

U.S. Customs and Border Protection

Slip Op. 11–132

FURNITURE BRANDS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES AND UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE AND VAUGHAN-BASSETT FURNITURE COMPANY, INC., Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Timothy C. Stanceu, Judge
Leo M. Gordon, Judge
Court No. 07–00026

[Denying plaintiff’s motion to amend the complaint and dismissing the complaint for failure to state a claim upon which relief can be granted]

Dated: October 20, 2011

David W. DeBruin and *Matthew E. Price*, Jenner & Block LLP, of Washington, DC, for plaintiff.

Jessica R. Toplin, *David S. Silverbrand*, and *Courtney S. McNamara*, Trial Attorneys, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With them on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the briefs was *Andrew G. Jones*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

Patrick V. Gallagher, Jr., Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant United States International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

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OPINION

Stanceu, Judge:

This case arises from decisions of the U.S. International Trade Commission (“ITC” or the “Commission”) to deny plaintiff Furniture Brands International, Inc. (“Furniture Brands”) status as an “affected domestic producer” (“ADP”) under the Continued Dumping and Subsidy Offset Act of 2000 (“CDSOA” or “Byrd Amendment”), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75 (codified at 19

U.S.C. § 1675c (2000)),¹ repealed by Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). ADP status potentially would have qualified Furniture Brands for distributions of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People’s Republic of China (“China” or the “PRC”). *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) (“*Antidumping Duty Order*”). Plaintiff brings a constitutional challenge to the CDSOA and to the ITC’s decisions under the CDSOA denying it ADP status for fiscal years 2006 through 2008. Second Supplemental Compl. ¶¶ 53–56 (deemed filed Oct. 8, 2008), ECF No. 46. Plaintiff also challenges the refusal of U.S. Customs and Border Protection (“Customs”) to pay it CDSOA distributions. *Id.* ¶¶ 57–59.

Before the court are four dispositive motions. Defendant-intervenors American Furniture Manufacturers Committee for Legal Trade and Vaughan-Bassett Furniture Company, Inc. and defendant Customs move for judgment on the pleadings under USCIT Rule 12(c). Def.-Intervenors’ Mot. for J. on the Pleadings (Feb. 23, 2011), ECF No. 72 (“Def.-intervenor’s Mot.”); Defs. the United States & U.S. Customs and Border Protection’s Mot. for J. on the Pleadings (May 4, 2011), ECF No. 95 (“Customs’ Mot.”). Defendant ITC moves under USCIT Rule 12(b)(5) to dismiss for failure to state a claim upon which relief can be granted. Def. U.S. Int’l Trade Comm’n’s Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 90 (“ITC’s Mot.”). Plaintiff moves to dismiss its own complaint under USCIT Rule 12(b)(1), asserting a lack of subject matter jurisdiction, and moves in the alternative to amend that complaint to add two new claims. Mot. to Dismiss for Lack of Subject Matter Jurisdiction, or, in the Alternative, for Leave to Amend the Compl. (Mar. 29, 2011), ECF No. 84 (“Pl.’s Mot.”).

The court determines that it has subject matter jurisdiction over this action and that no relief can be granted on the complaint. The court denies as futile plaintiff’s motion to amend the complaint, and concludes that this action should be dismissed.

I. BACKGROUND

In 2005, Commerce issued an antidumping duty order on imports of wooden bedroom furniture from China. *Antidumping Duty Order*, 70 Fed. Reg. at 329. During proceedings before the ITC to determine

¹ Citations are to the codified version of the Continued Dumping and Subsidy Offset Act (“CDSOA”), 19 U.S.C. § 1675c (2000). All other citations to the United States Code are to the 2006 edition.

whether such imports were causing or threatening to cause material injury to the domestic industry, Furniture Brands responded to the ITC's questionnaires, opposing the issuance of an antidumping duty order. *U.S. Producers' Questionnaire - Furniture Brands 2* (Sept. 3, 2004) (ITC Admin. R. Doc. No. 5), ECF No. 17; Second Supplemental Compl. ¶ 27. The ITC did not list Furniture Brands as an ADP with respect to this order for fiscal years 2006, 2007, or 2008. *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 71 Fed. Reg. 31,336, 31,375–76 (June 1, 2006); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 72 Fed. Reg. 29,582, 29,622–23 (May 29, 2007); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 73 Fed. Reg. 31,196, 31,236–37 (May 30, 2008).

In January 2007, plaintiff commenced this action to challenge the government's failure to provide it CDSOA distributions for fiscal year 2006. Compl. (Jan. 23, 2007), ECF No. 4. Customs and the ITC filed their answers to the complaint on March 28 and March 29, 2007, respectively. Answer (Mar. 28, 2007), ECF No. 20 (answer of Customs); Answer (Mar. 28, 2007), ECF No. 21 (answer of the ITC). Defendant-intervenors filed their answer on April 11, 2007. Answer (Apr. 11, 2007), ECF No. 28. The court then stayed this action pending a final resolution of other litigation raising the same or similar issues.² Order (June 5, 2007), ECF No. 39. On December 12, 2007, the court lifted this stay for the limited purpose of allowing an amendment to the complaint to include a challenge to the denial of CDSOA distributions to plaintiff for fiscal year 2007. Order (Dec. 12, 2007), ECF No. 44; First Amended Compl. (deemed filed Oct. 18, 2007), ECF No. 45. On December 11, 2008, the court again lifted the stay for the limited purpose of allowing amendment of the complaint, this time to include a challenge to denial of CDSOA distributions to plaintiff for fiscal year 2008. Order (Dec. 11, 2008), ECF No. 50; Second Supplemental Compl.

Following the decision of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals") in *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009) ("*SKF USA II*"), *cert. denied*, 130 S. Ct. 3273 (2010), which addressed legal questions that are also present in this case, the court ordered plaintiff to show cause why this case should not be dismissed. Order (Jan. 3, 2011), ECF No. 57. After plaintiff responded to the court's order, the court lifted its stay on this action for all

² The court's order stayed the action "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 5, 2007), ECF No. 39.

purposes. Order (Feb. 9, 2011), ECF No. 66; Pl.'s Br. in Resp. to the Ct.'s Order to Show Cause (Jan. 28, 2011), ECF No. 63. Defendant-intervenors filed their motion for judgment on the pleadings on February 23, 2011. Def.-intervenor's Mot. While briefing on this motion was pending, plaintiff filed its motion to dismiss pursuant to USCIT Rule 12(b)(1) or for leave to amend the complaint. Pl.'s Mot. Defendants Customs and ITC subsequently filed their dispositive motions. ITC's Mot.; Customs' Mot. Briefing on all dispositive motions is now complete.

During briefing on the various dispositive motions, plaintiff filed a letter notifying the court of a recent decision by the U.S. Supreme Court, which decision, according to plaintiff, "carries great significance for the pending motions to dismiss filed by the Defendants . . . and the pending motion for judgment on the pleadings filed by the Intervenors." *Letter from Pl. to the Ct.* 1 (July 8, 2011), ECF No. 105 ("Pl.'s Additional Authority Letter") (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)). Defendant-intervenors filed a reply to this letter, and both defendants responded to this letter in their reply briefs. Def.-intervenor's Resp. to Pl.'s Supplemental Authority Letter (July 22, 2011), ECF No. 109; Defs. United States & U.S. Customs & Border Protection's Reply in Supp. of their Mot. to Dismiss For Failure to State a Claim upon Which Relief can be Granted 4–5 n.3 (July 14, 2011), ECF No. 107; Def. U.S. Int'l Trade Comm'n's Reply to Pl.'s Br. in Opp'n to Mot. to Dismiss for Failure to State a Claim 11–13 (July 14, 2011), ECF No. 108. Subsequently, plaintiff filed another notice, this time informing the court of a decision reached by the U.S. District Court for the District of Columbia in a parallel action, in which plaintiff brought essentially the same claims it brings in this action, and requesting that the court transfer this action to that district court if subject matter jurisdiction is found lacking here.³ Pl.'s Notice of Supplemental Authority & Clarification of Relief Sought (Aug. 16, 2011), ECF No. 110 (citing *Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n*, No. 11–00202, 2011 WL 3562890 (D.D.C. Aug. 15, 2011)). Only Customs replied to this second letter. Defs. United States & U.S. Customs & Border Protection's Resp. to Pl.'s Notice of Supplemental Authority & Clarification of Relief Sought (Aug. 30, 2011), ECF No. 111. Finally, plaintiff replied to Customs'

³ The district court dismissed plaintiff's complaint without prejudice so that this Court, the court of first filing, could first determine which court had subject matter jurisdiction to resolve the dispute. *Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n*, No. 11–00202, 2011 WL 3562890, at *6 (D.D.C. Aug. 15, 2011).

response. Pl.'s Resp. to Customs' Filing Regarding Pl.'s Notice of Supplemental Authority & Clarification of Relief Sought (Sept. 6, 2011), ECF No. 112.⁴

II. DISCUSSION

The CDSOA amended the Tariff Act of 1930 ("Tariff Act") to provide for the distribution of funds from assessed antidumping and countervailing duties to persons with ADP status, which is limited to petitioners, and interested parties in support of petitions, with respect to which antidumping duty and countervailing duty orders are entered.⁵ 19 U.S.C. § 1675c(a)-(d). The CDSOA directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing duty order is issued, lists of "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response."⁶ *Id.* § 1675c(d)(1). The CDSOA directed Customs to publish in the Federal Register lists of ADPs potentially eligible for distributions of a "continuing dumping and subsidy offset" that are based on the lists obtained from the Commission. *Id.* § 1675c(d)(2). The CDSOA also directed Customs to segregate antidumping and countervailing duties according to the relevant antidumping or countervailing duty order, to maintain these duties in special accounts, and to distribute to an ADP annually, as reimbursement for incurred qualifying expenditures, a ratable share of the funds (including all interest earned) from duties assessed on a specific unfairly traded product that were received in the preceding fiscal year. *Id.* § 1675c(d)(3), (e).⁷

⁴ U.S. Customs and Border Protection ("Customs") has not made any distributions affecting this case and indicates that it will refrain from doing so until January 31, 2012 at the earliest. Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 75.

⁵ The CDSOA provided that:

The term "affected domestic producer" means any manufacturer, producer, farmer, rancher or worker representative (including associations of such persons) that—
(A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
(B) remains in operation.

19 U.S.C. § 1675c(b)(1).

⁶ Additionally, the CDSOA directed the U.S. International Trade Commission ("ITC") to forward to Customs a list identifying affected domestic producers "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . ." 19 U.S.C. § 1675c(d)(1). The antidumping duty order which is at issue in this case, on imports of wooden bedroom furniture from the People's Republic of China, was not in effect on that date.

⁷ Congress repealed the CDSOA in 2006, but the repealing legislation provided that "[a]ll duties on entries of goods made and filed before October 1, 2007, that would [but for the legislation repealing the CDSOA], be distributed under [the CDSOA] . . . shall be distributed as if [the CDSOA] . . . had not been repealed . . ." Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601(b), 120 Stat. 4, 154 (2006). In 2010, Congress further limited CDSOA

At issue in this case is the “petition support requirement” that the CDSOA imposes as a condition for obtaining distributions. *Id.* § 1675c(b)(1), (d). In challenging the petition support requirement on First and Fifth Amendment grounds, plaintiff relies on two decisions of the Court of International Trade, *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006) (“*SKF USA I*”) (holding the petition support requirement to violate the equal protection requirement of the Fifth Amendment Due Process Clause) and *PS Chez Sidney, L.L.C. v. U.S. International Trade Commission*, 30 CIT 858, 442 F. Supp. 2d 1329 (2006) (“*PS Chez Sidney I*”) (holding the petition support requirement to violate First Amendment freedom of expression provisions). Second Supplemental Compl. ¶ 55. After plaintiff brought this action, the Court of Appeals overturned both decisions, holding the CDSOA constitutionally permissible in denying ADP status to a plaintiff that did not indicate support of the petition. *SKF USA II*, 556 F.3d at 1359–60; *PS Chez Sidney, L.L.C. v. U.S. Int’l Trade Comm’n*, Nos. 2008–1526, 2008–1527, 2008–1534, 2008–1555, 2010 WL 4365784, at *1–2 (Fed. Cir. Oct. 28, 2010) (“*PS Chez Sidney II*”) (summarily reversing the holding that the petition support requirement was unconstitutional).

Despite the decisions of the Court of Appeals, plaintiff maintains its constitutional claims, arguing that *SKF USA II* does not foreclose a constitutional challenge to the CDSOA based on facts that plaintiff alleges to differ materially from those on which *SKF USA II* was decided. Pl.’s Mem. in Opp’n to Def.-Intervenors’ Mot. for J. on the Pleadings 4–5 (Mar. 29, 2011), ECF No. 85. Plaintiff also seeks to amend its complaint to add two new claims, both of which it grounds in alleged facts under which plaintiff maintains that defendants, in denying plaintiff ADP status and CDSOA distributions, acted contrary to the CDSOA as interpreted by *SKF USA II*. Proposed Third Amended Compl. ¶¶ 60–67 (Mar. 29, 2011), ECF No. 84. Plaintiff moves to amend only in the alternative, preferring that the court dismiss this action for lack of subject matter jurisdiction. Pl.’s Mot. 1–2.

A. The Court Has Jurisdiction Over Plaintiff’s Complaint

Although invoking subject matter jurisdiction under section 201 of the Customs Courts Act of 1980 (“Customs Courts Act”), 28 U.S.C. § 1581(i), in bringing this action, plaintiff now moves for dismissal according to USCIT Rule 12(b)(1), arguing that § 1581(i) does not

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.” Claims Resolution Act of 2010, Pub. L. No. 111–291, § 822, 124 Stat. 3064, 3163 (2010).

provide jurisdiction over this case. Pl.’s Mot. 1; see Second Supplemental Compl. ¶ 4. A party may invoke Rule 12(b) only in asserting a defense to a claim brought against it. See USCIT R. 12(b). The rule is not available to a party seeking to assert a would-be “defense” to its own claim for relief. Therefore, the court may not dismiss this action under Rule 12(b) by granting plaintiff’s motion to dismiss. Nor is the court able to construe plaintiff’s motion as a motion made under USCIT Rule 41(a)(2) for voluntary dismissal without prejudice. The court finds nothing in plaintiff’s motion indicating an intent to dismiss this action voluntarily; the motion seeks instead a dismissal that is involuntary. Nevertheless, because the court may not allow any action to proceed without first ensuring that subject matter jurisdiction exists over that action, the court considers, *sua sponte*, the jurisdictional question plaintiff has raised.⁸

Under paragraph (2) of 28 U.S.C. § 1581(i), the court is granted exclusive jurisdiction of “any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.” Although duties “on the importation of merchandise for reasons other

⁸ Declining jurisdiction in this case would be inconsistent with implicit findings of subject matter jurisdiction in every prior case in which the Court of International Trade or the U.S. Court of Appeals for the Federal Circuit has reached the merits of claims arising out of the CDSOA. See *PS Chez Sidney, L.L.C. v. U.S. Int’l Trade Comm’n*, Nos. 2008–1526, 2008–1527, 2008–1534, 2008–1555, 2010 WL 4365784 (Fed. Cir. Oct. 28, 2010) (“*PS Chez Sidney II*”); *SKF USA Inc. v. United States*, 556 F.3d 1337 (2009), *cert. denied*, 130 S. Ct. 3273 (2010); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (2008); *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353 (Fed. Cir. 2006); *Candle Corp. of Am. v. U.S. Int’l Trade Comm’n*, 374 F.3d 1087 (Fed. Cir. 2004); *Five Rivers Electr. Innovation, LLC v. United States*, 35 CIT __, 755 F. Supp. 2d 1349 (2011); *Sioux Honey Ass’n v. United States*, 34 CIT __, 722 F. Supp. 2d 1342 (2010); *Thyssenkrupp Mexinox S.A. de C.V. v. United States*, 33 CIT __, 662 F. Supp. 2d 1356 (2009); *Southern Shrimp Alliance v. United States*, 33 CIT __, 617 F. Supp. 2d 1334 (2009); *PS Chez Sidney, L.L.C. v. U.S. Int’l Trade Comm’n*, 30 CIT 858, 442 F. Supp. 2d 1329 (2006), *rev’d on other grounds PS Chez Sidney II*, 2010 WL 4365784, at *1–2; *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006), *rev’d on other grounds* 556 F.3d 1337; *Canadian Lumber Trade Alliance v. United States*, 30 CIT 391, 425 F. Supp. 2d 1321 (2006), *aff’d in part* 517 F.3d 1319; *Dixon Ticonderoga Co. v. U.S. Customs & Border Protection*, 29 CIT 406, 366 F. Supp. 2d 1352 (2005), *rev’d on other grounds* 468 F.3d 1353; *Candle Artisans v. U.S. Int’l Trade Comm’n*, 29 CIT 145, 362 F. Supp. 2d 1352 (2005); *Cathedral Candle Co. v. U.S. Int’l Trade Comm’n*, 27 CIT 1541, 285 F. Supp. 2d 1371 (2003), *aff’d* 400 F.3d 1352 (Fed. Cir. 2005); *Candle Corp. of Am. v. U.S. Int’l Trade Comm’n*, 27 CIT 560, 259 F. Supp. 2d 1349 (2003), *aff’d* 374 F.3d 1087. However, because none of the opinions in these cases discusses the specific jurisdictional argument plaintiff raises, the court analyzes the jurisdictional question anew. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) (“While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper” in previous cases.) (citation omitted).

than the raising of revenue” include, *inter alia*, antidumping and countervailing duties, *see, e.g., Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010), the instant action is not properly construed as arising broadly out of the antidumping and countervailing duty statute, Title VII of the Tariff Act, which the CDSOA amended. *See Orleans Int’l, Inc. v. United States*, 334 F.3d 1375, 1379 (Fed. Cir. 2003). Instead, this case arises out of the CDSOA.⁹ The CDSOA does not provide for antidumping and countervailing duties, which are assessed under other provisions of Title VII.

Paragraph (4) of 28 U.S.C. § 1581(i) provides subject matter jurisdiction of any civil action commenced against the United States that arises out of a law of the United States providing for “administration and enforcement with respect to the matters referred to” in other provisions of § 1581, including paragraph (2) of subsection 1581(i). The CDSOA is not an enforcement statute. Therefore, the jurisdictional question presented is whether the CDSOA is a law “providing for . . . administration . . . with respect to” antidumping and countervailing duties. 28 U.S.C. § 1581(i)(4). We conclude that it is.

The CDSOA directs Customs to conduct an array of functions, including the depositing, maintaining, allocating, and distributing of antidumping and countervailing duties; specifically, Customs is to maintain the deposited antidumping and countervailing duties by order and to allocate and distribute these duties to ADPs annually as reimbursement for qualifying expenditures. *See* 19 U.S.C. § 1675c(d)(3), (e). These functions as a whole satisfy definitions of the term “administration.” That term refers to, “[i]n public law, the practical management and direction of the executive department and its agencies.” Black’s Law Dictionary 49 (9th ed. 2009).¹⁰ The term is also defined as “[t]he management of public affairs; the conduct or carrying on of the details of government.” Oxford English Dictionary vol. 1, 163 (2d ed. 1989).

The legislative history of the Customs Courts Act supports the court’s exercise of jurisdiction over this case. According to the associ-

⁹ Plaintiff argues that this case arises out of only the provision in the CDSOA establishing the petition support requirement. Pl.’s Reply Br. in Supp. of its Mot. to Dismiss for Lack of Subject Matter Jurisdiction, Or in the Alternative, for Leave to Amend the Compl. 2–3 (May 23, 2011), ECF No. 98 (“Pl.’s Reply”) (arguing that the claim arises only from 19 U.S.C. § 1675c(b)(1), (d)(1), (d)(3)). This argument is meritless. The petition support requirement provision is integral in structure and purpose with the other provisions of the CDSOA, the provisions of which collectively constitute a “law” within the meaning of 28 U.S.C. § 1581(i).

¹⁰ Analogously, in the context of decedents’ estates, “administration” of an estate involves “realizing the movable assets and paying out of them any debts and other claims against the estate. It also involves the division and distribution of what remains.” Black’s Law Dictionary 49 (9th ed. 2009).

ated Report of the House Judiciary Committee (“House Report”), an objective of the provisions defining the jurisdiction of the new Court of International Trade was to resolve the then-existing problem of litigants mistakenly filing international trade cases before district courts due to the difficulty in “determin[ing] in advance whether or not a particular case falls within the jurisdictional scheme of the Customs Court . . .” H.R. Rep. No. 96–1235, at 19 (1980), *reprinted at* 1980 U.S.C.C.A.N. 3729, 3730–31. As the House Report explains, the U.S. Customs Court had been granted jurisdiction “over civil actions commenced to review those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]” by Title X of the Trade Agreements Act of 1979, jurisdiction that the Customs Courts Act restated in 28 U.S.C. § 1581(c) and vested in the newly-created court. *Id.* at 45, *reprinted at* 1980 U.S.C.C.A.N. at 3756. As the language of § 1581(i)(2) and (4) demonstrates, Congress intended to grant the new court jurisdiction over some actions arising out of the antidumping and countervailing duty laws that did not fall within the jurisdictional grant in § 1581(c). As stated in the House Report, new subsection § 1581(i) “makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade.” *Id.* at 47, *reprinted at* 1980 U.S.C.C.A.N. at 3759. Plaintiff’s view of the scope of § 1581(i) jurisdiction would place some suits in the Court of International Trade and others in the district courts, depending on whether the law in question satisfies plaintiff’s narrow construction of the words “administration . . . with respect to” antidumping and countervailing duties. Acceptance of plaintiff’s limited construction would frustrate rather than further the congressional purpose.

Plaintiff argues that jurisdiction over this action is lacking because the CDSOA does not “provide for administration or enforcement with respect to duties” but instead “provides for the *distribution of funds* collected from duties imposed, administered, and enforced by other statutory provisions.” Mem. of Law in Supp. of Pl.’s Mot. to Dismiss for Lack of Subject Matter Jurisdiction, Or, in the Alternative, for Leave to Amend the Compl. 2–3 (Mar. 29, 2011), ECF No. 84 (“Pl.’s Mem.”). Plaintiff’s bright-line demarcation between collected antidumping and countervailing duties and “funds” is an artificial one that lacks support in the language Congress chose for the CDSOA, which uses the term “duties” interchangeably with the term “funds.” *See* 19 U.S.C. § 1675c(a) (“Duties assessed pursuant to . . . an antidumping duty order . . . shall be distributed on an annual basis”); *id.* § 1675c(c) (“distribution shall be made . . . from duties assessed

during the preceding fiscal year.”); *id.* § 1675c(d)(3) (“The Commissioner shall distribute all funds . . . from assessed duties received in the preceding fiscal year”); *id.* § 1675c(e)(2) (“The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties . . . that are assessed after the effective date of this section”). The court must presume that in using the term “duties” in the CD-SOA, Congress intended the term to have the meaning the term had in the Customs Courts Act. *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). And whether or not plaintiff is correct in opining that distribution is not administration,¹¹ plaintiff’s argument overlooks the broader administrative scheme the CDSOA established, which extends beyond distribution and requires Customs to perform various functions that together constitute “administration . . . with respect to” collected antidumping and countervailing duties. 28 U.S.C. § 1581(i)(4).

Plaintiff cites a decision of the U.S. Court of Appeals for the District of Columbia Circuit, *International Labor Rights, Education, & Research Fund v. Bush*, 954 F.2d 745 (D.C. Cir. 1992) (per curiam), in arguing that jurisdiction is lacking here. Pl.’s Mem. 3–4. That case involved an action brought by human rights organizations and labor unions to compel Executive Branch enforcement of a provision in the Generalized System of Preferences (“GSP”) statute, 19 U.S.C. § 2462(b)(7), under which the President is to deny GSP beneficiary status to any country that has not taken or is not taking steps to afford workers internationally-recognized worker rights. Plaintiff argues that the Court of Appeals for the D.C. Circuit held that the case “should be heard in the district court, rather than in the Court of International Trade.” Pl.’s Mem. 3. *International Labor Rights* is neither precedent binding on this court nor on point, and plaintiff’s characterization of the holding is incorrect. The only holding in the case is that the district court was correct in dismissing the action. Of the two judges in the majority, each of whom filed a separate opinion concurring in the court’s per curiam affirmance of dismissal, one concluded that exclusive jurisdiction was in the Court of International Trade under 28 U.S.C. § 1581(i)(2) on the reasoning that the GSP statute is a law providing for duties, 954 F.2d at 746–48 (Hend-

¹¹ In support of this argument, plaintiff cites Harbor Maintenance Tax provisions in the Internal Revenue Code that address separately administrative and spending matters, Mem. of Law in Supp. of Pl.’s Mot. to Dismiss for Lack of Subject Matter Jurisdiction, Or, in the Alternative, for Leave to Amend the Compl. 6–7 (Mar. 29, 2011), ECF No. 84 (citing 26 U.S.C. §§ 4462(f)(3), 9505), and cites subtitle III of the Tariff Act, which is entitled “Administrative Provisions,” but, according to plaintiff, “says nothing about the distribution of the proceeds,” Pl.’s Reply 8. These tangential arguments fail to address directly the question of the intended meaning of the term “administration” as used in the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4).

erson, J., concurring) and the other, although finding subject matter jurisdiction in the district court, concluded that all plaintiffs lacked standing, *id.* at 748–52 (Sentelle, J., concurring).

Upon considering the plain language of 28 U.S.C. § 1581(i)(4), the relevant legislative history of the Customs Courts Act, and plaintiff’s arguments, we conclude that § 1581(i)(4) provides subject matter jurisdiction over this case.

B. Plaintiff Fails to State a Claim upon which Relief Can Be Granted

Plaintiff brings two claims in its Second Supplemental Complaint. Both are premised on the contention that the petition support requirement in the CDSOA is constitutionally impermissible. Plaintiff claims, first, that the ITC, in applying that requirement to deny Furniture Brands’ requests for ADP status, “disregarded this Court’s rulings” in *SKF USA I* and *PS Chez Sidney I*. Second Supplemental Compl. ¶¶ 53–56. Second, plaintiff claims that Customs unlawfully ignored these two holdings in refusing to distribute CDSOA funds to Furniture Brands. *Id.* ¶¶ 57–59.

The Second Supplemental Complaint, filed October 8, 2008, predated the 2009 decisions of the Court of Appeals that overturned *SKF USA I* and *PS Chez Sidney I*. The court must now dismiss that complaint under USCIT Rule 12(b)(5) because the complaint does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). *SKF USA II* held that the CDSOA is valid under the First and Fifth Amendments to the U.S. Constitution. 556 F.3d at 1360 (“[T]he Byrd Amendment is within the constitutional power of Congress to enact, furthers the government’s substantial interest in enforcing the trade laws, and is not overly broad.”); *id.* at 1360 n.38 (“For the same reason, the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech.”); *id.* at 1360 (“Because it serves a substantial government interest, the Byrd Amendment is also clearly not violative of equal protection under the rational basis standard.”). As the facts alleged in plaintiff’s complaint admit, Furniture Brands did not indicate to the ITC, either by letter or through questionnaire response, support of

¹² Defendant Customs and defendant-intervenors moved for judgment on the pleadings under USCIT Rule 12(c), and defendant ITC moved for dismissal for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(5). The court reviews each motion as a motion to dismiss for failure to state a claim upon which relief can be granted under USCIT Rule 12(b)(5). Judgment on the pleadings is unavailable until the pleadings have closed, which has yet to occur as no answers to the Second Supplemental Complaint have been filed.

the petition seeking antidumping duties on wooden bedroom furniture from China. Second Supplemental Compl. ¶¶ 27, 33, 44. Where, as here, an ITC injury determination was required and the ITC's records permit identification of those in support of a petition, the list of interested parties "in support of the petition with respect to which an antidumping order . . . has been entered," 19 U.S.C. § 1675c(b)(1)(A), consists of "persons that indicate support of the petition by letter or through questionnaire response," *id.* § 1675c(d)(1). The admitted facts demonstrate that Furniture Brands did not satisfy the petition support requirement in the CDSOA.

Plaintiff advances several arguments why this action should not be dismissed. First, plaintiff argues that the Court of Appeals adopted a construction of the CDSOA in *SKF USA II* under which it was impermissible for the ITC and Customs to deny Furniture Brands CDSOA distributions based solely on expression rather than on actions. Pl.'s Mem. in Opp'n to Defs. U.S. Customs & Border Protection & U.S. Int'l Trade Comm'n's Mots. to Dismiss 12–18 (Jun. 6, 2011), ECF No. 102 ("Pl.'s June Opp'n") (citing *SKF USA II*, 556 F.3d at 1353). Plaintiff asserts as a fact that it was denied CDSOA distributions based solely on expression, *i.e.*, its informing the ITC in a questionnaire response that it opposed the wooden bedroom furniture petition, rather than its actions, and that, in accordance with *SKF USA II*, that denial now must be found to be contrary to the First Amendment. *Id.* at 16–17.

Plaintiff's argument misinterprets the holding of *SKF USA II*. The case does not hold that an otherwise-eligible party may not be denied CDSOA distributions merely because the party expressed opposition to, or failed to express support for, a petition. It holds, instead, that the CDSOA, in imposing the petition support requirement, does *not* violate the First Amendment. The Court of Appeals concluded that the CDSOA meets the appropriate First Amendment legal standard, which the Court of Appeals determined to be the standard applying to regulation of commercial speech. *SKF USA II*, 556 F.3d at 1354–55. The Court of Appeals did state, as plaintiff highlights, that "[t]he language of the Byrd Amendment is easily susceptible to a construction that rewards actions (litigation support) rather than the expression of particular views" and that "a limiting construction of the statute is necessary to cabin its scope so that it does not reward a mere abstract expression of support." *Id.* at 1353; Pl.'s June Opp'n 13. These statements in the *SKF USA II* opinion must be read in the proper context, which was a discussion of statutory language as an alternative to previous discussion in the opinion on congressional purpose. These statements are part of the analysis by which the

Court of Appeals subjected the CDSOA to First Amendment standards for the regulation of commercial speech. They do not signify a holding that the First Amendment prohibits government agencies implementing the CDSOA from conditioning ADP status on the expression of support for a petition. Whether or not construed as an “as applied” challenge to the petition support requirement, plaintiff’s argument must fail.¹³

Plaintiff argues, next, that this court should apply strict scrutiny to the petition support requirement rather than the intermediate level of scrutiny applied by the Court of Appeals in *SKF USA II*. Pl.’s June Opp’n 18–22. Attempting to distinguish this case from *SKF USA II*, plaintiff argues that intermediate scrutiny is appropriate only for commercial speech, which, according to plaintiff, does not describe the nature of Furniture Brands’ opposition to the wooden bedroom furniture petition. *Id.* at 18. Plaintiff alleges that Furniture Brands’ “primary reasons for opposing the petition . . . were rooted in the company’s public policy judgment that, in the long run, American industry would be harmed by the imposition of duties.” *Id.* (“[U]nlike SKF, this case concerns speech on matters of public concern, subject to strict scrutiny.”). In arguing that it has raised a valid as applied challenge, plaintiff again misinterprets *SKF USA II*. Neither the holding nor the reasoning of the case depends on the specific motivations of plaintiff SKF USA in opposing the petition then at issue. Instead, the case concluded that the established First Amendment standard for regulation of commercial speech was the correct legal test for determining the constitutionality of the CDSOA petition support requirement. *SKF USA II*, 556 F.3d at 1354–55. Discussing how the CDSOA applies generally to affected parties, and not referring specifically to the speech of SKF USA, the Court of Appeals reasoned that “[r]ewarding parties under the circumstances here is similar to commercially contracting with them to assist in the performance of a government function” and that “rewarding those who support government enforcement is at least constitutional if those provisions satisfy the standards governing commercial speech.” *Id.*

Next, plaintiff attempts to distinguish *SKF USA II* on the ground that Furniture Brands, unlike the plaintiff in *SKF USA II*, is not foreign-owned, arguing that the petition support requirement as applied to Furniture Brands is, in this respect, “[u]nconstitutionally

¹³ The court observes, without deciding for purposes of adjudicating this case, that “as applied” First Amendment challenges in the commercial speech context may be disfavored generally. See *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 430–31 (1993) (“[We] judge the validity of the restriction in this case by the relation it bears to the general problem . . . not by the extent to which it furthers the Government’s interest in an individual case.”).

[o]verbroad.” Pl.’s June Opp’n 22 (citing *Central Hudson Gas & Electric v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980)). Alluding to language in *SKF USA II* in which the Court of Appeals reasoned that a purpose of the CDSOA was to prevent dumping, plaintiff bases its argument on the specific statement by the Court of Appeals that “Congress could permissibly conclude that it is not required to reward” a party opposed to a petition because “[o]pposing parties’ interests lie in defeating the petition, typically (as is the case here) because the domestic industry participant is owned by a foreign company charged with dumping.” *Id.* at 23–24 (quoting *SKF USA II*, 556 F.3d at 1358). According to plaintiff, “[t]hat rationale for disqualifying SKF from receiving Byrd Amendment distributions cannot justify the application of the ‘support’ requirement to disqualify” Furniture Brands, which plaintiff argues is not foreign-owned. *Id.* at 24.

Plaintiff’s argument that the CDSOA is unconstitutionally overbroad as applied to Furniture Brands is misguided in attempting to draw a distinction based on the ownership of a plaintiff challenging the CDSOA as violative of the First Amendment. The Court of Appeals reasoned that “the purpose of the Byrd Amendment’s limitation of eligible recipients was to reward injured parties who assisted government enforcement of the antidumping laws by initiating or supporting antidumping proceedings.” *SKF USA II*, 556 F.3d at 1352. It further reasoned that “the Byrd Amendment directly advances the government’s substantial interest in trade law enforcement by rewarding parties who assist in this enforcement,” *id.* at 1355, and that the CDSOA’s effect on protected expression was not “overly broad,” *id.* at 1360. The Court of Appeals considered it permissible under the First Amendment for Congress to decline to reward domestic parties who did not support a petition. *See id.* at 1358. The Court of Appeals did not condition that conclusion on a circumstance in which the party declining to support the petition is foreign-owned. For its argument, plaintiff seizes on language in *SKF USA II* that is not part of the holding of the case. The language refers only to the *likelihood* that ownership by a respondent in an antidumping proceeding will be the reason why a party opposes a petition. *Id.* (“Opposing parties’ interests lie in defeating the petition, typically (as is the case here) because the domestic industry participant is owned by a foreign company charged with dumping.”). Nothing in *SKF USA II* indicates that the Court of Appeals confined its holding to CDSOA First Amendment challenges brought by foreign-owned plaintiffs. And as the court explained previously, the holding of the case does not attach significance

to the reasons why an individual plaintiff who challenges the petition support requirement on First Amendment grounds actually opposed the petition.

Finally, plaintiff's July 8, 2011 submission draws the court's attention to the Supreme Court's recent decision in *Sorrell v. IMS Health Inc. Pl.'s Additional Authority Letter 1* (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653). According to plaintiff, "*Sorrell* holds that heightened scrutiny must be given to content-based regulations of commercial speech, and that in the ordinary course, such regulations cannot survive heightened scrutiny." *Id.* Plaintiff argues that *Sorrell* "rejects key premises of" the decision of the Court of Appeals in *SKF USA II* "so that *SKF* can no longer be considered good law." *Id.* Plaintiff argues in the alternative that "at the very least, *Sorrell* shows that the *SKF* decision must be read narrowly" such that Furniture Brands "is entitled to prevail on its First Amendment claim despite *SKF*." *Id.* The court rejects both of these arguments.

Sorrell struck down a Vermont statute, the "Prescription Confidentiality Law," that in its central provision, § 4631(d), prohibited, subject to certain exceptions, the sale, disclosure, and use of information obtained from pharmacy records that revealed the drug prescribing practices of individual physicians. *Sorrell*, 131 S. Ct. at 2660 (citing Vt. Stat. Ann. tit. 18, § 4631(d) (2009)). The information the statute restricted was useful to drug manufacturers in the marketing of brand-name, patented prescription drugs. *Id.* The statute, which was accompanied by a legislative finding that the marketplace for ideas on medicine safety and effectiveness is frequently one-sided in favor of brand-name drug companies, promoted the dissemination of information on generic drugs for which patents had expired. *Id.* at 2661. The Supreme Court concluded that the statute prohibited pharmacies, health insurers, and similar entities from disclosing or using the information in question for marketing but allowed sale to, and use by, private or academic researchers for other purposes and thereby "enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Id.* at 2662–63. Under the Supreme Court's analysis, the Vermont law "forbids sale" of the information "subject to exceptions based in large part on the content of a purchaser's speech," disfavors "marketing, that is, speech with a particular content," and "disfavors specific speakers, namely, pharmaceutical manufacturers." *Id.* Noting that the Vermont legislature, in stating the statutory purpose of the Prescription Confidentiality Law, had targeted for disfavored treatment "detailers," *i.e.*, certain persons who used the prescriber-identifying information to promote brand-name drugs on behalf of pharmaceutical manufacturers, the

Supreme Court concluded that the Vermont statute, in its practical application, “goes even beyond mere content discrimination, to actual viewpoint discrimination.” *Id.* (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)).

Because the Vermont statute “is designed to impose a specific, content-based burden on protected expression,” the Supreme Court concluded that “heightened judicial scrutiny is warranted.” *Id.* at 2664. The Supreme Court concluded that, in light of the restrictions placed on disfavored speech, the commercial nature of the speech was not a reason for the statute to escape heightened scrutiny, *id.*, under which “the State must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest,” *id.* at 2667–68. The Court decided that the State of Vermont failed to make that showing. The Court reasoned that a purpose the State advanced in support of the statute, promoting medical privacy and physician confidentiality, does not suffice where, as here, the law allows wide dissemination of the information but prohibits its use by a narrow class of disfavored speakers, the detailers, and for a disfavored use, marketing. *Id.* at 2668. Another purpose the State advanced in support of the Prescription Confidentiality Law, reducing health care costs and promoting public health, also failed to justify the burden on speech. *Id.* In restraining certain speech by certain speakers, and specifically, in diminishing the ability of detailers to influence prescription decisions, the statute sought to influence medical decisions by keeping physicians from receiving the disfavored information. *Id.* at 2670. “As Vermont’s legislative findings acknowledge, the premise of § 4631(d) is that the force of speech can justify the government’s attempts to stifle it.” *Id.* at 2671. Opining that Vermont was free to engage in its own speech if it wanted to convey views to compete with those of the detailers, the Supreme Court admonished that “[t]he State may not burden the speech of others in order to tilt public debate in a preferred direction.” *Id.*

The court disagrees with plaintiff’s argument to the effect that *Sorrell* implicitly overturns *SKF USA II*. Nothing in the Supreme Court’s holding in *Sorrell* requires that plaintiff’s constitutional claims avoid dismissal under the *SKF USA II* precedent. Although reaching opposite First Amendment outcomes, the two cases analyze dissimilar statutes, which vary considerably in the nature and degree of the effect on expression and, most significantly, differ in purpose. The Vermont statute at issue in *Sorrell* authorized civil remedies against those selling or using the prescriber-identifying information, engaged in content-discrimination and, in practical application, also

discriminated by viewpoint. *Id.* at 2660. The CDSOA does not have as a stated purpose, or even an implied purpose, the intentional suppression of expression. The Court of Appeals expressly so concluded in its opinion. *SKF USA II*, 556 F.3d at 1351–52. Nor does *Sorrell* require us to subject the CDSOA to a new First Amendment analysis differing from that applied by the Court of Appeals. In *Sorrell*, the Supreme Court stated that “the State must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest.” 131 S. Ct. at 2667–68 (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989); *Central Hudson*, 447 U.S. at 566). In *SKF USA II*, the Court of Appeals, having decided that “SKF’s opposition to the anti-dumping petition is protected First Amendment activity,” 556 F.3d at 1354, applied the same test, which it referred to as the “well established *Central Hudson* test” and which it described as requiring that regulation of commercial speech be held permissible if the asserted governmental interest is substantial, the regulation directly advances that interest, and the regulation is not more extensive than is necessary to serve that interest, *id.* at 1355 (citing *Central Hudson*, 447 U.S. at 566).

Also unconvincing is plaintiff’s argument that *Sorrell* compels a narrow reading of the holding in *SKF USA II* under which plaintiff, on the facts of this case, is entitled to prevail on its claims. To support this argument, plaintiff points again to the fact that Furniture Brands is not foreign-owned and to the reasons why Furniture Brands opposed the petition on wooden bedroom furniture. *Pl.’s Additional Authority Letter* 3. Plaintiff essentially is repeating two of the arguments that it made in support of its “as applied” challenges to the CDSOA and that the court has rejected. Plaintiff asserts once more that it was denied Byrd Amendment distributions because of the content of its speech and, specifically, the viewpoint it expressed when opposing the petition. *Id.* For the reasons the court has explained, *SKF USA II* is controlling precedent in this case, notwithstanding the alleged facts and circumstances on which plaintiff relies. *Sorrell* does not compel a “narrow reading” of *SKF USA II* under which the court may conclude that plaintiff’s constitutional claims are not foreclosed by the *SKF USA II* holding.

C. Plaintiff’s Motion to Amend the Complaint Is Properly Denied on the Ground of Futility

“When a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its plead-

ing states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion.” *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 1354–55 (Fed. Cir. 2006). The proposed new claims must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

Plaintiff seeks to add two new claims (Counts 3 and 4) to this action. Third Amended Compl. ¶¶ 60–67. Because neither Count 3 nor Count 4 makes out a plausible claim for relief under the set of facts alleged in the proposed Third Amended Complaint, adding these new claims would be futile. The court, therefore, will deny plaintiff’s motion to amend.

In Count 3, plaintiff would claim that the government’s denials of ADP status were contrary to the CDSOA as construed by the Court of Appeals in *SKF USA II* and therefore “not in accordance with law, in violation of 5 U.S.C. § 706.” *Id.* ¶¶ 62–63. Plaintiff argues that the Court of Appeals in *SKF USA II* “adopted a construction of the CDSOA intended to avoid the First Amendment infirmities that would result from conditioning eligibility for a CDSOA distribution on a party’s expression.” *Id.* ¶ 61. According to Count 3, under this construction “Furniture Brands should be regarded as having ‘supported the petition’ because of the voluminous information it provided to the ITC to assist in the ITC’s determination whether the dumping of Chinese goods caused material injury to domestic injury.” *Id.* ¶ 62. The providing of information to the ITC during the wooden bedroom furniture investigation, as plaintiff alleges in Count 3 to have occurred, would not satisfy the petition support requirement in the CDSOA. Therefore, even if the new factual allegations were added to the complaint, Furniture Brands, which expressed its opposition, rather than its support, to the ITC for the wooden bedroom furniture petition, would still not satisfy the petition support requirement. See 19 U.S.C. § 1675c(b)(1), (d)(1). *SKF USA II* did not construe the CDSOA to require or permit a party who provided the ITC information but who failed to indicate support for (and indeed opposed) the relevant petition to qualify as an ADP.

In Count 4, plaintiff seeks leave to claim that defendants’ determinations that plaintiff was ineligible for CDSOA distributions were “arbitrar[y] and capricious[], in violation of 5 U.S.C. § 706” because “the administrative record makes clear that [defendants] relied solely on Plaintiff’s expression of opposition and did not consider any evidence relating to Plaintiff’s actions.” Third Amended Compl. ¶¶ 64–67. Under the CDSOA, defendants lacked discretion to grant

Furniture Brands ADP status because Furniture Brands, according to the facts plaintiff admits, did not satisfy the petition support requirement. For the reasons we discussed previously in this Opinion, the alleged fact that defendants relied solely on the expression of opposition in denying plaintiff ADP status, if presumed to be true, could not alter our conclusion. Rather than construe the CDSOA to prohibit a denial of ADP status on an administrative record such as that which plaintiff alleges in Count 4 to exist in this case, *SKF USA II* upheld the petition support requirement as valid under the First and Fifth Amendments to the Constitution.

IV. CONCLUSION

The Second Supplemental Complaint must be dismissed for failure to state a claim upon which relief can be granted. The court will deny as futile plaintiff's motion to amend the complaint. Judgment dismissing this action will be entered accordingly.

Dated: October 20, 2011

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU

JUDGE

Slip Op. 11-133

FIRSTRAX, DIV. OF UNITED PET GROUP, INC., Plaintiff, v. UNITED STATES,
Defendant.

Court No. 07-00097

[Upon cross-motions as to classification of *port-a-crates*, summary judgment for the plaintiff.]

Dated: October 21, 2011

Barnes Richardson & Colburn (Lawrence M. Friedman and Shama K. Patari) for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Jason M. Kenner); and Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection (*Beth Brotman*), of counsel, for the defendant.

OPINION

AQUILINO, Senior Judge:

This test case contests classification by U.S. Customs and Border Protection ("CBP") of merchandise imported from China for the plain-

tiff *sub nom.* *port-a-crate*® under copious heading 4202 of the 2005 Harmonized Tariff Schedule of the United States (“HTSUS”), to wit,

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper[.]

in particular, subheading 4202.92.9026 (“Other . . . With outer surface of sheeting of plastic or of textile materials . . . Other . . . Other . . . Other: Of man-made fibers . . . 17.6%”). The importer duly protested that the goods should have been classified as other made up (textile) articles within the meaning of HTSUS subheading 6307.90.9889.

Upon CBP denial of the protest and liquidation of the duties claimed, the plaintiff filed its complaint herein that has been answered by the defendant, which thereafter interposed a motion for summary judgment upon the joined issue(s). Plaintiff’s simultaneously-filed response is in the form of a cross-motion for summary judgment.

I

The court’s jurisdiction is pursuant to 28 U.S.C. §§ 1581(a) and 2631(a), and its Rule 56(h)(1) requires that any motion for summary judgment contain a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

Defendant’s motion contains such a statement, in part, as follows:

1. The imported merchandise consists of 12 models of soft crates.
2. Soft crates are a subset of the pet containment category of pet products.
3. The pet containment line of products also includes plastic crates and wire kennels.
4. Each of the 12 models of soft crates is comprised of a metal skeleton covered by a textileskin.
5. The soft crates are portable products designed to transport a docile or crate-trained pet in the back of a sport utility vehicle (“SUV”).

6. The soft crates at issue are products designed to contain docile or crate-trained pets in the home, at a friend's home, at the park, on camping trips, etc.

7. The soft crates at issue vary in size based on the size of animal they are designed to contain.

8. The soft crates at issue range in size from those used to contain and transport 10 pound pets to those used to contain and transport 70 pound pets.

9. All models of the soft crates at issue are designed to protect a docile or crate-trained pet in the car by keeping them contained in the back of the vehicle, and preventing them from impeding the driver.

10. All models of the soft crates at issue protect docile or crate-trained pets from the sun when used out[]doors.

11. All models of the soft crate at issue offer docile or crate trained pets protection from running away and/or getting lost when used at the park, camping, or anywhere outdoors.

12. All models of the soft crates at issue are designed to be portable.

13. All models of the soft crates at issue are designed to prevent unwanted behavior such as jumping on visitors by confining the pets.

14. The soft crates at issue are designed to contain a docile or crate-trained pet for reasonable lengths of time.

15. The soft crates at issue are designed to contain a docile or crate-trained pet in the home, thus preventing the pet from damaging furnishings in the home.

16. The soft crates are designed to contain trained pets until such time as their owners let them out.

17. The soft crates at issue offer certain levels of protection for pets placed inside of them.

18. Soft crates are a product designed to contain docile pets.

19. All models of the soft crate at issue are designed to keep docile or crate-trained pets in their proper place both in and out of the home, including during transport in an SUV.

The defendant proffers support for each of these representations, the citations to which have been omitted in the interest of brevity.

Plaintiff's written response to the foregoing admits 1, 2, 3, 4, 7, 10, 12, 13, and 17. Its crafted reply to the other averments is:

5. Denies. Plaintiff avers that the soft crates have no design features or characteristics making them suitable for transporting pets.

6. Denies that soft crates are products only designed to contain docile or crate-trained pets in the home, at a friend's home, at the park, or on camping trips. Admits that soft crates provide a den-like home for dogs in those settings.

8. Denies that soft crates transport or contain pets while they are housed and in use. Admits that soft crates range in size from those used to house 10 pound pets to those used to house 70 pound pets. . . . Plaintiff avers that the pound measurement is irrelevant and intended only as an approximation of physical size.

9. Denies that soft crates were designed to protect pets by keeping them contained in the back of a vehicle. Admits that soft crates may occasionally be used to provide home environments for pets and to prevent crate-trained pets from distracting the driver of a motor vehicle.

11. Denies. Plaintiff avers that the level of protection provided by soft crates is not meaningful.

14. Denies. Plaintiff avers that the soft crates are designed to house pets for a reasonable length of time.

15. Denies. Plaintiff avers that the soft crates provide an indoor home environment for the docile or crate-trained dogs. . . . Because dogs cannot be permanently contained, the soft crates do not protect home furnishings.

16. Denies that soft crates are designed to contain trained pets until such time as their owners let them out. Admits that soft crates are designed to house pets for as long as they like to be housed.

18. Denies. Plaintiff avers that the soft crates are de[signed] to house docile pets.

19. Denies that soft crates have any design features adapting them to use in any vehicle. . . . Denies that the soft crates are designed to keep docile pets in their proper place at home or during transport in an SUV. Admits that soft crates are designed to provide den-like homes for pets both in and out of the home.

Citations omitted.

In support of its own cross-motion for summary judgment, the plaintiff has filed a Rule 56(h) Statement of Material Facts to Which No Genuine Dispute Exists, which the defendant correctly points out is not in keeping with the letter or the spirit of the rule, given its 21 pages and 178 individual averments. To sift out some of them:

10. Soft crates were created to fill a need in the pet industry for soft-sided temporary pet homes.

11. Based on its own market research in 2001, Firststrax determined that there was a need for a hospitable and aesthetic alternative to rigid wire crates or plastic carriers.

12. The marketing target of Firstrax was to create a niche market for docile or crate-trained pets, in particular dogs, to have a soft-sided crate that provides a “den” or “cave-like” environment.

13. The soft crates were designed to have furniture and a home decor aesthetic, rather than a harsh wire or molded plastic aesthetic.

20. The soft crates are constructed of nylon fabric stretched over a cube made of tubular steel.

21. The steel structure consists of a top and bottom rectangular tube structure connected at each of the four corners by four vertical poles.

22. The steel structure is designed to be collapsed or set up in one movement, without the use of tools.

23. The initial design innovation involved creating a slide and snap locking mechanism on the tubular structure for easy set up, which also folds flat for easy movement and storage.

24. The tubular structure supports only the edges of the cube: the top, sides and bottom of the soft crates consist solely of nylon fabric.

25. The sides and doors of the crates have mesh windows.

26. The doors and entry points have a zip closure that is designed to be rolled up and secured with a strap to allow the door to remain open if desired.

28. During the production process, the strength of the inner steel tubular structure was tested informally by having a 100-pound employee stand on the steel structure only.

29. The main concern of the testing was to *see* if the steel tubular structure would warp under too much weight, resulting in the inability for the mounting mechanism to function properly.

30. There were no tests conducted regarding the weight that the crate would carry, as this was not the intended purpose of the soft crates.

36. Soft crates are designed to rest on a solid surface, such as the floor or ground, which provides the needed support so that the weight of the pet does not cause the bottom of the crate to buckle or tear.

37. The strength of the bottom and side panels was not tested during the design or production stage because the bottom panel was never designed to resistor carry weight.

38. Some models of the soft crates have fabric tabs with grommets to allow the crates to be staked into the ground for outdoor use.

39. The soft crates were initially designed to be a portable area for pets, similar to playpens, which are designed to provide a comfortable environment for children either in their own homes or at travel destinations, but not to carry or transport children.

42. For the smaller models, handles were placed on the top of the models to aid in moving the empty soft crates from place to place without having to collapse it.

43. The smaller models were not designed to be moved with the pets inside them because there is no rigid bottom on the soft crate to support the pet during transport.

44. None of the soft crate models were [*sic*] tested to *see* if they could accommodate the weight listed, because they were not designed to be weight-bearing crates.

45. The soft crates were designed to be stationary homes.

46. For larger models, handles were placed along the bottom of the side panel, so the empty crate could be folded flat and carried from place to place when collapsed, much like an architect's portfolio.

52. The soft crates were not designed to duplicate the function of pet carriers, because of the lack of rigid bottom and awkwardness in carrying.

74. The soft crates are used by the pet to allow it to take a break and to provide the pet with [a] preferred place to sleep at night.

86. The soft crates, if properly used, . . . are portable pet homes for dogs that have been trained to accept them as their den or home.

93. Soft crates can not replace a [wire or plastic] kennel if the intent of the pet owner is to securely contain a dog or animal.

98. The fabric used for the soft crates is not waterproof, nor is it insulated.

99. The top and sides of the soft crates do not have the capacity of protecting a pet inside from cold, rain or snow.

100. If they are used outside, they are appropriate for use in late spring and summer in most climates.

108. The soft crate does not provide the security normally associated with wire kennels or plastic crates.

111. In contrast to the wire crates and plastic carriers that already existed in the market, the soft crates were designed to have rounded corners so that they would fit in the home environment without damaging floors or car seats when the empty crate was being moved about.

117. . . . [T]he fabric shell and mesh windows can be torn by any pet improperly confined in a soft crate.

118. Improper confinement means using the soft crate as a kennel and not as a pet home.

121. In contrast to rigid plastic, wood, or metal kennels that were designed for the secure containment of pets, the zipper and latch of a soft crate will not prevent a dog from easily escaping a soft crate by ripping through the fabric.

122. Soft crates were not designed with structural or weight bearing requirements that would enable the soft crates to be used for the purpose of transporting pets.

123. The soft crates do not meet the IATA airline transport safety standards for either domestic or international flight.

125. Soft [c]rates are not small enough to fit under the seat; they are not sturdy enough for cargo area.

127. The purpose of pet carriers is to safely and securely transport an animal.

128. Pet carriers are usually constructed of “high impact molded plastic.”

129. Pet [c]arriers have 1) the structural integrity to withstand transit while protecting the animal inside; 2) secure locking mechanisms to prevent escape; 3) rigid floor construction that allows the animal to stand when the carrier is either carried, or placed on an uneven surface; and 4) non-absorbent, leak proof floor material that will contain small amounts of urine to protect surfaces the carrier is place[d] on[.]

135. For soft crates, water and urine spills will soak into the bottom, making it unsuitable for the transport or containment of pets over any extended period of time.

136. Any carrier intended by design as suitable for airline use must comply with U.S. domestic and IATA international standards for both cargo and in-cabin transport.

140. Carriers and kennels must have a rigid bottom and a stable base that is integral to the unit, which, unlike the soft crates, do not rely on the ground or floor to support the animal inside.

141. Pet carriers or kennels used for the transport of pets constructed of steel wire or rigid plastic are strong enough to reasonably prevent even untrained pets from escaping.

143. In the event that a soft crate is used in a motor vehicle, the crate should be first put in the vehicle, and the pet then placed in the crate.

144. The purpose of using a soft crate in a motor vehicle is to provide the pet with a comfortable home environment rather than to provide the pet safe and secure transport.

145. . . . [T]he design features of the soft crate are not intended to make them a safe means of transporting pets in a moving motor vehicle.

148. Soft crates do not have loops incorporated into their structure that would allow the crates to be strapped in using seat belts.

149. Use in a motor vehicle is strictly for docile, crate-trained dogs to provide a safe and anxiety free environment for a traveling pet.

155. In contrast to the soft crates, pet carriers designed for use in motor vehicles include features such as tie-down strap holes molded into the rigid plastic of the carrier body, or have molded clips which can secure the pet carrier with a seat belt or other tie down strap.

156. Pet carriers are sized to limit the pet's ability to move around while . . . inside . . . so that the pet is encouraged to lie down.

157. The lack of extra space helps to protect the pet during a sudden severe driving maneuver or crash.

158. Neither the steel frame nor the soft crate nylon cloth exterior were designed to withstand impacts likely to "result from a vehicle crash, sever[e] maneuver, or from other stationary or loose objects in a vehicle that could damage the soft crate and the pet inside under crash conditions."

163. The locking system of the tubular structure could collapse if a pet were put inside the soft crate and the crate would be lifted or carried.

164. In addition, the non-rigid fabric bottom would stretch with the weight of the pet inside when lifted up, with the potential for the pet to eventually fall through the bottom panel.

165. For the smaller sized crates, the unsupported bottom panel would sag under the weight of the pet, causing the pet to be uncomfortable.

166. The lack of a rigid bottom panel on the soft crates makes them unsuitable for transporting pets inside them.

167. Although some of the smaller sizes originally had shoulder straps, it was determined that it was impractical to carry the crate in this manner, because its steel structure makes the carrier shift weight and lean over the crate to compensate for the awkward angle of the crate hanging from a shoulder strap.

168. The handles incorporated onto the top of the smaller crates were intended to allow consumers the option of moving the soft crate around without the pet inside, without having to collapse the crate and reassemble it at the destination.

169. There are no handles incorporated onto the larger crates, because of the impracticality of moving a large soft crate without first collapsing it.

170. The soft crates do not provide any pockets for interior organization of the pets or their accessories, because they are designed to provide an enclosed space to house a pet.

171. The soft crates are not designed to hold toys, cushions, or blankets. These items may be placed inside the crates, but they would have to be removed when the crate is folded for transport, because the crates fold completely flat.

172. The soft crates of the type at issue in this case are not intended to serve as an organizer of pet toys, treats, bedding, etc.

173. Dogs can and do escape from soft crates.

174. It is not recommended, or even feasible in some cases, to leave a pet inside a soft crate for an extended period of time.

175. Dogs would only stay in a soft crate for time periods that are reasonable based on the training that the dog has had.

176. The length of time a pet could stay in a soft crate would depend on factors such as the time duration used during training, the health and age of the pet, and . . . feeding and watering requirements.

Citations omitted.

Defendant's even-lengthier Response to Plaintiff's Separate Statement of Undisputed Facts admits outright or in sum and substance plaintiff's foregoing paragraphs 13, 20, 21, 25, 26, 30, 38, 42, 43, 44, 46, 98, 100, 111, 123, 127, 136, 143, 145, 148, 149, 179, 171, 175, and 176. It either denies or pleads lack of information sufficient to answer all of the other averments of the plaintiff quoted above.

II

Whatever the precise disagreements between the parties regarding the facts herein, their cross-motions for summary judgment are clearly well-founded. That is, the court concludes after consideration of the foregoing statements that there is no genuine issue of material fact that requires trial within the meaning of USCIT Rule 56 and teaching of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and their progeny. The dispute is simply a matter of law, to wit, interpretation of provisions of the HTSUS.

Plaintiff's merchandise at bar is not found therein *eo nomine*, whereupon CBP defends its classification under heading 4202 via *eiusdem generis*. In *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326 (Fed.Cir. 2005), the court pointed out in another classification case focusing on the very same heading that

eiusdem generis requires that, for any imported merchandise to fall with [its] scope . . . , the merchandise must possess the same essential characteristics or purposes that unite the listed exemplars

423 F.3d at 1332, citing *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed.Cir. 1994).

However, a classification under the *ejusdem generis* principle “is inappropriate when an imported article has a specific and primary purpose that is inconsistent with that of the listed exemplars in a particular heading.”

Id., quoting *Avenues in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed.Cir. 1999). And the court of appeals proceeded to point out that it had previously held that

“the common characteristic or unifying purpose of the goods in heading 4202 consist[s] of ‘organizing, storing, protecting, and carrying various items.’”

Id., quoting *Avenues in Leather, Inc. v. United States*, 317 F.3d 1399, 1402 (Fed.Cir. 2003).

Following this approach does not lead this court to conclude that plaintiff’s *port-a-crates* land within the ambit of HTSUS heading 4202.

A

To quote the paragon American lexicon, to “organize” is to “arrange or constitute in interdependent parts, each having a special function, act, office or relation with respect to the whole”. Webster’s New International Dictionary of the English Language, Unabridged, p. 1719 (2d ed. 1934). Defined another way, organize means “to bring together or form as a whole or combination, as for a common objective.” Funk & Wagnalls Standard Dictionary of the English Language, p. 890 (int’l ed. 1963).

In the context of heading 4202, organization implies multiple items placed together in a single container. *See, e.g., Totes, Inc. v. United States*, 18 CIT 919, 865 F.Supp. 867 (1994) (automotive tools and supplies in tool cases), *aff’d*, 69 F.3d 495 (Fed.Cir. 1995); *Len-Ron Mfg. Co. v. United States*, 24 CIT 948, 118 F.Supp.2d 1266 (2000) (multiple cosmetics in cases therefor), *aff’d*, 334 F.3d 1304 (Fed.Cir. 2003); *Processed Plastic Co. v. United States*, 29 CIT 1129, 395 F.Supp.2d 1296 (2005) (children’s toys in children’s backpacks), *aff’d*, 473 F.3d 1164 (Fed.Cir. 2006).

The plaintiff is correct in pointing out that named exemplars of heading 4202 are specifically designed to organize a number of items. Here, each *port-a-crate* is intended for only one pet. None is designed for more than a single animal. Unlike toiletry bags, for example, which often have multiple subcompartments, the crates are “soft-

sided temporary doghouses” “developed with only one compartment and intended to house only a dog”. Indeed, it is doubtful that anxious dogs (or cats) are capable of “organization”¹ in such goods, unlike the way toiletries or pairs of socks or pieces of jewelry or of cutlery *et cetera* are.

B

To “store” is to keep or set aside for future use. *See, e.g.*, Webster’s Third New International Dictionary, Unabridged, p. 2252 (1981). Defendant’s preferred definition is:

3. To place or leave in a location (as a warehouse, library, or computer memory) for preservation or use later. As such a particular item’s ability to hold or contain something.

Defendant’s Memorandum, p. 10, citing Merriam-Webster Online Dictionary, <http://merriam-webster.com/dictionary/store> (2009). While containing and storing things are similar, they are not equivalent. Contain is defined as:

- 1: To keep within limits: hold back or hold down: as
 - a: RESTRAIN, CONTROL . . . SUPPRESS . . .
 - b: CHECK, HALT, WITHSTAND, STEM . . .
 - c: to confine (the enemy) to the immediate terrain or to a limited area: prevent (the enemy) from making a breakthrough . . .

Webster’s Third New International Dictionary, Unabridged, pp. 490–91 (1981) (capitalization in original). Whereas to “store” is to put items and other inanimate objects aside for the future, to “contain” can be to restrain or suppress animated things from acting a certain way.

In this case, the plaintiff argues, and the court concurs, that, as a practical matter,

soft crates do not have the ability to store dogs away for later use at the convenience of the owner. First, the dogs must be trained to accept the soft crate as its[*sic*] home. . . . Second, the soft crates provide no means of supplying food or water to dogs, nor do they have a mechanism for dealing with urine or solid waste.

¹ The court understands that “simply ‘containing’ items is at least a rudimentary form of ‘organization’”. *Processed Plastic Co. v. United States*, 29 CIT 1129, 1142, 395 F.Supp.2d 1296, 1309 (2005). However, the test for classification is whether the organizational ability is an essential characteristic of the subject merchandise. *See, e.g., Totes, Inc. v. United States*, 18 CIT 919, 924, 865 F.Supp. 867, 872 (1994). The court cannot so find here.

Therefore, any “containment” function is only incidental to the dog[s] coming and going of its own volition.

Plaintiff’s Response to Defendant’s Motion, p. 7 (citations omitted). The plaintiff, noting defendant’s attempt to equate living, breathing dogs with inanimate objects like tools or beach toys, states further:

. . . Dogs are pets. They are members of the family, working partners, assistants to the disabled, and valuable show dogs. Treating the[m] as items to be stored for later retrieval and use invokes images of the kind of cruel containment devices the soft crate was designed to replace in the home environment. A more apt comparison is to children who may be placed in a corner or play pen, but would not be described as “stored” or “contained.”

Id. at 7.

On their face, exemplars listed in heading 4202 store and/or contain inanimate objects of personal property, not living, breathing animals. They include, *inter alia*, tobacco pouches, suitcases, handbags, wallets, toiletry bags, jewelry boxes, purses, cigarette cases, cutlery cases, musical-instrument cases, camera cases, school satchels, and gun cases. *See generally Totes, Inc. v. United States, supra.*

Port-a-crates on the other hand are not designed to store living four-legged pets. They are made of soft, permeable materials of mesh and nylon, capable of being worn or torn through. Whatever the precise structural integrity of the crates, they are not meant to warehouse their animate visitors. Unlike pet carriers made of rigid materials, such as hard plastic, metal or wood, the soft crates do not comply with either U.S. domestic or IATA international standards for either cargo or in-cabin airline transport.

Rather, a pet could, “if it chooses, chew and tear through the crate at any time. . . . The crate is only meant to act as a home for a dog and is purposely not made to cage or contain a dog.” Plaintiff’s Response to Defendant’s Motion, p. 4 (citations omitted).

C

Nor do the *port-a-crates* provide any significant protection, the third essential characteristic of the heading 4202 exemplars. As set forth above, they are made of nylon and mesh that are permeable to aggressive animal fangs and claws and capable of being torn through. They do not provide much protection from weather elements, as they are not waterproof and do not prevent leakage. They are not airline safe; nor would they protect a pet from being crushed in an automo-

bile collision. Rather, the *port-a-crates* are meant to be used in a home or other stable setting to provide a den-like refuge for their occupants. Any protection from the sun or minor impacts would be incidental, and not their essential purpose.

D

The last defining characteristic of the heading 4202 exemplars is their ability to carry their intended contents, which they will organize, store, and protect. *See, e.g., Totes, Inc. v. United States and Processed Plastic Co. v. United States, supra.* Here, the *port-a-crates'* structure and nylon materials prove they are not meant to hold and transport animals safely. They

are not designed or tested to withstand the weight of a dog when carried. The crates are designed to stand on a solid surface such as a floor. Carrying the crate while the dog is housed inside is not only uncomfortable, . . . it is unsafe for the dog. . . . The crate bottoms are not reinforced or rigid and can buckle under the weight of the dog. . . .

Plaintiff's Response to Defendant's Motion, p. 11 (citations omitted).

While the defendant correctly notes that "[t]here is no weight or structural integrity requirement specified for heading 4202[]"², the crates' design and structure make them incapable of desirable conveyance of their living contents. Hence, the court cannot find that plaintiff's *port-a-crates* are pet carriers.

III

In view of the foregoing, defendant's motion for summary judgment cannot be granted. As for plaintiff's cross-motion, at first blush, classification of the *port-a-crates* as posited under HTSUS chapter 63 (Other Made Up Textile Articles ...) might seem anomalous, but the memorandum of law in support thereof persuades this court that the motion should be granted due to lack of an HTSUS subheading more correct than the basket provided by 6307.90.9889.

Judgment will enter accordingly.

Dated: October 21, 2011

New York, New York

/s/ Thomas J. Aquilino, Jr.

SENIOR JUDGE

² Defendant's Memorandum, p. 15, citing *Processed Plastic Co. v. United States*, 473 F.3d 1164, 1171 (Fed.Cir. 2006).

Slip Op. 11–134

HEBEI FOREIGN TRADE AND ADVERTISING CORPORATION, Plaintiff,
CHERISHMET INCORPORATED, Consolidated Plaintiff, v. UNITED STATES,
AND UNITED STATES DEPARTMENT OF COMMERCE, Defendants, CALGON
CARBON CORPORATION, AND NORIT AMERICAS INC., Intervenor
Defendants.

Before: Jane A. Restani, Judge
Consol. Court No. 09–00524

[Judgment sustaining remand results in non-market economy antidumping duty matter granting separate rate status will be entered.]

Dated: October 24, 2011

Mowry & Grimson, PLLC (Kristin H. Mowry, Jill A. Cramer, Jeffrey S. Grimson, Sarah M. Wyss, and Susan L. Brooks) for the plaintiff, Hebei Foreign Trade and Advertising Company.

Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP (Francis J. Sailer) for the consolidated plaintiff, Cherishmet Incorporated.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); *Thomas M. Beline*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Kelley Drye & Warren LLP (R. Alan Luberda, David A. Hartquist, and John M. Herrmann, II) for the intervenor defendants, Calgon Carbon Corporation and Norit Americas, Inc.

OPINION

Restani, Judge:

This matter comes before the court following its decision in *Calgon Carbon Corp. v. United States*, Slip Op. 11–21, 2011 WL 637605 (CIT Feb. 17, 2011),¹ in which the court remanded *First Administrative Review of Certain Activated Carbon from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 57,995 (Dep’t Commerce Nov. 10, 2009) (“*Final Results*”) and *Certain Activated Carbon from the People’s Republic of China: Amended Final Results of Antidumping Duty Administrative Review*, 74 Fed. Reg. 66,952 (Dep’t Commerce Dec. 17, 2009) (“*Amended Final Results*”), instructing the United States Department of Commerce (“Commerce”) to further explain its interpretation of the certification requirements of 19 C.F.R § 351.303(g), to reexamine its determination that Mr. Wang Kezheng (“Mr. Wang”) was not in a position to certify separate rate status documents for Hebei Foreign Trade and Adver-

¹ This action was “deconsolidated” in part in order to permit final judgment to be entered as to another party. This resulted in a caption change for this aspect of the litigation.

tising Corporation (“Hebei Foreign”), and, if necessary under Commerce’s interpretation of its regulations, to permit Hebei Foreign to attempt to find someone who fulfills Commerce’s regulatory requirements.² *Calgon Carbon*, 2011 WL 637605, at *3. For the reasons stated below, the court sustains the *Final Results of Redetermination Pursuant to Court Remand* (Dep’t Commerce July 26, 2011) (Consol. Court No. 09–00524) (“*Remand Results*”), which, *inter alia*, set a separate rate for Hebei Foreign at 16.35%.

BACKGROUND

The facts of this case have been well-documented in the court’s previous opinion. *See Calgon Carbon*, 2011 WL 637605, at *1–3. The court presumes familiarity with that decision, but briefly summarizes the facts relevant to this opinion.

In June 2008, Commerce initiated the first administrative review of its antidumping (“AD”) order on certain activated carbon from the People’s Republic of China (“PRC”). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 73 Fed. Reg. 31,813, 31,813 (Dep’t Commerce June 4, 2008). Commerce concluded that Hebei Foreign’s separate rate status documents were inconclusive because Commerce determined that Hebei Foreign either certified the documents using an individual who was not its employee or filed an inaccurate and unreliable certification. *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Certain Activated Carbon from the People’s Republic of China*, A-570–904, POR 10/11/06–3/31/08, at 80–81 (Nov. 3, 2009), available at <http://ia.ita.doc.gov/frn/summary/prc/E9–27083–1.pdf> (last visited Oct. 24, 2011). As a result, Commerce revoked Hebei Foreign’s separate rate status and assigned Hebei Foreign the PRC-wide rate of

² The court also instructed Commerce to reexamine issues regarding the labor regression methodology as well as surrogate values for hydrochloric acid, carbonize material, and bituminous coal. The court later instructed the parties to advise the court as to how to proceed regarding Commerce’s zeroing methodology in view of the intervening decision in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011). The court agreed with the parties to continue as to the current schedule, and to permit the parties to address *Dongbu Steel* prior to final judgment. No party has commented on the recent zeroing developments post-remand. Accordingly, the court concludes it need not finally resolve any zeroing issue in this case.

Although Commerce addressed the labor regression methodology and surrogate value issues on remand, no party commented on or contested Commerce’s explanation. The court reasonably may infer that the parties concur in the resolution of those issues, as set forth in the remand redetermination. *See JTEKT Corp. v. United States*, 780 F. Supp. 2d 1357, 1367 (CIT 2011). Accordingly, the court affirms the resolution of these issues in the remand redetermination and the 2.95% margin for Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. and Beijing Pacific Activated Carbon Products Co., Ltd. (“Cherishmet”).

228.11%. *Id.* In December 2009, Hebei Foreign filed a complaint challenging the *Final Results* and *Amended Final Results* before the court. *Calgon Carbon*, 2011 WL 637605, at *1.

The court remanded the matter to Commerce, holding that Commerce did not provide substantial support for its determination that Mr. Wang was not a “formal employee” of Hebei Foreign because “[r]eliance on a single unclear statement by a party outside the respondent corporation to the exclusion of half a dozen others to the contrary does not rise to the level of substantial support.” *Id.* at *3. The court instructed Commerce to “explain its regulation in the context of Chinese corporations and determine whether or not Mr. Wang was in a position to certify the facts at issue.” *Id.* In addition, “[i]f Mr. Wang was in a position to know the facts but was not an employee in the sense required by Commerce, then Commerce must re-open the record to allow Hebei Foreign to attempt to find someone who fulfills the regulatory requirement.” *Id.*

On remand, Commerce clarified that in 19 C.F.R. § 351.303(g)(1) requires certification by a current employee of the respondent and that the “employer-employee” relationship is distinguished from independent contractor or agent of the party relationships. *Remand Results* at 5. Hebei Foreign admitted that Mr. Wang was not formally on Hebei Foreign’s payroll. *Id.* at 6. As a result, Commerce determined that it was “unclear as to whether Mr. Wang was an employee of Hebei Foreign or acted as an independent contractor or a selling agent for Hebei Foreign . . .” *Id.* Commerce permitted Hebei Foreign to submit additional certifications by someone “currently employed by” Hebei Foreign. *Id.* at 7. Hebei Foreign provided new company certifications, signed by Mr. Liu Guozhang—the Chief of Hebei Foreign—and Ms. Liu Furong. *See* Admin. R. 2, at Ex. 2–5. The certifications stated that Mr. Liu Guozhang and Ms. Liu Furong “prepared or supervised the preparation” of the responses in question. *Id.* Hebei Foreign provided tax return and payroll information for Mr. Liu Guozhang and payroll information for Ms. Liu Furong, which Commerce determined satisfied the definition of “employed by.” Admin. R. 2, at Ex. 6–8;³ *Remand Results* at 7. As a result, Commerce granted Hebei Foreign a separate rate. *Remand Results* at 7. Commerce calculated Hebei Foreign’s rate to be 16.35% by averaging the rates of Calgon Carbon (Tianjin) Co., Ltd. and Jacobi Carbons AB. *Id.*

³ The payroll information for Mr. Liu Guozhang is from Hebei Shenglun Advertising and Exhibition, Co. Ltd. (“Shenglun”), which his Declaration explains controlled and operated Hebei Foreign until mid-2010. Admin. R. 2, at Ex. 5, 7. The Declarant signed the Hebei Foreign tax return. *Id.* at Ex. 6.

Hebei Foreign and Calgon commented on the *Remand Results*. Cmts. of Hebei Foreign Trade and Advertising Corp. On Dep't of Commerce July 26, 2011 Final Results of Redetermination Pursuant to Court Remand ("Hebei Foreign's Cmts.") 1; Def.-Intervenors' Cmts. on Commerce Dep't Redetermination ("Calgon's Cmts.") 1-10. The government responded.⁴

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final results, as well as its remand results, in AD reviews unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Separate Rate Status

Calgon claims that Commerce's finding that Hebei Foreign is entitled to a separate rate status is contrary to law and not supported by substantial evidence. Calgon's Cmts. 2. Specifically, Calgon argues that 1) Commerce's conclusion that Mr. Liu Guozhang satisfies the requirements of 19 C.F.R. § 351.303(g) is inconsistent with Commerce's explanation of its regulation, Calgon's Cmts. 2, and 2) Ms. Liu Furong does not meet the requirements of 19 C.F.R. § 351.303(g), Calgon's Cmts. 2. Calgon's arguments fail for the following reasons.

All factual information submitted in an antidumping proceeding must be accompanied by a certification that the information is accurate. *See* 19 C.F.R. § 351.303(g). This necessarily includes factual information supporting a claim of entitlement to status separate from the government in a non-market economy case. The certification procedure requires that the person officially responsible for the "presentation of the factual information," state who he is "currently employed by." 19 C.F.R. § 351.303(g)(1). In the remand results, Commerce explained the regulation as follows:

Whenever a party (*e.g.*, a company or a government) submits factual information in an AD/CVD proceeding, the law requires that the person(s) officially responsible for presentation of the factual information provide a certification with the submission. The certifier(s) of that factual submission must be "currently employed by" the party submitting the factual information. For purposes of this certification requirement, the Department de-

⁴ Hebei Foreign attempted to file a reply. Def.-Intervenor's Motion to Strike 1-3. The reply was stricken from the record because the court's order did not permit Hebei Foreign a reply brief.

finer “employed by” as performing work under an employer-employee relationship. An “employee” is a person in the service of another where the employer has the power or right to control and direct the employee with respect to what work will be done and the details of how it will be done, and the employee receives payment for services from the employer. In this regard, an “employee” of the party submitting factual information is to be distinguished from an independent contractor(s) or agent(s) of the party. The certifier(s) must be employed by the party submitting the factual information at the time the submission is made to the Department and the certifier(s) must have prepared or supervised the preparation of the submission. The Department may require proof of employment from the employer.

Remand Results at 5. In the instant case, Commerce determined that Hebei Foreign’s documentary evidence demonstrated that Mr. Liu Guozhang and Ms. Liu Furong both satisfied the regulation because they were “currently employed by” Hebei Foreign and they “prepared or supervised the preparation,” *id.* at 6, of the separate rate status certifications and responses, *id.* at 6–7.

First, Calgon claims that Mr. Liu Guozhang did not meet the requirement of the regulation as “clarified” because he was not an employee of Hebei Foreign when the certifications were filed but rather was an employee of Hebei Shenglun Advertising and Exhibition, Co., Ltd. (“Shenglun”). Calgon Cmts. 3–4. The regulation as Commerce attempts to explain it in the remand results requires the certifier to be “employed by the party submitting the factual information at the time the submission is made to the Department”

Remand Results at 5. Commerce relied on Mr. Liu Guozhang’s position as Chief of Hebei Foreign and legal officer of Hebei Foreign, and also cited to documents where Mr. Liu Guozhang declared that he “performed work under an employer-employee relationship” and that he had a fiduciary duty to Hebei Foreign and that Hebei Foreign had the “power or right to control and direct me with respect to what work would be done and the details of how it would be done.” Admin. R. 2, at Ex. 2 ¶ 16.

Calgon is correct that the record indicated Mr. Liu Guozhong is on the payroll of the related company, Shenglun, which is a parent or successor to Hebei Foreign. He also appears to be the principal of Hebei Foreign. If Commerce construes its regulation in all instances to exclude non-payroll principals, i.e., those who know what is actually occurring in the company, it could make certification of factual submissions impossible for some corporations. Despite its attempt to

be as precise as possible in clarifying its regulation, Commerce appropriately decided that the payment arrangement does not always answer the question posed by the regulation. Principals actually might take no salary in some cases. Commerce has to make a sensible decision as to who can provide factual information and in this case it has. Furthermore, it is not disqualifying that in some sense Mr. Liu Guozhang directed and controlled the corporation while, in some other sense, was directed by the corporation, as his declaration states.⁵

Second, Calgon claims that Ms. Liu Furong and Mr. Wang could not both have “prepared or supervised” the September 15 and September 23 separate rate submissions. Calgon Cmts. 5. In accepting separate rate certifications signed by Ms. Liu Furong, Commerce relied upon payroll documents showing that Ms. Liu Furong was employed by Hebei Foreign and the statement that Ms. Liu Furong “prepared or supervised the preparation of” the separate rate certifications. *Remand Results* at 6–7. Nothing in the process of preparing or supervising the preparation of documents makes preparation or supervision by one individual mutually exclusive of the same tasks by a second or third individual. Thus, Commerce relied on substantial evidence in determining that Ms. Liu Furong was employed by Hebei Foreign and that she in fact supervised or prepared the documents in question. Commerce’s finding that the additional certifications satisfied 19 C.F.R. § 351.303(g) is supported by substantial evidence.⁶

II. Intent to Deceive

Calgon alleges that Commerce should be precluded from relying on Hebei Foreign’s separate rate submissions because Hebei Foreign attempted to deceive Commerce with regards to Mr. Wang’s employment status. Calgon Cmts. 7–10. In essence, Calgon argues that because Hebei Foreign provided one piece of arguably inconsistent information, Commerce should exclude all subsequent information submitted by Hebei Foreign from its separate rate status determination. This claim lacks merit.

Although it remains unclear exactly what Mr. Wang’s status is, assuming some information was not correct, the invalidity of information or documents cannot be imputed onto other information or

⁵ It is apparent that the “clarification” cannot be applied literally. It is sufficient for this case that the certifications comply with the regulation itself, and that the certifiers are in positions to know the facts certified.

⁶ Calgon also contests Hebei Foreign’s continued reliance on Mr. Wang’s certifications and his status as “currently employed by” Hebei Foreign. Calgon Cmts. 6–7. On remand, Commerce did not use Mr. Wang’s certifications or any documents relating to whether Mr. Wang is or is not an employee of Hebei Foreign. Thus, Calgon’s argument is irrelevant.

documents without substantial evidence. See *Shandong Huarong Gen. Grp. Corp. v. United States*, 27 CIT 1568, 1594–95 (2003) (finding that failure at verification did not permit Commerce to also cast doubt upon the reliability of a company’s separate rate certification); *China Kingdom Imp. & Ex. Co. v. United States*, 31 CIT 1329, 1331, 507 F. Supp. 2d 1337, 1342 (2007) (holding Commerce exceeded its authority when it rejected new information on the basis that previous submissions had been incorrect). Commerce can use adverse facts available, 19 U.S.C. § 1677e, or disregard information in deficient responses, 19 U.S.C. § 1677m(d), where a party fails to cooperate with Commerce or impedes the review proceeding. See *Gerber Food (Yunnan) Co. v. United States*, 31 CIT 921, 931, 491 F. Supp. 2d 1326, 1337 (2007) (“*Gerber Food II*”). In *Gerber Food II*, Commerce assigned the PRC-wide rate to two Chinese corporations. *Id.* at 922, 491 F. Supp. 2d at 1330. Commerce assigned the PRC-wide rate after excluding all information submitted by Gerber because Gerber’s alleged misrepresentations in its questionnaire responses “impugned the veracity of all of Gerber’s responses.” *Id.* at 931, 491 F. Supp. 2d. at 1338 (emphasis added). The court, however, determined that the alleged misrepresentations did not support a conclusion that all of the information submitted was unreliable: Commerce must specify what information was deficient and provide a reasoned analysis in support of such position. See *id.* at 929, 491 F. Supp. 2d. at 1335–36.

On remand, Commerce excluded Mr. Wang’s certification because the information Hebei Foreign provided about Mr. Wang was unclear. *Remand Results* at 6. Calgon’s reliance on the insufficiency or lack of credibility of prior documents to impugn subsequent documents is deficient, particularly where no other record evidence casts significant doubt on Commerce’s decision to rely on Hebei Foreign’s new submissions on remand. Thus, Commerce did not err in using the new information provided by Hebei Foreign to determine Hebei Foreign’s separate rate status.

CONCLUSION

For the foregoing reasons, Commerce’s determination to grant separate rate status to Hebei Foreign is supported by substantial evidence and is in accordance with the law. Accordingly, the *Remand Results* are sustained.

Dated: This 24th day of October, 2011.

New York, New York.

/s/ Jane A. Restani

JANE A. RESTANI

JUDGE