Slip Op. 11–31

CONSTANTINE N. POLITES, Plaintiff, v. UNITED STATES, Defendant, and THE AD HOC COALITION FOR FAIR PIPE IMPORTS FROM CHINA, & THE UNITED STEEL WORKERS, Defendant-Intervenors

Before: Pogue, Chief Judge
Court No. 09–00387

[Commerce's scope determination remanded.]

Dated: March 23, 2011

Peter S. Herrick, PA (*Peter S. Herrick*) for Constantine N. Polites;

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera* and *John J. Todor*); *Reid P. Swayze*, of Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for the United States Department of Commerce;

King & Spalding LLP (*Gilbert B. Kaplan*, *Brian E. McGill*, & *Daniel L. Schneiderman*) for Ad Hoc Coalition for Fair Pipe Imports from China, *et al*.;

Schagrin Associates (*Roger B. Schagrin*) for United Steelworkers, *et. al.*

OPINION AND ORDER

Pogue, Chief Judge:

Introduction

This matter returns to court following a voluntary remand to the Department of Commerce ("the Department" or "Commerce") to define the exclusion for "finished scaffolding" in the antidumping and countervailing duty orders on circular welded carbon quality steel pipe from the People's Republic of China.[1] On remand, Commerce defined "finished scaffolding" as "[c]ompleted supported elevated platforms and their completed supporting structures," or "component parts that enter the United States unassembled as a 'kit.'" *Final Results of Redetermination Pursuant to Voluntary Remand* (Dep't Commerce August 26, 2010) at 2 ("Remand Results").

[1] *See Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't Commerce July 22, 2008) (notice of antidumping duty order); and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg 42,545 (Dep't Commerce July 22, 2008) (notice of amended final affirmative countervailing duty determination and notice of Countervailing Duty Order); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,545 (Dep't Commerce July 22, 2008) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order) (collectively, "CWP Orders" or "Orders").

Seeking review of the remand determination, Plaintiff Constantine Polites[2] ("Plaintiff" or "Polites") challenges Commerce's definition of the "finished scaffolding" exception. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

Because Commerce's definition renders the "finished scaffolding" exception mere surplusage, the court remands. After a brief review of relevant background, the agency's determination and the applicable standard of review, the court will explain its conclusion.

Background

Seeking to exclude his merchandise from the scope of the CWP Orders, Plaintiff, on February 5, 2009, requested that Commerce determine whether the steel pipes that he imports were barred from inclusion in the Orders under the exclusion for "finished scaffolding." Polites Req. for Scope Ruling, A-570–910 (February 3, 2009) Admin. R. Pub. Doc. 1 at 2. Polites defined his imported merchandise as "finished scaffold tube[s] without any fittings." Polites Resp. to Req. for Additional Information, A-570–910, (July 14, 2010) Admin. R. Pub. Doc. 3 at 2.[3]

Procedurally, when determining whether merchandise falls within the scope of an antidumping or countervailing duty order, Commerce engages in a three step process.[4] First, Commerce examines the language of the order at issue. If the terms of the order are dispositive, then the order governs. *See Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1383 (Fed.Cir. 2005) (The "predicate for the interpretive process is language in the order that is subject to interpretation").

Second, if the terms of the order are not dispositive, Commerce must then determine whether it can make a determination based upon the factors listed in 19 C.F.R. § 351.225(k)(1). 19 C.F.R. § 351.225(k). These factors are "the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations [of Commerce] (including prior scope determinations) and the

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[2] Plaintiff filed the complaint under his own name, but has appeared in the administrative proceedings prior under the name of his company, Constantine N. Polites & Co.

[3] The tubes require the addition of twist lock fittings and/or right angle couplers, both of which are also manufactured by Polites, before they can be used in scaffolding. *See* Polites Resp. to Petitioner's Letter of June 1, 2009, (June 8, 2009) Admin. R. Pub. Doc. 12 at 2. The parties do not dispute whether the size and chemical composition of the tubes that Polites imports fall within the scope of the CWP Order. The size of Polites's tubes fall within the specified diameter and wall thickness requirements, and the steel used to construct them is no more than 2% carbon, 1.8% manganese, and 2.25% silicon, by weight, which also places them within the scope of the Orders. *See* Remand Results at 14.

[4] Here, Commerce determined that it need only apply up to two steps of the process and that the third step was unnecessary.

Commission." 19 C.F.R. § 351.225(k)(1). To be dispositive, the Section 351.225(k)(1) criteria "must be 'controlling' of the scope inquiry in the sense that they definitively answer the scope question." *Sango Int'l v. United States*, 484 F.3d 1371, 1379 (Fed. Cir. 2007).

If a Section 351.225(k)(1) analysis is not dispositive, Commerce then applies the five "*Diversified Products*" criteria as specified in 19 C.F.R. § 351.225(k)(2): 1) The physical characteristics of the product, 2) the expectations of the ultimate purchasers, 3) the ultimate use of the product, 4) the channels of trade in which the product is sold, and 5) the manner in which the product is advertised and displayed. *See* 19 C.F.R. § 351.225(k)(2); *Diversified Prods. Corp. v. United States*, 572 F.Supp. 883, 889 (CIT 1983).

In conducting a scope inquiry, "the scope of a final order may be clarified, [but] it can not be changed in a way contrary to its terms." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1097 (Fed. Cir. 2002) (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed.Cir. 1990)).

Following this process in the matter at issue here, Commere turned first to the CWP Orders. The Orders state in part:

> [T]his order covers certain welded carbon quality steel pipes and tubes, of circular cross section . . regardless of . . . surface finish, . . . end finish. . . or industry specification, [but] does not include . . . finished scaffolding. . . . [T]he product description, and not the Harmonized Tariff Schedule of the United States ("HTSUS") classification, is dispositive of whether merchandise imported into the United States falls within the scope of the order.

Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 73 Fed. Reg. 42,545 (Dep't Commerce July 22, 2008) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order).

Responding to Plaintiff's claim, Commerce initially found that Polites's pipes fell within the scope of the CWP Orders and therefore "finished scaffolding" need not be defined. *Mem. Re. Antidumping and Countervailing Duty Orders on Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Scope Ruling on Certain Scaffolding Tubes of Constantine N. Polites & Co.*, A-570–910 (August 12, 2009), Admin. R. Pub. Doc. 15 at 10. Polites then brought this action seeking review of Commerce's determination.[5]

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[5] Defendant-Intervenors assert as a threshold issue that Plaintiff's claim is an untimely challenge to the scope definition established by Commerce's final determination and the CWP Orders. Def. Int. Br. at 13 (citing 19 U.S.C. § 1516a(a)(2)(A)(i)(II)). Defendant-Intervenors, however, misread the statute. 19 U.S.C. § 1516a(a)(2)(A)(i)(II) dictates when the court may review, among others, countervailing duty orders. Here, Polites asked for a scope determination to assess whether the CWP Orders cover the tubes it imports, a request

Before filing a response to Polites's complaint, Commerce requested a voluntary remand for the sole purpose of establishing a definition for "finished scaffolding." The court granted Commerce's remand request.

On remand, as noted above, Commerce defined "finished scaffolding"[6] to cover two items. The first definition, "completed supported elevated platforms and their completed supporting structures made of scaffolding tubes which are attached to each other by means of fittings, couplers, clamps, base plate, and/or other means," refers to actual, completed scaffolding structures. *See* Remand Results at 2. Commerce also defined "finished scaffolding" to include scaffolding kits which contain, at the time of importation, all the necessary components to assemble a scaffold. *Id.*

Standard of Review

Under its familiar standard of review, the court "shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Koyo Seiko Co. v. United States*, 20 F.3d 1160, 1164 (Fed.Cir. 1994). On legal issues, the court grants "significant deference" to Commerce's scope rulings. *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1172, 1183 (CIT 2004). Nonetheless, the court will find a scope ruling not in accordance with law if the scope ruling "changes the scope of an order or interprets an order in a manner contrary to the order's terms." *Id.*;

which Defendant-Intervenors acknowledge is timely. Def. Int. Br. at 13. Scope determinations are governed by 19 U.S.C. § 1516a(a)(2)(A)(ii), which states that such a determination must be challenged within 30 days of the date of mailing. 19 U.S.C. § 1516a(a)(2)(A)(ii). Here, the scope determination was issued on August 12, 2009 and Polites timely filed its summons on September 12, 2009 (The date of mailing is not at issue because the scope determination was issued on August 12, 2009 and therefore could not have been mailed prior to that date.). Accordingly, Polites's summons filed on September 12, 2009 is timely. *See* 19 U.S.C. § 1516a(a)(2)(A)(ii).

[6] While the final CWP Orders do not include any language regarding pipes or tubes used for scaffolding, the petition explicitly addresses pipes used for scaffolding. Specifically, the petition states that "[p]ipe used for the production of scaffolding (but not finished scaffolding) . . . are included within the scope of th[e] investigation." *Circular Welded Carbon Quality Steep Pipe from the People's Republic of China*, 72 Fed. Reg. 36,663 (Dep't Commerce July 5, 2007) (initiation of antidumping duty investigation); *Circular Welded Carbon Quality Steep Pipe from the People's Republic of China*, 72 Fed. Reg. 36,668 (Dep't Commerce July 5, 2007) (notice of initiation of countervailing duty investigation) (collectively "the petition"). At Defendant-Intervenor's request, Commerce moved the parenthetical reference to "finished scaffolding" to the list of exclusions. Remand Results at 11. Concurrently, Commerce decided to omit all reference to end use from the final order and removed the language referring to "pipes used for scaffolding"; nonetheless, Commerce maintains that the intent of the petition was to include scaffolding pipes and tubes similar to those imported by Polites. Remand Results at 11–12.

see also Duferco Steel, Inc., 296 F.3d at 1089 ("Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it").

On factual issues, substantial evidence is relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938). Commerce's factual conclusions in a scope ruling are not precluded from being supported by substantial evidence when two different conclusions may be drawn from the same evidence and need only be reasonable to be upheld. *See id.*; *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 730 (CIT 2001).

Discussion

While Commerce has latitude in interpreting the CWP Orders, it may not render parts of the Order "mere surplusage." *Eckstrom Industries, Inc. v. United States*, 254 F.3d 1068, 1073 (Fed. Cir. 2001); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."); *Orlando Food Corp. v. United States*, 423 F. 3d 1318, 1324 (Fed Cir. 2005) (the rule against surplusage is a rebuttable presumption). Therefore, Commerce must, at the least, define the finished scaffolding exclusion such that it encompasses merchandise which may be imported into the United States and thus is potentially subject to the CWP Order.

Polites asserts that defining "finished scaffolding" as fully assembled scaffolding is unreasonable because merchandise fitting this description would be impractical to import into the United States. Pl.'s Comments on Dep't. Commerce's Determination ("Plaintiff's Comments"). Polites further contends that the petition and orders do not mention kits and therefore kits should not be included within the exclusion.[7] Polites Draft Remand Determination Comments, A-570–910 (August 9, 2010) Admin. R. Pub. Doc. 6 at 2 ("Polites Draft Remand Comments"). Polites's first argument is correct.

Commerce's first definition, fully assembled scaffolding, is unreasonable for the purposes of the CWP Order because nothing in the record demonstrates merchandise matching this definition is im-

[7] Polites argues that the definition of "finished scaffolding" which encompasses "completed supported elevated platforms and their completed supporting structures" does not represent merchandise which is imported into the United States and therefore the definition must include "disassembled, finished scaffolding." Plaintiff's Comments at 2. Commerce argues correctly that such a definition is already encompassed within the definition of a "kit." Remand Results at 18.

ported into the United States or is even possibly imported into the United States. Polites asserts that such merchandise could never be imported into the United States and Commerce does not disagree. *See* Remand Results at 17–18. Rather, both Commerce and Polites acknowledge that fully constructed scaffolding is merchandise that would be prohibitively expensive and impractical to import. Remand Results at 17; Polites Draft Remand Comments at 2.

It follows that, in the context of the CWP Orders, Commerce's literal definition of "finished scaffolding" renders the "finished scaffolding" exclusion mere surplusage. The terms of an antidumping and countervailing duty order are triggered when merchandise is imported into the United States. An exclusion from a scope determination must therefore encompass merchandise which is or may be imported into the United States in order to act as a meaningful exclusion; anything less renders the exclusion hollow and improperly changes the meaning of the exclusion in the CWP Orders. *See Allegheny*, 342 F.Supp.2d at 1183.

With regard to its second definition, Commerce asserts correctly that it has discretion to include scaffold kits in the definition of "finished scaffolding" even when such kits are not listed in the Petition. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983). However, if Commerce is to include kits in the definition of "finished scaffolding," its decision must be supported by the record. *See Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

Commerce argues that record evidence shows that scaffolding may be imported as a kit. Remand Results at 18 ("record evidence indicates that 'finished scaffolding' may be sold as a kit, which . . . contains, at the time of importation, all of the necessary component parts to fully assemble a final, finished scaffolding"). However, the portions of the record that Commerce relies on merely show that scaffolding kits are sold within the United States. *See Request for Additional Information*, A-570–910 (July 7, 2010) Admin. R. Pub. Doc. 3 at Attach. 5. While Polites acknowledges that such kits could be considered finished scaffolding, Polites Resp. to Req. for Additional Information at 2, he also asserts that such kits have never been imported into the United States. *See* Def. Resp. Br. at 15. In response, Commerce simply states that there is a market in the United States for scaffolding kits and that nothing on the record shows that any or all scaffolding kits are manufactured domestically. *Id.*

Commerce's assertion that scaffolding kits may be imported into the United States is not supported by substantial evidence because Commerce has failed to put forth any evidence demonstrating that

complete scaffolding kits are imported or are even possibly imported into the United States. Rather, Commerce simply makes the unsupported, conclusory determination that these kits are not only imported, but imported as complete kits with all the components necessary to build a scaffold. Remand Results at 18.

The evidence in the record consists of product descriptions extracted from four separate internet websites, each selling scaffolding kits. Request for Additional Information at Attach. 5. None of the pages from the four websites indicate the country of origin for the scaffolding kits. Absent any showing that scaffolding kits are or may be imported into the United States as complete kits, this definition of the "finished scaffolding" exclusion is also rendered mere surplusage. Commerce's definition of "finished scaffolding" must include merchandise that is at least potentially subject to the CWP Orders.[8] Indeed, the definition provided by Commerce refers to components that must be present "at the time of importation" in order to qualify for the exclusion.

Finally, the court finds that, in the context here, the term, "finished scaffolding" may be ambiguous and therefore if Commerce is unable to obtain substantial evidence showing that scaffolding kits are or may be imported into the United States, the § 351.225(k)(2) factors must be taken into account. The term "finished scaffolding" first appeared in the petition, which stated that "pipe used for the production of scaffolding (but not finished scaffolding) . . . are included within the scope of th[e] investigation." *Circular Welded Carbon Quality Steep Pipe from the People's Republic of China*, 72 Fed. Reg. 36,663 (Dep't Commerce July 5, 2007) (initiation of antidumping duty investigation); *Circular Welded Carbon Quality Steep Pipe from the People's Republic of China*, 72 Fed. Reg. 36,668 (Dep't Commerce July 5, 2007) (notice of initiation of countervailing duty investigation). Commerce, apparently using the § 351.225(k)(1) factors in its analysis, attempts to support its definition of the exclusion by finding that the intent of the petition was to include scaffolding pipes similar to the merchandise imported by Polites. Remand Results at 11–12. However, Commerce's attempt to define the exclusion based on the § 351.225(k)(1) factors has resulted in a definition that renders the exclusion surplusage and is unsupported by substantial evidence. Absent substantial evidence showing that scaffolding kits are or may be imported into the United States, the (k)(1) factors are not disposi-

[8] Plaintiff raises additional arguments, including, among others, whether tariff classification and end use should factor into Commerce's consideration of whether the pipes it imports fall within the general scope of the CWP Orders. The court declines to address these arguments because the only issue currently before it is whether Commerce's definition of "finished scaffolding" is reasonable and supported by the record.

tive and the term, "finished scaffolding" remains ambiguous. Therefore, the court remands this issue to Commerce so that it may 1) provide substantial evidence to support its assertion that "finished scaffolding" means scaffolding kits, or 2) progress to the next step of analysis and consider the § 351.225(k)(2) factors when determining the proper meaning of "finished scaffolding." *See Sango*, 484 F.3d at 1382 (holding that Commerce's definition using § 351.225(k)(1) criteria is unsupported by substantial evidence and therefore analysis using § 351.225(k)(2) criteria is required).

Conclusion

Accordingly, Commerce's definition of "finished scaffolding" is remanded for further consideration in accordance with this opinion. Commerce shall have until May 9, 2011 to complete and file its remand determination. Plaintiffs shall have until May 23, 2011 to file comments. Defendant and Defendant-Intervenors shall have until June 6, 2011 to file any reply.

It is SO ORDERED.

Dated: March 23, 2011
New York, NY

/*s*/ *Donald C. Pogue*
DONALD C. POGUE, CHIEF JUDGE

Slip Op. 11–32

STANDARD FURNITURE MANUFACTURING CO., INC., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, VAUGHAN-BASSETT FURNITURE COMPANY, INC., KINCAID FURNITURE CO., INC., L. & J.G. STICKLEY, INC., SANDBERG FURNITURE MANUFACTURING COMPANY, INC., STANLEY FURNITURE COMPANY, INC., AND T. COPELAND AND SONS, INC., Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Consol. Court No. 07–00028

[Granting plaintiff's motions to amend complaints to add a new claim and additional factual allegations and extending the time for plaintiff to respond to defendant-intervenors' motion to dismiss]

Dated: March 23, 2011

Mowry & Grimson, PLLC (*Jeffrey S. Grimson*, *Jill A. Cramer*, *Kristin H. Mowry*, *Sarah M. Wyss* and *Susan E. Lehman*) for plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand* and *Michael J. Dierberg*) and *Neal J. Reynolds* and *Patrick V. Gallagher, Jr.*, United States International Trade Commission, for defendant.

King & Spalding, LLP (*Jeffrey M. Telep*, *Joseph W. Dorn*, *Steven R. Keener* and *Taryn K. Williams*) for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

Plaintiff Standard Furniture Manufacturing Co., Inc. ("Standard"), a domestic furniture manufacturer, brought four actions, now consolidated, to contest on various grounds its denial by the United States International Trade Commission ("ITC") of status as an "affected domestic producer" ("ADP") under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), 19 U.S.C. § 1675c (repealed 2006). ADP status potentially would have qualified Standard for distributions of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China. *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005). Plaintiff also challenges the failure of United States Customs and Border Protection ("Customs") to pay it such distributions.

Before the court are plaintiff's motions, opposed by defendant and defendant-intervenors, for leave to amend the complaint in two of the four actions consolidated under Consol. Court No. 07–00028.[1] Also before the court is plaintiff's motion, opposed by defendant-intervenors, requesting an extension of time for its response to defendant-intervenors' motion to dismiss and for judgment on the pleadings. The court will grant plaintiff's motions.

II. Background

Plaintiff brought the four actions between January 31, 2007 and March 4, 2010. These actions pertain to antidumping duties collected by Customs during particular fiscal years, as follows: FY 2006 (Court No. 07–00028); FY 2007 (Court No. 07–00295); FY 2008 (Court No.

[1] Due to the presence of common issues, the court, on February 15, 2011, consolidated plaintiff's four actions. Order (Feb. 15, 2011), ECF No. 57. Consolidated with *Standard Mfg. Co. v. United States* under Consol. Court No. 07–00028 are *Standard Mfg. Co. v. United States*, Court No. 07–00295, *Standard Mfg. Co. v. United States*, Court No. 09–00027, and *Standard Mfg. Co. v. United States*, Court No. 10–00082.

09–00027); and FY 2009 & FY 2010 (Court No. 10–00082). The court stayed the four actions pending a final resolution of other litigation raising the same or similar issues.[2] *See, e.g.*, Order (June 11, 2007), ECF No. 37. Plaintiff filed the motions to amend the complaints on January 24, 2011. Mot. for Leave to Amend Compl. (Court No. 07–00028) (Jan. 24, 2011), ECF No. 47; Mot. for Leave to Amend Compl. (Court No. 07–00295) (Jan. 24, 2011), ECF No. 45.[3] The court lifted the stays soon thereafter. Order (Feb. 9, 2011), ECF No. 52. Defendant-intervenors filed their motion to dismiss and for judgment on the pleadings on February 23, 2011. Def. Intervenors' Mot. to Dismiss & for J. on the Pleadings (Feb. 23, 2011), ECF No. 61 ("Def.Intervenors' Mot."); Def.-Intervenors' Mem. in Supp. of their Mot. to Dismiss & for J. on the Pleadings (Feb. 23, 2011), ECF No. 61 ("Def.-Intervenors' Mem.").

III. Discussion

In the CDSOA, Congress directed the ITC to forward to Customs a list of "petitioners and persons with respect to each [antidumping or countervailing duty] order . . . and a list of persons that indicate support of the petition by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1). The CDSOA also directed Customs to deposit collected antidumping and countervailing duties into special accounts, to segregate those duties according to the relevant antidumping or countervailing duty order, and to distribute, on an annual basis, a ratable share of duties collected for a particular unfairly-traded product to domestic producers who qualified as ADPs under the CDSOA as reimbursement for incurred qualifying expenditures. *Id.* § 1675c(e). In the 2006 repeal of the CDSOA, Congress provided for the continued distribution of duties "on entries of goods made and filed before October 1, 2007." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006).[4]

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[2] The court's orders stayed the actions "until final resolution of *Pat Huval Restaurant & Oyster Bar, Inc. v. United States International Trade Commission*, Consol. Court No. 06–00290, that is, when all appeals have been exhausted." Order (June 11, 2007), ECF No. 37. The language of the court's stay orders in the other consolidated actions was substantially the same.

[3] Plaintiff amended the complaints in Court Nos. 07–00295, 09–00027, and 10–00082, as of right. Am. Compl. (Court No. 07–00295) (Oct. 4, 2007), ECF No. 16; First Am. Compl. (Court No. 09–00027) (Feb. 9, 2011), ECF No. 32; First Am. Compl. (Court No. 10–00082) (Feb. 9, 2011), ECF No. 29.

[4] In 2010, Congress further limited distributions by prohibiting payments with respect to entries of goods that as of December 8, 2010 were "(1) unliquidated; and (2)(A) not in litigation; or (B) not under an order of liquidation from the Department of Commerce." Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

Common to each of Standard's complaints are four claims. Standard claims, first, that the actions of the two agencies were inconsistent with the CDSOA, not supported by substantial evidence, and otherwise not in accordance with law. Compl. ¶ 41 (Court No. 07–00028) (Jan. 31, 2007), ECF No. 5. Second, it claims that the "petition support requirement" of the CDSOA, which conditions the availability of ADP status on a domestic producer's support of an antidumping or countervailing duty petition, violates the First Amendment of the United States Constitution. *Id*. ¶¶ 43–44. Third, Standard claims that the petition support requirement violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by impermissibly discriminating between Standard and other domestic furniture producers who expressed support for the antidumping petition. *Id*. ¶¶ 46–47. Fourth, plaintiff claims that the petition support requirement, by basing eligibility for distributions on past conduct, *i.e.*, the past expression of support for an antidumping petition, is impermissibly retroactive under the Due Process Clause of the Fifth Amendment of the United States Constitution. *Id.* ¶ 49.

The complaints Standard filed in the two most recent actions, Court Nos. 09–00027 and 10–00082, also state a fifth claim, designated as Count Five, that the petition support requirement of the CDSOA "violates the First Amendment to the Constitution as applied to Standard because it discriminates against Standard based on expression of its views rather than action (its litigation support)." First Am. Compl. ¶ 50 (Court No. 09–00027) (Feb. 9, 2011), ECF No. 32; First Am. Compl. ¶ 52 (Court No. 10–00082) (Feb. 9, 2011), ECF No. 29. Plaintiff has moved for leave to amend the complaints in the 2007 actions to add this fifth claim. Mot. for Leave to Amend Compl. & Proposed First Am. Compl. ¶ 50 (Court No. 07–00028) (Jan. 24, 2011), ECF No. 47; Mot. for Leave to Amend Compl. & Proposed Second Am. Compl. ¶ 50 (Court No. 07–00295) (Jan. 24, 2011), ECF No. 45. The proposed amended complaints also contain new factual allegations.[5] Proposed First Am. Compl. ¶¶ 20, 21 (Court No. 07–00028); Proposed Second Am. Compl. ¶¶ 20, 21 (Court No. 07–00295).

Defendant and defendant-intervenors oppose plaintiff's motions to amend the complaints on the ground of futility, arguing that any

[5] As plaintiff states in its motions, "Standard's proposed amended complaint also adds several paragraphs to the Statement of Facts providing further detail necessary to present the contrast between the litigation support provided by Standard and that provided by four domestic producers (1) who provided the same level of support, (2) who were not petitioners, and (3) received $4.5 million in CDSOA payouts based on their support for the petition." Mot. for Leave to Amend Compl. 7 (Court No. 07–00028) (Jan. 24, 2011), ECF No. 47; Mot. for Leave to Amend Compl. 7 (Court No. 07–00295) (Jan. 24, 2011), ECF No. 45. The proposed amended complaints also update certain factual information.

relief on plaintiff's proposed new "as applied" claim would be foreclosed by binding precedent holding that the CDSOA's petition support requirement does not violate the First Amendment. Resp. of Defs., United States & U.S. Customs & Border Prot., to Mot. for Leave to Amend Compl. (Feb. 14, 2011), ECF No. 55 ("Def.'s Resp."); Def.-Intervenors' Opp'n to Pl.'s Mot. for Leave to Amend its Compl. (Feb. 14, 2011), ECF No. 56 ("Def.-Intervenor's Opp'n"). Defendant and defendant-intervenors argue, *inter alia*, that the claim plaintiff seeks to add is indistinguishable from that rejected by the United States Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA, Inc. v. United States*, 556 F.3d 1337 (Fed. Cir. 2009). In addition, defendant-intervenors base their motion to dismiss and for judgment on the pleadings on the grounds of lack of subject matter jurisdiction and failure to state claims on which relief can be granted. Def.-Intervenors' Mot.; Def.-Intervenors' Mem.

The new claim plaintiff proposes to add and the supporting factual allegations are already before the court as a result of the complaints filed in the 2009 and 2010 actions, but these actions pertain to only three of the five fiscal years at issue in the consolidated case. The amendments, if allowed by the court, would permit plaintiff to achieve its objective of conforming the complaints in the 2007 actions with the complaints in the 2009 and 2010 actions. It also would allow plaintiff to achieve its objective of pleading its factual allegations with respect to the CDSOA distributions made in all five of the fiscal years for which plaintiff challenges agency actions. Plaintiff seeks the opportunity to plead facts sufficient to satisfy the factual pleading standard set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951–52 (2009), and the interpretations of those cases in the United States Court of International Trade and the Court of Appeals. Mot. for Leave to Amend Compl. 7–8 (Court No. 07–00028) (Jan. 24, 2011), ECF No. 47; Mot. for Leave to Amend Compl. 7–8 (Court No. 07–00295) (Jan. 24, 2011), ECF No. 45. In the interest of justice, plaintiff should be permitted to amend its complaints in the 2007 actions to serve both of these objectives.

As provided in USCIT Rule 15(a)(2), the court should freely give leave to amend a pleading "when justice so requires." USCIT R. 15(a)(2). The court has discretion, however, to deny a motion for leave to amend a pleading on various grounds, including futility or prejudice to the other parties. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Intrepid v. Pollock*, 907 F.2d 1125, 1128 (Fed. Cir. 1990); 6 Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure § 1487, at 701 (3d ed. 2010) ("Perhaps the

most important factor listed by the Court for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter a pleading.").

The court discerns no prejudice to defendant or defendant-intervenors that would result from allowing the amendment of the two earlier complaints, and neither defendant nor defendant-intervenors point to any. The opposition to plaintiff's motions to amend is based solely on the ground of futility. However, in the circumstances of this consolidated case, in which the legal theory supporting the new claim and the new factual allegations already are before the court and are addressed in defendant-intervenors' motion to dismiss and for judgment on the pleadings, and in which amendment would not prejudice opposing parties, the court is not required to consider futility in ruling on plaintiff's motions to amend. *See Foman*, 371 U.S. at 182 ("Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court . . . ."). The court necessarily would consider whether the proposed new claim should be dismissed in ruling on defendant-intervenors' motion to dismiss and for judgment on the pleadings, whether or not it grants the instant motions to amend. Therefore, the court reserves any decision on dismissing the new claim until it rules on defendant-intervenors' motion to dismiss, which is now moot with respect to the 2007 actions but not with respect to the 2009 and 2010 actions.[6] Briefing on this motion is not yet complete. Defendant-intervenors may submit new a new motion to dismiss the complaints, as now amended, in the 2007 actions.

Also before the court is plaintiff's motion for an extension of time to respond to defendant-intervenors' motion to dismiss and for judgment on the pleadings. Partial Consent Mot. for Extension of Time (Mar. 16, 2011), ECF No. 74. This motion is also moot as to the 2007 actions but not moot as to the 2009 and 2010 actions. Defendant-intervenors oppose this motion. Def.-Intervenors' Opp'n to Pl.'s Mot. for Extension of Time (Mar. 18, 2011), ECF No. 77. The court finds good cause for an extension of this time period.

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[6] Defendant-intervenors' motion for judgment on the pleadings, which applies only to the complaint in Court No. 07–00028 (the only of the four now-consolidated actions in which answers have been filed) is mooted by this Opinion and Order, which allows an amended complaint in that action. Answer of Def., United States Customs & Border Protection (Court No. 07–00028) (Apr. 3, 2007), ECF No. 20; Answer of Defs. Int'l Trade Comm'n & its Chairman Daniel R. Pearson (Court No. 07–00028) (Apr. 6, 2007), ECF No. 21; Answer of Def. Intervenors, American Furniture Manufacturing Committee for Legal Trade & Vaughan-Bassett Furniture Co., Inc. (Court No. 07–00028) (Apr. 11, 2007), ECF No. 24. Also moot is defendant-intervenors' motion to dismiss with respect to the complaint in Court No. 07–00295, now amended.

IV. Conclusion and Order

The court, in its discretion, will grant plaintiff's motions to amend its complaints in Court Nos. 07–00028 and 07–00295, reserving any ruling on whether the new claim plaintiff is adding to those actions should be dismissed. As to the claims in the 2009 and 2010 actions, the court will grant plaintiff additional time to respond to defendant-intervenors' motion to dismiss.

ORDER

In consideration of plaintiff's motions to amend its complaints in Court Nos. 07–00028 and 07–00295, defendant and defendant-intervenors' oppositions thereto, plaintiff's motion for an extension of time to respond to defendant-intervenors' motion to dismiss and for judgment on the pleadings, as filed on March 16, 2011, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's motions to amend its complaints, as filed on January 24, 2011, be, and hereby are, GRANTED; it is further

ORDERED that the proposed amended complaints in Court No. 07–00028 and Court No. 07–00295 be, and hereby are, accepted for filing in the consolidated action as of this date; and it is further

ORDERED that the period for plaintiff to respond to defendant-intervenors' motion to dismiss the claims in the complaints filed in Courts Nos. 09–00027 and 10–00082, be, and hereby is, extended to April 22, 2011.

Dated: March 23, 2011
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE