

**UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: UNASSIGNED**

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VIRTUS NUTRITION, LLC	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 21-00165
	:	
THE UNITED STATES	:	
	:	
Defendant.	:	
-----	X	

**PLAINTIFF’S APPLICATION FOR AN ORDER DIRECTING DEFENDANT TO
SHOW CAUSE WHY AN EXPEDITED LITIGATION SCHEDULE SHOULD NOT BE
ENTERED IN THIS ACTION**

Pursuant to Rules 1, 3(g)(3), 7 and 26 of the Rules of the United States Court of International Trade (“USCIT R.”), Plaintiff, Virtus Nutrition, LLC, respectfully requests that this Court enter an Order directing defendant, the United States, to Show Cause why an expedited litigation schedule should not be entered in this action, which challenges the exclusion of merchandise from entry by United States Customs and Border Protection. As demonstrated herein, good cause exists for the granting of this motion.

I. Statement of Facts

Plaintiff commenced this action April 15, 2021 to contest the denial of its protest which challenged the decision of United States Customs and Border Protection (“CBP”) to exclude from entry some \$2.08 million worth of palm oil fatty acid distillates and palm stearin, entered into the United States under cover of San Francisco Consumption Entry No. 808-2001373-0 of February 10, 2021. CBP first detained the merchandise on February 8, 2021, and then excluded it on March 23, 2021, asserting that the goods were subject to exclusion pursuant to 19 U.S.C.

§ 1307, which prohibits the importation of goods made with forced labor.¹ CBP purports to have detained and excluded plaintiff's merchandise pursuant to a December 30, 2020 Withhold Release Order ("WRO") issued with respect to palm oil products made in Malaysia by Sime Darby Plantation Bhd ("Sime Darby"). Plaintiff's imported palm oil is not manufactured by Sime Darby but by a different Malaysian producer, Wilmar, which is not subject to a WRO.

Plaintiff contends that its merchandise was not made by, and contains no content from, Sime Darby or any other Malaysian producer of palm oil and palm oil products which is which is subject to a WRO.

Plaintiff timely protested the exclusion of the merchandise which is the subject of this action. Upon denial of its protest, Plaintiff timely commenced this action by the filing of a Summons, and immediately thereafter filed its Complaint. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(a).

II. Grounds for this Motion.

Pursuant to USCIT Rule 3(g), Plaintiff moves this Court to issue an Order directing defendant to appear and Show Cause why an expedited litigation schedule should not be entered in this action. Plaintiff submits herewith a proposed expedited litigation schedule for this action.

¹ Section 307 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1307, provides:

All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

"Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "forced labor or/and indentured labor" includes forced or indentured child labor.

This action involves the exclusion of merchandise from entry, and is entitled to a calendar priority under USCIT R. 3(g)(3).² Moreover, pursuant to a Temporary Storage Agreement entered into between Plaintiff and the Port Director of CBP for the Port of San Francisco/Oakland, California, the excluded goods are currently being kept stored in shore tanks and rail cars in Stockton, California, at a cost to Plaintiff of more than \$35,000 for storage and maintenance per a month. *See* Affirmation of Matt Swanson, submitted herewith.

Plaintiff uses the imported merchandise at its Corcoran, California plant, in the manufacture of long fatty-acid chain calcium salts, which are used in cattle nutrition. While the imported materials remain unavailable to it, Plaintiff is unable to use them to produce calcium salts, or to realize revenue from the sale of such salts.

Entry of an order directing Defendant to show cause why an expedited litigation schedule should not be issued will not impose serious hardships on Defendant, since Plaintiff has provided the Government with extensive information concerning the imported merchandise in administrative proceedings, and in informal discovery and settlement discussions conducted prior to the filing of this motion.

² Rule 3(g)(3) provides in relevant part:

(g) Precedence of Action. On motion for good cause or on its own the court may expedite the following actions and give them precedence over other pending actions:

(1) An action involving the exclusion of perishable merchandise or redelivery of such merchandise;

* * *

(3) An action described in 28 U.S.C. § 1581(a) to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930, involving the exclusion or redelivery of merchandise;

While the subject imported Palm Fatty Acid Distillates and Palm Stearin are not immediately perishable, they are agricultural products which have a limited shelf life of about one (1) year.

A. Administrative Proceedings.

The merchandise in question was produced by Wilmar at its Sandakan Edible Oils Refinery in Sandakan, Sabah State, Malaysia. In connection with administrative consideration of the admissibility of the instant merchandise, Plaintiff furnished Defendant with extensive evidence concerning the merchandise which is the subject of this action. This evidence included:

- Information showing the merchandise being laden on the M/V ARGENT GERBERA at and from the Wilmar-controlled Sandakan Edible Oils Refinery in Sandakan, Sabah State, Malaysia;
- Information concerning the refining process performed at the Sandakan Edible Oils Refinery, Sandakan, Sabah State, Malaysia;
- Information concerning the processing of palm fresh fruit bunches (“FFB”) into crude palm oil (“CPO”) and lauric (made from the kernels of the palm fruit)³ at plants owned by Wilmar which supply CPO to the Sandakan Edible Oils Refinery;
- Information concerning the identity and ownership of other CPO plants which supply CPO and lauric to the Sandakan Edible Oils Refinery;
- Information showing the purchase and delivery of FFB to the CPO plants controlled by Wilmar; and
- Information showing the transportation of materials from the CPO mills to the Sandakan refinery.

In addition to providing this information to CBP during the detention period, Plaintiff provided CBP with an extensive Consignee Statement, pursuant to Section 12.43(b) of the CBP

³ Lauric is not involved in this litigation.

Regulations, 19 C.F.R. § 12.43, containing much of the documentation set out above, together with a narrative explanation of the sourcing and manufacturing of Plaintiff's merchandise.

Following exclusion of its merchandise, Plaintiff furnished CBP with extensive information accompanying its protest against exclusion of its merchandise.

B. Judicial Proceedings.

Upon the filing of this action, Plaintiff's undersigned counsel contacted Justin Miller, Attorney-in Charge of the United States Department of Justice's International Trade Field Office, to discuss the filing of this case, and the need for preliminary motions and entry of an expedited scheduling order. Plaintiff's counsel has also had open discussions with Marcella Powell, Esq., and Monica Triana, Esq., the Department of Justice attorneys who have entered an appearance in this case. These discussions have been in some ways productive. For instance, while the Notice of Exclusion issued with respect to the merchandise at bar provided Plaintiff with sixty (60) days to export the merchandise, under threat of disposition by CBP, the agency and its counsel have agreed with Plaintiff that the filing of Plaintiff's protest removes the threat of seizure or deemed abandonment, and that CBP will maintain the status quo, eliminating the need for Plaintiff to seek a Preliminary Injunction for that purpose.

Plaintiff has also made numerous proffers of evidence to defendant's counsel. These proffers have included all the documentation previously submitted to CBP, as well as additional information. It is accurate to say that all documentation which Plaintiff has regarding the production of the imported merchandise has been provided to Defendant's counsel.

In connection with discussions between the parties, Plaintiff has provided Defendant with a draft of its proposed documentary discovery requests in this action.

Plaintiff has also advised Defendant's counsel that if CBP had in its possession any information indicating that Plaintiff's merchandise was made with forced labor, Plaintiff would entertain a proffer of same (and likely withdraw this suit if the evidence was credible). Defendant has not made any such proffer, however.

Given the extensive discussions between the parties which have occurred prior to the filing of this application, Defendant is well-positioned to complete discovery in an expeditious manner.

While counsel for the parties have been in discussions regarding a proposed litigation schedule, they have been unable to arrive at an agreement, which necessitates the filing of the instant motion. This is an exclusion case. The excluded merchandise has a limited shelf life. In order for the case to have a chance of providing Plaintiff with meaningful relief, it must be litigated in an expeditious manner, and the Court must be given time to render a decision.

WHEREFORE, Plaintiff respectfully moves that this Court issue an Order directing Defendant to Show Cause, why the attached proposed scheduling order, or some other expedited Scheduling Order, should not be entered in this case.

Respectfully submitted,

NEVILLE PETERSON LLP
Counsel for Plaintiff Virtus Nutrition Inc.
One Exchange Plaza at 55 Broadway
New York, New York 10006
(212) 635-2730
(212) 635-0113 (Fax)

By: /s/ John M. Peterson
John M. Peterson
Richard F. O'Neill
Patrick B. Klein

May 12, 2021

**UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: UNASSIGNED**

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VIRTUS NUTRITION, LLC	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 21-00165
	:	
THE UNITED STATES	:	
	:	
Defendant.	:	
-----	X	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for an Order to Show Cause by this Court’s CM/ECF on May 12, 2021.

/s/ Patrick B. Klein
Patrick B. Klein

**UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: UNASSIGNED**

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VIRTUS NUTRITION, LLC	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 21-00165
	:	
THE UNITED STATES	:	
	:	
Defendant.	:	
-----	X	

ORDER DIRECTING DEFENDANT TO SHOW CAUSE WHY AN EXPEDITED LITIGATION SCHEDULE SHOULD NOT BE ENTERED IN THIS ACTION

Upon reading and considering Plaintiff’s Application for an Order directing Defendant, the United States, to appear and show cause why the court should not order the entry of an expedited litigation schedule in this action, and accompanying papers, it is hereby–

ORDERED, that Plaintiff’s application be, and hereby is, granted; and it is further –

ORDERED that Defendant shall appear remotely before this court, on May __, 2021, at __ o’clock in the __ noon, and shall show cause why the court should not order the entry of an expedited litigation schedule; and it is further –

ORDERED, that Plaintiff’s counsel shall serve a copy of this Order on Marcella Powell, Esq. and Monica Triana, Esq. by electronic mail or personal delivery no later than __ P.M. on this date.

SO ORDERED.

Dated: _____, 2021	_____
New York, NY	Judge

**UNITED STATES COURT OF INTERNATIONAL TRADE
BEFORE: UNASSIGNED**

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VIRTUS NUTRITION, LLC	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 21-00165
	:	
THE UNITED STATES	:	
	:	
Defendant.	:	
-----	X	

ORDER

Upon reading and considering plaintiff’s Application for an Order to Show Cause why an expedited litigation schedule should not be entered in this case, defendant’s response thereto, and upon due deliberation, the Court hereby enters the following schedule for this litigation:

1. Defendant shall file its Answer to the Complaint within ten (10) days from the date of this Order;
2. Fact discovery shall be completed by July 14, 2021; Any motions regarding discovery shall be filed by July 21, 2021;
3. Dispositive motions if any, shall be filed by August 16, 2021;
4. Briefs in response to dispositive motions shall be filed on or before August 26, 2021;
5. Reply briefs shall be filed on or before September 4, 2021
6. Any motion for oral argument with respect to the dispositive motions for phase one shall be filed on or before September 6, 2021; and

7. If no dispositive motions are filed a request for trial, if any, accompanied by a proposed order governing preparation for trial, shall be filed on or before August 26, 2021.

JUDGE

Dated: New York, NY
This day of , 2021

UNITED STATES COURT OF INTERNATIONAL TRADE

<p>VIRTUS NUTRITION LLC,</p> <p><i>Plaintiff</i></p> <p>v.</p> <p>THE UNITED STATES,</p>

Defendant

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AFFIRMATION OF MATT SWANSON

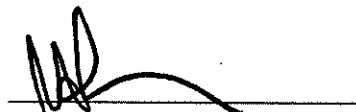
MATT SWANSON hereby affirms under penalty of perjury, pursuant to 28 U.S.C. §1746, as follows:

1. I am the President of Virtus Nutrition LLC, of Corcoran California, the plaintiff in this action. I am of legal age, provide this affirmation based on personal knowledge, and hereby affirm that the contents of this affirmation is true and correct.
2. I am providing this Affirmation in support of Plaintiff's Application for an Order Directing Defendant to show cause why an expedited schedule should not be entered in this action, which involves the exclusion of merchandise from entry.
3. Virtus Nutrition LLC is a manufacturer of long chain fatty acid calcium salts which are used in the care and nutrition of cattle. Palm oil fatty acid distillates and palm stearin are essential ingredients in the production of these calcium salts.
4. Historically, Virtus Nutrition has purchased palm oil distillates manufactured in Malaysia by Wilmar, a Malaysian producer. Typically Virtus used Mitsui & Co., a Japanese trading house, to obtain the merchandise from Wilmar.
5. On February 8, 2021, the M/V ARGENT GERBERA arrived at the Port of San Francisco with intent to unlade its cargo of palm oil fatty acid distillates and palm stearin, which Wilmar had manufactured in Malaysia, and which Virtus had purchased through Mitsui & Co. The terms of the sale were "CIF Port of San Francisco"
6. That same day, February 8, 2020, United States Customs and Border Protection

(CBP) placed a detention hold on the vessel, claiming that the goods were subject to a "Withhold Release Order" (WRO) which had been issued on December 30, 2020 against palm oil and palm oil products made in Malaysia by Sime Darby Plantation Bhd.,

7. On February 10, 2021, Virtus entered the goods at the Port of San Francisco under cover of Consumption Entry 808-200137. The merchandise had an entered value in excess of \$2.08 million, and estimated duties were deposited at that time.
8. For several days, CBP refused to allow the M/V ARGENT GERBERA to dock and discharge its cargo. Finally, after Virtus negotiated a Temporary Storage Agreement with the Port Director of Customs at San Francisco/Oakland, the vessel was allowed to discharge its cargo into shore tanks at Stockton, California, on February 20, 2021. The cargo remains in shore tanks and rail cars at Stockton, California, held securely under the terms of the Temporary Storage Agreement.
9. Because of the delay in docking the ARGENT GERBERA to discharge its cargo, Virtus has incurred 7 days and 9 hours days of additional vessel demurrage, totaling \$180,687.50 [Exhibit A]
10. Virtus supplied CBP officials with all requested information concerning the imported detained cargo, including information concerning where the palm fruit bunches were sourced, information concerning the mills which produced the oils, and the plants where the goods were refined. None of the evidence indicated any content from Sime Darby Plantation Bhd. or any other party subject to a WRO.
11. On March 23, 2021, CBP issued to Virtus a Notice indicating that the goods were excluded from entry pursuant to 19 U.S.C. §1307. The notice asserted that the information provided by Virtus was not sufficient to persuade CBP to revoke or modify with WRO against Sime Darby Plantation Bhd. However, it was never Virtus' intent to seek to have the WRO revoked or modified, merely to show that our merchandise was not subject to the WRO.
12. Virtus faces additional imminent, non-speculative and irreparable losses if the Court does not issue an expedited scheduling order in this case. The cost of storing the subject palm oil fatty acid distillates in shore tanks and rail cars at Stockton California is \$35,000 per month, plus an additional sum of approximately \$919 per month in charges for power to heat the merchandise. [Exhibit B]. Virtus is already paying those charges, and will continue to do so until this litigation is resolved. We are advised by our counsel that these monies will not be recoverably by Virtus even if it obtains the relief sought in this action.
13. Palm oil fatty acid distillates and palm stearin are not immediately perishable, but have a limited shelf life. After approximately one (1) year, the product begins to lose quality and usefulness for its intended purposes. If an expedited scheduling order is not entered, the product could irreparably deteriorate.
14. Finally, while the imported materials are excluded from entry into the Customs territory, they are not available for Virtus' use in producing calcium salts. This results in a reduced production capacity for the company which is resulting in definite, but not yet calculated losses.

Further affirmant sayeth not.



A handwritten signature in black ink, appearing to be 'VAD', is written over a horizontal line.

Matt Swanson

May 11, 2021

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VIRTUS NUTRITION LLC V. UNITED STATES – AFFIRMATION OF MATT SWANSON

EXHIBIT A

MITSUI & CO. (MALAYSIA) SDN. BHD.
 LEVEL 29, MENARA HAP SENG 2 PLAZA
 HAP SENG NO. 1, JALAN P. RAMLEE
 50250 KUALA LUMPUR
 MALAYSIA



Invoice Date: 25/2/2021
 Calc No.: 20210273-01
 Analyst: magdalene.mah

LAYTIME STATEMENT

Ship: ARGENT GERBERA, Voyage: 2009, BookingNo: 202100019, CP Date: 14/12/2020, Booking Date: 14/12/2020

Cgo	Qty(mts)	Cargo	Load Port - Discharge Port
9	1,999.300	Palm fatty acid distillate	SANDAKAN - STOCKTON
10	499.583	RBD Palm Stearin	SANDAKAN - STOCKTON
Sum:	2,498.883		

VEGOILVOY (COA DD 13 FEB 2018)
 LAYCAN: 23 DEC 2020 - 21 JAN 2021

SANDAKAN-ARGENT GERBERA	Time	Start End	Time Counting	ProRata (%)	Time Counting
NOR TENDERED (Anchored)	7/1/2021	22:10			
NOR + 6HRS	8/1/2021	04:10	S		
NOR RE-TENDERED (Hose off others)	9/1/2021	19:15	ES	01d15:05	00d00:00
SHIFTING	9/1/2021	20:07	ES		00d00:52
KARAMUNTING PALM OIL					
ALL FAST	9/1/2021	21:30	ES	00d01:23	00d00:00
CARGO HOSE CONNECTED	9/1/2021	23:30			
CARGO HOSE DISCONNECTED	10/1/2021	19:30	E		00d22:00
Time Counting					00d22:52
Pro Rata: 0.00% (Hose off others)					
Pro Rata: 0.00% ()					

STOCKTON-ARGENT GERBERA	Time	Start End	Time Counting	ProRata (%)	Time Counting
NOR TENDERED (Anchored, await USCBP detention hold on cargo)	11/2/2021	10:10			
NOR + 6HRS	11/2/2021	16:10	S		
ANCHOR AWEIGH	19/2/2021	02:45	ES		07d10:35
PENNY NEWMAN 1					
ALL FAST (Await USCBP approval to comm disch)	19/2/2021	11:25	ES	00d08:40	00d00:00
CARGO HOSE CONNECTED	19/2/2021	18:05			
GRANTED CUSTOM APPROVAL FROM USCBP	19/2/2021	18:55			
CARGO HOSE DISCONNECTED	20/2/2021	08:30	E		00d21:05
Time Counting					08d07:40

Deduction Description	Duration
SQUEEZING/STRIPPING - 20/02/2021 02:50-03:07	00d00:17
SQUEEZING/STRIPPING - 20/02/2021 07:35-07:50	00d00:15
Pro Rata: 0.00% (Await USCBP approval to comm disch)	

Total time counting:	09d06:00
Total time allowed:	01d21:00
Total time on demurrage:	07d09:00

Demurrage at USD 24,500.00 per day pro rata	USD	180,687.50
Adjustments	USD	0.00
Total demurrage due for payment	USD	180,687.50

VIRTUS NUTRITION LLC V. UNITED STATES – AFFIRMATION OF MATT SWANSON

EXHIBIT B

2891 S. Cedar Ave.
 Fresno, CA 93725



PLEASE REMIT TO:
 Post Office Box 12147 • Fresno, CA 93776-2147
 Phone (559) 448-8800 • Fax (559) 448-0500

MANUFACTURERS • WHOLESALERS • RETAILERS

Sold to: VIRTUS NUTRITION, LLC
 PO BOX 973
 TURLOCK, CA 95381

I N V O I C E #: 2650641

Invoice Date: 03/15/21

Terms: NET30

Company #: 13581

Ship Date	N/C #	Commodity	Weights/Quantities Misc Description	Price	Per	Amount
		STORAGE/TRANSLOADING	1.0000	35000.0000	Q	\$35000.00
		Plus: UTILITY (HEATING COST)				\$919.14
						\$35919.14
						\$35,919.14

Please Pay Total ----->

Lisa Verruso

Price Per: Q=Quantity,T=Ton,P=Pound,C=100 l=Bar,W=Wheat Bushel,M=Metric Ton,2=Bu,5=60# Bu
 Thank you very much for your business!
 Payment in full due 30 days from invoice date

0 0/ 0.0000 Lbs.

Attention Customers: Penny Newman Grain Co. does not request wire transfers or ACH payments from our customers. If you receive an email or a US Postal letter from any individual claiming to represent Penny Newman Grain Co., instructing you to send the company a payment via wire or ACH, do not comply. The safest and most secure method is a check mailed to our post office box. If you are currently remitting electronic payments, do not change ACH or wiring instructions without verbal confirmation from management at Penny Newman Grain Co.

PG&E ENERGY STATEMENT
 www.pge.com/MyEnergy

Account No: 5484518171-5
 Statement Date: 03/10/2021
 Due Date: 03/29/2021

Service For:

PENNY NEWMAN GRAIN CO
 1805 HARBOR AVE
 STOCKTON, CA 95203

Questions about your bill?

Business Specialist available:
 Mon-Fri: 7am to 6pm
 1-800-468-4743
 www.pge.com/MyEnergy

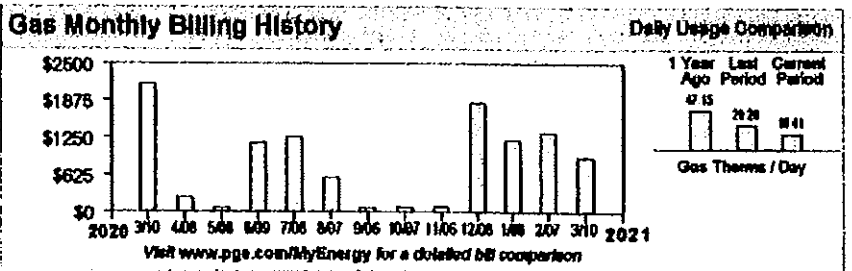
Ways To Pay

www.pge.com/waystopay

Your Account Summary

Amount Due on Previous Statement	\$1,324.42
Payment(s) Received Since Last Statement	-1,324.42
Previous Unpaid Balance	\$0.00
Current Gas Charges	\$919.14

Total Amount Due by 03/29/2021	\$919.14
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MAR 15 2021

Please return this portion with your payment. No staples or paper clips. Do not fold. Thank you.

99905484518171500000919140000091914

	Account Number: 5484518171-5	Due Date: 03/29/2021	Total Amount Due: \$919.14	Amount Enclosed: \$
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528770021159 01 AB 0.42 98 12460 2

 PENNY NEWMAN GRAIN CO
 PO BOX 12147
 FRESNO, CA 93776-2147

PG&E
 BOX 997300
 SACRAMENTO, CA 95899-7300

