UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JUDITH M. BARZILAY, JUDGE

PLAINTIFFS NAMES, Former Employees of IBM Corporation, Global Services Division; James Fusco; Barbara Lisa Pineau; Dick Young; John F. Lake; and on behalf of all others similarly situated,	)	**Court No. 03-00656-JMB**
v.	)	
Elaine L. Chao, Secretary of the United States Department of Labor; John Ashcroft, Attorney General of the United States, Defendants.	)	

PLAINTIFFS' CORRECTED REPLY IN SUPPORT OF THEIR RULE 56.1 MOTION FOR JUDGMENT ON THE AGENCY RECORD AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

Plaintiffs respectfully submit this reply brief in support of their Rule 56.1 Motion for Judgment on the Agency Record, filed November 5, 2004, and in opposition to Defendants' Response and Motion to Dismiss,[1] filed December 6, 2004.

As explained more fully below, Defendants' Motion to Dismiss the three named plaintiffs formerly employed by Computer Horizons should be denied because Defendants have waived the non-jurisdictional, waivable, affirmative defense of statute of limitations by not asserting it in their February 25, 2004, Answer. Additionally, Defendants have failed to convincingly rebut the numerous reasons offered by Plaintiffs as to why Labor erroneously determined that the software designed and developed by the plaintiffs formerly employed by IBM Global Services Division was not "production of an article" within the meaning of the Trade Act of 1974.[2] Accordingly, pursuant to 19 U.S.C. § 2395(c), this Court should order Defendants to certify the former employees of IBM and all other similarly situated individuals as eligible for TAA.

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[1] Throughout this brief, Plaintiffs will cite to their November 5, 2004, Rule 56.1 Motion as "Pls. R. 56.1 Mot." and to Defendants' December 6, 2004, Response and Motion to Dismiss as "Defs. R 56.1 Opp'n".

[2] As noted in Plaintiffs' Rule 56.1 Motion, Plaintiffs' discussion of whether the design and development of software is "production of an article" within the meaning of the Trade Act of 1974 "is framed by the factual and procedural history of solely Investigation No. TA-W-50,129/50,129A [the IBM investigation] because Defendants have neither filed with the Court nor served on Plaintiffs an administrative record relating to Investigation No. TA-W-50,399 [the Computer Horizons investigation]." Defendants have failed to produce an administrative record relating to Investigation No. TA-W-50,399, notwithstanding (1) that Defendants were put on notice of Plaintiffs Pineau, Young, and Lake's claims when Plaintiffs filed their First Amended Complaint ("FAC") on January 2, 2004, *see* FAC ¶ 6; (2) that Defendants acknowledged in their Answer that Plaintiffs Pineau, Young, and Lake "were denied trade benefits," *see* Answer ¶ 6; and (3) that, as argued below, Defendants have waived the statute of limitations affirmative defense to the Computer Horizons Plaintiffs' claims.

II. DEFENDANTS' CROSS-MOTION TO DISMISS THE COMPUTER HORIZONS PLAINTIFFS SHOULD BE DENIED.

A. DEFENDANTS HAVE WAIVED THE STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE TO THE CLAIMS OF THE COMPUTER HORIZONS PLAINTIFFS

Defendants move to dismiss as time-barred the claims of named Plaintiffs Barbara Lisa Pineau, Dick Young, and John F. Lake, each of whom formerly worked for Computer Horizons in Irving, Texas (collectively, the "Computer Horizons Plaintiffs"). Unfortunately for Defendants, they have waived this affirmative defense. Here, Defendants were put on notice of the Computer Horizons Plaintiffs' claims on January 2, 2004, when Plaintiffs filed their First Amended Complaint ("FAC"), (*see* FAC ¶ 6), and acknowledged the Computer Horizon Plaintiffs' claims in Defendants' February 25, 2004, Answer, (*see* Answer ¶ 6). Defendants waited almost ten months (after having already long-filed their responsive pleading), until December 6, 2004, to raise the statute of limitations defense in their Cross-motion to Dismiss.

"It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case." 5 Charles Alan Wright & Arthur R Miller, Federal Practice and Procedure: Civil 3d § 1278. The Federal Circuit adheres to this maxim of procedure: "[T]he statute of limitations can be waived by the parties even for claims that have expired. It is well settled that parties can waive such an affirmative defense . . . by not raising it . . . ." *United States v. Hitachi America, Ltd.*, 172 F.3d 1319, 1334 (Fed. Cir. 1999); *see also, e.g., In re Pugh*, 158 F.3d 530, 532, 538 (11th Cir. 1998) (affirming district court decision holding that limitations periods could be waived and were waived by failure to assert the statute of limitations defense in an answer as required by [Federal] Rule [of Civil Procedure] 8(c)); *United States v. Big D Enters, Inc.*, 184 F.3d 924, 935 (8th Cir. 1999) (defense based upon

the statute of limitations because not raised in a responsive pleading); *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987) ("The statute of limitations is an affirmative defense under Fed. R. Civ. P. 8(c) that must be asserted in a party's responsive pleading 'at the earliest possible moment' and is a personal defense that is waived if not promptly pleaded." (citations omitted)).

This Court's Rule 8 *literally* mirrors the Federal Rule inasmuch as they both list statute of limitations as an affirmative defense. *Compare* CIT R. 8(d) ("[A] party *shall* set forth affirmatively . . . statute of limitations . . . and any other matter constituting an affirmative defense." (emphasis added)), *with* Fed. R. Civ. Pro. 8(c) (same). When this Court's rules mirror the Federal Rules, this Court applies cases construing the Federal Rules. *See, e.g., AutoAlliance Intern., Inc. v. United States*, Slip Op. 04-138, 2004 WL 2554587, *1 n.1 (Ct. Int'l Trade 2004) ("[C]ases interpreting Federal Rule of Civil Procedure are appropriate for discussing the Court of International Trade Rule."); *United States v. Optrex America, Inc.*, Slip Op. 04-80, 2004 WL 1490419, *3 n.3 (Ct. Int'l Trade 2004) (Barzilay, J.) ("USCIT Rules closely mirror the Federal Rules of Civil Procedure, and thus cases under FRCP are applicable in our court."). Application of cases construing the Federal rules to Defendants' failure to affirmatively plead the statute of limitations defense can yield but one conclusion: Defendants have waived the affirmative defense.

B. CONGRESS DID NOT INTEND FOR 28 U.S.C. § 2636(d) TO BE JURISDICTIONAL

Defendants appear to cast their statute of limitations argument as a jurisdictional defect that the Computer Horizons Defendants are charged with satisfying. (Defs. R. 56.1 Opp'n at 9-10.) But neither the Federal Circuit nor this Court has, in the face of the Department of Labor's failure to properly assert the statute of limitations affirmative defense, ever held that a TAA plaintiff's commencement of suit outside of 28 U.S.C. § 2636(d)'s sixty-day limitations period is

a jurisdictional defect (as opposed to a waivable affirmative defense). Accordingly, the four cases on which Defendants rely (*see* Defs. R. 56.1 Opp'n at 10) — *Kelley v. Secretary, U.S. Dep't of Labor*, 812 F.2d 1378, 1380 (Fed. Cir. 1987); *Former Employees of Roeder Hydraulics, Inc. v. U.S. Secretary of Labor*, 19 CIT 825, 826, 1995 WL 350172 (Ct. Int'l Trade 1995); *Former Employees of ITT v. Secretary of Labor*, 12 CIT 823, 824, 1988 WL 95919 (Ct. Int'l Trade 1988); and *Former Employees of Geosearch, Inc. v United States*, 11 CIT 953, 954, 1987 WL 32713 (Ct. Int'l Trade 1987) — for the proposition that this Court is without jurisdiction to entertain the Computer Horizons Plaintiffs' claims are inapposite. These precedents do not transform *Labor's* affirmative statute of limitations defense into *Plaintiffs'* jurisdictional prerequisite.

This Court has held that, when "making the determination as to whether a statute of limitations is jurisdictional . . . a court always should be guided by Congressional intent, as demonstrated by the language and structure of a statute or by its legislative history, rather than by simple formulas." *Former Employees of Westmoreland Mfg. Co. v. United States*, 10 C.I.T. 784, 650 F. Supp. 1021, 1023 n.3 (Ct. Int'l Trade 1986). *Hardin v. City Title & Escrow Co.*, 797 F.2d 1037 (D.C. Cir. 1986), provides a good example of how this is done. At issue in *Hardin* was whether the one-year time limitation, applicable to Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2614, is a jurisdictional prerequisite to suit. *See id.* at 1038. In *Hardin*, the D.C. Circuit looked to how Congress entitled § 2614, *see id.* at 1040 (noting that Congress entitled §2614 "JURISDICTION OF COURTS"), and compared it to the Clayton (Antitrust) Act's time-limitation provision, *see id.* (noting that the subtitle that Congress applied to § 15b [of the Clayton Act] was "Statute of Limitations"). Because § 15b of the Clayton Act was "set apart from the Act's jurisdictional provisions . . . the time limitation of §15b was not directly tied to

the creation of jurisdiction. Thus, § 15b is not jurisdictional, but rather is an affirmative defense." *Id.* In contrast, § 2614 was not set apart from RESPA's jurisdictional provisions — indeed, it was RESPA's jurisdiction-granting provision — and was entitled "JURISDICTION OF COURTS." *See id.* Accordingly, the D.C. Circuit held that § 2614 was jurisdictional. *See id.* at 1041.

The D.C. Circuit's analysis can be easily conducted, here, on § 2636(d), which Defendants mistakenly argue is jurisdictional. A straightforward application of this analysis demonstrates that, contrary to Defendants' argument, § 2636(d) is not jurisdictional. Section 2636(d), enacted as part of the *Customs Courts Act of 1980*, Pub. L. 96-417, 94 Stat. 1734 (1980), like § 15b of the Clayton Act, was cast by Congress in *non*-jurisdictional terms and is set apart from the *Customs Courts Act*'s jurisdictional provision. Section 2636(d) is entitled "Time for commencement of action" and appears within Chapter 169 ("COURT OF INTERNATIONAL TRADE PROCEDURE") of Part VI ("Particular Proceedings") of Title 28 of the United States Code, *see* 28 U.S.C. § 2636(d); *see also* Pub. L. 96-417, Title III, § 301 (applying the subtitle "Time for commencement of action" to § 2636(d)). It is set apart from the *Customs Courts Act*'s jurisdictional provision, 28 U.S.C. § 1581(d), which appears in Chapter 95 ("COURT OF INTERNATIONAL TRADE") of Part IV ("Jurisdiction and Venue") of Title 28. *See* 28 U.S.C. § 1581(d); *see also* Pub. L. 96-417, Title II, § 201. Because § 2636(d) was cast by Congress in *non*-jurisdictional terms and is set apart from the *Customs Courts Act*'s jurisdictional provision, § 2636(d) is a waivable, non-jurisdictional statute of limitations.

C. 28 U.S.C. § 2636(d) CANNOT BE JURISDICTIONAL BECAUSE IT IS SUBJECT TO EQUITABLE TOLLING.

Moreover, the Federal Circuit's and this Court's jurisprudence holding that § 2636(d) is subject to equitable tolling also indicates that § 2636(d) is a waivable, non-jurisdictional statute

of limitations. "This court held in F*ormer Employees of Siemens Info. Communication Networks, Inc. v. Herman*, 120 F.Supp.2d 1107 (Ct. Int'l Trad e 2000), that the doctrine of equitable tolling is available in NAFTA TAA cases because 'the remedial purpose of the trade adjustment assistance program . . . supports the conclusion that equitable tolling is available' in an action challenging a final determination of the Secretary of Labor regarding worker eligibility for TAA." *Former Employees of Quality Fabricating, Inc. v. U.S. Secretary of Labor*, 259 F.Supp.2d 1282, 1285 (Ct. Int'l Trade 2003) (quoting *Siemens*, 120 F.Supp.2d at 1113-14). In *Former Employees of Sonoco Products Co. v. Chao*, 372 F.3d 1291, (Fed. Cir. 2004), the Federal Circuit adopted this Court's reasoning. *See id.* at 1298 (quoting *Siemens*, 120 F. Supp. 2d at 1113). '[T]olling rules, such as equitable tolling, are designed for statut es of limitations, not for jurisdictional deadlines." *Fogel v. Gordon & Glickson, P.C.*, — F.3d —, 2004 WL 2999125, *4 (7th Cir. Dec. 29, 2004). Because both the Federal Circuit and this Court have recognized that § 2636(d)'s deadline for commencing a TAA suit is subject to equitable tolling, it cannot be — as Defendants aver — a jurisdictional deadline.

D. ALTERNATIVELY, THE COURT SHOULD DEFER ITS DECISION ON DEFENDANTS' MOTION TO DISMISS

Alternatively, should this Court find that Defendants have not waived this affirmative defense, Plaintiffs request that the Court defer its decision on Defendants' Motion to Dismiss pending resolution of Plaintiffs' Rule 23 Motion for Class Certification, filed May 3, 2004, which presently remains under submission pending the Court's decision on the instant Rule 56.1 Motion for Judgment on the Agency Record. (*See* Aug. 26, 2004 Status Report.) Should the Court grant Plaintiffs' Rule 56.1 Motion for Judgment on the Agency Record and Plaintiffs' Rule 23 Motion for Class Certification, the Computer Horizons Plaintiffs would indisputably fall within Plaintiffs proposed Subclass I, which includes '[a]ll software workers who have applied

for trade readjustment allowance . . . and have been denied certification by Labor under the reasoning that software is not an article . . . ." (Pls. R. 23 Mot. at 4-5.)

The claims of the putative Subclass I members — including the Computer Horizons Plaintiffs — who failed to seek judicial review within § 2636(d)'s sixty-day period would be resuscitated under either an equitable tolling or a continuing violation theory because they were "all subject to the same policy: Labor's refusal to certify them for TRA benefits under the reasoning that software is not an article." (Pls. R. 23 Reply at 7.)

The Computer Horizons Plaintiffs' TAA petition was denied by Labor because "[t]he workers firm does not produce an article as required for certification for Section 222 of the Trade Act of 1974." *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 68 Fed. Reg. 5654, 5654 (Feb. 4, 2003) (TA-W-50-399); *see also* TA-W-50,399 Decision (the "Computer Horizons Decision"), *available at* http://www.doleta.gov/tradeact/taa/taadecisions/50399.txt. The Computer Horizons Decision does not explain how Labor reached the conclusion that the Computer Horizons Plaintiffs did not produce an article. *See id.* But Labor has acknowledged in this litigation and in at least one other TAA matter that it "does not consider the design and development of software to be the production of an 'article' within the meaning of the statute." (Defs. R. 56.1 Opp'n at 41); *see also Ericsson, Inc., Brea, CA; Notice of Negative Determination on Reconsideration on Remand*, 69 Fed. Reg. 3394, 3394 (Jan. 23, 2004) (NAFTA-6472) ("[T]he Department does not consider the design and development of the software itself to be production and, therefore, does not consider software designers and developers to be production workers.").

Labor's continued adherence to this unlawful policy has no doubt deterred countless TAA applicants from seeking judicial review of their negative determinations for fear of

engaging in a costly and time-consuming exercise in perceived futility. This is sufficient to trigger both equitable tolling and the continuing violations exception to statutes of limitations. *See, e.g., Siemens*, 120 F.Supp. 2d at 1114 (noting that equitable tolling will apply "where a claimant has been 'induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.'" (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *Local 194, Retail, Wholesale & Dept Store Union v. Standard Brands, Inc.*, 85 F.R.D. 599, 611 (N.D. Ill. 1979) (continuing violation reached back past the limits of the applicable statutes).

III. DEFENDANTS HAVE FAILED TO ESTABLISH THAT SOFTWARE *IS NOT* AN ARTICLE

In their Rule 56.1 Motion, Plaintiffs offered seven reasons why Labor *erroneously* concluded that the software produced by the IBM employees was not "production of an article." Specifically, Plaintiffs argued that Labor's conclusion

(1) contravenes Congress' stated purpose for enacting the Trade Act of 1974 and is inconsistent with Congress' own understanding of what constitutes manufacturing or production (Pls. R. 56.1 Mot. at 8-11);

(2) is based on the erroneous belief that software is not listed on the Harmonized Tariff Schedule of the United States (*id.* at 11-13);

(3) is based on the irrelevant fact that software is not subject to duty and is inconsistent with the Bureau of Customs and Border Patrol's interpretation of what constitutes an article (*id.* at 13-15);

(4) is based on the erroneous premise that tangibility is required for an article (*id.* at 16-17);

(5) relies on the "irrelevant" North American Industry Classification System ("NAICS") and is inconsistent with its own prior TAA and NAFTA-TAA decisions (*id.* at 18-20);

(6) is inconsistent with how the International Trade Commission ("ITC") has interpreted sister provisions of Title 19 of the U.S. Code (*id.* at 21-23); and

(7) is inconsistent with decades of the Court of Customs and Patent Appeals' and Federal Circuit's "new machine" precedent (i *d.* at 24-27).

Defendants have failed to effectively rebut any of these arguments. Indeed, Defendants concede that Labor's reliance on the NAICS was improper. (Defs. R. 56.1 Opp'n at 39 -40.) And they wholly fail to acknowledge Plaintiffs' arguments that La bor's construction of what constitutes an article is inconsistent with how the ITC has interpreted sister provisions of Title 19 and is inconsistent with decades of the Court of Customs and Patent Appeals' and Federal Circuit's "new machine" precedent. Wh at Defendants have chosen to argue does not persuade. All of Defendants' arguments in opposition carry the common thread that tangibility is required of "articles" and that software cannot be an "article" because, without a carrier medium, it is intangible. As will be shown throughout this reply brief, the two primary flaws in this reasoning are that tangibility is not required and, even if it was, software is *always* on a carrier medium — whether that medium is the computer on which it is being written, the drive on which it is being stored, the disk on which it is temporarily and transiently stored, or the machine on which it is installed to perform a function.

A. THE TRADE ACT DOES NOT LIMIT ARTICLES TO "ANY MATERIAL THINGS"

Defendants argue that "th e literal reading of 'article' supports Labor's interpretation," (Defs. R. 56.1 Opp'n at 16), that "articles" are limited to "any material thing[s]," (*id.* at 18-19.) It is not clear to what "literal reading" Defendants refer. Defendants spend two pages o f their brief excerpting, quoting, and underlining passages from 19 U.S.C. § 2272(a) & (b). (*Id.* at 16-17.) But conspicuously absent from those passages is any definition of the term "article" or the words "tangible" or "material" — much less, any indication that the statute requires "articles" to be "tangible" or "material." The reality is that the Trade Act's use of the term "article" is ambiguous with respect to tangibility. "If a literal reading of the disputed provision does not answer the question presented, the court may look to the entire statutory scheme and to the

provision's legislative history in an effort to resolve the ambiguity." *Woodrum v. Donovan*, 5 CIT 191, 194, 564 F. Supp. 826, 829 (1983).

As Plaintiffs outlined in their Rule 56.1 Motion, the purpose of the Trade Act was "'to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm, workers, and communities to adjust to changes in international trade flows.'" (Pls. R. 56.1 Mot. at 8 (quoting 19 U.S.C. § 2102(4)).) As remedial legislation, 'the trade adjustment assistance laws . . . are to be construed broadly to effectuate their intended purpose." *Former Employees of Chevron Products Co. v. U.S. Sec'y of Labor*, 298 F. Supp. 2d 1338, 1340 (Ct. Int'l Trade 2003) (citation omitted). Moreover, inasmuch as this case — bore out of an increasingly electronic marketplace — requires interpretation of a thirty year-old statute, it 'presents 'the famil iar proposition that Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect' and 'changing circumstances' such as rapid advances in technology should be treated consistent with Congress's general intent." *Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor*, Slip Op. 04-151, 2004 WL 2830676, *5 (Ct. Int'l Trade 2004) (Barzilay, J.) (quoting *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392-93 (1999)). Congress' general intent to 'safeguard American . . . labor . . . and to assist . . . workers," 19 U.S.C. § 2102(4), can only be vindicated by the recognition that designers and developers of software 'produce an article" within the meaning of the Trade Act.

In their brief in opposition, Defendants attempt to import a tangibility requirement into the 'literal meaning" of the term article by reference to Labor's own regulation, 20 C.F.R. § 90.2. (Defs. R. 56.1 Opp'n at 17-18.) While the regulation suggests factors to be considered in determining whether an import is 'substantially identical" to, or has 'inherent or intrinsic

characteristics" of, a domestic product, it does not define what constitutes a product or article. The regulation, therefore, offers no support for Defendants' argument that an article must be tangible.[3]

Likewise, Defendants attempt to import from *Fortin v.* Marshall, 608 F.2d 525 (1st Cir. 1979), a requirement that an article be "any material thing." (Defs. R. 56.1 Opp'n at 18 -19.) *Fortin* will not support the interpretive weight that Defendants attempt to place on it. In *Fortin*, former employees of an airline appealed the denial of their petition for certification of eligibility for TAA benefits. The First Circuit found that, in performing various passenger, cargo, mechanical, administrative and managerial tasks, the airline employees provided services rather than produced articles for consumers. *See* 608 F.2d at 527-28. Unlike airline travel, which, though commercial and marketable, is not a good, software, as Plaintiffs have demonstrated, (Pls. R. 56.1 Mot. at 18), and as Defendants concede, is a good. (Defs. R. 56.1 Opp'n at 24 ("Labor's longstanding practice is to consider 'articles' to be goods that are marketable, fungible, and interchangeable for commercial purposes, and that enter the stream of commerce.").)[4]

The words "any material thing" appear in *Fortin* just once in a parenthetical quote from *Kaiser Aluminum & Chemical Corp v. U.S. Consumer Product Safety Comm'n*, 574 F.2d 178, 180 (3d Cir. 1978), following a "*Cf.*" signal. *See Fortin*, 608 F.2d at 527. Surely, by referring to it so passively, the First Circuit did not intend to adopt for all future TAA cases *Kaiser*'s

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[3] For example, "quality," which is one of the characteristics listed in the regulation to determine likeness, does not require tangibility. 29 C.F.R. § 90.2.

[4] Labor has recently used "good" as a synonym for "article" when determining TAA eligibility. *See* Brief for the United States in Opposition to Petition for Certiorari at 2, *Former Employees of Marathon Ashland Pipe Line LLC v. Chao*, 370 F.3d 1375 (Fed. Cir. 2004), *petition for cert. filed* 73 USLW 3170 (Sep. 9, 2004) (No. 04-397) ("[E]mployees involved in the production of a *good* are eligible for assistance under the Trade Act." (emphasis added)); *see also id.* ("[T]he Trade Act . . . offers . . . adjustment assistance to employees involved in the production of a *good* who lose their jobs because of competition from imported *goods*."). Labor's brief in opposition to the *Marathon Ashland* petition for certiorari is available on Westlaw at 2004 WL 2851221.

materiality requirement. Moreover, *Kaiser* was a Consumer Product Safety Act case in which the court was charged with determining whether branch circuit wiring was a "consumer product," which was, in turn, statutorily defined as "any article, or component part thereof, produced or distributed . . . for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise." 15 U.S.C. § 2052(a)(1). This definition is far more specific than the Trade Act's repeated, yet undefined, references to "article." And, importantly, unlike the Trade Act, § 2052(a)(1)(A)-(I) expressly excepts nine classes of articles from the definition of "consumer product" — all nine of which are indisputably tangible (*e.g.,* cosmetics and motor vehicles). Those exceptions, contained in the very same subsection as the term "consumer product," are strong evidence that Congress intended to impose a tangibility requirement on the definition of "consumer product." They do not suggest, however, that Congress intended the term "article" — in the Trade Act, a *wholly* separate statutory scheme — to be so limited.

Finally, to the extent that *Fortin* held that "the term 'article' was plainly meant to refer to a tangible thing and not to a service," 608 F.2d at 527, this Court, with many more years of expertise in construing the Trade Act than the First Circuit had when it decided *Fortin* — just the second TAA case that the First Circuit decided in the first five years of the statute's existence[5] — is the proper Court to revisit that interpretation in light of the last twenty-five years of "rapid advances in technology," *Elec. Data Sys.*, 2004 WL 2830676, at *5.

B. THE STATUTORY CONTEXT DOES NOT REQUIRE TANGIBILITY

Defendants next argue that "the statutory context supports Labor's exclusion of software, independent of its carrier media, from being considered an 'article' for purposes of TAA

[5] The only TAA case decided by the First Circuit before *Fortin* was *Usery v. Whitin Mach. Works, Inc.*, 554 F.2d 498 (1st Cir. 1977).

certification" because the Trade Act charges Labor with "measur[ing]" or "count[ing]" whether "imports increased" and, according to Labor, it "could devise no reasonable method or manner of determining whether the software was in fact 'imported.'" (Defs. R. 56.1 Opp'n at 21-22.) Defendants' argument entirely overlooks two critical points discussed in Plaintiffs' Rule 56.1 Motion. (Pls. R. 56.1 Mot. at 13-14.) First, the electronic transmission of software *is* "importation of merchandise." In Headquarters Ruling Letter ("HRL") 114459, The Bureau of Customs and Border Patrol ("CBP") found as much:

> that the transmission of software modules and products to the United States from a foreign country via the Internet *is an importation of merchandise* into the customs territory of the United States in that the software modules and products are brought into the United States from a foreign country. The fact that the importation of the merchandise via the Internet is not effected by a more "traditional vehicle" (e.g., transported on a vessel) does not influence our determination. The essential facts are that merchandise in a foreign country is brought into the United States.

HRL 114459, at *2, dated Sep. 17, 1998 (emphasis added), *available at* 1998 U.S. Custom HQ LEXIS 640; *see also Elec. Data Sys*, 2004 WL 2830676, at *4 (discussing HRL 114459).

Second, the federal government's failure to require reporting of electronically transmitted software is *by choice* — not because of impracticability or lack of legal authority. Customs has explained that it does not require reporting of electronically transmitted software because "it does not have a legitimate interest or responsibility to tap as sources of revenue or statistics, electromagnetic transmission and reception of data across international borders." New York Ruling Letter 881983, dated Feb. 3, 1993, *available at* 1993 U.S. Custom NY LEXIS 396. And it does not have "a legitimate interest" in requiring reporting of electronically transmitted software *only* because "software modules and products" are "not subject to duty, nor are they required to be entered." HRL 114459, 1998 U.S. Custom HQ LEXIS 640 at *5 (construing General Note 16(b) (now General Note 3(e)) to the HTSUS).

C. LABOR'S OVERLY-NARROW DEFINITION OF "ARTICLE" FRUSTRATES CONGRESS' PURPOSE

Defendants assert that the legislative history of the Trade Act reveals that "Congress designed the TAA program primarily to address trade imbalances in 'labor intensive industries' and declines in manufacturing employment." (Defs. R. 56.1 Opp'n at 23 (quoting S. Rep. No. 1298, 93rd Cong. (1974), *reprinted in* 1974 U.S.C.A.A.N. 7186, 7197).) Plaintiffs do not quarrel with Defendants' reading of the 1974 Senate report. But Defendants' reliance on *solely* the 1974 report overlooks two classes of legislative documents that provide critical insight into Congress' understanding of what constitutes manufacturing and what renders a TAA applicant eligible for benefits.

First, as discussed in Plaintiffs' Rule 56.1 Motion, Congress' current understanding of what constitutes "manufacturing" includes the design and development of software. (Pls. R. 56.1 Mot. at 10 (discussing the *American Jobs Creation Act of 2004*, Pub. L. No. 108-357, 118 Stat. 1418 (2004).)[6] Second, the numerous post-1974 Congressional reports discussed in Plaintiffs' Rule 56.1 Motion, (*id.* at 8-9), from sessions in which Congress amended the Trade Act reveal that Congress understands the Trade Act to apply *not* solely to agricultural and manufacturing workers — as Defendants suggest — but, more broadly, "to workers who lose their jobs . . . as a consequence of import competition." *E.g.,* S. Rep. 107-134, at 2 (2002). Defendants' narrow focus on *only* the legislative history preceding enactment of the Trade Act, as opposed to a complete reading of the legislative history, including amendments to the Trade Act, contravenes the oft-followed principle that "[i]n attempting to discern and implement intent of the legislature behind a statute, the court will seek edification from the statute's legislative history [and] will examine the statute's evolution *through a number of amendments*." 2B SUTHERLAND STATUES

[6] Without any explication or citation to authority, Defendants assert that Plaintiffs' reliance on the *American Jobs Creation Act* "lacks merit."

AND STATUTORY CONSTRUCTION § 52:2 at n.20 (6th ed. 2004); *see also, e.g., United States v. McNab*, 331 F.3d 1228, 1238 (11th Cir. 2003) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served, *the discussion of statutory meaning in committee reports*, *the effect of amendments whether accepted or rejected and the remarks in debate preceding passage*." (quotation omitted; emphasis added)); *Johnson v. Department of Treasury, I.R.S.*, 700 F.2d 971, 974 (5th Cir. 1983) (similar). Read together, Congress' present understanding of what constitutes manufacturing and Congress' increasingly flexible definition of TAA eligibility should counsel the Court to recognize that designers and developers of software are engaged in the "production of an article."

D. LABOR'S CONSTRUCTION OF "ARTICLE" IS NOT ENTITLED TO *CHEVRON* DEFERENCE

Defendants argue that, if the Court finds "Congress' intent regarding the statutory term 'article' [to be] unclear, *Chevron* deference [to Labor's construction of the term] is warranted because Labor's construction of the term is permissible." (Defs. R. 56.1 Opp'n at 28.) [7] In support of this argument, Labor asserts that its "reliance upon the tariff treatment of software under Customs law was reasonable." (*Id.* at 30.) For a number of reasons, this line of argument must fail.

First, this Court has twice recently held that Labor's interpretation of Customs law and application of that interpretation to the Trade Act is *not* entitled to *Chevron* deference. *See Elec. Data. Sys.*, 2004 WL 2830676, at * 2; *Former Employees of Murray Eng'g, Inc. v. Chao*, Slip Op. 04-45, 2004 WL 955607, *2 (Ct. Int'l Trade 2004). Second, even if this were still an open

[7] It is, of course, Plaintiffs' position that the statutory term "article" is itself unclear, but that, conversely, Congress' *intent* that the provision be interpreted flexibly and with the best-interests of separated workers in mind is clear.

question for this Court, it would have to be answered in the negative. Defendants concede that "Congress has delegated broad authority to the International Trade Commission ('ITC') to determine what constitutes an article for the purposes of Title 19." (Defs. R. 56.1 Opp'n at 30.) As thoroughly laid out in Plaintiffs' Rule 56.1 Motion, the ITC has determined that software — whether transmitted on a carrier medium or transmitted electronically — is an article within the meaning of Title 19.[8] (Pls. R. 56.1 Mot. at 21-24.)

Finally, nothing in Defendants' opposition effectively rebuts Plaintiffs' reasoning that Labor improperly relied on Customs' differentiation between software and its carrier medium to determine that the design and development of software was not "production of an article." (Pls. R. 56.1 Mot. at 13-15.) As laid out above and in Plaintiffs' Rule 56.1 Motion, Customs has determined that software is importable merchandise, though not subject to duty. (*Id.* at 15.) This Court recently held not all duty-free items "escape[] the definition of an article." *Elec. Data Sys.*, 2004 WL 2830676, *4 n.10. As shown in detail in Plaintiffs' Rule 56.1 Motion, software is just such an item. (Pls. R. 56.1 Mot. at 13-15.)

E. PLAINTIFFS WERE NOT REQUIRED TO "EXHAUST" THEIR LEGAL ARGUMENTS THAT SOFTWARE IS IN FACT TANGIBLE

Defendants attempt to duck Plaintiffs' argument that software satisfies Labor's tangibility criteria because "it must be stored on *some* carrier medium," (Pls. R. 56.1 Mot. at 16), by claiming that this argument was not administratively exhausted, (Defs. R. 56.1 Opp'n at 38). The only authority Defendants cite for this proposition is 28 U.S.C. § 2637(d), which requires "the exhaustion of administrative remedies" in actions brought to this Court. Of course,

[8] Plaintiffs' believe that Defendants' acknowledgement that the ITC is charged with determining what constitutes an article under Title 19 dooms the entirety of Defendants' defense. If the ITC is charged with determining what constitutes an article under Title 19 and it has determined that software — whether transmitted on a carrier medium or transmitted electronically — is an article within the meaning of Title 19, why should this Court's inquiry not end there?

Plaintiffs have exhausted their administrative remedies. As this Court has held, "Plaintiffs' administrative remedies were exhausted once Labor issued its final negative determination denying their petition." *Former Employees of Quality Fabricating, Inc. v. U.S. Dep't of Labor*, 343 F.Supp.2d 1272, 1282 (Ct. Int'l Trade 2004).

All the exhaustion doctrine requires is a "final [administrative] determination" before a court will have jurisdiction to entertain a plaintiff's challenge to agency action. *See, e.g., Fernandez v. Chao*, Slip Op. 03-123, 2003 WL 22169785, *5-*6 (Ct. Int'l Trade 2003) (administrative remedies not exhausted because reconsideration determination had not yet issued). In *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 137-38, 583 F. Supp. 607, 611-12 (Ct. Int'l Trade 1984), this Court held that the exhaustion doctrine does not bar a plaintiff from raising a new argument "purely legal" in nature which requires no further agency involvement or when it would have been futile for plaintiff to raise its argument at the administrative level. In light of these precedents, the exhaustion doctrine surely does not require TAA applicants to articulate and present to Labor *legal* arguments in an attempt to persuade Labor to alter its regulatory interpretation of provisions of the Trade Act. Even if such a requirement was desirable, since Labor's TAA investigations are "*ex parte*," *Former Employees of Chevron Prods. Co. v. U.S. Sec'y of Labor*, 298 F.Supp.2d 1338, 1340-41 (Ct. Int'l Trade 2003), and non-adversarial, it would be impractical — if not, nearly impossible — for TAA applicants to comply with such a requirement.

Accordingly, Defendants' invitation for the Court to avoid considering Plaintiffs' arguments that software *is* tangible should be rebuffed. The authorities discussed on pages sixteen through eighteen of Plaintiffs' Rule 56.1 Motion strongly support the notion that software *is* tangible because, at any given time, software must be contained on some carrier medium —

whether that medium is the computer on which it is being written, the drive on which it is being stored, the disk on which it is temporarily and transiently stored, or the machine on which it is installed to perform a function.

F. THE APPENDICES TO LABOR'S BRIEF REVEAL THE ARBITRARINESS OF LABOR'S STANDARDS FOR DETERMINING WHETHER SOFTWARE WORKERS WERE ENGAGED IN "PRODUCTION OF AN ARTICLE"

In their Rule 56.1 Motion, Plaintiffs asserted that, "on at least three occasions in the last three and a half years" Labor certified for TAA benefits various applicants who appeared to have done work "factually indistinguishable" to the work done by the IBM Plaintiffs. (Pls. R. 56.1 Mot. at 19-20.) Defendants discuss and attach as appendices to their Rule 56.1 Opposition brief the investigation findings from those three TAA investigations. While these appendices may explain why Labor certified these particular applicants for benefits, (Defs. R. 56.1 Opp'n at 43-45) — information previously unavailable to Plaintiffs — they do not refute Plaintiffs' argument that Labor's exclusion of software from the definition of an article yields inconsistent and, therefore, arbitrary results.

In all three of the cases in which Labor certified the applicants as eligible for TAA benefits, it did so because of some reason *other* than that the design and development of software is production of an article. (Defs. R. 56.1 Opp'n App. A (produced software *and* hardware products); *id.* App. B (software sold and distributed on CD-ROM); *id.* App. C (produced software delivered on CD *and* hardware)). The arbitrariness revealed by a comparison of these three investigations to the facts of the instant case and by Labor's erroneous interpretation of the term "article" is that all four sets of workers do essentially the same work, yet the IBM Plaintiffs were denied TAA benefits. The other three sets of workers would have been denied TAA

benefits too under Labor's interpretation of the term "article," but for some fortuitous quirk in how their work-product was stored, distributed, or marketed.

IV. THIS COURT HAS THE AUTHORITY TO ORDER CERTIFICATION

Defendants boldly assert that this Court "lacks the authority to order certification." (Defs. R. 56.1 Opp'n at 46; *see also id*. at 46-49.) This assertion lacks merit and contravenes over a decade's worth of this Court's settled precedent.

Section 284 of the Trade Act of 1974, as amended, expressly provides:

> (a) Petition for review; time and place of filing
>
> A worker, group of workers . . . aggrieved by a final determination of the Secretary of Labor under section 2273 of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.
>
> * * * *
>
> (c) Determination; review by Supreme Court
>
> The Court of International Trade shall have jurisdiction to affirm the action of the Secretary of Labor . . . *or to set such action aside, in whole or in part*.

19 U.S.C. § 2395 (emphasis added). Since this Court's decision in *United Electrical, Radio & Machine Workers of America v. Martin*, 15 C.I.T. 299, 1991 WL 117400 (Ct. Int'l Trade 1991), this Court has steadfastly read this provision as a grant of authority to order the Secretary of Labor to certify workers as eligible for TAA benefits. *See id.* at 308, 1991 WL 117400, at *6 ("The court has the power to order the Secretary to certify the entire plant, and does so."); *see also Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Secretary of Labor*, 17 C.I.T. 126, 130, 814 F. Supp. 1111, 1115 (Ct. Int'l Trade 1993) ("[T]he Court also has the power to order the Secretary to certify the entire plant."); *Former Employees of Barry Callebaut v. Herman*, 240 F. Supp. 2d 1214, 1228 (Ct. Int'l Trade 2002) (same), *rev'd on other grounds*, 357 F.3d 1377

(Fed. Cir. 2004); *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 277 F.Supp.2d 1298, 1312 (Ct. Int'l Trade 2003) (Barzilay, J.) ("This court retains the ability to . . . order the Secretary to certify Plaintiffs for eligibility."), *rev'd on other grounds*, 370 F.3d 1375 (Fed. Cir. 2004), *petition for cert. filed*, 73 U.S.L.W. 3170 (Sep. 9, 2004) (No. 03-397); *Former Employees of Pittsburgh Logistics Sys., Inc. v. U.S. Sec'y of Labor*, 2003 WL 22020510, *15 (Ct. Int'l Trade 2003) ("Labor's neg ative eligibility determination is reversed, and judgment is awarded to the plaintiffs. Labor shall certify the plaintiffs as eligible for trade adjustment assistance benefits forthwith."). There is no principled reason to turn back the clock on over a decade's worth of this Court's precedent.

Moreover, Defendants' suggestion that remand is always necessary also ignores the present posture of this case. As both Plaintiffs and Defendants agree, the only issue in this case is the legal question whether software is an "article." (Pls. R. 56.1 Mot. at 2.) If this Court answers that question in the affirmative, remand would be a needless and futile gesture; there would simply be nothing left for Labor to do because Plaintiffs' entitlement to TAA benefits would be established by the Court's determination that software is an article. Where "as here, remand would be futile," courts repeatedly decline to remand. *Fogg v. Ashcroft*, 254 F.3d 103, 111 (D.C. Cir. 2001) (refusing to remand to Merit Systems Protection Board because, after curing agency's legal error, "only one conclusion would be supportable" (quoting *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984)); *see also, e.g., People of Illinois v. ICC,* 722 F.2d 1341, 1348-49 (7th Cir. 1983) ("[*SEC v.*]*Chenery* [*Corp.*, 318 U.S. 80 (1943),] does not require futile gestures.").

V. CONCLUSION

For the foregoing reasons, the reasons stated in Plaintiffs' Rule 56.1 Motion, and because the facts in the record demonstrate that the IBM employees have satisfied all the elements of 19 U.S.C. § 2272, Plaintiffs respectfully request that the Court certify the IBM employees and all other similarly situated individuals as eligible for TAA benefits.

Dated: January 7, 2005
(Corrected January 8, 2005)

Respectfully submitted,

IVEY, SMITH & RAMIREZ

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CERTIFICATE OF SERVICE

I hereby declare that on the 10th day of January 2005, I caused to be served copies of **PLAINTIFFS' CORRECTED REPLY IN SUPPORT OF THEIR RULE 56.1 MOTION FOR JUDGMENT ON THE AGENCY RECORD AND OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** in the following manner addressed as follows:

By First Class Mail

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