

A-201-820
Changed Circumstances Review
CCR – NatureSweet
Public Document
ITA/E&C/P&N/OP/BAU: JJM

March 8, 2022

NS Brands, Ltd. and its Affiliates¹
c/o Matthew Nolan, Esq.
ArentFox Schiff LLP
1717 K Street, NW
Washington, DC 20006

Re: Declining Initiation of a Changed Circumstances Review

Dear Mr. Nolan:

The Department of Commerce (Commerce) has reviewed the changed circumstances review request submitted by NS Brands, Ltd. and its affiliates (collectively, NatureSweet) on January 7, 2022.² Commerce’s regulations require Commerce to determine whether to initiate a changed circumstances review within forty-five days after the request is filed,³ and Commerce considers whether “changed circumstances sufficient to warrant a review exist.”⁴ On February 22, 2022, we extended this deadline, in accordance with 19 CFR 351.216(b), to March 8, 2022.⁵ At this time, we decline to initiate a changed circumstances review for the reasons explained below.

NatureSweet’s submission has not demonstrated that changed circumstances sufficient to warrant a review exist. Commerce commonly initiates changed circumstances reviews based on lack of interest from the domestic industry or to consider the applicability of cash deposit rates after there have been changes in the name or structure of a company, although Commerce is not limited to initiating a changed circumstances review in only these circumstances.⁶ Commerce’s regulations reflect these types of changed circumstances.⁷ The regulations specifically mention

¹ NS Brands, Ltd.’s affiliates include NatureSweet Invernaderos S. de R.L. de C.V., (signatory A-201-820-710).

² See NatureSweet’s Letter, “NatureSweet Request for Changed Circumstances Review,” dated January 7, 2022 (CCR Request); see also NatureSweet’s Letter, “NatureSweet’s Comments in Response to FTE’s Opposition to Request for Changed Circumstances Review,” dated February 4, 2022 (NatureSweet Supplemental Comments).

³ See 19 CFR 351.216(b).

⁴ See 19 CFR 351.216(d).

⁵ See Memorandum, “Changed Circumstances Review: Extension of Initiation Deadline,” dated February 22, 2022.

⁶ See, e.g., *Refillable Stainless Steel Kegs From the Federal Republic of Germany: Initiation and Preliminary Results of Changed Circumstances Review and Intent To Revoke Order*, 85 FR 27717 (May 11, 2020) (*Stainless Steel Kegs from Germany*) (considering expressed lack of interest from the petitioner); *Initiation and Preliminary Results of Changed Circumstances Review: Certain Softwood Lumber Products From Canada*, 86 FR 36525 (July 12, 2021) (considering issues surrounding a successor-in-interest); See *Biodiesel from Argentina: Initiation of Changed Circumstances Reviews of the Antidumping and Countervailing Duty Orders*, 83 Fed. Reg. 56,300 (Dep’t of Commerce Nov. 13, 2018) (considering the effects of the Government of Argentina’s changes to its export tax regime).

⁷ See 19 CFR 351.222(g)(1)(i)-(ii).



revocation of an order, in whole or in part, or termination of a suspended investigation, based on “lack of interest;” in addition, successor-in-interest issues are included in “{o}ther changed circumstances sufficient to warrant revocation or termination.”⁸

First, NatureSweet has not demonstrated changed circumstances based on lack of interest.⁹ When examining a lack-of-interest claim, Commerce’s regulations require that we consider whether “{p}roducers accounting for substantially all of the production of **the domestic like product to which the . . . suspended investigation pertains** have expressed a lack of interest” (emphasis added).¹⁰ Thus, we first identify the domestic like product definition in this case. The International Trade Commission (ITC) is responsible for determining the domestic like product as part of its material injury determination.¹¹ In this case, the ITC defined the domestic like product as a “single domestic like product that is coextensive with the scope of this investigation,” *i.e.*, all fresh tomatoes from Mexico, except for those which are for processing.¹² In other words, the “greenhouse grown Specialty Tomatoes” identified in NatureSweet’s submission are not a separate product and are included along with other tomato varieties under the domestic like product of fresh tomatoes. Further, the definition of domestic like product and the scope of the suspended investigation have not changed since the suspension of the investigation in September 2019 or the ITC’s December 2019 determination.

Next, we must consider whether NatureSweet submitted information sufficient to warrant review with respect to “lack of interest” from the producers of the domestic like product in the trade remedy. We consider whether domestic producers accounting for “substantially all of the production,” *i.e.*, 85 percent by value or volume of the domestic like product,¹³ have expressed a “lack of interest.”¹⁴ NatureSweet’s submission does not contain information demonstrating that producers accounting for substantially all of the production of the domestic like product have expressed a lack of interest.¹⁵ In fact, NatureSweet’s submission indicates producers accounting for at least forty-five percent of domestic production continue to show interest in the trade remedy.¹⁶ Further, the Florida Tomato Exchange, a member of the U.S. petitioning industry, continues to express interest in the trade remedy.¹⁷

⁸ *Id.*

⁹ NatureSweet made no claims with respect to the applicability of cash deposit rates after changes in the name or structure of a company.

¹⁰ See 19 CFR 351.222(g)(1)(i).

¹¹ See U.S. International Trade Commission, “Fresh Tomatoes from Mexico: Investigation 731-TA-747 (Final)” (December 2019) (ITC Report) at 7. FTE previously placed the ITC Report on the record of this proceeding. See FTE’s Letter, “Comments in Opposition to NatureSweet’s Changed Circumstances Review Request,” dated January 18, 2022 at Attachment 3.

¹² See ITC Report at 9, 11, 14.

¹³ See *Stainless Steel Kegs from Germany*, 85 FR at 27718.

¹⁴ See 19 CFR 351.222(g)(1)(i).

¹⁵ See CCR Request at 17; see also NatureSweet Supplemental Comments at 9.

¹⁶ See CCR Request at 17; see also NatureSweet Supplemental Comments at 9. We are placing the document referenced in NatureSweet’s submission on the record of this proceeding. See Attachment: Florida Tomato Exchange’s Letter, “Request to Terminate Antidumping Suspension Agreement,” dated November 14, 2018 (FTE Request).

¹⁷ See Florida Tomato Exchange’s Letter, “Comments in Opposition to NatureSweet’s Changed Circumstances Review Request,” dated January 18, 2022. According to FTE, it represents approximately forty-five percent by volume of tomato production in the United States. See FTE Request at 2.

Second, NatureSweet has not demonstrated that there are other changed circumstances that warrant review. We note that NatureSweet has requested a changed circumstances review of the 2019 Agreement.¹⁸ The statute, likewise, focuses on the review of a “determination or agreement.”¹⁹ Because the subject of the proposed changed circumstances review is of the 2019 Agreement, the alleged changed circumstances should occur in the period *after* the signing of the 2019 Agreement. However, some of NatureSweet’s claims address alleged changed circumstances occurring prior to the signing of the 2019 Agreement, which are not under consideration for our determination on whether to initiate a changed circumstances review.²⁰

In its submission, NatureSweet identifies several possible changed circumstances that occurred after the 2019 Agreement was signed, but it does not provide adequate explanation of why these circumstances warrant a review of the 2019 Agreement and how these circumstances specifically relate to “greenhouse grown Specialty Tomatoes.” NatureSweet identifies the COVID-19 pandemic and effects of climate change to be changed circumstances, but it does not explain how “greenhouse grown Specialty Tomatoes” specifically relate to these changed circumstances or why such circumstances warrant termination with respect to only the specified products.²¹ Further, NatureSweet does not define “greenhouse grown,” so it is unclear to which products NatureSweet refers.

Further, NatureSweet claims that “greenhouse grown Specialty Tomatoes” are a “new product segment”²² but ignores that the ITC, as recently as December 2019, rejected similar arguments and deemed that there is a “single domestic like product that is coextensive with the scope of this investigation.”²³ NatureSweet also claims that the completed investigation and certain terms of the 2019 Agreement themselves constitute changed circumstances. However, it cites no prior cases for the proposition that the existence of a new trade remedy for the domestic like product, a change in the terms of a trade remedy vis à vis prior remedies, or the potential future imposition of a trade remedy, by themselves, are sufficient changed circumstances to warrant a review.²⁴ To the contrary, the statute and Commerce’s regulations suggest that new trade remedies are not usually “changed circumstances” by themselves.²⁵ Therefore, NatureSweet should only specify the changed circumstances occurring *after* the 2019 Agreement was signed and thoroughly explain and support why such circumstances warrant review.

Lastly, it is not clear that Commerce has the statutory authority to grant the relief that NatureSweet seeks through the mechanism of a changed circumstances review. NatureSweet requests “termination, *in part*, of the 2019 Suspension Agreement *and, accordingly, any subsequent order*,” in order to exclude “greenhouse grown Specialty Tomatoes” from the applicable trade remedies.²⁶ Crucially, in the context of a changed circumstances review, the

¹⁸ See CCR Request at 2.

¹⁹ See section 751(b)(1) of the Tariff Act of 1930, as amended.

²⁰ See, e.g., CCR Request at 6 (mentioning product types that did not exist in 1995).

²¹ See CCR Request at 21.

²² See NatureSweet Supplemental Comments at 15.

²³ See ITC Report at 11, 14.

²⁴ See NatureSweet Supplemental Comments at 13-14.

²⁵ See section 751(b)(4) (limiting the review of changed circumstances to twenty-four months after publication of the trade remedy unless good cause is shown); 19 CFR 351.216(c) (same).

²⁶ See CCR Request at 2 (emphasis added).

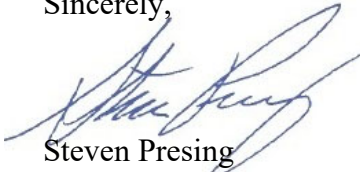
statute and Commerce's regulations state that it may revoke an *order* "in whole or in part;" however, the phrase "terminate a suspended investigation" indicates that there is no provision for partial termination of a suspension agreement or suspended investigation.²⁷

In the context of antidumping and countervailing duty orders, Commerce has previously revoked an order in part through a changed circumstances review when the proposed change is supported by the petitioners.²⁸ However, as discussed above, NatureSweet has not provided adequate support for a "lack of interest" finding, nor has NatureSweet identified any examples of Commerce revoking an order in part or terminating a suspended investigation through a changed circumstances review despite opposition by the domestic industry. We emphasize that the support for the proposed change by domestic producers accounting for substantially all of the domestic like product is important when considering whether to initiate a changed circumstances review on a suspension agreement, and in the instant case the record indicates that a significant portion of the industry producing the domestic like product opposes the proposed request.

We decline to initiate a changed circumstances review at this time for the reasons explained above. There are several issues that NatureSweet needs to address to establish that a changed circumstances review is warranted. However, we emphasize that NatureSweet may re-file its request for a changed circumstances review and, in its request, NatureSweet should address the issues identified in this letter.

If you have any questions, please contact Jesse Montoya at (202) 482-8211 or David Cordell at (202) 482-0408.

Sincerely,



Steven Presing
Executive Director
Office of Policy
Enforcement and Compliance

²⁷ See section 751(d)(1); 19 CFR 351.222(g)(1).

²⁸ See, e.g., *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 76 FR 30101 (May 24, 2011); *Certain Steel Nails From the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 84 FR 49508 (September 20, 2019) and accompanying Issues and Decision Memorandum at Comment 1 (*Steel Nails from China*) (noting a "a lack of interest on behalf of the domestic industry in the relief provided by the Order with respect to the four types of nails at issue.").