U.S. Customs and Border Protection

Slip Op. 12–20

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 for an injunction pending appeal to prevent distribution of withheld funds]

Dated: February 17, 2012

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

Jessica R. Toplin, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief 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 U.S. International Trade Commission. With him were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel.

Joseph W. Dorn, *Jeffrey M. Telep*, and *Taryn K. Williams*, King & Spalding LLP, of Washington, DC, for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge:

I. INTRODUCTION

This litigation concerns administrative decisions by two agencies, the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs"), that denied plaintiff Furniture Brands International, Inc. ("Furniture Brands") distributions of funds available under the Continued Dump-

ing and Subsidy Offset Act of 2000 ("CDSOA"), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000),[1] *repealed by* Deficit Reduction Act of 2005, Pub.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). The ITC did not include Furniture Brands on a list of parties potentially eligible for "affected domestic producer" ("ADP") status under the CDSOA, which status could 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"). Second Supplemental Compl. ¶ 31 (deemed filed Oct. 8, 2008), ECF No. 46; *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*"). Based on the ITC's decision, Customs declined to provide Furniture Brands annual CDSOA distributions for Fiscal Years 2006 through 2008.

Plaintiff brought this action in 2007, raising constitutional (First Amendment and Fifth Amendment equal protection) challenges to the agency actions and the CDSOA. Compl. (Jan. 23, 2007), ECF No. 4. Plaintiff was opposed in this action by defendant-intervenors American Furniture Manufacturers Committee for Legal Trade, a coalition of domestic wooden bedroom furniture producers that were eligible to receive CDSOA distributions, and Vaughan-Bassett Furniture Company, Inc., a domestic wooden bedroom furniture producer eligible to receive CDSOA distributions. Mot. for Joinder & Intervention 2–3 (Mar. 16, 2006), ECF No. 11. In *Furniture Brands International, Inc. v. United States*, 35 CIT __, 807 F. Supp. 2d 1301 (2011), the court entered judgment dismissing plaintiff's action, concluding, first, that plaintiff's complaint failed to state a claim upon which relief could be granted and, second, that plaintiff's attempt to amend the complaint to add additional claims would be futile.

Plaintiff now moves for an injunction pending appeal under USCIT Rule 62(c), attempting to prevent distribution of "any funds pursuant to the [CDSOA] that are currently being withheld by Customs for Furniture Brands" until the conclusion of "all appeals, petitions for certiorari, and remands." Pl.'s Mot. for Inj. Pending Appeal 1–2 (Jan. 18, 2012), ECF No. 117 ("Pl.'s Mot."); Pl.'s Mem. of Points & Authorities in Supp. of its Mot. for Inj. Pending Appeal (Jan. 18, 2012), ECF No. 117 ("Pl.'s Mem."). The court denies plaintiff's motion.

[1] Citations are to 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.

II. BACKGROUND

In 2005, Commerce issued an antidumping duty order on imports of wooden bedroom furniture from China. *Antidumping Duty Order*. During proceedings before the ITC to determine 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. *Furniture Brands Int'l*, 35 CIT at __, 807 F. Supp. 2d at 1304. Furniture Brands did not appear as a potential ADP with respect to the antidumping duty order on the list published by Customs 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 this litigation, plaintiff challenged the ITC's decision not to include Furniture Brands on the list of parties potentially eligible for ADP status and the failure by Customs to distribute CDSOA funds to Furniture Brands, arguing that these actions violated freedom of expression guarantees of the First Amendment to the U.S. Constitution, the equal protection guarantee of the Fifth Amendment, and the CDSOA. *Furniture Brands Int'l*, 35 CIT at __, 807 F. Supp. 2d at 1306–07. Plaintiff also requested an order dismissing its own action for lack of subject matter jurisdiction and moved for leave to amend the complaint to add claims that the ITC and Customs had violated the Administrative Procedure Act in denying Furniture Brands CDSOA distributions. *Id.* at __, 807 F. Supp. 2d at 1303–04. As relief, plaintiff sought an order that the ITC include Furniture Brands on the list of potential ADPs and that Customs distribute to Furniture Brands the withheld funds. Second Supplemental Compl. Prayer for Relief.

On October 20, 2011, the court dismissed plaintiff's action upon motions to dismiss filed by defendant and defendant-intervenors. *Furniture Brands Int'l*, 35 CIT at __, 807 F. Supp. 2d at 1316. The court concluded, first, that this action was within its subject matter jurisdiction under section 201 of the Customs Courts Act of 1980 ("Customs Courts Act"), 28 U.S.C. § 1581(i)(4), as a "civil action commenced against the United States that arises out of a law of the United States . . . 'providing for . . . administration . . . with respect to' antidumping and countervailing duties." *Furniture Brands Int'l*, 35 CIT at __, 807 F. Supp. 2d at 1308. The court then concluded that

plaintiff's constitutional claims were foreclosed by precedent of the U.S. Court of Appeals for the Federal Circuit ("Court of Appeals"), which, in rejecting analogous First and Fifth Amendment claims, held that "the CDSOA is valid under the First and Fifth Amendments to the U.S. Constitution." *Id.* at __, 807 F. Supp. 2d at 1310 (citing *SKF USA, Inc. v. United States*, 556 F.3d 1337 (Fed. Cir. 2009) ("*SKF*")). Finally, the court denied plaintiff's motion for leave to amend the complaint because the two claims Furniture Brands sought to add would have been futile, as neither claim "makes out a plausible claim for relief under the set of facts alleged in the proposed Third Amended Complaint . . . ." *Id.* at __, 807 F. Supp. 2d at 1316.

On November 4, 2011, Furniture Brands appealed the court's judgment dismissing this action. Notice of Appeal (Nov. 4, 2011), ECF No. 114. On January 5, 2012, the court conferred with the parties to this case, as well as other parties to other cases involving the CDSOA, during which conference Customs informed the court that it did not intend to delay processing of CDSOA distributions past a date to which it had agreed previously, January 31, 2012. Pl.'s Mem. 5; Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 75. According to subsequent e-mail communications between counsel for plaintiff and Customs, no distributions will be made until March 9, 2012. Pl.'s Mem. attachment B. Plaintiff filed the instant motion on January 18, 2012. Pl.'s Mot. On February 10, 2012, defendant Customs and defendant-intervenors filed their responses in opposition. Defs. United States' & U.S. Customs & Border Protection's Opp'n to Pl.'s Mot. for an Inj. Pending Appeal (Feb. 10, 2012), ECF No. 122; Def.-Intervenors' Resp. to Pl.'s Mot. for an Inj. Pending Appeal (Feb. 10, 2012), ECF No. 123. Defendant ITC did not respond.

III. DISCUSSION

Furniture Brands seeks to enjoin Customs and the ITC from making any CDSOA distributions "that are currently being withheld by Customs for Furniture Brands" and that would "remain in place for the pendency of this litigation, including all appeals, petitions for

certiorari, and remands." Pl.'s Mem. 2.[2] The court concludes that USCIT Rule 62(c) governs the issue presented by plaintiff's motion, in providing that "[w]hile an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction . . . ." USCIT R. 62(c). Although the court's judgment in *Furniture Brands International* did not grant, dissolve, or deny an injunction expressly, the judgment implicitly denied plaintiff's request for affirmative injunctive relief in the form of an order under which the ITC would add Furniture Brands to the list of potential recipients of CDSOA distributions and Customs would distribute to Furniture Brands the CDSOA funds plaintiff claims it is owed. Second Supplemental Compl. Prayer for Relief.

Our first consideration is the standard to be applied to plaintiff's motion. With respect to the standard governing a stay pending appeal, the U.S. Supreme Court in 2009 instructed that a court is to consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay;
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 129 S. Ct. 1749, 1761 (2009) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The Court instructed that "[t]he first two factors of the traditional standard are the most critical," *id.*, and that "[it] is not enough that the chance of success on the merits be better than negligible," *id.* (internal quotations omitted).

What plaintiff requests is not a stay, which would merely "operat[e] upon the judicial proceeding itself," but instead is an injunction that is "directed at someone, and governs that party's conduct." *See Nken*, 129 S. Ct. at 1757–58. We conclude that to obtain the injunction it seeks, plaintiff must satisfy a test at least as stringent as the test

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[2] Furniture Brands International, Inc. seeks

> [An] injunction enjoining the Defendants, the United States, United States Customs and Border Protection ('Customs'), and United States International Trade Commission ('USITC'), together with their agents, officers, delegates, and employees, from disbursing, ordering the disbursement of, or causing the disbursement of any funds pursuant to the Continued Dumping and Subsidy Offset Act of 2000 ('CDSOA'), that are currently being withheld by Customs for Furniture Brands. Furniture Brands further requests that such injunction remain in place for the pendency of this litigation, including all appeals, petitions for certiorari, and remands.

Pl.'s Mem. of Points & Authorities in Supp. of its Mot. for Inj. Pending Appeal 1–2 (Jan. 18, 2012), ECF No. 117 (internal citation omitted).

prescribed in *Nken*. We find instructive as guidance several statements of the Supreme Court, made in the context of the Supreme Court's exercise of its powers under the All-Writs Act, that injunctions pending appeal demand a "significantly higher justification" than do stays, *Ohio Citizens For Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers), at least where, as here, the injunction is "against the enforcement of a presumptively valid Act of Congress," *Turner Broadcasting System, Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers). *See Respect Maine PAC v. McKee*, 131 S. Ct. 445 (2010) (Mem.) (noting that the standard for injunctive relief pending appeal is more demanding than the standard for a stay of a judgment).

The court determines that plaintiff's motion does not satisfy even the test stated in *Nken*. Although the court presumes the irreparably injury factor to be satisfied, plaintiff has not shown that it is likely to succeed on appeal. Moreover, plaintiff is unable to show that our granting the injunction will not prejudice defendant-intervenors, whose receipt of the withheld funds would be further delayed through the progress of plaintiff's appeal. And it is not readily apparent that the public interest, which is served by the orderly and proper administration of the CDSOA, would be advanced by the injunction being sought.

A. Plaintiff Has Not Shown a Likelihood of Succeeding on the Merits of Its Appeal

For likelihood of success on appeal, plaintiff relies on three arguments that we considered and rejected in *Furniture Brands International*. Plaintiff does not cite an intervening change in the governing law, nor does it present a new argument for why we now should conclude that *Furniture Brands International* was incorrectly decided.

Plaintiff's first argument is that this Court lacks subject matter jurisdiction over this action. According to plaintiff, an injunction pending appeal is appropriate because there is a "substantial and novel question concerning whether this Court properly exercised subject matter jurisdiction over this case." Pl.'s Mem. 12. Section 201 of the Customs Courts Act grants this Court jurisdiction "of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . administration and enforcement with respect to," *inter alia*, "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue . . . ." 28 U.S.C. § 1581(i)(2), (4). Plaintiff argues that its case does not arise out of the CDSOA as a whole but rather

from particular subsections of the CDSOA defining the petition support requirement, 19 U.S.C. § 1675c(b)(1), (d)(1), & (d)(3). Pl.'s Mem. 12–15. In support of this argument, plaintiff cites *Orleans International, Inc. v. United States*, 334 F.3d 1375 (Fed. Cir. 2003), which it views as holding that "the relevant 'law' out of which a civil action arises, for purposes of 28 U.S.C. § 1581(i)(4), is the particular subsection giving rise to the civil action." Pl.'s Mem. 12. Plaintiff maintains that these subsections "do not involve the administration of *duties*; they merely establish a scheme to distribute money to a class of beneficiaries selected by Congress." *Id.* at 13. Plaintiff perceives in the meaning of the word "law," as used in 28 U.S.C. § 1581(i), a "substantial question as to whether this action falls outside this Court's carefully delimited jurisdiction." *Id.* at 14.

In *Furniture Brands International*, we rejected the argument that plaintiff's case, for purposes of subject matter jurisdiction, arises out of the CDSOA subsections defining the petition support requirement. 35 CIT at __, 807 F. Supp. 2d at 1308 n.9. We reasoned that 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)." *Id.* at __, 807 F. Supp. 2d at 1308 n.9. Concluding that the CDSOA is a law providing for administration of antidumping and countervailing duties within the meaning of § 1581(i)(2) and (4), we held that plaintiff's claims were within the court's subject matter jurisdiction. *Id.* at __, 807 F. Supp. 2d at 1307–1310.

Plaintiff again relies on *Orleans International* for its argument that there is a lack of subject matter jurisdiction. Pl.'s Mem. 12. In that case, the Court of Appeals reversed a judgment of this Court dismissing, for lack of subject matter jurisdiction, an action that arose from import duties assessed pursuant to the Beef Promotion and Research Act of 1985, which funded a "program of promotion and research" in support of the beef industry through fees assessed both on domestic purchases and on import transactions of cattle, beef, and beef products. *Orleans Int'l*, 334 F.3d at 1377. The Court of Appeals concluded that, because the Beef Promotion and Research Act imposed a duty on imports for reasons other than the raising of revenue, an action arising from import duties assessed under the statute "fits squarely within the language of [28 U.S.C.] § 1581(i)(2)," even though the statute expressly granted to the district courts jurisdiction over certain types of actions arising thereunder. *Id.* at 1379. The Court of Appeals stated that it found "no requirement in the law that a statute (as opposed to a specific cause of action) must be entirely involved with international trade for the Court of International Trade to have

jurisdiction over any action brought under that statute." *Id.* In crafting its argument on jurisdiction, plaintiff reads too much into this statement. *Orleans International* did not hold that the term "law," as used in 28 U.S.C. § 1581(i), always must be construed to refer to an individual provision within a statute. In this case, such a construction is unsound because the various provisions of the CDSOA operate together to create a program for "the depositing, maintaining, allocating, and distributing of antidumping and countervailing duties." *Furniture Brands Int'l*, 35 CIT at __, 807 F. Supp. 2d at 1308. Plaintiff's claims and the remedy sought, the distribution to plaintiff of the withheld funds, arise from that program. *Id.* at __, 807 F. Supp. 2d at 1308 & 1308 n.9. As we concluded in *Furniture Brands International*, the CDSOA is a statute providing for administration of antidumping duties within the meaning of 28 U.S.C. § 1581(i)(2) and (i)(4), and, therefore, jurisdiction was properly exercised over this case.

Plaintiff argues, second, that "the facts in its case are materially different than the facts in *SKF*, requiring a different result." Pl.'s Mem. 15. Plaintiff asserts as factual differences that, unlike the plaintiffs in *SKF*, "Furniture Brands is not foreign owned and does not own any Chinese exporters of wooden bedroom furniture" and that it "opposed the imposition of duties because . . . it believed that trade barriers . . . ultimately would do more harm than good to domestic industry." *Id.* at 16–17. Furniture Brands views these facts as material, on the premise that the Court of Appeals "expressly recognized" the *SKF* plaintiffs as a "'domestic industry participant . . . owned by a foreign company charged with dumping . . . . '" *Id.* at 15 (quoting *SKF*, 556 F.3d at 1358) (emphasis omitted). According to Furniture Brands, it was only in that factual context that the Court of Appeals "viewed the indication of opposition in response to the ITC's questionnaire as action taken by an 'opposing party' rather than as an expression of viewpoint." *Id.* Furniture Brands argues that *SKF* was thus limited to circumstances in which the opposition can be construed as action, which it alleges not to be the case here. *Id.*

We rejected plaintiff's argument in *Furniture Brands International*, concluding that "[t]he Court of Appeals considered it permissible under the First Amendment for Congress to decline to reward domestic parties who did not support a petition" and that "[t]he Court of Appeals did not condition that conclusion on a circumstance in which the party declining to support the petition is foreign-owned." 35 CIT at __, 807 F. Supp. 2d at 1313. As we pointed out, the language in *SKF* to which plaintiff directed our attention refers only to the likelihood that a domestic producer opposing a petition does so because of ownership by a respondent in an antidumping proceeding.

Id. at __, 807 F. Supp. 2d at 1313. In reaching its holding in *SKF*, the Court of Appeals did not attach controlling significance to the reason why a domestic producer opposes a petition.

Plaintiff argues, third, that it has met its burden of showing likelihood of success on appeal because "the intervening Supreme Court decision in *Sorrell* presents a substantial question concerning whether *SKF* must be revisited altogether." Pl.'s Mem. 15 (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011)). According to Furniture Brands, *Sorrell* held that a law imposing a "'content-based burden on protected expression'" must be subjected to "'heightened judicial scrutiny,'" and that "'[c]ommercial speech is no exception.'" *Id.* at 19 (quoting *Sorrell*, 131 S. Ct. at 2664). Furniture Brands argues that the Court of Appeals in *SKF* incorrectly "applied intermediate scrutiny because it regarded the CDSOA as akin to a regulation of commercial speech." *Id.* Alternatively, plaintiff construes *Sorrell* to compel a narrow reading of *SKF* under which the court should distinguish between "mere commercial speech and speech on matters of public concern like Furniture Brands,' which is entitled to greater protection and stricter judicial scrutiny." *Id.*

In *Furniture Brands International*, we rejected the argument that *Sorrell* implicitly overturned *SKF*. 35 CIT at __, 807 F. Supp. 2d at 1314–15. We also rejected the argument that *Sorrell* requires a narrow reading of *SKF* under which the court may conclude that plaintiff's constitutional claims are not foreclosed by the *SKF* precedent. *Id.* at __, 807 F. Supp. 2d at 1315. We reject those same arguments again, for the reasons we stated in *Furniture Brands International*. In brief summary, the Vermont statute struck down in *Sorrell* authorized civil penalties against certain persons selling or using a type of information ("prescriber-identifying information") that the statute sought to suppress, while the CDSOA does not have as a stated or implied purpose the intentional suppression of expression. *Id.* at __, 807 F. Supp. 2d at 1314–16. Moreover, the Supreme Court in *Sorrell* concluded that the Vermont statute could not survive First Amendment scrutiny under the same standard that the Court of Appeals applied to the CDSOA in *SKF*. *Id.* at __, 807 F. Supp. 2d at 1315. *Sorrell* is not properly construed to reach a holding requiring us to subject the CDSOA to a different standard than that applied by the Court of Appeals.

Recognizing that the court already has rejected its arguments grounded in *SKF* and *Sorrell*, plaintiff argues that it need not make a strong showing that it is likely to succeed on the merits and that it "can meet its burden to show a likelihood of success on the merits merely by raising questions that are 'serious, substantial, difficult,

and doubtful.'" Pl.'s Mem. 11 (quoting *SKF USA, Inc. v. United States*, 28 CIT 170, 176, 316 F. Supp. 2d 1322, 1329 (2004)). Plaintiff argues that it has met this burden because its arguments "resulted in a 27-page opinion by this Court addressing several matters of first impression." *Id.* at 11; *id.* at 7 (arguing that plaintiff had "raised 'serious, substantial, difficult and doubtful questions, as shown by this Court's 27page opinion . . .") (internal citation omitted); Pl.'s Mot. 3 (same).

The court rejects the argument plaintiff puts forth as to why it has satisfied the likelihood of success factor, for two reasons. First, the page length of the opinion from which an appeal is pending is insufficient to show that the underlying issues were serious, substantial, difficult, or doubtful. Second, plaintiff's permissive view of the likelihood of success factor does not square with the Supreme Court's statements in *Nken* that an applicant must have "made a strong showing that he is likely to succeed on the merits" and that "[it] is not enough that the chance of success on the merits be 'better than negligible.'" 129 S. Ct. at 1761. Plaintiff cites various judicial decisions in support of its view, but these cases are inapplicable because they refer to the likelihood of success factor in other contexts, such as applied to preliminary injunctions, rather than as applied to post-judgment relief pending appeal. *See id.* (stating in *dicta* that the test for granting a preliminary injunction differs from the test for granting post-judgment relief). According to an appellate court that has considered this question, the burden is greater when a party seeks post-judgment relief than when a party seeks a preliminary injunction because the court already has considered the merits. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) ("[A] movant seeking a stay pending review on the merits of a district court's judgment will have greater difficulty in demonstrating a likelihood of success on the merits. In essence, a party seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal.").

For the foregoing reasons, the court concludes that plaintiff has not shown that upon appeal it is likely to succeed on the merits of its claims.

B. Plaintiff Has Shown a Probability That It Would Be Irreparably Injured Absent an Injunction

Furniture Brands argues that denial of an injunction pending appeal would cause it irreparable harm in three ways. First, plaintiff states that, because its claims involve First Amendment rights, any unlawful loss of those rights should be presumed to be irreparable injury. Pl.'s Mem. 8. Second, plaintiff argues that the court's denying

injunctive relief would lead to distribution of the CDSOA funds reserved for Furniture Brands, which would leave Furniture Brands without "an adequate remedy in the event that it prevails on its appeal and on remand." *Id.* at 9. Plaintiff argues that the regulation pertaining to recovery of overpayment of CDSOA funds, 19 C.F.R. § 159.64(b)(3) (2011), would not allow Customs to recover the entirety of the amounts that might be found owing to Furniture Brands, should Furniture Brands succeed on appeal, because of the "real possibility of bankruptcies among some of the affected domestic producers . . . ." Pl.'s Mem. 9. Plaintiff also argues that "[e]ven those companies that are not on the verge of bankruptcy may have difficulty promptly repaying CDSOA funds" because "one cannot assume that the companies receiving the funds will leave them untouched until Furniture Brands' action is resolved." *Id.* at 10.

The court is willing to presume, based on the circumstances plaintiff identifies, that a distribution of CDSOA funds to furniture producers currently designated as ADPs is likely to prevent Furniture Brands from receiving the funds to which it claims entitlement. The distribution would render uncertain the prospects of plaintiff's ever receiving those funds in the entirety. Even though irreparable harm may not be a certainty, the court presumes, for purposes of ruling on plaintiff's motion, the irreparable harm requirement to be satisfied by plaintiff's motion for an injunction pending appeal.

C. Plaintiff Has Not Shown that Issuance of an Injunction Would Not Substantially Injure the Other Parties Interested in the Proceeding

Plaintiff argues that "the balance of hardships also weighs strongly in favor of Furniture Brands" because Customs' continued withholding of CDSOA distributions would not injure Customs and the ITC and that any harm caused to defendant-intervenors by additional delay in receiving the CDSOA distribution would be insubstantial, as evidenced by the fact that "[d]efendant-intervenors have never filed any action to compel the distribution of funds . . . ." Pl.'s Mem. 20. Plaintiff also argues that continued delay would cause defendant-intervenors no harm if Furniture Brands succeeds on its claims and is ultimately determined to be eligible for CDSOA distributions. *Id.*

The court disagrees that defendant-intervenors would not be substantially injured by the court's granting the requested injunction. As plaintiff admits, these funds have been withheld for more than five years. *Id.* The court is not in a position to presume that further delay, even if only during appellate review, would cause nothing more than insubstantial harm to defendant-intervenors. The court views as unduly speculative plaintiff's argument that the court should presume

a lack of harm to defendant-intervenors based on the lack of attempts to force distributions prior to the conclusion of this litigation. Regarding plaintiff's remaining argument, that no parties would be injured by our granting the injunction if Furniture Brands were determined to be eligible for these funds, that outcome is unlikely for the reasons we have discussed. *See Furniture Brands Int'l*, 35 CIT at __, 807 F. Supp. 2d at 1316.

D. Plaintiff Has Not Shown that the Public Interest Lies in the Court's Granting an Injunction

Plaintiff argues that enjoining CDSOA distributions pending appeal would serve the public interest by "avoiding the needless complication and expense that would result from recouping funds that are prematurely distributed" and by "ensuring that the government comply with constitutional dictates." Pl.'s Mem. 21–22. Plaintiff also argues that an injunction would be consistent with the CDSOA's purpose, which plaintiff describes as providing "a competitive remedy to domestic producers adversely affected by dumping." *Id.* at 22. According to Furniture Brands, the injunction would further the purpose of the CDSOA because if funds were distributed it would place "Furniture Brands at a competitive disadvantage and compound the conditions of unfair trade that have harmed Furniture Brands as much as any other domestic producer." *Id.*

We are not persuaded that the injunction plaintiff desires would serve the public interest. To the contrary, the public at large is best served by a lawful and orderly resolution of the issue posed by the continuing withholding of the funds. Continued delay in the distribution of the funds to those who are entitled to them by law is inimical to the public interest.

IV. CONCLUSION AND ORDER

For purposes of ruling on Plaintiff's Motion for Injunction Pending Appeal, as filed on January 18, 2012, ECF No. 117 ("Plaintiff's Motion"), the court presumes that plaintiff has satisfied the irreparable harm factor. That factor, standing alone, is insufficient to justify the injunction plaintiff seeks, particularly where, as here, there has been no showing of likelihood of success on the merits of plaintiff's claims during the appellate process. Plaintiff has not satisfied the remaining two factors relevant to a determination on Plaintiff's Motion.

Upon consideration of Plaintiff's Motion, the accompanying memorandum of law, and all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that Plaintiff's Motion be, and hereby is, DENIED.
Dated: February 17, 2012
New York, New York

Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

Slip Op. 12–21

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

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

[Dismissing the consolidated case, in which certain claims must be dismissed for lack of standing and the remaining claims must be dismissed for failure to state a claim upon which relief can be granted]

Dated: February 17, 2012

Kristin H. Mowry, *Jeffrey S. Grimson*, *Jill A. Cramer*, *Sarah M. Wyss*, and *Susan L. Brooks*, Mowry & Grimson, PLLC, of Washington, DC and *Kevin K. Russell*, Goldstein, Howe & Russell, P.C., of Bethesda, MD, for plaintiff.

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Patrick V. Gallagher, Jr., Attorney Advisor, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant. 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:

I. INTRODUCTION

Plaintiff Standard Furniture Manufacturing Co., Inc. ("Standard"), a domestic furniture manufacturer, brought four separate actions, now consolidated,[1] during the period of January 31, 2007 through March 4, 2010, all stemming from certain administrative determinations of the U.S. International Trade Commission ("ITC" or the "Commission") and U.S. Customs and Border Protection ("Customs" or "CBP"). The ITC did not include Standard on the list of entities potentially eligible for status as an "affected domestic producer" ("ADP") under the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA" or "Byrd Amendment"), Pub. L. No. 106–387, §§ 1001–03, 114 Stat. 1549, 1549A-72–75, 19 U.S.C. § 1675c (2000),[2] *repealed by* Deficit Reduction Act of 2005, Pub. L. 109–171, § 7601(a), 120 Stat. 4, 154 (Feb. 8, 2006; effective Oct. 1, 2007). If the ITC had included Standard on the list of companies potentially eligible for ADP status, Standard might have qualified for annual monetary distributions by Customs of antidumping duties collected under an antidumping duty order on imports of wooden bedroom furniture from the People's Republic of China. *Notice of Amended Final Determination of Sales at Less Than Fair Value & Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China*, 70 Fed. Reg. 329 (Jan. 4, 2005) ("*Antidumping Duty Order*"). The ITC construed the "petition support requirement" of the CDSOA, under which distributions are limited to petitioners and parties in support of a petition, to disqualify Standard from the list of potential ADPs because Standard indicated to the ITC that it opposed the petition that resulted in the antidumping duty order.

Plaintiff claims that the administrative actions of the two agencies were inconsistent with the CDSOA, were not supported by substantial evidence, and were otherwise not in accordance with law. Plaintiff also brings constitutional challenges grounded in the First Amend-

[1] Due to the presence of common issues, the court, on February 15, 2011, consolidated plaintiff's four actions under Consol. Court No. 07–00028. Order (Feb. 15, 2011), ECF No. 57. Consolidated with *Standard Furniture Mfg. Co. v. United States* under Consol. Court No. 0700028 are *Standard Furniture Mfg. Co. v. United States*, Court No. 07–00295, *Standard Furniture Mfg. Co. v. United States*, Court No. 09–00027, and *Standard Furniture Mfg. Co. v. United States*, Court No. 10–00082.

[2] Citations are to the version of the Continued Dumping and Subsidy Offset Act ("CDSOA") found at 19 U.S.C. § 1675c (2000). All other citations to the United States Code are to the 2006 edition.

ment, the Fifth Amendment equal protection guarantee, and the Fifth Amendment due process guarantee.

Before the court are four dispositive motions. On February 23, 2011, defendant-intervenors American Furniture Manufacturers Committee for Legal Trade, Kincaid Furniture Co., Inc., L. & J.G. Stickley, Inc., Sandberg Furniture Manufacturing Company, Inc., Stanley Furniture Co., Inc., T. Copeland and Sons, Inc., and Vaughan-Bassett Furniture Company, Inc. moved to dismiss under Rule 12(b)(5) and for judgment on the pleadings under Rule 12(c). Def. intervenors' Mot. to Dismiss & for J. on the Pleadings (Feb. 23, 2011), ECF No. 61 ("Def.-intervenors' Feb. Mot."). After the court granted plaintiff leave to amend its complaints in Court Nos. 07–00028 and 07–00295, defendant-intervenors moved to dismiss under USCIT Rule 12(b)(5). Def.-intervenors' Mot. to Dismiss Case Nos. 07–00028 & 07–00295 (April 1, 2011), ECF No. 83 ("Def-intervenors' Apr. Mot."). Defendants ITC and Customs moved to dismiss under Rule 12(b)(5) on May 2, 2011. Def. U.S. Customs & Border Protection's Mot. to Dismiss the Second Amended Compl. for Failure to State a Claim upon which Relief can be Granted (May 2, 2011), ECF No. 92 ("Customs' Mot."); Def. U.S. Int'l Trade Comm'n's Mot. to Dismiss for Failure to State a Claim (May 2, 2011), ECF No. 91 ("ITC's Mot.").

Also before the court is Standard's motion for a preliminary injunction, filed January 11, 2012. Pl.'s Mot. for Prelim. Inj. (Jan. 11, 2012), ECF No. 110. Standard seeks to halt, pending a final disposition of this litigation, including all appeals and remands, CBP's pending distribution of certain collected antidumping duties to domestic parties recognized as ADPs by the Commission, including the defendant-intervenors in this case. *Id.* at 1. The distribution was scheduled to occur on or after January 31, 2012. [3] Def. U.S. Customs & Border Protection's Resp. to the Ct.'s Feb. 14, 2011 Request (Feb. 28, 2011), ECF No. 66. Customs withheld these funds from distribution pending the resolution of various lawsuits, including plaintiff's, challenging the constitutionality of the CDSOA.

The court concludes that relief is not available on plaintiff's claims challenging the administration of the CDSOA by the two agencies. We also conclude that no relief can be granted on Standard's claims challenging the CDSOA on First Amendment and Fifth Amendment equal protection grounds. Plaintiff lacks standing to assert the claims it bases on Fifth Amendment due process grounds. Finally, plaintiff

[3] Defendants represent that distribution is now scheduled to take place on or after March 9, 2012. Def.'s Mot. for an Extension of Time for all Defs. to File Their Resps. in Opp'n to Pl.'s Mot. for Prelim. Inj. 2 (Jan. 19, 2012), ECF No. 112.

does not satisfy the standards for obtaining the injunction it seeks. The court will enter judgment dismissing this action.

II. BACKGROUND

During a 2003 ITC investigation to determine whether imports of wooden bedroom furniture from China were causing or threatening to cause material injury to the domestic industry, *Initiation of Antidumping Duty Investigation: Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228, 70,231 (Dec. 17, 2003), Standard responded to the ITC's questionnaires, indicating that it opposed the issuance of an antidumping duty order. *See, e.g.*, First Amended Compl. ¶ 19 (Mar. 23, 2011), ECF No. 81. Based on the affirmative ITC injury determination, the International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department") issued the antidumping duty order on imports of wooden bedroom furniture from China in 2005. *Antidumping Duty Order*, 70 Fed. Reg. at 329. Determining that Standard had not supported the petition so as to qualify it for CDSOA benefits, ITC declined to place Standard on the list of potential ADPs with respect to this order for Fiscal Years 2006 through 2010. *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); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 74 Fed. Reg. 25,814, 25,855–56 (May 29, 2009); *Distribution of Continued Dumping & Subsidy Offset to Affected Domestic Producers*, 75 Fed. Reg. 30,530, 30,571–72 (June 1, 2010).

Plaintiff filed actions contesting the government's refusal to provide it CDSOA distributions of antidumping duties collected during Fiscal Years 2006 (Court No. 07–00028), 2007 (Court No. 07–00295), 2008 (Court No. 09–00027), and 2009–2010 (Court No. 10–00082). The court stayed the four actions pending a final resolution of other litigation raising the same or similar issues.[4] *See, e.g.*, Order (June 11, 2007), ECF No. 37.

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

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

F.3d 1337 (2009) ("*SKF*"), *cert. denied*, 130 S. Ct. 3273 (2010), which addressed legal questions also present in this case, the court issued an order directing Standard to show why these actions should not be dismissed and lifted the stay for the purposes of allowing any brief, response, or reply described in that order. *See, e.g.*, Order (Jan. 3, 2011), ECF No. 45. On February 1, 2011, plaintiff responded to the court's order and moved for a partial lift of the stay to allow amendment of the complaints in Court Nos. 07–00028 and 07–00295 as a matter of course to add an additional count challenging the CDSOA under the First Amendment as applied to Standard. *See, e.g.*, Pl.'s Br. in Resp. to the Ct.'s Order to Show Cause (Feb. 1, 2011), ECF No. 50 ("Pl.'s Br."); Mot. for Leave to Amend Compl. (Jan. 24, 2011), ECF No. 47; Proposed First Am. Compl. ¶ 50 (Jan. 24, 2011), ECF No. 47; Mot. for Leave to Amend Compl. (Jan. 24, 2011), ECF No. 45 (Court No. 07–00295); Proposed Second Am. Compl. ¶ 50 (Jan. 24, 2011), ECF No. 45 (Court No. 07–00295).

The court lifted the stay for all purposes on February 9, 2011. *See*, *e.g.*, Order (Feb. 9, 2011), ECF No. 52. The same day, plaintiff filed notices of amended complaints in Courts Nos. 09–00027 and 10–00082. First Amended Compl. (Feb. 9, 2011), ECF No. 32 (Court No. 09–00027); First Amended Compl. (Feb. 9, 2011), ECF No. 29 (Court No. 10–00082). On February 15, 2011, the court consolidated *Standard Furniture Mfg. Co. v. United States*, Court No. 07–00295, *Standard Furniture Mfg. Co. v. United States*, Court No. 09–00027, and *Standard Furniture Mfg. Co. v. United States*, Court No. 10–00082 under Consol. Court No. 07–00028. Order (Feb. 15, 2011), ECF No. 57. Defendant-intervenors filed their motions to dismiss the consolidated action and for judgment on the pleadings on February 23, 2011. Def-intervenors' Feb. Mot. On March 23, 2011, this court acknowledged plaintiff's amendment of its complaints in Court Nos. 09–00027 and 10–00082, granted plaintiff's motion to amend the complaints in Court Nos. 07–00028 and 07–00295, and accepted the amended complaints in the 2007 actions for filing in the consolidated action. *Standard Furniture Mfg. Co. v. United States*, 35 CIT __, Slip Op. 11–32 (Mar. 23, 2011); First Amended Compl.; Second Amended Compl., ECF No. 82 (Court No. 07–00295). Defendant-intervenors filed a motion to dismiss the consolidated action on April 1, 2011. Def-intervenors' Apr. Mot. The ITC and Customs filed their motions to dismiss the consolidated action on May 2, 2011. ITC's Mot.; Customs' Mot.

In July 2011, plaintiff filed a notice of supplemental authority highlighting recent decisions by the U.S. Supreme Court, which, according to plaintiff, are "relevant to the pending motions to dismiss

Standard's as-applied First Amendment challenge to the government's implementation of the [CDSOA]." Notice of Supp. Authority 1 (July 7, 2011), ECF No. 105 ("Pl.'s Notice of Supp. Authority") (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2086 (2011); *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010)). Defendant-intervenors filed a reply to this letter, and both defendants addressed the supplemental authority question in their reply briefs. Def.-intervenor's Resp. to Pl.'s Notice of Supplemental Authority (July 22, 2011), ECF No. 109; 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 5–6 n.4 (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 12–14 (July 14, 2011), ECF No. 108.

Standard filed its motion for a preliminary injunction on January 11, 2012, seeking to prevent the pending CBP distribution. Pl.'s Mot. for Prelim. Inj.; Pl.'s Mem. of Points & Authorities in Supp. of Mot. for Prelim. Inj. (Jan. 11, 2012), ECF No. 110.

III. DISCUSSION

The court exercises jurisdiction over this action according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(4), which provides the Court of International Trade jurisdiction of civil actions arising out of any law of the United States, such as the CDSOA, providing for administration with respect to duties (including antidumping duties) on the importation of merchandise for reasons other than the raising of revenue. *See Furniture Brands Int'l v. United States*, 35 CIT __, __, 807 F. Supp. 2d 1301, 1307–10 (2011) ("*Furniture Brands*").

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. 19 U.S.C. § 1675c(a)-(d).[5] The statute directed the ITC to forward to Customs, within sixty days after an antidumping or countervailing

[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) (emphasis added).

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." *Id.* § 1675c(d)(1).[6] The CDSOA directed Customs to publish in the Federal Register lists of entities potentially eligible to be ADPs for distributions of a "continuing dumping and subsidy offset" 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]

In February 2009, approximately two years after plaintiff filed the first of its four actions, the Court of Appeals decided *SKF*, upholding the CDSOA against constitutional challenges brought on First Amendment and Fifth Amendment equal protection grounds. 556 F.3d at 1360. *SKF* reversed the decision of the Court of International Trade in *SKF USA Inc. v. United States*, 30 CIT 1433, 451 F. Supp. 2d 1355 (2006), which held the petition support requirement of the CDSOA unconstitutional on Fifth Amendment equal protection grounds.

We address below the motions to dismiss, basing our rulings on the five claims that are stated in plaintiff's First Amended Complaints. In Count 1 of the amended complaints, plaintiff claims that defendants' actions were unlawful under the CDSOA and not supported by substantial evidence.[8] First Amended Compl. ¶¶ 39–40. In Counts 2

[6] Additionally, the CDSOA directed the U.S. International Trade Commission to forward to U.S. Customs and Border Protection a list identifying potential 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 at issue in this case 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 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).

[8] Plaintiff's four First Amended Complaints are essentially identical but directed to CDSOA distributions for the different Fiscal Years, *i.e.,* 2006, 2007, 2008, 2009, and 2010. In citing to the claims in the consolidated action, the court will cite to the First Amended Complaint as filed in *Standard Furniture Manufacturing Co., Inc., v. United States*, Court No. 07–00028.

and 5, plaintiff challenges the "in support of the petition" requirement of the CDSOA ("petition support requirement") on constitutional First Amendment grounds. *Id*. ¶¶ 41–43, 49–50. In Count 3, plaintiff brings a challenge to the petition support requirement on Fifth Amendment equal protection grounds. *Id*. ¶¶ 44–46. In Count 4, plaintiff challenges the petition support requirement on Fifth Amendment due process grounds, claiming that the CDSOA is impermissibly retroactive. *Id*. ¶¶ 47–48. We also address, in Part II(C) of this opinion, plaintiff's motion for an injunction.

A. No Relief Can Be Granted on the Claims in Counts 1, 2, 3, and 5 of the Amended Complaints

In ruling on motions to dismiss made under USCIT Rule 12(b)(5), we dismiss complaints that do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). For the reasons discussed below, we conclude that plaintiff has failed to plead facts on which we could conclude that it could obtain a remedy on any of the claims asserted in Counts 1, 2, 3, and 5 of the amended complaints. In brief summary, plaintiff's claims that the actions by the two agencies were not supported by substantial evidence and were otherwise not in accordance with law must be dismissed because Standard admits a fact establishing its disqualification from receiving CDSOA distributions and presents no other facts from which the court could reach a conclusion that those actions must be set aside. Relief on Standard's constitutional claims under the First Amendment and the equal protection guarantee of the Fifth Amendment is foreclosed by the binding precedent established by *SKF*, which upheld the CDSOA against constitutional challenges brought on First Amendment and equal protection grounds. In the following, we address Counts 1 through 3, and Count 5, in further detail.[9]

1. Count 1 Fails to State a Claim upon which Relief Can Be Granted

In Count 1, plaintiff claims that "[t]he Commission's determination not to include Standard on its list of affected domestic producers for the antidumping order covering wooden bedroom furniture from China and Customs' failure to make distributions to Standard, were inconsistent with the CDSOA, were not supported by substantial

[9] Although relief on the Fifth Amendment due process claims that plaintiff bases on retroactivity, which are stated in Count 4 of its amended complaints, is not foreclosed by binding precedent, we conclude in Part II(B) of this opinion that Standard has no standing to bring these claims.

evidence, and were otherwise not in accordance with law." First Amended Compl. ¶¶ 39–40. We conclude that Count 1 fails to state a claim upon which relief can be granted and, therefore, must be dismissed.

Plaintiff alleges that "[d]uring the injury phase of the antidumping investigation covering wooden bedroom furniture from China, Standard filed timely and complete questionnaire responses to the Commission's domestic producer and importer questionnaires." *Id.* ¶ 19. The CDSOA language pertinent to the issue raised by Count 1 is the directive that the ITC, in providing its list to Customs, include "a list of persons that *indicate support of the petition* by letter or through questionnaire response." 19 U.S.C. § 1675c(d)(1) (emphasis added). Standard's filing of questionnaire responses without an indication of support for the petition does not satisfy the petition support requirement. Moreover, plaintiff admits that "[in] its questionnaire responses, Standard indicated that it opposed the petition." First Amended Compl. ¶ 19. Doing so disqualified Standard from receiving CDSOA distributions.

In opposing dismissal of Count 1, plaintiff argues that "[in] *SKF*, the Federal Circuit adopted a saving construction of the CDSOA that could otherwise have violated the First Amendment by conditioning receipt of CDSOA payments on the content of a domestic producer's speech." Pl.'s Resp. to Def.'s May 2, 2011 Mot. to Dismiss 9 (Jun. 6, 2011), ECF No. 101 ("Pl.'s Resp."). Plaintiff submits that, due to this saving construction, *SKF* does not support dismissal of Standard's claims but rather "makes clear that Standard is entitled to disbursements under the statute, constitutionally construed." *Id.* (footnote omitted). Plaintiff views *SKF* to hold "that the CDSOA 'only permit[s] distributions to those who actively supported the petition (i.e., a party that did no more than submit a bare statement that it was a supporter without answering questionnaires or otherwise actively participating would not receive distributions).'" *Id.* at 10 (quoting *SKF*, 556 F.3d at 1353 n.26) (alteration in original). Under this saving construction, plaintiff argues, SKF USA Inc. ("SKF"), the plaintiff in *SKF*, "was ineligible to receive distributions *not* because it opposed the petition in its responses to the ITC questionnaire, but rather because it *actively opposed* the petition in other concrete ways that placed it in 'a role that was nearly indistinguishable from that played by a defendant in a qui tam or attorney's fees award case.'" *Id.* at 11 (quoting *SKF*, 556 F.3d at 1358). According to plaintiff, "[in] light of this substantial opposition, . . . the First Amendment did not bar denying [SKF] a share in antidumping duties" but "compels the

opposite result" in this case because, "[by] contrast, Standard took no similar steps to 'impede the investigation,' nor did it express a 'refus[al] to cooperate' with the Government." *Id.* at 11–12 (quoting *SKF*, 556 F.3d at 1359) (second alteration in original).

Plaintiff's argument is based on an incorrect understanding of the *SKF* holding. The Court of Appeals did not construe the CDSOA such that a domestic producer may express opposition to a petition in its ITC questionnaire response and still be eligible to receive CDSOA distributions, so long as the producer does not take additional steps that amount to "substantial opposition" to the petition. The opinion in *SKF* recounts the various steps SKF took in opposing an antidumping duty order that were beyond merely indicating opposition to the petition on a questionnaire response, but it did so in the context of explaining why it considered the petition support requirement not to be overly broad, and therefore permissible, under the test established by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). *SKF*, 556 F.3d at 1357–59. The Court of Appeals reasoned that in enacting the petition support requirement Congress permissibly, and rationally, could conclude that those who did not support a petition should not be rewarded. *Id*. at 1357, 1359.

Defendants' determinations denying benefits to Standard comported with the CDSOA. Therefore, we reject plaintiff's claims that either or both of the agencies acted contrary to law.

2. Relief on Plaintiff's First Amendment Claims Is Foreclosed by Binding Precedent

In Count 2 of the First Amended Complaints, plaintiff claims that the petition support requirement "violates the First Amendment to the Constitution." First Amended Compl. ¶ 42. Standard claims, specifically, that "[d]efendants' application of the [CDSOA] conditions receipt of a government benefit on a private speaker['s] expressing a specific viewpoint support for an antidumping petition and, therefore, is viewpoint discrimination in contravention of the First Amendment." *Id.* ¶ 43. Count 5 of plaintiff's First Amended Complaints contains an as-applied challenge to the CDSOA that plaintiff also bases on the First Amendment. *Id*. ¶¶ 49–50. Plaintiff claims that the CDSOA violates the First Amendment as applied to Standard "because it discriminates against Standard based on expression of [Standard's] views rather than action ([Standard's] litgation support)." *Id*. ¶ 50.

Relief on Standard's facial First Amendment claims is precluded by the holding in *SKF*, 556 F.3d at 1360 (holding that the Byrd Amendment is "valid under the First Amendment" because it "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."). The holding in *SKF* also forecloses relief on plaintiff's as-applied First Amended claims. The Court of Appeals held that the CDSOA did not violate constitutional First Amendment principles as applied to SKF, which expressed in its response to the ITC's questionnaire its opposition to the antidumping duty petition involved in that litigation. *See SKF*, 556 F.3d at 1343 (stating that "SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition"). Standard, like SKF, expressed opposition to the petition in its response to the ITC's questionnaire. First Amended Compl. ¶ 19. Plaintiff fails to plead any facts allowing the court to conclude, notwithstanding the binding precedent of *SKF*, that the CDSOA was applied to Standard in a manner contrary to the First Amendment. In all material respects, Standard's expression of opposition to an antidumping duty petition was equivalent to that of SKF and properly resulted in Standard's disqualification from receiving distributions under the CDSOA.

In support of its as-applied First Amendment claims, Standard directs the court's attention to the Supreme Court's decisions in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), *Citizens United v. Federal Election Comm'n*, 130 S. Ct. at 876, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. at 2653, and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. at 2806. According to plaintiff, these recent decisions have "rendered [the] conclusion of [*SKF*] utterly untenable. . . . Today, it is clear that corporate speech relating to matters such as international trade and law enforcement is entitled to the strictest First Amendment protection." Pl.'s Resp. 21. We recently addressed these arguments in our opinions in *Ashley Furniture Industries, Inc. v. United States*, 36 CIT __, __, Slip Op. 12–14, at 16–25 (Jan. 31, 2012) ("*Ashley Furniture*") and *Furniture Brands*, 35 CIT __, __, 807 F. Supp. 2d at 1313–15. We conclude here, as we did in those opinions, that the cases plaintiff cites do not implicitly overturn *SKF* or otherwise require us to apply a level of scrutiny to the CDSOA different from that applied in *SKF*.

In *Snyder v. Phelps*, the Supreme Court held that members of the Westboro Baptist Church who picketed near the funeral of a member of the U.S. Marine Corps killed in the line of duty in Iraq could not be held liable on state-law tort claims alleging intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. 131 S. Ct. at 1213–14, 1220. Concluding that the various messages condemning the United States and its military displayed on the picketer's signs were entitled to "'special protection' under the First Amend-

ment," *id*. at 1219, the Supreme Court held that the jury verdict holding the Westboro picketers liable on the tort claims for millions of dollars in damages must be set aside as an impermissible burden on protected speech, even if the picketing caused emotional distress to the mourners, *id.* at 1213, 1220. The Supreme Court cautioned that its holding was narrow and limited only to the particular facts before it, having emphasized that the picketers carried signs displaying messages that, for the most part, constituted speech addressing matters of public concern, *id.* at 1216–17, and conducted their picketing peacefully, and without interfering with the funeral, at each of three locations the Supreme Court considered to be a public forum, *id.* at 1218–19.

Plaintiff maintains that "[in] light of the Court's decision in *Snyder*, there can be no dispute that opposition to a government antidumping investigation constitutes speech on a matter of public concern, subject to full First Amendment protection" and that to the extent that *SKF* rested on a belief that this opposition does not constitute political speech, "*Snyder* demonstrates that the Federal Circuit erred." Pl.'s Resp. 22. *Snyder*, however, resolved a First Amendment question differing from those presented by this case and by *SKF*. Standard is not asserting First Amendment rights as a defense against civil liability for an award of monetary damages. The "burden" the CDSOA placed on Standard's speech ineligibility for potential CDSOA distributions does not rise to a level commensurate with the burden the Supreme Court addressed by setting aside the jury verdict against the Westboro picketers. In speaking to a different First Amendment issue than the one Standard raises, *Snyder* does not establish a principle of First Amendment law under which we may invalidate the CDSOA petition support requirement in response to Standard's as-applied challenge.

In *Citizens United v. Federal Election Commission*, the Supreme Court struck down a federal election law imposing an "outright ban, backed by criminal sanctions" on independent expenditures by "corporation[s]," including "nonprofit advocacy corporations" or "unions," during the thirty-day period preceding a primary election or the sixty-day period preceding a general election, for an "electioneering communication" or for advocacy of the election or defeat of a candidate. 130 S. Ct. at 886–87, 897. Reasoning that "political speech must prevail against laws that would suppress it, whether by design or inadvertence," the Supreme Court concluded that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id*. at 898

(citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

Standard argues that the holding in *SKF* cannot stand now that the Supreme Court has "made perfectly clear that so long as speech relates to matters of public concern, it is entitled to the highest form of constitutional protection, even if it involves corporations or 'activities of a commercial nature.'" Pl.'s Resp. 23 (quoting *SKF*, 556 F.3d at 1355). According to plaintiff, applying a lesser standard of scrutiny to the petition support requirement, as the Court of Appeals did in *SKF* based on a perceived statutory purpose of rewarding cooperation with the government, "is incompatible with *Citizens United*." *Id.* Positing that the petition support requirement as applied to entities like Standard "is calculated to silence or at least discourage dissent against proposed antidumping actions," plaintiff argues that "[t]his sort of arm-twisting cannot withstand constitutional scrutiny after *Citizens United*." *Id.* at 24.

Citizens United does not hold that any statute affecting speech relating to matters of public concern, whether made by individuals or corporations, is to be subjected to a strict scrutiny standard. The statute struck down in *Citizens United* banned political speech, and the Supreme Court's decision to apply strict scrutiny can only be viewed properly in that context. As the Court of Appeals recognized in *SKF*, the CDSOA "does not prohibit particular speech," that "statutes prohibiting or penalizing speech are rarely sustained," and that "cases addressing the constitutionality of such statutes are of little assistance in determining the constitutionality of the far more limited provisions of the Byrd Amendment." 556 F.3d. at 1350. The Court of Appeals reasoned that "[in] considering limited provisions that do not ban speech entirely, the purpose of the statute is important," and concluded that "[n]either the background of the statute, nor its articulated purpose, nor the sparse legislative history supports a conclusion that the purpose of the Byrd Amendment was to suppress expression." *Id.* at 1350–51. Contrary to this view, Standard maintains that "the Supreme Court in *Citizens United* made clear that the degree of First Amendment protection afforded corporate speech on matters of public concern does not vary depending on whether the government directly prohibits speech or instead withholds benefits based on speech." Pl.'s Resp. 24 (citing *Citizens United*, 130 S. Ct. at 905). Thus, plaintiff's argument would have us consider immaterial the distinction between the CDSOA, which does not prohibit speech, and the statute struck down in *Citizens United*, which had as its purpose and effect the suppression of political speech through an

"outright ban, backed by criminal sanctions." *Citizens United*, 130 S. Ct. at 897.

Plaintiff misreads *Citizens United*. In the passage from the opinion to which plaintiff directs our attention, the Supreme Court explained that it no longer subscribes to certain reasoning expressed in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which *Citizens United* overturned. *Citizens United* signaled the Supreme Court's rejection of the notion that the special state-law advantages corporations enjoy over wealthy individuals, such as limited liability, perpetual life, and favorable treatment of accumulation and distribution of assets, can suffice to allow laws "prohibiting speech," *i.e.*, laws prohibiting corporations from speaking on matters of public concern. 130 S. Ct. at 905. Plaintiff misconstrues the Supreme Court's explanation to mean broadly that "[w]hile the government has no obligation to provide those benefits to corporations, the Court made clear that the government may not condition corporations' receipt of these benefits on corporations' foregoing full First Amendment protection for their speech." Pl.'s Resp. 24 (citing *Citizens United*, 130 S. Ct. at 905). Rather, the Supreme Court was specific in concluding that the granting of benefits to corporations under state laws "does not suffice, however, to allow laws *prohibiting* speech." *Citizens United*, 130 S. Ct. at 905 (emphasis added). Because the CDSOA is not a prohibitory statute, and because the relevant purpose of the CDSOA is to reward petitioners and those in support of petitions, we reject the argument that *Citizens United* implicitly invalidates the *SKF* analysis upholding the CDSOA against attack on First Amendment grounds.

Plaintiff argues, next, that in the wake of the Supreme Court's decision in *Sorrell*, the conclusion that intermediate scrutiny should be applied to the CDSOA "despite the CDSOA's viewpoint discrimination" is a conclusion that "can no longer stand" and that the CDSOA now must be subjected to "heightened judicial scrutiny." Pl.'s Notice of Supp. Authority 2 (citing *Sorrell*, 131 S. Ct. at 2663–64). We reject the argument that *Sorrell* implicitly overturned *SKF*.

In *Sorrell*, the Supreme Court struck down a Vermont statute (the "Prescription Confidentiality Law") that prohibited, subject to certain exceptions, the sale, disclosure, and use of "prescriber-identifying information," which is information obtained from pharmacy records that reveals the drug prescribing practices of individual physicians. 131 S. Ct. at 2660 (citation omitted). The statute prohibited pharmacies, health insurers, and similar entities from selling this information, or allowing such information to be used for marketing, without the prescriber's consent, and it prohibited pharmaceutical manufacturers and marketers from using such information for marketing

without the prescriber's consent. *Id*. The statute authorized the Vermont attorney general to pursue civil remedies against violators. *Id*.

The Supreme Court concluded that the Prescription Confidentiality Law "enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Id.* at 2663. Under the "heightened scrutiny" the Supreme Court considered to be warranted, "the State must show at least that the statute directly advanced a substantial government interest and that the measure is drawn to achieve that interest." *Id.* at 2667–68. The Court concluded that the State of Vermont failed to make that showing. The Court considered that the stated interest of promoting medical privacy and physician confidentiality did not justify the prohibitions placed on the sale and use of the information. *Id*. at 2668. The Court noted that the law allowed wide dissemination of the information but effectively prohibited use of the information by a class of disfavored speakers ("detailers," who used the prescriber-identifying information to promote brand-name drugs on behalf of pharmaceutical manufacturers) and in effect prohibited a disfavored use, marketing. *Id*. 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.* at 2663. Another purpose the State of Vermont 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*. at 2668, 2670. 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 the impermissible means of keeping physicians from receiving the disfavored information. *Id*. at 2670–71.

Sorrell and *SKF* analyze dissimilar statutes, which vary considerably in the nature and degree of the effect on expression as well as in purpose. *SKF* concluded that the CDSOA does not have as a stated purpose, or even an implied purpose, the intentional suppression of expression, *SKF*, 556 F.3d at 1351–52, whereas the Vermont statute authorized civil remedies against those selling or using the prescriber-identifying information that the statute sought to suppress. *See Sorrell*, 131 S. Ct. at 2660. *Sorrell* does not require us to review the CDSOA according to a First Amendment analysis differing from that applied by the Court of Appeals in *SKF*. In analyzing the Vermont statute, the Supreme Court stated in *Sorrell* 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, 480–81 (1989); *Central Hudson*, 447 U.S. at 566). *SKF* concluded that "SKF's opposition to the antidumping petition is protected First Amendment activity," 556 F.3d at 1354, and applied a test to which it referred to as the "well established *Central Hudson* test," *id.* at 1355. The Court of Appeals described this test 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.* (citing *Central Hudson*, 447 U.S. at 566). We reject plaintiff's argument that *Sorrell* requires us to apply to the CDSOA a level of scrutiny different from that applied by the Court of Appeals in *SKF*.

In *Arizona Free Enterprise*, the Supreme Court struck down an Arizona campaign finance law imposing a "matching funds scheme" that "substantially burdens protected political speech without serving a compelling state interest and therefore violates the First Amendment." 131 S. Ct. at 2813. Under the Arizona statute, candidates for state office who agreed to accept public funding received matching funds when the allotment of state funds to the publicly financed candidate were exceeded by an amount calculated according to the amount a privately funded candidate received in contributions (including the candidate's "contribution" of expenditures of personal funds), combined with the expenditures independent groups made in support of the privately funded candidate or in opposition to a publicly funded candidate. *Id.* at 2313–14.

According to plaintiff, "the Supreme Court's decision in *Arizona Free Enterprise* demonstrates that, contrary to the government's position, strict scrutiny applies to viewpoint discrimination that falls short of an 'outright ban'" and that "[in] *SKF*, the Federal Circuit declined to apply heightened scrutiny even though the CDSOA has the equivalent effect, providing a subsidy to the direct economic competitors of those engaging in disfavored speech." Pl.'s Notice of Supp. Authority 3–4. Therefore, plaintiff argues, *SKF* "is no longer compatible with Supreme Court precedent." *Id*. at 4.

We do not agree that the Supreme Court's holding in *Arizona Free Enterprise* implicitly invalidates the holding in *SKF*. *Arizona Free Enterprise* is one of a line of Supreme Court cases that struck down laws affecting speech during campaigns for political office. That line of cases includes *Citizens United*, discussed *supra*, and *Davis v. Federal Election Comm'n*, 554 U.S. 724 (2008), which invalidated a federal statute under which a new, asymmetrical regulatory scheme of limits on campaign donations of individuals in elections for the U.S.

House of Representatives was triggered when one candidate in such an election spent more than $350,000 of personal funds on the race. *Arizona Free Enterprise*, 131 S. Ct. at 2818. The Supreme Court grounded its reasoning in *Arizona Free Enterprise* partly on the principle that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Id*. (quoting *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989)) (internal quotation omitted). Stating in *Arizona Free Enterprise* that "[t]he logic of *Davis* largely controls our approach to this case," the Supreme Court found the burdens the Arizona law imposed on speech uttered during a campaign to impose an even more onerous penalty on the free speech of a privately funded candidate than did the federal statute invalidated in *Davis* and to inflict a penalty on groups making or desiring to make independent expenditures. *Id.* at 2818–20. Under the Arizona law's scheme, "[t]he direct result of the speech of privately financed candidates and independent expenditure groups is a state-provided monetary subsidy to a political rival." *Id.* at 2821. Contrary to plaintiff's argument, the CDSOA does not bear more than a superficial resemblance to the laws invalidated in *Arizona Free Enterprise*, *Davis* (a case decided prior to *SKF*), and similar such cases, which regulated and impermissibly burdened political speech during an election by restricting campaign expenditures. Accordingly, we reject Standard's contention that *Arizona Free Enterprise* established a new First Amendment principle requiring us to disregard the holding in *SKF* and to apply a strict scrutiny analysis to the CDSOA.

In summary, *SKF* remains binding precedent that is controlling on the disposition of plaintiff's as-applied First Amendment claims. These claims must be dismissed according to USCIT Rule 12(b)(5).

3. Relief on Plaintiff's Equal Protection Claims Is Foreclosed by Precedent

In Count 3 of the amended complaints, plaintiff claims that the petition support requirement of the CDSOA "violates the Equal Protection Clause of the Constitution because Defendants have created a classification that implicates Standard's fundamental right of speech and Defendants' actions are not narrowly tailored to a compelling government objective." First Amended Compl. ¶ 45. Count 3 claims, further, that defendants' application of the CDSOA to Standard "also violates the Equal Protection Clause because it impermissibly discriminates between Standard and other domestic parties who expressed support for the relevant antidumping petition, denying a benefit to Standard." *Id.* ¶ 46.

Relief on these claims is foreclosed by the holding in *SKF*. The Court of Appeals held in *SKF* that the CDSOA did not violate equal protection principles as applied to plaintiff SKF. Standard, like SKF, expressed opposition to the relevant antidumping duty petition and thus failed to satisfy the petition support requirement, 19 U.S.C. § 1675c(d)(1). *Compare* First Amended Compl. ¶ 19 ("In its questionnaire responses, Standard indicated that it opposed the petition.") *with SKF*, 556 F.3d at 1343 ("SKF also responded to the ITC's questionnaire, but stated that it opposed the antidumping petition."). Plaintiff points out that SKF "did much more than simply express abstract opposition to the petition," Pl.'s Resp. 11, but this fact does not distinguish the holding in *SKF* from the instant case. In ruling on claims that are not distinguishable from Standard's in any material way, the Court of Appeals held that "[b]ecause it serves a substantial government interest, the Byrd Amendment is . . . clearly not violative of equal protection under the rational basis standard," *SKF*, 556 F.3d at 1360, and that "the Byrd Amendment does not fail the equal protection review applicable to statutes that disadvantage protected speech," *id*. at 1360 n.38.

Because plaintiff fails to plead facts allowing the court to conclude that its equal protection claims are distinguishable from those brought, and rejected, in *SKF*, Count 3 must be dismissed for failure to state a claim upon which relief can be granted.

B. Plaintiff Lacks Standing to Bring a Fifth Amendment Retroactivity Challenge to the CDSOA

Count 4 of the amended complaints challenges the CDSOA under the Due Process guarantee of the Fifth Amendment on the ground that the statute is impermissibly retroactive. Plaintiff claims that the petition support requirement of the CDSOA "violates the Due Process Clause of the Constitution because Defendants base Standard's eligibility for disbursements on past conduct (*i.e.,* support for a petition)." First Amended Compl. ¶ 48. According to Count 4, "[t]he Due Process Clause disfavors retroactive legislation, and Defendants' disbursements only to those companies that express support for a petition is not rationally related to a legitimate governmental purpose." *Id*.

We construe Standard's retroactivity claims, which are vaguely stated, to mean that the CDSOA is impermissibly retroactive under the Fifth Amendment due process guarantee because it conditions the receipt of distributions on a decision whether or not to support an antidumping duty petition that was made before the statute went into effect, and thus before the affected party making that decision

could have had notice of the consequences. *See* 19 U.S.C. § 1675c(d)(1) (directing the ITC to forward to Customs a list identifying petitioners and parties expressing support for a petition "within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999 . . ."). Because it applies to petition support decisions made prior to enactment, the CDSOA may be characterized as having a retroactive aspect. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (considering a retroactive statute to be one that attaches "new legal consequences to events completed before its enactment").

We previously have concluded that the CDSOA is not violative of the due process guarantee because "the retroactive reach of the petition support requirement in the CDSOA is justified by a rational legislative purpose and therefore is not vulnerable to attack on constitutional due process grounds." *New Hampshire Ball Bearing Co., Inc. v. United States*, 36 CIT __, __, Slip Op. 12–2, at 14 (Jan. 3, 2012); *see also Schaeffler Grp. USA, Inc. v. United States*, 36 CIT __, __, Slip Op. 12–8, at 11–12 (Jan. 17, 2012). We conclude that Standard's retroactivity claims, when construed in this way, must be dismissed for lack of standing.[10] Because the CDSOA was enacted in 2000, it was not applied retroactively to Standard, which expressed opposition to the wooden bedroom furniture petition in 2003. First Amended Compl. ¶¶ 18–19. Standard, therefore, had the "opportunity to . . . conform [its] conduct accordingly." *Landgraf*, 511 U.S. at 265. As a consequence, plaintiff's amended complaints fail to allege an injury in fact arising from conduct predating the CDSOA's enactment. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) ("To satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . .").

[10] It is also possible to construe Standard's retroactivity claims, when read literally, to mean that the CDSOA is impermissibly retroactive under the due process guarantee simply because it attaches negative consequences to petition support decisions made prior to the determination of eligibility for distributions. We decline to construe the claims in this way because, according to such a construction, the CDSOA would not be "retroactive" as the term has been recognized in case law and would be indistinguishable from any of innumerable statutes attaching a consequence to a past action of a person to whom enactment of the statute provided notice of the consequences. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). Were we to adopt the alternate construction of plaintiff's retroactivity claims that we pose hypothetically, we would be compelled to dismiss such claims as ones upon which no relief could be granted.

Because the amended complaints do not allege facts from which we may conclude that Standard has standing to bring the claims stated as Count 4, we must dismiss these claims for lack of jurisdiction pursuant to USCIT Rule 12(b)(1).

C. Plaintiff Does Not Qualify for an Injunction

Plaintiff's January 11, 2012 motion seeks what plaintiff terms a "preliminary injunction," under which defendants would be enjoined from disbursing any funds "that are currently being withheld by CBP for Standard for FY2006-FY2010 . . . for the pendency of this litigation, including all relevant appeals and remands, until such time as a final court decision is rendered in this case." Pl.'s Mot. for Prelim. Inj. 1. A preliminary injunction normally dissolves upon the entry of judgment. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (stating that the purpose of a preliminary injunction is to preserve the status quo until the merits of the action are ultimately determined); 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure, § 2947 (2d ed. 2010) (the principal purpose of preliminary injunctive relief is to preserve the court's power to render a meaningful decision pursuant to a trial on the merits). Because our decision today will conclude this action, the question of a preliminary injunction to prevent irreparable harm during the pendency of this case is moot.

By attempting to enjoin distribution through all remands and appeals, plaintiff's January 11, 2012 motion seeks equitable relief beyond a preliminary injunction. Additionally, plaintiff seeks as a remedy that the court order the ITC to declare Standard an ADP and order Customs to "disburse pursuant to the CDSOA a pro rata portion of the assessed antidumping duties on wooden bedroom furniture from China . . . ." First Amended Compl. ¶ 51 (Prayer for Relief). In summary, Standard seeks to prevent Customs from paying to other CDSOA claimants what Standard claims is its share of the withheld distributions and seeks affirmative injunctions against both agencies so that Standard will receive those distributions. In these respects, plaintiff is seeking permanent equitable relief both as a provisional measure pending a possible appeal and as a remedy on its claims. We conclude, however, that Standard does not qualify for permanent equitable relief.

Standard is required to show for a permanent injunction that it has suffered an irreparable injury, that the remedies available at law are inadequate to compensate for that injury, that, considering the balance of hardships between the parties, a remedy in equity is warranted, and that the public interest would not be disserved by a

permanent injunction. *Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006). Here, we conclude that there are no "remedies available at law" and that no "remedy in equity is warranted," based on our analysis of plaintiff's claims as discussed *supra*. We presume, without deciding, that plaintiff would be irreparably harmed were Customs to distribute to other parties what Standard claims to be its share of the withheld distributions. With respect to the balance of hardships, Standard would be prejudiced by such a distribution, but defendant-intervenors also will be prejudiced by further delay in obtaining what they claim to be their lawful CDSOA disbursements. The public interest favors an orderly and lawful distribution of the withheld funds. The controlling factor, however, is that neither a remedy at law nor a remedy in equity is appropriate in these circumstances. For the reasons discussed in this opinion, we conclude that the appropriate disposition is the dismissal of this action.

IV. CONCLUSION

Because Counts 1, 2, 3, and 5 of plaintiff's amended complaints fail to state a claim upon which relief may be granted, and because the claims in Count 4 of plaintiff's amended complaints must be dismissed for lack of standing, we will grant the motions to dismiss filed by defendants and defendant-intervenors. And because neither a remedy at law nor a remedy in equity is available on the claims stated, we conclude that plaintiff is not entitled to injunctive relief that would delay the pending CBP distribution of CDSOA funds or to an affirmative injunction directing distribution of CDSOA benefits to Standard. Plaintiff has taken the opportunity to amend its original complaints and has not indicated an intention to seek leave to amend its complaints again, and we *see* no reason why this action should be prolonged. Accordingly, we shall enter judgment dismissing this consolidated action.

Dated: February 17, 2012
New York, New York

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

Slip Op. 12–22

LIBERTY FROZEN FOODS PRIVATE, LIMITED, et al., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE, AMERICAN SHRIMP PROCESSORS ASSOCIATION, and DEVI SEA FOODS LIMITED, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol.[1] Court No. 10–00231

[Affirming Department of Commerce's remand redetermination]

Dated: February 21, 2012

Lizbeth R. Levinson and *Ronald M. Wisla*, Kutak Rock LLP of Washington DC, for the Plaintiffs Liberty Frozen Foods Private, Limited; Devi Marine Food Exports Private, Limited; Kader Exports Private, Limited; Kader Investment and Trading Company, Private, Limited; Liberty Oil Mills Limited; Premier Marine Products; and Universal Cold Storage Private, Limited.

Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With him on the briefs were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was *Scott D. McBride*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Andrew W. Kentz, *Jordan C. Kahn*, *Nathaniel J. Maandig Rickard*, and *Kevin M. O'Connor*, Picard Kentz & Rowe LLP, of Washington, DC, for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

Terence P. Stewart, Geert M. De Prest and *Elizabeth J. Drake*, Stewart and Stewart, of Washington DC, and *Edward T. Hayes*, Leake & Andersson, LLP, of New Orleans, LA, for the Defendant-Intervenor American Shrimp Processors Association.

Ronald M. Wisla, Kutak Rock LLP, of Washington, DC, for the Defendant-Intervenor Devi Sea Foods Limited.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This case returns to court following remand by *Liberty Frozen Foods Pvt., Ltd. v. United States*, __ CIT __, 791 F. Supp. 2d 1249 (2011) ("*Liberty I*"). In *Liberty I*, the Court reviewed the final results of the fourth administrative review of certain frozen warmwater shrimp from India,[2] and ordered the Department of Commerce ("Commerce" or "the Department") to "further explain or amend, its

[1] This action was consolidated with Court No. 10–00237, which was subsequently dismissed. Order, Mar. 1, 2011, ECF No. 53.

[2] *Certain Frozen Warmwater Shrimp from India*, 75 Fed. Reg. 41,813 (Dep't Commerce July 19, 2010) (final results of antidumping duty administrative review, partial recission of

decision to consider the full amount of [Liberty Frozen Foods'] March 2008 bad debt write-off" in light of the apparently inconsistent decisions in *Saccharin from the People's Republic of China*, 68 Fed. Reg. 27,530 (Dep't Commerce May 20, 2003) (notice of final determination of sales at less than fair value) ("*Saccharin from PRC*")[3] and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 75 Fed. Reg. 34,980 (Dep't Commerce June 21, 2010) (final results of the antidumping duty administrative review) ("*Pipe from Korea II*").[4] *Liberty I*, __ CIT at __, 791 F. Supp. 2d at 1256–57. In the *Final Results of Redetermination Pursuant to Court Remand*, ECF No. 86 ("*Remand Results*"), Commerce reaffirmed its decision to include the full amount of the bad debt write-off in the calculation of indirect selling expenses consistent with its general practice of basing "indirect selling expenses on the amounts recorded in a company's books and records during the period under review." *Remand Results* at 4. Commerce distinguished *Saccharin from PRC* and *Pipe from Korea II* as exceptions to the general rule applicable to facts not present in this case. *Id.* at 6–9.

As discussed below, the court affirms the *Remand Results* as neither arbitrary nor contrary to law because the Department sufficiently explains why its decision is consistent with *Saccharin from PRC* and *Pipe from Korea II*.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and § 516A(a)(2) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2) (2006).[5]

BACKGROUND

The facts necessary to the disposition of the remand are the following:[6]

Liberty Frozen Foods ("LFF") was chosen as a mandatory respondent for the fourth administrative review of certain frozen warmwater shrimp from India. *Final Results*, 75 Fed. Reg. at 41,813. The period of review ("POR") for the fourth administrative review was

review, and notice of revocation of order in part) ("*Final Results*"), and accompanying *Issues & Decision Memorandum*, A-533–840, ARP 08–09 (July 13, 2010), Admin. R. Pub. Doc. 310 ("*I & D Mem.*") (adopted in *Final Results*, 75 Fed. Reg. at 41,815).

[3] *See also Issues & Decision Memorandum*, A-570–878, (May 20, 2003) ("*Saccharin from PRC I & D Mem.*") (adopted in *Saccharin from PRC*, 68 Fed. Reg. at 27,530).

[4] See also, *Issues & Decision Memorandum*, A-580–809, ARP07–08 (June 14, 2010) ("*Pipe from Korea II I & D Mem.*") (adopted in *Pipe from Korea II*, 75 Fed. Reg. at 34,981).

[5] All subsequent citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[6] Familiarity with the court's prior decision is presumed.

February 2008 to January 2009. *Id.* During the POR, in March 2008, LFF wrote-off the value of a sale for which full payment had never been received (the "bad debt write-off") as a year-end expense.[7] *I & D Mem.* Cmt. 5 at 17–18. When calculating LFF's indirect selling expenses, Commerce included the full value of this bad debt write-off. *Id.*

LFF challenged inclusion of the bad debt write-off's full value before Commerce, *Id.* Cmt. 5 at 20, and then before this Court, arguing that (1) the bad debt write-off should not be included in indirect selling expenses because it related to a transaction that occurred prior to the POR, and (2) if the bad debt write-off was included it should be prorated because LFF's fiscal year and the POR overlapped by only two months. *Liberty I*, __ CIT at __, 791 F. Supp. 2d at 1253–57. The Court affirmed the Department's rejection of LFF's first argument, but, in light of apparently contradictory practices in *Saccharin from PRC* and *Pipe from Korea II*, remanded the *Final Results* to Commerce for further explanation of why the bad debt write-off was not prorated. *Id.* at 1255–57.

STANDARD OF REVIEW

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

DISCUSSION

As recognized in *Liberty I*, "an unexplained inconsistency in the application of a methodology is unlawful agency action." *Liberty I*, __ CIT at __, 791 F. Supp. 2d at 1256 (citing *SKF USA Inc. v United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001); *Pakfood Pub. Co. v. United States*, __ CIT __, 724 F. Supp. 2d 1327, 1334 (2010)). Following remand, the issue presented is whether Commerce has shown that its *Remand Results* are in accordance with law by sufficiently explaining the apparent inconsistencies between its methodology for calculating indirect selling expenses in this case and the methodologies employed in *Saccharin from PRC* and *Pipe from Korea II*.

Commerce first argues that its standard methodology for calculating indirect selling expenses, as exhibited in this case, is not to parse expenses into POR and non-POR components.

> When determining the total expenses incurred, the Department is not concerned with expenses recorded in specific months but

[7] LFF's 2007–2008 fiscal year ran from February 2007 to March 2008.

> rather the aggregate amount incurred over the POR. Thus, as a general rule, the Department does not attempt to split expenses that are recorded on a semi-annual or annual basis into monthly amounts, nor does it analyze whether the component expenses are recorded in the months that the underlying activity took place. . . . Just as companies normally do not reflect such annual adjustments in quarterly, monthly or weekly terms, the Department, as a rule, does not attempt to pro-rate such adjustments . . . .

Remand Results at 4–5 (footnote omitted). Rather, Commerce takes those expenses "actually recorded in the books and records of the respondent during the period of review," aggregates those expenses, and "then divide[s] those expenses by the total value of sales during the same period of time." Def.'s Resp. Pls.' Comments Regarding Remand Results at 15, ECF No. 97 ("Def.'s Reply Br."). This account accurately describes the methodology employed by Commerce in this case: (1) LFF recorded the bad debt write-off within the POR; (2) Commerce aggregated the bad debt write-off with the other expenses recorded during the POR; and (3) Commerce then divided the aggregate by the total value of sales for the POR.[8]

However, as Commerce explains in the *Remand Results*, the standard methodology is inadequate when the POR is incongruent with the period over which an expense is realized. It is this fact that distinguishes *Saccharin from PRC* and *Pipe from Korea II* as exceptions to the standard methodology.[9]

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[8] LFF asserts in its Comments on the *Remand Results* that its depreciation expenses from the two fiscal years encompassing the POR were prorated to arrive at one year's worth of depreciation expenses in a method similar to that used in *Pipe from Korea II*, *see infra* pp. 10–11. Pl.'s Comments on Remand Results at 10, ECF No. 88 ("Pl.'s Comments"). However, LFF did not provide a citation to the relevant records, which would permit the court to review this claim. Therefore, the court will not consider this argument.

[9] The court notes that in cases where an exception does not apply, such as this one, Commerce's standard methodology does not permit it to capture expenses recorded after the POR has ended. Commerce acknowledged as much in the *Remand Results* :

> LFF's fiscal year runs from April through March. Thus, any adjusting entries made in March 2008 (at the end of the first fiscal year included in the POR) should be included in LFF's costs; any adjusting entries made in March 2009 ([at the end of] the [fiscal] year in which the remaining portion of the POR is included) should not be (and were not) reported.

Remand Results at 5 n.4. In light of this fact, the court finds unpersuasive Commerce's argument that including the full expense when it is recorded is necessary to capture expenses relevant to the POR. Had LFF waited another year, until March 2009, to write-off its bad debt expense, the expense would not have been captured because LFF was not chosen as a mandatory respondent in the fifth administrative review of this Order. *See Certain Frozen Warmwater Shrimp from India*, 76 Fed. Reg. 41,203, 41,205 (Dep't Commerce July 13, 2011) (final results of antidumping duty administrative review, partial rescission, and final no shipment determination). Thus, while it is true on the facts of this

In *Saccharin from PRC*, Commerce prorated a bad debt expense recorded as a year-end expense outside the six-month period of investigation ("POI").[10] In cases like *Saccharin from PRC* that involve a six-month POI/POR year-end expenses may go entirely uncaptured using the standard methodology for calculating indirect selling expenses. This is not because relevant expenses are recorded outside the POI/POR; rather, it is because the POI/POR encompasses a span of time that does not overlap with any year-end recording periods. *See Remand Results* at 7, 7 n.5. Because a six-month POI/POR may not capture *any* year-end expenses, an exception to the standard methodology that permits inclusion of certain expenses recorded outside the POI/POR is necessary to prevent a distortive undercounting due to expenses being "omitted completely from the reported costs 'solely as a matter of [when the respondent completed its books for the year].'" *Id.* at 7 (alternation in original) (quoting *Saccharin from PRC I & D Mem.* Cmt. 10 at 20 n.5).

A second exception is then necessary to prevent overstating the value of year-end expenses in calculations involving a truncated POI/POR, i.e., to prevent including a full year's expenses in a six-month POI/POR. Therefore, the year-end expenses are properly, and exceptionally, prorated in such cases to prevent a distortion through overcounting.

Commerce clearly articulated the *Saccharin from PRC* exception in footnote seven of the *Remand Results*:

> If those companies [that record depreciation expenses only at the end of the fiscal year] were investigated or reviewed and the POI or POR was less than a year, the Department would not include a full year's worth of depreciation expenses in its calculations. Rather, if the truncated POI/POR precedes the month in which the companies' year end adjustments were made, the Department would attribute, on a *pro rata* basis, a portion of these expenses to the POI/POR because it would be distortive to include no depreciation expenses in the analysis. Similarly, if the companies' fiscal year ended within a truncated POI/POR, it would be distortive to include a full year's depreciation to that

case that "if these expenses are not included in the analysis for the period under consideration, they would never be captured in the calculation of LFF's margin although they clearly pertain," *Remand Results* at 16, Commerce's chosen methodology is no guarantee that an expense which pertains to the POR will be captured during that POR.

[10] Commerce noted in *Saccharin from PRC* that,

> Suzhou booked bad debt into its financial statements at the end of the fiscal year (outside the POI). However, this choice was made solely as a matter of completing the books for the year. We will divide these expenses by two and attribute half to the POI (the first half of the calendar year).

Saccharin from PRC I & D Mem. Cmt. 10 at 20 n.5.

> truncated POI/POR. In that situation, the Department would therefore include only a portion of the depreciation expenses.

Id. at 7 n.7.

LFF reads footnote seven differently, concluding that "[t]he Department's argument that it does not parse expenses into POR and non-POR elements is directly contradicted by its own examples." Pl.'s Comments at 4. LFF's argument is misguided on two accounts: (1) LFF reads the exception as the rule, and (2) it fails to appreciate the significance of the modifier "truncated." As discussed above, a truncated POR presents circumstances that require exceptions, including both provisions for capturing yearend expenses to prevent undercounting distortions and prorating year-end expenses to prevent overcounting distortions.

Pipe from Korea II presents a distinct but related difficulty for the standard methodology. Unlike *Saccharin from PRC*, *Pipe from Korea II* did not involve a truncated POR. The POR was one year, but the record contained two years worth of bad debt expense data. Thus, as Commerce plainly and accurately stated in that case, "including the entire allowance of doubtful accounts from both years would result in overstating the bad debt allowance." *Pipe from Korea II I & D Mem.* Cmt. 4 at 22. With two years of bad debt expenses on the record of a one year POR, Commerce prorated the two years of data to arrive at a nondistortive amount consistent with the POR — a reasonable deviation from the standard methodology on these facts.[11]

Nor does LFF's reliance on *Certain Preserved Mushrooms from India*, 68 Fed. Reg. 41,303 (Dep't Commerce July 11, 2003) (final results of antidumping duty administrative review) ("*Mushrooms from India*"),[12] undermine Commerce's reasoned distinctions in *Saccharin from PRC* and *Pipe from Korea II*. *See* Pl.'s Comments at 4–5. In *Mushrooms from India*, a respondent requested that Commerce offset its financial expenses by the full amount of a recorded gain from

[11] Commerce also distinguishes *Pipe from Korea II* from the instant case on the basis that *Pipe from Korea II* involved a bad debt provision, whereas the instant case involves a bad debt write-off: "[T]here is a meaningful difference between a provision for bad debt and a one-time write-off. . . . As a set-aside in anticipation of periodic expenses, rather than a onetime recognition of a specific expense, a provision is more appropriate to pro-rate than a direct write-off." Def.'s Reply Br. at 11. The court need not decide whether Commerce's statement is accurate to resolve the case before it. Rather, it is sufficient to note that *Pipe from Korea II* is distinguishable from the instant case *both* because it involved a bad debt provision and because the two years of bad debt expense data presented a danger of double counting.

[12] *See also* the accompanying *Issues & Decision Memorandum*, A-533–813, ARP 01–02 (July 11, 2003) ("*Mushrooms from India I & D Mem.*") (adopted in *Mushrooms from India*, 68 Fed Reg. at 41,303).

debt restructuring. *Mushrooms from India I & D Mem.* Cmt. 13 at 20. Commerce declined to credit respondent the entire amount of the gain during the POR at issue, arguing that

> [i]t is the Department's practice to offset financial expenses only with the current portion of gain on debt restructure. . . . The benefit of the restructured debt covers multiple accounting periods through the maturity of the loan. [Respondent's] reporting methodology is distortive in that it recognizes the entire gain in the year of restructure, when, in fact, multiple accounting periods will benefit from the restructured debt.

Id. (citations omitted).

The reasoning in *Mushrooms from India* is consistent with the Department's position articulated in the *Remand Results* of this case. Like *Saccharin from PRC* and *Pipe from Korea II*, in *Mushrooms from India* the financial data at issue (here a gain rather than an expense) was not coterminous with the POR. Because the gain related to a term ("multiple accounting periods") that exceeded the POR, Commerce "included as an offset to the financial expenses the portion of the gain that is current to this POR." *Id.* Cmt. 13 at 20–21. Contrary to LFF's argument, *Mushrooms from India* provides further support to the Department's articulation of its standard methodology and the necessity of certain exceptions, as also recognized in *Saccharin from PRC* and *Pipe from Korea II*.

With its standard methodology for calculating indirect selling expenses, Commerce seeks to capture and aggregate one year's worth of such expenses to accurately reflect the one year length of the POR. Thus, when year-end expenses are recorded during the POR, it is reasonable for Commerce to include the full expense. However, when the expense is incongruous with the POR, it is reasonable and consistent for Commerce to avoid distortion by adjusting its policy to prevent either undercounting or overcounting. The *Remand Results* are consistent with this reasonable explanation.

CONCLUSION

For all the foregoing reasons, the Department's *Final Results*, 75 Fed. Reg. 41,813, as explained by the *Remand Results*, will be affirmed.

Judgment will be entered accordingly.

It is **SO ORDERED**.

Dated: February 21, 2012
New York, New York

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