-67 seeking judicial review of Commerce's antidumping duty investigation.⁸ Plaintiff then moved, in what are now two of the member cases in that consolidated action, Court Numbers 15-00083 and 15-00088,⁹ to preliminarily enjoin Defendant from liquidating its subject merchandise.¹⁰ Both motions were

questionnaire on behalf of "SunPower Corporation . . . and its wholly owned U.S. subsidiaries, [including] SunPower Corporation Systems." Submission of [Q&V] Questionnaire for SunPower Corp. & Wholly Owned U.S. Subsidiaries, Certain Crystalline Silicon Photovoltaic Products from China, A-570-010, Investigation (Feb. 13, 2014) reproduced in Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34 at Ex. 2 ("SunPower Q&V Questionnaire"), at 1. In 15-90, SunPower entered an appearance in the countervailing duty investigation, likewise claiming both 19 U.S.C. §§ 1677(9)(A) and (9)(C) interested party status. SunPower Corp.'s Entry of Appearance & Appl. for Admin. Protective Order, Certain Crystalline Silicon Photovoltaic Products from China, C-570-011, Investigation (Feb. 12, 2014), reproduced in Pl.'s Mot. to Amend, Ct. No. 15-00090, ECF No. 30 at Ex. 1 ("SunPower CVD Entry of Appearance"), at 1; Suppl. to Sunpower Corp.'s Entry of Appearance, Certain Crystalline Silicon Photovoltaic Products from China, C-570-011, Investigation (Mar. 31, 2014), reproduced in Pl.'s Mot. to Amend, Ct. No. 15-00090, ECF No. 30 at Ex. 2 ("Suppl. to SunPower CVD Entry of Appearance").

⁸ Summons, Consol. Ct. No. 15-00067, ECF No. 1; Compl., Consol. Ct. No. 15-00067, ECF No. 16.

⁹ By order dated July 1, 2015, the court consolidated 15-00083 and 15-00088 under Consolidated Court Number 15-00067, along with Court Numbers 15-00071, 15-00087, and 15-00089; Court Number 15-00090 remains unconsolidated. See Order, July 1, 2015, Consol. Ct. No. 15-00067, ECF No. 31.

¹⁰ [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00083], Consol. Ct. No. 15-00067, ECF No. 35; [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00088], Consol. Ct. No. 15-00067, ECF No. 36.

granted.¹¹ Plaintiff now seeks for both its complaint and its injunction to be expanded to cover Systems.¹² Defendant opposes both motions, arguing that Systems does not have standing before this court and that SunPower is not empowered to expand the injunction on Systems' behalf.¹³

SunPower also timely filed a summons and complaint in 15-90.¹⁴ Here, too, SunPower moves to amend their complaint to

¹¹ Order, May 29, 2015, Ct. No. 15-00083, ECF No. 38 (granting in part SunPower's motion for preliminary injunction); Order, May 29, 2015, Ct. No. 15-00088, ECF No. 40 (same).

¹² Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34; [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00083], Consol. Ct. No. 15-00067, ECF No. 35; [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00088], Consol. Ct. No. 15-00067, ECF No. 36. SunPower also moves to "remove Count VI" from the complaint, which is challenged but effectively uncontested. Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34, at 1; see also Def.'s Mot. to Dismiss Count VI, Consol. Ct. No. 15-00067, ECF No. 37; Def.-Intervenor's Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 39. This is discussed further below, see infra Discussion Section II. SunPower also moves to amend its complaint in 15-67 to correct an error. Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34, at 1 (moving to "correct a prior inadvertent reference to the scope of the investigations as stated in the petition"). This is uncontested, see Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15-00067, ECF Nos. 41 (conf.) & 43 (pub.); Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Consol. Ct. No. 15-00067, ECF No. 46, and therefore granted.

¹³ Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15-00067, ECF Nos. 41 (conf.) & 43 (pub.), at 2; Def.'s Resp. in Opp'n to Pl.'s Mots. to Enlarge Prelim. Injs., Consol. Ct. No. 15-00067, ECF Nos. 44 (conf.) & 45 (pub.).

¹⁴ Summons, Ct. No. 15-00090, ECF No. 8; Compl., Ct. No. 15-00090, ECF No. 9.

cover Systems,¹⁵ and for a preliminary injunction to prevent liquidation of their entries and those of Systems.¹⁶ The

¹⁵ Pl.'s Mot. to Amend, Ct. No. 15-00090, ECF No. 30. This motion also seeks to correct errors in the complaint. Id. at 1-2 (moving to "correct prior inadvertent references to the companion antidumping duty investigation and order" and "inadvertent reference . . . to the scope of the investigation stated in the petition"). These corrections are uncontested, see Def.'s Resp. in Opp'n to [Pl.'s Mot. to Amend], Ct. No. 15-00090, ECF No. 37; Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Ct. No. 15-00090, ECF No. 39, and therefore granted.

¹⁶ In 15-90, Plaintiff moved for a preliminary injunction, [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 17, which Defendant and Defendant-Intervenors opposed, Def.'s Resp. to Pl.'s Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 20; Def.-Intervenor's Opp'n to Pl.'s Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 19. On consent motion, time was extended for a series of teleconferences. Teleconference, June 17, 2015, ECF No. 22; Consent Mot. for Extension of Time, June 30, 2015, ECF No. 25 (requesting rescheduling of teleconference from July 1, 2015 to July 8, 2015); Order, July 1, 2015, ECF No. 26 (granting); Teleconference, July 1, 2015, ECF No. 27; Teleconference, July 8, 2015, ECF No. 29. Therefore, this motion for a preliminary injunction was still pending when Plaintiff first sought to add Systems as a party to 15-90 and extend the scope of its preliminary injunctions to cover Systems' entries. In consequence, Plaintiff has filed a motion for leave to file an amended motion for preliminary injunction. Pl.'s Mot. for Leave to File Am. Prelim. Inj. Mot. to Include Entries Made by [Systems], Ct. No. 15-00090, ECF No. 31. Defendant and Defendant-Intervenor each filed papers characterized as oppositions to the request for leave to file an amended motion for preliminary injunction, but Defendant argues the merits of Plaintiff's proposed amended filing without contending that the amendment itself should be disallowed, Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend Prelim. Inj., Ct. No. 15-00090, ECF No. 38, and Defendant-Intervenor's filing adopts Defendant's arguments by reference without adding any further argument, Def.'s-Int.'s Resp. to Pl.'s Mot. for Leave to File Am. Prelim. Inj., Ct. No. 15-00090, ECF No. 40. Accordingly, the court shall grant as unopposed Plaintiff's motion for leave to file an amended motion, and will below

(footnote continued)

Government and SolarWorld move to dismiss 15-90,¹⁷ and accordingly argue that the Court lacks jurisdiction to grant SunPower's motions to amend its complaint and preliminarily enjoin.¹⁸

DISCUSSION

I. Motions to Dismiss in Ct. No 15-90

The arguments to dismiss in 15-90 boil down to a contention that SunPower itself lacks standing to bring this case.

SunPower's claim of standing is based on 28 U.S.C. § 2631(j)(1)(B), which provides that "in a civil action under [19 U.S.C. § 1516a] only an *interested party* who was a *party to the proceeding* in connection with which the matter arose may intervene" (emphasis added).

A. SunPower was an Interested Party

19 U.S.C. § 1677(9) defines an "interested party" as,

resolve Plaintiff's amended motion and all oppositions to it, see infra Discussion Section V.

¹⁷ Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15-00090, ECF No. 32 (conf.) & 33 (pub.); Def.-Intervenor's Mot. to Dismiss, Ct. No. 15-00090, ECF No. 35.

¹⁸ Def.'s Resp. in Opp'n to [Pl.'s Mot. to Amend], Ct. No. 15-00090, ECF No. 37; Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend its Prelim. Inj. Mot., Ct. No. 15-00090, ECF No. 38; Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Ct. No. 15-00090, ECF No. 39; Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. [Prelim. Inj. Mot.], Ct. No. 15-00090, ECF No. 40.

inter alia, "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise" ¹⁹ In the CVD investigation, SunPower asserted status as an importer, based on the entries made by Systems; in the alternative, SunPower claimed that it was a producer by virtue of its toll-produced products.²⁰ The agency made no determination to the contrary.²¹ Similarly, the Defendant's motion to dismiss does not claim that SunPower was not an interested party.²² SunPower was therefore an interested party.

¹⁹ 19 U.S.C. § 1677(9) (A).

²⁰ Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15-00090, ECF No. 30 at Ex. 2 (claiming standing under both 19 U.S.C. § 1677(9) (A) and (9) (C)).

²¹ See CVD Final Determination, 79 Fed. Reg. 76,962, and accompanying Issues & Decision Mem., C-570-011, Investigation (Dec. 15, 2014).

²² Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15-00090, ECF Nos. 32 (conf.) & 33 (pub.), at 8-9 (contending only that "because SunPower was not a party to the proceeding, it does not have standing to bring this action . . ."). Although the Defendant, in a teleconference held on September 15, 2015, questioned whether SunPower can claim status as an importer based solely on its ownership of a subsidiary importing subject goods, see Teleconference, Sept. 15, 2015, Ct. No. 15-00090, ECF No. 43, this claim was not presented in its moving papers, see Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15-00090, ECF Nos. 32 & 33, and the agency made no such determination, see CVD Final Determination, 79 Fed. Reg. 76,962, and accompanying Issues & Decision Mem., C-570-011, Investigation (Dec. 15, 2014). Arguments omitted from a party's briefing are waived. See United States v. Great American Ins. Co. of NY, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived." (citations omitted)).

B. SunPower was a Party to the Proceeding.

While there is no statutory definition of "party to the proceeding," Commerce has defined the term as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding."²³ This Court has previously adopted that definition, holding that a party is a "'party to the proceeding' only when that party provides factual information or promotes a legal position before Commerce."²⁴

There is no requirement that a party provide *both* factual information *and* legal argument. Providing factual data on exports in response to a questionnaire from Commerce is sufficient to make a party a "party to the proceeding."²⁵ The

²³ 19 C.F.R. § 351.102(b) (36).

²⁴ Legacy Classic Furniture, Inc. v. United States, ___ CIT ___, 774 F. Supp. 2d 1293, 1295 (2011) (emphasis added).

²⁵ Defendant's position here is that the lack of an argument accompanying the data dooms SunPower's attempt at participation. Def's Mot. to Dismiss, Ct. No. 15-00090, ECF No. 32 p. 4-9. Legacy holds that a party is a party to the proceeding "only when that party provides factual information or promotes a legal position before Commerce." Legacy Classic Furniture, ___ CIT at ___, 774 F. Supp. 2d at 1294. In effect, Defendant argues that the 'or' in Legacy should be read as 'and.'

To support this proposition, Defendant cites Specialty Merchandise Corp, in which a plaintiff was found to have been a party to the proceeding because it had submitted both facts and argument. Specialty Merchandise Corp. v. United States, 31 CIT 364, 365-66, 477 F.Supp.2d 1359, 1361 (2007); see Def's Mot. to Dismiss, Ct. No. 15-00090, ECF No. 32 p. 7-8. There, this Court

(footnote continued)

addition of relevant information to an otherwise procedural filing changes the character of that filing to meaningful participation in the administrative proceeding.

Here, SunPower submitted factual data on exports and sales of goods imported by Systems in response to Commerce's request.²⁶ This makes SunPower a "party to the proceeding."

Accordingly, SunPower is an interested party who was a party to the proceeding, and on that basis, jurisdiction over SunPower's claim is proper. Defendant and Defendant-Intervenors' motions to dismiss 15-90 are therefore denied.

affirmed Commerce's determination that Specialty Merchandise was a party to the proceeding because it made written submissions containing argument. Defendant now appears to argue that by agreeing that evidence backed by argument was one valid form of participation, this Court somehow conjured up a requirement that only evidence linked to argument counts as participation. Def's Mot. to Dismiss, Ct. No. 15-00090, ECF No. 32 p. 7. This is not the case. The fact-to-argument link is sufficient to establish participation, but it is not necessary. See Union Steel v. United States, 33 CIT 614, 618-19, 617 F. Supp. 2d 1373, 1378-79 (2009).

²⁶ Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15-00090, ECF No. 30 at Ex. 2, at 2-3 (noting that Commerce "requested that [SunPower] provide customs entry documentation to substantiate [the] assertion that it is an importer of subject merchandise," and provide factual information that its "wholly owned subsidiary, [Systems]," did); see Ex. 1 to Suppl. to Sunpower Corp.'s Entry of Appearance, Certain Crystalline Silicon Photovoltaic Products from China, C-570-011, Investigation (Mar. 31, 2014), reproduced in Def.'s [Conf.] Mem. in Supp. of Mot. to Dismiss for Lack of Jurisdiction, Ct. No. 15-00090, ECF No. 32 at Attach. A, (providing entry summary (Customs and Boarder Protection ("CBP") Form 7501) and the associated commercial invoice used by Systems to make entry).

II. Motions to Dismiss Count VI in 15-67

Plaintiff moves to withdraw Count VI of its complaint in 15-67.²⁷ Defendant and Defendant-Intervenor move to dismiss Count VI as well.²⁸ Since there is no disagreement between the parties on this point, SunPower's motion to withdraw Count VI is granted and Defendant and Defendant-Intervenor's motions to dismiss Count VI are denied as moot.

III. Motions to Amend in Both 15-67 and 15-90

SunPower has moved to amend its complaints in both 15-67 and 15-90 pursuant to USCIT Rules 7(b)(1), 15(a)(2), 15(c)(1), 20, and 21.²⁹ The chief purpose of these amendments is to add Systems as a party.³⁰ Defendant and Defendant-Intervenor oppose the addition of Systems, arguing that Systems was not a party to the underlying administrative proceedings, and further, that Systems should be time-barred because it seeks joinder more

²⁷ Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No 34, at 1-2 (seeking to amend its complaint to "remove Count VI," as it had not intended "to challenge any aspect of the [International Trade] Commissions determinations").

²⁸ Def.'s Mot. to Dismiss Count VI, Consol. Ct. No. 15-00067, ECF No. 37; Def.-Intervenor's Mot. to Dismiss Count VI of Pl.'s Compl., Consol. Ct. No. 39.

²⁹ Pl's Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34; Pl's Mot. to Am., Ct. No. 15-00090, ECF No. 30.

³⁰ See Pl's Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34, at 3-9; Pl's Mot. to Am., Ct. No. 15-00090, ECF No. 30, at 4-11.

than thirty days after Commerce's final determinations.³¹

USCIT Rule 21 empowers this Court, "[o]n motion or on its own . . . [to] at any time, on just terms, add or drop a party." This equitable power is broad: "Rules 20 and 21, involving, *inter alia*, the addition of parties, are to be construed liberally in order to promote complete resolution of disputes, thereby preventing multiple lawsuits."³²

Despite Defendant and Defendant-Intervenor's claims, Systems standing is not time-barred, since, as explained below, the filing date of the amended complaint relates back to the filing date of the original complaint. In addition, Systems has

³¹ Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15-00067, ECF Nos. 41 (conf.) & 43 (pub.), at 5-13; Def.'s Resp. in Opp'n to [Pl.'s Mot. to Amend], Ct. No. 15-00090, ECF No. 37, at 4-10; see also Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Consol. Ct. No. 15-00067, ECF No. 46 (concurring with and adopting Defendant's arguments); Def.-Intervenor's Resp. to Pl.'s Mot. for Leave to File Am. Compl., Ct. No. 15-00090, ECF No. 39 (same).

³² United States v. Gold Mountain Coffee, Ltd., 9 CIT 16, 18 (1985) (not reported in Federal Supplement) (citations omitted); see also AD HOC Utilities Grp. v. United States, 33 CIT 1284, 1296 n.20, 650 F. Supp. 2d 1318, 1330 n.20 (2009) ("[I]n applying [USCIT] Rule 21, the court is governed by the liberal amendment standards of Rule 15(a)." (quoting Insituform Techs., Inc. v. CAT Contracting, Inc., 385 F.3d 1360, 1372 (Fed. Cir. 2004))); cf. USCIT Rule 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) ("Under the [Federal Rules of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.").

standing in its own right because: Systems has shown that it is an interested party, having imported subject goods during the period of investigation that Commerce knew or should have known about by virtue of Systems' filings on the administrative record. Systems has shown it was a party to the underlying proceedings because it provided Commerce with factual data regarding those entries in response to questionnaires from the agency.

A. Systems' Addition is Not Time-Barred, Because the Amended Complaint Relates Back to the Date of the Original Filing.

Systems is not barred by the requirement in 19 U.S.C. § 1516a that a case be filed within thirty days of Commerce's final determination. Here, the bar is avoided, since "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading."³³ Because the original complaints described

³³ USCIT Rule 15(c)(1)(B). "[W]here it is appropriate to relate back an amendment to a pleading under Rule 15, jurisdiction is assessed as if the amendment had taken place at the time the complaint was first filed." E.R. Squibb & Sons, Inc. v. Lloyd's & Companies, 241 F.3d 154, 163 (2d Cir. 2001). Leave to amend should be given freely absent "apparent or declared reason . . . such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by

(footnote continued)

SunPower's tolling arrangements with its various wholly-owned subsidiaries,³⁴ and since SunPower's factual submission in the underlying administrative proceedings were submitted jointly with Systems and discussed entries made by Systems that SunPower now seeks to cover with its amended complaints and expanded preliminary injunctions,³⁵ as discussed below, it follows from

virtue of allowance of the amendment, futility of amendment." Foman v. Davis, 371 U.S. 178, 182 (1962); see also Rural Fire Protection Co. v. Hepp, 366 F.2d 355, 362 (9th Cir. 1966) ("The purpose of Rule 15(c) is to defeat the bar of statutes of limitations, and is liberally applied especially if no disadvantage will accrue to the opposing party."). Defendant has not shown bad faith, prejudice, futility, or any other meaningful potential disadvantage. Commerce's parade of horrors here is unpersuasive: SunPower is not attempting to parachute previously unsuspected time-barred corporations into this litigation years after the fact. The rules would prohibit this, and will continue to do so in the future. Rather, they are attempting, several months after filing their complaint and promptly after discovering a defect in their pleading, to correct that defect in order to preserve the ability to challenge liquidation of the same entries they had apparently intended to protect in the first place. See Compl., Consol. Ct. No. 15-00067, at 2-4 (original complaint describing SunPower's tolling arrangement with subsidiaries); Compl., Ct. No. 15-00090, ECF No. 9, at 3-4 (same); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00083, ECF No. 24, at 1-2 (seeking to enjoin liquidation of subject merchandise "imported by SunPower or any wholly owned subsidiary of SunPower (collectively, 'SunPower')"); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00088, ECF No. 30, at 1-2 (same); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 17, at 1-2 (same).

³⁴ Compl., Consol. Ct. No. 15-00067, ECF No. 16 at ¶¶ 5-7; Compl., Ct. No. 15-00090, ECF No. 9 at ¶¶ 5-7.

³⁵ SunPower AD Entry of Appearance, Ct. No. 15-00067, ECF No. 34 at Ex. 1; SunPower Q&V Questionnaire, Consol. Ct. No. 15-00067, ECF No. 34 at Ex. 2; SunPower CVD Entry of Appearance, Ct. No.

(footnote continued)

these filings that Commerce had fair notice of Systems' status and that Systems' status may therefore relate back to the date of the original filing of the complaints.³⁶ The thirty-day time bar is therefore satisfied.

B. Systems Has Standing Because it was an Interested Party and a Party to the Proceedings in its Own Right.

SunPower may amend its complaints to add Systems as a party if Systems is an interested party who was a party to the underlying proceedings.³⁷ If not, Systems lacks standing.³⁸

Systems is an interested party if it acted as the importer of record for subject merchandise during the period of investigation.³⁹ In 15-67, SunPower, with Systems, provided Commerce, in the underlying proceedings, with entry summary documents for three entries of subject merchandise with Systems

15-00090, ECF No. 30 at Ex. 1, at 1; Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15-00090, ECF No. 30 at Ex. 2.

³⁶ See Foman, 371 U.S. at 182.

³⁷ SunPower does not need to prove anything about its relationship with Systems. As explained below, Systems' submission of factual information is independently sufficient to establish its participation in the proceedings, see infra Discussion Section III, such that it is not necessary to address the nature of SunPower's corporate structure, or any related legal questions.

³⁸ See 19 U.S.C. § 1516a(a)(2)(A); see also 28 U.S.C. § 2631(j)(1)(B) ("[O]nly an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right.")

³⁹ 19 U.S.C. § 1677(9)(A) (defining "interested party" as a *inter alia*, "the United States importer[] of subject merchandise").

as the importer of record.⁴⁰ In 15-90, SunPower relies similarly on entry documents that describe subject merchandise entered during the period of review with Systems as the importer of record.⁴¹ As Defendant points out, in 15-67 the summary forms erroneously list the importer of record as "SunPower Corporation USA" and not "SunPower Corporation, Systems"; "SunPower Corporation, Systems" is identified only as the consignee.⁴² However, Commerce knew or had reason to know that these entries

⁴⁰ Aff. By Michael Holland, Sr. Counsel for [SunPower], in Supp. of [Systems'] Status as Importer of R. During Period of Investigation, reproduced in Affs. in Supp. of [Systems'] Status as Importer of R. during Period of Investigation, Consol. Ct. No. 15-00067, ECF Nos. 67 (conf.) & 68 (pub.) at App. 1 ("Holland Aff."), at Ex. 3.1 (providing the CBP Form 7501 and commercial invoice for Entry Number 201-9399143-6, dated June 18, 2013); id. at Ex. 3.2 (providing the CBP Form 7501 and commercial invoice for Entry Number 201-9399165-9, dated July 19, 2013); id. at Ex. 3.3 (providing the CBP Form 7501 and commercial invoice for Entry Number 201-9399161-8, dated July 17, 2013); see Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15-00067, ECF Nos. 41 (conf.) & 43, at 15 (describing these CBP Forms 7501 as "provided to Commerce in SunPower's separate rate application").

⁴¹ See Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15-00090, ECF No. 30 at Ex. 2 (noting that Exhibit 1 to the supplement is a CBP Form 7501, and its commercial invoice, for Entry Number 322-0768689-4, dated Sept. 9, 2012, for which Systems is the importer of record); see also Ex. 1 to Suppl. to Sunpower Corp.'s Entry of Appearance, Certain Crystalline Silicon Photovoltaic Products from China, C-570-011, Investigation (Mar. 31, 2014), reproduced in Def.'s [Conf.] Mem. in Supp. of Mot. to Dismiss for Lack of Jurisdiction, Ct. No. 15-00090, ECF No. 32 at Attach. B, (providing CBP Form 7501 and the associated commercial invoice for Entry Number 322-0768689-4, dated Sept. 9, 2012, with Systems as the importer of record).

⁴² Def.'s Partial Opp'n to Mot. for Leave to File an Am. Compl., Consol. Ct. No. 15-00067, ECF No. 41, at 15.

were in fact made by Systems because the address and importer number listed on the forms were those of Systems, and "SunPower Corporation USA," which does not actually exist.⁴³ Therefore, because Systems served as importer of record of subject merchandise during the periods of investigation for both the AD and CVD administrative proceedings, and Commerce knew or had reason to know of this, Systems is an interested party for the purposes of both 15-67 and 15-90.

Systems next must show that it was a party to the underlying administrative proceedings.⁴⁴ As explained above, the statute provides no definition of the term "party to the proceeding," but Commerce has defined the term as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding."⁴⁵ Purely procedural filings, such as an "[administrative protective order] application and notice of appearance," unaccompanied by other participation before the

⁴³ See Holland Aff., ECF Nos. 67 (conf.) & 68 (pub.) at App. 1, at ¶ 6 (noting that Systems' importer number is provide in the CBP Forms 7501 for the importer of record); id. at ¶9 (noting that forms make clear that the consignee and the importer of record are the same entity because they have the same federal Tax Identification Number), ¶10 (providing that "SunPower Corporation USA" does not exist and the forms give the correct, unique, physical address of Systems).

⁴⁴ 28 U.S.C. § 2631(j) (1) (B).

⁴⁵ 19 C.F.R. § 351.102(b) (36).

administrative agency, are insufficient to create a party to the proceeding.⁴⁶ On the other hand, an interested party who responds to a questionnaire from the Department seeking information to use in selecting respondents is a party to the proceedings.⁴⁷

The documents on which SunPower and Systems rely in each case contained factual data on imports to the United States and were submitted to Commerce as a part of the administrative review process.⁴⁸ Filings that contain factual data on imports of subject merchandise are enough to establish participation.⁴⁹ Further, in 15-67, System's status as a party to the proceeding is strengthened by the fact that it, in conjunction with SunPower, "responded to a questionnaire from the Department seeking information to use in selecting respondents"⁵⁰ - a

⁴⁶ Legacy Classic Furniture, ___ CIT at ___, 774 F. Supp. 2d at 1294.

⁴⁷ Union Steel, 33 CIT at 618-19, 617 F.Supp.2d at 1378-79 (2009).

⁴⁸ SunPower AD Entry of Appearance, Ct. No. 15-00067, ECF No. 34 at Ex. 1, at 1; SunPower Q&V Questionnaire, Consol. Ct. No. 15-00067, ECF No. 34 at Ex. 2, at 1; SunPower CVD Entry of Appearance, Ct. No. 15-00090, ECF No. 30 at Ex. 1, at 1; Suppl. to SunPower CVD Entry of Appearance, Ct. No. 15-00090, ECF No. 30 at Ex. 2.

⁴⁹ Union Steel v. United States, 33 CIT 614, 618-19, 617 F. Supp. 2d 1373, 1378-79 (2009).

⁵⁰ See Legacy Classic Furniture, ___ CIT at ___, 774 F. Supp. 2d at 1294 (2011) (citing Union Steel, 33 CIT at 618, 617 F. Supp. 2d at 1378); SunPower Q&V Questionnaire, Consol. Ct. No. 15-00067, (footnote continued)

response that Commerce noted in its preliminary determination⁵¹ and its final determination.⁵² Commerce, having "acknowledged implicitly [System's] participation in the proceeding by responding to [its] submission containing factual information," cannot now say that Systems is not a party to the proceeding.⁵³

Like its parent, Systems provided factual information to Commerce in the underlying proceedings to both 15-67 and 15-

ECF No. 34 at Ex. 2 at 1 (noting that the questionnaire was submitted on behalf of SunPower and "its wholly owned U.S. subsidiaries," including Systems, "collectively, 'SunPower U.S.'"); *id.* at 2 ("modules incorporating crystalline silicon photovoltaic ('CSPV') cells that were exported to SunPower U.S."); Holland Aff., Consol. Ct. No. 15-00067, ECF Nos. 67 (conf.) & 68 (pub.) at App. 1, at Exs. 3.1, 3.2, & 3.3 (providing the CBP Forms 7501 and commercial invoice for three entries during the period of investigation with Systems as the importer of record, *see supra* notes 39 & 43 with associated text, which are described by Defendant as "entry summary forms submitted to CBP, and later provided to Commerce in SunPower's separate rate application," *see* Def.'s Partial Opp'n to [Pl.'s Mot. to Amend], Consol. Ct. No. 15-00067, ECF Nos. 41 (conf.) & 43, at 15).

⁵¹ Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China, Preliminary Issues & Decision Mem., A-570-010, Investigation (July 24, 2014) (adopted in 79 Fed. Reg. 44,399 (Dep't Commerce July 31, 2014) (affirmative preliminary determination of sales at less than fair value and postponement of final determination)) at 6 n.20 (listing "SunPower Corporation," and thereby Systems, *see supra* note 50, as among the companies that "filed timely Q&V questionnaire responses").

⁵² See AD Final Determination, 79 Fed. Reg. at 76,973 ((listing SunPower, and thereby Systems, *see supra* note 50, as among the companys that participated but were not eligible for separate rate status)).

⁵³ See Union Steel, 33 CIT at 619, 617 F. Supp. 2d at 1378-79.

90, and is therefore entitled to participate in both cases as a party to the underlying proceedings in its own right.

Plaintiff's motions to amend its complaints to add Systems as a co-plaintiff are accordingly granted.

IV. Systems is Entitled to the Protection of the Previously-Granted Preliminary Injunction in 15-67.

It is uncontested that, if Systems can be added to this litigation in its own right, and the litigation survives the motions to dismiss, it also has the right to expand the existing preliminary injunction in 15-67 to protect its entries from liquidation.⁵⁴ Parties spend much ink arguing about whether or not SunPower possesses independent authority to expand the scope of its previously-granted preliminary injunction to cover Systems' entries. However, this issue does not need to be addressed. Systems having standing, and having therefore properly been joined to this litigation for the reasons described above, Systems is therefore granted an expansion to the preliminary injunction to cover all entries of subject merchandise made during the period covered by the previously-

⁵⁴ Systems is entitled to a preliminary injunction in this case for the same reason that SunPower is, which is laid out in [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00083, ECF No. 24 (granted in part by Order, May 29, 2015, Ct. No. 15-00083, ECF No. 38); see also [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00088, ECF No. 30 (granted in part by Order, May 29, 2015, Ct. No. 15-00088, ECF No. 40).

granted preliminary injunctions. leave for Systems to expand the preliminary injunction to protect its entries during the time period covered by the previously-granted preliminary injunction is therefore granted.

V. SunPower and Systems are Entitled to a Preliminary Injunction in 15-90.

In opposing SunPower's motion for a preliminary injunction in 15-90, Defendant claims solely that "the Court should deny SunPower's [and Systems'] motion because SunPower lacks standing to bring this action and, thus, is not entitled to injunctive relief."⁵⁵ However, as explained in Sections I through III, *supra*, SunPower and Systems do both have standing.

For the same reasons supporting the grant of preliminary injunctions against liquidation of SunPower and System's subject entries in the cases consolidated into 15-67, SunPower and Systems are entitled to an injunction in 15-90. Their motion, as amended, is granted.

CONCLUSION

SunPower has established that, by submitting factual data to Commerce, it participated in the underlying administrative proceedings; accordingly, this court has

⁵⁵ Def.'s Resp. in Opp'n to Pl.'s Mot. for Leave to Amend its Prelim. Inj. Mot., Ct. No. 15-00090, ECF No. 38, at 1.

jurisdiction and the motions to dismiss 15-90 must be denied.⁵⁶

SunPower's motion to dismiss Count VI of 15-67 is granted as unopposed, and in consequence Defendant and Defendant-

Intervenor's motions to dismiss Count VI are denied as moot.⁵⁷

SunPower has also established that its wholly-owned subsidiary, Systems, joined it on its factual submissions, thereby giving Commerce notice of Systems' separate status and as an interested party who was a party to the proceedings. SunPower may therefore amend its complaints in both actions to include Systems as a party because it has shown that Systems was an interested party and a party to the underlying administrative proceedings. Systems has accordingly established standing before this court in both cases,⁵⁸ entitlement to protection under the previously-granted preliminary injunction in 15-67,⁵⁹

⁵⁶ Def.'s Mot. to Dismiss Pl.'s Compl., Ct. No. 15-00090, ECF Nos. 32 (conf.) & 33 (pub.) (denied); Def.-Intervenor's Mot. to Dismiss, Ct. No. 15-00090, ECF No. 35. (denied).

⁵⁷ Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34 (motion to dismiss Count VI granted); Def.'s Mot. to Dismiss Count VI, Consol. Ct. No. 15-00067, ECF No. 37 (denied as moot); Def.-Intervenor's Mot. to Dismiss Count VI, Consol. Ct. No. 15-00067, ECF No. 39 (denied as moot).

⁵⁸ Pl.'s Mot. to Amend, Consol. Ct. No. 15-00067, ECF No. 34 (granted); Pl.'s Mot. to Amend, Ct. No. 15-00090, ECF No. 30 (granted).

⁵⁹ [SunPower's] Mot. to Enlarge Scope of Prelim. Inj. to Include Entries Made by [Systems] [in Connection with Ct. No. 15-00083], Consol. Ct. No. 15-00067, ECF No. 35 (granted); [SunPower's] Mot. to Enlarge Prelim. Inj. to Include Entries Made by

(footnote continued)

and to protection under the newly granted preliminary injunction in 15-90.⁶⁰ The amended complaints relate back to the filing date of the original complaints, and therefore the thirty-day time bar is not implicated.

For the above-stated reasons, Defendant and SolarWorld's motions to dismiss are denied, Plaintiff's motions to amend are granted, Plaintiff's motion to expand the preliminary injunctions in 15-67 to cover co-plaintiff Systems is granted, and the motion for a preliminary injunction in 15-90 as to both SunPower and Systems is granted.

IT IS SO ORDERED.

/s/Donald C. Pogue
Donald C. Pogue, Senior Judge

Dated: December 30, 2015
New York, NY

[Systems] [in Connection with Ct. No. 15-00088], Consol. Ct. No. 15-00067, ECF No. 36 (granted).

⁶⁰ SunPower's Mot. to Amend Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 31 (granted); [SunPower's] Mot. for Prelim. Inj., Ct. No. 15-00090, ECF No. 17 (granted as amended).