U.S. Customs and Border Protection

Slip Op. 10–119

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 08–00009

[Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.]

Dated: October 21, 2010

Williams Mullen (*Evelyn M. Suarez, Dean A. Barclay, and George H. Bowles*) for Plaintiff Horizon Lines, LLC.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, U.S. Department of Justice (*Edward F. Kenny*); and *Paula Smith*, U.S. Customs and Border Protection, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I.
Introduction

Plaintiff Horizon Lines, LLC ("Plaintiff") challenges a determination by U.S. Customs and Border Protection ("Customs") that certain coatings work performed on Plaintiff's vessel is subject to a 50 percent *ad valorem* duty as a foreign repair under 19 U.S.C. § 1466(a). Jurisdiction is available under 28 U.S.C. § 1581(a). Defendant United States ("Defendant") has moved for summary judgment. *See* Defendant's Motion for Summary Judgment ("Defendant's waterline, *see infra* n.4, Defendant's Motion is GRANTED as to these claims. Because material facts regarding Plaintiff's other claims remain in dispute, *see infra* Part IV, Defendant's Motion is DENIED as to these claims.

II

Background

The work at issue in this action relates to the antifouling system of the CRUSADER, a U.S.-flagged vessel owned by Plaintiff. *See* Complaint ¶ 1.[1] The growth of marine organisms on the hull of a nautical vessel can impair the speed or fuel efficiency of that vessel. *See* Defendant's Statement of Undisputed Material Facts with Respect to Its Motion for Summary Judgment ("Defendant's Facts") ¶ 3; Plaintiff's Statement of Material Facts as to Which Genuine Issues to Be Tried Exist ("Plaintiff's Facts") ¶ I–3. Antifouling paint is generally designed to impede this growth by killing organisms that come into contact with it and by sloughing off if organisms attach to it. *See* Defendant's Facts ¶ 4; Plaintiff's Facts ¶ I–4. This paint has a limited service life and may be reapplied as part of vessel maintenance. *See* Defendant's Facts ¶ 7; Plaintiff's Facts ¶ I–7.

In some antifouling paint, organotin compounds perform the biocidal function. *See* Plaintiff's Facts ¶ II–1; Defendant's Response to Plaintiff's Statement of Additional Material Facts as to Which Genuine Issues to Be Tried Exist ("Defendant's Fact Response") ¶ US–2.[2] Under the auspices of the International Maritime Organization ("IMO"), a number of states (including the United States) agreed that these compounds "pose a substantial risk of toxicity and other chronic impacts to ecologically and economically important marine organisms" and may harm the health of humans who consume "affected seafood." International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 ("IMO AFS Convention") at 1; *see* Plaintiff's Facts ¶ II–1; Defendant's Fact Response ¶ US–1. These states therefore agreed that, as of January 1, 2008, certain vessels subject to their authority either:

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[1] This opinion uses the terms "antifouling paint" and "antifouling coatings" interchangeably to refer to the particular type of antifouling system at issue in this action. *See* International Convention on the Control of Harmful Anti-Fouling Systems on Ships, 2001 ("IMO AFS Convention") art. 2 ("'Anti-fouling system' means a coating, paint, surface treatment, surface, or device that is used on a ship to control or prevent attachment of unwanted organisms."); Defendant's Memorandum in Support of Its Motion for Summary Judgment ("Defendant's Brief") (referring generally to "antifouling paint"); Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Response") (referring generally to "anti-fouling coatings" and "anti-fouling system").

[2] Organotin compounds contain tin (Sn) bonded with carbon (C). *See* HAWLEY'S CONDENSED CHEMICAL DICTIONARY (Richard J. Lewis Sr. ed., 14th ed. 2001) at 822. "All are highly toxic." *Id.*

> (1) shall not bear [organotin compounds which act as biocides in antifouling systems] on their hulls or external parts or surfaces; or
>
> (2) shall bear a coating that forms a barrier to such compounds leaching from the underlying non-compliant anti-fouling systems[.]

IMO AFS Convention at 15. Vessels are to be inspected and certified by their flag state or by an organization designated by that state. *See id.* at 19–21.[3]

In 2006, the CRUSADER drydocked at a shipyard in the People's Republic of China for certain inspections and operations, including the work at issue. *See* Defendant's Facts ¶ 1; Plaintiff's Facts ¶ I–1. Prior to that work, the coatings on the CRUSADER's external hull below the waterline comprised (from overcoat to undercoat): "tin-free anti-fouling coating; a sealer, forming a barrier against any tin-bearing coatings underneath it; tin-bearing anti-fouling coating; and regular paint, possibly tin-bearing." Plaintiff's Facts ¶ II–3; *see* Defendant's Fact Response ¶ US–3. The condition of the coatings was described in part as follows:

ESTIMATED SIZE OF COATING DEFECTS EXTERNAL HULL

Flatbottom	25%	Local blistering
	5%	Scatered corrosion
Under water vertical	10%	Local blistering
	2%	Scatered corrosion

Defendant's Exhibit 4, W. Mann, 2006 CRUSADER Drydock Paint Report ("2006 Paint Report") (syntax and spelling in original), *cited in* Defendant's Facts ¶ 5; *see* Plaintiff's Facts ¶ I–5. Plaintiff and Defendant dispute whether these coatings "compl[ied] with the requirements of the IMO AFS Convention." Plaintiff's Facts ¶ II–5; *see* Defendant's Fact Response ¶ US–4. They also dispute how much service life, if any, remained in the tin-free antifouling coatings. *See* Defendant's Facts ¶¶ 5–10; Plaintiff's Facts ¶¶ I–5–10.

[3] The IMO AFS Convention was signed by the United States on December 12, 2002, *see* Plaintiff's Facts ¶ II–1; Defendant's Fact Response ¶ US–1, and approved by the Senate on September 26, 2008, *see* 154 CONG. REC. S. 9850 (declaring that, *inter alia*, "[t]his Convention is not self-executing").

The work at issue was performed below the waterline and consisted of (1) removal of all existing coatings such that bare steel was exposed, (2) application of "wholly tin-free regular paint," and (3) application of "wholly tin-free anti-fouling coatings." Plaintiff's Facts ¶ II-4; *see* Defendant's Fact Response ¶ US–4. The American Bureau of Shipping certified that "the new, wholly tin-free anti-fouling system complied with the IMO AFS Convention." Plaintiff's Facts ¶ II–4; *see* Defendant's Fact Response ¶ US–4.[4] Plaintiff alleges that compliance with the IMO AFS Convention, rather than repair or maintenance, was the "sole purpose" of this work. Plaintiff's Facts ¶¶ II–4–6. Defendant denies this allegation. *See* Defendant's Fact Response ¶¶ US–4–6. If not for the IMO AFS Convention, Plaintiff claims that it would not have removed the existing coatings but "would have done . . . a spot treatment and . . . added another layer of antifouling coating." Defendant's Exhibit 11, Deposition of Joseph Edward Walla ("Walla Deposition") at 78.[5]

Following the CRUSADER's return to the United States, Plaintiff submitted Customs Form 226, "Record of Vessel Foreign Repair or Equipment Purchase." *See* Defendant's Memorandum in Support of Its Motion for Summary Judgment ("Defendant's Brief") at 3–4. This form, as subsequently supplemented, identified the work performed on the CRUSADER. *See id.* at 4. Customs reviewed this form and determined that, pursuant to 19 U.S.C. § 1466, Plaintiff "would owe $251,077.63 on the entire entry which included duties on the charges associated with the application of tin-free antifouling paint." *Id.*

Plaintiff protested portions of this determination, and Customs denied the protest in part. *See* Customs Headquarters Ruling ("HQ") H015615 (October 23, 2007). Plaintiff then commenced the instant action to challenge portions of the denial, arguing that the work at issue is not a repair under 19 U.S.C. § 1466(a). *See* Summons; Complaint. Following discovery, Defendant moved for summary judgment. *See* Defendant's Motion.

III

Standard of Review

In a civil action contesting the denial of a protest under 19 U.S.C. § 1515, the plaintiff bears the burden of demonstrating that such

[4] Plaintiff has abandoned its claims with respect to work performed above the waterline. *See* Plaintiff's Response at 11 n.19; *see also* Defendant's Brief at 14–16.

[5] Joseph Walla is a supervisory port engineer who, pursuant to USCIT R. 30(b)(6), testified on Plaintiff's behalf regarding "issues involving the antifouling paint system that was put on the [CRUSADER] in 2006." Walla Deposition at 7–8.

denial is incorrect. *See* 28 U.S.C. § 2639(a)(1). The court makes its decision "upon the basis of the record made before the court." 28 U.S.C. § 2640(a). The purpose of this *de novo* review is to "reach the correct result." *Rheem Metalurgica S/A v. United States*, 20 C.I.T. 1450, 1456, 951 F. Supp. 241 (1996) (citing *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)).

The Court will grant a motion for summary judgement "if the pleadings, discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "The court may not resolve or try factual issues on a motion for summary judgment." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). Instead, it must view the evidence "in a light most favorable to the nonmovant" and draw "all reasonable inferences . . . in the nonmovant's favor." *Avia Group International, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988).

IV

Discussion

Jurisdiction is available under 28 U.S.C. § 1581(a). 19 U.S.C. § 1466(a) does not apply generally to all vessel work, *see infra* Part IV.A.1, or specifically to all painting, *see infra* Part IV.A.2. The factors frequently cited by Customs in its administration of that provision are not necessarily determinative as to the nature of the work at issue. *See infra* Part IV.A.3. Defendant's arguments in favor of summary judgment are not persuasive, *see infra* Part IV.B.1, and material facts remain in dispute, *see infra* Part IV.B.2. Accordingly, summary judgment is not appropriate.

A

Legal Framework

1

19 U.S.C. § 1466(a) Applies Only To Equipment And Repairs

19 U.S.C. § 1466 reflects a Congressional desire to "protect the American shipbuilding and repairing industry." *Texaco Marine Services, Inc. v. United States*, 44 F.3d 1539, 1545 (Fed. (Cust. Ct. 1979)). The 50 percent *ad valorem* duty imposed by the statute was first

prescribed in 1866. *See* Foreign Repairs to American Vessels, 66 Fed. Reg. 16,392, 16,392 (March 26, 2001). The statute's current (and pertinent) version provides in relevant part that:

> [t]he equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country.

19 U.S.C. § 1466(a).[6] Accordingly, assessment of a duty under 19 U.S.C. § 1466 requires an affirmative answer to at least one of the following three threshold questions:

1) Were "equipments, or any part thereof" purchased?

2) Were "repair parts or materials" acquired?

3) Were "expenses of repairs" incurred?

In answering the first question, the Court of Customs and Patent Appeals ("CCPA") held that "the hull and fittings" do not constitute equipment, "equipment ordinarily being portable things and the hull and fittings being constituted of those things of a permanent character attached to the hull, which would remain on board if the vessel were to be laid up for a long period." *United States v. Admiral Oriental Line*, 18 C.C.P.A. 137, 139 (1930) (holding that a newly installed swimming pool is not equipment).[7]

In answering the second and third questions, the CCPA held that a new installation does not constitute a repair. *See Admiral Oriental*, 18 C.C.P.A. at 141 (holding that installation of the restoration to a sound or good state after decay, waste, injury, dilapidation, or partial destruction; supply of loss; reparation." *H.S. Folger v. United States*, T.D. 21670 (Board of General Appraisers 1899). It "contemplates an existing structure which has become imperfect by reason of the action of the elements, or otherwise." *Admiral Oriental*, 18 C.C.P.A. at 141

[6] The excerpted portion of the current statute is nearly identical to the corresponding portion of the 1866 statute, except that the 1866 statute referred to only "the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States." 39 Cong. Ch. 201, 14 Stat. 178 at Sec. 23.

[7] Holdings of the CCPA are binding as precedent in the Federal Circuit. *See South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982).

(quoting *Gagnon v. United States*, 193 U.S. 451, 457, 24 S. Ct. 510, 48 L. Ed. 745 (1904)).[8]

A "modification," 19 C.F.R. § 4.14(h)(1), is neither equipment nor a repair and hence not subject to a duty under 19 U.S.C. § 1466. *See* 19 C.F.R. § 4.14(h)(1) ("Requests for relief from duty under 19 U.S.C. 1466(a) consist of claims that a foreign shipyard operation or expenditure is not considered to be a repair or purchase within the terms of the vessel repair statute or as determined under judicial or administrative interpretations. Example: a claim that the shipyard operation is a vessel modification."); *SL Service, Inc. v. United States*, 357 F.3d 1358, 1359 (Fed. Cir. 2004) (describing "American Bureau of Shipping and United States Coast Guard required inspections and modifications" as "non-dutiable"); *Horizon Lines, LLC v. United States*, 659 F. Supp. 2d 1285, 1289 (2009) ("[T]he term 'repairs' describes work putting something that has sustained damage back into working condition whereas the term 'modifications' describes work addressing a problematic feature.").

2

Painting Is Not Necessarily A Repair Under 19 U.S.C. § 1466(a)

Paint applied to a vessel's hull is not equipment. *See H.C. Gibbs v. United States*, 28 Cust. Ct. 318, 327 (1952), *aff'd*, 41 C.C.P.A. 57 (1953); *cf. E.E. Kelly & Co. v. United States*, 17 C.C.P.A. 30, 32 (1929) ("Paint is essential to the preservation of the ship's structure. When applied, it is a part of the ship."). In *H.C. Gibbs*, the United States argued that, *inter alia*, lettering on the hull applied for the purpose of advertising "consisted of temporary equipment to be used in connection with the particular cargo." *H.C. Gibbs*, 28 Cust. Ct. at 323. The Customs Court rejected this argument and determined that the advertising was not subject to a duty under 19 U.S.C. § 1466(a). *See id.* at 327.[9]

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[8] The Federal Circuit also distinguished repairs from routine cleanings and certain inspections. *Cf. SL Service*, 357 F.3d at 1359; *Texaco*, 44 F.3d at 1541 (citing *Northern Steamship Co. v. United States*, 54 Cust. Ct. 92, 96–98 (1965)). *SL Service* and *Texaco* addressed whether and how 19 U.S.C. § 1466(a) applies to certain items, such as cleaning and drydocking, that are associated with dutiable repairs but that are not by themselves repairs. *See SL Service*, 357 F.3d at 1359 (upholding apportionment); *Texaco*, 44 F.3d at 1541 (prescribing a "but for" test). Accordingly, these decisions control the scope, but not the existence, of dutiable repairs. *See Horizon Lines, LLC v. United States*, 659 F. Supp. 2d 1285, 1289 (2009).

[9] On one occasion, the Customs Court concluded that "paint applied to the vessel is not to be regarded as hull and fittings." *American Mail Line, Ltd. (Seattle) v. United States*, 2 Cust. Ct. 779, 780 (1939). This decision, however, conflates the equipment and repair

Painting for the purpose of restoration, however, is a repair. *See H.C. Gibbs*, 41 C.C.P.A. at 60 (both cosmetic painting to restore "old and rusted surfaces" and repainting of the vessel name, which was necessitated by the cosmetic painting, constitute repairs); *American Mail Line, Ltd. v. United States*, 24 C.C.P.A. 70, 73 (1936) (repainting constitutes repairs); *E.E. Kelly*, 17 C.C.P.A. at 33 ("maintenance painting" constitutes repairs); *H.C. Gibbs*, 28 Cust. Ct. 318 (advertising painting does *not* constitute repairs); *H.S. Folger*, T.D. 21670 ("We are also of opinion that the item of $155 incurred for painting the vessel, which is no less for preservation than ornamentation, is an expense of [repairs].").

The primary purpose of a particular paint job is a question of fact. *See H.C. Gibbs*, 41 C.C.P.A. at 60. In affirming the Customs Court's conclusion that certain cosmetic painting constituted a repair, the CCPA explained that:

> The [trial] testimony is sufficiently strong to support a finding that the rust to which we have referred, to some extent at least, justified and made necessary a new paint job, and such testimony, as we view it, outweighs the other reasons assigned for such painting. In other words, we feel that the weight of the testimony is strongly in support of a finding to the effect that the painting of the ship's hull was done primarily because of the rusted condition, and therefore should be designated as a repair within the meaning of [19 U.S.C. § 1466], as found by the trial court.

Id.; *cf. Waterman Steamship Corp. v. United States*, 26 Cust. Ct. 114, 122 (1951) (concluding that certain annealing is not a repair because of the reason for that annealing).

3

Certain Factors Identified By Customs Are Not Necessarily Determinative

Customs has frequently identified, but never promulgated through formal rulemaking, four factors that it "may" consider in its duty

components of 19 U.S.C. § 1466(a), *see id.*, and is unpersuasive in light of *H.C. Gibbs*, 28 Cust. Ct. 318. Regardless, Customs has not determined, and Defendant does not argue, that the antifouling paint at issue is equipment. *See* HQ H015615; Defendant's Brief; Defendant's Reply Memorandum in Support of Summary Judgment ("Defendant's Reply"); Defendant's Fact Response ¶¶ US–1, 2, 4, 5, 11, 12, 13, 14 ("As we made clear in our brief in chief, the issue at bar is whether the old tin free anti fouling coating on the CRUSADER which was replaced by [the shipyard] in 2006 was in disrepair.") (emphasis removed).

determinations under 19 U.S.C. § 1466(a). *E.g.*, HQ H071240 (March 16, 2010); HQ H041636 (June 24, 2009); HQ H072555 (August 25, 2009); HQ 116589 (January 6, 2006) (identifying two of the four factors); HQ 116484 (September 21, 2005); HQ 115763 (September 30, 2002); HQ 114092 (September 12, 1997); HQ 113692 (July 2, 1997); HQ 227043 (August 12, 1996); HQ 226968 (May 31, 1996); HQ 112488 (October 9, 1992); HQ 112143 (July 9, 1992); HQ 111546 (October 28, 1991); *see also* HQ H015615 (identifying none of the factors). The first two factors reflect the holding in *Admiral Oriental*, 18 C.C.P.A. at 139, that a vessel's hull and fittings do not constitute equipment:

> 1. Whether there is a permanent incorporation into the hull or superstructure of a vessel, either in a structural sense or as demonstrated by means of attachment so as to be indicative of the intent to be permanently incorporated.
>
> 2. Whether in all likelihood an item would remain aboard a vessel during an extended lay-up.

E.g., HQ 114092 (citation omitted).

The third and fourth factors appear to reflect an attempt by Customs to distinguish a new installation from a repair. Customs has formulated the third factor in two different ways. One formulation asks:

> 3. Whether, if not a first time installation, an item under consideration replaces a current part, fitting or structure which is not in good working order.

E.g., HQ 112488. The other formulation inquires:

> 3. Whether an item constitutes a new design feature and does not merely replace a part, fitting, or structure that is performing a similar function.

E.g., HQ 114092. The fourth factor examines:

> 4. Whether an item provides an improvement or enhancement in operation or efficiency of the vessel.

E.g., *id.*

Customs has repeatedly noted that "[t]hese factors are not by themselves necessarily determinative, nor are they the only factors which may be relevant in a given case. However, in a given case, these factors may be illustrative, illuminating, or relevant with respect to the issue . . . ." *E.g.*, HQ H072555; HQ 114092; *cf. Horizon Lines*, 659 F. Supp. at 1289–90 ("Because the HAWAII's cell entry guides, after

the shipyard work, exhibited new design features that improved or enhanced the vessel's operation or efficiency, the 'good working order' condition of the cell entry guides, before the shipyard work, is not a relevant consideration in determining whether the work constitutes a non-dutiable modification, for purposes of 19 U.S.C. § 1466(a).").

The Federal Circuit requires this court to accord some deference to "a long-standing administrative practice . . . even where, as here, judicial review is *de novo*." *SL Service*, 357 F.3d at 1362 (quoting *Toyota Motor Sales, U.S.A., Inc. v. United States*, 7 C.I.T. 178, 192, 585 F. Supp. 649 (1984)); *see also Optrex Am., Inc. v. United States*, 475 F.3d 1367, 1371 (2007). Accordingly, like Customs, the court "may" consider these factors as potentially "illustrative, illuminating, or relevant" questions of fact but need not treat them as determinative on the issue of repairs. *E.g.*, HQ H072555; HQ 114092.

The analysis undertaken by Customs in the instant matter, *see* HQ H015615 ("[The Customs Vessel Repair Unit] found the tin-free coating, freeboard coating system, blast and coat hatch covers work to be dutiable repairs. We agree. The descriptions of the work performed on the invoices clearly indicate that repair work was done in each case."), is not binding on the court. *See United States v. Mead Corp.*, 533 U.S. 218, 221, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) (finding "no indication that Congress intended [for a Customs Headquarters Ruling] to carry the force of law") (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)); *see also supra* Part III (describing *de novo* review). However, that analysis "is eligible to claim respect according to its persuasiveness." *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944)).

B

Propriety of Summary Judgement

1

Defendant's Arguments Do Not Satisfy The Standard For Summary Judgment

Defendant makes three principal arguments for summary judgment. *See* Defendant's Brief at 9–14; Defendant's Reply Memorandum in Support of Summary Judgment ("Defendant's Reply") at 4–6, 14–15. All three arguments are unpersuasive.

Defendant's first argument is that the work at issue constitutes maintenance painting. *See* Defendant's Brief at 9–11 (citing *E.E. Kelly*, 17 C.C.P.A. at 32–33). The maintenance painting at issue in

E.E. Kelly involved the routine reapplication of paint. *See E.E. Kelly*, 17 C.C.P.A. at 32 ("There was some testimony offered to show that a vessel needs her hull and superstructure completely repainted about every two months in order to maintain the vessel in a clean, presentable, and sanitary condition."). Mr. Walla testified that "it's common practice to reapply antifouling [paint] when you have the opportunity." Walla Deposition at 34. Antifouling paint was previously applied to the CRUSADER in 2001 and 2003. *See id.* at 18, 31. In 2006, if not for the IMO AFS Convention, Plaintiff "would have done . . . a spot treatment and building up of the antifouling coating." *Id.* at 78.

However, Mr. Walla also testified that the work at issue was not routine:

> Q. . . . Other than the wholesale removal and replacement of the antifouling system to meet an IMO requirement, have you ever done that, the wholesale removal and replacement of the antifouling system on any ship?
>
> A. I've never done that. No.
>
> Q. And why haven't you ever done that on any other ship?
>
> A. It hasn't been necessary.
>
> Q. Why hasn't it been necessary?
>
> A. Because this is the—to my knowledge, the first legislation that insisted that the—one type of antifouling be removed or sealed in order to favor another type.
>
> Q. So, in your experience, you never had to remove and completely replace an antifouling system merely because it had worn out?
>
> A. No.

Id. at 62–63; *see also id.* at 61 ("We would not have removed the systems, if it wasn't for the IMO requirement."). When these facts are viewed in a light most favorable to Plaintiff, the work at issue is either something other than or something more than the kind of maintenance painting described in *E.E. Kelly*, 17 C.C.P.A. at 32.

Defendant's second argument is that any work that ameliorates a state of disrepair, however incidentally, is necessarily a repair. *See* Defendant's Brief at 14; Defendant's Reply at 5–6. In support of this argument, Defendant cites *Admiral Oriental*, 18 C.C.P.A. at 141. *See* Defendant's Brief at 14; Defendant's Reply at 5–6. That decision holds in part that a repair implies "an existing structure which has become imperfect by reason of the action of the elements, or otherwise."

Admiral Oriental, 18 C.C.P.A. at 141. It does not hold that the existence of such a structure implies a repair. *See id.* As Plaintiff correctly notes, Defendant confuses "the logical relationship between repairs and disrepairs. Yes, every repair is preceded by disrepair. But not every disrepair is followed by repairs." Plaintiff's Response at 24 (distinguishing between necessary and sufficient conditions).[10]

Defendant also cites a single Customs Headquarters Ruling, which asserts that "in order to qualify as a modification rather than a repair it must be made clear that the element which has been replaced was in full working order at the time of the enhancement." Defendant's Reply at 6 (quoting HQ 114140 (November 18, 1997)). This unsupported assertion is neither binding, *see Mead*, 533 U.S. at 221, nor persuasive, *see Skidmore*, 323 U.S. at 140, nor consistent with precedent, *see H.C. Gibbs*, 41 C.C.P.A. at 60; *Horizon Lines*, 659 F. Supp. at 1289–90.

Contrary to Defendant's second argument, the condition of the antifouling system prior to the work at issue is not necessarily dispositive. *See supra* Part IV.A; *H.C. Gibbs*, 41 C.C.P.A. at 60 (describing the purpose of the work); *Horizon Lines*, 659 F. Supp. at 1289–90 (describing the effect of the work). Moreover, when viewed in a light most favorable to Plaintiff, the evidence suggests that this system was in good working order. Mr. Walla testified that "we would have touched up [approximately] five percent of the flat bottom area and then two percent on the vertical sides area" if the antifouling coatings had not been completely removed. Walla Deposition at 60. And Customs Vessel Repair Unit Specialist Mary Bean answered in the negative when asked whether there was "any indication in the information you reviewed that . . . the [prior] anti-fouling coating was in any way deteriorated." Plaintiff's Exhibit 9, Deposition of Mary Bean ("Bean Deposition") at 6, 98.

Defendant's third argument is that at least a portion of the work at issue constitutes a repair and because Plaintiff "failed to segregate [that] portion of the invoice" from the other portions, "the entire anti-fouling replacement charge is still dutiable as a repair." Defendant's Fact Response ¶ 6 (citing 19 C.F.R. § 4.14(i) and HQ 112974 (July 18, 1995)); *see also* Defendant's Reply at 14–15 (citing *Texaco*, 44 F.3d at 1548 and *Horizon Lines*, 659 F. Supp. 2d at 1289).

None of these authorities support Defendant's third argument. While 19 C.F.R. § 4.14(i) states that "[t]he cost of items for which a request for relief is made must be segregated from the cost of the other items listed in the vessel repair entry," 19 C.F.R. § 4.14(i)(1)(i),

[10] Similarly, an antifouling system that has some "deterioration and damage," *E.E. Kelly*, 17 C.C.P.A. at 32, might nonetheless be "in good working order," *e.g.*, HQ 112488.

it does not state that the cost of items that are later determined to be nondutiable must be initially segregated from the cost of items that are later determined to be dutiable, *see id.*; *cf.* HQ 112974 ("Unless and until the applicant can satisfactorily itemize the costs associated with each aspect of the invoice, this item is dutiable."). *Texaco* notes only that the plaintiff "ha[d] made no effort" to segregate the expenses that it claimed to have incurred independent of its dutiable repairs. *Texaco*, 44 F.3d at 1541–42, 1548 nn.9–10. *Horizon Lines* notes only that the plaintiff had "properly segregated the nondutiable [work] from other dutiable work." *Horizon Lines*, 659 F. Supp. 2d at 1289.

2

Classification Of The Work At Issue Depends On Resolution Of Disputed Material Facts

Plaintiff and Defendant appear to disagree on, *inter alia*, the nature, purpose, and effect of the work at issue as well as the condition of the antifouling system prior to that work. *See, e.g.*, Plaintiff's Facts ¶¶ I–5 (significance of "blistering" and "corrosion"), 6 (effectiveness of the biocide in the prior antifouling coatings), 7 (service life of antifouling coatings generally), 10 (significance of service life); Defendant's Fact Response ¶¶ US–6 (reason for the work at issue), 8 (functionality of the prior antifouling system), 9 (remaining service life of prior antifouling coatings), 10 (condition of the prior antifouling system). These issues are material to the classification of the work at issue, *see supra* Part IV.A, and the evidence, when viewed in a light most favorable to Plaintiff, suggests that they are genuine, *see, e.g.*, Walla Deposition at 59–60 (discussing the 2006 Paint Report); Bean Deposition at 98–101 (discussing the nature of the work at issue).[11] Accordingly, summary judgment is not appropriate.

V

Conclusion

For the reasons stated above, Defendant's Motion is GRANTED as to Plaintiff's claims with respect to work performed above the waterline and DENIED as to Plaintiff's other claims.

[11] Because the court would reach this conclusion even without the deposition of James L. Dolan and the affidavits of Mr. Dolan and Mr. Walla, it need not address Defendant's arguments regarding these materials at this time, *see* Defendant's Reply at 6–13.

Dated: October 21, 2010
New York, New York

__/s/ *Evan J. Wallach*___
EVAN J. WALLACH, JUDGE

Slip Op. 10–120

NATIONAL FISHERIES INSTITUTE, INC., ET AL., Plaintiffs, v. UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 05–00683

[Affirming an amended remand redetermination by United States Customs and Border Protection of limits of liability on bonds previously subject to an enhanced bonding requirement and entering a permanent injunction to accomplish bond cancellation without delay]

Dated: October 21, 2010

Steptoe & Johnson LLP (*Eric C. Emerson*, *Gregory S. McCue*, and *Michael A. Pass*) for plaintiffs.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini* and *David F. D'Alessandris*); *Chi S. Choy*, Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

OPINION

Stanceu, Judge:

I. Introduction

Plaintiffs (the "NFI Importers" or "NFI") are domestic shrimp importers who brought this action to contest a new, more stringent bonding requirement (the "enhanced bonding requirement," or "EBR") that United States Customs and Border Protection ("Customs," "CBP," or the "Agency") applied to all importers of shrimp products subject to antidumping duty orders. *See Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 34 CIT __, __, Slip Op. 10–61, at 1–2 (May 25, 2010) ("*Nat'l Fisheries IV* "). Before the court is the amended second redetermination upon remand ("Amended Second Remand Redetermination"), which Customs submitted to the court in response to the remand order in *National Fisheries IV*, 34 CIT at __, Slip Op. 10–61, at 20. The court affirms the redetermined bond amounts in the Amended Second Remand Redetermination. The court orders permanent injunctive relief under which Customs, with

a limited exception, is required to implement the Amended Second Remand Redetermination within sixty days of the entry of judgment.

II. Background

Background information, presented in *National Fisheries Institute, Inc. v. U.S. Bureau of Customs & Border Protection*, 30 CIT 1838, 1843–47, 465 F. Supp. 2d 1300, 1305–09 (2006) ("*National Fisheries I*"), *National Fisheries Institute, Inc. v. U.S. Bureau of Customs & Border Protection*, 33 CIT __, __, 637 F. Supp. 2d 1270, 1274–81 (2009) ("*National Fisheries II* "), and *National Fisheries IV*, 34 CIT at __, Slip Op. 10–61, at 2–10, is summarized and supplemented herein.

Early in these proceedings, the court ordered limited preliminary injunctive relief in favor of the eight of twenty-seven plaintiffs who testified before the court and established, *inter alia*, that they would suffer irreparable harm absent such relief. *Nat'l Fisheries I*, 30 CIT at 1840–43, 465 F. Supp. 2d at 1303–05. More recently, in ruling on plaintiffs' motion for judgment upon the agency record, the court remanded for redetermination the bond sufficiency determinations that Customs, in implementing the EBR, applied to all of the plaintiffs. *Nat'l Fisheries II*, 33 CIT at __, 637 F. Supp. 2d at 1304–05. In *National Fisheries II*, the court held that Customs exceeded its discretion in applying the EBR, arbitrarily and capriciously imposed increased bond requirements only on importers of shrimp products, and unreasonably applied a formula for determining bond liability limits that secures potential antidumping duties at a substantial amount over the required cash deposit. *Id.* at __, 637 F. Supp. 2d at 1294. In determining that remand proceedings were appropriate, the court held in abeyance plaintiffs' request for permanent injunctive relief. *Id.* at __, 637 F. Supp. 2d at 1300–01. Defendant moved for a clarification of the order the court issued in *National Fisheries II*, a motion the court denied. *Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs & Border Prot.*, 33 CIT __, Slip Op. 09–104 (Sept. 25, 2009) ("*National Fisheries III*").

Concluding that the redetermined bond amounts in the remand redetermination that Customs issued in response to *National Fisheries II* did not address adequately the remaining issues in this litigation, the court again remanded the action to Customs in *National Fisheries IV*, 34 CIT at __, Slip Op. 10–61, at 19–20. Customs filed a second redetermination on June 23, 2010, on which plaintiffs submitted comments on July 21, 2010. Pls.' Comments in Resp. to Second Remand Results ("Pls. Comments"). Defendant filed a response to plaintiffs' comments on August 20, 2010. Def.'s Resp. to NFI's Remand Comments ("Def. Resp."). On September 2, 2010, de-

fendant filed an unopposed motion for leave for Customs to file an amended second remand redetermination. Def.'s Consent Mot. for Leave to File Am. Remand Results. After plaintiffs informed the court that they would file no further comments, the court accepted the Amended Second Remand Redetermination for filing on September 8, 2010. Order, Sept. 8, 2010.

III. Discussion

A. Standard of Review

The court reviews the Amended Second Remand Redetermination according to the standard of review set forth in Section 301 of the Customs Courts Act of 1980, 28 U.S.C. § 2640(e), under which it "shall review the matter as provided in section 706 of title 5." 28 U.S.C. § 2640(e) (2006). In accordance with Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, the court will "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A).

B. The Bond Amounts in the Second Amended Remand Redetermination

In accordance with the court's order in *National Fisheries IV*, 34 CIT at __, Slip Op. 10–61, at 20, Customs redetermined the limits of liability on plaintiffs' bonds using the 10% bond formula of Customs Directive 99–3510–004, which was in effect prior to the adoption of the enhanced bonding requirement. Am. Second Remand Redetermination 2; *see Monetary Guidelines for Setting Bond Amounts*, Directive 99–3510–004 (July 23, 1991), http://www.cbp.gov/linkhandler/cgov/trade/legal/directives/3510–004.ctt/3510–004.txt (last visited Oct. 21, 2010). The court directed that "[o]n remand, Customs must reconsider its application of the 10% formula to amounts that include entries for which duty liability, as determined upon liquidation, is already satisfied." *Nat'l Fisheries IV*, 34 CIT at __, Slip Op. 10–61, at 16. The court reasoned that

> [a]pplication of the 10% formula to the entire amount of duties, taxes, and fees for the bond period, including duties on entries for which liquidation is final and liability is satisfied, results in an actual level of security that could exceed substantially the guideline level of 10%, as applied to the actual amount of duties at risk of nonpayment.

Id. at __, Slip Op. 10–61, at 15. Upon reconsidering the question, Customs reduced the bond amounts to adjust for entries on which liquidation is final. Am. Second Remand Redetermination 2 (stating that "the total duties, taxes, and fees paid during the bond period was reduced by the total duties, taxes and fees relating to entries that were liquidated and the time to file a protest had expired without a protest having been filed"). In response, plaintiffs state that they "do not contest the bond redeterminations made by Defendant in its second remand results." Pls. Comments 1. The court affirms the redetermined limits of liability for the bonds at issue in this action, as set forth in the Amended Second Remand Redetermination.

In the Amended Second Remand Redetermination, Customs states that it is issuing the redetermined bond amounts "under protest," taking the position that "once a bond is in place, its limit of liability should not be retroactively redetermined." Am. Second Remand Redetermination 1. Customs states that retroactive redetermination "foregoes security to which the agency may otherwise be entitled," limits the agency's ability to aggressively collect debts, and impedes "efficient administration of bonds." *Id.* at 1–2. The court does not affirm the portion of the Amended Second Remand Redetermination stating the Agency's position against redetermined bond amounts. This position contradicts the court's holdings in this action. It rests on the untenable premise that Customs should be free to maintain in place indefinitely bonds for which the limits of liability were determined contrary to law. Customs cannot be said to be foregoing security to which it "otherwise may be entitled," *id.* at 1, when it has acted contrary to law in ordering that security.

C. Timing of the Required Cancellation of the Bonds

Customs will be required to cancel all bonds at issue in this case, whether or not it chooses to require a replacement ("superseding") bond in an amount determined without regard to the EBR and in accordance with the Amended Second Remand Redetermination. *See Nat'l Fisheries II*, 33 CIT at __, 637 F. Supp. 2d at 1305. In their comments on the Amended Second Remand Redetermination, plaintiffs advocate that the court "set a time certain by which Defendant must cancel all bonds calculated under the enhanced bonding requirement." Pls. Comments 1. Plaintiffs argue that "a fixed deadline is necessary to ensure that Defendant takes action on these illegally calculated bonds," *id.* at 1–2, urging that the court allow Customs thirty days for this purpose, *id.* at 3. Defendant proposes, instead, a judgment in which Customs would be required to take no action until thirty days from the date on which the judgment becomes final and

conclusive, *i.e.*, after all appeals have been exhausted. Def. Resp., Judgment 1 (proposing that the court order Customs to implement the Amended Second Remand Redetermination "within 30 days of any final and conclusive judgment in this matter which sustains those remand results"). Defendant objects that plaintiffs are attempting to obtain relief that would void the bonds such that the bonds could not be reinstated should the government successfully appeal a judgment entered in this case. Def. Resp. 2.

Plaintiffs' comments seek an order that, after expiration of a time period under which Customs would accept replacement bonds, would compel Customs to cancel the bonds on a date certain and would permanently enjoin Customs from making claims or charges on the original bonds. *See* Pls. Comments 1–4. In seeking relief entailing bond cancellation before the conclusion of an appeal, plaintiffs are moving for permanent injunctive relief and are pursuing an equitable remedy in the nature of the relief for which they moved earlier. *See National Fisheries II*, 33 CIT at __, 637 F. Supp. 2d at 1274 (stating that plaintiffs seek a permanent injunction to prohibit Customs from applying the EBR to them). The court has held in abeyance any ruling on permanent injunctive relief pending the outcome of remand proceedings. *Id*., 33 CIT at __, 637 F. Supp. 2d at 1300–01.

A plaintiff seeking a permanent injunction must demonstrate that it has suffered an irreparable injury, that the remedies available at law, such as monetary damages, are inadequate to compensate for that injury, that, considering the balance of hardships between the plaintiff and defendant, 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). "An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 381 (2008) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)).

The court finds as facts, based on the record in this case, that each of the plaintiffs has incurred, and will continue to incur absent permanent injunctive relief, adverse effects as a result of being made subject to the unlawful enhanced bonding requirement. *See*, *e.g.*, Pls.' Submission of Supplemental Information Requested by the Ct. during *In Camera* Proceedings on Mar. 28, 2008, ¶¶ 25–42, Apr. 28, 2008; *Nat'l Fisheries I*, 30 CIT at 1850–51, 465 F. Supp. 2d at 1311–12; Status Report in Resp. to the Ct.'s Inj., Jan. 26, 2007, Attach. 2–4; Status Report (Def.), Dec. 4, 2006; Status Report (Pls.), Dec. 4, 2006. Those adverse effects, as shown by uncontested facts and undisputed evidence on the record, have taken various forms. Generally, plain-

tiffs have been required to post collateral, typically in the form of letters of credit, to obtain bonds in amounts demanded by Customs according to the EBR. Earlier, some plaintiffs agreed to cease or reduce importing activity to avoid the costs of enhanced bonding; others have incurred costs due to the reduced availability of their credit to conduct their general business activities. *See Nat'l Fisheries I*, 30 CIT at 1855–57, 465 F. Supp. 2d at 1313–15.

In addition, the court finds that all plaintiffs are experiencing competitive harm in continuing to be subjected to a bonding requirement that does not apply to parties who began importing after repeal of the EBR. *See Nat'l Fisheries II*, 33 CIT at __, 637 F. Supp. 2d at 1303 ("The continued refusal of Customs to address the problem of the previous bonds has resulted in inequitable treatment of long-time importers, such as plaintiffs, relative to new importers who were never subject to the unlawful enhanced bonding requirement."). The harm imposed on plaintiffs must be considered irreparable because plaintiffs will never be able to recover the costs they incurred, or obtain redress for harm they have experienced, in maintaining the bonds that Customs is unlawfully requiring of them. The adverse effects stemming from the EBR will continue until cancellation of the bonds on which plaintiffs are principals. The court concludes, therefore, that plaintiffs will continue to incur irreparable harm directly caused by unlawful government action if cancellation of the EBR-based bonds must await the deciding of any appeal.

Regarding the second factor for permanent injunctive relief, no remedy at law is available. Plaintiffs are not entitled to recover money damages from the United States as compensation for the adverse effects they have incurred and will incur from the unlawful bonding requirement. Only through an injunctive remedy will plaintiffs avoid incurring additional irreparable harm during an appellate proceeding.

With respect to the balancing of the hardships, the absence of injunctive relief will impose on plaintiffs the irrecoverable costs of maintaining, during appeal, bonding set according to the EBR, including the costs of maintaining collateral and of the reduced availability of credit for other business activities and the irremediable competitive harm plaintiffs are incurring relative to other importers. Alternatively, a grant of injunctive relief, absent a stay pending appeal, will preclude defendant from maintaining security at EBR-based levels for entries for which liquidation is not yet final and for which potential duty liability is not yet satisfied, even if the government ultimately prevails upon appeal. The hardship to Customs resulting from a permanent injunction, however, is limited. Although

the level of security available for the entries now secured by EBR-based bonds in this case will be reduced from the current levels, security still will be available in the form of cash deposits. Additional security for amounts potentially owing that exceed the cash deposits will be available as a result of any superseding bonds that Customs may require, pursuant to the court's order, as a condition of cancellation of the EBR-based bonds. Customs will be authorized to secure the remaining liability that is the subject of those now-terminated bonds according to the standard bond formula that it applies to all other importers. *See Monetary Guidelines for Setting Bond Amounts*, Directive 99–3510–004 (July 23, 1991), http://www.cbp.gov/linkhandler/cgov/trade/legal/directives/3510–004.ctt/3510–004.txt (last visited Oct. 21, 2010).

The court concludes that the balance of the hardships is in favor of plaintiffs. Due to the previous decision of Customs not to apply the repeal of the EBR to bonds for previous bonding periods, a decision that Customs has maintained through two remand proceedings, plaintiffs have been adversely affected, and continue to be adversely affected, by a regulatory requirement that Customs never applied to any importers other than shrimp importers and that Customs itself has abandoned and thus no longer imposes on any importers. Whatever interest Customs has in continuing to apply the EBR to plaintiffs' now-terminated bonds is outweighed by the harm being caused to plaintiffs. That harm, absent a permanent injunction, will continue through the time that an appellate proceeding will consume.

The public interest also favors the granting of the permanent injunction. Although maintaining a maximum level of security for the unliquidated entries would serve broadly the public interest of revenue collection, it would do so at the cost of continuing to subject plaintiffs to an unlawful, and discriminatory, bonding requirement that Customs no longer imposes on any importers other than on a distinct class of persons, *i.e.*, those who began importing shrimp subject to antidumping duty orders prior to the government's abandonment of the EBR. The public interest is not served by the discriminatory, arbitrary, and capricious continuation of an onerous and unlawful requirement against a single group of importers.

Defendant argues that "[i]n essence, NFI is attempting to obtain premature relief in a manner that may, in NFI's view, render moot any appeal that the Solicitor General were to elect to take from any final judgment, by voiding the bonds in a manner under which they could not be reinstated were the Government to successfully appeal." Def. Resp. 2. According to defendant, plaintiffs erroneously presume

that the relief sought would achieve the result plaintiffs hope to accomplish, which is release of the collateral by the sureties prior to the conclusion of appellate proceedings. *Id.* Defendant adds that "the Government will not voluntarily waive its right to redress under any bond" and that "[t]he Court cannot direct CBP to voluntarily elect never to proceed against any bond regardless of the outcome of a Government appeal." *Id.*

The court concludes that a judgment in the form sought by plaintiffs, which would impose a permanent injunction, likely would moot any appeal by the United States in the particular circumstances of this case, unless defendant, at a later date, were to qualify for a modification of the injunction (essentially, a stay of the judgment) pending appeal. *See* USCIT Rule 62(c); F.R. App. P. 8(a). Because the EBR that previously was in effect has been repealed, arguably the only issue on appeal that is not already mooted by the repeal of the EBR is whether Customs will be required to implement the Amended Second Remand Redetermination, which affects only the level of security arising out of plaintiffs' now-terminated bonds. Plaintiffs seek equitable relief under which those bonds, after replacement with bonds in lower amounts, would be canceled within a definite period of time from the entry of judgment. By definition, a canceled bond is one on which a principal and surety are released from all liability thereunder, and therefore Customs would be unable to obtain payment from a surety upon a demand, claim or charge made on a bond once that bond has been canceled in accordance with the Amended Second Remand Redetermination. The court is aware of no means, and the parties identify none, under which Customs could reinstate a bond and thereby bind the surety once again, after the bond is canceled. Nevertheless, the court, exercising its discretion to weigh the competing equitable considerations, concludes that the bonds remaining at issue in this litigation must be canceled as soon as possible. In weighing those considerations, the court concludes that the possible mooting of defendant's appeal is not a sufficient reason for the court to deny plaintiffs the equitable relief to which plaintiffs are otherwise entitled. Defendant has not demonstrated that it should be granted what would constitute an automatic stay of the judgment, and a delay in the remedy, pending a possible appeal. Should defendant choose to bring an appeal, it may exercise its right to seek modification through the procedures of USCIT Rule 62(c) and, should defendant not prevail, to seek a stay from the U. S. Court of Appeals for the Federal Circuit pursuant to F.R. App. P. 8(a). To balance these competing considerations, the court is allowing defendant sixty days, rather than thirty days, from the entry of judgment in which to implement

the Amended Second Remand Redetermination. The court considers this time period sufficient to allow defendant to pursue a stay under USCIT Rule 62(c) and, should it not prevail, under F.R. App. P. 8(a).

In summary, the court concludes that plaintiffs have established their entitlement to permanent injunctive relief as contemplated by the position they took earlier in this litigation and as specifically sought in their comments on the Amended Second Remand Redetermination.

D. Form of Equitable Relief affecting Claims or Charges against the Bonds

Plaintiffs state that they have "a well-founded fear" that the sureties will be unwilling to release collateral absent certainty that they will not face liability on the canceled bonds. Pls. Comments 3. "Plaintiffs accordingly request that as part of its Order this Court explicitly direct that all bonds cancelled by Customs are null and void, and further, permanently enjoin Customs from making any claim or charge against any canceled bond." *Id.* at 4.

Plaintiffs' request appears to presume that a canceled bond, in some respect, can be the basis for liability of a surety, or at least for a belief by a surety that liability may exist. As the court discussed above, a canceled bond is a bond on which Customs no longer may demand performance of any bond condition or obligation. Therefore, an injunction that orders Customs not to make a claim or charge against a canceled bond would appear to be redundant and unnecessary. Nevertheless, the court is unable to find in the Customs Regulations a definition of a canceled bond or similar provision that unambiguously states the general principle that no claim or charge can be made upon a canceled bond. *See* 19 C.F.R. Part 113 and Subpart F (2010). To avoid any ambiguity that any party may discern with respect to the intent of the court in ordering bond cancellation (with or without bond replacement), the judgment will provide that Customs is permanently enjoined from making any demand, claim, or charge on any bond that has undergone the cancellation procedure required therein.

IV. Conclusion

The court concludes that the redetermined bond liability limits in the Amended Second Remand Redetermination are in accordance with law and comply with the remand order in *National Fisheries IV*, 34 CIT at __, Slip Op. 10–61, at 20. The court finds as facts that all plaintiffs have incurred and, absent permanent injunctive relief will incur during any appeal, irreparable harm as a result of the continued unlawful and discriminatory application to them of the enhanced

bonding requirement. Balancing all competing equitable considerations, the court concludes that permanent injunctive relief ensuring prompt bond cancellation is the appropriate remedy by which this litigation should be concluded. Customs, except in the event of a delay in the tendering by a plaintiff-importer of a superseding bond, must accomplish all actions necessary to implement the Amended Second Remand Redetermination within sixty days of the entry of judgment.
Dated: October 21, 2010
New York, New York

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

Slip Op. 10–121

NUCOR FASTENER DIVISION, Plaintiff, v. UNITED STATES, Defendant, and XL SCREW CORPORATION, et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 09–00534

[Defendant's Motions to Dismiss and Defendant-Intervenors' Motion to Dismiss are GRANTED.]

Dated: October 22, 2010

Wiley Rein LLP (*Alan H. Price*, *Daniel B. Pickard*, and *Maureen E. Thorson*) for Plaintiff Nucor Fastener Division.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Joshua E. Kurland*); and *Ahran Kang McCloskey*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Barnes, Richardson & Colburn (*Matthew T. McGrath*, *Jeffrey S. Neely*, *Stephen W. Brophy*, *Cortney O. Morgan*, *Michael S. Holton*) for Defendant-Intervenors XL Screw Corporation, The Hillman Group, Bossard North America, Inc., and Heads and Threads International, LLC.

OPINION

Wallach, Judge:

I.
Introduction

Plaintiff Nucor Fastener Division ("Nucor" or "Plaintiff") challenges the U.S. Department of Commerce's ("Commerce" or the "Department") decision not to investigate an alleged subsidization by the

People's Republic of China ("PRC" or "China") of the Chinese standard steel fastener industry through currency manipulation. Because Nucor's challenge is unripe, the Motions to Dismiss filed by Defendant United States ("Defendant") and Defendant-Intervenors XL Screw Corporation, The Hillman Group, Bossard North America, Inc., and Heads and Threads International, LLC (collectively, "Defendant-Intervenors") are GRANTED, and this action is dismissed in its entirety, but without prejudice.

II.
Background

A
Legal Overview

Before either antidumping or countervailing duties ("CVD") can be imposed, Commerce and the U.S. International Trade Commission ("ITC") must each render affirmative determinations after conducting separate investigations. *See* 19 U.S.C. §§ 1671, 1673. "The central aim of the antidumping laws is to protect domestic industries from foreign manufactured goods that are sold injuriously in the United States at prices below the fair market value of those goods in their home market." *U.S. Steel v. United States*, 637 F. Supp. 2d 1199, 1204 (CIT 2009).

> [CVDs] are imposed on foreign products that are imported, sold, or likely to be sold in the United States, where the foreign government is directly or indirectly subsidizing the manufacture, production, or export of that merchandise. The purpose of CVDs is to level the playing field in international trade by offsetting the unfair advantage that a foreign exporter receives through subsidies.

Royal Thai Gov't v. United States, 31 CIT 1213, 1217–18, 502 F. Supp. 2d 1334 (2007) (citations omitted).

In its antidumping and CVD investigations, Commerce respectively determines whether the subject imports are, or are "likely to be, sold in the United States at less than its fair value," 19 U.S.C. §1673(1), and whether "the subject imports are in fact being subsidized," *Wolff Shoe Co. v. United States*, 141 F.3d. 1116, 1117 (Fed. Cir. 1998). Commerce in its CVD investigation determines, *inter alia*, whether the alleged subsidy "is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy." 19 U.S.C. § 1677(5A)(D). "The specificity test was intended to function as a rule of reason and to avoid the imposition of

[CVDs] in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy." The Uruguay Round Agreements Act Statement of Administrative Action, H.R. Doc. 103–316 (1994),[1] at 222, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4242 (emphasis omitted).

ITC undertakes a related inquiry in investigating allegations of dumping or subsidization. Antidumping duties and CVDs can be imposed if ITC "determines that—(A) an industry in the United States—(i) is materially injured; or (ii) is threatened with material injury." 19 U.S.C. §§ 1671(a)(2), 1673(2). In its investigation, ITC "cumulatively assess[es] the volume and effects of imports of the subject merchandise" from countries that are subject to review. *Id.* § 1677(7)(G). Whether petitioners allege dumping or subsidization, in its investigations ITC renders a preliminary determination, "based on the information available to it at the time of the determination, whether there is a reasonable indication" of injury or threat thereof. *Id.* §§ 1671b; 1673b. If ITC at this preliminary stage "makes a negative determination . . . the investigation shall be terminated." *Id.* § 1671b(a)(1); *see also* 19 C.F.R. § 351.207(d) ("An investigation terminates automatically upon publication in the Federal Register of the . . . Commission's negative preliminary . . . determination.").

B
The Administrative Proceedings

In September 2009, Nucor filed antidumping and CVD petitions with Commerce and ITC concerning imports of certain standard steel fasteners from PRC and Taiwan. *See Certain Standard Steel Fasteners From [PRC]: Initiation of [CVD] Investigation*, 74 Fed. Reg. 54,543, 54,543 (October 22, 2009) ("*Initiation Notice*"); *Certain Standard Steel Fasteners From [PRC] and Taiwan: Initiation of Antidumping Duty Investigation*, 74 Fed. Reg. 54,537, 54,538 (October 22, 2009); *Certain Standard Steel Fasteners From China and Taiwan*, 74 Fed. Reg. 49,889, 49,890 (September 29, 2009) ("*ITC Notice*"). ITC that month instituted a preliminary investigation "to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material in-

[1] The Uruguay Round Agreements Act was signed into law on December 8, 1994. The Act approved the new WTO Agreement, and the agreements annexed thereto, "resulting from the Uruguay Round of multilateral trade negotiations [conducted] under the auspices of the General Agreement on Tariffs and Trade." 19 U.S.C. § 3511(a)(1). The Statement of Administrative Action approved by Congress to implement the Agreements is regarded as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." *Id.* § 3512(d).

jury . . . by reason of imports from China and/or Taiwan." *ITC Notice*, 74 Fed. Reg. at 49,889.

In October 2009, Commerce "initiat[ed] a CVD investigation to determine whether manufacturers, producers, or exporters of standard steel fasteners in the PRC receive counter vailable subsidies." *Initiation Notice*, 74 Fed. Reg. at 54,545. The period of investigation twenty-six specific programs that Nucor alleged to have provided counter vailable subsidies. *Id.* at 54,545–46. Commerce declined to investigate alleged currency manipulation, stating as follows:

> [Nucor] alleges that the [government]-maintained exchange rate effectively prevents the appreciation of the Chinese currency ([‘‘RMB’’]) against the U.S. dollar. Therefore, when producers/exporters in the PRC sell their dollars at official foreign exchange banks, as required by law, the producers receive more RMB than they otherwise would if the value of the RMB were set by market mechanisms. . . . [Nucor] has failed to sufficiently allege that the receipt of the excess RMB is contingent on export or export performance because receipt of the excess RMB is independent of the type of transaction or commercial activity for which dollars are converted or of the particular company or individuals converting the dollars. Therefore, *we do not plan on investigating this program because [Nucor] has failed to properly allege the specificity element*.

Id. at 54,546 (emphasis added).

In November 2009, ITC rendered its preliminary determination. *See Certain Standard Steel Fasteners From China and Taiwan; Determinations*, 74 Fed. Reg. 58,978 (November 16, 2009). ITC found "that there is no reasonable indication that an industry in the United States is materially injured or threatened with material injury . . . by reason of imports from China." *Id.* In its report, ITC included the following bases for its determination:

- there was not a "reasonable indication that subject imports have had an adverse impact on the domestic industry during the period examined;
- "[t]he domestic industry maintained substantial and increasing operating profits from 2006 to 2008;" and
- there was not a "significant correlation between subject imports and any declines in the industry's profitability."

Certain Standard Steel Fasteners From China and Taiwan, Investigation Nos. 701-TA-472 and 731-TA-1171–1172 (Preliminary), U.S.

International Trade Commission (November 2009) ("*ITC Preliminary Determination*") at 29.

ITC further concluded that there was "no reasonable indication of a threat of material injury by reason of cumulated subject imports from China and Taiwan." *Id.* at 31 (emphasis omitted). In its cumulation analysis, ITC found that, "by quantity, U.S. shipments of subject imports from China declined during the period examined." *Id.* at 34. ITC thereafter noted as follows: "*Nor is there any indication on this record that any of the subsidies allegedly conferred by the Government of China on producers of subject merchandise would cause us to reach a different conclusion.*" *Id.* at 34 n.227 (emphasis added). Given the negative *ITC Preliminary Determination*, both Commerce and ITC "terminated" their investigations pursuant to statute. 19 U.S.C. § 1671b(a)(1); *see* 19 C.F.R. § 351.207(d).

C
Nucor's Litigation

In December 2009, Nucor initiated companion cases in this court challenging determinations of ITC and Commerce, respectively. *See* Complaint; *Nucor v. United States*, Court No. 09–531, Complaint ("ITC Complaint"). Nucor's ITC Complaint asserts jurisdiction based on 28 U.S.C. § 1581(c) and alleges that the *ITC Preliminary Determination* "was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." ITC Complaint ¶¶ 1, 6–11. Briefing on Nucor's ITC challenge is underway and is expected to be complete in December 2010. *See Nucor*, Court No. 09–531, September 20, 2010 Order.

In the instant action challenging Commerce, Nucor "seeks judicial review of the Department's decision not to initiate a [CVD] investigation into subsidies provided by the Government of China to its standard steel fastener industry by means of enforced undervaluation of the [RMB]." Complaint ¶ 1. Nucor asserts jurisdiction based on 28 U.S.C. § 1581(i) or, "in the alternative," 28 U.S.C. § 1581(c). *Id.* ¶¶ 2–3. Nucor's Complaint contains the following footnote explaining its connection with the ITC challenge:

> Plaintiff has also filed an appeal of the [Commission's] negative preliminary injury determination. Plaintiff notes that the Commission is required by law in its preliminary determinations to determine whether there is a reasonable indication that a U.S. industry is threatened with material injury by reason of subject imports and, in so doing, to take into account all export subsidies being investigated by the Department. To the extent that the

> Department unlawfully or without substantial record evidence failed to initiate a subsidy investigation into the enforced undervaluation of the [RMB], *its decision may have affected the Commission's negative preliminary determination*.

Complaint at 2–3 n.2 (emphasis added) (citation omitted); *see also* ITC Complaint at 3 n.1.

IV
Standard of Review

In deciding a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). When jurisdiction is challenged, "[t]he party seeking to invoke this Court's jurisdiction bears the burden of proving the requisite jurisdictional facts." *Former Employees of Sonoco Prods. Co. v. United States*, 27 CIT 812, 814, 273 F. Supp. 2d 1336 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)).

V
Discussion

Nucor's challenge to Commerce's *Initial Notice* decision not to investigate the alleged currency manipulation is not ripe for judicial review. *Infra*, Part IV.A. Defendant and Defendant-Intervenors' Motions to Dismiss are therefore granted, albeit without prejudice for Nucor to re-file in the event that its challenge subsequently becomes ripe for review. The argument to dismiss based on mootness,[2] and the

[2] Nucor responds to the mootness argument by claiming that the *Initiation Notice* affected the *ITC Preliminary Determination*. *See* Nucor's Opposition to Defendant and Defendant-Intervenors' Motions to Dismiss ("Nucor's Opposition") at 5 ("By failing to initiate a subsidy investigation into the enforced undervaluation of [RMB], the Department's actions detrimentally and wrongfully impacted the Commission's preliminary determination, thereby causing injury to Plaintiff."). However, the speculation in Nucor's Complaint that the *Initiation Notice* "may have affected" the *ITC Preliminary Determination* is belied by the ITC statement that consideration of the alleged subsidies would not have resulted in "a different conclusion." Complaint at 3 n.2; *ITC Preliminary Determination* at 34 n.227.

argument to dismiss based on statutory jurisdiction,[3] need not be resolved because of the dismissal based on ripeness. The stay requested by Nucor as an alternative to dismissal is not appropriate. *Infra*, Part IV.B.

A
Nucor's Commerce Challenge Is Not Ripe

Ripeness is a "justiciability doctrine" that "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 807–08, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003) (quotations omitted). "In determining whether an appeal from an administrative determination is ripe for judicial review," courts look "to (1) 'the fitness of the issue for judicial decision' and (2) 'the hardship to the parties of withholding court consideration.'" *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed. Cir. 2008) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). Nucor's challenge to the *Initiation Notice* is not fit for review, *infra* Part IV.A.1, and Nucor will not suffer hardship if that challenge is not reviewed, *infra* Part IV.A.2.

1
Nucor's Challenge To The *Initiation Notice* Is Not Fit For Review

Nucor's challenge to the *Initiation Notice* is unfit for review because the Commerce investigation terminated by statute before Commerce could render a reviewable decision. *See* 19 U.S.C. § 1671b(a)(1); *ITC Preliminary Determination*. Pursuant to statute, actions taken by

[3] Because the ripeness deficit is attributable to Commerce not having made a "final determination" with respect to its CVD investigation, jurisdiction cannot exist under 28 U.S.C. § 1581(c). 19 U.S.C. § 1516a(a)(1)(D); *see infra* Part IV.A.1. Nucor argues that 28 U.S.C. § 1581(i) provides jurisdiction because "the Department's decision not to investigate a particular subsidy allegation is not one of the enumerated decisions" subject to judicial review in 28 U.S.C. § 1581(c). Nucor's Opposition at 15. 28 U.S.C. § 1581(i) is a "catch-all provision." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). Legislative history explains that 28 U.S.C. § 1581(i) can be used for cases contesting Commerce in CVD proceedings "so long as the action does not involve a challenge to a determination specified in" 19 U.S.C. § 1516a. H.R. Rep. No. 96–1235 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3760. However, 28 U.S.C. § 1581(i) cannot be used to circumvent the "final determination" requirement. 19 U.S.C. § 1516a(a)(1)(D). Defendant is correct that "this Court has repeatedly declined to exercise jurisdiction pursuant to 28 U.S.C. § 1581(i) in the absence of final agency determinations. . . . Thus, regardless of whether one views the case through the lens of ripeness or simple lack of statutory jurisdiction, there is no basis for Nucor's premature challenge to Commerce's actions." Defendant's Memorandum in Support of its Motion to Dismiss at 18 (citations omitted).

Commerce as part of its CVD investigation become reviewable when there is a "final determination." 19 U.S.C. § 1516a(a)(1)(D). This requirement reflects:

> The essential purpose of the ripeness doctrine . . . "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Tokyo Kikai, 529 F.3d at 1362 (quoting *Abbott Labs.*, 387 U.S. at 148–49).

Allowing Nucor's challenge to the *Initiation Notice* to proceed despite the statutory termination of the underlying investigation would constitute impermissible "judicial interference." *Id.* In *Tokyo Kikai*, Commerce's stated intent to reopen an antidumping proceeding was unfit for review as a non-final action. *See id.* at 1363. The Federal Circuit found that the "memorialized intention . . . neither 'marks[s] the consummation . . . of the decisionmaking process' nor defines rights or obligations . . . or causes legal consequences to flow." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). As explained by the Federal Circuit:

> A stated intention . . . is just that, and leaves room for Commerce to change course. Although Commerce stated that it intended to reopen the . . . proceedings, it could, for any number of reasons, elect not to do so. This is precisely the reason why courts decline to address issues that are not "ripe."

Id.

Nucor's Commerce challenge is likewise unfit for review because it is not a "final determination." 19 U.S.C. § 1516a(a)(1)(D). As with the stated intention to reopen proceedings in *Tokyo Kikai*, the *Initial Notice* stated intention not to investigate currency manipulation left "room for Commerce to change course."[4] *Tokyo Kikai*, 529 F.3d at 1363. Commerce did not finalize its investigation scope because of the *ITC Preliminary Determination*. *See* 19 U.S.C. § 1671b(a)(1). Nucor pleads that the ITC "negative injury determination put an end to the Department's investigation, and thus the negative aspects of the subsidy initiation could be considered final." Complaint ¶ 3. However, Defendant is correct that "the statutory termination of Commerce's

[4] Indeed, Commerce can and does reconsider the scope during the course of ongoing CVD investigations. *See Preliminary Affirmative [CVD] Determination: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 5,984, 5,985 (February 8, 2002).

investigation due to the ITC's negative preliminary determination does not convert Commerce's Initiation Notice into a 'final determination'" that is fit for review. Defendant's Motion at 19–20 (quotation omitted).

2
Nucor Will Not Suffer Hardship If Its Challenge To The *Initiation Notice* Is Not Reviewed

Relying on precedent from this court, Nucor claims it "will suffer hardship if the court chooses to withhold review." Nucor's Opposition to Defendant and Defendant-Intervenors' Motions to Dismiss ("Nucor's Opposition") at 11–12 (citing *Internor Trade, Inc. v. United States*, 10 CIT 826, 651 F. Supp. 1456 (1986)). In *Internor*, although Commerce determined that the subject imports were sold at less than fair value, an antidumping order was not published because of the ITC negative injury determination. *See Internor*, 10 CIT at 827. Despite argument that adjudication of the Commerce decision "could well prove advisory," the case was found ripe for review. *Id.* at 830, 832. Nucor argues that, "[s]imilar to the plaintiffs in *Internor Trade, Inc.*, Plaintiff will suffer hardship if the court withholds review in this case." Nucor's Opposition at 12. Defendant in response explains that "because the Commerce action at issue was a final decision, the Court in *Internor* determined that the statutory language in effect at that time specifically authorized jurisdiction over the final Commerce antidumping decision." Defendant's Reply Memorandum in Support of Its Motion to Dismiss ("Defendant's Reply") at 10.

Internor does not show Nucor suffered hardship that makes its Commerce challenge ripe for review. Unlike the final Commerce action at issue in *Internor*, Nucor here challenges an intended scope of investigation. *See* Complaint ¶ 1; *Internor*, 10 CIT at 827. Nucor states that denying its Commerce challenge "will not only result in immediate hardship to Plaintiff but also could effectively preclude judicial review of the issue altogether." Nucor's Opposition at 13. However, this alleged hardship requires only that Nucor bring a challenge that the court is able to adjudicate. Defendant-Intervenors are correct in stating "that a Plaintiff cannot receive judicial review of . . . unripe issues is not a hardship. There can be no hardship on the parties for withholding court consideration of this issue until the normal process is completed." Reply Brief in Support of Defendant Intervenors' Motions to Dismiss This Action ("Defendant-Intervenors' Reply") at 10.

B
Nucor's Requested Stay Is Not Appropriate

Nucor in the alternative "submits that the Court should stay this action pending a decision in the companion challenge to the Commission's preliminary determination, rather than dismiss Plaintiff's appeal." Nucor's Opposition at 13–14. Defendant and Defendant-Intervenors oppose such a stay. *See* Defendant's Reply at 11; Defendant-Intervenors' Reply at 10 n.2. A stay would impermissibly leave in this court an action over which it lacks jurisdiction. Nucor correctly conceded at oral argument that if its Commerce challenge is found to be unripe, there is no jurisdiction to grant the requested stay. *See* September 16, 2010 Oral Argument at 12:41–14:02. A stay cannot be granted. *See id.*; *supra*, Part IV.A.

VI
Conclusion

For the reasons stated above, Defendant's Motion to Dismiss and Defendant-Intervenors' Motion to Dismiss are GRANTED, and this action is dismissed in its entirety, but without prejudice.

Dated: October 22, 2010
New York, New York

__/s/ Evan J. Wallach____
EVAN J. WALLACH, JUDGE