U.S. Customs and Border Protection

Slip Op. 11–148

UNITED STATES, Plaintiff, v. INNER BEAUTY INT'L (USA) LTD., Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 10–00256

[Awarding judgment by default in favor of plaintiff on claim to recover civil penalty for merchandise entered by means of false statements of country of origin]

Dated: December 2, 2011

Vincent D. Phillips, Jr., Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for plaintiff. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Jeanmarie Ressa Reiner*, Senior Attorney, Office of the Associate Chief Counsel, U.S. Customs and Border Protection, of New York, NY.

OPINION

Stanceu, Judge:

Plaintiff United States brought this action to recover a civil penalty under section 592 of the Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. § 1592 (2006), against defendant Inner Beauty International (USA) Ltd. ("Inner Beauty"), a New York corporation engaged in importing women's apparel. Compl. ¶¶ 3, 9 (Sept. 1, 2010), ECF No. 2. Plaintiff alleges, *inter alia*, that on the documentation filed with U.S. Customs and Border Protection ("Customs or "CBP") in 2004 for eight entries of women's undergarments subject to an import quota, Inner Beauty falsely stated the country of origin of the merchandise as Hong Kong rather than the correct origin, which was the People's Republic of China ("China"). *Id.* ¶¶ 9, 12. Plaintiff further alleges that these false statements of origin were the result of gross negligence, or, in the alternative, negligence, on the part of Inner Beauty. *Id.* ¶¶ 18–23.

Before the court is plaintiff's application for a judgment by default, in which plaintiff seeks an award of a civil penalty of "$158,197.20 plus pre-judgment and post-judgment interest and costs as provided by law," if the court finds that Inner Beauty acted with gross negligence, or, in the alternative, $79,098.60 "plus pre-judgment and post-judgment interest and costs as provided by law," if the court finds that

Inner Beauty acted with negligence. Mot. for Default J. 6–7 (June 3, 2011), ECF No. 10 ("Pl.'s Mot."). For the reasons stated below, the court determines it appropriate to award judgment by default for a civil penalty in the amount of $39,549.30, plus post-judgment interest as provided by law, based on a level of culpability of negligence.

I. Background

Plaintiff alleges that between February 9, 2004 and November 18, 2004, defendant made eight entries of women's undergarments, which were classified under any of three subheadings of the Harmonized Tariff Schedule of the United States ("HTSUS"). Compl. ¶¶ 9–10 (alleging that the merchandise is classified under subheadings 6212.20.0010, 6212.10.9020, or 6212.20.0020, HTSUS). Plaintiff states that, at the time of Inner Beauty's entries, merchandise classified under these three tariff subheadings was subject to an import quota. *Id.* ¶¶ 8, 11 (citing *Announcement of Request for Bilateral Textile Consultations with the Government of the People's Republic of China & the Establishment of an Import Limit for Brassieres & Other Body Supporting Garments, Category 349/649, Produced or Manufactured in the People's Republic of China*, 68 Fed. Reg. 74,945 (Dec. 29, 2003)). Plaintiff alleges that Inner Beauty "identif[ied] the merchandise as a product of Hong Kong when the merchandise was produced in the People's Republic of China." *Id.* ¶ 12. Plaintiff alleges that "[d]efendant's false statements and/or omissions . . . were material because they prevented CBP from accurately counting the quantities of merchandise under HTSUS 6212.20.0010, 6212.10.9020, and 6212.20.0020 entered into the United States from the People's Republic of China," *id.* ¶ 13, and that "at least one of the defendant's eight entries" was "admitted into the commerce of the United States after the quota filled at 2:15 p.m. on November 18, 2004," *id.* ¶ 14. Plaintiff alleges that the "domestic value of the merchandise defendant entered is $395,493.00," *id.* ¶ 16, which value plaintiff shows on an attachment to the complaint as the sum of the entered value of the merchandise on each of the eight entries, *id.* attachment A. Based on an alleged non-revenue-loss violation of section 592, plaintiff seeks a penalty of $158,197.20, which represents 40% of the dutiable value of the merchandise, the statutory maximum penalty under section 592 for such a violation at a gross negligence level of culpability. Pl.'s Mot. 6; *see* 19 U.S.C. § 1592(c)(2)(B). In the alternative, plaintiff seeks a penalty of $79,098.60, *i.e.*, 20% of the dutiable value, which is the statutory maximum for a penalty based on negligence. Pl.'s Mot. 6–7; *see* 19 U.S.C. § 1592(c)(3)(B).

Plaintiff filed the complaint on September 1, 2010 and effected service upon Inner Beauty on November 10, 2010. Compl.; Pl.'s Proof of Service Upon Def. (Nov. 10, 2010), ECF No. 5. After Inner Beauty failed to appear by licensed counsel and failed to plead or otherwise defend itself within twenty-one days of being served with the complaint, plaintiff requested entry of default on February 17, 2011. Request for Entry of Default (Feb. 17, 2011), ECF No. 7; USCIT R. 12, 55. On March 9, 2011, the Clerk of this Court entered Inner Beauty's default. Order (Mar. 9, 2011), ECF No. 8. On June 3, 2011, plaintiff filed the instant application for a default judgment. Pl.'s Mot.

II. Discussion

Section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1582(1) (2006), grants the court jurisdiction over this action to recover a civil penalty under section 592 of the Tariff Act, 19 U.S.C. § 1592. The court determines all issues *de novo*, including the amount of any penalty, 19 U.S.C. § 1592(e)(1), but because Inner Beauty has defaulted the court accepts as true all well-pled facts in the complaint, *see Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981). If the well-pled facts in the complaint, taken as true, establish Inner Beauty's liability for a civil penalty, it is left to the court to decide, *de novo*, the amount of the civil penalty to be awarded. 19 U.S.C. § 1592(e)(1). The court may look beyond the complaint if doing so is necessary to investigate any matter or to determine appropriate relief. *See* USCIT R. 55(b).

Under section 592(a)(1)(A), it is unlawful for any person, by fraud, gross negligence, or negligence, to enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of material and false documents, statements, or acts or material omissions. 19 U.S.C. § 1592(a)(1)(A)(i)-(ii). Violations of this provision are punishable by a civil penalty not to exceed the domestic value of the merchandise and not to exceed certain upper limits established according to the violator's level of culpability. *Id.* § 1592(c). For a violation that did not affect the assessment of duties, the statute allows a maximum penalty of "40 percent of the dutiable value of the merchandise" if the violation occurred by gross negligence and, if the violation occurred by negligence, a maximum penalty of "20 percent of the dutiable value of the merchandise." *Id.* § 1592(c)(2)-(3).

A. The Well-Pled Facts Establish that Inner Beauty Violated Section 592

The well-pled facts in the complaint and plaintiff's application for a default judgment establish for the purposes of Rule 55 that Inner Beauty was the importer of record on the eight entries upon which the United States seeks a civil penalty and that the eight entry summaries (Customs Form 7501) informed Customs, by listing the International Organization for Standardization ("ISO") country code "HK" in the country of origin boxes on those forms, that the entered merchandise originated in Hong Kong.[1] *See* HTSUS, annex B. Plaintiff's submissions–including, specifically, country of origin declarations attached to the entry summaries disclosing China as the country of origin–also establish for this purpose that the merchandise did not originate in Hong Kong and that, instead, the designation of country of origin that should have been presented on the entry summaries was "CN," the ISO country code for China. *Id.*; Compl. ¶ 12; Pl's Mot. exhibits A-H. The incorrect listings of the country of origin on the eight entry summaries constituted, for purposes of section 592(a)(1)(A), false statements that were used to enter the merchandise. 19 U.S.C. § 1592(a)(1)(A). The court concludes that these false statements were "material" within the meaning of section 592(a)(1)(A), as they had the potential to affect the administration by Customs of the quota on imports from China.[2] *Id.*; *United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (holding a false statement of country of origin to be material); *see also* 19 C.F.R. Part 171, appendix B § (B) (2008) ("*Penalty Guidelines*") ("A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including . . . [d]etermination of the classification, appraisement, or admissibility of merchandise . . ."). Because the well-pled facts in the complaint and plaintiff's application for default judgment establish

[1] Although Hong Kong is within the territory of China, U.S. Customs and Border Protection ("CBP" or "Customs") treats Hong Kong and China as separate countries of origin for tariff purposes. Customs instructs importers to list Hong Kong, rather than China, as the country of origin on the entry summary form only in a circumstance in which the goods actually were manufactured, produced, or grown in Hong Kong. U.S. Customs & Border Protection, *CBP Form 7501 Instructions* 5 (last updated Mar. 17, 2011), *available at* http://forms.cbp.gov/pdf/7501_instructions.pdf ("Record the country of origin utilizing the International Organization for Standardization (ISO) country code located in Annex B of the HTS."); Harmonized Tariff Schedule of the United States, annex B (2011) (listing Hong Kong as a country of origin).

[2] Even though the correct country of origin was presented to Customs on the origin declarations attached to each of the eight entry summaries, the false designations of the country of origin still must be seen as "material" false statements because they had the potential to cause Customs to administer the quota erroneously.

that the merchandise at issue in this case was entered on behalf of defendant by means of material false statements, the court concludes that plaintiff has established for purposes of Rule 55 "the act or omission constituting the violation" within the meaning of that term as used in section 592(e)(4). *See* 19 U.S.C. § 1592(e)(4) ("[If] the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation . . ."). Under the statute, that much is sufficient to establish defendant's penalty liability for a violation of section 592 based on negligence in the context presented by plaintiff's application for a default judgment. *See id.* (providing that where the United States has met its burden of proof to establish the act or omission constituting the violation, "the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence."). Because the court is ruling on an application for a default judgment, the court, in accordance with section 592(e)(4), presumes without further inquiry that the false statements of country of origin appearing on the entry summaries occurred as a result of negligence. *Id.*

B. Plaintiff Fails to Plead Facts from which the Court Could Conclude that the False Statements of Country of Origin Occurred as a Result of Gross Negligence on the Part of Inner Beauty

The court next considers whether the well-pled facts establish that the false designations of country of origin on the entry summaries were the result of gross negligence on the part of Inner Beauty. In the context of this case, such a determination would require a finding that the violator charged with liability for the false statements have acted with "reckless disregard" as to the true country of origin of the merchandise. *United States v. Ford Motor Co.*, 463 F.3d. 1286, 1292 (Fed. Cir. 2006) ("An importer is guilty of gross negligence if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts and the statutory obligation, or acted with an utter lack of care."). For several reasons, the court concludes that plaintiff has not asserted well-pled facts from which the court could conclude that Inner Beauty acted with gross negligence.

The complaint does not allege facts and circumstances from which the court could conclude that Inner Beauty acted willfully, wantonly, or with reckless disregard in its role as importer of record. The complaint states that defendant violated section 592 "by falsely identifying the merchandise as a product of Hong Kong when the mer-

chandise was produced in the People's Republic of China." Compl. ¶ 12. It further states that "[d]efendant entered or introduced the above-described merchandise into the United States by means of false statements, and these violations constitute gross negligence in violation of 19 U.S.C. § 1592(a)." *Id.* ¶ 19. The complaint states nothing further that is relevant to the question of whether defendant acted with gross negligence in causing the entry of the merchandise and is, on the whole, conclusory with respect to the alleged level of culpability.

In support of the gross negligence claim, plaintiff's application for default judgment argues, first, that "Inner Beauty acted with reckless disregard for the truth of its representations by marking the merchandise it imported as originating in Hong Kong." Pl.'s Mot. 4. This statement is not only insufficient but also puzzling. Neither the complaint nor the documentation submitted with the application make any reference to the country of origin "marking" of the merchandise itself.[3] Each of the eight entry summaries incorrectly set forth the country code for Hong Kong in the country-of-origin box, as the court previously discussed.

Next, citing *United States v. Ford Motor Co.*, 463 F.3d. at 1293, plaintiff argues that Inner Beauty's actions were analogous to those found grossly negligent in that case, alleging that "Inner Beauty repeatedly failed to comply with its obligations to accurately state the country of origin to CBP," that "Inner Beauty did not use reasonable care in entering the merchandise," and that Inner Beauty "could have easily verified the country of origin of the merchandise by referring to the country of origin declarations that accompanied each entry, but it failed to do so on eight separate occasions." Pl.'s Mot. 4–5 (citing 19 U.S.C. §§ 1484–85 (2004)). These statements amount to nothing beyond an allegation of negligence based on a failure to exercise reasonable care in entering the merchandise. Plaintiff does not assert facts analogous to those upon which gross negligence was found in *Ford Motor Co.,* in which the U.S. Court of Appeals for the Federal Circuit held that the Court of International Trade was not "clearly erroneous" in determining that an importer was grossly negligent when the importer knew that dutiable values reported to Customs were incorrect but failed to provide the correct values. *Ford Motor*

[3] The term "marking," which is a term of art, as used by plaintiff is reasonably construed to refer to the marking required by section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304 (2011) ("[E]very article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article . . .will permit . . ."). If, instead, plaintiff intended the term to refer to the false origin as declared on the entry summaries, plaintiff's allegation still fails to constitute a well-pled fact from which the court could conclude that gross negligence occurred.

Co., 463 F.3d. at 1293 (citing *United States v. Ford Motor Co.*, 29 CIT 793, 810, 387 F. Supp. 2d 1305, 1321 (2005)). Here, the entry documentation provided both the incorrect and correct countries of origin, and no well-pled facts inform the court that Inner Beauty was aware of the mistaken origin reference at any of the eight times at which the merchandise was entered.

Finally, plaintiff argues that "Inner Beauty admitted to its gross negligence in a letter its principal, Joyce Hu, submitted to CBP after initiation of the administrative penalty proceedings." Pl.'s Mot. 5. This statement mischaracterizes the referenced letter, in which Ms. Hu stated that "[o]ur shipping documents showed a Hong Kong supplier but also made reference to the actual country of origin as China." *Id.* exhibit I. The letter further mentions that "[t]his was a tremendous oversight and we have instructed our factory and Brokers subsequently after these entries to make clear and indicate the actual supplier and pay particular attention to country of origin." *Id.* The letter admits no fact from which the court could conclude that gross negligence occurred. Absent such a factual circumstances, the words "tremendous oversight," in the context in which they are used in the letter, cannot plausibly be construed as an admission of gross negligence by Inner Beauty.

Moreover, the facts as stated in Ms. Hu's letter and the entry documentation plaintiff submitted with its application do not support the gross negligence claim. The documentary evidence establishing the violation consists of the aforementioned references to Hong Kong on the entry summaries and the declarations attached to each of the entry summaries identifying China as the country of origin. *Id.* exhibits A-H. Six of these declarations list the manufacturer as "Inner Beauty (Shunde) Garment Co Ltd." of "Shunde Guangdog, China," *id.* exhibits A-F, and the other two declarations list "Inner Beauty (Panyu) Garment Co Ltd." of "Panyu District, Guangzhou City," *id.* exhibits G-H. The entry summaries are signed by the customs broker who, it appears, prepared them, Solan A. James of Valley Stream, New York. *Id.* exhibits A-H. No facts are alleged, and no documents are presented, from which the court could conclude that Inner Beauty, rather than the broker, caused the incorrect origin declaration to be placed on the entry summaries, or that the incorrect origin references, repeated over eight entries, were anything but inadvertent errors that Inner Beauty failed to discover and bring to the broker's attention.[4]

[4] Plaintiff also includes with its application a declaration of Mr. Edward P. Nagle, CBP's Fines, Penalties, and Forfeitures Officer for the Newark/New York area. Mot. for Default J.

C. A Penalty Below the Statutory Maximum Amount is Appropriate in this Case

Plaintiff requests that the court, if concluding that the violations occurred as a result of negligence, "enter a default judgment for $79,098.60 in civil penalties for negligence plus prejudgment and post-judgment interest and costs as provided by law." Pl.'s Mot. 7. Thus, plaintiff seeks a judgment by default for the maximum penalty allowed by section 592 for a non-revenueloss, negligent violation, which is an amount calculated as 20% of the dutiable value of the merchandise, not to exceed the domestic value of the merchandise. 19 U.S.C. § 1592(c)(3)(B). Plaintiff accepts as the dutiable value of the merchandise (and as the domestic value of the merchandise) the entered value of the merchandise on the eight entries, which is $395,493. Compl. attachment A. Plaintiff views the maximum penalty as a "sum certain" for which a judgment by default should be awarded pursuant to USCIT Rule 55. Pl.'s Mot. 1.

Plaintiff is not necessarily entitled to be awarded a judgment for the maximum penalty available under section 592 as a "sum certain," as that term is used in Rule 55. Because section 592(e) directs that the court determine "de novo" the amount of penalty to be recovered, the penalty cannot be considered a "sum certain" to which plaintiff has established its entitlement as a matter of right. 19 U.S.C. § 1592(e)(1). It is appropriate that the court consider the facts and circumstances as shown in plaintiff's submissions.

Beyond advocating generally for the maximum penalty provided by law, plaintiff in its complaint and application for a default judgment does not address the matter of whether any aggravating or mitigating circumstances exist in this case. *See* Pl.'s Mot. While not binding on the court, guidelines published by Customs are informative on the general question of what constitutes aggravating and mitigating circumstances. *See Penalty Guidelines* §§ (E)-(I). Under those guidelines, a negligent violation of section 592 in a non-revenue loss case is to be disposed of administratively, upon consideration of aggravating and mitigating factors, with a penalty in "an amount ranging from a minimum of 5 percent of the dutiable value to a maximum of 20 percent of the dutiable value of the merchandise . . . ." *Id.* § (F)(c)(ii). While not directing the court's attention to any aggravating circumstance, plaintiff's submission of the letter of Ms. Hu alleges facts relevant to matters recognized in CBP's guidelines as mitigating factors: immediate remedial action and inability to pay. Pl.'s Mot.

Decl. of Nagle (June 3, 2011), ECF No. 10. This declaration does not add to the record any facts from which the court could reach a conclusion that gross negligence occurred in this case.

exhibit I. Plaintiff puts forth no evidence or allegations rebutting the claim in the letter that Inner Beauty, upon being put on notice of the violations, instructed its factory and brokers to pay particular attention to ensuring that country of origin is correctly declared on future entries. Also unrebutted by plaintiff is Ms. Hu's claim that a penalty of the magnitude contemplated in the pre-penalty notice (as shown in the Nagle declaration, $158,197.20) "will force us to close our doors and force us to terminate over 15 full and part time workers . . . ." *Id.* Decl. of Nagle & exhibit I.

The court does not give weight to the "inability to pay" factor because the maximum penalty authorized by the statute for a negligent violation is considerably less than the proposed penalty amount stated in the pre-penalty notice, which was based on gross negligence. The court concludes that some mitigation is warranted by the corrective action that defendant claims to have taken, which claim plaintiff does not rebut. *See Penalty Guidelines* § (G)(3) ("In appropriate cases, where the violator provides evidence that immediately after learning of the violation, substantial remedial action was taken to correct organizational or procedural defects, immediate remedial action may be granted as a mitigating factor."). In deciding on a penalty amount, the court also takes into consideration the absence of well-pled facts from which the court could find an aggravating circumstance.

III. Conclusion

Based on the mitigating circumstance the court has identified, and lack of apparent any aggravating circumstance, the court considers appropriate a penalty award in an amount calculated at one-half of the statutory maximum, *i.e.*, at 10% of the dutiable value of the merchandise. Accordingly, the court will enter judgment by default awarding a penalty of $39,549.30, plus post-judgment interest as provided by law.[5]

Dated: December 2, 2011
New York, New York

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

[5] Plaintiff also requested pre-judgment interest, Pl.'s Mot. 7, but such interest is not appropriate on penalties awarded under section 592. *United States v. National Semiconductor Corp.*, 547 F.3d 1364, 1370 (Fed. Cir. 2008).

Slip Op. 11–149

LERNER NEW YORK, INC. Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 07–00361

[Denying defendant's motion in limine to preclude certain testimony and exclude certain evidence prior to trial in an action requiring the court to determine the tariff classification of an imported article of women's apparel]

Dated: December 5, 2011

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for movant and defendant United States. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office.

Francis P. Hadfield, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for plaintiff. With her on the brief were *Robert B. Silverman* and *Alan R. Klestadt*.

OPINION AND ORDER

Stanceu, Judge:

In this case involving the tariff classification of an imported article of women's apparel that has been described as a "Top, Bodyshaper w/Shelf Bra," Joint Pretrial Order, Schedule C ¶ 5 (Nov. 29, 2011), ECF No. 52, defendant moves to preclude plaintiff's lay witness, Ms. Christina Trainer, from testifying at trial or, in the alternative, to preclude this witness from testifying "with respect to the subject merchandise as to the fit, feel, support, design, function or any other category that is within her expertise as a fit model." Def.'s Mot. in Limine 2, 5 (Dec. 1, 2011), ECF No. 53 ("Def.'s Mot."). Defendant also moves to preclude any testimony and exclude any evidence "relating to the November 23, 2009 fitting of the subject merchandise because it is irrelevant to these actions, constitutes hearsay and will not assist the Court in determining the proper classification of the merchandise." Def.'s Mot. 5.

With respect to plaintiff's intention to call Ms. Trainer as a witness, defendant argues that Ms. Trainer, a "fit model," is an expert "[w]ith respect to describing the fit, support and design features of a bra or top" and that "[p]laintiffs are seeking to have Ms. Trainer testify at trial in the guise of a fact witness but based on her fit model expertise." *Id.* at 2. Because plaintiff did not provide defendant the notification required by USCIT Rule 26(a)(2) for an expert witness and did not provide an expert witness report, defendant seeks to preclude Ms. Trainer's testimony according to USCIT Rules 26 and 37. *Id.* Characterizing as a violation of the Court's rules the failure to provide an

expert witness notification or report, defendant argues that "[t]he party facing USCIT Rule 37 sanctions bears the burden of proving the harmlessness of its violation." *Id.* at 4.

The court must deny defendant's motion to the extent the motion seeks to prohibit Ms. Trainer from testifying on any subject. Defendant is correct that Federal Rule of Evidence ("FRE") 701 is intended to prevent a party's use of a lay witness as a means of circumventing the procedural requirements governing expert witness testimony.[1] Nevertheless, the court finds nothing in the Court's rules or the Federal Rules of Evidence prohibiting plaintiff from calling Ms. Trainer as a fact witness, despite whatever expertise Ms. Trainer may or may not possess as a result of her experience as a fit model. FRE 701 contemplates that a witness testifying as other than an expert may offer opinion testimony in certain circumstances and does not prohibit an appearance at trial based on the witness's qualifications. Defendant, therefore, is incorrect both in its allegation that plaintiff has committed a violation of USCIT Rule 26(a)(2) and in its conclusion that Ms. Trainer must not be permitted to testify at trial.

Defendant moves in the alternative for an order under which Ms. Trainer would not be permitted to testify "with respect to the subject merchandise as to the fit, feel, support, design, function or any other category that is within her expertise as a fit model," arguing that "[a]ny such testimony would constitute improper expert testimony in view of Ms. Trainer's expertise as a fit model." Def.'s Mot. 5. Referring to plaintiff's having employed Ms. Trainer to wear a sample of the merchandise at issue and other garments on November 23, 2009, defendant seeks to confine any testimony of the witness "to simply the facts surrounding her November 23, 2009 fitting and the facts relating to what fit models do." *Id.*

Defendant's proposed limitations on the scope of any testimony of Ms. Trainer are overly restrictive. The court will permit Ms. Trainer to present any testimony in the form of opinions that is allowed under the FREs and, specifically, under FRE 701, *i.e.*, opinions that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." With respect to the limitation in

[1] Federal Rule of Evidence 701 states that

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

FRE 701(c) related to "specialized knowledge within the scope of Rule 702," defendant's motion identifies only in the vaguest of terms the subject or subjects on which defendant alleges Ms. Trainer to possess such knowledge. In determining what opinion testimony is permissible under FRE 701, a court must distinguish between the broad scope comprised of all the knowledge a person acquires as a result of employment in a given field and the much narrower scope of specialized knowledge or expertise that would fall within the scope of FRE 702. As the notes pertaining to the amendments to FRE 701 in 2000 clarify, the rule as amended "incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992)," specifically, the distinction between lay and expert witness testimony that lay testimony "'results from a process of reasoning familiar in everyday life' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" Fed. R. Evid. 701, 2000 amendment notes. Under this standard, the court must reject defendant's argument that any testimony Ms. Trainer offers that is beyond facts surrounding the fitting and facts relating to what fit models do necessarily must be excluded as expert witness testimony.

Defendant also moves to prevent all testimony, including that of plaintiff's expert Ms. Alexandra Armillas, and exclude all evidence relating to the November 23, 2009 fitting of garments to Ms. Trainer. "The government objects to the introduction of any testimony or evidence relating to the November 23, 2009 fitting of the subject merchandise because it is irrelevant to these actions, constitutes hearsay and will not assist the Court in determining the proper classification of the merchandise." Def.'s Mot. 5.

Defendant's first argument is that plaintiff's testing of the subject merchandise on Ms. Trainer was limited to a garment in Ms. Trainer's size, size medium, even though the subject merchandise was imported in all sizes from extra small to extra large. *Id.* at 6. Therefore, according to defendant, the data resulting from such testing is "incomplete data" on which the court "should not rely . . . in assessing the proper classification of the subject merchandise." *Id*. Defendant fails to put forth a convincing argument as to why the court must conclude that testimony and evidence related to the November 23, 2009 fitting is either irrelevant or so unreliable as to preclude its introduction at trial. Based on the parties' proposed pre-trial order, other submissions of the parties, and the court's pre-trial consultations with the parties, the court must presume that how, and to what degree, the subject merchandise performed the body support function claimed for it are at issue in this case. The court must conclude, further, that data and testimony related to the testing of a medium-

sized garment on Ms. Trainer, whom the parties agree is a fit model of a specific garment size, is relevant to those issues.

Defendant argues, second, that the evidence from the fitting is irrelevant for purposes of FRE 401[2] because "[w]hether the articles provide support is not in dispute so no evidence will make that determination more or less probable." *Id.* This argument oversimplifies the issues upon which the parties remain in dispute. The parties' joint statement of uncontested facts does not justify defendant's assertion that no dispute exists with respect to any issue relating to the support the imported garment provides to the wearer. *See* Joint Pretrial Order, Schedule C.

Third, defendant argues that, through testimony and evidence on the fitting of other articles that U.S. Customs and Border Protection would classify as brassieres, plaintiff is attempting to "bootstrap" the classification of the subject merchandise to these dissimilar articles. Def.'s Mot. 7. Defendant maintains, citing the General Rules of Interpretation and the Additional U.S. Rules of Interpretation, HTSUS, and various judicial decisions, that long-standing precedent counsels against the court's comparing "an article to another dissimilar article in an effort to properly classify it." *Id.* This argument fails to convince the court that plaintiff's witnesses must be prohibited, on relevance grounds, from giving any testimony that pertains to the support provided by garments other than the specific merchandise at issue in this case. Subject to the FREs, plaintiff should be permitted to introduce evidence in an attempt to establish as a fact that the garment at issue provides support to the wearer comparable to that provided by garments that plaintiff claims are recognized, either in common parlance or in the apparel industry, as brassieres.

Finally, defendant argues that the court must exclude as hearsay, prior to trial, all evidence consisting of measurements obtained during the November 23, 2009 fitting involving Ms. Trainer. *Id.* at 8. The court disagrees. Plaintiff proposes to call as witnesses individuals who took measurements at the fitting or observed the process by which the measurements were taken. Subject to the FREs, these witnesses will be permitted to testify concerning the events that occurred at the fitting, based on their observations and recollections. Any documentary exhibits that plaintiff seeks to admit as evidence during the examination of the witnesses will be admitted to the record provided they are entitled to admission under the FREs. Defendant's generalized attempt to exclude prior to trial all evidence

[2] Federal Rule of Evidence 401 states that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

pertaining to the measuring of the fit model and the results of that measuring is overly inclusive and without basis at this time. Defendant argues, further, that "the concern with admitting hearsay is amplified because the best evidence of the measurements has been destroyed." *Id.* This objection is based on an unwarranted presumption that all evidence pertaining to the measuring conducted on the fit model must be excluded as hearsay. Moreover, the best evidence rule does not support this objection because plaintiff proposes to elicit testimony regarding the results of the November 23, 2009 fitting. Any ruling on the admissibility of documents relating to the measuring is premature at this time.

Order

Upon consideration of Defendant's Motion in Limine (Dec. 1, 2011), ECF No. 53 ("defendant's motion"), the response thereto, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that defendant's motion be, and hereby is, DENIED.

Dated: December 5, 2011
New York, New York

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

Slip Op. 11–150

VICTORIA'S SECRET DIRECT, LLC Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 07–00347

[Denying defendant's motion in limine to preclude certain testimony and exclude certain evidence prior to trial in an action requiring the court to determine the tariff classification of an imported article of women's apparel]

Dated: December 5, 2011

Beverly A. Farrell, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, for movant and defendant United States. With her on the brief were *Tony West*, Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office.

Francis P. Hadfield, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of New York, NY, for plaintiff. With her on the brief were *Robert B. Silverman* and *Alan R. Klestadt*.

OPINION AND ORDER

Stanceu, Judge:

In this case involving the tariff classification of an imported article of women's apparel that has been described as a "Bra Top," Joint Pretrial Order, Schedule C ¶ 10 (Nov. 29, 2011), ECF No. 53, defendant moves to preclude plaintiff's lay witness, Ms. Christina Trainer, from testifying at trial or, in the alternative, to preclude this witness from testifying "with respect to the subject merchandise as to the fit, feel, support, design, function or any other category that is within her expertise as a fit model." Def.'s Mot. in Limine 2, 5 (Dec. 1, 2011), ECF No. 54 ("Def.'s Mot."). Defendant also moves to preclude any testimony and exclude any evidence "relating to the November 23, 2009 fitting of the subject merchandise because it is irrelevant to these actions, constitutes hearsay and will not assist the Court in determining the proper classification of the merchandise." Def.'s Mot. 5.

With respect to plaintiff's intention to call Ms. Trainer as a witness, defendant argues that Ms. Trainer, a "fit model," is an expert "[w]ith respect to describing the fit, support and design features of a bra or top" and that "[p]laintiffs are seeking to have Ms. Trainer testify at trial in the guise of a fact witness but based on her fit model expertise." *Id.* at 2. Because plaintiff did not provide defendant the notification required by USCIT Rule 26(a)(2) for an expert witness and did not provide an expert witness report, defendant seeks to preclude Ms. Trainer's testimony according to USCIT Rules 26 and 37. *Id.* Characterizing as a violation of the Court's rules the failure to provide an expert witness notification or report, defendant argues that "[t]he party facing USCIT Rule 37 sanctions bears the burden of proving the harmlessness of its violation." *Id.* at 4.

The court must deny defendant's motion to the extent the motion seeks to prohibit Ms. Trainer from testifying on any subject. Defendant is correct that Federal Rule of Evidence ("FRE") 701 is intended to prevent a party's use of a lay witness as a means of circumventing the procedural requirements governing expert witness testimony.[1] Nevertheless, the court finds nothing in the Court's rules or the Federal Rules of Evidence prohibiting plaintiff from calling Ms.

[1] Federal Rule of Evidence 701 states that

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Trainer as a fact witness, despite whatever expertise Ms. Trainer may or may not possess as a result of her experience as a fit model. FRE 701 contemplates that a witness testifying as other than an expert may offer opinion testimony in certain circumstances and does not prohibit an appearance at trial based on the witness's qualifications. Defendant, therefore, is incorrect both in its allegation that plaintiff has committed a violation of USCIT Rule 26(a)(2) and in its conclusion that Ms. Trainer must not be permitted to testify at trial.

Defendant moves in the alternative for an order under which Ms. Trainer would not be permitted to testify "with respect to the subject merchandise as to the fit, feel, support, design, function or any other category that is within her expertise as a fit model," arguing that "[a]ny such testimony would constitute improper expert testimony in view of Ms. Trainer's expertise as a fit model." Def.'s Mot. 5. Referring to plaintiff's having employed Ms. Trainer to wear a sample of the merchandise at issue and other garments on November 23, 2009, defendant seeks to confine any testimony of the witness "to simply the facts surrounding her November 23, 2009 fitting and the facts relating to what fit models do." *Id.*

Defendant's proposed limitations on the scope of any testimony of Ms. Trainer are overly restrictive. The court will permit Ms. Trainer to present any testimony in the form of opinions that is allowed under the FREs and, specifically, under FRE 701, *i.e.*, opinions that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." With respect to the limitation in FRE 701(c) related to "specialized knowledge within the scope of Rule 702," defendant's motion identifies only in the vaguest of terms the subject or subjects on which defendant alleges Ms. Trainer to possess such knowledge. In determining what opinion testimony is permissible under FRE 701, a court must distinguish between the broad scope comprised of all the knowledge a person acquires as a result of employment in a given field and the much narrower scope of specialized knowledge or expertise that would fall within the scope of FRE 702. As the notes pertaining to the amendments to FRE 701 in 2000 clarify, the rule as amended "incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992)," specifically, the distinction between lay and expert witness testimony that lay testimony "'results from a process of reasoning familiar in everyday life' while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.'" Fed. R. Evid. 701, 2000 amendment notes. Under this standard, the court must reject defen-

dant's argument that any testimony Ms. Trainer offers that is beyond facts surrounding the fitting and facts relating to what fit models do necessarily must be excluded as expert witness testimony.

Defendant also moves to prevent all testimony, including that of plaintiff's expert Ms. Alexandra Armillas, and exclude all evidence relating to the November 23, 2009 fitting of garments to Ms. Trainer. "The government objects to the introduction of any testimony or evidence relating to the November 23, 2009 fitting of the subject merchandise because it is irrelevant to these actions, constitutes hearsay and will not assist the Court in determining the proper classification of the merchandise." Def.'s Mot. 5.

Defendant's first argument is that plaintiff's testing of the subject merchandise on Ms. Trainer was limited to a garment in Ms. Trainer's size, size medium, even though the subject merchandise was imported in all sizes from extra small to extra large. *Id.* at 6. Therefore, according to defendant, the data resulting from such testing is "incomplete data" on which the court "should not rely . . . in assessing the proper classification of the subject merchandise." *Id*. Defendant fails to put forth a convincing argument as to why the court must conclude that testimony and evidence related to the November 23, 2009 fitting is either irrelevant or so unreliable as to preclude its introduction at trial. Based on the parties' proposed pre-trial order, other submissions of the parties, and the court's pre-trial consultations with the parties, the court must presume that how, and to what degree, the subject merchandise performed the body support function claimed for it are at issue in this case. The court must conclude, further, that data and testimony related to the testing of a medium-sized garment on Ms. Trainer, whom the parties agree is a fit model of a specific garment size, is relevant to those issues.

Defendant argues, second, that the evidence from the fitting is irrelevant for purposes of FRE 401[2] because "[w]hether the articles provide support is not in dispute so no evidence will make that determination more or less probable." *Id.* This argument oversimplifies the issues upon which the parties remain in dispute. The parties' joint statement of uncontested facts does not justify defendant's assertion that no dispute exists with respect to any issue relating to the support the imported garment provides to the wearer. *See* Joint Pretrial Order, Schedule C.

Third, defendant argues that, through testimony and evidence on the fitting of other articles that U.S. Customs and Border Protection

[2] Federal Rule of Evidence 401 states that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

would classify as brassieres, plaintiff is attempting to "bootstrap" the classification of the subject merchandise to these dissimilar articles. Def.'s Mot. 7. Defendant maintains, citing General Rules of Interpretation and the Additional U.S. Rules of Interpretation, HTSUS, and various judicial decisions, that long-standing precedent counsels against the court's comparing "an article to another dissimilar article in an effort to properly classify it." *Id.* This argument fails to convince the court that plaintiff's witnesses must be prohibited, on relevance grounds, from giving any testimony that pertains to the support provided by garments other than the specific merchandise at issue in this case. Subject to the FREs, plaintiff should be permitted to introduce evidence in an attempt to establish as a fact that the garment at issue provides support to the wearer comparable to that provided by garments that plaintiff claims are recognized, either in common parlance or in the apparel industry, as brassieres.

Finally, defendant argues that the court must exclude as hearsay, prior to trial, all evidence consisting of measurements obtained during the November 23, 2009 fitting involving Ms. Trainer. *Id.* at 8. The court disagrees. Plaintiff proposes to call as witnesses individuals who took measurements at the fitting or observed the process by which the measurements were taken. Subject to the FREs, these witnesses will be permitted to testify concerning the events that occurred at the fitting, based on their observations and recollections. Any documentary exhibits that plaintiff seeks to admit as evidence during the examination of the witnesses will be admitted to the record provided they are entitled to admission under the FREs. Defendant's generalized attempt to exclude prior to trial all evidence pertaining to the measuring of the fit model and the results of that measuring is overly inclusive and without basis at this time. Defendant argues, further, that "the concern with admitting hearsay is amplified because the best evidence of the measurements has been destroyed." *Id.* This objection is based on an unwarranted presumption that all evidence pertaining to the measuring conducted on the fit model must be excluded as hearsay. Moreover, the best evidence rule does not support this objection because plaintiff proposes to elicit testimony regarding the results of the November 23, 2009 fitting. Any ruling on the admissibility of documents relating to the measuring is premature at this time.

Order

Upon consideration of Defendant's Motion in Limine (Dec. 1, 2011), ECF No. 54 ("defendant's motion"), the response thereto, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that defendant's motion be, and hereby is, DENIED.

Dated: December 5, 2011
New York, New York

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

Slip Op. 11–151

MYONIC GMBH, AND NEW HAMPSHIRE BALL BEARINGS, INC., Plaintiffs, v. UNITED STATES, Defendant, and THE TIMKEN COMPANY, Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 11–00349

Dated: December 6, 2011

David Edward Bond, *Jay Charles Campbell*, and *Walter Joseph Spak*, White & Case, LLP, for the plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *Melissa Marion Devine*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for the defendant.

Geert M. De Prest, William A. Fennell, Lane Steven Hurewitz, and *Terence Patrick Stewart*, Stewart and Stewart, for the defendant-intervenors.

ORDER

Carman, Judge:

Plaintiffs ask the Court to stay this case. They argue that the issue for decision—whether Commerce may legally employ zeroing in the calculation of dumping margins during an administrative review when it has abandoned zeroing during initial antidumping investigations—is "under review in multiple pending cases that are at more advanced stages." (ECF No. 24 ("*Pls.' Mot. to Stay* ") at 3.) Plaintiffs point to four cases currently pending in the Court of International Trade: *Dongbu Steel Co. Ltd. v. United States* (Court No. 07–00125); *JTEKT Corp. v. United States* (Consol. Court No. 07–00377 and Consol. Court No. 08–00324); and *SKF USA Inc. v. United States* (Court No. 09–00392). (*Id.*) Plaintiffs argue that a stay pending a "conclusive court decision (including all appeals) on the

zeroing issue would promote judicial economy and enable all parties to conserve resources." The instant case would best be stayed, plaintiffs claim, because if the ultimate court addressing the issue of zeroing in administrative reviews struck down zeroing, plaintiffs would prevail on that precedent. On the other hand, plaintiffs say they would withdraw their suit if the ultimate court upheld zeroing in administrative reviews. (*Id.* at 4.) Plaintiffs also seek an extension of 30 days from any denial of this motion in which to file their proposed briefing schedule and joint status report. (*Id.*)

Among many strongly argued points, Defendant's principal argument against a stay is that "[t]here is not yet a case [on point] pending at the United States Court of Appeals for the Federal Circuit, and therefore it is entirely speculative whether or when the Federal Circuit will rule" on the issue of zeroing in administrative reviews. (ECF No. 27 ("*Def.'s Resp.*") at 2.) Because "there is no pending Federal Circuit decision and a decision from this Court would not bind future cases in this Court," Defendant reasons that a stay would needlessly delay resolution of this case. (*Id.* at 4.)

Examination of the docket sheets and opinions in the four cases cited by Plaintiff reveals that those cases are currently pending before other judges of the Court of International Trade (the two *JTEKT* cases and the *SKF* case are before Judge Timothy C. Stanceu, and *Dongbu* is before Judge Delissa A. Ridgway). In two of the cases, *Dongbu* and one of the *JTEKT* cases (Consol. Court No. 08–00324), the assigned Court of International Trade judge issued an opinion upholding zeroing in the administrative review and a judgment of dismissal. Each of those cases was appealed to the Court of Appeals for the Federal Circuit, which vacated each judgment and remanded each matter for further proceedings to enable Commerce to explain why foregoing zeroing in initial investigations, but not in administrative reviews, is nonarbitrary. A mandate was issued in each of the appealed cases returning it to the jurisdiction of the Court of International Trade, where the cases remain pending. The other two cases (*SKF* and the *JTEKT* case under Consol. Court No. 07–00377) are still before judges of the Court of International Trade and have never been appealed.

In all four of these cases, any decision of the Court of International Trade judge assigned would be afforded due regard, but would not bind the decision of this Court. And it is pure speculation, as Defendant says, to assume that those cases which were appealed and returned to the Court of International Trade after being vacated and

remanded by the Court of Appeals would ever reach the Court of Appeals again, or would do so before this case might reach the appeals stage.

In light of these considerations, the Court determines that a stay would cause unnecessarily delay and denies plaintiffs' motion. However, should this situation change at a later point, plaintiffs may renew their motion to stay.

It is therefore

ORDERED that plaintiffs' motion to stay is denied, and it is further

ORDERED that the parties shall submit a joint status report and proposed briefing schedule no later than January 6, 2012.

Dated: December 6, 2011
New York, New York

/*s*/*Gregory W. Carman*
GREGORY W. CARMAN, JUDGE